Pushing the Limits on Court-Annexed Arbitration: The Hawaii Experience*

Professors John Barkai**
Gene Kassebaum***

Hawaii's mandatory Court-Annexed Arbitration Program (CAAP) is nationally significant for several reasons. First, while most arbitration programs have much lower jurisdictional ceilings— the most common are $15,000 and $50,000 (Keilitz et al., 1988; Ebener and Betancourt, 1985)— Hawaii's program applies to tort cases valued up to $150,000. As such, the Hawaii evaluation can offer insight into what might happen if other programs raised their limits. Second, because the primary goal of the Hawaii program is to reduce litigants' costs by limiting pretrial discovery, this evaluation may offer guidance to jurisdictions seriously interested in reducing litigation costs. Finally, because the Hawaii evaluation suggests that litigant savings may be heavily affected by the lawyers' fee arrangement (contingent v. hourly), the findings help to establish criteria for determining which cases should be in arbitration.

This article first discusses the Hawaii program and explains its unique features; then presents and interprets evaluation data with particular attention to the issues of discovery reduction, cost reduction, lawyers' fee, pace, satisfaction, and the use of arbitrators. Finally, by analyzing data for cases of $1-15,000, $15,001-50,000, and over $50,000, the article will discuss the implications of significantly increasing the jurisdictional limits of other arbitration programs.

Hawaii's Arbitration Program

Hawaii's Court-Annexed Arbitration Program (CAAP) is intended to "provide a simplified procedure for obtaining a prompt and equitable resolution of certain civil matters." Its major goals are to reduce litigant costs, increase the pace of tort case disposition, and improve, or at least maintain, the level of satisfaction for litigants and attorneys.

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** Professor of Law, William S. Richardson School of Law, University of Hawaii.

*** Professor of Sociology, Department of Sociology, University of Hawaii.

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The program was established by court rule in 1986 as a two-year experiment. At first, CAAP was voluntary and had a jurisdictional limit of $50,000. Any party could request that a tort case valued at or below a probable jury award of $50,000 be placed into the arbitration program. That $50,000, voluntary program is now called Phase I.

Less than six months into Phase I, the state legislature expanded the arbitration program as part of tort reform legislation. Beginning May 1, 1987, all tort cases with "a probable jury award value, not reduced by the issue of liability, exclusive of interest and costs, of $150,000 or less" were included in the program. The new law changed the $50,000 voluntary program into a $150,000 mandatory program known as Phase II. CAAP has the highest jurisdictional amount of any mandatory, statewide program with full arbitration hearings. Only a few federal courts have jurisdictional amounts as high as $150,000 and newer federal programs have set their limits at $100,000 (Ebener and Betancourt, 1985).

In Hawaii's program, all tort cases are presumed to be valued at less than $150,000, the jurisdictional limit. In other words, all cases initially are assigned to the arbitration program; attorneys may request that their case be exempted from the program if the value of the case exceeds $150,000. After the last defendant's answer is filed, a list of five potential arbitrators is sent to the attorneys for the parties. In cases of multiple parties, for each additional party two additional potential arbitrators are added to the list. After each party gets two peremptory strikes, a single, volunteer arbitrator is assigned to the case from the names remaining on the list. The arbitrator must schedule a pre-hearing conference within 30 days from the date a case is assigned. Perhaps the most unique aspect of the Hawaii program is that discovery is only permitted with the consent of the arbitrator. The arbitrator also can attempt to aid in the settlement of the case if all parties consent in writing.

The arbitration rules require that the case be concluded within nine months from the service of the complaint on the defendant. At the arbitration hearing, the rules of evidence can be relaxed, and no transcription or recording is permitted. Arbitration awards are not limited to the jurisdictional amount of $150,000. They must be in writing, although findings of fact and conclusions of law are not required. Awards must be filed within seven days of the conclusion of the arbitration hearing or within thirty days of receipt of the final authorized memoranda of counsel.

The award becomes the final judgment if no party files a written Notice of Appeal and Request for Trial De Novo within 20 days of the date the award is served upon the parties. If such notice and request is timely filed, the case is scheduled for trial de novo. The case is then treated as if it never had been in arbitration, and full discovery is permitted under the rules of civil procedure. No testimony made during the arbitration hearing is admissible in the trial de novo. Frivolous appeals are discouraged, since when parties appeal, they must do at least 15 percent better at the trial de novo than they did at the arbitration hearing or be subject to sanctions of attorney fees up to $5000, costs of jurors, and other reasonable costs actually incurred.

The Evaluation Project

The evaluation is being conducted by researchers from the University of Hawaii in a randomized experimental design with two groups of cases. One-half of the cases are assigned to the arbitration program and one-half of the cases are designated as a "comparison group" and are assigned to regular litigation. Data are drawn from five sources: (1) a case record data base maintained by the arbitration administrator; (2) surveys of arbitrators and lawyers in both the arbitration and the comparison group, conducted after a case closes by settlement, award or dismissal; (3) surveys of lawyers conducted after an arbitration appeal is concluded; (4) a general survey of the lawyers most active in CAAP; and (5) interviews and focus group sessions with lawyers, arbitrators, insurance industry representatives and others involved in tort litigation.

The focus of the evaluation is on cost, pace, and satisfaction, because these factors reflect the goals of CAAP. *Cost* includes discovery costs, time spent on cases by plaintiffs' lawyers, and hourly fees of defense lawyers. *Pace* refers to the time necessary to terminate a case once it enters the arbitration program. *Satisfaction* is measured by asking lawyers how satisfied they were with the program and how satisfied they thought their clients were. The aim of the program evaluation is to determine whether disposing of a case in the arbitration program can decrease *cost* and increase *pace* while maintaining *satisfaction*.

Data Analysis

Since Hawaii's arbitration program began in 1986, more than 2000 cases have entered CAAP. Of the cases that have closed, the majority have settled and did not result in an arbitration award. The ratio of settlements to awards is about 3.1

to 1. Approximately half (47%) of the awards are appealed, and most have settled on appeal before reaching a trial de novo. Only five of over 1200 cases (.4%) have gone to trial.

In the evaluation effort, more than 1200 CAAP and comparison cases have been surveyed. In arbitration cases, 70 percent of the plaintiffs' lawyers, 66 percent of the defense lawyers and 86 percent of the arbitrators returned their surveys. In regular litigation, 50 percent of plaintiffs' lawyers and 54 percent of defense lawyers returned their surveys. A total of 625 lawyers were surveyed.

An additional, onetime survey, called the *General Survey*, was sent to the 91 lawyers who had the most cases in CAAP. These lawyers were involved in 84 percent of the cases we sampled, which indicates that a small number of specialists handle a large percentage of the cases. Sixty-two lawyers (68%) returned the *General Survey*.

Evaluation Results

Prior evaluation data on the Hawaii Program have been reported in detail elsewhere (Barkai and Kassebaum, 1989a, 1989b; Barkai, Kassebaum and Chandler, 1989). The following results are a brief overview of the evaluation data that continue to suggest that the program is reducing discovery, reducing costs of litigation, increasing the pace of litigation, and maintaining an adequate level of satisfaction for lawyers in the program. Interestingly, defense lawyers are less pleased with the program than are the plaintiffs' lawyers.

Reducing Discovery

Cost saving from reduced discovery is the hallmark of the program's design. The majority of lawyers and arbitrators reported that in CAAP discovery was reduced.

Does discovery reduction affect the outcome of a case? For cases in which the arbitrator limited discovery, the percentage of lawyers reporting that discovery reduction actually did affect the outcome is small, but a significant percentage thought that it may have affected the outcome. The defense lawyers more often expressed this concern than did the plaintiffs' lawyers.

Discovery Costs

Discovery reduction will, of course, lower discovery costs. With a high percentage of lawyers reporting a reduction of discovery, it is not surprising that the majority of lawyers reported that discovery costs are lower in CAAP. Plaintiffs' lawyers, however, are more apt to say that CAAP saves litigation costs than are defense lawyers. For awards, which are generally more costly than settlements, a higher percentage of plaintiffs' lawyers than defense lawyers reported that discovery costs would have been greater if the case had not been in arbitration. However, a majority of defense lawyers reported that discovery costs for settlements are about the same in CAAP and regular litigation. Only 31 percent of defense lawyers who settled thought CAAP was cheaper than regular litigation, although 64 percent of plaintiffs' lawyers thought CAAP was cheaper for settlements.

Table 1.
Discovery Reduction*

	Plaintiff		Defendant	
	Settled	Awards	Settled	Awards
Discovery was reduced	72%	80%	63%	73%
Discovery denial affected outcome (yes or maybe)	23%	35%	50%	52%

* The tables in this report are based upon 625 surveys; 102 arbitration awards of plaintiffs' lawyers and 112 of defense lawyers; arbitration settlements of 116 plaintiffs' lawyers and 99 defense lawyers; regular litigation (comparison) of 130 plaintiffs' lawyers and 56 defense lawyers. The exact sample size may vary from question to question because of pairwise deletions of missing values. These tables report an abbreviated form of the results of lawyer surveys. A complete set of tables is available from the authors. The tables are in percentages, dollars, and days.

In the *General Survey*, a onetime survey of the 91 lawyers who had the most CAAP cases, 83 percent of the lawyers reported that CAAP was cheaper than

regular litigation and 17 percent thought CAAP cost about the same as regular litigation. Not a single plaintiffs' or defense lawyer in the *General Survey* thought that CAAP was more expensive than regular litigation. Their opinions are particularly relevant, because these lawyers handle many cases in both arbitration and regular litigation.

Table 2.
Discovery Costs

	Plaintiff		Defendant	
	Settled	Awards	Settled	Awards
Discovery costs would be greater if not in CAAP	64%	69%	31%	53%
Average discovery costs	$353	$1000	$638	$1054

The data show that discovery is more expensive in cases that go to awards than in cases that settle. For settlements, plaintiffs spend only about half as much on discovery as defendants spend. For awards, the average discovery costs for plaintiffs and defendants were almost the same. Furthermore, the reported discovery costs for awards underestimate the final discovery costs because additional discovery is conducted in the awards that are appealed.

Lawyers' Fees

The largest part of litigation costs is lawyers' fees, not the discovery costs. For the majority of cases, both plaintiff and defense lawyers reported that discovery costs were only ten percent or less of the total costs. Therefore, although CAAP is designed to reduce discovery, even greater cost savings may result if the discovery reduction affects lawyers' fees.

For plaintiffs' lawyers, the average fee was estimated to be $10,732 for settled cases and $11,645 for cases that had a hearing. The average defense fees were reported to be $2,762 for settled cases and $6,224 for cases in which a hearing was

held. Using the ratio of 3.1 settlements to each award, the average fee before the appeal process was $10,955 for plaintiffs' lawyers and $3,606 for defense lawyers.

We estimated the fees for plaintiffs' lawyers by computing one-third of the settlement or award value, which is the standard contingent fee percentage in Hawaii. When cases settle with little work by the lawyer however, the plaintiff's lawyer may discount the fee below the standard one-third contingency. After the plaintiff's lawyer's fee is deducted, the discovery costs and any other litigation expenses are subtracted, and the plaintiff receives the remaining amount. In 22 percent of the awards, the arbitrator found for the defendant, and in those cases plaintiff's lawyers' fees were calculated as $0 because the plaintiff's lawyer would not earn a fee on contingency. A $0 award is the same as saying there was no liability. In Hawaii, if the plaintiff is more than fifty percent negligent, the plaintiff would not recover any damages in a tort lawsuit (see Hawaii Revised Statutes 1984).

The relationship between discovery costs and lawyers' fees differs for plaintiffs and defendants. For plaintiffs, a reduction of discovery costs will not reduce the lawyers' fee because the fee is a percentage of the amount recovered. On the other hand, for defendants, a reduction of discovery costs should reduce lawyers' fees because defense lawyers charge an hourly fee. If discovery is limited, defense lawyers presumably will work fewer hours on discovery activities.

If the award is appealed, the total lawyers' fees will change. Defense lawyers will earn more fees because they will work additional hours. Once appealed, the case is returned to regular litigation and the normal, unlimited, discovery process. On the other hand, because plaintiffs' lawyers work on a percentage basis, their fees will not change unless the case eventually terminates at a value different from the award amount. On appeal, many cases settle either higher or lower than the award amount.

Who Benefits from Arbitration and by How Much?

Although the majority of lawyers reported that CAAP is cheaper than regular litigation, until more comparison cases close, we cannot estimate how much money, if any, the program is saving for litigants. If the program works as designed, current thinking would assume that plaintiffs, plaintiffs' lawyers, defendants, and insurance companies will benefit from CAAP. Defense lawyers, however, are unlikely to prefer arbitration.

Plaintiffs would benefit by saving discovery costs. An earlier settlement also would be an economic benefit because of the time value of money. The fees paid to the plaintiffs' lawyers, however, will not decrease unless the lawyers reduce their contingent fee percentage. CAAP also would benefit the plaintiffs' lawyers, because in tort litigation, costs are usually advanced by the plaintiffs' lawyers. When a case terminates, the lawyer first deducts one-third of the recovery as a fee, and then deducts the costs that have been advanced. The plaintiff receives the amount remaining. If the pace of litigation is faster in arbitration, plaintiffs' lawyers will advance a smaller amount of money for a shorter period of time. If, in addition, CAAP also reduces the amount of time that plaintiffs' lawyers need to prepare a case, plaintiffs' lawyers might be making more money per hour.

Defendants can benefit by saving both discovery costs and lawyers fees. Limited discovery activity means that lawyers work less on each case, bill fewer hours, and therefore make less money per case. Because most defendants in tort cases have insurance, insurance companies would actually be the primary beneficiaries of any savings on defense. The vast majority of cases surveyed involved an insurance company; 15 insurance companies accounted for 78 percent of the insurance defense. Perhaps defendants will only benefit if the program affects insurance premiums.

One interesting change took place after CAAP was instituted—some insurance companies began to hire defense lawyers on a fixed fee. For a fixed fee, the lawyer agrees to handle the case through the arbitration hearing and receives the same fee whether the case settles or ends in an award. If the case is appealed, the defense lawyer begins billing by the hour. Defense firms bid to handle groups of cases for insurance companies at a certain fixed fee.

Pace of Terminations

CAAP rules require that cases be completed within nine months (270 days) from the service of the complaint. In general, awards take longer than bilateral settlements between lawyers. Since half the awards are appealed, the average pace for all awards is even longer. Hence, awards drive up the time it takes the average case to close in arbitration. The average pace of terminations is shown in Table 3.

Although not all the sampled cases have closed yet, the majority of lawyers surveyed so far report that CAAP increased the pace. In other words, CAAP cases (whether they resulted in settlement or award) closed in less time than they

Table 3.
Pace

	Settled	Awards
Average pace of CAAP cases in days (Data from court records)	266	352

	Plaintiff		Defendant	
	Settled	Awards	Settled	Awards
Pace slower if not in CAAP (Data from surveys)	66%	76%	32%	67%

would have in regular litigation. The lawyers' perception that arbitrated cases closed faster is clearly confirmed in award cases. This perception is more ambiguous in settled cases. Although two-thirds of the plaintiffs' lawyers with settlements thought CAAP was quicker than regular litigation, only one-third of the defense lawyers thought that CAAP settlements were quicker. The majority of defense lawyers thought the pace of CAAP settlements was about the same as the pace of a comparable case in regular litigation.

In the *General Survey*, the lawyers reported that cases in CAAP were completed faster than cases in regular litigation. Ninety-two percent of lawyers thought CAAP was faster than regular litigation. Only eight percent of the lawyers thought cases took about the same amount of time. Not a single plaintiffs' or defense lawyer in the *General Survey* thought CAAP was slower than regular litigation.

Satisfaction with CAAP

In evaluating the general level of satisfaction with CAAP, our inquiry focused on the lawyers, not individual litigants. Most of the lawyers surveyed have had cases in both CAAP and in regular litigation. The majority of lawyers reported being satisfied with their cases in CAAP. Perhaps not surprisingly, they are less satisfied with awards imposed by arbitrators (83% satisfaction rating for plaintiffs' lawyers and 67% for defense lawyers) than with their own voluntary settlements. (94% satisfaction rating for plaintiffs' lawyers and 85% for defense lawyers.)

Interestingly, defense lawyers were more critical and dissatisfied than were plaintiffs' lawyers.

Although satisfaction with CAAP is high, surveys of the comparison group suggest that satisfaction with regular litigation is even higher. Both plaintiffs' lawyers and defense lawyers are less satisfied with arbitration awards than they are with regular litigation. Although plaintiff's lawyers are almost equally satisfied with settlements in arbitration and with settlements in regular litigation, defense lawyers are more satisfied with regular litigation settlements than with arbitration settlements. Since settlements are voluntary in both arbitration and regular litigation, it is curious that defense lawyers are less satisfied with arbitration settlements.

In the general survey, 78 percent of lawyers reported satisfaction with the program. Again there was a major difference between plaintiffs' lawyers and defense lawyers. Ninety-one percent of the plaintiffs' lawyers were satisfied with the program, but only 46 percent of the defense lawyers were satisfied.

Defense Satisfaction

In both the end-of-case surveys and the general surveys, the defense lawyers are less satisfied with the arbitration program than are plaintiffs' lawyers. Even though the majority of the most active plaintiff and defense lawyers who responded to the general survey agreed that CAAP is both faster and cheaper than regular litigation, a considerable percentage of defense lawyers expressed dissatisfaction with the program.

The source of the defense lawyers' dissatisfaction is not clear, but there are at least two possible explanations. One obvious reason is the loss of revenue. If CAAP truly is reducing discovery, hourly-fee defense lawyers should face decreasing income from working fewer hours on each case. According to court records, tort filings have not increased, and therefore, defense lawyers as a group cannot compensate for any lower fee per case by taking more of these cases. Loss of income easily could translate to dissatisfaction.

The second hypothesis is related to changes in the work patterns of lawyers. Some people suggest that discovery is more critical to the defense lawyer than to the plaintiff because the plaintiff usually has some idea of what caused the damages. Defense lawyers have said that discovery limits require them to handle the case "in the dark." Before CAAP, defense lawyers could organize and conduct

pretrial discovery using any permissible methods in any sequence that they chose. In CAAP, discovery management is taken away from the defense lawyers and assigned to the arbitrator. Lawyers can no longer manage their own work schedules. There might be further dissatisfaction if an older, very experienced defense lawyer is restricted in discovery by a younger, less experienced arbitrator just five years out of law school.

Arbitrator Workload and Compensation

Practicing lawyers who serve as volunteer arbitrators are the backbone of CAAP. Although most arbitration programs only use the arbitrators for hearings, Hawaii arbitrators are appointed at the beginning of the case and manage it until it terminates. Because of their early appointment, Hawaii arbitrators are involved in cases that settle. In CAAP, arbitrators worked the hours shown in Table 4 below.

Overall, arbitrators averaged 7.2 hours per case (using the ratio of 3.1 settlements to one award). Valuing lawyers' time conservatively at $75 per hour, the in-kind contribution of arbitrators' time was $539 per case in CAAP. However, the amount of time that an arbitrator spends on a case varies widely.

Table 4.
Arbitrator Hours

	Settlements	Awards
Average arbitrator time per case	4.8 hours	14.6 hours
Hours per case by percentage of cases		
0-3 hours	52%	1%
4-8 hours	37	21
9-15 hours	8	47
16-20 hours	1	17
21-30 hours	1	10
31-50 hours	1	5

Arbitration hearings are the largest single block of time spent by the arbitrators and serve as a "day-in-court" for the parties. Arbitrators reported that 58 percent of hearings lasted from one to four hours; 33 percent were from five to eight hours in length; and ten percent took nine or more hours to complete.

Case Value and Complexity

When CAAP was being designed, court records suggested that most cases terminate at less than $50,000. Data from arbitration and comparison cases indicate that approximately 80 percent of the cases have settlements or awards of $50,000 or less. Even though Hawaii's program has a $150,000 jurisdictional limit, the average CAAP case terminates at only slightly above $30,000.

Table 5.
Case Value and Complexity

	Plaintiff		Defendant	
	Settled	Awards	Settled	Awards
Case Value	$32,196	$31,235	$34,936	$32,538
Case Complexity				
Not complex	41%	35%	46%	38%
Average	51%	50%	44%	52%
Complex	7%	15%	9%	10%

Because other arbitration programs are limited to lower valued, and presumably simpler cases, many people speculated that Hawaii's higher valued cases would be more complex, and therefore inappropriate for an arbitration program. Very few cases in Hawaii's program, however, are considered by the lawyers to be complex. Less than ten percent of the settled cases were considered to be complex, and no more than 15 percent of cases in which an award was rendered were characterized as complex.

Arbitrator Fairness

The survey evidence overwhelmingly indicates that the arbitrators are perceived as competent, fair, and impartial.

Table 6.
Arbitrator Fairness

	Plaintiff		Defendant	
	Settled	Awards	Settled	Awards
Arbitrator was experienced enough	97%	89%	91%	90%
Arbitrator was impartial	93%	91%	92%	92%

"Award-ment" and Awards - New Options

"Only about five percent of cases actually go to trial," is a common statement about civil litigation. But it would be a mistake to assume that the other 95 percent of cases settle. While most cases may settle, a significant percentage are dismissed because either a judge grants a motion to dismiss or the plaintiff withdraws the complaint without a settlement.

When cases are terminated in regular litigation, they usually are classified in court records simply as trials or dismissals. Most state courts, including Hawaii, do not keep detailed records of how cases terminate. Court statistics classify cases as "dismissals" whether or not the plaintiff recovers on the claim, so unfortunately, most court statistics mask this distinction between dismissals and settlements.

Cases terminate in three ways in regular litigation: dismissals, settlements, and trial verdicts. Court-annexed arbitration creates two new options: awards, and what we call "award-ments." When a case goes to an arbitration award, there are two possible results. First, the non-binding award might not be appealed, and the amount awarded becomes the judgment for the case. In about 50 percent of the awards, one party appeals (rejects) the award, and demands a trial de novo. Very few of those appealed awards, however, actually end in a trial verdict. Most appeals terminate in a negotiated settlement. For this reason, we call this new option an "award-ment" to indicate that it is a settlement that occurred after an

award. This post appeal settlement has been informed by both the hearing and the award.

Evaluation of court-annexed arbitration is complicated by the fact that awards and award-ments have no analogue in regular litigation. To what should awards be compared? They are not settlements, since they represent a third party evaluation and non-binding judgement after an informal hearing. They are not trials, since they were not decided by a judge or jury in open court. Nor are they subject to appellate review. Perhaps awards should be compared to cases that have had motions hearings, pretrial conferences, or judicial settlement conferences. Such regular litigation events might most closely resemble the arbitration hearing in activity and cost.

Assessing an arbitration program is thus not a simple weighing of the relative costs and benefits in arbitration against regular litigation. Our evaluation must consider the fact that arbitration offers two new alternative ways to conclude a lawsuit. The value of the award and award-ment must be determined in the context of regular litigation and their indirect effects on law practice and litigant satisfaction.

Arbitrated awards are more expensive than settlements in arbitration. Both discovery costs and hourly lawyers' fees are greater in awards than settlements. Most commentators on court-annexed arbitration probably would agree that if these cases were not in arbitration, most would not end in a trial but would eventually settle. Even in evaluating programs that do not explicitly seek to reduce litigant costs, we still need to ask, "What is the cost of arbitration awards?" If these cases are more expensive than settlements, is arbitration worth the extra expenditure, especially if these cases would have settled without a trial? But when one explicit intent of the program is to lower litigation costs, it is even more important to account for the higher costs of arbitration cases. Do only the more difficult and hence costly cases go to arbitration hearings? Or, do lawyers feel compelled to prepare more and discover more before the arbitration hearing? We find the higher discovery costs for arbitrated cases especially intriguing because in CAAP the arbitrator decides the amount of discovery before knowing that cases are destined for award hearings.

Case Outcomes by Case Value

Most state arbitration programs have jurisdictional limits in the range of $15,000 to $50,000 (McIver and Keilitz, in this issue; Keilitz et al., 1988; Ebener and Betancourt, 1985), considerably lower than Hawaii's $150,000 limit. Generally, larger cases are thought to be inappropriate for arbitration because they are too complex.

We believe that jurisdictions might benefit from the Hawaii data if it were separated into different levels of case values. We have done a "four-break analysis" by classifying the most relevant of our evaluation data into ranges by the dollar amount of settlement or award. The prayer or claim could not be used to set up the ranges because a recent Hawaii law prevents lawyers from putting a specific amount in the complaint (*ad damnum* clauses are prohibited). We used the following ranges as the breaks:

Break 1	$1-$15,000
Break 2	$15,001 - $50,000
Break 3	$50,001 and above
Break 4	$0

The $0 arbitration cases (the so-called "defense verdicts") were classified separately because we could not determine if each case was most comparable to a case in break one, two, or three.

Overall, there is very little difference on any of the program evaluation measures between the break levels. In other words, the differences between big and small cases on any of the evaluation measures are minor. Thus, our data suggest that arbitration programs could raise their jurisdictional limits without compromising the benefits of arbitration. Increasing jurisdictional limits may, however, make program management more complicated; for example, it might be more difficult to assure an adequate supply of arbitrators if the number of cases in arbitration increases.

Discovery Reduction

The data indicate that there are no major differences between big and small cases on discovery reduction. A majority of lawyers reported that, under CAAP, discovery was reduced for cases at all value breaks. At all breaks, both plaintiffs' and defense lawyers reported that discovery was reduced more for awards than for

settlements. Furthermore, plaintiffs' lawyers reported that there was more savings on discovery as the value of the case increased.

Table 7
Discovery Reduction by Case Value

	Plaintiff		Defendant	
	Settled	Award	Settled	Award
$0	- %	77%	- %	74%
$1 - 15K	70	72	67	75
>$15K - 50K	72	83	61	73
>$50K	75	95	64	71

Discovery Costs

At all breaks, the discovery costs for cases that settled were considerably lower than the costs for cases that went to awards. Although discovery costs generally increased as the cases got larger, discovery costs for both plaintiffs and defendants were the lowest for the settlements over $50,000. Furthermore, defense discovery costs were higher than plaintiffs' costs in all but one break (awards over $50,000).

Interestingly, for settlements the average discovery costs did not increase as the case value levels increased, i.e., higher valued cases did not have correspondingly higher discovery costs. For awards, however, higher valued cases generally did have higher discovery costs. The only exception to this trend was that defense discovery was higher for cases between $15,000 and $50,000 than for cases above $50,000.

Plaintiffs' lawyers reported that the discovery costs would have been greater for both settlements and awards if the case had not been in CAAP. Defense lawyers also thought that awards from $0 up to $50,000 would have cost more if the case were not in CAAP. For awards over $50,000, the opinions of defense lawyers divided almost equally between lower cost, the same, and greater cost. However, the majority of defense lawyers reported that for all breaks, arbitration settlements would have cost the same in regular litigation.

Table 8.
Discovery Costs

	Plaintiff		Defendant	
	Settled	Award	Settled	Award
By Case Value				
Average Discovery Costs				
$0	$ -	$1,162	$ -	$1,052
$1 - 15K	385	546	437	641
>$15K - 50K	359	990	772	1,386
>$50K	270	1,268	291	1,031
Compared to Regular Litigation				
Discovery Costs Greater if not in CAAP				
$0	-	67%	-	59%
$1 - 15K	55%	69	32%	59
>$15K - 50K	70	68	29	56
>$50K	50	71	36	36

Lawyer Fees

At all breaks, lawyers earn larger fees for awards than for settlements. Because the defense lawyers work at an hourly rate, higher fees for awards means that lawyers spend more time on award cases. In fact, defense lawyers earn about two to three times more on awards than on settlements (2.1 times more on cases $1-15,000, 2.4 times more on cases $15,001-50,000, and 2.8 times more on cases over $50,000). Since the fees for plaintiffs' lawyers are a fixed portion (one-third) of the settlement or award amount, and fees are higher for awards than for settlements, one may infer that arbitration awards are somewhat higher than settlement amounts. At least two factors, however, complicate that comparison. First, although computed award fees are higher, about 20 percent of the award cases (22 of 102) are $0 awards from which the plaintiffs' lawyers would earn nothing. Second, these cases can be appealed, and half the time they end in an "award-ment." Any increase over the $0 award, of course, earns the plaintiffs' lawyers some fee.

Table 9.
Lawyers' Fees By Case Value

	Plaintiff		Defendant	
	Settled	Award	Settled	Award
$0	$ -	$ 0	$ -	$6,770
$1 - 15K	2,207	2,439	2,390	4,949
>$15K - 50K	10,691	10,837	3,030	6,959
>$50K	24,006	34,858	2,156	5,933

Table 10.
Pace By Case Value

	Plaintiff		Defendant	
	Settled	Award	Settled	Award
Pace: Time in CAAP (in days)				
$0	-	339	-	380
$1 - 15K	258	290	275	336
>$15K - 50K	236	352	261	374
>$50K	243	396	278	380
Pace: Time to terminate would be longer if not in CAAP				
$0	-	81%	-	67%
$1 - 15K	57	71	33	70
>$15K - 50K	62	85	29	60
>$50K	58	55	36	73

Pace

The break analysis on pace shows that settlements are faster than awards in all breaks. (The average time for awards includes both awards that do not appeal and those that have settled on appeal after the award.) There is almost no variation in pace of settlements between breaks, but the higher the level of the award, the longer the award cases take to terminate.

Even though awards take longer to terminate than settlements, the survey opinions for both plaintiff and defense lawyers are that more time was saved on award cases than on settlements. One explanation for this finding might be that awards are the cases that would be more difficult to settle in regular litigation. These cases also might take longer to terminate; they might be the cases that do not settle in regular litigation until near the trial date.

Lawyer Satisfaction

Satisfaction with awards is lower than satisfaction with settlements in all breaks for both plaintiffs' and defense lawyers in CAAP. That result seems predictable. Lawyers are less likely to be satisfied with a decision imposed by a third party than with their own voluntary settlement.

Table 11.
Lawyer Satisfaction By Case Value

	Plaintiff		Defendant	
	Settled	Award	Settled	Award
$0	-%	65%	-%	86%
$1 - 15K	93	89	81	70
>$15K - 50K	93	82	86	66
>$50K	100	95	89	53

Complexity

Awards are rated as more complex than settlements in every break. For awards, as cases increase in value, the rating of complexity increases. The cases rated the most complex were the $0 awards rated by the plaintiffs' lawyers. Since these are cases in which the arbitrator ruled against the plaintiff, presumably these

cases were weak on liability. A case weak on liability might seem complex, especially to a plaintiff's lawyer.

Arbitrator Experience and Impartiality

Lawyers rated the arbitrators as experienced enough to handle the cases in all breaks. For awards of $1-50,000, both plaintiffs' and defense lawyers rated the arbitrators experienced enough in 84-95 percent of the cases. Ratings for awards of $0 and over $50,000 seemed to reflect whether the lawyer "won" their case or not. At $0 award (a win for defense lawyers) 100 percent of defense lawyers but only 72 percent of plaintiffs' lawyers, thought the arbitrator was experienced enough. For awards over $50,000, almost the exact opposite was reported. One hundred percent of plaintiffs' lawyers but only 74 percent of defense lawyers thought the arbitrator was experienced enough.

Table 12.
Complexity By Case Value
Cases Rated to be of "High Complexity"

	Plaintiff		Defendant	
	Settled	Award	Settled	Award
$0	-	57%	-	27%
$1 - 15K	24	25	-	23
>$15K - 50K	20	29	18	30
>$50K	21	32	14	33

Ratings on arbitrator impartiality also showed the "win-bias" factor. Arbitrators who made awards of $1-50,000 were rated impartial 90 percent or more of the time. For $0 awards, however, the rating by plaintiffs' lawyers was slightly lower, and for awards over $50,000 the rating by defense lawyers was also slightly lower.

Table 13.
Arbitrator Experience and Impartiality

	Plaintiff Settled	Plaintiff Award	Defendant Settled	Defendant Award
Arbitrator was Experienced Enough				
$0	-	72%	-	100%
$1 - 15K	100	84	88	95
>$15K - 50K	95	95	93	88
>$50K	100	100	91	74
Arbitrator was Impartial				
$0	-	86%	-	93%
$1 - 15K	90	94	93	96
>$15K - 50K	93	90	93	94
>$50K	100	95	91	83

Conclusion

Hawaii's Court Annexed Arbitration Program (CAAP) appears to be meeting its goals of reducing litigant costs, increasing pace, and maintaining the satisfaction of participants. In addition, because of its high jurisdictional limit, its evaluation bears close attention from other courts that are considering implementing arbitration programs or modifying existing programs. Currently, there are only minor, and largely insignificant, differences between lower valued and higher valued cases in arbitration. This finding suggests that some current assumptions about the limits of court-annexed arbitration may be inappropriate. The arbitration hearing and the award-ment, new forms of case disposition that are created in arbitration, make a side-by-side comparison of arbitration and regular litigation a complex task. Even after two years of evaluation, more time is needed to formulate a bottom line answer on the impact of court-annexed arbitration.