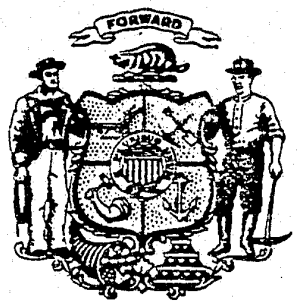

AN INTRODUCTION TO ALTERNATIVE DISPUTE RESOLUTION

STAFF BRIEF 85-2

Wisconsin Legislative Council Staff
State Capitol

April 5, 1985
Madison, Wisconsin

TABLE OF CONTENTS

TABLE OF CONTENTS (continued)

Wisconsin Legislative Council Staff — Madison, Wisconsin

April 5, 1985

STAFF BRIEF 85-2*

AN INTRODUCTION TO ALTERNATIVE DISPUTE RESOLUTION

INTRODUCTION

The Legislative Council, in May 1984, directed the Legislative Council Staff to prepare a report on:

> The use of alternative forms of dispute resolution to reduce court case backlog problems, including the feasibility of using mediation, arbitration, administrative procedures and similar alternative forms of dispute resolution to reduce case backlogs in Wisconsin.

This Staff Brief constitutes that report. Part I discusses the recent development of alternative dispute resolution (ADR) programs. It also summarizes the perceived shortcomings of the traditional court system for resolving disputes and the expected advantages of ADR programs.

Part II describes the major types of ADR programs currently being used in the United States. The programs discussed include arbitration, mediation, mini-trials, use of private judges and neighborhood justice centers. Examples of the types of programs are presented, along with the arguments for and criticisms of the various techniques.

Part III describes options for funding ADR programs, including a discussion of funding sources of current programs and of recently proposed programs in other states.

Part IV contains brief descriptions of selected current Wisconsin ADR programs and provides an overview of the development of ADR in the state.

*This Staff Brief was prepared by Keith Johnson and Don Salm, Staff Attorneys, Legislative Council.

Part V describes 1983 Assembly Bill 908, which would have created a dispute resolution funding program in Wisconsin, administered by the Director of State Courts. The Bill was recommended for passage by the Assembly Judiciary Committee but did not receive further legislative consideration.

Part VI provides an overview of the issues involved in establishing ADR programs or developing legislation. The American Bar Association (ABA) model state legislation is discussed in this Part.

PART I

THE NATURE OF ALTERNATIVE DISPUTE RESOLUTION MECHANISMS

A. SHORTCOMINGS OF COURT-BASED ADJUDICATION

There has been an increased interest in altnerative dispute resolution (ADR) programs within the last 10 years. Legislation has been enacted in 17 states relating to the use of mediation as an alternative to the traditional court system for resolving disputes [American Bar Association's Special Committee on Dispute Resolution, Legislation on Dispute Resolution (1984)]. Over 170 communities in 40 states have established centers using ADR programs to resolve disputes outside the courts. More than 400 public and private agencies are involved in providing such services throughout the country [American Bar Association's Special Committee on Alternative Dispute Resolution 1983 Dispute Resolution Program Directory].

This interest in ADR programs has grown out of dissatisfaction with the traditional court-based system of adjudication. Criticisms which have been leveled at the court system include the following:

(1) Resolution of disputes through the courts is slow. In many parts of the United States the courts are chronically overloaded. For example, in Los Angeles, a 72,000 case backlog causes five-year delays between the filing of an ordinary case and an opportunity for trial [Dispute Resolution in America: Processes in Evolution, National Institute for Dispute Resolution, p. 18 (1984)]. In this regard, Wisconsin fares better than most states. Non-small claims civil cases resolved during 1983 in Wisconsin (outside Milwaukee County) took an average of approximately 11 months to reach judgment (including both cases settled before trial and those that went to trial). In Milwaukee County, the average was slightly lower, at eight months. [Wisconsin data supplied by the Director of State Courts. A separate case management system is maintained for Milwaukee County.]

(2) The court system is costly. The courts are often too expensive to serve as a forum for low- and middle-income persons with disputes which do not involve large claims but exceed the $1,000 limit for small claims actions. In addition, excessive costs borne by the parties to a dispute can consume resources that otherwise might be allocated to compensate victims or fulfill the terms of a dispute resolution agreement.

(3) Court processes are mystifying. The formalities, legal language and complicated procedures involved in processing claims through the courts make court procedure difficult for a layperson to understand. The

special knowledge which is required to process a dispute through the courts may also cause inequities between parties. Institutional litigants that can afford legal representation or who are often involved in matters before the courts may have an advantage over one-time litigants or parties who cannot afford legal representation and are new to the process. In addition, complex court procedures may alienate participants from the court system.

(4) The adversary atmosphere may polarize the parties. The emphasis on "winning" in court can direct parties away from a cooperative search for a solution to their dispute. If there is a continuing relationship between the parties, this may cause problems between them by channeling energy to preparation for adversary encounters, rather than focusing on preventive actions to minimize disputes and develop problem-solving skills.

(5) Available remedies may not reach the real conflicts between parties. Framing a conflict in the terms necessary to express a legal theory may not address the emotional conflict which is the base of a dispute. For example, in a criminal proceeding on an assault charge, a penalty may be imposed upon the guilty party, but parties will not be required to resolve the underlying issues which gave rise to the assault. In general, courts must focus on past disputes and have a limited ability to prevent future disputes through the resolution of underlying conflicts.

(6) Courts may lack the expertise to fashion an adequate resolution. A judge cannot be expected to have a working understanding of all the technologies and issues that become involved in disputes brought before the court. This can reduce a court's effectiveness in reaching the best resolution of a dispute.

B. OBJECTIVES OF ALTERNATIVE DISPUTE RESOLUTION PROGRAMS

The ADR programs have arisen to address the flaws believed to exist in the traditional court-based system of adjudication. Various ADR programs have been used in the following areas: small claims matters; family disputes (including domestic violence, custody, divorce and visitation); landlord-tenant disputes; consumer disputes; minor criminal matters, including juvenile offenses; complex business litigation; commercial disputes; environmental lawsuits; and general civil cases.

While there are many differences among them, most ADR programs share several common goals. In general, the objectives of ADR programs include the following:

(1) Reducing court workload and overcrowding. Especially in the case of ADR programs that are administratively attached to a court system, one of the main goals is to reduce demands on the courts by eliminating backlogs.

(2) Lowering costs and barriers to access. Many ADR programs are aimed at providing low- and middle-income disputants access to a low-cost forum for resolution of their grievances.

(3) Achieving superior results. Many ADR programs are intended to help disputants identify and address the underlying causes of the dispute. They encourage development of problem-solving skills aimed at preserving the relationship between disputants. The ADR process, itself, is often designed to provide disputants with more control and participation in reaching the resolution.

(4) Reorienting American attitudes toward the resolution of disputes. Some theorists see ADR programs as a means of revitalizing the legitimacy of neighborhood institutions for providing a resolution of disputes. The ADR programs often use neighborhood citizens as arbitrators or mediators, rather than seeking a resolution from a court outside the community. In a broader sense, some theorists also see ADR as an attempt to educate Americans toward a more cooperative, less adversarial style of resolving differences.

C. FUNCTIONS THAT ALTERNATIVE DISPUTE RESOLUTION PROGRAMS CANNOT PERFORM

Most ADR programs have been developed to address perceived deficiencies in the traditional court-based system of adjudication. However, they are not a replacement for the court system. While some disputes may lend themselves to resolution through ADR programs, others are more appropriately brought before the courts.

For example, the court system may be the most desirable method to resolve a dispute for which there is no legal precedent and no accepted social norm. The courts are designed to fashion rules of law through case-by-case decisions governing future conduct in similar situations. Removal of rule-enunciating disputes from the court system could undermine the ability of courts, and even legislative bodies, to govern by rule of law.

Groups or individuals who have gained legal protection for their rights may also need the authority of the courts to enforce those rights. Without the legal force provided by the courts, disputants who lack power or status may be placed at a great disadvantage.

In other instances, disputes may be so controversial or involve such an overriding public interest that they cannot be resolved outside the public forum provided by the courts. For example, the processing of major criminal offenses involves an overriding public concern that must be taken into account in addition to the interests of the parties directly involved. Other disputes, especially those involving public agencies or large institutions, may involve controversial issues which individual officials or officers are unwilling or unable to take responsibility for resolving.

D. ADAPTATION OF THE COURT SYSTEM

It should be pointed out that the courts have adopted a variety of dispute resolution techniques, other than adjudication. Settlement conferences, pretrial discovery and the use of court-appointed masters as fact-finders can assist litigants in reaching a settlement without a trial. In fact, only 5% to 10% of the civil cases filed in the courts in the United States actually go to trial [Report of the Ad Hoc Panel on Dispute Resolution and Public Policy, Paths to Justice: Major Public Policy Issues of Dispute Resolution, U.S. Department of Justice, p. 7 (1984)].

Similarly, the parties to a dispute may also engage in settlement negotiations and reach resolution of a dispute without filing a lawsuit. For every civil dispute which reaches the courts in the United States, there are generally nine others that have been resolved without filing suit [Working Paper 1983-5, The Costs of Ordinary Litigation, University of Wisconsin Law School Disputes Processing Research Program, p. 18 (1983)].

Small claims courts have been used to provide a less formal atmosphere for resolution of disputes. Diversion programs have been designed to ease the burden on the courts by allowing alternative dispositions for less serious criminal offenses. Family court counseling services have offered an opportunity for conciliation of grievances in divorce and other actions affecting the family.

The recently-expanding field of ADR offers a supplement to the techniques already in use in the courts. Some ADR programs have been attached to the courts. Others are operated separately.

PART II

SURVEY OF CURRENT AMERICAN ALTERNATIVE DISPUTE RESOLUTION PROGRAMS

This Part describes the primary types of ADR programs currently used in the United States: mediation, arbitration, private judges, mini-trials and variations of those methods. The arguments for and criticisms of the programs are also discussed.

A. MEDIATION

1. Introdution

Mediation is a dispute resolution process in which a neutral third party (a "mediator") assists the parties to a dispute in reaching a consensual settlement of their differences. Generally, it is a voluntary process that results in a signed agreement defining the future behavior of the parties. The parties, not the mediator, make the final decision; the mediator possesses no authority to impose a settlement. The mediator's role has been described as "that of a facilitator of communications, a guide toward the definition of issues, and a settlement agent who works toward the resolution of those issues by assisting disputants in their own negotiations" [Milne, "Divorce Mediation -- An Idea Whose Time has Come?", Wisconsin Journal of Family Law, Vol. 2, No. 2, p. 5 (December 1982)]. While the mediator may be a lawyer, he or she is not an advocate for either party but for the mediation process itself.

In recent years, mediation programs have been developed both within and outside the judicial system, although most programs operate: (a) within the courts; (b) in agencies connected with the courts; or (c) independent agencies that receive referrals from the courts and the criminal justice system.

Mediation has generally been used in situations where the disputants have an on-going relationship, such as labor-management relations and landlord-tenant, consumer, small claims and domestic relations (e.g., child custody and visitation) matters. Mediation has also been used to handle environmental disputes, minor criminal disputes and juvenile delinquency cases. Examples of recent mediation efforts in other states are discussed below.

a. The Boston Municipal Court Mediation Program

This Program, begun in 1980 and funded entirely by private foundations and corporations, provides a voluntary mediation service for minor criminal cases. The mediation is done by neutral volunteer attorneys.

The following description of the procedures used in the Boston Program illustrates the general procedures common to most mediation programs. The description is taken from "The Boston Municipal Court Mediation Program," Boston Bar Journal, pp. 29-32, Vol. 28, No. 3 (1984):

> Criminal matters are referred to specially assigned staff, who explain mediation and assure the disputants that ordinary legal remedies may be pursued at any point. Hearings are scheduled at the parties' convenience and begin with carefully prepared remarks about the role of the mediator, rules of confidentiality, and the structure of the hearing. The mediator then asks the parties for their versions of the dispute, urging them to be complete but not to interrupt others even if they disagree with what they hear. This phase of the session is usually intense, with stories in marked conflict. Next, the mediator calls a brief recess to outline central issues, identify possible areas of compromise, and develop a plan for the rest of the hearing. After the recess, the mediator talks to each party in private, where discussion is less turbulent than in direct encounters. A series of private and group meetings may occur before the mediator reunites the parties for the last time, presenting them with a written agreement for their consideration and acceptance.
>
> Subsequently, program staff members inform the court that the case has been settled, and schedule another report to be filed after the agreement has run its course. In the meantime, staff members monitor the parties' satisfaction and watch for any signs of difficulty. Every effort is made to intervene before conflict erupts again, including the delivery of various human services. If the parties honor the terms of the settlement, as they almost always do, the court is so informed and the original complaint is dropped or dismissed.

Among the types of cases that have been handled in the Boston Program are:

(1) Families in physical conflict over drugs, lovers, arranged marriages, illegitimate children or interfering relatives.

(2) Friends and neighbors stealing or destroying property because of border disputes, living conditions, unruly children, garbage disposal or contested ownership.

(3) Strangers exploding at one another for obscenities, racial epithets, bad checks, indecency or assaults.

(4) Businesses disputing over unauthorized use of equipment, faulty goods, theft or competition, as well as employes at odds over work rules, character assassination and even personal hygiene ["The Boston Municipal Court Mediation Program," supra, p. 31].

b. California Mandatory Custody Mediation Law

California law requires parents involved in a child custody or visitation dispute to mediate the dispute before a court-appointed mediator prior to proceeding to trial on the issue. There is also a provision requiring stepparents and grandparents petitioning for visitation rights to mediate the visitation issue with the parents [ss. 4351.5 and 4607 (a), Cal. Civil Code].

c. Colorado Dispute Resolution Act

Under the Colorado Dispute Resolution Act, judicial districts in Colorado are required to establish dispute resolution programs to permit "the resolution of disputes by a neutral mediator in an informal setting for the purpose of allowing each participant, on a voluntary basis, to define and articulate his or her problem for the possible resolution of such dispute." The Act is applicable to all civil actions. Participation of disputants in the program is voluntary [ss. 13-22-301 to 13-22-310, Col. Rev. Stats.].

d. Environmental Mediation in Various States

Among the states permitting mediation of environmental disputes by statute or administrative rule are Texas (low-level radioactive waste disposal site), Massachusetts (wetland use permits), Montana (water rights), Alaska (coastal zone development permits) and Wisconsin (solid and hazardous waste facility sites). [Current Wisconsin mediation programs are discussed in more detail in Part V, below.]

In general, environmental disputes (e.g., waste disposal, plant siting) are well-suited to mediation because they usually involve (1) many parties (e.g., federal, state and local agencies, private industry and citizen groups); (2) complex fact situations; (3) enough power distributed among the parties to require that each of them be taken seriously by the others; and (4) no obvious law-dicated solution that will actually solve the multiple problems ["The Mediation Movement," Boston Bar Journal, supra, p. 8].

For example, when a coalition of environmentalists in Colorado opposed Homestake Mining Company's plans to mine uranium in the Gunnison National Forest, both sides agreed to try to negotiate a compromise through voluntary mediation outside the court system. The process started with a succession of meetings where representatives of the various parties attempted to identify the issues with the assistance of scientists who provided technical information. The final result was a statement of understanding and a mediation agreement. In addition, the environmentalists, in a covenant not to sue, agreed to drop claims that they might have had against Homestake and U.S. and state environmental agencies ["Lawyers Sans Armor Resolve Environmental Clash," Legal Times, May 24, 1984, p. 1].

2. Arguments For and Criticisms of Mediation

The following arguments for and criticisms of mediation as an alternative dispute resolution technique are based on the literature relating to mediation and the results of one of the few major comprehensive studies of mediation. The latter study was a three-year effort by the Denver Custody Mediation Project. The Denver Project was begun in 1979 and evaluated the short-term and long-term effects of using mediation to resolve child custody and visitation disputes in divorce actions. For a detailed description of the study and its results, see Pearson and Thoennes, "Divorce Mediation: Strengths and Weaknesses Over Time," Alternative Means of Family Dispute Resolution, pp. 51-77 (1982).

a. Arguments for Mediation

(1) Satisfaction with process. Parties feel they have greater control over the process and outcome of a dispute in a mediated negotiation than they do in a court proceeding. As a result, they are more satisfied with the process and the fairness of their final agreements.

(2) Flexibility. The nonlegal and flexible nature of mediation permits the parties to tailor solutions to fit their own needs. The mediation process is less restricted by rules of procedure and evidence

than the adversary approach. A mediated case is neither governed by nor does it establish precedent. Each dispute is viewed as unique. Since the rules of evidence need not be strictly adhered to, whatever the parties consider relevant may be discussed. Thus, the participants have the opportunity to discuss any facts, issues and interests that they deem to be important, including underlying issues which probably would not surface in a court setting.

(3) Prevents future disputes. By resolving underlying issues which may not be dealt with in the court system, mediation may prevent future disputes. Proponents claim that mediation gets at the causes of the parties' problems rather than dealing with just the surface symptoms which are often the focal point of the adversarial process. In general, mediation tends to mitigate tensions and build understanding and trust between disputants, thereby avoiding the bitterness which may follow a normal court case [Comment, "The Best Interest of the Divorcing Family - Mediation Not Litigation," Loyola Law Review, Vol. 29, pp. 55-76 (1983)].

(4) Encourages compliance. A study of small claims courts in the State of Maine found that 70.6% of mediated agreements involving a monetary settlement were reported to be paid in full while only 33.8% of judgments ordered by the court were paid in full [McEwen, "Small Claims Mediation in Maine: An Empirical Assessment," Maine Law Review, Vol. 33 (1981)]. This study supports the idea that people are more likely to feel bound by an obligation they have undertaken voluntarily (e.g., a mediated agreement) than one which is imposed by the court. This may mean, for example, that a parent who has agreed to pay a specific amount of child support in a mediated agreement is more likely to pay his or her child support obligation than a parent who has not mediated but has been ordered by the court to pay the support.

(5) Educational experience. Parties to mediation learn problem solving techniques which they would not acquire in the adversarial court process where lawyers would negotiate for them. These conflict management skills can be used by the parties to resolve future disagreements [Loyola Law Review, supra, p. 77].

(6) Time and money savings. Disputants who are successful with mediation move through the court system faster than other couples in the study. For example, the average number of months between the initiation of proceedings and the promulgation of final orders in the divorce actions in the Denver Custody Mediation Project was 8.5 months for successful mediation couples, compared to 10.2 for couples solely using the adversarial court process. As to attorney fees, the Denver Project study found some evidence of savings, though the results were inconsistent.

(7) Court cost savings. Studies have indicated that mediation reduces the costs of the court system by efficiently resolving issues in an extra-judicial setting. For example, in the area of divorce mediation, Jessica Pearson, one of the organizers of the Denver Custody Mediation Project, notes the following about costs savings under the Project:

> (a) In 1980, it cost about $882.00 per day to operate a Colorado trial court, or $110.25 per hour, based on an eight-hour day. The average bench time to resolve a contested custody case in Colorado was 9.8 hours, meaning each custody resolution case cost the state approximately $1,080 in bench time, plus $528 for a custody investigation. This did not include the parties' private attorney fees and fees for private investigators, evaluations and testimony by expert witnesses.
>
> (b) The average number of hours per case surveyed in the Mediation Project was 5.4 and the mediators were paid $25 per hour. Because the mediators mediated singly and in teams, this translated to an average cost of $135 to $270 per case. Pearson concluded that, "even if we assume an overhead of 100% for project administration, the cost of mediating falls far below the cost of litigating" [Pearson, "Child Custody: Why Not Let the Parents Decide?", Judges' Journal, Vol. 20, No. 1, p. 10 (1981)].

b. Criticisms of Mediation

(1) Fairness. Some critics of mediation are concerned about the fairness of the mediation process in those situations where one party is in a better bargaining position because of superior knowledge, intellect or ability to psychologically dominate the other. Critics believe a submissive, nonverbal party will be subject to exploitation in a process in which he or she is not represented by an attorney. In particular, critics point to women (especially in custody and visitation disputes), the poor, the elderly and persons for whom English is a second language as classes of disputants who are often less powerful or skilled at negotiation than their opponents.

(2) Time consuming. Because it may deal with the underlying issues in a dispute and requires the agreement of the parties, mediation may, in some instances, be more time consuming than the traditional court process. Also, mediation does not always result in an agreement. Thus, if

mediation fails to resolve the dispute, it is just an extra step in an already lengthy court process.

(3) Lack of enforcement mechanism. Where mediation is conducted outside the court system, there may be no legal mechanism to enforce the mediated agreement. Under certain circumstances, the parties may be able to subsequently enforce the agreement as a contract, but this may require a costly and time-consuming court action.

(4) Qualifications of mediators. There is substantial concern over the types of competency and training which should be required of mediators. For example, in discussing divorce mediation, one commentator notes:

> Critics contend that the financial issues of divorce are becoming so complex and sophisticated that even many lawyers have difficulty understanding the issues. How, then, is it possible for nonattorney mediators to provide the parties with the legal and factual information requisite to an intelligent decision? [Comment, "The Best Interest of the Divorcing Family -- Mediation Not Litigation," Loyola Law Review, Vol 29, pp. 55, 80 (1983)].

As evidence of this concern over mediator qualifications, several states (e.g., Michigan and California) require court-connected divorce mediators to have statutorily-specified minimum qualifications. These minimum qualifications include a law or counseling degree or a certain number of years of experience in family counseling; completion of a state training program; and knowledge of the court process relating to domestic relations matters.

(5) Ethical issues. Both lawyers and mental health professionals may face legal and ethical problems upon becoming involved in mediation. For example:

(a) A lawyer practicing as a mediator is subject to possible conflict of interest problems for representing two parties with adverse interests. For example, this is a practice prohibited by the Wisconsin Code of Professional Responsibility [Supreme Court Rule 20.23 (3)], which requires a lawyer to maintain independent professional judgment on behalf of a client. Also, Wisconsin Supreme Court Rule 20.28 establishes a requirement for lawyers to refuse employment if another client's interests may interfere with the lawyer's independent judgment.

(b) A nonlawyer mediator may be subject to charges that he or she is engaged in the unauthorized practice of the law. As one commentator notes, with reference to divorce mediation:

> It is, of course, perfectly permissible for nonlawyers to counsel clients on the emotional and psychological problems of divorce, but family mediation also focuses on property and child custody arrangements. Attorneys argue that nonlawyer/mediators who give advice in these areas endanger their clients' interests, while mental health professionals believe that the legal issues involved are simple ones which can be adequately handled by nonlawyers. [One author] suggests that the legal concerns addressed by mental health professionals in their capacity as divorce mediators are merely "incidental" to that role and "therefore...fall outside the 'unauthorized practice' prohibition."
>
> Bar associations have not often addressed the unauthorized practice problems presented in lay mediation, and the question is still an open one [Loyola Law Review, supra, pp. 85 and 86].

Related to these ethical issues and the issue of fairness referred to in item (1), above, is the role of the mediator when one of the parties is at an intellectual or psychological disadvantage. As a recent article notes:

> In general, mediation works best when the parties have a rough parity of power, resources, and information. But, what is the responsibility of the mediator if there is a significant power imbalance among parties or if one party is uninformed or misinformed about the law or facts needed to make a sound decision? Should the mediator, or anyone else, have the responsibility to make certain an agreement has a principled basis and is not reached out of ignorance or fear? Should a mediator refuse to take part in resolving a dispute if one or another party may be hurt in the process or have their confidences disclosed? What are the consequences if the mediator becomes interventionist and is not perceived as impartial? In sum, assuming they can be defined, how are the ethics of the mediator assured? [Paths to Justice:

Major Public Policy Issues of Dispute Resolution, prepared by the National Institute for Dispute Resolution, pp. 14-15 (October 1983).]

B. ARBITRATION

1. Introduction

In contrast to mediation, arbitration involves the submission of a dispute to a third party who renders a decision after hearing arguments and reviewing evidence. It is generally less formal, cheaper, less complex and quicker than court adjudication. Contractual arbitration has been especially popular in labor and commercial disputes; and, in those areas, it has been in use since the 18th Century.

There are several different mechanisms through which disputes can reach arbitration. It can be required pursuant to a clause in a contract out of which the dispute arose; it can be submitted to arbitration under an agreement entered into between the parties after a dispute arises; or it can be required pursuant to a court diversion program.

Nine states have adopted compulsory arbitration laws; these laws require litigants, who file civil damage suits seeking less than a specified monetary amount, to arbitrate the dispute before going to trial. The states with such laws are Alaska, Arizona, California, Nevada, New Hampshire, New York, Ohio, Pennsylvania and Washington. Pennsylvania adopted its mandatory arbitration act in 1952; the other states have developed their programs since 1970.

Within the last 10 years, New Jersey, Florida and Washington have also established active diversion programs which use arbitration for certain juvenile offenses.

a. Contractual Arbitration

Among the 50 states, only Vermont does not have statutes authorizing the use of arbitration to settle contractual disputes ["An Introduction to Arbitration for Idaho Lawyers," Idaho Law Review, p. 304 (1984)]. Although not limited to commercial settings, contractual arbitration most frequently has been used in business disputes. The Wisconsin Arbitration Act is contained in ch. 788, Stats.

Contractual arbitration is conducted pursuant to a provision in a contract or an agreement between the disputants. The arbitrator can be designated in the contract; chosen by agreement of the parties; appointed by a third party (such as the American Arbitration Association or a

court); selected through elimination of potential arbitrators from a list supplied by a third party; or selected by any combination of these methods. Arbitration may be conducted by an individual or by a panel of arbitrators.

After selection of the arbitrator, the parties present their cases to the arbitrator. Arbitrators generally do not follow strict rules of evidence. However, witnesses and documents are presented and arguments are made by the parties at a hearing similar to a court trial.

After the hearing, the arbitrator renders a decision. Unless the agreement between the parties provides otherwise, the decision is binding. It may not be appealed to the courts, unless there was fraud or misconduct on the part of the arbitrator or the arbitrator exceeded his or her powers under the agreement.

The parties must pay the fee of the arbitrator. The fee may be apportioned between the parties in the arbitrator's decision.

b. Court-Annexed Arbitration

Alaska, Arizona, California, Nevada, New Hampshire, New York, Ohio, Pennsylvania and Washington have mandatory judicial arbitration programs. As an example of this type of arbitration, the California law is described in the remainder of this section.

The California law requires courts in counties with 10 or more judges to provide for arbitration of all civil cases where the amount in controversy is $15,000 or less. Courts in other counties have the option of adopting such an arbitration program. Actions requesting equitable relief, such as issuance of an injunction, are exempt from the arbitration requirement.

In California, the arbitrators are appointed by the court and must be attorneys or retired judges. A single arbitrator hears each case and issues a decision. The decision has the same effect as a judgment issued by the court, except that it may be appealed only for fraud or misconduct or if the arbitrator has exceeded his or her authority.

If a party is not satisfied with the arbitration award, a request for a new trial may be filed with the trial court, under the California law. In that event, the case is processed through the regular adjudication system. However, if the party who requested a new trial does not receive a judgment at trial which is more favorable than the arbitrator's award, the party must pay the arbitrator's compensation and costs of the other parties incurred in the new trial. In cases of substantial economic

hardship, the imposition of costs may be waived by the court [s. 1141.11, Cal. Civil Code].

c. Arbitration of Juvenile Offenses

Florida, New Jersey and Washington have programs for the arbitration of selected juvenile offenses. The Florida law is described here as an example of this type of arbitration mechanism.

The Florida law authorizes counties to establish, at their option, juvenile arbitration panels, or to appoint individual arbitrators, to hear juvenile offenses involving misdemeanors and violations of local ordinances. Arbitrators must be law school graduates, hold a degree in behaviorial social work or receive training in conflict resolution techniques.

In Florida, law enforcement officers who issue complaints to juveniles for covered offenses may recommend the case for arbitration. If the juveniles' parents accept arbitration of the complaint, the arbitrator or arbitration panel holds a hearing to receive documents and hear witnesses. Statements made by the juvenile may not be used as evidence against him or her in subsequent proceedings. The arbitrator or arbitration panel is authorized to: refer the juvenile for placement in a community-based program; order counseling; require performance of community service work; mandate restitution; or fashion any other remedy designed to encourage noncriminal behavior.

Under the Florida law, if the juvenile and his or her parents consent to the disposition, the complaint is dismissed upon compliance with the order. However, any interested person, including the victim, who is dissatisfied with the disposition provided by the arbitrator or arbitration panel, may request review of the disposition by the juvenile intake officer and consideration of formal juvenile delinquency proceedings [s. 39.331, Fla. Stats.].

2. Arguments for and Criticisms of Arbitration

The following arguments for and criticisms of arbitration are based upon a review of the literature on and studies of the use of arbitration. The studies include (a) a survey on Idaho lawyers reported in "An Introduction to Arbitration for Idaho Lawyers," Idaho Law Review, p. 303 (1984); and (b) a study of the Pittsburgh Court Annexed Arbitration Program by the Rand Institution for Civil Justice reported in Simple Justice: How Litigants Fare in the Pittsburgh Court Arbitration Program, The Rand Institute for Civil Justice, p. 87 (1983).

a. Arguments for Arbitration

In general, the following have been cited as being the principal advantages of arbitration:

(1) Timely resolution. Arbitration can generally be commenced and finished more quickly than court adjudication.

(2) Less formal. Because arbitrators are not required to follow the rules of evidence and formal procedures that are used by the courts, an arbitration proceeding can be less complex. This more informal atmosphere serves to put disputants at ease. Consequently, arbitration has generally been perceived as being fairer than adjudication.

(3) Less costly. Since arbitration can save time and is less formal, it can reduce attorney fees and cut other costs that would be incurred in litigation. This may be the case, particularly where the amount in controversy is too small to warrant the expense of a trial or where the costs of a lawsuit would otherwise be prohibitive.

(4) Expert review. Where complex or technologically sophisticated issues are involved, an arbitrator with expertise can be chosen to hear a case. An arbitrator may better deal with complex or technical subjects, which a judge or jury may have difficulty understanding. Familiarity of the decision-maker with the subject matter may not only save time, but also may allow the development of a more equitable remedy.

(5) Flexibility. Arbitrators have more flexibility to fashion an award than do the courts. An arbitrator may grant a party partial relief, may provide equitable remedies, such as specific performance of a contract provision, may provide monetary damages and may fashion a remedy to fit each particular situation.

(6) Privacy. Unlike court proceedings, arbitration hearings are generally not open to the public. This can be used to preserve trade secrets or prevent public disclosure of embarrassing or sensitive information.

(7) Relationship between the parties. The private, flexible nature of arbitration proceedings permits the parties to avoid the rigid adversarial atmosphere of a court trial and the harm that an adversarial court process can cause to the future relationship between the parties [see "An Introduction to Arbitration for Idaho Lawyers," supra, for further discussion of the arguments for and criticisms of arbitration].

b. Criticisms of Arbitration

Despite its perceived advantages, arbitration has been criticized on the following grounds:

(1) Concealing wrongs. Because arbitration is not generally open to the public, it can be used to conceal tortious acts of individuals or corporations or hide other information which might be brought to public attention through the courts.

(2) Injustice. Arbitration may provide a lower standard of justice due to the limited grounds on which an arbitrator's decision can be appealed. For example, a federal court in Wisconsin has held that a mistake in applying the substantive law or an error in making factual determinations does not constitute grounds for overturning an arbitrator's award [Papenfuss v. Mathews, 397 F. Supp. 165 (W.D. Wis. 1975)].

(3) Lack of precedent. Because there is no reporting system for arbitrator's decisions, there is no guarantee that a rule of law will be developed or followed to govern conduct in similar situations and provide consistency in deciding subsequent cases.

(4) Additional delay. In some instances, such as in a court-annexed arbitration program where arbitration is mandatory and a new trial is demanded after the arbitration award, the length of time required to resolve an arbitrated dispute may be longer than would have been the case without arbitration.

(5) Added costs. In situations where arbitration is unsuccessful and litigation is subsequently used to resolve a dispute, the arbitration may only serve to add costs.

C. USE OF PRIVATE JUDGES

1. Introduction

A method for resolving disputes that is similar to arbitration is the use of private judges. Private judging involves appointment by the court of a "referee" with the powers of a trial judge to hear and decide a case. The main difference between private judging and arbitration is that the private judge's decision is subject to the same appeal rights as a decision rendered by the court. [As was discussed above, under most arbitration laws, an arbitrator's decision may only be overturned due to fraud, misconduct or exceeding the limits of the arbitrator's authority.] The costs of the private judge are shared by the parties to the lawsuit.

Most states, including Wisconsin, allow reference of issues in a lawsuit to an outside referee. Some states allow the use of private judges to decide all issues of fact and law in all cases and give the referee's decision the weight of a trial court judgment ["Getting Out of Court - Private Resolution of Civil Disputes," Boston Bar Journal, p. 11 (May/June 1984)]. Under s. 805.06, Stats., Wisconsin permits the use of referees in exceptional circumstances only and allows the court to modify or reject the referee's report.

Retired judges are generally used as private judges. Since their compensation can reach $1,000 per day, private judging has generally been used only in business disputes and in other matters involving wealthy litigants ["Secret Justice for the Privileged Few," Judicature, p. 6 (June/July 1982)].

The use of private judges has been most prevalent in California. Under the California Code of Civil Procedure, s. 638, et seq., a trial court may appoint a referee, with the agreement of the parties, to try all issues in the action and reach a judgment thereon. In practice, the referee is usually a former judge, although the parties are free to select someone else. Once appointed, the referee has all the powers of a trial judge, except the power to impose contempt for violation of court orders. Applicable substantive law and the rules of evidence are followed. The referee must submit a written report containing findings and the judgment to the court within 20 days after the close of testimony. The decision is subject to appeal in the same manner as a court judgment [see "Secret Justice for the Privileged Few," supra].

2. Arguments for and Criticisms of Use of Private Judges

a. Arguments for Private Judges

The advantages cited by attorneys who have used private judges include the following:

(1) Speed. Use of private judges avoids delays waiting for trial where court calendars are crowded.

(2) Litigants choose the judge. Rather than being assigned a trial judge, the parties can choose a referee who is acceptable to both sides and, where relevant, has expertise in the issues involved in the case.

(3) Privacy. Unlike court trials which are open to the public, only the referee's findings of fact and conclusions of law need be made public. This can help the parties to avoid public disclosure of sensitive information.

(4) Less costly. In cases which lend themselves to complex legal maneuvering, the quicker resolution allowed through the use of private judges can reduce the amount of attorney fees.

(5) It reduces court congestion. By removing cases from the court calendar, it frees up court time for other cases and can reduce court backlogs. While not an advantage to the parties, this does benefit the court system as a whole.

b. Criticisms of Private Judges

The use of private judges has not been without its critics. The primary criticisms include:

(1) Separate system. The use of private judges may establish a separate legal system for those wealthy enough to hire their own judge. Under this separate system, parties would be able to avoid long delays where the courts are overcrowed and can leapfrog over previously-filed cases in access to the appellate courts.

(2) Quality of justice. Critics fear that the quality of justice in this private judicial system could exceed that available to other litigants who must use the crowded public courts.

D. MINI-TRIALS

1. Introduction

The so-called "mini-trial" was developed in corporate litigation as a means of helping to bring about a negotiated settlement in complex disputes. Despite the name, a mini-trial is not really a trial at all. Rather, it is a structured settlement process. The parties, or in the case of a corporation or government agency, the management of each party, hear the case and, based on the case presentations of each side, try to negotiate a settlement.

The process usually is initiated by the parties through an agreement to submit the dispute to a mini-trial. It involves a shortened period of discovery and case preparation, during which lawyers from both parties gather information and prepare as if they were going to trial. The mini-trial itself consists of informal and abbreviated presentations of each party's best case to the parties or management personnel from each party with the authority to enter into a binding settlement. The presentations are intended to give the parties or management panel a clear conception of the strengths and weaknesses of the positions of both sides.

After the presentations, the parties or management panel begin settlement negotiations.

The presentations are not conducted pursuant to the rules of evidence. However, the lawyers may comment on what evidence would be admissible if the mini-trial were unsuccessful and the dispute went to a court trial.

At most mini-trials, a third party, agreed upon by the disputants, is present to render an advisory opinion to the parties or management panel, if requested by one or both parties. The advisors' opinion is nonbinding. However, it can be considered as an indication of how the case would be resolved if it went to trial.

If the parties or management panel reach a settlement agreement, it is either put into a contract or, if a court action was already initiated, drafted as a stipulation for entry as a court order. When a settlement is not reached, most of the trial preparation required for adjudication will already have been completed.

Although mini-trials were initially used for large inter-corporate disputes, they have more recently been used in employment, regulatory and government contract cases ["Getting Out of Court - Private Resolution of Civil Disputes," supra]. They are generally used in complex cases that do not turn solely on an issue of law or fact and involve parties with a continuing relationship.

For example, a mini-trial was used to resolve a legally and technically complex patent infringement case between Telecredit, Inc., and TRW, Inc. Telecredit was the owner of patents covering computerized check verification, charge authorization and automated cash dispensing systems. The TRW was the manufacturer of such systems for banks and other financial institutions. After three years of unproductive negotiations on Telecredit claims of patent infringements and delay due to crowded court calendars, the parties entered into an agreement to conduct a mini-trial.

The mini-trial procedure took several months to organize but only two days to conduct. Within one-half hour of the close of the presentation of the cases, the parties reached a settlement [see "Getting Out of Court - Private Resolution of Civil Disputes," supra, for further discussion of the mini-trial].

Other complex disputes which have been successfully resolved through the use of mini-trials include:

(a) A business interruption claim between Warner Lambert Laboratories and its business insurer.

(b) A contract dispute between the National Aeronautics and Space Administration and several government contractors.

(c) A construction contract dispute between Amoco and five construction contractors.

(d) A $27 million products liability case between Automatic Radio Corporation and TRW, Inc. [see "Working Taxonomy of Alternative Legal Processes," Alternatives to the High Cost of Litigation (May 5, 1983), for a discussion of these and other examples of mini-trials].

2. Arguments for and Criticisms of Mini-Trials

Mini-trials can provide a speedy and cost-effective resolution of a dispute by clarifying the issues, promoting dialogue and, perhaps, converting what may have become a "lawyer's dispute" into a business problem. In complex cases which might take years to resolve in the courts, a mini-trial can shorten the amount of time required to resolve the matter and correspondingly decrease litigation costs.

However, mini-trials are effective only in cases where the parties have roughly equal bargaining power. Cases brought for tactical reasons, such as instances where one of the parties is using court procedures to delay a decision, do not lend themselves to the cooperative process of a mini-trial. The motivation of the parties and the existence of a continuing relationship between them generally have an important impact on the likelihood of successful resolution of a dispute by a mini-trial ["Getting Out of Court - Private Resolution of Civil Disputes," supra].

Although the time spent in preparing for and conducting a mini-trial will be valuable in reducing trial preparation time if a settlement is not reached, mini-trials are subject to misuse by parties not acting in good faith. A party could use a mini-trial to gain information about the opposing party's case and legal theories prior to trial.

E. NEIGHBORHOOD JUSTICE CENTERS

1. Introduction

Neighborhood justice centers (NJC's), also called community mediation centers, community dispute resolution centers or citizen dispute settlement centers, have been one of the primary means through which ADR programs have been delivered to the public. In 1983 there were more than 170 NJC's operating in the United States [1983 Dispute Resolution Program Directory, supra].

These centers vary in the types of ADR methods which they use and the kinds of disputes which they handle. In general, NJC's use mediation, conciliation, arbitration and mediation-arbitration to resolve disputes. Cases handled vary among NCJ's, but can include small claims matters; family disputes (including domestic violence, custody, divorce and visitation); landlord-tenant disputes; consumer complaints; minor criminal offenses; juvenile offenses; ordinance violations; employer-employe grievances; and neighborhood disputes.

Some NJC's are attached to courts or district attorneys' offices and are used for diversion of cases that otherwise would be handled by the courts. Others operate independently of the courts, but receive referrals. Still others provide an independent forum for disputes that would not reach the courts [Dispute Resolution in America: Processes in Evolution, supra, p. 34].

The NJC's also differ in the types of individuals used to conduct dispute resolution sessions. The ABA reports that 34% of the programs use laypersons; 21% use attorneys; 28% use social service professionals; and 17% use students or court clerks. The amount of training provided to or required of these personnel also varies between programs [1983 Dispute Resolution Program Directory, supra].

2. Arguments for and Criticisms of Neighborhood Justice Centers

It is difficult to generalize about the performance of NJC's, because of the variety of programs that exist. Early studies indicate that NJC's can resolve disputes more quickly than the courts and that disputants using NJC's report more satisfaction with the experience than those who go through the courts.

However, comparisons of overall costs involved in handling disputes in the courts and in NJC's have been inconclusive. Although some studies indicate NJC's can reduce the costs of resolving disputes, others have found no cost differential [see Tomasic, Roman and Feeley, Malcolm, Neighborhood Justice: Assessment of an Emerging Idea, New York: Longman, pp. 102 to 105 and 182 to 191 (1982); and Neighborhood Justice Centers' Field Test: Final Evaluation Report Executive Summary, National Institute of Justice, pp. 19 to 24 (1980) for discussion of recent studies of NJC's].

In general, the arguments for and criticisms of the various ADR methods discussed in this Staff Brief apply to NJC's using those methods.

F. OTHER ALTERNATIVE DISPUTE RESOLUTION METHODS

1. Conciliation

Conciliation is a dispute resolution method that is very similar to mediation. It involves the use of a third party to serve as a "go-between" to facilitate communications between the disputants. Unlike a mediator, the conciliator does not play an active role in developing a resolution to the dispute. Rather, the conciliator serves merely as a conduit between the parties, ensuring that communication takes place. For example, a friend who relays messages between two other feuding friends is acting as a conciliator.

Conciliation requires that the conciliator maintain a neutral, nonparticipatory role. However, because of the difficulty of maintaining this neutrality, attempts at conciliation often become mediation, where the third party plays an active role in recommending settlements, structuring communication and translating statements made by the parties.

Because conciliation is so closely related to mediation, ADR programs rarely use only conciliation. Conciliation is more likely to be integrated into a mediation program as one approach used in situations where the third party does not wish to risk alienating the disputants by becoming actively involved in the dispute.

2. Mediation-Arbitration

Mediation-arbitration, also called "med-arb," is a cross between mediation and arbitration that has been used in labor and other disputes. It involves the use of a third party to initially mediate the dispute and, if the disputants are unable to reach a resolution through mediation, impose a settlement as an arbitrator. In some med-arb programs, the arbitrator is limited to selecting from the final settlement offers made by the parties. In other programs, the arbitrator may fashion its own award.

This Staff Brief does not discuss the traditional use of med-arb in labor disputes. Forty states, including Wisconsin, provide for the use of med-arb in settling municipal employe collective bargaining impasses [see Wisconsin Legislative Council Staff Brief 84-12, Municipal Collective Bargaining Impasse Resolution Procedures in the 50 States and District of Columbia, (September 14, 1984) for a discussion of the use of med-arb in the labor setting].

Med-arb has also been used at many community dispute resolution centers [Neighborhood Justice Center's Field Test: An Interim Report,

National Institute of Law Enforcement and Criminal Justice, p. 26 (1979)]. It provides a mechanism for resolving a dispute in mediation without forcing the parties to incur more costs initiating a different procedure when mediation fails.

However, med-arb has been criticized because statements made during the mediation may be used against a party in any subsequent arbitrated decision when the same person (or panel) does the mediation and arbitration. This may cause parties to use the initial mediation session to curry favor of the third party mediator-arbitrator. Consequently, potential that the dispute might go to arbitration may inhibit disputants from openly participating in the mediation portion of med-arb [Community Dispute Settlement Centers for Juveniles: Technical Assistance Manual, Wisconsin Supreme Court Office of Planning and Research, p. 27 (1980)].

3. People's Ombud

Between 1967 and 1975, four states (Alaska, Hawaii, Iowa and Nebraska) enacted legislation establishing state offices of the people's ombud, generally called "ombudsman" offices. These state ombudsman offices are responsible for receiving complaints from citizens regarding state agencies and state government actions. The ombudsman investigates the complaint and, if necessary, recommends a resolution. The recommendation is purely advisory to the agency and citizens involved but may have substantial impact because of its neutrality. In this respect, ombudsman are often said to exercise "persuasive justice" [Outside the Courts: A Survey of Diversion Alternatives in Civil Cases, National Center for State Courts, pp. 58 to 62 (1977)].

State ombudsman office staffs in these four states are small, with two to five employes. The offices are attached to the Legislature, and the ombudsmen are appointed for terms ranging from four to six years by a vote of the entire Legislature [see s. 24.55.010, Alaska Stats.; s. 96-1, Hawaii Stats.; s. 601.G.1, Iowa Stats.; and ss. 81-8 and 240, Nebraska Stats.].

The ABA has developed a Model Ombudsman Act that provides for selection of the state ombudsman through alternatives of: (a) appointment by a vote of the Legislature or (b) appointment by the Governor, subject to confirmation by both houses of the Legislature [see "State Ombudsman Legislation in the United States," University of Miami Law Review, p. 397 (1976) for a discussion of the ABA model act].

4. Consumer Alternatives

Many industries have developed dispute resolution processes for handling consumer complaints regarding industry products without court action. For example, in 1971 the Association of Home Appliance Manufacturers created the Major Appliance Consumer Action Panel (MACAP). The program gives consumers assistance in resolving problems regarding major appliances, such as dishwashers, refrigerators, washers and dryers. When a complaint is received, MACAP facilitates exchange of information between the manufacturer and consumer by notifying the manufacturer, at the management level, that the complaint will be handled by MACAP if not resolved to the consumer's satisfaction within three weeks. Approximately 75% to 80% of the complaints received by MACAP are resolved through this contact.

If the complaint is not resolved by the parties, the MACAP panel, which has industry and consumer members, reviews the dispute and makes a recommendation for its resolution. The recommendation is not binding on either party. However, MACAP reports that 89% of the complaints received by it are satisfactorily resolved ["Consumer Dispute Resolution: Exploring the Alternatives," American Bar Association's Special Committee on Alternative Dispute Resolution, p. 76 (1983)].

There are a number of other programs similar to MACAP, which are intended to facilitate the exchange of information between the consumer and manufacturer. Examples of consumer programs include:

(a) The Automotive Consumer Action Program (AUTOCAP), which arbitrates unresolved consumer complaints against new auto and truck dealers. Decisions of the AUTOCAP panel are binding on the dealer but not on the consumer.

(b) The Ford Consumer Appeals Board, which arbitrates consumer grievances against Ford dealers. Decisions are binding on the dealer but not on the consumer.

(c) The Insurance Consumer Action Panel (ICAP), which provides advisory arbitration of consumer disputes with property and casualty insurance companies. Decisions are not binding.

(d) The National Funeral Director's Association Consumer Action Panel (ThanaCAP), which provides mediation of consumer complaints against funeral directors. With the consent of the parties, when mediation is unsuccessful, ThanaCAP provides binding arbitration.

(e) Warranty arbitration programs established under the Federal Magnuson-Moss Warranty Act. The Act and corresponding Federal Trade

Commission regulations encourage warrantors to use ADR mechanisms to resolve warranty disputes [15 U.S.C. s. 2310 and 16 C.F.R. Part 703]. At least 19 states (including Wisconsin) have enacted motor vehicle warranty enforcement acts, known as "Lemon Laws," encouraging auto dealers to use nonbinding arbitration programs established under the Magnuson-Moss Warranty Act to resolve new car warranty disputes [see "Report on the National Conference on Minor Disputes Resolution," American Bar Association's Special Committee on Resolution of Minor Disputes, p. 46 (1977); "Working Taxonomy of Alternative Legal Processes," supra; and Legislation on Dispute Resolution, supra, pp. 196 and 255].

There is a lack of data on the level of consumer satisfaction with many of the trade association programs ["Neighborhood Justice Centers: An Analysis of Potential Models," supra]. In addition, consumer advocates have charged that some panels in these programs are biased toward the industry or serve to forestall government regulation by dealing with complaints individually, rather than addressing serious problems indicated by complaint patterns ["Consumer Dispute Resolution: Exploring the Alternatives," supra, p. 45].

However, the programs have provided a mechanism for addressing large numbers of consumer complaints. For example, MACAP processed 15,000 complaints in the first five years of its operation. It is likely that many more consumer complaints would end up in the courts without the existence of consumer ADR programs ["Neighborhood Justice Centers: An Analysis of Potential Models," supra].

5. Multi-Door Courthouses

The American Bar Association (ABA) has recently funded three experimental multi-door courthouse programs aimed at integrating the traditional court-based system of adjudication with ADR programs. These experimental programs were established in 1984 in Houston, Texas; Tulsa, Oklahoma; and Washington, D.C.

The purpose of the multi-door courthouse is to provide intake screening for all types of disputes at a single location. The intake officer analyzes each dispute and refers it to a dispute resolution program, or sequence of programs, which the officer believes is most likely to resolve the dispute effectively. For example, an intake officer might refer cases to arbitration, mediation, a people's ombud, conciliation, a small claims court, a specialized tribunal such as a medical malpractice screening board or traditional court-based adjudication ["The Multidoor Courthouse," National Forum, p. 24 (Fall 1983)].

The success of the multi-door courthouse concept depends upon the development of an effective screening mechanism that will reliably predict the most appropriate process for handling a dispute. An evaluation of the ABA experimental programs will begin later this year. Experience gained from the ABA experimental projects will provide information upon which the success multi-door courthouse concept can be judged ["Diversifying Legal Solutions," Harvard Law School Bulletin, p. 4 (Summer/Fall 1984)].

PART III

FUNDING OF ALTERNATIVE DISPUTE RESOLUTION PROGRAMS

A. INTRODUCTION

Funding for ADR programs has generally been provided through user fees, private grants from foundations and corporations; federal and state government appropriations; segregated revenues from court filing fees; or a combination of these sources. Because many of the ADR programs are new and some have been experimental, long-term funding sources for ADR are just now being developed. The ABA Ad Hoc Panel on Dispute Resolution sees development of secure funding sources as one of the primary issues to be addressed if ADR programs are to be institutionalized ["Paths to Justice: Major Public Policy Issues of Dispute Resolution," supra, p. 19].

The current sources of funding for ADR programs are described below. Adding surcharges to civil case filing fees is the newest ADR funding method that has been developed. State appropriations for programs have also been recently used as a funding source. User fees and public or private grants were the first source of funding for ADR programs.

B. CIVIL CASE FILING FEE SURCHARGES

Florida, Minnesota and Texas have recently enacted legislation providing for a surcharge on civil court filing fees to support ADR programs. Under a Texas law enacted in 1983, counties are authorized to add up to $5 to the court filing fee for civil lawsuits to establish an "alternative dispute resolution fund" administered by the county court commissioner. Court commissioners are authorized to establish rules governing alternative dispute resolution programs supported from the fund and to contract with public or private groups [art. 2372aa, Texas Civil Stats.].

The counties in which Houston, Fort Worth, Dallas and San Antonio are located have exercised the option to establish a civil lawsuit filing fee surcharge for ADR programs. In Harris County alone, where Houston is located, it is estimated that the surcharge will raise $400,000 per year for ADR programs.

Similar legislation was enacted in Florida and Minnesota in 1982. Under s. 480.241, Minn. Stats., a $10 surcharge is added to the initial court filing fee for civil actions. The Minnesota Supreme Court, with the assistance of an advisory committee, is directed to distribute 15% of the funds generated by the surcharge to qualified legal services programs,

including ADR programs. The remainder of the funds are earmarked for distribution to programs providing representation for low-income clients in civil matters.

Under s. 61.21, Florida Stats., counties are authorized to impose a surcharge of up to $2 on any circuit court proceedings. The surcharge must be used for establishment of a county family mediation or conciliation service.

The use of a surcharge on filing fees has been an attractive ADR program funding source in these three states for several reasons. First, it does not require a direct state appropriation. Second, there is a logical relationship between the use of ADR programs and civil lawsuits, namely, to the extent that ADR programs ease court congestion, they benefit litigants who remain in the court system.

C. STATE APPROPRIATIONS

State appropriations have been made directly for ADR programs in three states [Legislation on Dispute Resolution, supra]. New York appropriated over $1 million in state general fund moneys for grants to community dispute resolution centers during the 1983-84 fiscal year. This state grant program was created in 1981 and is administered by the State Office of Court Administration. The Chief Administrator of the state court system is authorized to provide grants to community dispute resolution centers for the establishment and continuance of ADR programs. The state's share of the cost of any center may not exceed 50% [art. 21-A, s. 849, New York Stats.].

In addition, Hawaii appropriated $255,000 for ADR programs during the 1982-83 biennium and Iowa appropriated $175,000 during the 1982-83 biennium.

D. USER FEES

Commercial arbitration, mini-trials and the use of private judges have generally been funded by user fees charged to the parties in the dispute. Many other ADR programs also receive part or all of their funding from user fees, sometimes levied in proportion to a client's ability to pay.

For ADR programs aimed at providing greater access to dispute resolution mechanisms for low- and moderate-income persons, the use of user fees can affect access to the program. The ABA reports that 14% of

the NJC programs in the United States are funded by user fees [1983 Dispute Resolution Program Directory, supra].

E. PRIVATE GRANTS AND OTHER SOURCES

Grants from private foundations and corporations provide a substantial amount of funding for ADR programs. The ABA reports that 31% of the ADR programs in the United States received funding from private sources [1983 Dispute Resolution Program Directory, supra]. For example, organizations such as the National Institute for Dispute Resolution (NIDR) provide grants for ADR programs. The NIDR is a nonprofit organization which began operation in 1983 with $6 million in grants provided by several foundations and corporations. The Institute's purpose is to support, expand and provide for the examination of ADR techniques.

Some ADR funding also comes from the courts, district attorneys' offices and federal government. For example, the courts and district attorneys' offices provide 12% of Neighborhood Justice Center funding in the United States, and the federal government, through the Department of Justice, provides 5% [1983 Dispute Resolution Directory, supra].

PART IV
IDENTIFICATION OF ALTERNATIVE DISPUTE RESOLUTION IN WISCONSIN

As in other states, ADR programs have been developed in Wisconsin. Discussed below are the Wisconsin programs identified by the Legislative Council Staff during preparation of this Staff Brief. It is likely that there are other ADR programs which are operative in Wisconsin. The following discussion provides a general idea of Wisconsin ADR resources; no attempt was made to evaluate the programs or to describe their operation in detail.

A. FAMILY MEDIATION SERVICES

According to a 1983 survey by the Wisconsin Interprofessional Committee on Divorce, 29 counties in Wisconsin have some type of mediation available in child custody matters. Of the 29 counties, 16 have a formalized mediation program, which is defined as a program where the court has sanctioned mediation and uses its judicial powers to direct parties through the mediation system. The remaining 13 counties provide mediation services "unofficially"; i.e., they encourage settlement through counseling, but offer no formal system for parties to be involved in the mediation process. The formal programs are generally attached to and funded by the courts. [SOURCE: Paper, "Family Court Mediation in Wisconsin," Wisconsin Interprofessional Committee on Divorce, July 18, 1983.]

B. DANE COUNTY CASE MEDIATION PROGRAM

The Dane County Case Mediation Program is aimed at civil actions (excluding family law cases) ready to be set for trial and which, in the opinion of the judge, lend themselves to possible settlement in mediation. Under this program, sometime prior to setting the matter for trial, the judge attempts to persuade the parties and their counsel to voluntarily agree to proceed to mediation. If mediation is agreed to, counsel for the parties select the mediator.

Approximately 100 Dane County attorneys have agreed to act as pro bono mediators in at least two cases per year. The Program is sponsored by the Dane County Bar Association and the Wisconsin Bar Foundation and is funded by grants from the William T. Evjue Foundation and the Patrick and Anna M. Cudahy Fund.

C. MILWAUKEE MEDIATION CENTER

The Milwaukee Mediation Center handles a broad range of disputes, including family matters, misdemeanor criminal actions, landlord-tenant matters, consumer complaints, small claims actions and others. Cases are referred from various sources, including the police, social service agencies, courts and community agencies. The program uses lay-volunteers, including attorneys, to conduct mediation sessions. Each volunteer must complete a mediation training program involving 25 to 40 hours of instruction and mediation role plays. The Center is funded by the City of Milwaukee and Milwaukee County.

D. LA CROSSE SMALL CLAIMS MEDIATION PROGRAM

The La Crosse circuit court operates a small claims mediation program for voluntary mediation of small claims cases in which none of the parties is represented by legal counsel. The mediation is done by an attorney who also serves as a law clerk for the court. No special funding for the project is involved.

E. WAUKESHA COUNTY MEDIATION PROGRAM

The Waukesha County Mediation Program handles juvenile offenses, minor adult criminal offenses, small claims matters, landlord-tenant disputes, consumer complaints and other interpersonal disputes. Mediation sessions are conducted by 25 lay-volunteers. The volunteers receive the same training as is provided to volunteers at the Milwaukee Mediation Center. The Program is funded by the United Way.

F. DISPUTE SETTLEMENT CENTER OF RACINE COUNTY

The Dispute Settlement Center of Racine County handles juvenile offenses, minor adult criminal offenses, small claims matters, landlord-tenant problems, consumer grievances and other community disputes. The Center currently has approximately 10 lay-volunteers who conduct mediation sessions. The volunteers receive the same training as is provided to volunteers at the Milwaukee Mediation Center. The Racine Center is currently funded by private donations.

G. EAU CLAIRE COUNTY DISPUTE SETTLEMENT CENTER

The Eau Claire County Dispute Settlement Center is currently beginning operations. It intends to handle landlord-tenant problems, consumer grievances, family disputes, and other interpersonal disputes. The Center hopes to have initially 10 to 12 lay-volunteers to conduct

mediation sessions. The volunteers will be trained in mediation techniques. Funding has been provided by the county board.

H. MILWAUKEE DISPUTE RESOLUTION SERVICE

The Milwaukee Dispute Resolution Service is run by the Milwaukee Young Lawyers Association (MYLA). It offers binding arbitration under ch. 788, Stats., of minor civil disputes, including consumer grievances, landlord-tenant problems and other small claims disputes. The MYLA assigns volunteer attorneys to conduct the arbitration sessions. Decisions of the arbitrators are binding.

The program is funded by MYLA and grants from the ABA and State Bar.

I. MEDICAL MALPRACTICE PATIENTS COMPENSATION PANELS

Under ch. 655, Stats., no medical malpractice action involving injury or pecuniary loss may be commenced in court against a health care provider in Wisconsin unless the controversy has first been heard and findings and an order have been made by a patients compensation panel. Panel membership varies depending upon the size of the claim. However, physicians, attorneys and laypersons are included on the panels. Once a panel issues its order determining the award in a medical malpractice action, either party may commence an action for a new trial in circuit court.

The panels are appointed by the Director of State Courts. Costs of operating the panels are taken out of the Patients Compensation Panels Fund, generated from payments made by health care providers.

J. SOLID AND HAZARDOUS WASTE FACILITY NEGOTIATION AND ARBITRATION

Chapter 374, Laws of 1981, created s. 144.445, Stats., which provides a mechanism for resolving disputes over the siting of solid and hazardous waste disposal facilities in Wisconsin. The process uses negotiation and arbitration between the applicant proposing the new or expanded waste management facility and a committee representing municipalities that would be affected by the facility. The committee is composed of members appointed by the governing bodies of each municipality which has adopted a siting resolution objecting to the facility.

At any time after 120 days after the first siting resolution was adopted by an objecting municipality, either the applicant or the local committee negotiating on behalf of the municipalities may petition for

arbitration. Arbitration is conducted by the Waste Facility Siting Board, appointed by the Governor. In issuing its decision, the Board is limited to accepting the final offer of either the applicant or the negotiating committee. The decision of the Board is binding.

The costs of mediation and arbitration are shared equally between the applicant and the municipalities represented on the local committee. However, a negotiated agreement or final arbitration award may provide for a different division of costs.

K. NEW CAR WARRANTY ARBITRATION PROGRAMS

Wisconsin's new "Lemon Law," which governs repair and replacement of new vehicles under warranties, encourages automobile manufacturers to establish informal dispute resolution procedures to resolve warranty disputes [s. 218.015 (4), Stats.]. The dispute resolution procedures must provide consumers with protections equaling those set under regulations established by the Federal Trade Commission in 16 C.F.R. Part 703. In general, these regulations require investigation of the warranty complaint by a neutral third-party and if the dispute cannot be settled in this manner, issuance of a nonbinding decision by the third party. Either disputant may initiate a civil action in court after the decision of the third-party has been rendered. [Some programs make the decision binding on the manufacturer.]

The Milwaukee Better Business Bureau operates the "Autoline" program which qualifies as a dispute resolution mechanism under 16 C.F.R. Part 703. The program is funded by participating auto manufacturers. The Ford Consumer Appeals Board and Chrysler Customer Satisfaction Board also operate qualifying programs available to Wisconsin consumers.

L. CONTINUING CARE CONTRACT GRIEVANCE PROCEDURES

Under s. 647.01 (7), Stats., as created by 1983 Wisconsin Act 358, any provider of nursing, medical or personal care services under a continuing care contract entered into on or after January 1, 1985, which care is to extend for the duration of a person's life or for a term in excess of one year, must establish and use a grievance procedure for handling grievances between the provider and residents of the facility. The grievance procedure must provide any resident of the facility with an opportunity to submit written grievances and to have those grievances investigated and resolved. Each facility bears the costs of its own grievance procedure.

M. PILOT STATEWIDE DISPUTE MEDIATION PROGRAM

Pursuant to Executive Order No. 67, issued by Governor Earl on November 19, 1984, a fund for a Pilot Statewide Dispute Mediation Program was established in the Department of Administration (DOA). The program is intended to provide funding for retention of mediators to assist in the resolution of statewide public policy disputes. In order to receive funding, a dispute must be of statewide significance and must be approved for the programs by the Secretary of DOA, Secretary of the Department of Industry, Labor and Human Relations and the Governor.

The fund consists of a $10,000 grant from the National Institute for Dispute Resolution and $35,000 in state funding. The selection of the mediators paid by the fund is left up to the disputing parties.

PART V

1983 ASSEMBLY BILL 908

During the 1983-84 Legislative Session, the Legislature considered 1983 Assembly Bill 908, relating to dispute resolution. The Bill was introduced on January 4, 1984, by Representative Rutkowski, cosponsored by Senator Adelman. A public hearing on the Bill was held by the Assembly Judiciary Committee on January 17, 1984. The Committee offered Assembly Substitute Amendment 1 and recommended the Bill, as amended by the Substitute Amendment, for passage on February 14, 1984 on a vote of Ayes, 8; Noes, 8. Assembly Substitute Amendment 1 to 1983 Assembly Bill 908 is attached to this Staff Brief as Appendix 1.

The Bill was then referred to the Joint Committee on Finance. However, no further action was taken on it.

Assembly Substitute Amendment 1 to 1983 Assembly Bill 908 would have created a dispute resolution program administered by the Director of State Courts. Under the Substitute Amendment, $303,000 would have been appropriated for the 1983-85 Biennium for the establishment and operation of dispute resolution projects. The Director of State Courts was authorized to directly establish dispute resolution projects or provide grants for the establishment of projects by local governments, local government agencies and nonprofit organizations. A 12-member dispute resolution program committee was created to advise the Director in allocation of funding and administration of the program.

Funding would have been available for projects providing arbitration, mediation, conciliation or a similar procedure to assist disputing parties in reaching agreements. The use of matching funds from local units of government, charitable organizations or other sources was encouraged, but not required.

The Substitute Amendment authorized the Director of State Courts to adopt rules governing the administration of the dispute resolution program and dispute resolution projects funded under it. The Chief Judge of each Judicial Administrative District was authorized to adopt local court rules for the diversion or transfer of disputes to the projects.

The Director of State Courts was required to monitor and evaluate the effectiveness of dispute resolution projects established under the program. Grant recipients were required to keep records required by the Director for auditing and examining projects.

The Substitute Amendment created a specific statutory provision establishing the confidentiality of written materials and oral communications in dispute resolution projects funded under the program. However, exceptions to the confidentiality provision were allowed for (a) the gathering of nonidentifiable information for research and (b) any lawsuit involving negligence or fraud on the part of the mediator, arbitrator or another person during the course of a dispute resolution process.

PART VI

AMERICAN BAR ASSOCIATION MODEL ACT

The ABA has developed model state legislation on mediation. The model legislation identifies issues relating to ADR. These and other issues that could be dealt with in legislation on ADR are discussed below.

A. FUNDING ISSUES

The ABA model act contains two methods for funding ADR programs, which could be combined or used as options. These methods are (1) appropriation of state funding to establish dispute resolution centers and (2) authorization of a locally-set surcharge on the court filing fees for civil actions.

The model act also presents options for administration of the ADR funding. Under these options, the funding could be appropriated to: (1) the state's office of court administration; (2) the state's criminal justice planning agency; (3) a newly-created state office of dispute resolution; or (d) local dispute resolution programs themselves.

The model act provides for limiting the state share of costs of a dispute resolution center to a specified amount, such as 50%. It authorizes the advance of a portion (e.g., up to 20%) of a grant to a project as start-up money to allow for planning and establishment of the dispute resolution center. It also allows the use of federal funds or funds received from any other public or private agency to be used under the dispute resolution program.

Although not addressed by the model act, legislation could specifically authorize or require projects to collect user fees as a source of funding. In addition, an advisory committee could be established to assist the administering agency in determining which projects should receive funding.

B. PROGRAM DESIGN

The ABA model act leaves establishment of criteria governing the operation and design of ADR programs to rules developed by the courts or a committee composed of mediators, judges, attorneys, community representatives and local officials. Whether program design criteria are established by statute or rule, issues which could be addressed include the following:

1. Location of programs. Programs could be administratively attached to the courts, operated outside the court system or allowed both as court-attached programs and private programs. No matter where the programs are located, adequate provision for referral of cases from the courts, police, district attorneys, private bar and other sources should be provided.

2. Types of disputes accepted. The disputes which may be handled, or which may not be handled, could be specified. For example, consideration could be given to whether disputes involving domestic violence, obscenity, sexual assault or drug and alcohol abuse are appropriate for mediation. Disputes where there is an overriding public concern or inability of a party to effectively participate could be left to the courts.

3. Mandatory or voluntary participation. Participation in alternative programs could be made voluntary or compulsory. If participation is made mandatory, consideration could be given to the impact on the system of cases when the ADR program is not successful.

4. Entry of court orders. When pending cases are diverted from the courts, a mechanism could be developed for staying further proceedings in the lawsuit pending the ADR program outcome. Provision could be made for entry of interim court orders pending completion of the ADR process. For example, interim court orders could contain agreements for the handling of a couple's financial affairs during the pendency of a divorce action involving mediation. Consideration could also be given to whether final dispute settlements should be entered as court orders or merely drafted as contractual agreements between the parties.

5. Disclosure. Disclosure of the nature of the ADR program and effect of any resolution agreement could be required prior to consent by the parties to use an ADR mechanism. This would ensure knowing voluntary participation.

6. Degree of formality. The extent to which the rules of evidence and court procedures are to be followed could be specified. This might affect the ability of parties to represent themselves and actively participate in the process.

7. Selection of mediator or arbitrator. Consideration could be given to design of the mechanism for selecting the mediator, arbitrator or other neutral party directing the ADR session. The mechanism could allow parties to make their own selection and could provide for selection based on applicable expertise in the dispute subject matter.

8. Discovery of evidence. Inclusion of a procedure for requiring disclosure of evidence, such as through court-ordered discovery, and subpoenaing documents and witnesses could be provided. Access to evidence could affect the integrity of the process.

9. Training requirements. Minimum standards of training or competency for mediators, arbitrators and other persons processing disputes in an ADR program could be specified. Standards may influence both the quality and nature of the process. Professionalization of the process may or may not be seen as desirable.

10. Legal representation. Consideration could be given to whether representation by legal counsel should be required or allowed in ADR programs. The participation of legal counsel in mediation sessions could greatly influence how they are conducted. Some programs encourage legal representation outside of the process.

11. Enforcement of agreements. When dispute resolution agreements are merely entered into as a contractual agreement and not entered as a court order or treated as a court order, consideration could be given to establishing a procedure to assist parties if the agreement is breached.

12. Appeals. Rules governing appeal from the decision or agreement should be included if the process is binding. If appeals are to be discouraged, provision could be made for imposing costs upon the appealing party if the outcome on appeal is not more favorable.

13. Evaluation. Legislation could establish an evaluation process to facilitate research on ADR programs and help determine the need for continued funding. However, care should be given to selection of the criteria on which programs will be evaluated. For example, should programs be expected to reduce costs; shorten court backlogs; improve access to dispute resolution mechanisms for low- and middle-income persons; result in greater public satisfaction with our system of justice; produce resolution agreements that reduce the incidence of future disputes; or achieve some other goal?

C. LEGAL PROBLEMS

The ABA model act specifically provides that all written materials and oral communications made during the mediation process are confidential and may not be disclosed in any court or administrative proceeding. In addition, the act exempts ADR proceedings from open records law requirements. The intent of these provisions is to encourage free and open negotiations during mediation sessions. Allowing documents used in

and statements made during ADR proceedings to be used later in court could discourage the parties from making full use of the ADR process.

In the event child abuse is disclosed during mediation, the act establishes a process for a judge to be petitioned for a confidential review of whether the duty to report abuse should be overridden by the confidentiality requirements of the mediation process. Given the conflicting public policies involved, without some statutory directive a mediator's responsibility in such instances is unclear.

During mediation, applicable statutes of limitations are suspended under the model act. This prevents any party from losing the right to go to court if the ADR process is unsuccessful.

Criminal defendants involved in ADR programs under the model act are deemed to have waived their right to a speedy trial during participation in the mediation program. Without this provision, the prosecution could lose the right to continue the prosecution of a criminal defendant.

In addition to these issues which are addressed in the model act, legislation could include provisions on the following:

1. Ethical violations. Ethics concerns discussed in subpart (A) of Part II, above, regarding participation of attorneys and nonattorneys could be dealt with. Currently, attorneys might be subject to conflict of interest problems and nonattorneys could be seen as engaging in the unauthorized practice of law.

2. Requiring mediation. Consideration could be given to the effect of Biel v. Biel, 114 Wis. 2d 191, 336 N.W. 2d 404 (Ct. App. 1983) on the ability of courts to require mediation as a matter of course in child custody cases. Biel appears to require courts to make a finding of necessity for mediation before requiring it.

3. Educating lawyers. Legislation could contain requirements that law schools provide training to students regarding ADR methods. Continuing legal education courses could also be provided for attorneys. Because of the central role that attorneys play in the resolution of disputes, it is essential that they be familiar with programs used as alternatives to court-based adjudication.

KJ:DLS:jc:kjh:ckm;jmm

Attachment

APPENDIX 1

1983-84 Legislature STATE OF WISCONSIN LRBs0619/2
BF:tm

ASSEMBLY SUBSTITUTE AMENDMENT 1,

TO 1983 ASSEMBLY BILL 908

February 7, 1984 - Offered by COMMITTEE ON JUDICIARY.

AN ACT to renumber 990.08; to repeal and recreate 990.08; and to create 20.680 (2) (c) and 751.20 to 751.32 of the statutes, relating to dispute resolution, granting rule-making authority, creating a committee and making an appropriation.

The people of the state of Wisconsin, represented in senate and assembly, do enact as follows:

SECTION 1. 20.005 (3) (schedule) of the statutes: at the appropriate place, insert the following amounts for the purposes indicated:

			1983-84	1984-85
20.680	SUPREME COURT			
(2)	DIRECTOR OF STATE COURTS			
(c)	Dispute resolution program	GPR C	303,000	0

SECTION 2. 20.680 (2) (c) of the statutes is created to read:

20.680 (2) (c) Dispute resolution program. As a continuing appropriation, the amounts in the schedule for administration of the dispute resolution program under ss. 751.20 to 751.32.

SECTION 3. 751.20 to 751.32 of the statutes are created to read:

751.20 FINDINGS AND POLICY. (1) The legislature finds that court-attached, county, municipal or community-based dispute resolution

projects can provide and promote expeditious, accessible, inexpensive and equitable resolution of disputes.

(2) The purpose of ss. 751.20 to 751.32 is to assist or initiate dispute resolution projects which are expeditious, accessible, inexpensive and equitable.

751.21 DEFINITIONS. In ss. 751.20 to 751.32:

(1) "Director" means the director of state courts.

(2) "Dispute resolution project" means any organized undertaking which provides for arbitration, mediation, conciliation or agreement between disputing parties or which provides a similar procedure.

(3) "Parties" means individuals, groups or entities presenting a dispute they have in common.

751.22 DISPUTE RESOLUTION PROGRAM. The director shall administer a dispute resolution program. The director may do one or more of the following:

(1) Establish and provide for the operation of dispute resolution projects.

(2) Provide grants for the establishment and operation of dispute resolution projects.

751.23 ASSESSMENT OF PROPOSALS. The director shall assess proposals for dispute resolution projects under s. 751.22 (1) or (2) according to the following:

(1) Access and assistance provided to potential participants of the project.

(2) Ability to evaluate project effectiveness in terms of caseload, cost, resolution success rate and impact on court caseload.

(3) Estimated cost of the project in relationship to the goals of the project.

(4) Support by the community, including the legal community.

751.24 GRANT PROGRAM. The director may make grants from the appropriation under s. 20.680 (2) (c) to sponsors for dispute resolution projects. The director and each sponsor shall enter into a written agreement regarding the grant.

751.25 APPLICATIONS FOR GRANTS. Local governments, local government agencies and nonprofit organizations may apply for grants under this section. Each application shall do the following:

(1) Contain a proposed plan describing the manner in which the financial assistance will be used to establish and operate a new dispute resolution project or to operate an existing project.

(2) Set forth the types of disputes to be resolved by the dispute resolution project.

(3) Include an estimate of the cost of the proposed dispute resolution project.

751.26 RECIPIENT RECORDS. Each grant recipient shall keep records which fully disclose the amount and disposition by a grant recipient of the proceeds of assistance, the total cost of the project, the amount of moneys supplied by other sources and other records required by the director. The director shall have access for purposes of audit and examination to any relevant books, documents, papers and records of grant recipients for 3 years following the close of the last fiscal year for which a grant was received under s. 751.24.

751.27 MATCHING FUNDS. The director shall encourage dispute resolution projects under s. 751.22 (1) or (2) to obtain matching funds from local units of government or contributions from charitable organizations or other sources.

751.28 PROJECT EVALUATION. The director shall monitor and evaluate the effectiveness of dispute resolution projects under s. 751.22 (1) or (2).

751.29 RULES. (1) The director may adopt rules under SCR 70.34 for the administration of the dispute resolution program.

(2) Each chief judge of a judicial administrative district may adopt additional local rules under SCR 70.34 for the diversion or transfer of certain disputes to dispute resolution projects.

751.30 COURTS; INFORMING PARTIES. In any case it deems appropriate, a court may inform the parties in a civil action regarding the availability of any dispute resolution projects.

751.31 CONFIDENTIALITY. (1) A mediator, arbitrator or other person may not be called to testify in any court as to any fact which he or she became privy to during the course of the dispute resolution. The mediator, arbitrator or other person may not disclose any matter which he or she became privy to during the course of the process. All memoranda, work notes, products or case files of a mediator or arbitrator, or of a person acting on behalf of or employed by a mediator or arbitrator, are confidential and privileged.

(2) Subsection (1) does not prevent the gathering of nonidentifiable information for statistical or other research purposes or educational efforts in cooperation with other states, the federal government or other dispute resolution programs.

(3) Subsection (1) does not apply to any action brought against the mediator, arbitrator or other person alleging negligent or fraudulent acts or omissions by the mediator, arbitrator or other person during the course of the dispute resolution process.

751.32 APPLICABILITY. Sections 751.20 to 751.31 apply only to dispute resolution projects which are established and operated under s. 751.22 (1) or (2). Sections 751.20 to 751.31 do not limit the authority of persons to establish and operate other dispute resolution projects.

SECTION 4. 990.08 of the statutes, as renumbered by chapter 372, laws of 1981, is renumbered 990.07.

SECTION 5. 990.08 of the statutes, as affected by the supreme court order dated December 11, 1979, effective January 1, 1980, is repealed and recreated to read:

990.08 CITATION OF SUPREME COURT RULES. When a supreme court rule is cited within the statutes, the reference shall be to the SCR number, such as "words and phrases specified in SCR 99.02".

SECTION 6. NONSTATUTORY PROVISIONS. (1) There is created a dispute resolution program committee to consist of 12 members, of which 6 shall be appointed by the director of state courts and 6 appointed by the governor.

(2) The committee shall advise the director regarding the administration of the dispute resolution program under sections 751.20 to 751.32 of the statutes. The committee shall meet on the call of the director. Members may be reimbursed for expenses is accordance with section 15.04 (1) (c) of the statutes.

(3) The committee is abolished on July 1, 1986.

SECTION 7. CROSS-REFERENCE CHANGES. In the sections of the statutes listed in Column A, the cross-references shown in Column B are changed to the cross-references shown in Column C:

A	B	C
Statute Sections	Old Cross-References	New Cross-References
13.93 (2)(c)	990.08	990.07

(End)