



NEW JERSEY STATE BAR ASSOCIATION

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March 14, 2016

Hon. Glenn A. Grant, J.A.D.
Acting Administrative Director of the Courts
Comments: Final Offer Arbitration Pilot Proposal
Hughes Justice Complex; P.O. Box 037
Trenton, New Jersey 08625-0037

Re: Report of the Supreme Court Arbitration Advisory Committee

Dear Judge Grant:

Thank you for the opportunity to review and comment on the report and recommendations of the Supreme Court Arbitration Advisory Committee, and for extending the time period for comment to allow for that. The New Jersey State Bar Association (NJSBA) commends the members of the Committee for their efforts in seeking to improve the current arbitration program; however, after careful review, the association urges the Court not to implement the proposed final offer arbitration pilot program.

At the heart of our judicial system is a litigant's right to a jury trial. The proposed program, although not binding, takes litigants even farther away from a jury trial than the current arbitration program. While the NJSBA agrees that encouraging settlement is a laudable goal, this proposed program would frustrate settlement by discouraging any meaningful settlement discussions between the parties, since attorneys on both sides seek to put their clients in the best possible position for the arbitrator's decision. We believe that will lead to inflated demands and unreasonably low offers. Furthermore, arbitrators will be forced to choose one of two numbers, rather than being able to provide litigants with their own objective, knowledgeable and independent evaluation of the cause of action before them, as they do under the present system. In many instances, it is this independent evaluation that helps lead to realistic and meaningful settlement discussions.

The proposal is based on the current baseball arbitration system, the success of which is noted favorably in the report. A key component of that system, though, is that the arbitrator's decision is binding. This forces the parties to present realistic demands and provides built-in motivation to settle. The program proposed here would be non-binding, resulting in little incentive to put forward realistic settlement figures. This comment should not be construed as advocating for binding arbitration, however, as that would likely produce a host of other difficulties and concerns.

There are a number of mechanical concerns about the proposed program as well:

- The report does not address cases with multiple defendants, where each defendant is acting independently and submitting different settlement figures.

- The report does not address cases in which there are coverage disputes and the responsible defendant is unknown at the time of arbitration.
- Sufficient time is lacking for defendant's counsel to obtain authority from an insurer to make a settlement offer. Since this practice does not usually occur until after arbitration and the insurer has the benefit of the arbitrator's evaluation, this proposal would cause delays.
- It is unclear what cases would be referred to the program – all cases with even numbered docket numbers or select cases chosen from those with even-numbered docket numbers? If it is select cases, how will they be chosen?
- It is unclear when parties would be notified that their case was selected for the program. Notice of referral to the program should be provided to the parties as early as possible – upon filing of the Answer, if possible – so the parties can make appropriate decisions and preparations.
- Cases will be referred to the program without regard to complexity; therefore, it is likely that a number of cases could include those that require the highest level of expertise and the greatest amount of time on the part of the arbitrator. Adding in the additional procedures mandated by the program, the proposed system would overtax the best arbitrators and lead to further delays in the system.

The NJSBA notes there are resolution options currently available to litigants, if they wish to take advantage of them, that do not present the same difficulties and concerns as the proposed final offer arbitration program. Those options include utilizing the Offer of Judgment Rule, and voluntarily consenting to the baseball-type arbitration proposed here.

In light of these concerns, if the Court decides to move forward with the pilot program, the NJSBA strongly recommends providing a simple opt-out for parties that do not believe it will be beneficial to their case.

In summary, again, the NJSBA urges the Court not to proceed with the proposed pilot program, as the above concerns would work to adversely and unfairly affect those litigants subject to the program. If it does, the association urges the Court to address the above concerns before implementation and to consider including a simple opt-out for parties that do not wish to participate.

Thank you for your courtesies in considering these comments. Please do not hesitate to contact me if any additional information is necessary.

Very truly yours,

A handwritten signature in black ink, appearing to read "Miles S. Winder III", followed by three horizontal lines.

Miles S. Winder III, Esq.
President

/sab

cc: Thomas H. Prol, Esq., NJSBA President-Elect
Angela C. Scheck, NJSBA Executive Director