

# You Can Have Your Day in Court—But Not Before Your Day in Mandatory, Nonbinding Arbitration: Balancing Practicalities of State Arbitration

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*ABSTRACT: Mandatory, nonbinding civil arbitration programs have existed for decades as a means of reducing the workload of crowded court systems. Many state laws either proscribe the details of their state’s program or allow their courts to decide the specifics. Despite their longstanding presence, many of the programs are not designed to optimize the balance between efficiency and fairness. The programs are hindered by three overarching concerns: the fact that they are mandatory, supposedly nonbinding, and not always more efficient than a court proceeding. Moved by these concerns, the current programs often vary in jurisdictional limits, qualifications of arbitrators, and the ease of appeal. This Note discusses the advantages and pitfalls of these programs, then suggests that state legislatures redraft their laws to include in these programs the factors most likely to offer plaintiffs an economical, reliable alternative to the over-crowded court system. These factors include a \$50,000 jurisdictional limit, required training for arbitrators, case assignment based on subject-matter expertise of arbitrators, and a carefully drafted disincentive to appeal an arbitral decision.*

I.	INTRODUCTION.....	326
II.	THE HISTORY AND STRUCTURE OF MANDATORY, NONBINDING ARBITRATION PROGRAMS.....	328
	A. THE HISTORY OF ARBITRATION IN THE LAW.....	330
	B. STATE-MANDATED ALTERNATIVE DISPUTE RESOLUTION PROGRAMS IN SPECIFIC AREAS OF THE LAW.....	333
	C. MANDATORY, NONBINDING ARBITRATION PROGRAMS FOR CIVIL SUITS.....	334
	1. Maricopa County, Arizona .....	335

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2.	Cook County, Illinois.....	336
3.	King County, Washington .....	337
III.	THE PROBLEMS WITH MANDATORY, NONBINDING CIVIL ARBITRATION PROGRAMS .....	338
A.	<i>OVERARCHING PROGRAM CONCERNS</i> .....	338
1.	The Consequences of “Mandatory” Arbitration .....	339
2.	The Consequences of “Nonbinding,” “Private” Proceedings.....	340
3.	The True Costs of Mandatory, Nonbinding Arbitration .....	340
B.	<i>PROGRAM-SPECIFIC CONCERNS</i> .....	342
1.	Jurisdictional Limits.....	342
2.	Arbitrator Qualifications .....	343
3.	Appeals Process.....	345
C.	<i>ISSUES APPLIED</i> .....	346
IV.	SOLUTION.....	347
A.	<i>STATE LEGISLATURES SHOULD PROVIDE PROGRAM STRUCTURE IN DETAILED STATUTES</i> .....	348
B.	<i>STATE LEGISLATURES SHOULD ADOPT EFFICIENT AND FAIR PROGRAM SPECIFICATIONS</i> .....	348
1.	Ideal Jurisdictional Limit.....	349
2.	Ideal Arbitrator Qualifications .....	349
3.	Ideal Appeals Process .....	350
V.	CONCLUSION .....	351

#### I. INTRODUCTION

Imagine a citizen has lost around \$20,000 at the hands of a wrongdoer in a landlord-tenant dispute. The citizen looks to the law, believing it will provide justice. Raring for their day in court, the citizen is deflated to discover that they must instead attend a mandatory, nonbinding arbitration proceeding before stepping foot in the courtroom. The citizen obliges and pays a steep fee for legal representation. However, the citizen is further distressed to learn that the court-appointed arbitrator has neither experience as an arbitrator nor experience in landlord-tenant law. As a result, the arbitrator erroneously enters an award for the opposing party, leaving the citizen longing for a judge to review the decision. However, the citizen discovers that an appeal will lead to increased risks of court-imposed fees as well as the continued cost of legal fees. At this point, the citizen either (1) does not have the funds necessary to pursue an appeal, or (2) could appeal, but would risk incurring court fees exceeding his \$20,000 loss. This

leaves the citizen in a bind, likely leading the citizen to accept an unfavorable, unjust arbitration award.

Although courts initially viewed arbitration proceedings with hesitance, they increasingly warmed up to private arbitration proceedings.<sup>1</sup> Eventually, states began implementing arbitration proceedings in state court systems in particular areas of the law, such as family law and bankruptcy.<sup>2</sup> Finally, arbitration programs crept into a wider scope of cases, now effecting many forms of civil suits in states that have adopted arbitration programs.<sup>3</sup> State courts use mandatory, nonbinding,<sup>4</sup> civil arbitration programs to address the common problem of over-crowded court dockets.<sup>5</sup> By forcing parties to arbitrate cases involving low monetary stakes, state legislatures clear up the court system's availability for other cases, while offering the parties an efficient alternative to court proceedings.

Although mandatory, nonbinding civil arbitration programs have been around for several decades, many of the programs are not structured in a way that promotes efficiency for the state and fairness for the parties.<sup>6</sup> Thus, there remains room for improvement. There are two categories of concerns that state legislatures should take into account when either creating or reviewing their mandatory, nonbinding civil arbitration programs: (1) the overarching problems present regardless of the structural specifications of their program, and (2) the consequences associated with the structural specifications themselves.<sup>7</sup> These concerns are often intertwined,<sup>8</sup> and legislatures must take care to note the consequences that arise when they select particular features.

This Note first explains the history of arbitration in the legal system.<sup>9</sup> The Note then defines mandatory, nonbinding civil arbitration programs and explains how and why they found their place in state legal systems.<sup>10</sup> Next, the Note explains why there is a need for state legislatures to reexamine their

1. *See infra* Section II.A.

2. *See infra* Section II.B.

3. *See infra* Section II.C.

4. Nonbinding arbitration refers to arbitration proceedings where an arbitral decision or award does not bind either party. After the proceeding, parties may still have their dispute decided in court. *Non-Binding Arbitration Law and Legal Definition*, USLEGAL, <https://definitions.uslegal.com/n/non-binding-arbitration> (last visited July 2, 2018). These proceedings contrast against binding arbitrations, which are "proceeding[s] with a final and binding award, that is often enforceable in courts." *Binding Arbitration Law and Legal Definition*, USLEGAL, <https://definitions.uslegal.com/b/binding-arbitration> (last visited July 20, 2018).

5. *See infra* Section II.C.

6. *See infra* Section III.C (analyzing the mandatory, nonbinding civil arbitration program in Maricopa County, Arizona, and noting the areas in which the program's structure does not balance the state's interest in efficiency with the parties' interest in fairness).

7. *See infra* Section III.A–B.

8. *See infra* Section III.A–B.

9. *See infra* Section II.A.

10. *See infra* Section II.C.

programs.<sup>11</sup> There are three noteworthy overarching problems that affect every program, including: (1) issues with a “mandatory” program, (2) issues when awards are “nonbinding,” and (3) whether arbitration proceedings are truly more efficient than traditional court proceedings.<sup>12</sup> A variety of structural concerns also need to be addressed. These relate to: (1) how high a state sets the jurisdictional limit for cases subject to their arbitration program,<sup>13</sup> (2) how strict of qualifications and training requirements a state imposes on arbitrators,<sup>14</sup> and (3) how difficult it is for a party to appeal an arbitration award.<sup>15</sup> In considering these concerns, this Note suggests that state legislatures should explicitly lay out their arbitration programs within their statutes, and implement a program structure that ensures a balance between efficiency and fairness.<sup>16</sup>

## II. THE HISTORY AND STRUCTURE OF MANDATORY, NONBINDING ARBITRATION PROGRAMS

Arbitration is generally known “as a consensual, alternative mechanism for dispute resolution that is private in nature, typically informal, and presumably expedient for the disputing parties.”<sup>17</sup> Arbitration proceedings are flexible<sup>18</sup> and take many forms: mandatory (sometimes referred to as

11. See *infra* Part III.

12. See *infra* Section III.A.

13. See *infra* Section III.B.1.

14. See *infra* Section III.B.2.

15. See *infra* Section III.B.3.

16. See *infra* Part IV.

17. Matthew R. Koch, Note, *Shhh . . . Secret Arbitration in Process: The Unconstitutionality of Delaware’s Chancery Arbitrations*, 118 PENN. ST. L. REV. 437, 442 (2013); *The Arbitral Procedure*, KONRAD & PARTNERS, <http://konrad-partners.com/knowledge-base/arbitration-guide/the-arbitral-procedure.html> (last visited July 20, 2018) (“Generally, there are no fixed rules of procedure in arbitration; this provides a high degree of flexibility on how to conduct arbitral proceedings.”). Arbitration proceedings contain these same attributes, regardless of whether they are run by a private arbitration association or a state-run program.

18. THOMAS E. CARBONNEAU, *THE LAW AND PRACTICE OF ARBITRATION* 3 (5th ed. 2014) (“[A]rbitral adjudication can be more flexible and less adversarial and protracted than its judicial counterpart.”); AM. BAR ASS’N.: SECTION OF DISPUTE RESOLUTION, *BENEFITS OF ARBITRATION FOR COMMERCIAL DISPUTES* 4, [https://www.americanbar.org/content/dam/aba/events/dispute\\_resolution/committees/arbitration/arbitrationguide.authcheckdam.pdf](https://www.americanbar.org/content/dam/aba/events/dispute_resolution/committees/arbitration/arbitrationguide.authcheckdam.pdf) (“The flexibility of arbitration fosters a relatively informal atmosphere. Together with the privacy of the arbitration proceeding, this serves to reduce the stress on the witnesses and on what are often continuing business relationships between the parties.”); MAYER BROWN INT’L LLP, *THE PROS AND CONS OF ARBITRATION* 2 (2012), [https://m.mayerbrown.com/Files/News/04165fd5-5165-41ea-bb6f-19d9235c171d/Presentation/NewsAttachment/7e531e5e-4040-4251-b1a8-1d4b6168c99b/Practice%20Note\\_Duncan\\_Pros-Cons-Arbitration\\_oct12.pdf](https://m.mayerbrown.com/Files/News/04165fd5-5165-41ea-bb6f-19d9235c171d/Presentation/NewsAttachment/7e531e5e-4040-4251-b1a8-1d4b6168c99b/Practice%20Note_Duncan_Pros-Cons-Arbitration_oct12.pdf) (listing autonomy and flexibility as one “pro” to arbitration proceedings, as they allow the participating parties to agree on methods based on their needs).

compulsory) or voluntary,<sup>19</sup> binding or nonbinding,<sup>20</sup> single arbitrator or arbitrator panel,<sup>21</sup> etc. “[C]ivil disputes are nearly universally arbitrable,” and arbitration proceedings are used to solve an increasing variety of disputes: consumer transactions, employment disputes, sale of goods, etc.<sup>22</sup> Arbitration proceedings are ordinarily used when parties to a dispute contractually agree, either before or after the dispute arises, to resolve a dispute before a neutral arbitrator or arbitrator panel rather than a court.<sup>23</sup> There are, however, occasions when arbitration is mandated not by contract, but by a state government for various reasons; this category is where the subject of this Note falls.

State-mandated, nonbinding arbitration programs for civil actions are a unique addition to the history of arbitration. To further the understanding of these programs, this Note will first discuss: the history of arbitration in the law; the use of state-mandated alternative dispute resolution programs in specific areas of the law; and the emergence and structure of mandatory, nonbinding civil arbitration programs, using several county programs to provide illustrations.

19. See *Mandatory Arbitration Law and Legal Definition*, USLEGAL, <https://definitions.uslegal.com/m/mandatory-arbitration> (last visited July 21, 2018) (defining mandatory arbitration as “a form of alternative dispute resolution in which two or more parties are required to submit their dispute to an arbitrator. Such parties should not opt for litigation. It is a contract term that prevents judicial attention from disputes.”); *Voluntary Arbitration Law and Legal Definition*, USLEGAL, <https://definitions.uslegal.com/v/voluntary-arbitration> (last visited July 21, 2018) (defining voluntary arbitration as “a binding adversarial dispute resolution process in which the disputing parties choose one or more arbitrators to hear their dispute and to render a final decision or award after an expedited hearing”).

20. *Non-Binding Arbitration Law and Legal Definition*, *supra* note 4.

21. See STEPHEN K. HUBER & MAUREEN A. WESTON, *ARBITRATION: CASES AND MATERIALS* 269 (3d ed. 2011) (discussing the different phases of an arbitration proceeding and the options within each, including the number of arbitrators selected); Ben Giaretta & Akshay Kishore, *One Arbitrator or Three?*, ASHURST (Sept. 1, 2015), <https://www.ashurst.com/en/news-and-insights/legal-updates/one-arbitrator-or-three> (contemplating whether parties are better off handling their case with a single arbitrator or a three-arbitrator panel, noting the decreased biases but increased cost of panels).

22. CARBONNEAU, *supra* note 18, at xiii; see Mandy Walker, *The Arbitration Clause Hidden in Many Consumer Contracts*, CONSUMER REPORTS (Sept. 29, 2015), <https://www.consumerreports.org/cro/shopping/the-arbitration-clause-hidden-in-many-consumer-contracts> (listing (1) a number of popular companies with consumer contracts, including: “Amazon, Groupon, Netflix, and Verizon”, and (2) the various types of contracts that are affected, including: credit cards, car loans, and employment agreements).

23. HUBER & WESTON, *supra* note 21, at 51; Katie Shonk, *What is an Arbitration Agreement?*, HARV. L. SCH. PROGRAM ON NEGOT. (July 19, 2016), <https://www.pon.harvard.edu/daily/conflict-resolution/what-is-an-arbitration-agreement> (“Arbitration agreements are common in consumer contracts and employment contracts, but they can be proposed additions to any contract negotiation in which one or both parties would like to head off the possible [sic] of a future lawsuit.”).

## A. THE HISTORY OF ARBITRATION IN THE LAW

When arbitration proceedings first grew in popularity as an alternative dispute resolution (“ADR”)<sup>24</sup> option in the United States, one of their central purposes was to ease the increasingly crowded court dockets around the country.<sup>25</sup> However, under the common law, early courts were staggeringly hesitant about enforcing arbitration agreements and arbitral awards.<sup>26</sup> Courts were often wary of whether justice would truly be served in proceedings run by possibly underqualified arbitrators.<sup>27</sup> Further, others were opposed to upholding arbitration proceedings because the common law did not support the specific enforcement of arbitration contracts.<sup>28</sup>

Considering the number of arbitration proceedings conducted in modern times,<sup>29</sup> it is needless to say that the courts’ early hesitance toward

24. Alternative dispute resolution is referred to as proceedings where “a resolution to a dispute is sought out of court.” *What is Alternative Dispute Resolution?*, LAW DICTIONARY, <http://thelawdictionary.org/alternative-dispute-resolution> (last visited July 21, 2018); see *ADR Types & Benefits*, CAL. CTS., <http://www.courts.ca.gov/3074.htm> (last visited July 21, 2018) (listing four different types of alternative dispute resolution programs: mediation, arbitration, neutral evaluation, and settlement conferences).

25. See Hiro N. Aragaki, *Constructions of Arbitration’s Informalism: Autonomy, Efficiency, and Justice*, 2016 J. DISP. RESOL. 141, 147 (“In the decades leading up to the enactment of the FAA . . . [c]rippling delays and mounting backlogs made it difficult for claims to be adjudicated on their merits in a timely fashion.”); Norman N. Robbins, *Will Arbitration Ease the Crowded Divorce Docket?*, 19 FAM. COORDINATOR 374, 376 (1970) (“A court that has a crowded docket of divorce matters could easily help ease that docket by procedurally suggesting voluntary arbitration or possibly even involuntary arbitration.”); Jack B. Weinstein, *Some Benefits and Risks of Privatization of Justice Through ADR*, 11 OHIO ST. J. ON DISP. RESOL. 241, 264–65 (1996) (“A recurrent theme in the rhetoric of those advocating an increased role for ADR and other procedural reforms that implicate the accessibility of the courts is the need to respond to a so-called ‘litigation explosion.’”); Jerry Flint, *An Answer to Crowded Courts*, N.Y. TIMES (May 29, 1978), <http://www.nytimes.com/1978/05/29/archives/an-answer-to-crowded-courts-concerns-turn-to-private-arbitration.html> (“The jam in the courts, plus new and growing areas of business controversy, are adding impetus to the idea of resolving disputes by private arbitration, rather than through the public justice system.”).

26. See, e.g., *Tobey v. Cty. of Bristol*, 23 F. Cas. 1313, 1321 (C.C.D. Mass. 1845) (emphasizing that under the common law, courts may not compel arbitration and that submission to arbitration is irrevocable at any point after “the award is actually made”); *Chicago M. & St. P. Ry. Co. v. Stewart*, 19 F. 5, 11 (C.C.D. Minn. 1883) (refusing, as a court of equity, to uphold an agreement to arbitrate).

27. CARBONNEAU, *supra* note 18, at 125 (“[C]ourts were unwilling to relinquish their adjudicatory prerogatives and have their functions performed by untrained and unqualified individuals.”); see also *Chicago*, 19 F. at 11 (“Equity will not compel a party to submit the decision of his rights to a tribunal which confessedly does not possess full, adequate, and complete means within itself to investigate the merits of the case and to administer justice.”).

28. See *Chicago*, 19 F. at 11 (“[E]quity will not make a vain decree, incapable of enforcement.”).

29. Jessica Silver-Greenberg & Robert Gebeloff, *Arbitration Everywhere, Stacking the Deck of Justice*, N.Y. TIMES (Oct. 31, 2015), <https://www.nytimes.com/2015/11/01/business/dealbook/arbitration-everywhere-stacking-the-deck-of-justice.html> (explaining how arbitration agreements are frequently found among credit card applications, cellphones, internet providers, online stores, job applications, rental car agreements, and even nursing home agreements). Note that in Fall 2016, Medicaid and Medicare programs provided that nursing homes receiving federal funding

arbitration proceedings has largely disappeared.<sup>30</sup> This change was a gradual process. During industrialization, the country saw an increase in business disputes, prompting a need to “recogniz[e] arbitration agreements as being just as valid as other contract provisions.”<sup>31</sup> In 1925, Congress used the Commerce Clause to pass the Federal Arbitration Act (“FAA”),<sup>32</sup> which greatly impacted courts’ approaches to arbitration by upholding the validity and enforceability of arbitration agreements.<sup>33</sup> The pertinent section of the FAA states:

A written provision in . . . a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction, or the refusal to perform the whole or any part thereof, or an agreement in writing to submit to arbitration an existing controversy arising out of such a contract, transaction, or refusal, shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.<sup>34</sup>

Despite the FAA being federal law, states must largely abide by its terms, as the Supreme Court has held the FAA preempts state laws that discount the enforcement of arbitration agreements and awards.<sup>35</sup>

Soon after Congress passed the FAA, state support for arbitration inevitably increased.<sup>36</sup> The National Conference of Commissioners on Uniform State Laws (“NCCUSL”) pushed for a model arbitration statute and found success with the Uniform Arbitration Act of 1955 (“UAA”), and again in 2000 with the Revised Uniform Arbitration Act (“RUAA”).<sup>37</sup> In summary, the UAA (1) reversed common law ideals by enforcing arbitration agreements

are not allowed to include mandatory arbitration clauses in their contracts. David Lazarus, *Trump Wants to Deny Nursing-Home Residents and Their Families the Right to Sue*, L.A. TIMES (June 13, 2017, 3:00 AM), <http://www.latimes.com/business/lazarus/la-fi-lazarus-nursing-home-arbitration-20170613-story.html>. Other areas are still heavily dominated by arbitration clauses. See, e.g., *Spotify Terms and Conditions of Use*, SPOTIFY, <https://www.spotify.com/us/legal/end-user-agreement> (last updated July 21, 2017) (“You and Spotify agree that any dispute, claim, or controversy between you . . . will be determined by mandatory binding individual (not class) arbitration.”).

30. This is not to say that the hesitance has completely diminished, however. See *Arbitration: Not Necessarily a Better Option than Litigation*, BUS. & TECH. LAW GROUP, [http://www.btlg.us/News\\_and\\_Press/articles/arbitration.html](http://www.btlg.us/News_and_Press/articles/arbitration.html) (last visited July 21, 2018) (explaining how litigation may still be favored over arbitration proceedings in a number of ways).

31. CONG. RESEARCH SERV., RL30934, THE FEDERAL ARBITRATION ACT: BACKGROUND AND RECENT DEVELOPMENTS 2–3 (2002), [https://digital.library.unt.edu/ark:/67531/metacrs2223/m1/1/high\\_res\\_d/RL30934\\_2002Jun17.pdf](https://digital.library.unt.edu/ark:/67531/metacrs2223/m1/1/high_res_d/RL30934_2002Jun17.pdf).

32. Federal Arbitration Act, 9 U.S.C. §§ 1–16 (2012).

33. *Id.*; see also HUBER & WESTON, *supra* note 21, at 9–10.

34. 9 U.S.C. § 2.

35. *Southland Corp. v. Keating*, 465 U.S. 1, 16 (1984) (“Congress intended to foreclose state legislative attempts to undercut the enforceability of arbitration agreements.”).

36. HUBER & WESTON, *supra* note 21, at 11.

37. *Id.*

entered in anticipation of future disputes, and (2) specified basic arbitral procedures.<sup>38</sup> It is further worth noting that “[t]he Uniform Act d[id] not mandate arbitration of any dispute,” but rather called for the enforcement of arbitration agreements.<sup>39</sup> The RUAA was created to provide for more modern arbitration procedures.<sup>40</sup> As of 1987, every state in the United States had an arbitration act in place;<sup>41</sup> at the time of this Note, 32 states and the District of Columbia have enacted either the UAA or the RUAA.<sup>42</sup>

In addition to legislatures and courts supporting the enforcement of arbitration, arbitration has grown in popularity in part due to the advantages achieved through privatization. There are various large, private arbitral institutions which parties may contractually select to arbitrate their claims;<sup>43</sup> while most institutions cover a large variety of legal matters, some institutions specialize in particular areas of the law,<sup>44</sup> or particular locations.<sup>45</sup> Parties may be drawn to private institutions because they are equipped with amenities that the American court systems lack: “Access to the courts may be implicated in fee-setting, lack of resources to appoint counsel in civil cases, and failing to provide a court process comprehensible to laypeople, particularly potential pro se litigants and foreign-speaking litigants.”<sup>46</sup> For example, the American Arbitration Association—one of the oldest, most well-known arbitration

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38. *Arbitration Act (2000) Summary*, UNIF. LAW COMM’N, [http://www.uniformlaws.org/ActSummary.aspx?title=Arbitration%20Act%20\(2000\)](http://www.uniformlaws.org/ActSummary.aspx?title=Arbitration%20Act%20(2000)) (last visited July 21, 2018).

39. *Id.*

40. *Id.*

41. HUBER & WESTON, *supra* note 21, at 11.

42. These states include: Alaska, Arizona, Arkansas, Colorado, Delaware, District of Columbia, Florida, Georgia, Hawaii, Idaho, Indiana, Iowa, Kansas, Kentucky, Maine, Michigan, Minnesota, Missouri, Montana, Nebraska, Nevada, New Jersey, New Mexico, North Carolina, North Dakota, Oklahoma, Oregon, South Carolina, South Dakota, Utah, Virginia, Washington, and West Virginia. See *Legislative Fact Sheet—Arbitration Act (1956)*, UNIF. LAW COMM’N, [http://www.uniformlaws.org/LegislativeFactSheet.aspx?title=Arbitration%20Act%20\(1956\)](http://www.uniformlaws.org/LegislativeFactSheet.aspx?title=Arbitration%20Act%20(1956)) (last visited July 21, 2018); *Legislative Fact Sheet—Arbitration Act (2000)*, UNIF. LAW COMM’N, [http://www.uniformlaws.org/LegislativeFactSheet.aspx?title=Arbitration%20Act%20\(2000\)](http://www.uniformlaws.org/LegislativeFactSheet.aspx?title=Arbitration%20Act%20(2000)) (last visited July 21, 2018).

43. See, e.g., AM. ARB. ASS’N, <https://www.adr.org> (last visited July 21, 2018); *Dispute Resolution Services*, INT’L CHAMBER OF COMMERCE, <https://iccwbo.org/dispute-resolution-services> (last visited July 21, 2018); INT’L INST. FOR CONFLICT PREVENTION & RESOLUTION, <https://www.cpradr.org> (last visited July 21, 2018); JAMS, <https://www.jamsadr.com> (last visited July 21, 2018).

44. See, e.g., *Arbitration and Mediation*, FINRA, <https://www.finra.org/arbitration-and-mediation> (last visited July 21, 2018) (providing both arbitration and mediation for securities dispute resolution).

45. See, e.g., IOWA ARBITRATORS, <http://www.iowaarbitrators.com> (last visited July 21, 2018).

46. Weinstein, *supra* note 25, at 257–58 (footnotes omitted).

institutions—provides ease by offering online case filing,<sup>47</sup> arbitrators with accomplished expertise in relevant fields,<sup>48</sup> and quick case resolutions.<sup>49</sup>

B. *STATE-MANDATED ALTERNATIVE DISPUTE RESOLUTION PROGRAMS IN SPECIFIC AREAS OF THE LAW*

While private arbitration proceedings address a wide scope of matters, the use of state arbitration programs began in specific areas of law. In 1998, Congress enacted the Alternative Dispute Resolution Act, which provided: “Each United States district court shall authorize . . . the use of alternative dispute resolution processes in all civil actions, including adversary proceedings in bankruptcy.”<sup>50</sup> The Act, however, only granted federal courts this power. Nonetheless, states followed Congress’ lead and began enacting their own statutes implementing mandatory, state-run mediation programs.<sup>51</sup>

Arbitration and mediation are now frequently promoted by courts when it comes to select areas of the law, one of the areas being family law.<sup>52</sup> In 1980, “California was the first to adopt statewide, mandatory mediation in all custody disputes . . . and approximately thirty-seven states and the District of Columbia followed suit.”<sup>53</sup> Although state laws may differ, only two states forbid family law arbitration.<sup>54</sup> Following in California’s footsteps, other states added their own ADR options, as “some statutes allow courts to mandate mediation at their discretion or offer mediation as an option for the disputing parties, others provide that parties in custody disputes may request mediation at any time before final judgment.”<sup>55</sup>

47. INT’L CTR. FOR DISPUTE RESOLUTION, HOW TO FILE YOUR ARBITRATION CASE 1–2, [https://www.adr.org/sites/default/files/document\\_repository/How%20to%20File%20Your%20Arbitration%20Case.pdf](https://www.adr.org/sites/default/files/document_repository/How%20to%20File%20Your%20Arbitration%20Case.pdf) (last visited July 21, 2018).

48. *The AAA National Roster of Arbitrators and Mediators*, AM. ARBITRATION ASS’N, <https://www.adr.org/aaa-panel> (last visited July 21, 2018).

49. AM. ARBITRATION ASS’N, AAA ARBITRATION: FASTER, MORE COST EFFECTIVE THAN LITIGATION, [https://www.adr.org/sites/default/files/document\\_repository/AAA18g\\_Arbitration\\_Myths.pdf](https://www.adr.org/sites/default/files/document_repository/AAA18g_Arbitration_Myths.pdf) (last visited July 21, 2018) (“Some Large and Complex Cases were Awarded in 5 Months or Less.”).

50. 28 U.S.C. § 651(b) (2012).

51. Holly A. Streeter-Schaefer, *A Look at Court Mandated Civil Mediation*, 49 DRAKE L. REV. 367, 373 (2001) (“Numerous states jumped on the bandwagon, enacting some form of a mandatory mediation statute, giving courts the power to order parties to settle disputes in mediation rather than the courtroom.”); *see also, e.g.*, LA. STAT. ANN. § 9:332 (2018); ME. REV. STAT. ANN. tit. 19-A, § 251 (2017); OR. REV. STAT. § 107.755(1)(b) (2017).

52. Nancy Ver Steegh, *Family Court Reform and ADR: Shifting Values and Expectations Transform the Divorce Process*, 42 FAM. L.Q. 659, 662 (2008) (“Because less than 2% of family cases are ultimately decided by a judge and families prefer to avoid litigating, new emphasis has been place [sic] on settlement and new settlement processes have been developed.” (footnote omitted)).

53. Yishai Boyarin, *Court-Connected ADR—A Time of Crisis, A Time of Change*, 95 MARQ. L. REV. 993, 1001 (2012) (footnote omitted).

54. LINDA D. ELROD, CHILD CUSTODY PRACTICE AND PROCEDURE § 16:5 (2018) (“Only Kentucky and Rhode Island appear to not allow arbitration in family law cases.”).

55. Streeter-Schaefer, *supra* note 51, at 379.

Apart from family law, mandatory ADR proceedings have also been used in bankruptcy cases. Similar to family law mediation programs, the first bankruptcy mediation program was started by a California Bankruptcy Court.<sup>56</sup> Once again, many districts followed in California's footsteps.<sup>57</sup> The use of ADR for bankruptcy purposes was generally found to be a successful method of resolving certain creditor claims.<sup>58</sup> Finally, albeit not as popular as the use of court-mandated ADR in family and bankruptcy law, at least one state has used mandatory mediation for medical malpractice disputes; however, critics argue that discovery is insufficient in such proceedings, specifically because the cases often demanded more time than mediation permits.<sup>59</sup> These examples highlight the growing use of various ADR proceedings in state court systems, which paved the way for the now growing use of mandatory, nonbinding arbitration proceedings.

C. MANDATORY, NONBINDING ARBITRATION PROGRAMS FOR CIVIL SUITS

Many states have broadened the use of arbitration proceedings to reach a wider scope of matters, by passing statutes allowing their courts to require arbitration of a wider scope of disputes: purely monetary civil actions.<sup>60</sup> In fact, "sixteen states and nine federal courts had, by 1985, adopted some form of mandatory, non-binding arbitration and . . . crowded court dockets were the primary motivation" for the change.<sup>61</sup> Some of these states' legislatures have laid out the parameters of their program within statutes, while others have left the courts to create their own programs.<sup>62</sup> The programs arising

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56. Steven R. Wirth & Joseph P. Mitchell, *A Uniform Structural Basis for Nationwide Authorization of Bankruptcy Court-Annexed Mediation*, 6 AM. BANKR. INST. L. REV. 213, 217 (1998) (noting that California led the way for other states by establishing their bankruptcy mediation program in 1986). California courts still maintain a modern-day bankruptcy court mediation program. For a deeper look, see *Mediation Program*, U.S. BANKR. COURT. CENT. DIST. CAL., <http://www.cacb.uscourts.gov/mediation-program> (last visited July 22, 2018).

57. Wirth & Mitchell, *supra* note 56, at 217.

58. *Id.* at 218 ("[B]ankruptcy courts have successfully used mediation to resolve single creditor claims, to liquidate or determine multiple creditor claims, and to confirm consensual plans of reorganization." (footnotes omitted)).

59. Streeter-Schaefer, *supra* note 51, at 382 (explaining how Michigan courts used mandatory mediation early in the process of malpractice suits, only allowing each party a fifteen-minute testimony).

60. See, e.g., ARIZ. REV. STAT. ANN. § 12-133 (2016); 735 ILCS 5/2-1001(a) (2017).

61. Thomas L. Fowler, *Court-Ordered Arbitration in North Carolina: Selected Issues of Practice and Procedure*, 21 CAMPBELL L. REV. 191, 191 (1999).

62. See SUSANNE DI PIETRO, ALASKA JUDICIAL COUNCIL, REPORT TO THE ALASKA LEGISLATURE: ALTERNATIVE DISPUTE RESOLUTION IN THE ALASKA COURT SYSTEM 10 (1997), <http://www.ajc.state.ak.us/reports/adr.pdf> ("[P]rograms vary by their implementation authorization. Some programs are established by state statute, while others are established by court rule or even by administrative order.").

from these statutes are typically inspired by the appeal of resolving claims using less time and fewer resources.<sup>63</sup>

As discussed in further detail later in this Note, these programs frequently differ in the following key imperative areas: jurisdictional monetary limits, arbitrator qualifications and selection, and the process of appealing an arbitration award.<sup>64</sup> First, the jurisdictional monetary limits vary, ranging from \$25,000 to \$150,000.<sup>65</sup> Second, programs diverge in the number of requirements they impose on their arbitrators and the manner in which they assign an arbitrator to a particular case.<sup>66</sup> Third, programs also vary in the difficulty level of their appeal process. For example, some programs impose strict appeal disincentives, forcing parties to improve their awards on appeal or face paying a number of additional costs.<sup>67</sup>

To illustrate what these programs mean for a modern claimant, this Note looks to the mandatory, nonbinding civil arbitration programs in: (1) Maricopa County, Arizona; (2) Cook County, Illinois; and (3) King County, Washington.<sup>68</sup>

### 1. Maricopa County, Arizona

First, in Arizona, state statute A.R.S § 12-133 authorizes Maricopa County to implement their mandatory civil arbitration program. The statute grants

63. See, e.g., *Civil Arbitration*, FIFTH JUD. DISTRICT OF PA., <https://www.alleghenydcourts.us/civil/arbitration.aspx> (last visited July 22, 2018) (“The arbitration system provides for simple and concise pleadings and a trial of the issues within a short time of filing of suit, enabling the parties to fairly resolve the claim with a minimum of expense and time.”).

64. See *infra* Section III.B.

65. See JOHN BARKAI & GENE KASSEBAUM, UNIV. OF HAW. AT MĀNOA PROGRAM ON CONFLICT RESOLUTION, COURT-ANNEXED ARBITRATION IN HAWAII: AN EVALUATION OF COST, SATISFACTION, AND PACE 4 (1988), [http://www.peaceinstitute.hawaii.edu/academic-programs/\\_epubs/Court-Annexed-Arbitration-in-Hawaii.pdf](http://www.peaceinstitute.hawaii.edu/academic-programs/_epubs/Court-Annexed-Arbitration-in-Hawaii.pdf) (stating that Hawaii’s mandatory arbitration program has the highest jurisdictional limit out of all the state programs in the country); *Arbitration and Mediation*, N.C. JUDICIAL BRANCH, <https://www.nccourts.gov/help-topics/lawsuits-and-small-claims/arbitration-and-mediation> (last visited July 26, 2018).

66. See Bob Dauber & Roselle Wissler, *Lawyers’ Views on Mandatory Arbitration*, ARIZ. ATT’Y, July–Aug. 2005, at 32, 34 (“In Pima County, the court generally assigns arbitrators to cases according to their area of practice, whereas Maricopa County does not, and the other counties’ practices vary.”).

67. See BARKAI & KASSEBAUM, *supra* note 65, at 2 (“The right to jury trial is preserved because either party may appeal the arbitration award to a trial de novo, but in some programs, sanctions may be imposed if the trial verdict does not improve on the arbitration award.”); DELTA J. HAWKINS ET AL., LAKE COUNTY ARBITRATION: QUESTION & ANSWER BOOKLET 27 (2017), <http://www.19thcircuitcourt.state.il.us/DocumentCenter/Home/View/114> (allowing a party to reject the award “upon payment of the sum of \$200 to the Clerk of the Court if the Award was \$30,000 or less, or \$500 if the Award was greater than \$30,000”); *Court Arbitration*, WASH. CTY. CIRCUIT COURT, <http://www.courts.oregon.gov/Washington/Services/Civil/Pages/Court%20Arbitration.aspx> (last visited July 22, 2018) (“It [sic] the appealing party does not get a better result from a jury or trial judge, that party will lose the appeal fee paid.”).

68. These arbitration programs were selected at random to highlight how programs have unique features.

the superior court the power to require arbitration in civil cases where the parties are seeking less than the jurisdictional monetary limits set by the court (limit may not be over \$65,000).<sup>69</sup> In turn, Maricopa County has created a mandatory arbitration program “intended to lower court costs to litigants and allow the Court to utilize judicial resources more effectively.”<sup>70</sup> Maricopa County chose to set its jurisdictional limit at \$50,000; as such, a claimant in Maricopa County who seeks purely monetary relief of an amount less than \$50,000 is subjected to compulsory arbitration.<sup>71</sup> After the claimant files a complaint, the court appoints a single arbitrator to the case.<sup>72</sup> The arbitrator comes from a list of Maricopa County attorneys who have been licensed by the Arizona State Bar for four or more years.<sup>73</sup> After the arbitration proceeding, the arbitrator will issue an award, which a party may appeal.<sup>74</sup> However, if the judgment on appeal does not result in monetary relief in the appellants favor of at least 23% more than the arbitration award, the appellant must pay:

1. To the county, the compensation actually paid to the arbitrator.
2. To the appellee, those costs taxable in any civil action and reasonable attorney fees as determined by the trial judge for services necessitated by the appeal.
3. Reasonable expert witness fees that are incurred by the appellee in connection with the appeal.<sup>75</sup>

## 2. Cook County, Illinois

Next, to compare the specifications of the Maricopa County program, we look to the Cook County Mandatory Arbitration Program. As with Maricopa County, Illinois’ Cook County derives its power to compel arbitration from a state statute allowing courts to dictate the program’s rules.<sup>76</sup> Cook County

69. ARIZ. REV. STAT. ANN. § 12-133(A) (2016).

70. *Arbitration Guide Frequently Asked Questions*, JUDICIAL BRANCH OF ARIZ. MARICOPA CTY., <http://www.superiorcourt.maricopa.gov/SuperiorCourt/CivilDepartment/Arbitration/faq.asp> (last visited July 22, 2018).

71. *Arbitration Guide*, JUDICIAL BRANCH OF ARIZ. MARICOPA CTY., <http://www.superiorcourt.maricopa.gov/SuperiorCourt/CivilDepartment/Arbitration/Index.asp> (last visited July 22, 2018).

72. *Id.*

73. *Id.*

74. *Id.*

75. ARIZ. REV. STAT. ANN. § 12-133(I) (2016).

76. ILL. S. CT. R. 86 (West 2017) (“Each judicial circuit court may adopt rules for the conduct of arbitration proceedings which are consistent with these rules and may determine which matters within the general classification of eligible actions shall be heard in arbitration.”).

claimants are subject to mandatory civil arbitration when they seek purely monetary damages up to \$30,000.<sup>77</sup>

Unlike Maricopa County, Cook County appoints a three-person arbitrator panel comprised of attorneys who are licensed in Illinois and “have taken a court certified arbitrator training program.”<sup>78</sup> These arbitrators are subject to several qualifications, including the following: (1) must attend an arbitration seminar; (2) must read the Supreme Court rules and the mandatory arbitration act; (3) must be currently licensed to practice in Illinois; and (4) must have practiced law in Illinois for at least three years, or be a retired judge.<sup>79</sup> After the arbitration proceeding, the parties have the option to reject the award.<sup>80</sup> If a party rejects an award, however, they must pay a flat \$200 fee to the court.<sup>81</sup> Cook County claims “[t]he fee is intended to discourage frivolous rejections.”<sup>82</sup>

### 3. King County, Washington

Finally, we take a look at the mandatory arbitration program in the Superior Court of King County, Washington. King County’s program began after Washington state passed statutes permitting the state’s counties to implement such arbitration programs.<sup>83</sup> The county has adjusted their program frequently since its enactment. The King County program began in 1980; just three years later, the initially mandatory program was watered down to “discretionary” before returning once again to mandatory arbitration in 2002, 19 years later.<sup>84</sup> Further, like Maricopa County, King County subjects cases to mandatory arbitration when the claim does not exceed \$50,000<sup>85</sup>—however, \$50,000 was not always the limit. Originally, the limit was \$10,000, seeing four increases until the County settled on \$50,000 in 2005.<sup>86</sup>

77. *Cook County Mandatory Arbitration: Eligibility*, STATE OF ILL.: CIRCUIT COURT OF COOK CTY., <http://www.cookcountycourt.org/ABOUTTHECOURT/OfficeoftheChiefJudge/CourtRelatedServices/MandatoryArbitration.aspx> (last visited July 22, 2018).

78. *Cook County Mandatory Arbitration: Introduction*, STATE OF ILL. CIRCUIT COURT OF COOK CTY., <http://www.cookcountycourt.org/ABOUTTHECOURT/OfficeoftheChiefJudge/CourtRelatedServices/MandatoryArbitration.aspx> (last visited July 22 2018).

79. ILL. CIR. CT. OF COOK CTY. R. 18.4(a).

80. *Cook County Mandatory Arbitration: Rejection/Non-Binding Procedure*, STATE OF ILL. CIRCUIT COURT OF COOK CTY., <http://www.cookcountycourt.org/ABOUTTHECOURT/OfficeoftheChiefJudge/CourtRelatedServices/MandatoryArbitration.aspx> (last visited July 22, 2018).

81. *Id.*

82. *Id.*

83. *Mandatory Arbitration: Cases Subject to Mandatory Arbitration*, KING CTY., <http://www.kingcounty.gov/courts/superior-court/civil/arbitration.aspx> (last visited July 22, 2018); see WASH. REV. CODE ANN. § 7.06.020 (West 2017).

84. *Mandatory Arbitration: The History of Mandatory Arbitration*, KING CTY., <https://www.kingcounty.gov/courts/superior-court/civil/arbitration.aspx> (last visited July 22, 2018).

85. *Id.*

86. *Id.*

Next, not seen in the Maricopa and Cook County examples, King County imposes a filing fee of \$220 “to help defray the costs of the program.”<sup>87</sup> Additionally, the arbitrators are selected from a list of retired judges and members of the State Bar admitted for at least five years.<sup>88</sup> Arbitrator training is not a requirement, but potential arbitrators must sign an oath of office before they are qualified.<sup>89</sup> Finally, the parties have the option to appeal their award by requesting a trial de novo, but the court will charge fees and costs to appellants who do not improve their outcome—though not subject to a percentage limitation as seen in Maricopa County.<sup>90</sup>

Although the differences between these three example programs may not seem terribly extreme, they highlight only a fraction of the variation in programs across the country. Moreover, the small differences show inconsistency, and possible disagreement as to the best way to structure mandatory, nonbinding civil arbitration programs. The advantages and disadvantages of these variations will be discussed in further detail in the following section.

### III. THE PROBLEMS WITH MANDATORY, NONBINDING CIVIL ARBITRATION PROGRAMS

While the judicial attitude toward arbitration proceedings has changed over time, there remain disadvantages that come with mandatory, nonbinding civil arbitration programs. Section A of this Part will discuss three overarching problems with the programs as a whole: (1) the consequences of a mandatory proceeding; (2) the consequences of nonbinding awards; and (3) the true costs to the programs. Next, Section B will address the issues with the specific features each program possesses: (1) jurisdictional limits; (2) arbitrator criteria and training; and (3) ease of appeal. State legislatures should take these logistical flaws into consideration; if mandatory arbitration is their route of choice, then the noted concerns should provide guidance for drafting a program carefully tailored to meet the needs of the court system while maintaining the highest standards for justice.

#### A. OVERARCHING PROGRAM CONCERNS

Before discussing the customizable features of the arbitration programs, it is worth noting that there are general, inherent problems that come with all of them, based on the fact that they are (1) mandatory, (2) nonbinding, and (3) supposedly cost efficient. These underlying issues exist in every mandatory, nonbinding arbitration program, no matter how the state structures the program’s specific terms.

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87. *Id.*

88. WASH. SUPER. CT. ARB. R. § 3.1 (2008).

89. *Id.*

90. *Id.* § 7.3.

### 1. The Consequences of “Mandatory” Arbitration

The most important feature of a mandatory, nonbinding civil arbitration program is the fact that it is mandatory. Legislatures, intent on diverting cases from their states’ busy courtrooms, do not have much choice but to force the cases away. If an arbitration program was optional, few parties would likely elect to participate in the program.<sup>91</sup> As a result, the program’s voluntariness would undermine the state’s goal of “efficiency,” as plaintiffs would have the opportunity to elect the court system rather than the arbitration proceeding. The court system would not experience as much change as the legislature seeks.

However, parties never agreed to participate in these programs—unlike the ordinarily contract-based, voluntary arbitration proceedings run by arbitral institutions<sup>92</sup>—so participants may feel robbed of justice when they realize they must attend arbitration before a court will even consider their claims. In a 2009 study on the Public Attitudes of Forced Arbitration, the Employee Rights Advocacy Institute for Law and Policy found a general opposition to the practice of forced arbitration.<sup>93</sup>

The act of “forcing” citizens to participate in a particularly nuanced program has numerous downsides:

Some critics believe that mandatory mediation [and arbitration] takes the power of the legal system out of the parties’ hands and puts the courts in control, just to reduce their overcrowded docket. Many critics also feel that mandatory mediation does not give a person who was wronged a day in court—a fundamental component of the United States legal system. Another critic states: “You can’t avoid being sued, but you should have the right to answer before the jury, instead of having settlement virtually extorted from you by piling on

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91. See John L. Barkai & Gene Kassebaum, *Using Court-Annexed Arbitration to Reduce Litigant Costs and to Increase the Pace of Litigation*, 16 PEPP. L. REV. 43, 52 (1989) (comparing Hawaii’s old voluntary arbitration program to their newer mandatory program, finding that when the program was voluntary, many cases went to court rather than arbitration “for reasons of ignorance, caution, suspicion, or strategy”). Note that Hawaii’s largest purpose for their program is to reduce costs for its litigants. *Id.* at 44.

92. HUBER & WESTON, *supra* note 21, at 51 (“As arbitration is fundamentally a matter of contract, judicial enforcement is warranted provided that the parties have agreed to arbitrate, the issues are within the scope of the arbitration provision, and the arbitration clause is otherwise valid as a matter of contract law.”).

93. THE EMP. RIGHTS ADVOCACY INST. FOR LAW & POLICY, NATIONAL STUDY OF PUBLIC ATTITUDES ON FORCED ARBITRATION 3 (2009), <http://employeerightsadvocacy.org/publications/national-study-of-public-attitudes-on-forced-arbitration> (“Even after voters hear arguments in favor of, and opposed to, forced arbitration, opposition to the practice holds firm.”). The Employee Rights Advocacy Institute for Law and Policy is an institution that “advocate[s] for employee rights by advancing equality and justice in the American workplace.” *Our Work*, EMP. RIGHTS. ADVOCACY INST. FOR LAW & POLICY, <http://employeerightsadvocacy.org/our-work> (last visited July 22, 2018).

extraordinary costs of litigation in the form of settlement conferences.”<sup>94</sup>

## 2. The Consequences of “Nonbinding,” “Private” Proceedings

Additionally, other critics focus their attention on the problems that ensue when arbitration is “nonbinding,” asking: If parties are not bound to an arbitral award, how can the program be a true alternative to traditional court proceedings?<sup>95</sup> Further, some contend that such programs dangerously walk the line of being considered “binding” because parties must act affirmatively should they wish to not be bound by the arbitration award.<sup>96</sup> For example, under the Cook County program’s approach, discussed in Section II.C.2, a claimant is bound by an arbitration award unless they can afford the \$200 appeal fee. Additionally, under Maricopa County’s approach, appellants are “bound” by their arbitration award unless they can afford the risk of paying penalty fees in the event they cannot improve their award by 23%.<sup>97</sup>

For a claimant who cannot meet the demands of an appeal, an arbitration award is essentially binding. To highlight, “[r]etired judge Robert Thomas, now an arbitrator, admitted that in some cases, he wished ‘somebody could have taken another look at it. Because it’s a big responsibility, deciding these cases.’”<sup>98</sup> Having a second look at a case is not just useful, it is often necessary. “The fact that nobody, not even another arbitrator, is privy to prior arbitration proceedings leaves room for abuse and substantial injustice.”<sup>99</sup>

## 3. The True Costs of Mandatory, Nonbinding Arbitration

Finally, in relation to costs, some critics argue that despite the goals of achieving a cost-savvy alternative to litigation, mandatory ADR programs have the exact opposite effect. In critique of California’s mandatory ADR program, Judge Sharon Waters of Riverside County, California stated, “‘Our crowded courts have added another layer of unpredictability and cost’ to civil

94. Streeter-Schaefer, *supra* note 51, at 385 (footnotes omitted). Although the author is writing about mediation, the same critiques may be applied to arbitration proceedings.

95. Andrew Daeschel, Note, *Fake Arbitration: Why Florida’s Nonbinding Arbitration Procedure is Not Arbitration Within the Scope of the Federal Arbitration Act*, 67 FLA. L. REV. 1281, 1302 (2016) (“If the parties must engage in it against their wishes, then there is a significant possibility that it will simply be ‘an additional layer in a protracted contest.’”).

96. *Recent N.J. Supreme Court Decision Highlights Pitfalls of Nonbinding Arbitration*, DAY PITNEY LLP (Feb. 3, 2015), <https://www.daypitney.com/insights/publications/2015/02/recent-nj-supreme-court-decision-highlights-pitf> (“Nonbinding arbitration in the Superior Court is a misnomer, and parties should be aware of its many potential traps or they risk finding themselves subject to an adverse judgment without even going to trial.”).

97. See *supra* Section II.C.1.

98. AMANDA PERWIN, CTR. FOR JUSTICE & DEMOCRACY, MANDATORY BINDING ARBITRATION: CIVIL INJUSTICE BY CORPORATE AMERICA 4 (2005).

99. *Id.*

litigation.”<sup>100</sup> This is because some claimants are truly set on having their day in court. For example, in 2011, the Alternative Dispute Resolution Coordinating Committee to the Illinois Judicial Conference found that firms were using arbitration proceedings as a form of discovery, used for a greater settlement strategy.<sup>101</sup> Additionally, “the arbitration process appears to have little net effect on the rate at which cases go to trial.”<sup>102</sup> For these cases, the added program will certainly add to the attorney and court fees associated with litigation. By doing so, many claimants are faced with the risk of “having to pay higher court costs if they don’t gain more than the arbitrator’s figure.”<sup>103</sup> In order to meet those high demands, parties in such arbitrations have an incentive not to fully fight out the details of their case in arbitration, saving them for a future court proceeding.<sup>104</sup>

That leaves the question: Are the mandatory, nonbinding arbitration programs truly more efficient than traditional court proceedings? Some statistics suggest the answer is no. In a 2004 study of member of Arizona’s arbitration program, “only 25 percent [of attorney participants] thought [the arbitration program] was effective in reducing [the] disposition time in those cases.”<sup>105</sup> Additionally, “[i]n courts that require arbitration as a precondition for trial, one-third to one-half of the cases that are referred to arbitration actually go to hearing.”<sup>106</sup> Paired with the knowledge that the state arbitration proceedings have a mere minimal effect on cases going to trial,<sup>107</sup> these statistics show that these supposedly “efficient” programs may not be as efficient as legislatures intend.

100. Richard K. De Atley, *Lawsuits: Unclogging Courts—A Civil Alternative*, PRESS-ENTER, (Dec. 19, 2005, 8:49 AM), <http://www.pe.com/2005/12/19/lawsuits-unclogging-courts-a-civil-alternative>. By “layer,” the Justice is likely referring to mandatory arbitration proceedings as just another hoop a party must jump through to get to where they really want to be: court; *see also* STACEY KEARE, PUB. LAW RESEARCH INST., REDUCING THE COSTS OF CIVIL LITIGATION, <https://gov.uchastings.edu/public-law/docs/plri/adr.pdf> (last visited Sept. 28, 2018) (“One of the likely reasons for the lack of proof of cost savings is that people who use ADR in the court system preserve the right to request a trial de novo. If a trial is requested, the ADR effort in such cases may be duplicative.”).

101. ALT. DISPUTE RESOLUTION COORDINATING COMM., ANNUAL REPORT 63 (2011), [http://www.illinoiscourts.gov/supremecourt/jud\\_conf/AnnualReport/2011/JudConfADR\\_2011.pdf](http://www.illinoiscourts.gov/supremecourt/jud_conf/AnnualReport/2011/JudConfADR_2011.pdf).

102. Deborah R. Hensler, *Court-Ordered Arbitration: An Alternative View*, 1990 U. CHI. LEGAL F. 399, 408; *see also* KEARE, *supra* note 100 (finding that the rate of trial de novo is higher for cases handled in arbitration as compared to those in mediation).

103. De Atley, *supra* note 100.

104. *Id.* (“Critics say arbitration is less popular than mediation because the possibility of a future trial makes each side reluctant to reveal details of its case.”).

105. Dauber & Wissler, *supra* note 66, at 38. Bob Dauber and Rosselle Wissler, from Arizona State University, conducted this survey using a web based questionnaire sent to every member of the Arizona State Bar. *Id.* at 32–33.

106. Hensler, *supra* note 102, at 407.

107. *See supra* text accompanying note 102.

*B. PROGRAM-SPECIFIC CONCERNS*

When money and justice are on the line, states and counties should be particular about the way they organize their arbitration programs. Each arbitration program has its own rules over what monetary (jurisdictional) limit the program accepts, what makes an arbitrator eligible to participate in the program, and how parties may appeal an arbitration decision.<sup>108</sup> The advantages and disadvantages of the program-specific factors that go into the design of mandatory, nonbinding civil arbitration programs affect one another, and the effects must be taken into consideration when state legislatures implement a program. States must deal with the complicated balance between the specific terms and features within an individual program. This balance is further complicated when you factor in the overarching problems,<sup>109</sup> which can be either heightened or lessened depending on the specifics of a program. This Section explains these specifications by discussing the effects of different (1) jurisdictional limits, (2) arbitrator qualifications, and (3) appeals processes.

*1. Jurisdictional Limits*

As previously mentioned, the jurisdictional limits in these mandatory, nonbinding arbitration programs vary greatly from state-to-state, and county-to-county.<sup>110</sup> On one hand, a high jurisdictional amount effectively means that (1) more cases will be subject to the mandatory program and (2) a plaintiff may have more money at stake. The parties are more dependent on their case being heard by a trustworthy, informed arbitrator, and will want an opportunity to appeal if an award is unfair. Further, because more money is at risk, a higher limit also means that people are generally more willing to spend money on the proceeding. If they receive an unjust award, legal fees are less likely to deter them from appealing. In a case where \$100,000 is at stake, a payment to an attorney may be a good investment, in contrast to a case where only \$10,000 is at stake. In the latter scenario, a plaintiff may think twice before appealing an award.

On the other hand, instituting lower jurisdictional limits has its own advantages and disadvantages. First, a lower jurisdictional limit means that a program will affect a limited scope of cases because fewer cases are subject to the mandatory program. This allows for more cases to be settled by the court system itself. The downside to this is that the program will inevitably divert fewer cases away from the courts, which defeats one of the program's main purposes. Next, generally speaking, the parties subject to the arbitration have less risk in these lower-limit cases. This means that they will have less financial incentive to appeal an egregious arbitration award, and as previously

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108. *See supra* Section II.C.

109. *See supra* Section III.A.

110. *See supra* Section II.C.

mentioned are at risk of being indirectly “bound” by their award.<sup>111</sup> As a result, the parties to arbitration proceedings with lower jurisdictional amounts still need to be able to rely on a sound process and qualified arbitrator to make a decision. After all, a proper judicial system strives to protect justice and equity, no matter the stakes.

## 2. Arbitrator Qualifications

Arbitrators are essential to the validity and trustworthiness of the arbitration process. The two main concerns are the arbitrators’ requirements and the selection process. An arbitrator is meant to be neutral, and “[i]n any arbitration program, it is essential that the arbitrator be perceived as competent, fair, and impartial.”<sup>112</sup> A fully neutral party ensures trust in the proceeding and thus in the award itself.

An arbitrator’s eligibility requirements can depend on both their experience and training.<sup>113</sup> Most programs do not require that their arbitrators have prior experience working as an arbitrator. Rather, they require that their arbitrators have simply practiced law in the jurisdiction for a number of years—typically around five years.<sup>114</sup> Further, many programs do

111. See *supra* Section III.A.2.

112. Barkai & Kassebaum, *supra* note 92, at 70; see also JOHN H. MATHIAS, JR. ET AL., WHAT’S WRONG WITH ARBITRATION? 1 (2014), [https://www.americanbar.org/content/dam/aba/administrative/litigation/materials/2014/2014\\_sac/2014\\_sac/whats\\_wrong\\_with\\_arbitration.athcheckdam.pdf](https://www.americanbar.org/content/dam/aba/administrative/litigation/materials/2014/2014_sac/2014_sac/whats_wrong_with_arbitration.athcheckdam.pdf) (explaining that even if arbitration is more efficient, parties will not embrace arbitration as a valid alternative to court if they do not believe the arbitration process is fair); *Arbitrator Neutrality Statement*, ARBITRATION FORUMS, INC. <https://home.arbfile.org/arbitrators/arbitrator-neutrality-statement> (last visited July 22, 2018) (“Objectivity and neutrality are the foundations of a credible arbitration system.”).

113. States frequently set parameters for arbitrators. Longevity in practice and completion of training shows that arbitrators are better prepared to do the job. Holly Lyke-Ho-Gland, *Quantifying the Benefits of Quality: Employee Training and Incentives*, INDUST. WEEK (Jan. 10, 2017), <http://www.industryweek.com/quality/quantifying-benefits-quality-employee-training-and-incentives> (“Training programs help develop competencies, ensure employees understand their role in creating quality for the customer, and establish a quality-focused culture.”); Alexandra Smith, *Experience, Not Degree, Comes First for Employers*, GUARDIAN (Aug. 4, 2006, 5:00 AM), <https://www.theguardian.com/education/2006/aug/04/highereducation.workandcareers> (discussing how work experience is a coveted asset when it comes to seeking employment).

114. See, e.g., William P. Lynch, *Problems with Court-Annexed Mandatory Arbitration: Illustrations from the New Mexico Experience*, 32 N.M. L. REV. 181, 185 (2002) (stating New Mexico’s Second Judicial District requires their arbitrators to have been members of the state bar for five years); *Arbitration Guide*, *supra* note 71 (stating Maricopa County requires their arbitrators have been members of the state bar for four years); *Lawsuits*, N.C. COURT JUDICIAL BRANCH, <http://www.nccourts.org/Support/FAQs/FAQs.asp?Type=6#272> (last visited July 22, 2018) (stating North Carolina courts require their arbitrators to have been members of the state bar for at least five years); *For Arbitrators or Attorneys Wanting to Become Arbitrators*, STATE OF ILL.: CIRCUIT COURT COOK Cty., <http://www.cookcountycourt.org/ABOUTTHECOURT/OfficeoftheChiefJudge/CourtRelatedServices/MandatoryArbitration/BecomingACertifiedArbitrator.aspx> (last visited July 22, 2018) (requiring arbitrators in Cook County, IL to have been licensed to practice law in Illinois for at least three years).

not require their arbitrators to complete any training prior to serving.<sup>115</sup> This can be contrasted with the rigid requirements imposed on the arbitrators in private arbitration associations; by way of example, the American Arbitration Association's list of arbitrators includes "highly accomplished and respected experts" such as former judges, attorneys with specific expertise, and relevant business owners.<sup>116</sup> The Association's approved arbitrators are also required to complete educational programs that "focus on managing the dispute resolution process."<sup>117</sup>

Unsurprisingly, the relaxed requirements in the state programs have consequences.<sup>118</sup> The previously mentioned 2004 study of Arizona's arbitration program, which has no training requirements, showed "only about half of the lawyers felt the arbitrator was very prepared, understood the issues involved in the case very well, or was very knowledgeable about arbitration procedures."<sup>119</sup> Further, the survey showed that 55% of participating Arizona attorneys believe arbitrators should be trained in arbitration procedures prior to serving.<sup>120</sup> Offering training is increasingly important considering that arbitrators largely come from non-neutral backgrounds in advocacy. Most arbitrators are practicing attorneys, with their practice focused on either plaintiffs or defendants. Without the proper training, attorneys serving as supposedly neutral arbitrators may have underlying biases.<sup>121</sup> Arbitrator bias is one explanation for why one study in Hawaii found that defense attorneys

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115. See, e.g., 16 ARIZ. R. CIV. P. 73 (2018) (providing eligibility requirements for arbitrators, but not requiring any specific training).

116. *Arbitrators & Mediators*, AM. ARBITRATION ASSOC., <https://www.adr.org/aaa-panel> (last visited July 22, 2018). For further examples, see *Arbitration Services*, JAMS, <https://www.jamsadr.com/adr-arbitration> (last visited July 22, 2018) (explaining that JAMS arbitrators include retired state and federal judges and experienced attorneys), and *Who Are CPR Neutrals*, INT'L INST. FOR CONFLICT PREVENTION & RESOLUTION, <https://www.cpradr.org/neutrals> (last visited July 22, 2018) ("Neutrals comprise those among the most respected and elite mediators and arbitrators in the world. They include prominent attorneys, retired state and federal judges, academics, as well as highly-skilled business executives, legal experts and dispute resolution professionals who are particularly qualified to resolve all business disputes including those involving multi-national corporations or issues of public sensitivity.").

117. *Arbitrators & Mediators*, *supra* note 116.

118. See Lynch, *supra* note 114, at 212 ("Although undoubtedly many experienced, well-qualified lawyers are selected as arbitrators, there is a real danger that a relatively inexperienced lawyer, or a lawyer not familiar with the subject matter of the arbitration, will serve as arbitrator and improperly enter an award of default or dismissal against a party."); Mark Baril, *MED-ARB: The Best of Both Worlds or Just a Limited ADR Option? (Part Two)*, ARBITRATE (Aug. 2014), <http://www.arbitrate.com/article.cfm?zfn=BarilM3.cfm> (stating that even a mediator, a neutral in another ADR proceeding, should not serve as an arbitrator if he or she has not been trained in arbitration).

119. Dauber & Wissler, *supra* note 66, at 33-34.

120. *Id.* at 38.

121. Terry Carter, *Implicit Bias Is a Challenge Even for Judges*, ABAJOURNAL (Aug. 5, 2016, 9:58 PM), [http://www.abajournal.com/news/article/implicit\\_bias\\_is\\_a\\_challenge\\_even\\_for\\_judges](http://www.abajournal.com/news/article/implicit_bias_is_a_challenge_even_for_judges) (explaining that even judges, who "are tasked with being the most impartial members of the legal profession," are affected by unconscious biases).

were less likely to be satisfied than plaintiffs' attorneys.<sup>122</sup> One writer has suggested that to decrease some of this bias, courts should release data showing the distribution of awards to various groups.<sup>123</sup> Such transparency would serve as a means of public education as well as a tool to ensure arbitrators are held accountable for their decisions.

In addition to an arbitrator's qualifications, there are concerns surrounding their areas of expertise. Parties to a dispute want to know that their arbitrator has enough knowledge to fully grasp the details of their suit.<sup>124</sup> However, this often does not occur because many programs do not select their arbitrators based on their specialty area.<sup>125</sup> Essentially, this means an anti-trust attorney could wind up making crucial decisions in a property case, an area of the law in which he is not well-versed. The 2004 study showed that the attorneys in counties where arbitrators were assigned cases within their practice area were more likely to feel as though their arbitrator was prepared and knowledgeable about the process than attorneys in counties that did not assign arbitrators to cases within their practice area.<sup>126</sup> This suggests that the selection and placement of arbitrators outside of their main practice areas hinders the quality of an arbitration proceeding.

### 3. Appeals Process

A final program-specific concern is the process of appealing an arbitration award. In the American justice system, the opportunity to appeal a judicial decision, whether granted from a court or an arbitrator, is critically important. "The primary function of the modern right of appeal is to protect

122. Barkai & Kassebaum, *supra* note 91, at 65 ("Ninety-one percent of the plaintiffs' lawyers were satisfied with the program, but only 46% of the defense lawyers were satisfied."). These statistics came from a study in the late 1980s, funded by the State of Hawaii and a Conflict Resolution program at the University of Hawaii, that evaluated the state's arbitration program. *Id.* at 43-44.

123. Hensler, *supra* note 102, at 420 ("To guard against awards that systematically disadvantage plaintiffs or defendants, courts could also be instructed to publish statistical data on the distribution of arbitration awards on a regular basis.").

124. See COMM'N TO PROMOTE PUB. CONFIDENCE IN JUDICIAL ELECTIONS, REPORT TO CHIEF JUDGE JUDITH KAYE 1, <https://www.nycourts.gov/reports/JudicialElectionsReport.pdf> (last visited July 22, 2018) ("If the actual independence and impartiality of the judiciary are essential to the successful operation of democracy, so is the public perception that courts provide an independent and impartial tribunal to resolve disputes and provide basic protections to individuals. Without public confidence in the judiciary, its ability to do justice is compromised. Where people do not trust the courts, they will resort to other means to resolve those matters that are properly in the judiciary's realm.").

125. See, e.g., Dauber & Wissler, *supra* note 66, at 34 (stating that Maricopa County, and others in Arizona, do not assign arbitrators based on their subject-matter knowledge); *Arbitration Guide*, *supra* note 71 (explaining the structure of Maricopa County's mandatory arbitration program, but never mentioning any set out plan for assigning arbitrators based on expertise).

126. Dauber & Wissler, *supra* note 66, at 34 (stating that 71% of attorneys from Pima County felt as though their arbitrator understood the issues of their case very well, while only 54% of attorneys from Maricopa County agreed).

against miscarriages of justice.”<sup>127</sup> Within these mandatory, nonbinding arbitration programs specifically, an appeal is crucial. For reasons previously discussed—namely the supposed “nonbinding” nature of the proceedings, frequently minimal arbitrator expertise, and lack of arbitrator training<sup>128</sup>—the programs must provide parties with an opportunity to appeal the arbitration award.

Many states impose appeal disincentives, which have both advantages and disadvantages. A successful program will disincentivize appeals that are erroneous or unlikely to change the outcome of the proceeding, while allowing parties to appeal awards when they have good reason to do so. On one hand, these disincentives are not only advantageous, they are actually necessary. A main purpose of mandatory, nonbinding civil arbitration programs is to reduce crowding in court-systems.<sup>129</sup> If a plaintiff is able to appeal an award without effort, this purpose would be undermined.<sup>130</sup>

On the other hand, a disincentive to appeal can improperly hinder parties from appealing in completely justifiable scenarios. This is where state legislatures should be concerned. Harsher disincentives—such as those requiring the appellant to improve their award by a certain percentage—can be especially unpredictable for plaintiffs. In this scenario, a plaintiff may fully believe that their received arbitration award was lower than the amount a court would have granted. However, in a program that imposes costs on a party who fails to improve their award by say 20%, the plaintiff would be punished by receiving an award of merely 19% more. This indirectly communicates to litigants that they should not fight for a court to make their loss whole unless they are positive they can increase their award by this arbitrary percentage. This emphasizes particular dollar amounts, rather than one of the important legal principles of damages: making an injured plaintiff whole again.

### C. ISSUES APPLIED

All of the stated concerns build on each other in the analysis of whether a program is both efficient and fair. Therefore, it is worth applying these principal concerns to an existing arbitration program to point out how

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127. Peter D. Marshall, *A Comparative Analysis of the Right to Appeal*, 22 DUKE J. COMP. & INT'L L. 1, 3 (2011) (explaining three functions of appeals: (1) “to protect against miscarriages of justice,” (2) “to maintain consistency in trial courts,” and (3) to “serve important institutional functions”); see also Cassandra Burke Robertson, *The Right to Appeal*, 91 N.C. L. REV. 1219, 1225 (2013) (listing four main purposes of an appellate system as: “[1] correcting legal and factual errors; [2] encouraging the development and refinement of legal principles; [3] increasing uniformity and standardization in the application of legal rules; and [4] promoting respect for the rule of law”) (footnotes omitted).

128. See *supra* Part III.

129. See *supra* Section II.C.

130. In theory, if a party could easily appeal an award, many cases could end up right back in the courts, continuing the crowding.

intertwined the issues can be. For this purpose, this Note will analyze the Maricopa County arbitration program, which was detailed in Section II.C.1.

Considering jurisdictional limits around the country range from \$25,000 to \$150,000,<sup>131</sup> the Maricopa County program has a fairly moderate jurisdictional limit (\$50,000). This limit strikes a reasonable balance between the over-encompassing high jurisdictional limits, and the decreased efficiency of low jurisdictional limits. As for arbitrator qualifications, however, the program is lacking. Apart from the requirement that the arbitrator has practiced in the jurisdiction for at least four years, the state does not impose any further requirements.<sup>132</sup> There is similarly no training program.<sup>133</sup> Thus, the Maricopa County program is not maximizing the litigants' trust in their arbitrator, nor is it maximizing trust toward the accuracy of the ultimate award granted. Without ensuring the utmost trust in their arbitral awards, disgruntled parties will look to the appeals process. Unfortunately, Maricopa County's program imposes a tough appeal disincentive on the participating parties, requiring the appellant to increase their award substantially or otherwise pay added fees. The analysis now shows that not only does the program fail to evoke a deeper trust in the award, it subsequently makes it difficult for a litigant to be "unbound" by it. The appeal disincentive increases the efficiency of crowded courts through a minimal number of appeals. However, the County does not balance that benefit against the cost of perceived unfairness among the parties.

#### IV. SOLUTION

Despite program drawbacks, states have plenty of existing incentives to continue their mandatory nonbinding arbitration programs. First, states have already devoted significant time and resources toward their programs and would not want their efforts to go to waste by scrapping their programs entirely. Next, modern courts are as crowded as ever.<sup>134</sup> Unless court dockets miraculously clear up, states will need to provide alternatives to court proceedings, and successful arbitration programs are an attainable—not to mention existing—option.<sup>135</sup> Finally, participant feedback toward arbitration

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131. See *supra* Section II.C.

132. *Arbitration Guide*, *supra* note 71 (providing that the list of arbitrators is comprised simply of those who have been licensed by the state bar for four or more years).

133. *Id.* (stating the requirements of the serving arbitrators, not once mentioning any training requirements).

134. Stephen J. Ware, *Is Adjudication a Public Good? "Overcrowded Courts" and the Private Sector Alternative of Arbitration*, 14 *CARDOZO J. CONFLICT RESOL.* 899, 901–02 (2013).

135. Hensler, *supra* note 102, at 399 ("Because litigants must wait two, three or even five years for cases to reach trial, and because many lawyers are unwilling to invest their time in trying smaller value cases, litigants' real choice in courts that offer arbitration is between arbitration and settlement."). Also, it is important to note that some parties pursue their claims purely for the purpose of voicing their position to a third party, irrespective of any monetary award. *Id.* at 413.

programs has largely been positive, indicating the majority of the public does not disapprove of the programs in their entirety.<sup>136</sup>

To optimize the balance between the litigant's interest in justice and the state's interest in efficiency, state legislatures should implement mandatory, nonbinding arbitration programs using legislation that outlines specific details of the program. Additionally, this legislation should provide (1) a jurisdictional limit of \$50,000, (2) compulsory arbitrator training and placement based on subject-matter expertise, and (3) appeal disincentives requiring appellants to pay a fee if they fail to improve their award on appeal.

A. STATE LEGISLATURES SHOULD PROVIDE PROGRAM STRUCTURE  
IN DETAILED STATUTES

The first step to improving these arbitration program begins with statutes. Rather than drafting statutes that allow courts to create arbitration programs based on loose guidelines, this Note suggests state legislatures should design their mandatory, nonbinding arbitration programs within the statute itself. Thus, states will have one uniform program throughout every county. "Benefits to establishing comprehensive, statewide statutes or court rules include program consistency and continuity."<sup>137</sup> After all, if state legislatures focused on developing a strong, efficient, and fair program, there would be no need for each county to implement their own terms and procedures. This legislation-based method is further beneficial because states will not have to exercise as much oversight over each individual program, further saving time and money.<sup>138</sup>

B. STATE LEGISLATURES SHOULD ADOPT EFFICIENT AND FAIR  
PROGRAM SPECIFICATIONS

Next, this Note proposes that within the suggested state statutes, legislatures should ensure their arbitration programs contain the following provisions so as to increase both efficiency and fairness: (1) a medium jurisdictional limit; (2) required arbitrator training and specified placement; and (3) a difficult process of appealing an award.

136. *Id.* at 415.

137. DI PIETRO, *supra* note 62, at 10.

138. See generally THOMAS L. KILBRIDE ET AL., SUPREME COURT OF ILL., COURT-ANNEXED MANDATORY ARBITRATION: ANNUAL REPORT OF THE SUPREME COURT OF ILLINOIS TO THE ILLINOIS GENERAL ASSEMBLY FOR STATE FISCAL YEAR 2011 (2011), <http://www.illinoiscourts.gov/Administrative/ManArb/2011/ManArbRpt11.pdf> (reporting on the individual statistics of each of the state of Illinois' numerous county programs, including Cook County).

### 1. Ideal Jurisdictional Limit

First, the jurisdictional limit should be set at a medium amount, such as \$50,000.<sup>139</sup> A limit of \$50,000 is a common jurisdictional limit for arbitration programs,<sup>140</sup> and cases under \$50,000 are still considered “lower-value” cases.<sup>141</sup> As mentioned previously, there are problems associated with both low and high jurisdictional limits.<sup>142</sup> Low jurisdictional limits lead to parties being unintentionally “bound” by a “nonbinding” program, deterring parties from pursuing their claims.<sup>143</sup> Conversely, higher jurisdictional amounts can lead to more complicated arbitration proceedings involving higher risks.<sup>144</sup> A medium dollar amount strikes an ideal balance by ensuring that the program encompasses enough cases to effectively reduce crowding in court, while allowing cases with more money at stake to be handled by the traditional court system. Further, according to a 2010 survey of Arizona attorneys, conducted by the Institute for the Advancement of the American Legal System at the University of Denver, the most ideal limit for both Plaintiffs and Defendants was \$50,000.<sup>145</sup>

### 2. Ideal Arbitrator Qualifications

Next, to increase the effectiveness of arbitrators, courts should require that participating attorneys, regardless of how long they have been in practice, complete at least one compulsory training session prior to serving as an arbitrator.<sup>146</sup> In training, arbitrators should learn how to fill the role of a

139. \$50,000 is reasonable amount compared to the low of \$15,000 and high of \$150,000 jurisdictional limits. *See supra* note 65 and accompanying text.

140. *See, e.g.*, OR. REV. STAT. ANN. § 36.400(3) (West 2013); *Arbitration Guide, supra* note 71; *Mandatory Arbitration*, GRAYS HARBOR CITY., [http://www.co.grays-harbor.wa.us/government/superior\\_court/mandatory\\_arbitration.php](http://www.co.grays-harbor.wa.us/government/superior_court/mandatory_arbitration.php) (last visited July 22, 2018); *What is Mandatory Arbitration?*, TWELFTH JUDICIAL CIRCUIT COURT WILL CTY., ILL., <http://judges.willcountyillinois.com/For-Citizens/Mandatory-Arbitration> (last visited July 22, 2018).

141. NAT'L CTR. FOR STATE COURTS & STATE JUSTICE INST., *THE LANDSCAPE OF CIVIL LITIGATION IN STATE COURTS* 3 (2015), [https://www.ncsc.org/~media/Files/PDF/Research/CivilJusticeReport-2015.ashx](https://www.ncsc.org/~/media/Files/PDF/Research/CivilJusticeReport-2015.ashx).

142. *See supra* Section III.B.1.

143. *See* NAT'L CTR. FOR STATE COURTS & STATE JUSTICE INST., *supra* note 141, at iv; *supra* Section III.B.1.

144. *See* Amy J. Schmitz, *Nonconsensual + Nonbinding = Nonsensical? Reconsidering Court-Connected Arbitration Programs*, 10 CARDOZO J. CONFLICT RESOL. 587, 593 (2009).

145. INST. FOR THE ADVANCEMENT OF THE AM. LEGAL SYS., UNIV. OF DENVER, *SURVEY OF THE ARIZONA BENCH & BAR: ON THE ARIZONA RULES OF CIVIL PROCEDURE* 47 (2010), [http://iaals.du.edu/sites/default/files/documents/publications/survey\\_arizona\\_bench\\_bar2010.pdf](http://iaals.du.edu/sites/default/files/documents/publications/survey_arizona_bench_bar2010.pdf).

146. In 2011, the state of Connecticut conducted a survey of participants in its civil arbitration program, and the participants' “most frequent comment was that the success of the arbitration program depends largely on the effectiveness of the arbitrator.” COMM'N ON CIVIL COURT ALT. DISPUTE RESOLUTION, STATE OF CONN. JUDICIAL BRANCH, *REPORT AND RECOMMENDATIONS* 70 (2011), [https://www.jud.ct.gov/Committees/ADR/Commission\\_Final\\_Report\\_122111.pdf](https://www.jud.ct.gov/Committees/ADR/Commission_Final_Report_122111.pdf).

neutral party and the arbitration proceeding as a whole. This suggestion should not come as a surprising change, as some states have already required classroom training for arbitrators.<sup>147</sup> States may simplify training by employing technology; for example, in 2011, the Illinois courts implemented training videos.<sup>148</sup> This option reduces costs for states, because the video eliminates the need to hire employees to train incoming arbitrators. Another, more intensive, option is to implement a mentorship program in which new arbitrators can learn from more experienced arbitrators.<sup>149</sup>

Further, arbitrators should largely be assigned to cases based on their practice and their expertise in particular areas of law. One study showed that 71% of attorneys thought arbitrators should be assigned according to subject-matter expertise.<sup>150</sup> This selection process would give more assurance to everyone involved that the arbitrator is well-qualified to handle the case. Along with the increased training requirements, the selective assignment of arbitrators to cases will likely increase the overall trust in the arbitrator's judgment and increase the sense that an arbitrator "got it right" when it comes to an award, therefore decreasing the likelihood that a party will appeal the decision.

### 3. Ideal Appeals Process

With increased arbitrator qualifications and training, arbitration programs would produce decisions with greater accuracy, reducing the need to reverse an erroneous award. There is still, however, the need to increase reliance on arbitration awards and eradicate the use of arbitration as a mere gateway to court proceedings. An efficient and fair arbitration program should include a somewhat stringent appeal disincentive: If on appeal, the appellant fails to increase their arbitration award, they are required to pay either a set fee to the courts, their opponent's legal fees, or both.

This suggestion balances the challenge of prohibiting frivolous appeals without infringing on parties' genuine need to appeal. By only penalizing an appellant who fails to increase their award by any amount, the suggested appeal disincentive accomplishes two objectives: to (1) avoid arbitrary appeals

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147. See DI PIETRO, *supra* note 62, at 20 (stating that although not a common feature, both Florida and Georgia required their arbitrators to complete four to six hours of classroom training); GA. COMM'N ON DISPUTE RESOLUTION, REQUIREMENTS FOR QUALIFICATION AND TRAINING OF NEUTRALS 14 (2014), [http://godr.org/sites/default/files/Godr/supreme\\_court\\_adr\\_rules/APPENDIX%20B%205-28-2014.pdf](http://godr.org/sites/default/files/Godr/supreme_court_adr_rules/APPENDIX%20B%205-28-2014.pdf) (stating the arbitration training program also qualifies as a CLE credit).

148. KILBRIDE ET AL., *supra* note 138, at 3.

149. *Id.*

150. Dauber & Wissler, *supra* note 66, at 34. Interestingly, more attorneys in Pima County believed arbitrators should be assigned according to their subject-matter expertise than the attorneys in Maricopa County. *Id.* Pima County already assigns arbitrators accordingly, while Maricopa County does not. *Id.* This suggests that the attorneys of Pima County are more content with the structure of their program.

from taking place, because an appellant would know she must improve the original award or face payment; and (2) allow appellants to rightfully fight for an award that will fully make their injury whole. The risk of facing additional fees upon appeal will lead parties to rely on reasonable arbitration decisions and prevent parties from appealing from proper, but unfavorable decisions; “as fees and penalties for proceeding to trial increase, the potential for trials to serve as a corrective mechanism for arbitration errors will decrease.”<sup>151</sup> The process still acknowledges the importance of giving parties an opportunity to appeal, as the suggestion still provides parties with a reasonable chance to appeal an award when they strongly believe their case was handled improperly.

## V. CONCLUSION

Undoubtedly, mandatory, nonbinding civil arbitration programs are a useful tool for states. However, it is important that states not let their interest in efficiency blind them to their citizens’ interest in fairness. To balance the states’ interests with those of their citizens, state legislatures should adopt statutes that specifically outline the details of their arbitration programs, leaving minimal space for individual courts to select aspects of their program that alter the quality of the proceedings.<sup>152</sup> When designing their programs, the legislatures must decide how high to set their jurisdictional limit, how to select arbitrators and assign them to cases, and how a party may appeal an award.<sup>153</sup> When setting these terms, the legislature must consider the numerous consequences that affect the parties involved. Each aspect of a program affects the efficiency and fairness of the program as a whole. After analyzing the consequences against the state’s goals of efficiency, it is clear that an optimal arbitration program should have a medium jurisdictional limit, require arbitrators to complete training prior to serving, assign arbitrators to cases based on their relevant expertise, and only impose disincentive appeal costs on parties who fail to increase their award by any amount on appeal.<sup>154</sup> These suggested features ensure that states are providing citizens with the opportunity to bring their legal issues in an equitable system.

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151. Hensler, *supra* note 102, at 420.

152. *See supra* Section IV.A.

153. *See supra* Section III.B.

154. *See supra* Section IV.B.