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2015-16 Term

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February 29, 2016

Hon. Glenn A. Grant, JAD
Acting Director, Administrative Office of the Courts
Hughes Justice Complex
PO Box 037
Trenton, NJ 08625-0037

TRUSTEES 2016

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Re: Comments – Final Offer Arbitration Pilot Proposal

Dear Judge Grant:

The Middlesex County Bar Association (MCBA) opposes the “Final Offer Arbitration” Pilot Program (FOA) proposed by the Arbitration Advisory Committee. Our Civil Practice Committee has reviewed the proposal and formulated the response below from plaintiff’s counsel, defense counsel, arbitrators and mediators.

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While there is a split of opinions on whether the Rule 4:21A mandatory non-binding arbitration program has been successful with automobile cases, many lawyers believe that it does result in settlement discussions in some cases. We also understand that the de novo rate is about 80%, so 20% of the cases are resolving at the arbitration award. The MCBA applauds the AOC’s effort to re-examine this program and consider new ways to promote settlement. However, there are several elements to the proposed FOA program which the MCBA believes will not advance the AOC’s goal to provide efficient and fair resolution in non-auto bodily injury cases (we expect that there would be a plan to roll the program out to automobile cases at some point). The MCBA has identified the following issues:

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Craig M. Aronow

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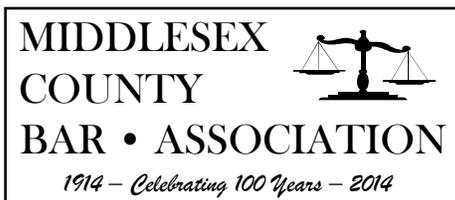
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Pattyann Pulda

- (1) Compilation and Analysis of Raw Data: The current proposal provides no insight as to how the results of the arbitrations will be compiled and analyzed to determine if the program should be expanded, discontinued or modified. It also provides no explanation as to how the arbitration result

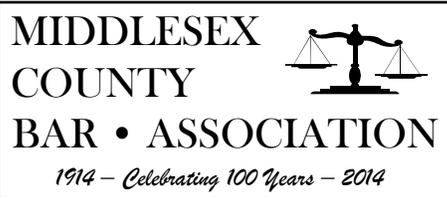


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can be correlated with the outcome. Will the program be judged by the number of *de novos* filed; the number of these cases that ultimately go to trial; or the relationship between the award and the ultimate result? How will the data on settled cases be obtained? We do believe that the cases in the program will have an even higher *de novo* rate than the current program. One party will nearly always believe the other side's number is unreasonable.

- (2) Experience of Arbitrators: The programs on which this pilot is based, the Major League Baseball team salary negotiations and New Jersey Public Employer-Employee Relations Act, concern very specific salary determinations. The arbitrators for these programs are people who are very familiar with the salary ranges and are highly knowledgeable as to the qualifications required for certain salary levels. In the pilot program, the injuries sustained by plaintiffs and the liability issues inherent in the cases are numerous and varied. A case may be assigned to an arbitrator with very little knowledge of the type of injury or cause of action and therefore the arbitrator would have no reasonable basis upon which to make a decision. There is no suggestion in this proposal that arbitrators would be chosen by specialty; rather it appears to be a random assignment from a pool.
- (3) Motivation to Settle: With respect to the Major League Baseball team salary negotiations, both sides have agreed to the FOA procedure and it is binding. Here, the pilot program is being imposed by the AOC without request or agreement by the parties and it is non-binding. There is little motivation for the parties to provide reasonable demands that will move the case toward settlement. With the current program, there is an open and meaningful dialogue about case value and the arbitrator is able to consider the perspective of both parties and their own experience in setting a value. Under the proposed system there would only be two options. This is unlikely to help foster the acceptance of an award or meaningful settlement discussions shortly thereafter.



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- (4) Duplication: There is already a method of providing a “final offer” in the Court Rules, namely, the Offer of Judgment, R. 4:58. The Offer of Judgment encourages more reasonable demands/offers that the proposed FOA procedure because of the benefits and penalties outlined in the rule.
- (5) Multiple Defendants/Contested Liability: Non-auto BI cases often have multiple defendants and issues with contested liability and liability splits. It is unclear how this proposed process would accommodate such cases.

As indicated above, we respect the Court’s effort to develop new programs to encourage settlement, however, we do not believe that this proposal will achieve the desired goal. The current arbitration system and the settlement panels, that many counties are running shortly before trial, are more effective methods.

Thank you for your attention to and consideration of our comments.

Respectfully,

Craig M. Aronow

CRAIG M. ARONOW, ESQ.
President
Middlesex County Bar Association

cc: Miles Winder, Esq., President, New Jersey State Bar Association
All New Jersey County Bar Associations

CMA/jpc