ACCESS TO JUSTICE

HEARINGS

BEFORE THE

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UNITED STATES SENATE

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FIRST SESSION

ON

ACCESS TO JUSTICE

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ACCESS TO JUSTICE

TUESDAY, FEBRUARY 13, 1979

U.S. SENATE,
COMMITTEE ON THE JUDICIARY,
Boston, Massachusetts.

The committee met at 9:00 a.m. in room 2003, John F. Kennedy Federal Building, Boston, Massachusetts, the Honorable Edward M. Kennedy, chairman of the committee, presiding.

Present: Senator Kennedy.

Also present: David Boies, chief counsel and staff director, and Robert M. McNamara, Jr., staff counsel.

OPENING STATEMENT OF SENATOR KENNEDY

On behalf of the Senate Committee on the Judiciary I want to welcome all of you to the first in a series of hearings which the committee will be holding during this Congress to study various methods providing better access to justice for our citizens.

Equal access is more than just a hallmark of justice—it's a definition of justice, and no system merits that description if access is the privilege of a few and not the right of all. That principle is the foundation of our legal system, but the reality is that more than two-thirds of the American people lack easy access to the courts. The guarantee of justice has too frequently been nothing more than a hollow promise. Instead of getting their day in court and getting justice, citizens have been getting frustrated and cynical.

In too many cases, justice becomes a luxury which too few can afford. They cannot afford lost time from work, they cannot afford the legal costs, and they cannot afford the frustrations. Securing justice has become an effort which taxes the patience, the hope, and the finances of even the most determined. Complex procedures, disproportionate expenses, and long delays have turned away too many of our citizens. For them, the doors of justice do not revolve. They are simply closed.

In the past few years many individuals and groups have begun to rethink the basic principles for effectively delivering justice. They have realized that litigation is neither the only method nor always the best method of resolving a dispute. Chief Justice Warren Burger has repeatedly sounded that theme. He stated that:

> The notion that ordinary people want black robed judges, well dressed lawyers, fine panelled courtrooms as settings to resolve their disputes is not correct. People with problems, like people with pains, want relief, and they want it as quickly and inexpensively as possible.

All of us encounter problems in the course of our daily lives. All of us seek an easy and effective means of resolving them. Because the court system fails too often to provide such a means, we must find effective alternatives. Experimentation with these alternatives has been undertaken throughout the country with some success, and today I want to discuss some of these alternatives with our witnesses.

Experimentation with various dispute resolution alternatives began some time ago in Massachusetts, and these programs have become models for others now being operated throughout the country. The Urban Court program is one of the best developed and most successful programs in the country. Since 1975 its 50 volunteer citizen mediators have handled nearly a thousand cases, held hearings in 680 of these, and settled 77 percent of the disputes. After 3 months 87 percent of these cases remain settled.

The Court Mediation Service in Taunton, begun in 1977 under the auspices of Judge Volterra, has handled nearly 60 referrals. Sixty-two percent of the cases mediated resulted in agreement, 95 percent of which remained in force 3 months later.

There are a number of other excellent and innovative programs in our State, such as the Mediation Component of the Youth Resources Bureau in Lynn, the Assistance in Domestic Disputes program in Middlesex County, the Domestic Crisis Intervention program in Cambridge, the Aid for Battered Women program in New Bedford, and the Mediation program in Quincy. These programs address a critical need and provide valuable assistance to our citizens in resolving a wide range of daily disputes.

In order to continue and encourage this experimentation, Senator Wendell Ford and I just last week introduced the Dispute Resolution Act of 1979, which will establish a clearinghouse for information and technical assistance and will provide incentive grants to those who wish to develop innovative approaches to resolving citizen disputes.

Today we are fortunate to have with us a number of witnesses who will discuss the general problem of the inaccessibility of justice, and some the specific alternatives which are being developed and used to deal with this critical problem. My thanks to all of you for taking the time from your busy schedules to be with us here this morning. Unfortunately, Dan Meador could not be with us, due to 8 inches of snow in Washington.

We have as our first panel, Frank Sander, who is a professor at Harvard Law School, and a nationally recognized expert on resolution of minor disputes, Sandy D'Alemberte, who is the chairman of the ABA special committee on resolution of minor disputes and Dan McGillis, research fellow, Center for Criminal Justice, Harvard Law School. Glad to have you all here. We also have John Beal, who lives close to the airport. [Laughter.]

John, we are glad to have you and appreciate your extra effort.

Professor SANDER. Senator Kennedy, we appreciate the opportunity to appear on this important subject. I want to first briefly give John Beal an opportunity to say a couple of words on behalf of Assistant Attorney General Meador, who worked hard to be here and has sent John in his stead.

PANEL OF EXPERTS:

STATEMENT OF JOHN BEAL, ATTORNEY, DEPARTMENT OF JUSTICE; TALBOT D'ALEMBERTE, CHAIRMAN, AND PROF. FRANK E. SANDER, MEMBER, SPECIAL COMMITTEE ON RESOLUTION OF MINOR DISPUTES, AMERICAN BAR ASSOCIATION, AND DR. DANIEL McGILLIS, RESEARCH FELLOW, CENTER FOR CRIMINAL JUSTICE, HARVARD LAW SCHOOL

Mr. BEAL. First of all, I just want to point out that Dan is in fact snowed in in McLean, Virginia, not in Washington. A municipality that apparently does not sweep its side streets. He's facing 12 inches of snow.

Senator KENNEDY. Which is to the delight of my children. [Laughter.]

Mr. BEAL. He sends his deep regrets. I talked with him late last night. This is an area of great interest and concern to our office, the question of what disputes are suitable for litigation and what disputes really ought to be dealt with through alternative means of dispute resolution. Our office has just embarked on two major studies in this area.

One of these studies addresses the role of courts in American society, including what matters ought not go to court, and if they don't go to court, where they should go. Also, the Department of Justice is conducting a major study of the costs of litigation to determine how much litigation costs and what alternatives to litigation costs. We want to determine or to provide a factual basis for making policy decisions on when we should litigate and when we should use alternatives and what alternatives we should use.

In addition, the Department has several programs in operation in the area of alternatives to litigation. In the Federal area we have worked with the courts to try arbitration in three Federal district courts. The preliminary results in that area are very good. We are very encouraged by the results from Philadelphia, from Connecticut, and from San Francisco, on the use of arbitration in Federal courts.

At the State and local level, we have started three neighborhood justice centers and have been most encouraged by the results of the justice centers. I have, if you are interested, a copy of a report on the justice centers just released, that we would be glad to make available, giving the results of the first 6 months of operation of those centers. Of course, we have worked closely with your committee in the development of the Dispute Resolution Act, which we hope will receive favorable consideration this year in the Congress and we expect to continue to work with you on it.

As I started out saying, Dan very much regrets not being able to be here today and he would welcome any other opportunity to discuss this topic with you. He asked me to convey those feelings for him. I'd be glad to answer any questions that you may have on any of the activities that we are involved in in this area.

Senator KENNEDY. Well, I want to thank you for your presence here. I think all of us on the Judiciary Committee are enormously mindful of the extraordinary work that Dan Meador and his division have been giving to this whole issue. I know from my own conversations

with General Bell that he established this as a high priority for the Justice Department. Dan Meador has been an enormously thoughtful and knowledgeable person in this area. There are a number of different areas of experimentation which you have referred to, and I hope to touch on some of those during the course of the panel discussion.

But we will look forward to an opportunity to hear from Mr. Meador at a later time when we will be studying these important areas during this session of Congress. I want to acknowledge the excellent work that was done by the Department in the development of the Dispute Resolution Act which is now at the desk awaiting Senate action. I'm very hopeful it will be the very first piece of legislation that is passed in this Congress early next week. We hope it will be expedited over in the House as well.

[The prepared statement of Daniel J. Meador follows:]

PREPARED STATEMENT OF DANIEL J. MEADOR

It is a pleasure to appear before the Judiciary Committee to discuss alternatives to litigation and to support adoption of the Dispute Resolution Act.

One of the paramount goals of the Department of Justice is to ensure that the people of the United States have full and equal access to justice. I know that this is a principle concern of the Congress, as well.

Access to justice means access to the institutions through which disputes are resolved and the public order is maintained. In this country, it is through the courts that individual rights are protected and the civil and criminal laws are enforced. I and the staff of my office have devoted considerable attention in the 2 years of our existence to developing measures that would improve the operation of the courts.

We nonetheless recognize that no matter how effective and efficient the courts may become, they will remain relatively expensive and time consuming for those coming before them. The cost of courts, to a large extent, is a necessary consequence of their procedural formality. This formality, however, is essential to their legitimacy. In most cases, justice requires representation by counsel, adherence to the rules of evidence, the right of appeal, and the like. Each of these elements are necessary to ensure accurate and unbiased findings and judgments, but each contributes to the cost and delay of court proceedings.

The recognition of these inherent incumbrances on the courts has caused us to consider whether many disputes in fact need to be resolved through the full panoply of procedures that accompany a court trial. It has been recognized for some time in such fields as commerce and labor-management relations that arbitration provides a faster and less expensive way of resolving disputes.

Indeed, it has become clear that "access to justice" cannot necessarily be equated with "access to the courts." For many types of matters, access to the courts may not, in reality, be access to effective justice. It is becoming increasingly clear that nonjudicial procedures and forums may be better suited for the resolution of many disputes.

We should examine all of the types of disputes to determine where it would be appropriate to develop such alternatives. Our courts are operating under substantial pressures today. Dockets are growing in size at the same time as Government budgets are shrinking. In these circumstances, the courts must look for ways of reducing cost and delay without, however, diminishing the fairness of the results they produce.

We have been exploring a number of aspects of this problem. During my time here this morning, I would like to indicate to the Committee the projects that the Office for Improvements in the Administration of Justice has been developing to provide nonjudicial procedures for dispute resolution. I would also like to discuss pending legislation on minor dispute resolution.

One of the things our office has done, which may yield proposals for legislation in the future, is to launch two major empirical studies, one on the role of the courts in American society, and the other on the costs of civil litigation. These studies will include examinations of alternatives to the courts and of matters which are suitable for resolution outside of the courts.

In the Federal arena, we are involved in developing several alternatives to district court trials. One is court-annexed arbitration. Building on the successful experience of several States, we have worked with three Federal district courts to implement court-annexed arbitration by local rule. Under this process, tort and contract cases for money damages only, involving less than $100,000, are referred to a panel of attorney-arbitrators within a few months of filing. The arbitrators hear the evidence in the case and render an award. A full trial in the distict court is available, but if neither party files a demand for a trial, the award of the arbitrators becomes the final judgment in the case.

We are encouraged by the early results of the test districts. We have introduced legislation, which is pending before this committee, that would authorize any district to adopt this arbitration procedure. We hope that favorable action on this bill will be taken soon.

Another legislative proposal that we have developed, and which would provide an alternative to full court proceedings, is a bill to expand the jurisdiction of magistrates with respect to misdemeanors and civil cases where the parties consent to case disposition by the magistrate. This proposal, which passed both Houses last year only to die in conference, would relieve judges of the handling of matters that can just as well be dealt with by a magistrate. This would benefit the court and the parties alike. We hope this bill will receive prompt and favorable consideration.

In the State and local court arena, we are seeking to provide Federal leadership in the improvement of the quality of justice throughout the United States. Our principal focus here is on improving mechanisms for the resolution of disputes that arise in the course of the daily lives of our citizens.

This addresses a significant need of our country today. Society has always had various means of dealing with everyday disputes such as complaints by neighbors, customers, tenants and family members. Many of these disputes are small irritations. Others are larger and more serious. All are important to the persons involved.

In decades gone by, citizens in this country have turned to such informal dispute settling means as the justice of the peace down the road, the policeman on the neighborhood beat, the minister or the priest, and the family elder. There were institutions that were strong in the past, such as churches, schools, and the family, within which many controversies were considered and resolved; in contemporary American life, many of these persons and institutions have either been diminished in influence and authority or, indeed, may have disappeared altogether. Social conditions have changed. Today there is a void in the means available for settling citizen disputes. If left unsettled, everyday problems, small or large, can fester and grow. They can lead to breakdowns in otherwise harmonious neighborhood relationships. They can even lead to crime. Thus, in today's world, we need to devise new means of dealing with these controversies and to improve existing mechanisms.

The Department of Justice has undertaken two projects in this area. First, we have launched a Neighborhood Justice Center program. Three Neighborhood Justice Centers, developed by my Office and the Law Enforcement Assistance Administration, have been in operation since March 1978. They are located in Atlanta, Kansas City, and Los Angeles. These Centers are neighborhood offices that utilize citizen mediators to deal with a variety of problems arising in the communities in which they are located. They focus on family, neighborhood, consumer, and landlord-tenant disputes. Wherever possible, they resolve community problems at the community level. They refer disputes that they cannot solve to the forum that is appropriate for the particular problem.

An interim report on the first 6 months of operation of the Centers is encouraging. It shows that in that 6-month period, the three centers resolved 719 cases, 452 through hearings and 267 in the prehearing process. Of the cases that went to a mediation or arbitration hearing, approximately 90 percent of both the complainants and respondents were satisfied with their experience in the centers. Through the pilot centers we are learning new and better ways of dealing with a variety of disputes. We are seeking to develop a model that can be replicated across the country.

Our other effort is to develop with this committee and others in the Congress the Dispute Resolution Act, S. 423. This proposal was passed by the Senate last year as S. 957. The bill has two components. The first part of the program would be the creation of a dispute resolution resource center. No national clearinghouse of information and experience concerning these types of programs presently exists. No individual State or locality can support such a facility. The proposed center would gather together from all the States information and experience on minor dispute resolution process, would make that information avail-

able to each State, and would conduct research and demonstration projects. The center would operate on a budget of $3 million per year.

The second component of the dispute resolution proposal would be a seed money grant program. This would enable a State to obtain experience with new or improved programs and would provide a vehicle for further experimentation, which is much needed in this field. Applications would be sent directly to the Department of Justice by the agency or organization that would operate the project. The Federal funding for an individual project would begin to taper off with the 2d year of the program and local funding would take its place. After 4 years, there would be no further Federal contribution to an individual project.

We believe that the Dispute Resolution Act has an appropriate structure for the grant program it creates. It will allow for experimentation with innovative proposals. It also will ensure that all States receive some assistance, while enabling areas with greater population to receive a share of the total grant program which reflects their greater need. In addition, it will allow grants to be awarded in a manner that will ensure that all types of minor disputes are covered by funding. Disputes such as those involving family members or consumers could be resolved in those projects that deal with a wide range of disputes, such as Neighborhood Justice Centers. They also would be resolved in more specialized projects, such as consumer action programs or family dispute mediation projects. Overall, the dispute resolution program would maintain a general balance of coverage between inter-personal disputes (such as family and neighborhood disputes), and essentially economic disputes (such as consumer and landlord-tenant grievances).

Through the experience gained from the variety of both general and specialized projects to be funded, we expect to learn much about how best to aid people in resolving the many disputes that arise in the course of everyday life. Presently it is not known whether specialized or generalized dispute resolution mechanisms are more effective. It would be premature to promote only one type of mechanism or method. The approach contained in the bill—to proceed simultaneously with a variety of programs—is the best course to take at this time.

In addition to funding programs for interpersonal and economic disputes, the grant program will fund both informal and formal dispute resolution mechanisms. With informal programs, it is our expectation that the dispute resolution program will build upon the Neighborhood Justice Centers, discussed earlier, that the Department of Justice has recently launched.

The dispute resolution program would also assist states and localities in improving their more formal mechanisms for the resolution of minor disputes, such as small claims courts. In some communities, small claims courts work very well, while in others they are nonexistent or not very effective. The dispute resolution program would promote the more widespread use of small claims procedures that have been proven effective, convenient, and inexpensive. It also would fund experimental efforts in areas where further work is needed, such as the development of better means for collecting small claims courts judgments.

I would like to note here that it is the view of the Department of Justice that there is a basic theme underlying the overall approach of the proposed dispute resolution program. While there are minor disputes in a wide variety of substantive areas that require resolution, the process of resolving such disputes has many common threads. It is by improving this process that we can most effectively enhance the quality of justice rendered to the people of this country.

The Department of Justice supports adoption of the Dispute Resolution Act as a limited, experimental program. We do not believe that it should be established as a separate, new grant program. Instead, it should be funded out of existing departmental funds for fiscal years 1980 and 1981. This arrangement is most consistent with the need to restrain government spending while being responsive to the needs of our society. Consequently, we support enactment of the program but do not seek additional funding for it.

In summary, the Dispute Resolution Act would establish an appropriate role for the Federal Government in the minor dispute area. In addition to recognizing the limited role that the Federal Government should play in matters of purely local jurisdiction, the dispute resolution program would take a balanced and comprehensive approach to the whole spectrum of minor disputes. This is the method that we believe will be most productive.

The program under this bill would help to achieve an important goal: that every community have an appropriate forum to provide effective redress for minor disputes. This forum need not necessarily be a full-fledged court. For many disputes, a public hearing before a judge—operating under formal rules of evidence and procedures—takes far too long and costs too much. A less formal means of resolution can be just as fair, but considerably more expeditious and less costly for all involved.

The dispute resolution program would develop and promote the use of improved dispute resolution mechanisms for a wide range of citizen disputes. The Department of Justice supports the prompt enactment of the bill that would create this much needed program.

Senator KENNEDY [continuing]. That is only a small segment of the larger issue of access to justice which we want to talk about here today, but it is an important one, and I think it is symbolic of the interest of our committee in this whole area which for far too long has gone without attention. We are looking forward to the testimony this morning.

Professor SANDER. Mr. Chairman, I would like to present my colleague from the ABA, Sandy D'Alemberte, Chairman of the ABA Special Committee on Resolution of Minor Disputes, who has come up here all the way from sunny Miami at considerable sacrifice this morning—considering the temperature here—to have an opportunity to appear at this proceeding.

Senator KENNEDY. Professor, if you knew Sandy like I knew him, you'd know that he is a remarkable man. I have known him for a number of years. He was a distinguished representative in the Florida legislature. He's been active in civil affairs in his community. He's also been known to be involved in democratic politics down there, too. [Laughter.] He has been one of the most concerned and respected leaders in this area, and he has been a good friend. I am delighted to welcome him here.

[The prepared statement of Messrs. Talbot D'Alemberte and Frank Sander follow:]

PREPARED STATEMENT OF TALBOT D'ALEMBERTE AND PROF. FRANK SANDER

I am Talbot D'Alemberte from Miami, Florida, where I am in private practice of law. I serve as chairman of the American Bar Association's special committee on resolution of minor disputes. With me is my colleague, Professor Frank Sander, from Cambridge, Massachusetts, who is a professor at Harvard Law School. He acted as reporter for our 1977 national conference on minor disputes resolution.

We appear today at the request of the association's president, S. Shepherd Tate. President Tate has taken particular interest in your bill, Mr. Chairman, and lists this legislation among his top legislative priorities for his term as president.

To evidence Mr. Tate's and the ABA's continuing support for proposals to assist all citizens in resolving even the most minor disputes, I ask that Mr. Tate's January 1979 President's Page from the *ABA Journal* be included in the record of these hearings. "There can be no doubt," wrote Mr. Tate, "that we must find ways to improve the settlement of small, personal or monetary disputes without the formalities or prohibitive costs of court action."

American Bar Association support for the pending legislation was first expressed by the Board of Governors in May 1977 following extensive study and approval by the special committee. As adopted, the resolution provides:

> Resolved, that the American Bar Association supports, in principle, the enactment of legislation such as the [Dispute Resolution Act] Consumer Controversies Resolution Act (S. 957 and H.R. 2482, 95th Cong.), or legislation of similar purport, which would provide Federal financial assistance to

the States for the improvement of existing mechanisms, and the experimentation with new mechanisms, for the resolution of minor disputes and which would reserve to each State the right to provide such mechanisms for the resolution of minor disputes as appear appropriate to meet the needs of its residents.

The Board also directed that consideration be given to amending the then-pending version of S. 957 to (1) expand its application to the broad range of citizen disputes in addition to consumer disputes; (2) place in the Justice Department's Office for Improvements in the Administration of Justice the responsibility for conducting the envisioned grant program; and (3) establish the grant program as a special revenue-sharing plan without burdensome requirements of detailed federal regulations.

Causes of Popular Dissatisfaction With the Administration of Justice

During the 1906 Annual Meeting of the ABA, Dean Roscoe Pound delivered his classic address, "The Causes of Popular Dissatisfaction with the Administration of Justice." [1] To commemorate Dean Pound's insight on the 70th Anniversary of his speech and the 200th Anniversary of our Nation, the ABA jointly convened [2] in April 1976 a National Conference to review the current causes of public discontent with our justice system. These causes, however, are not unknown: Federal and State court backlogs and delays are notorious; the costs of litigation and legal counsel have priced the means of legal advocacy out of the reach of many; legislatures are legislating more protections which the justice system can't assimilate quickly enough to make the protection readily available; Government bureaucracy, created in part to resolve disputes and to protect the public from shabby practices and products, is too cumbersome to effectively do its job; and I could go on.

But the real significance of the 1976 Pound conference was the body of recommendations for action which the participants suggested. Pertinent to our discussion today were recommendations to create state and local Neighborhood Justice Centers; to increase research and experimentation in to which disputes are most susceptible of non-judicial dispute resolution; to experiment with non-governmental dispute resolution mechanisms, especially in the area of consumer disputes; and to evaluate the experience with small claims courts and arbitration programs as different, but important, existing mechanisms for dispute resolution.

These recommendations, and others, have guided the ABA in its work, and they have become the basis of a substantial portion of the Justice Department's legislative program during the past 2 years. Since Attorney General Griffin Bell was chairman of the task force that prepared these recommendations, I would ask that these recommendations be included in the record.

One of the recommendations was to convene a national conference on minor disputes resolution, which the special committee did in May 1977 at the Columbia University School of Law. Since I have provided the chairman with a copy of the report of that conference, I will not detail the discussion that took place. I would like to note, however, that appendix C, "Alternative Dispute Mechanisms," is a compilation of the kinds of dispute resolution forums which could benefit from enactment of the pending legislation and which also could be models for replication throughout the country. I would also ask that this report be included in the record of these hearings.

Alternative Dispute Resolution Mechanisms

Passage of the Dispute Resolution Act would provide much-needed seed money to assist in the development of new projects, as well as to foster the expansion of the existing mechanisms to which I have referred.

There appear to be two primary goals advanced by the kinds of experiments and demonstration projects the Dispute Resolution Act might support: One is to make justice more accessible for low and middle income people; the second is to develop adequate forums for solving problems which are not particularly suited for the adversary system of justice.

The first goal responds to the perception that litigation in the courts simply has become too expensive for most people. Even the affluent cannot afford to litigate rather modest disputes where what is at stake does not justify the legal fees and related expenses. Thus, a corollary to the proposition that poorer persons can't afford access to the courts is the fact that many aggrieved parties, regardless of socio-economic status, effectively have *no* access to any forum for the resolution of disputes because the time, money and trouble involved are simply worth far more than the loss involved. Consequently, we are as concerned with simplifying access as we are in assuring that many disputes which now go unresolved, will finally be aired.

There is, of course, another distinct way of furthering access. Government can provide subsidies—free lawyers and the rest—to litigants desiring to resolve modest disputes in the regular courts. If committed to increasing access for rather modest disputes, the economic question for Government probably is whether the goal can be accomplished more efficiently by supplying nonjudicial forums that operate effectively without lawyers or by subsidizing access to the regular courts for anyone, including the affluent, who become implicated in these disputes.

Such issues as comparative equity, fair process, and subjective satisfaction also are important and perhaps more difficult to appraise. The ultimate resolution, preferably approached carefully through experimentation and research, may lie in a mix of low cost (to litigants), nonjudicial forums and Government subsidized access to the regular courts.

The other problem that the Dispute Resolution Act addresses is that for some disputes the adversarial model is not the best approach. Common sense or research might suggest, for instance that litigation in the courts is counterproductive for disputes between people with a continuing emotional relationship, such as members of the same family, or neighbors, simply because a negotiated settlement is likely to be more conducive to a harmonious future than would an adversary proceeding and an imposed solution. In addition, the traditional adversary proceeding, by definition, is only concerned with the result of a wrong, and does not often deal effectively with resolving the cause of the dispute. For instance, does a fine of admonishment from the bench really resolve a domestic dispute? Most probably not. In fact, it is suggested that it may even fuel the fire.

It is also necessary to consider that many such disputes never reach a court simply because they are not within the parameters of a definable, actionable cause. Consider the neighborhood dispute about a loud stereo: Is this really a matter for police, prosecutors and judges? Today it is, and the results are astonishingly poor: In court, the State says the defendant broke the law by x decibels. He will either be fined, or jailed, or both if proved guilty; neither if not. Yet there is no resolution of the underlying dispute between neighbors. A finding of guilty as well as a finding of not guilty can heighten the animosity between the disputants. Soon (estimates run to about 90 days), the parties will be back with the same problem, or one which has escalated, perhaps, into a serious criminal matter.

Similarly, research may establish that litigation is less effective than some other approaches in disputes between parties involved in a continuing economic relationship such as landlord-tenant, supplier-merchant, or seller-consumer. This proposition appears more problematic since these economic relationships tend to be rather transitory and easily exchanged compared to the emotional ties discussed above. It is simpler for a customer to shift patronage to another store than to disown a son or even to ignore a next-door neighbor.

Yet it may be preferable to offer all disputants government- or private sector-sponsored forums where they can seek to work out their problems short of litigation, and with less rancor, despite the fact that the "failures" will end up in the professionalized adjudicatory setting. For the most part, knowledgeable negotiation currently is available to disputants only after the opposing parties have obtained (and paid for) legal counsel. Any discussions, after all, take place within the context of what the court is likely to do. For that reason, without lawyers at their side, litigants may be reluctant to enter into meaningful negotiations, and especially wary of making or accepting a settlement offer.

Many disputants might be able to work out their less complicated problems if the right kind of alternative forum were available. In some instances, this would require a law-trained mediator who could give both sides some rough idea of the likely outcome should the case go to court. The night small claims court experiment in Los Angeles has introduced a reform which approaches this idea. Volunteer lawyers function as pretrial mediators, listening to both litigants and seeking to resolve the problem without a court hearing. In that context,

[1] Reprinted in 35 F.R.D. 273 (1964).
[2] The conference was co-sponsored by the Judicial Conference of the U.S., the Conference of Chief Justices, and the ABA.

they advise the disputants of their respective legal rights and the probable outcome, or at least the possibilities and risks. Thus far, the mediators have been successful in negotiating compromises in a rather high percentage of cases.

A similar program in Orlando, Florida handles minor criminal matters. Jointly co-sponsored by the ABA's BASICS program (Bar Association Support to Improve Correctional Services) and the Orlando Bar Association, some 125 local lawyers volunteer their time to mediate disputes involving simple assault, menancing threat, harrassment, trespass, disorderly conduct and other minor disputes. This project was recently the subject of an NBC Nightly News "Segment 3" program, which noted that the program settles about half of the 60 cases a month handled. The program announcer concluded by observing that legislation was pending in Congress to help other cities start their own programs.

There does not appear to be any sound reason for limiting the government's dispute resolution role to that of the place of last resort. Society has a stake not only in a final disposition of a personal controversy but in an amicable one as well. Consequently, the legal system might invest resources in forums which could facilitate negotiated compromises in nonadversary settings.

Whatever the reasons, it already is possible to detect a trend toward alternatives to the formal, adversarial judicial model both within the United States and elsewhere.

One of the most pervasive is found in England. Beginning shortly after World War II, Parliament began creating specialized "administrative tribunals" to hear cases arising out of newly enacted social legislation. Each tribunal is composed of a chairman, often a lawyer, several citizens usually possessing some subject matter expertise, and a representative of an interest group relevant to that class of dispute. There are now several thousand administrative tribunals in England and their jurisdiction has spread beyond the social welfare area. In fact, in recent years the tribunals have been handling nearly as many noncriminal cases annually as the entire English court system.

The "public complaint boards" in Sweden are a more recent development and on a less ambitious scale. But they also incorporate more revolutionary features. Aimed principally at consumer disputes, the boards accept complaints by mail and actively pursue a satisfactory resolution of the case. Staff members contact the commercial firm involved to learn its version of the facts. Where appropriate, staff also attempt to mediate the dispute to produce a suitable settlement. If that is unsuccessful, the disputing parties appear before a hearing board composed of citizen representatives from consumer groups and the relevant industry, e.g., dry-cleaning or auto repair. The decisions of these boards are not binding, but they are very persuasive since recalcitrant disputants can expect to appear on a blacklist reported in the newspaper! It is not surprising, then, that the Swedish public complaint boards report ninety percent compliance with their recommendations.

The rentalsman, found in British Columbia and a few other Canadian provinces, is an example of another model—nonlegal personnel employed on a fulltime basis to resolve disputes. In this instance, the disputes are between landlords and tenants. The rentalsman and his deputies have been granted exclusive jurisdiction over these problems. Landlords and tenants can register complaints by telephone or letter. The rentalsman office attempts to mediate informally. If that attempt is unsuccessful, an investigator looks into the case and a hearing is scheduled at a convenient location. Again mediation is tried, based in part on the investigative report. If this second attempt fails, the deputy rentalsman, a layman, decides the case. Unlike the Swedish public complaint boards, he possesses adjudicative power.

The community ingredient becomes even more immediate when dispute resolution becomes a local or neighborhood matter, rather than part of a national scheme of specialized tribunals or boards. The "community conciliation committees" established in many Polish cities and towns during the sixties exemplify this development. These committees are composed of local citizens chosen by broad-based community organizations because of their credibility with other residents of the area. Members serve without pay on a rather infrequent basis—2 or 3 times a month. They hear both civil and criminal cases at evening sessions in an informal manner without lawyers. These disputes may be brought to them directly by the parties or on referral from the courts. If a mediated settlement is impossible, the committee will announce its own solution to the problem. Community conciliation committee decisions are not binding, but the committee can use its powers of persuasion, which have proved quite effective in producing compliance.

Recent years have seen community-based justice establish a tentative foothold in several American cities. Variously called arbitration as an alternative to adjudication, community mediation, or citizen dispute centers, they all embody a similar approach. Principally focused on crimes between relatives, friends or neighbors, these programs seek to mediate a long-term solution to the problems which underlie the criminal offense. If the defendant struck his next-door neighbor out of frustration over a long-standing, unresolved controversy about a barking dog or an overhanging tree, the mediators seek to deal with the dog or tree as well as the punch that brought the neighbors to court.

PROPOSED DISPUTE RESOLUTION ACT

As noted earlier, the American Bar Association generally is pleased with the provisions of S. 957, as passed by the Senate last year. We consider this bill a vastly improved version (with the exception of some relatively minor drafting problems) of the original Consumer Controversies Resolution Act.

The earlier concerns of the Association have generally been resolved in S. 957:

(1) The proposed Dispute Resolution Resource Center, as part of the Dispute Resolution Program, will be under the direction of the Justice Department (although we assume most of the research, information-exchange, technical assistance and surveys will be undertaken outside of the Department under the Attorney General's direction);

(2) The scope of the bill has been expanded to include the broad range of citizen disputes in addition to consumer disputes.

The American Bar Association commends this committee for its attention to this important bill. Our system of justice, and increased access to that system, will be greatly enhanced by the enactment of the Dispute Resolution Act, and we are pleased to offer our assistance in working with you to this end.

Mr. D'ALEMBERTE. Thank you, Mr. Chairman, I'm delighted to be here and also delighted to be speaking for the American Bar Association. Frankly, I'm very proud that the American Bar Association has taken the kind of leadership position it has in this area. I'm speaking today at the authorization of ABA president S. Shephard Tate, who expresses his gratitude to you for your efforts in this area, Senator. He and other recent past presidents of the ABA think there's a great deal to be done in the area of dispute resolution and establishing alternatives to traditional adjudication procedures.

The ABA has been historically concerned with the cost of providing legal services and has supported and encouraged the establishment of programs to make sure that lawyers, through free and low-cost legal services programs, are available to all citizens. Over the years lawyers and bar associations have been active in establishing small claims courts which, in one sense, were one of the alternatives to adjudication at an earlier time that met an earlier identified need. We believe many of those needs remain largely unfilled even today.

But recent efforts of the ABA in this area relate back to the conference that was held in 1976 to commemorate Roscoe Pound's famous speech in 1906, "The Causes of Popular Dissatisfaction with the Administration of Justice." I guess we all think there are still even now, some 73 years later, causes for popular dissatisfaction with the administration of justice. Some of these were identified at that 1976 conference, which was sponsored by the ABA and the Conference of Chief Justices, and the Judicial Conference of the United States.

I would request the inclusion in the record of the Pound Conference follow-up report.

Unlike other conferences, this conference had a follow-up committee to suggest means of implementing conference recommendations. It was chaired by an obscure Georgia lawyer by the name of Griffin Bell, who has since come to somewhat greater attention in this nation. He wrote a report which has served as an agenda for American Bar Association activities and, as it turns out, in part for the efforts of the Department of Justice.

It called for establishment of neighborhood justice centers and for the development and evaluation of other experimental programs of alternative methods of dispute resolution. This ABA effort also resulted in a major conference in May of 1977.

Professor Frank Sander, with whom I serve on the ABA special committee, was the person responsible for organizing that conference and for writing the comprehensive report which came out of that conference. I urge to your attention and that of the committee professor Sander's report and the appendix to that report, and respectfully request that the report be included in the formal record of this proceeding.

I think you'd see by examining those two documents that the area we are dealing with today is an area of really rather great excitement. There is an awful lot going on by way of efforts of bar associations, individual citizens, judges, neighborhood, consumer and business groups, and others, to solve some of the problems that are identified—some of them probably as early as 1906 by Roscoe Pound, and which were reidentified and addressed by the Pound conference and the Pound conference follow-up report.

Part of the excitement that we in the American Bar Association feel is that we believe there is a genuine interest among practicing lawyers and that interest is demonstrated by the participation of a number of lawyers who are contributing volunteer efforts, in part to organize some of these programs and in part to serve in these alternative dispute resolution programs as volunteer mediators and arbitrators. We do believe that this is in the highest tradition of the bar and would hope that the effort that you have begun and which you have just indicated will be strenuously pushed in this Congress, will be continued.

We look forward proudly for the opportunity to work together with you, and I do again in closing express the deep appreciation of president Shephard Tate, who asked me specifically to convey that to you for the leadership you have shown. Thank you, sir.

Senator KENNEDY. Thank you very much.

Our next witness will be Professor Frank Sander.

Professor SANDER. Thank you. I would like to just briefly, before introducing the other panelist, Dan McGillis, try to set the subject of our discussion here in a somewhat broader contextural framework. It seems to me that the recent alternative movement has had three alternate prongs to it. One, of course, is the whole movement towards alleviating court congestion. Obviously, we are all aware that the courts are not in good shape and that in many places the delay is totally unacceptable. And that, I think, has been one of the impetuses for the alternatives movement.

I myself have some doubt about that rationale because I think we should not try to see the alternatives movement as a way of curing court congestion. I think that threatens to promise too much. For one thing, it runs headlong into the second rationale, which is providing increased access that you made reference to at the outset. If, obviously, we are trying to increase access for more people, including access by people that are now not provided any place to air their disputes, then there is some problem about also seeing that as a way of totally relieving court congestion.

I think basically we have got to use other means, as you are only too well aware in your Judiciary Committee role, for relieving court congestion. Most notably, the recent addition of a large number of judges will have considerable impact in alleviating that problem, as well as your efforts, Mr. Chairman to expedite and improve the court process. So I think alleviation of court congestion seems to me a dubious rationale for interest in the alternatives movement.

The second rationale frequently voiced, providing more access to people, seems to me a very important rationale. Not only are there great many people, as you have suggested at the outset, Senator, who presently have no access to any effective dispute resolution machinery, but I suppose we should also be concerned about the fact that trial lawyers, such as Sandy D'Alemberte, now often tell their clients that unless a case involves a hundred thousand dollars, it simply is not worth bringing to trial. The costs are too great and the delays are too certain.

It seems to me that is a shocking situation that we need to do something about. But there is a third rationale for interest in the alternatives movement, and I think it's the rationale that I myself am from a scholarly point of view, most interested in, and that is to try and provide a more effective method of dispute resolution for different types of disputes. It seems to me that we have to put it very bluntly—that we have had too single-minded an emphasis on the adversary litigation model as the way to resolve all disputes.

I think we should try to broaden our perspective and look at the great variety of ways of resolving disputes through negotiation, mediation, conciliation, arbitration, fact finding, ombudsman—a great panoply of resources. We ought to try to begin to rationalize the dispute resolution process so that we can try to adapt particular types of disputes to particular types of processes.

Much like the punishment fitting the crime, I think the dispute resolution machinery ought to fit the dispute, and we ought not to simply automatically push everything into the adversary mechanism. Obviously, for some types of cases that is an effective, proven method. And I think in the study that John Beal referred to, the Council on the Role of Courts, of which I happen to be a member, we are trying to think out what kinds of cases ought to belong in the court.

But then there are a whole group of other cases, of which I will cite a few examples, which should not fit directly into the court

machinery where we are trying to find cheaper, quicker, more convenient, more acceptable to the parties, and in many cases more long lasting, kinds of dispute resolution mechanisms. Let me just cite a few examples, there will obviously be reference to many others as we go along.

Take the case of divorce, an area in which I am also working. It seems to me that on the one hand, the divorce itself is something that in most cases the parties agree on and the courts are really a kind of bureaucratic rubber stamp. They are not resolving disputes. They are simply bureaucrats and there are simpler ways of handling those cases, as we know from such other countries as Japan, where uncontested divorces are handled administratively by a clerk. We simply don't need to use highly educated judges to pronounce divorces in uncontested cases.

On the other hand, on difficult issues of custody and financial settlement, where we are dealing with people who have to continue to get along with each other afterwards because there are children involved, we have got to find some other means. I think there, for example, some kind of mediational mechanism is much more promising because what that does is to help the parties together to try to come to a consentual, acceptable resolution instead of a judge saying this is what should happen, this is who should get custody.

Of course, the judges here are in the same position that Solomon was a good many years ago. There is no easy, acceptable solution and the net result often is that the parties simply don't live up to the agreement. Probably half the clog in the courts, or some fraction of the clog in the courts, are the initial cases, and the other fraction or an additional fraction is the follow-up cases that we get into—support enforcement with respect to children. I think it is likely, that if we help the parties to come to a consentual agreement with the help of a mediator, then they would regard that as their agreement, not a court-imposed agreement. It would be likely to be more acceptable to them and more durable as an agreement.

We also experience the sort of situations that we will hear a lot more about later on involving low level neighborhood disputes, where presently the only way to get help is to assault your neighbor and then be hauled into criminal court. Agencies like the neighborhood justice centers or the urban court here in Boston, which have seen that disputes like that are not criminal disputes, they are basically civil disputes involving the inability of two parties to get along with each other. What we need in such cases is not a pronouncement of guilt or fault in the way that the criminal courts do. We need some attempt to reorder the relations between the parties and to help them to get along better. Again a mediational kind of mechanism seems to me more appropriate there.

Reference has already been made to the greater use of arbitration. It seems to me many routine kinds of cases would be better disposed of by that simpler, more informal mechanism rather than using the full dress, full due process model, even for the more routine cases.

Finally, here in Massachusetts I think we have developed a very effective medical malpractice screening mechanism that I think has

so far screened out approximately 50 percent of the cases that previously went to malpractice trails through a three-person screening tribunal composed of a judge, a doctor, and a lawyer. It's kind of like a civil probable cause hearing to see whether the plaintiff probably has a good case. If he doesn't have a case, of course he can still go ahead and get his trial to meet the "right of a jury trial" requirement, but then he has to put up a $2,000 bond, unless the plaintiff doesn't have the ability to pay the $2,000, in which case the court can waive that or reduce it. That is another example of a new mechanism introduced in 1975 in Massachusetts, that for those types of cases has proved to be very effective.

So in sum, it seems to me that we have to look at the broad range of dispute resolution mechanisms and try to rationalize some way to find what kinds of cases ought to be handled by what kinds of mechanisms. There, of course, the proposed dispute resolution act that you sponsored in the last session and that we hope will get enacted in this session is critical. It would, first of all, provide a national presence where information and research about alternative dispute resolution would be available. That is the resource center to be established under the act.

Second, it would provide some minimal seed money for experimentation of the kind that I have just described. I hope you will be able to persuade the rest of your colleagues in the Congress to act expeditiously on that bill because it will be an important first step.

Senator KENNEDY. I agree.

Professor SANDER. I'd now like to introduce Dan McGillis from the Criminal Justice Center at Harvard Law School who has had a great deal of experience, particularly with the neighborhood justice centers, where he wrote the definitive monograph. At the conclusion of his statement we would be glad, the whole panel, to be available for such questions as you may have.

Dr. MCGILLIS. Thank you, Prof. Sander. Mr. Chairman, I appreciate the opportunity to comment on issues of access to justice and on the possibilities for improving our dispute processing and mechanisms. As Prof. Sander noted, I have been working in this area, studying various types of minor dispute processing mechanisms, and particularly looking at the neighborhood justice centers.

In the next few minutes, I will review some of the recent innovations in this area, and I thought I'd note some issues which need to be addressed in improving our delivery of justice. In the past few years, as has been noted already, there has been a remarkable nationwide increase in interest in creating improved mechanisms for handling minor disputes and I think the ABA and the Justice Department among others should be commended for their efforts in stimulating this interest.

Projects that have been developed exist in dozens of cities; they employ mediation, arbitration, ombudsman services and related techniques, and they vary on quite a few dimensions. For example, projects vary greatly in terms of size. A very small project has been re-

cently developed in Chapel Hill, North Carolina, with an annual budget of approximately $3,500. This project is totally run by volunteers and a local bartender serves as its executive director. Other projects are quite large, as you know. Some of them are sponsored by government agencies and their budgets run into the hundreds of thousands of dollars.

Some projects are run by the courts and city governments, such as those in Miami and Kansas City. Others are operated by community groups which are attempting to test the notion that communities can solve their problems without the aid of government agencies. The program in San Francisco called the San Francisco Community Board Program is a particularly interesting program of this type, and it has actually refused Federal funding from a number of different agencies in order to test this community-based model.

Projects also vary in level of specialization. Some programs handle only a single type of dispute. For example, there's a landlord-tenant mediation program in Santa Cruz. Others look only at consumer matters and still others process a wide range of types of disputes. As you probably know, mediators in these programs also vary widely in their characteristics. We have housewives and auto mechanics and other neighborhood people in some programs. Others employ lawyers, law students, and other professionals.

These programs have generated a great deal of excitement in their various communities. Many tend to use volunteers. And the response of community volunteers has been striking. For example, in San Jose recently they put an ad in the paper for volunteer mediators and they received 300 responses for the 18 slots that they had in that program. This is in keeping with recent findings by public opinion polls. For example, Gallup found recently that two-thirds of people polled agreed that they would be happy to act as volunteers in some sort of neighborhood or social service program. So it seems as though we have an ideal situation here really when you think of it.

We have a documented need for improvements in the dispute resolution mechanisms in society, and we also seem to have wide spread willingness on the part of many people to volunteer to help address these needs. I agree with Prof. Sander's points about the value of the Dispute Resolution Act. I think it would be a very timely effort to provide experimentation in this area.

The resource center that's contemplated in this legislation can provide a great many services. I think some of the problems that should be addressed by the resource center include, first, assessing the quality of justice of the new mechanisms. As you probably know, some people have questioned whether these mechanisms would provide second rate justice. I think that we need to conduct some quite sophisticated research on the whole question of equity in these mechanisms, disputent satisfaction, durability of the settlements, and what not.

Because if these mechanisms came to be thought of as second rate justice, clearly I think they would be doomed from the outset.

Senator KENNEDY. What's your initial impression—I'm interested in the panel's assessment—of the programs that are in existence now. Do you think they provide only second-class justice?

Dr. MCGILLIS. I think in some cities programs tend to be viewed as poverty programs. They tend to have a clientele that's relatively poor economically. Other programs seem to get a very wide range of citizens participating in them. For example, in Coram, New York, on Long Island there, is a suburban program and the people who are the clientele span a very wide range of socio-economic backgrounds. So, I think that in a few cases projects have been used primarily by poverty stricken people, but it's not necessary that that be the case.

Senator KENNEDY. Or that the programs will be resolving only certain types of cases, for example bad checks or something like that.

Dr. MCGILLIS. A few programs focus on bad debts. The Columbus prosecutor program handled over 10,000 bad check cases. Merchants in the city actually fill out forms and mail them out to the person who is the respondent. Then they haul them in and have sort of a mass summary hearing bringing them up to a table at the front. The sessions do not really involve mediation. There is nothing to mediate in those matters generally. The check bounced because there were insufficient funds. It's typically not a consumer problem with fault merchandise in Columbus, it's usually no money.

Other programs have strictly banned the use of mechanisms for bad debt checks and things of this sort. I think it's something to worry about certainly. The small claims courts have been accused of being a forum for merchants' debt collection and we wouldn't want to see the new projects have the same problem.

I think we have to look at the quality of justice. In addition, the resource center should provide some ideas about how to encourage local funding. As you well know, we have a long history of federally funded projects that failed to get institutionalized although they looked as if they were successes, for a wide variety of reasons at the local level. The resource center could make a contribution in that area, studying what optimum levels of funding might be, so we don't fund these huge Cadillac projects in some cases where there's only a Pinto budget in the local area.

I think we could try to keep prices down by using free space in some cases, such as churches, schools, YMCAs, and whatnot. A few programs have done this. We should also encourage the use of volunteers. Finally, as Prof. Sander has alluded to, I think we really need to focus on developing dispute processing mechanism networks in the various communities. We need to develop insights on how to coordinate the various mechanisms so that people can find the right mechanism for the various types of disputes they have.

At present disputants have a difficult time finding an appropriate judicial or alternative forum. I am just beginning a study here in Boston, with Ford Foundation support, to try to look at the problems of ignorance of the existing dispute mechanisms and how we might develop screening devices that might channel people into the Better Business Bureau, American Arbitration Association mechanisms and other forms. I think that ignorance of the existence of mechanisms can be as effective a bar to justice as a lack of money or the other traditional barriers that we see.

Senator KENNEDY. I think you are right. You referred to the importance of maintaining local flavor and leadership in these programs.

Perhaps the panel would comment briefly on what the role of the Federal Government ought to be in these areas. We are talking about a Cadillac solution for a local Pinto budget. What should we be doing? What is our role? What is the appropriate place for us? These programs can be developed within the states. What is the Federal Government's appropriate position in all of this?

Mr. D'ALEMBERTE. In the general area we are delighted by the role identified by the Dispute Resolution Act. That would serve to invigorate the whole process, provide the start-up resources, hopefully the written information and technical assistance that people need when they start one of these programs. We think with just a little bit of money you can cross fertilize these ideas.

You asked a moment ago whether there was a lower quality of justice in alternative mechanisms, and I would respond by saying that I think we really have to listen to the experts that run these programs—people who are willing to go out and talk about how good the quality really is. Lynwood Slayton, a young attorney running the Atlanta neighborhood justice center, is one such person. I earlier asked him the question you asked a moment ago and he said, in terms of quality, when these programs work they are better than the small claims courts or the traditional court processes, because they provide a solution to many problems that the courts just simply can't provide.

I think you need to have resources to get people like that around and to explain what's involved. You need the people who have actually dealt with problems to explain to other communities how they work.

Senator KENNEDY. The role is trying to help communities from making the same mistakes that have been made in similar programs in other areas. There will at least be a body of information and knowledge available so that they are not duplicating the wheel and repeating all the mistakes that might have been made in other programs before.

Professor SANDER. It's been sort of interesting that this special committee that Sandy D'Alemberte chairs and of which I'm a member, has become kind of an ad hoc resource center, because of the information vacuum that exists and because there simply is an incredible need for people to know where to go for assistance. Several times I have received phone calls, on the one hand, from someone in the Colorado bar and the other hand, someone from the office of the chief justice of a State in the Midwest inquiring, "We are interested in this problem, where can we get information? Where can we get help? Where are the places where there are modest funds available?"

It seems to me the Federal role ought to be to undertake precisely this kind of coordination, leadership, and to pump-priming experimental programs with a modest amount of Federal money. So I think, and the ABA thinks, that the Dispute Resolution Act is a major step in the right direction.

Senator KENNEDY. If an agreement is made between the parties, should it be legally binding and enforceable at law?

Professor SANDER. Binding for mediated settlements?

Senator KENNEDY. Yes.

Professor SANDER. That certainly is an area in need of much more illumination.

Senator KENNEDY. What do you think?

Professor SANDER. My own thinking is that they ought to be, yes. That is if the parties clearly understand that an agreement they mutually arrive at will be enforceable. I think there ought to be clear notice to the parties, but I think this whole question about second class justice that was mentioned before is a very important one, and I think there are some distinctions to be drawn here.

We ought to be careful about coercing people into settings that they don't want to be in. I think that does raise important issues. But on the other hand, if two people consentually want to come in and resolve their dispute outside of the court, simply because of the absence of all the trappings of the court, such as lawyers and discovery and all the other things that we have dreamt up for the big cases, I think it is wrong to call that second-class justice, and I think we ought to make it easy for people to resolve their dispute that way.

If they don't live up to the agreement in that consentual setting, it ought to be legally enforceable.

Dr. MCGILLIS. I think we might want to consider a two-stage process where the dispute is mediated in the initial instance, and only when mediation failed perhaps move on to arbitration. I think quite a few people might be hesitant to go into a legally binding process, where at the same time they would be happy to use a mechanism where they would just sit down and discuss the problem. Perhaps we could resolve a great many of these problems without having to go on to the binding arbitration sort of format.

Plus, informed consent would be less of a problem. Once they had participated in the mediation session I think they would be well informed about how the program works and what implications it would have for a binding solution. There have been some problems with arbitration programs in the past where police officers, for example, in one city would carry the arbitration forms with them, go to a dispute where people are still in the heat of passion, and ask them if they would sign this form agreeing to arbitration.

Well, it seems to me as though informed consent is really a questionable item there because it's hard to imagine they would be thinking clearly and know what rights they would be giving away.

Senator KENNEDY. Can you make any generalizations about the types of disputes which should be resolved in this kind of forum, or those that should be excluded? There's obviously some that lend themselves much more comfortably to this kind of resolution and others less so. But are there any sort of parameters which we ought to consider?

Dr. MCGILLIS. That's an item that's being focused on a great deal in the research being funded by the Justice Department now. It seems to me, of course, disputes among people with ongoing relationships are very amenable to mediation and other forms of informal dispute resolution. When you have a wide disparity between the power of the parties so that one party perhaps is very wealthy and a large institution and the other party is an individual, I think that poses real problems.

You can get around that by providing mechanisms that make the more powerful party have greater responsibility in the setting. For example, in Fairfax County, Virginia, the Chamber of Commerce has a pre-condition for membership agreement that merchants will go on

to mediation if a consumer wants it. That provides some sort of pressure on the more powerful party to bargain in good faith.

Professor SANDER. I think this is an area that we really need to work on. I think as Dan McGillis said, we have some pretty strong notions—primitive notions—of these relational cases that really are not only badly handled in court, but would be better handled in this type of mediational mechanism. I think there is a strong notion that, for example, there have been some interesting cases involving class action claims where the courts have very wisely resolved the complex problems themselves and then referred determination of individual class member disputes through a court-annexed kind of arbitration process.

Again I think that seems to me a good division of the unique skill of the court to lay down the initial principles and then use a more expeditious, more efficient process like arbitration to resolve the massive claims under its jurisdiction. But I think we are really just beginning to feel our way in this area. I think what we need is experimentation and research. I don't think anybody is prepared to say this is the way it is; we are not ready to pronounce any clear principles.

I think this task force in the Department of Justice on the role of courts is another effort to look at the other side of the coin, to determine what really belongs in court. Meanwhile, we are trying to experiment with what we are learning about the things not in the courts. Perhaps in another hearing 10 years from now we will know a great deal more, or 5 years from now.

Senator KENNEDY. Let me just ask a final question. To what extent are there real threats to the legitimate legal rights of the citizens who are involved in this type of resolution and who use the mechanisms which you have outlined here? What are the dangers you see?

Mr. D'ALEMBERTE. That's a subject Frank Sander and I discussed at some length. The most troublesome part to me, Dan referred to a moment ago, the problem of coercion. A number of programs in operation operate with a rather severe dose of coercion. It even appears that some authority to get people to the table may be necessary for the success of these programs.

One of my doubts about some of the neighborhood justice centers frankly, is that without some legal trappings, people may not be willing to come to that table. So how much of it is enough and how much is too much is still an unanswered question. I join with Frank and say that we think the genius of the act that you have introduced is that it allows us to get the answers to these questions. It encourages experimentation, it encourages it at a local level, it provides resources and information to people who really want to do something, and it doesn't impose a result where we really don't know the full answers.

So again, we are delighted with your proposed act and delighted to proceed.

Senator KENNEDY. OK. Thank you very much. Very, very helpful.

Professor SANDER. Thank you, Senator.

Senator KENNEDY. Our next panel will be made up of four judges, Chief Justice Samuel Zoll of Salem, Judge Cratsley of Roxbury, Judge DiBuono of Framingham, and Judge Guy Volterra of Taunton. Would they be kind enough to come up.

PANEL OF DISTRICT COURT JUDGES:

STATEMENT OF SAMUEL ZOLL, SALEM, MASS.; JOHN G. CRATSLEY, ROXBURY, MASS., AND GUY VOLTERRA, TAUNTON, MASS.

Judge Zoll, we are glad to have you with us this morning. It's nice to welcome all of you here. We appreciate your willingness to share your thoughts with us. You may proceed.

Judge ZOLL. Thank you, Senator Kennedy. I apologize, Judge DiBuono was not able to make it this morning. I'd like to introduce Judge Guy Volterra, who is to my immediate left, who is the presiding Justice of the Taunton Division, to whom you referred in your opening remarks. To my far left is Judge John Cratsley, who is the acting Presiding Justice in Salem and also associated with the Roxbury Court, who has what we feel a national reputation in the area of this particular subject matter.

[The prepared statement of Judge Zoll follows:]

PREPARED STATEMENT OF SAMUEL E. ZOLL

Senator Kennedy, I deeply appreciate the privilege of providing you and your colleagues with some general observations concerning the current necessity of instituting and improving alternative means of dispute resolution in a community court. Your presence at this hearing is timely in that the District Court department, for which I have ultimate administrative responsibility, is substantially involved in the implementation of this concept. As you are aware, through your knowledge of and practice in the courts of this State, the District Courts, more appropriately called the community courts, touch more lives within the judicial system than any of its other counterparts. The community courts, both through the recently enacted court reorganization legislation, and the tensions which permeate our fragile society, have required that the community court assume a greater role in reconciling the differences among family members, neighbors, and those outside any describable social relationship. In the last reportable period, the District Court department heard over approximately 1 million criminal matters, not to mention the burdens of civil and less formal, litigation.

Apart from the logistics in managing the paperwork incident to these cases, is the degree of intense personal care that is required of those in a judicial or magisterial capacity to bring order out of chaos in the lives of people in conflict.

The traditional formal structured courtroom proceeding, with all of the necessary rules that relate to the formalities of a trial, has evolved in such a complex way that it becomes most difficult, if not impossible, to reach the root causes of cases which, in my judgment, do not belong in a sophisticated adversary system. The pressure of the numbers do not permit either the judge or the clerk-magistrate to engage in an expanded exploration of the differences that give rise to the pending dispute or full consideration of the possible solutions which should address preventing the reappearance of the parties. It is, in the preventative area, that I believe the concept of alternative means of dispute resolution has its greatest strength. Disputants may express themselves in a way in which they feel most comfortable, uninhibited by hearsay rules and public focus. Quantums of evidence and comparative skill of counsel weigh less heavily on the final result. It is in the best sense, a means of ventilation where seething antagonisms can be raised, addressed, treated, and, hopefully, cured. Unfortunately, this is an area in which the traditional adjudicatory process falls incomplete. The entire alternative resolution process must of necessity involve probing into the family or neighborhood situations which give rise to the friction.

Through the insights gained and the issues raised, a challenging opportunity is provided for the community court to be the catalyst for activating those social service functions in the community which can best meet some of the deficiencies of living of the parties, which are tangential to the dispute which brought them before the court. More importantly, as most of these disputes involve more than a single member of a family or more than one person in a neighborhood, it confirms what I believe to be the new, yet growing, approach of the community court

system; that is, a recognition that it would be in the best interest of both the victim and the aggressor if attention were directed to all of the parties involved and not necessarily the "defendant" in the traditional sense. I submit to you, Senator Kennedy, not only is the concept of the alternative means of dispute resolution a desirable one to find and pursue; it is a mandatory one. The criminal justice system at the local level is being crushed by an avalanche of essentially familial and neighborhood matters, major to the parties, but less significant in comparison to some of the other types of litigation which the court is required to handle within the framework of prescribed and formal procedures.

It may be encouraging for you to know that your home State has made substantial specific commitment to programs of this nature in its District Court department.

One particular type of controversy that will soon be subject to mediation in all district court divisions is the Small Claims Dispute. Pursuant to G. L. c. 218, s. 22, as amended by s. 186 of ch. 478 of the Acts of 1978, two alternative procedures are available for the resolution of such matters. They are either mediation or a court hearing. Parties that choose the judicial forum will testify in court before a judge, who after hearing evidence, will make a binding determination. Those that elect mediation will attempt to resolve their dispute in an informal setting, aided by a clerk-magistrate. Disputants who are unable to reach an accord may, upon request, "be heard by a justice." For those that are able to reach an agreement, an "entry of judgment shall be made by the court."

The legislation provides certain safeguards for those parties that seek to mediate their dispute. First, the "agreement of both parties" is required for the small claims action to "be submitted to the magistrate for mediation and resolution." Since all parties must consent to have their dispute mediated, one disputant may not elect the alternative process as a delaying tactic. To ensure that the parties "agree" to the mediation forum, it is necessary to make provisions for an informed choice. Further, on request of a party, a justice may hear "any action which is not resolved by agreement." The parties are not prevented from requesting a court hearing if they are unable to settle their dispute in a mutually acceptable manner. Once they have reached an accord, however, their agreement has the force of a judicial determination. The promulgation of rules assigned to clarify procedures for the mediation process is under study and will soon issue.

In addition to the mediation of small claims dispute, divisions of the district court department have begun both formalized programs which are operating with grant funding and incorporate internal continuous training for mediators and informal programs for the mediation of various types of disputes. The names and locations of some of these programs are as follows: the Urban Court Mediation Unit in Dorchester; the Mediation Component, Youth Resource Bureau in Lynn; the Court Mediation Services in Taunton; Assistance in Domestic Disputes for Middlesex County; Domestic Crisis Intervention in Cambridge; Aid for Battered Women in New Bedford and Lynn; the Mediation Program in Quincy; the Framingham Mediation Project in Middlesex County; and Court Mediation Services in Bristol County.

In addition, a program is about to commence in the Salem division which will be described by acting presiding Justice John C. Cratsley.

I hope that the success of many of these programs will encourage you to continue your support of such mediation as a new and vital part of the judicial system.

Senator KENNEDY. I think you're touching on an important point. Would you describe the relationship with the courts themselves. To what extent should these programs be a part of the court system or to what extent should they be outside the court system? I'd be interested in your views on this issue.

Judge ZOLL. I have a sense, Senator Kennedy, that anybody who brings an issue to the court, regardless of its magnitude, ought to have the privilege of having his day in court and that the matter ought to be supervised, if not heard, by the justices or the magisterial authori-

ties in that court. So I do think that the court system ought to maintain or retain jurisdiction even though there may be some delegation of the manner in which the hearing is going to be held.

I think that lends a real legitimacy to the proceeding in that people do not feel that they are just being shunted aside because their case carries with it no importance. The involvement can be both from an audit function and also can be from a supervisory function.

Senator KENNEDY. I don't know whether the others want to make a comment on this now or during the course of their testimony.

Judge CRATSLEY. Senator, what got me interested in the question about the capacity of the court or the role of the court, was the reality when I came to the bench that folks were coming to our courthouses in ever increasing numbers for a whole variety of complaints and grievances.

One can't come into our district courts without being struck by that. Institutions and persons in the community, including religious figures or labor or political figures, are simply not doing what they might have done 10 or 20 years ago in helping folks to resolve their problems and folks are being told go down and see the clerk or go down and see the judge. That struck me first off as the reason why the courthouse was the place to begin with alternatives.

I think we are going to see, as our experimental programs develop in Massachusetts, a lot of use of these alternatives and we are going to have to, as Professor McGillis mentioned, expand our sense of what these other networks are that we can relate to in the court system. But we have to deal with our own disputes and offer these folks alternatives first.

I think we are going to have a large volume of participants after a number of years and we are going to have to be ever more sensitive as to what our relationship can be with the Better Business Bureau, what it can be with the school systems, what our relationship can be with this whole network out in the community apart from courts doing dispute resolution.

Judge VOLTERRA. Historically our experience in the Taunton center has been to structure a program outside of the court with the consumers of the alternative dispute resolution service being informed that it was a separate agency. They were directed to a place approximately a hundred yards from the court in a separate building, because of the failure of CETA funding at the conclusion of 1 year. We then obtained funds from the Shaw Foundation and we moved our operations to the interior——

Senator KENNEDY. Was this a CETA program?

Judge VOLTERRA. We started with six individuals who were hired through a CETA grant. Then the Shaw Foundation very kindly gave us sufficient monies so we could continue our program for several months while we attempted to obtain LEAA funding. And once we moved inside of our building and the consumers got the idea it was an entity directly connected to the court, we found we were more successful in mediating disputes since it was an adjunctive service of the court.

Now, it may be the Urban Court in Dorchester has had a dissimilar experience because they tend to be outside of the court. So I'd like to

hear from them. Our experience is that it's better when it's an adjunction of the court.

Senator KENNEDY. OK. Why don't we proceed.

Judge ZOLL. Senator, I want to address what I perceive to be your concern in the small claims process. If the parties are dissatisfied with the mediation effort, they still have the opportunity to appeal, so to speak, to the judge to hear the particular case so that they will have their day in court. There are a number of groups now embarking on these types of mediation programs.

Although Prof. Sander in his testimony earlier alluded that he doesn't view this as a panacea for congestion, we are involved in the day-to-day congestion of the courts, and that problem has to be a necessary aspect of our full consideration of this proposal. Judge Cratsley.

Judge CRATSLEY. What I wanted to talk about this morning, Senator, if I could, are the new Massachusetts experiments and some of the new directions that the Framingham, Taunton, and Salem courts are going to be undertaking as we expand really from what we have learned in the Dorchester project. I think I'll answer some of your concerns as I illustrate some of the new directions that we are going to be gathering data on and evaluating over the next 2 or 3 years.

All three of these experiments are funded by the State Committee on Criminal Justice, which is LEAA money. This is a good solution. Your bill would offer another solution to the necessity of having this type of money to continue these experiments. I think the first thing we are looking at, of course, is to evaluate programs outside the urban setting. It's urgent that we evaluate citizen participation, types of disputes, and so on in our suburban areas and in our smaller cities and towns.

I have a couple of preliminary feelings about what we will find as we get the Salem project under way and I think Judge Volterra will have some comments about the Taunton experiment. It does appear we will have an increased number of family situations; in the Salem program cases that had been brought into the court, perhaps to a court clinic or perhaps to a probation officer, without formal process initiated at all. These cases generally go into the category of the child in need of services, or CHINS cases, and now I think they are going to be referred to our mediation coordinator.

This whole dimension of family life seems to me to be one that may have been underevaluated in other mediation programs and that we are going to have more experience with it in the Salem area. Another type of case I think we are going to see more of are the small claims and landlord-tenant disputes, where people do in fact know each other and have reason to continue in some type of merchant-consumer relationship, or some type of landlord and tenant relationship.

There has been a general notion, as Dan McGillis illustrated, that those disputes can best go to mediation where people know one another and have a reason to continue a relationship, but folks have tended to say this does not apply to the monetary oriented disputes. I think in

the smaller cities and towns we are going to see an interest, where folks do live together and have ongoing relationships as buyer and seller or landlord and tenant, to want to use mediation because they know they are going to be together for a number of years to come. So that's one area where we are going to be looking at some new data on types of disputes.

We are going to get, as the professor suggested, some more hard facts on the kinds of disputes we can resolve through the mediation approach. We are also going to experiment with who are the best mediators. We are going to divert a bit from the Dorchester notion of using exclusively community mediators and train some of our courthouse personnel, as well as some of our community agency personnel, in mediation techniques. Consequently a mediation panel might have an assistant probation officer on it or it may have someone from the Salem Youth Resources Bureau on it, like a youth worker.

I also think we are going to get some additional data on what types of panels, for what types of cases, again looking at Prof. Sander's notion of tailoring the mechanism to the dispute, can speak best to what types of disputes. This will occur as we begin to get a better sense of who is using the mechanisms.

Finally, we have to expand our sources of disputes. Traditionally in Massachusetts the parties have come to mediation almost exclusively by referral from the clerk of court or the arraigning judge. In other words, fairly traditional criminal process has been the source from which the referrals have been made. This includes an application to a clerk for criminal complaint or a case that's actually gone to complaint and the arraigning judge stops and explains the mediation option.

I have a feeling we need to look at expanding those routes into mediation. Granted folks walk into the courthouse, but many of the things they bring to us cannot be fixed or put into criminal law or civil law categories. They are life's annoyances, they are often the beginning of something that could be far more serious in the future. We need to respond to those.

But it may be that the response comes simply by someone at the front counter or at an information desk saying to the parties, "That sounds like something you ought to talk to the mediation coordinator about," without even the filing of a complaint or the beginning of formal process. I can see this developing even to the point where the police prosecutors from our cities and towns who work in the courthouses suggest to parties that they go straight to the mediation program and let the problem be handled there.

I have a sense, and the Senator asked about community interest, that in the area we are working in on the North Shore, a lot of spontaneous community interest and some from the fairly established institutions, like police departments and social agencies and city agencies, will send disputes to the court related program for mediation.

The last new development I want to talk a bit about is the situation when you don't live where the courthouse is. What happens if the courthouse is in Salem and you live 20 miles away in one of the towns

that comes to Salem or in the western part of the State where the individual district court systems get bigger and bigger.

There again, I think this all relates to the question of what the other institutions in our cities and towns, whether it's the police department, mayor's office, youth services agency, can do to develop a network notion. Then the folks that live in the far off town could call to the courthouse and get a mediation panel convened back in their town so that they don't have to make the 25- or 30-mile drive, perhaps don't even have to come to the courthouse.

Consequently this is one dimension of access to justice that these types of alternatives need to address.

Senator KENNEDY. Thank you.

Judge VOLTERRA. I have no further comments.

Senator KENNEDY. How much support for these programs is there in the communities? I think each of you touched on it. Are the communities prepared to make a financial commitment to this type of dispute resolution? If there these initial, albeit very small, seed grants are made available to the communities and States, what is your experience on the willingness of the communities to assume this additional resource commitment within the community?

Judge VOLTERRA. Initially our program started because of a response by the Taunton Housing Authority. They were concerned with a particular dispute that involved a series of tenants of the authority and as a result of that we commenced informal mediation practices with our probation department, using the services of our probation department, in an attempt to mediate the dispute since one of our probation officers had fortunately been trained by the American Arbitration Association as a mediator through their community dispute resolution panel.

And thereafter, after we accomplished the CETA grant, we found that the community was receptive to our mediation efforts and in particular that the city was willing in a sense, since we made some informal overtones to funding, that they were willing to perhaps supply the seed money. However, we opted to obtain our seed money from the chief administrative judge, Judge Mason. We felt as an ongoing process it would be better if we attempted to obtain State funding, since that was the source of our usual funding for all of our court procedures.

Although we did have support within the community and perhaps we could have got funding of seed money at a local level, we opted to go to the State level. On the other hand, I think on a continuing basis that it would be difficult for a community such as Taunton or the other towns that comprise our district, given their financial constraints, to come up with the funding, and I think that we would have great difficulty in obtaining funding from local sources on 100 percent basis over a long period of time.

Judge ZOLL. Senator, I just might comment that the local office of LEAA, represented here today by Stephen Liman, has been very sensitive and very supportive of this concept and without their assistance we frankly, I don't think, would be as far along as we are now.

Senator KENNEDY. Well, we are in the process of holding hearings on LEAA, and we are finding in a number of instances they are

playing an extremely vital role. I think the early days of LEAA had some problems and some difficulties which we are well aware of, but they are now playing an important role.

Let me ask you, Judge Volterra, on a side issue, but about a program I'm very much interested in, whatever happened to those six CETA workers?

Judge VOLTERRA. The grant ended and they have gone in to the community, we know not where. And that's the problem with CETA, because it has no continuity. We found that we have over the years obtained excellent employees who, if we had been able to get State and county funding, we could have kept at the courthouse in positions that sorely need to be filled, but we were unable to obtain local funding and these people go back in to the unemployment rolls.

Senator KENNEDY. OK. How is this kind of information and this experience being shared with other communities? Is there any kind of mechanism that is set up to pass this on to other communities as well?

Judge ZOLL. One aspect, Senator, is that we have commissioned a task force that recently completed a report that was submitted to Mr. McNamara.

Senator KENNEDY. We are going to make that report a part of the record. Judge Cratsley's law review article is also very helpful and will be included in the record.

Judge ZOLL. So centralization is through the office of the Chief Justice of the District Courts in terms of an overview and Judge Cratsley may want to comment on something beyond that.

Judge CRATSLEY. Well, simply that the committee was an important first step. It enabled us to learn from the Dorchester experience, enabled a broader group of judges to learn who perhaps are not acquainted with that project. We did a statewide questionnaire, results of which are in the final committee report, indicating widespread support from our colleagues on the bench and clerks and probation officers, for offering alternatives.

It seems to me the committee's future role, and now I'm speaking less to you than I am to the chief justice, is to talk about these three new programs. Once we are under way in the next 6 months and begin to be able to tell our colleagues in the other courts what we have accomplished, where we obtained our money, what the potential for other sources of money are for these programs, what sorts of dimensions, what types of disputes to expect to handle. We will have some very, very good data on all of these things within 6 months to a year.

Senator KENNEDY. Do you know what our other New England States are doing in this area? Do they have similar programs?

Judge CRATSLEY. You have received some communications from Maine as I recall, from a program in Portland.

Senator KENNEDY. I'm wondering if it would be useful at all to suggest this, but the regional commission ought to be at least trying to offer some assistance in this area. It might try to find out what is being done, share those experiences with us, and also communicate to other communities what you are doing here. It seems to me that we have some common experiences to share. It just might be a project that, even with very small resources, could collect that information

and disseminate it to other interested groups. I'll explore that at another time.

OK; well, this has been very helpful testimony. We will be calling on you as we move ahead in this whole area. We are just beginning to come to grips with this issue in the Congress. Once again, the communities are well ahead of the Federal Government and Federal Congress on it. We are learning important information and important lessons. I think it's something that we want to share with the other states. I want to thank you all very much.

Judge ZOLL. Thank you, Senator.

Judge VOLTERRA. Thank you very much, Senator.

Senator KENNEDY. We have a citizens panel as our next group of witnesses, and I will ask Brian Callery, the former director of the Urban Court program in Dorchester; Della Rice, who is supervisor of mediation of the Urban Court in Dorchester; Juanita Evans, a citizen who used the Urban Court program and became a volunteer mediator, and Patrick Drummond, a citizen who used the Urban Court program, to come forward.

Mr. CALLERY. Senator, on behalf of the Urban Court program, I want to thank you for giving us this opportunity to be here.

Senator KENNEDY. We want to welcome you all here. I want to thank all of you very much. I think you have a good sense of what we are concerned about at this hearing. I think obviously the great concern we have is to find out from those who have been a part of the process how they react and respond to it, what they think the strengths of the program are, what they may be troubled by, both from their own experience and what they hear from their neighbors. I am looking forward to this panel.

Brian, would you start off.

PANEL OF CITIZENS:
STATEMENT BY BRIAN CALLERY, FORMER DIRECTOR, URBAN COURT PROGRAM; DELLA RICE, SUPERVISOR OF MEDIATION; JUANITA EVANS, DISPUTANT AND MEDIATOR, AND PATRICK DRUMMOND, DISPUTANT, UCP

Mr. CALLERY. Thank you, Senator. I'd like to begin by talking briefly in terms of the whole program.

Senator KENNEDY. Maybe you could just give us a thumbnail sketch of your own background, and how you became involved with the program.

Mr. CALLERY. Fine. I was a probation officer in the Dorchester District Court at the time that this program was being planned. I had an opportunity to move into the program and be part of the Federal staff of the program, which was federally funded. I served in the capacity as the head of the victim services portion of the program.

I then moved to Quincy District Court where I assisted in establishing a mediation program there. I then returned to the urban court program as its director in 1977. I spent about 1½ years as a director of the program and have since left and now am with the Probation Accreditation Commission for the State of Massachusetts.

The urban court program itself became operational in 1975 as a result of some needs that were identified by its planners. The first need

which was identified was to provide assistance to victims of crime. It was decided that a component of the Urban Court should react to and address those kinds of issues that victims have because of their victimization, so a victim assistance program was established within the urban court.

The second need that was identified was the involvement of the community, the Dorchester community, in the sentencing process itself. The court itself was in turmoil. The presiding justice had recently been removed. The community was changing. Crime was changing from petty thievery and drunkenness, and nonsupport type cases, to a much more violent kind, and the court became the focal point of criticism from the community as a whole.

Judge Paul King saw this program as an opportunity to involve the community more directly, and he established within the Urban Court what is known as the disposition component that provided direct community involvement in recommended sentences for defendants referred to the program.

The third need and at that time, I might add, the most skeptical of the three components, involved the apparent need to take certain cases out of the regular court proceedings. These cases involved neighborhood disputes, husband and wife disputes, other family member disputes, disputes among friends, merchant-customer type disputes. There was a need to give these people an opportunity in an informal process to really vent their frustrations. And there were a lot of frustrations.

If you have ever sat in on a court hearing that involves neighbors or cross-complaints with family members, trials usually last a considerable amount of time and at the end of that period of time, at the end of the trial, it has been my experience that the judges, the probation officers, the clerks, whatever, still don't really have a clear sense of who is at fault, who is guilty and who is not guilty.

So it was felt that a mediation process which was to be used in Dorchester would be beneficial in handling these types of cases. The program itself is about a block and a half from the court. We operate a storefront in Codman Square. We handle cases at the convenience of the disputants themselves, which results in the program being opened approximately 5 nights a week as well as Saturday mornings.

We don't want people to miss work. We want people to become involved in the process and, therefore, they have to agree on all points, including the time that they would mediate. I think that the program has been successful for one key reason, and that is community involvement. Community residents were involved in this program from the point of hiring all the way through to program design. We recruited all of our volunteers from the community, and the program has approximately 100 active community volunteers in all three components.

By combining our efforts with the community and coming up with the program, they are involved in a volunteer capacity and in an advisory group capacity to monitor the progress of the program. This is probably the key issue in terms of the success of the program. Additionally, we began by having outside people come in to train, to train in the sentencing process and to train in the mediation process.

Over the last 2 years we have been able to take all of that training and develop an expertise capacity to provide the training within the

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program. Right now all training that's done for the mediators as well as the other two components is done by staff and active community volunteers.

Basically the program has been a success. Community involvement has proven to be a great asset in administering justice at the district court level. On behalf of the urban court I would urge you as chairman of the Judiciary Committee to work vigorously to produce legislation that would provide other citizens with the same opportunity and services as those in Dorchester have been so fortunate in having.

Thank you.

Senator KENNEDY. Let me ask you, Brian, just before we go on now, what are the costs of resolving these disputes? What's the magnitude?

Mr. CALLERY. The program began in 1975 with a budget of almost $500,000 a year. That has been pared down considerably.

Senator KENNEDY. The program was started with an LEAA grant?

Mr. CALLERY. LEAA discretionary Federal grant. At the present time the program has been absorbed by the Dorchester District Court and put on its permanent payroll. The entire mediation staff, which consists of three people, is presently being paid out of the court's budget. We pay a stipend to volunteers to cover their baby sitting and transportation expenses, which is $7.50. But that amounts to a total of $5 or $6,000 a year to all volunteers. It is pretty cost effective in that sense.

Senator KENNEDY. Good. Della.

Mrs. RICE. Senator Kennedy, I will tell you how referrals come to mediation. All our referrals begin at the clerk's hearing. Daily, we have a person in the Dorchester court——

Senator KENNEDY. You are the supervisor of all the mediation?

Mrs. RICE. Yes, and daily we have a person assigned to the district court. This particular person would cover the first session, bringing back any cases that have been continued for that particular day or being there for possible referrals from the bench.

At 10:30 he or she goes upstairs to the clerk's office, and we sit there for a while throughout the hearings for possible referrals. Once a person is referred into mediation, both parties have to agree to participate. Usually at the clerk's hearing you have two parties there. Both parties are told about the process, and they are given a time or they give us a time that is most convenient for them to appear at our program, which is about a block and a half from the Dorchester court. We work nights and Saturdays.

Usually when the case coordinator who is covering in court comes back to the urban court. I then assign mediators to the case. Usually we take into consideration every aspect of that case, age, color, whatever. Those are the main factors, we feel, in scheduling mediators to a particular case. Throughout a period of time I begin to know mediators, their personalities, who feel they can relate better to, et cetera. From that I decide who would be the best members on a panel to work with these disputants. At that particular point the case is scheduled, and the mediators are called.

The mediators are told about the specific case only by name. They are told the names only at that particular point to be sure that—with

all of us being community people living right in the area—the particular mediator does not know the disputants. We feel if you know a person in any way, shape, or form, it tends to sway the decision a little bit. People tend to really play on that. If they feel, "Well, I know Della. She is on the panel. She will be on my side," it tends to make things a little hard for the mediator. We like to make sure our mediators don't know the people at all.

At that particular point, a case coordinator is scheduled to work with the mediators. They will come and are told the name, the case, the crime, who referred it to us, the judge or the clerk, and when it's due back in court. It's mediated. Now, mediation goes anywhere from 1 hour to 4 hours. We have had cases started at 7 and be out at 12. It depends on the nature of the case, how much time people feel they need.

This is what we as a staff see they get. If we need more time in a particular evening or morning, whatever, we will always reschedule and get the people to come back and really sit and work it out. Now, the most important thing the mediators are taught in their training is not to coerce anybody into an agreement. We really, really play on that. That's a big point as far as the mediators go. We just really want them to realize and to know that the parties that are sitting before them, it's their agreement and they are the people that should make it and not the mediators.

We work very well in that sense, and we work with two mediators at all times. We have a feedback form that each mediator fills out. So from that we can evaluate what actually happened within the case. Then you have disputants talking back and forth to the staff member if there's a problem with their particular mediator. So you're well abreast of what's happening within the room whether you are there or not, and usually a staff member is never in the room with the disputants and mediators. We sit in only if a mediator is not there.

Here are the statistics. We started in November 1975 and as of January 1979, we have had 1,030 referrals. Three hundred and eight of these came directly from the clerk; 642 came from the bench, that's at the arraignment stage. We find that the judges tend to trust us and give us many more cases than the clerk. Originally in our proposal we had hoped that all our cases came directly from the clerk's office before a complaint was issued. At this particular point we find that that's a concept that has been changed because most of our cases come directly from the bench. Hopefully Mr. McKinney will see us as a part of the court and begin to give us many more cases in the future and keep them out of the court to really help lighten that burden.

Senator KENNEDY. What were some of the problems you encountered when you set up the program? What were your greatest difficulties in getting established?

Mrs. RICE. Well, I don't think that we had any real difficulties because the people that were hired to work in different components of Urban Court had extensive knowledge of the community as a whole, and the majority of us had come from social service agencies. The only slight problem we had was getting the court to accept us fully as

a help to them. That was about the only problem that I feel we encountered.

Mr. CALLERY. I want to comment on that, Senator. One of the potential problems that we saw was that the program itself had to be representative of Dorchester, and if it wasn't, or if the program was seen as an all-white program or an all-black program or an all-liberal or an all-hard line program, then we would alienate a great section of Dorchester. Early in the program an attempt was made and has been continued that, when we recruit volunteers, staff, they represent the Dorchester community and that the program always represents the Dorchester community in every way possible.

Senator KENNEDY. Let me ask, Della, how are the mediators chosen? How do you select the mediators?

Mrs. RICE. Right now I'm recruiting another 20 mediators, and I've sent advertisement through the local newspapers, "Boston Globe" and the radio stations. Now, as applications are beginning to come in, we schedule appointments, and I personally, with staff, interview every single candidate. We make a determination at the point of interview whether this person can be trained in the techniques of mediation. Out of the pool, we have already chosen about 15 applications. Our cutoff is next Friday. Hopefully by then we will have decided or picked the 20 people.

Senator KENNEDY. Then what kind of training do you give them to be mediators?

Mrs. RICE. We have 40 hours of intensive training, which is given by two of our top mediators with the assistance of myself and another staff member.

Senator KENNEDY. Who runs that particular training program? Do you?

Mrs .RICE. Yes. In the evenings and all day Saturday.

Senator KENNEDY. Do you set up the training program yourself, or do you get some help?

Mrs. RICE. We get our material from the Institute of Mediation and Conflict Resolution in New York. This is the material that we still utilize.

Senator KENNEDY. I see.

Mr. CALLERY. Training itself consists mainly of role playing and running people through as disputants and mediators.

Senator KENNEDY. So they get a feel of the situation.

Mr. CALLERY. Exactly. It's been very effective, and initially we made a mistake by deciding in one of the first training sessions that we would put a new mediator with an old mediator in order to have some balance. What happened was the new mediator would be shy in terms of his or her involvement and tend to watch the more experienced mediator.

So now we just put the people right in with the cases and it's a sink or swim type situation.

Senator KENNEDY. So far they are swimming.

Mr. CALLERY. Yes. [Laughter.]

Senator KENNEDY. Juanita, maybe you'd share with us your contacts with the program, how you became involved in the program, how you first heard about it, and what your role in the program is at the present time.

Mrs. EVANS. I first became aware of the program when I took out a complaint against a friend, a fellow that I had been going out with for several years, and I had been continuously harassed by him. So I took out a complaint, and the morning that we were supposed to appear in court, a case worker approached me before we went in to see the judge. He explained mediation to me and to the defendant also. He told us that we would go before the judge and that he would probably recommend that we go to what they called mediation.

I didn't understand too much about it, but he explained the way mediation worked, and the fact that the other person would not end up with a record. This wasn't what I had in mind anyway. What I basically wanted was someone with authority to speak to him to get him to stop harassing me. So he agreed and I agreed that probably mediation would be a good thing. We stood before the judge, and at that time the judge asked us if we both agreed that we would go to this mediation. And we did.

They set up an appointment for both of us, which was after working hours, and we went down to the mediation building. I think it was within a week we went down there. At that point you're told what mediation is fully, and there's two people there. We were male and female, so our mediation board consisted of a male and a female. They told us that they were community people, that they were not of the courts, and that they had no authority like a policeman or anything like that. They told us to relax—that's one important thing about being there, you do relax.

Normally when you have a complaint, sometimes people don't even know what they are angry about, but you have an opportunity to tell your side of the story and the other party has an opportunity to tell their side of the story. We came to an agreement, and the mediation session was over. The case worker then has to follow the case. So about 2 weeks afterwards the case worker would call me and asked me was the other party keeping his part of the agremeent, and I guess they called the other party also to see if they had any complaints against me.

In the meantime, Della, the supervisor, also called me and asked me if was I satisfied with the agreement and the program, and at this point I became interested in mediation because I was doing that sort of work anyhow in my full time job, and I told her when there were some openings I'd like to become a mediator also. I went in for a training program as she described, and I became a mediator over a year ago.

Within that time I don't think I have lost or not gotten agreement in more than two cases. The mediation program, I believe, is a very good program and if I had another problem, I think I would go through the same method again.

Senator KENNEDY. Well, that's a very encouraging story. How has the relationship with the courts affected you? You mentioned when you were telling your story that, at least in terms of your own initial experience, that you were informed that this was a process outside the courts. Did that make you feel either better or worse?

Mrs. Evans. Much better. When you go to the court, and this was my first time going before the judge, first of all, you're not concerned about what's going on. You are frightened, basically, but in the program you feel you can sit down and relax and tell a person your problem. These people are trained to listen, not take sides. Basically they listen and let you do the deciding.

One thing we are taught is that the two parties that are before you make the agreement, something that's comfortable for the two of them to live with. I feel that before a judge he may say well, you're guilty or not guilty, and you never have a chance to express what you feel. You never have a chance to do anything. But in the program you can tell everything you feel, even things you don't want the other party to know, because at that point you can speak to the panel individually. You have a chance to speak with a person there, and you have a chance to speak without them there. You can tell what you think is the cause for you being there.

Senator Kennedy. You think then that is preferable to the formalistic atmosphere of a court proceeding?

Mrs. Evans. For the cases that we receive, yes.

Senator Kennedy. You think some cases lend themselves to this type of resolution perhaps more quickly, less expensively, and perhaps even with a better sense of justice than the more formal process of the courts themselves?

Mrs. Evans. Yes, I do. Because normally the types of cases I get the parties are going to continue to be friends or continue to mingle with one another even after they leave the courtroom. The thing is not to find a solution, just say cut and dried you have to do this. But something they themselves designed and will live with.

Senator Kennedy. That's probably a very fundamental and basic and, I think, important aspect of this mediation. In a court proceeding, you have a winner and a loser and a final decision. As you point out, many of these situations are the results of disputes within a community or individuals within a community. Mediation is a continuing kind of process aimed at a just and fair solution and resolution, which is done expeditiously, and I guess from your own experience, done completely satisfactorily.

Do you find that pople within the community are increasingly, one, aware of this process, and two, gaining increasing confidence in it? Do they feel they are getting fairness and justice with this process?

Mrs. Evans. Yes. I think you find that the people that get involved with the program are satisfied. We even have had people offer to give money and things like that. So I think they are satisfied. I think our neighborhood people are becoming more aware that the program is there, maybe just from hearing about it from someone else that had a case and they told them how it was solved. It is going around the neighborhood.

Senator Kennedy. What about it, Della, is this a learning experience? You have been involved in the program for a long time.

Mrs. Rice. Yes, it is. People who have come through the program refer friends to us or come back in again with a different type situation, perhaps with a neighbor or husband at this particular point. We feel we are well known.

Mr. Drummond. Senator Kennedy, I was referred to the Urban Court from the Dorchester Court. I was involved with some teenagers. We went to clerk of the courts when I summoned them. I was referred to the urban court. I met Mr. Larry Boyer. He was the one that told me about the urban court and about mediation. So he explained it to me. I agreed and so did the other party.

They set up the meeting for us. We arrived at the urban court. The mediators explained the process. Each party had his own time to say what he had to say, and so did the other people. I thought myself that the urban court was very good. First of all, the surroundings were different. Being involved with teenagers, teenagers are apt to be a little more relaxed in this position than being in a court.

We both explained our cases. We both agreed and signed a document that this thing wouldn't happen again. What I thought about the urban court and why I recommend it is that the surroundings are important, the way they explain things to you. You weren't scared, at least I wasn't nor were the teenagers I was involved with. They were a little bit more relaxed and trying to tell more of the truth maybe than they would in court. So I really recommend the urban court. Thank you very much.

Senator Kennedy. You have found at least in terms of the resolution of that dispute that the agreement has held up pretty well?

Mr. Drummond. So it has and so has the other side.

Senator Kennedy. You're well satisfied?

Mr. Drummond. Very satisfied.

Senator Kennedy. You think that if you had gone through the court procedure it might have taken more time and been more costly?

Mr. Drummond. That's right, because I would have been losing time from work.

Senator Kennedy. This way you didn't lose the time from work either?

Mr. Drummond. No, they arranged it for me on a Saturday morning.

Senator Kennedy. That's helpful, obviously.

Mr. Drummond. Yes.

Senator Kennedy. Brian, perhaps you can answer this. Are there some kinds of disputes which mediation cannot handle? What sort of disputes can they handle and what sort of things shouldn't they handle? Can you give us a general sense of this?

Mr. Callery. I think you have hit upon one of the fundamental ingredients, Senator, in terms of a good mediation case or a good case that could in fact be referred to mediation. That is the relationship. A relationship I think has to occur, has to be present. Any disputes that take place with a family is going to be an ongoing relationship. With neighbors, for sure, they are going to have to live next to each other. The fact that somebody has been found guilty and somebody innocent is not going to be enough to keep those people living peacefully together.

The types of cases that wouldn't obviously be appropriate for mediation are those cases where there is no relationship at all, a typical breaking and entering or a burglary. The fiber is not there to hold together. The key to any type of mediation case in my mind is an ongoing relationship. And I don't believe that you can single out particular types of cases, such as, you know, all breaking and entering cases are not good for mediation.

We had a case a number of years ago where two people had been living together for approximately 8 years. They weren't married formally, and the woman decided at that point that she didn't want him there any more. So she changed the locks on the doors. He came home, broke the door open, and she took out a complaint for breaking and entering. There was a lot more to that than the initial break. When they got into the case they found out that the original furniture which belonged to the woman had been traded in and more money had been given by the man to buy better furniture. Now that they were breaking up they had to decide who gets the furniture, TV set and stereo.

These seemed like minor items, but to those two parties they are very, very big. And so that you can't define it by type of case. You have to define it by relationship, and if the relationship is there, it's a good mediatable type of case.

Senator KENNEDY. Let me ask, Della and the others, do you think, through the mediation process, that you are getting first-class justice or do you think, from the people that you have talked with who have gone through the process of mediation, that they somehow feel that they are not getting first-class justice? What's your sense, both from your own view and from the members within the community?

Mrs. RICE. Well, my personal feeling, in addition to people that I work with, is that people are getting justice. For the first time in their life, somebody is not telling them what to do. When a person goes into an institution for any reason, they are always told what to do and how to do it. So for the first time these people are deciding for themselves, this is what I want to do and this is what I'm going to do.

So I feel personally, and I think I can speak for people that we service, I feel that they are getting justice.

Mrs. EVANS. To add to what she said, when we have parties before us, one of the first things we ask the parties is what do you expect out of this mediation. At that point the complainant will tell us what she or he wants, and they work from there together. Say, for instance, something was damaged and they want $500, they have stated the amount they wanted. They may not get it, but they work towards it, and we work towards this with them.

So they have a goal in mind, and we work with them to reach their goal. I think that's the important part in our mediation sessions, finding out why are they there and what is it they expect out of mediation.

Senator KENNEDY. You think that when they do agree to it, since they have been a part of the process and a part of the resolution, they will support the resolution and have a more constructive attitude than if it was being imposed upon them?

Mrs. EVANS. Right. We emphasize to them this is your agreement and we do write it down and that's all we really do, we write it down. But they suggest the terms, and they make the agreement actually. They are the ones that tell us what they want, and then we write it down and both parties receive the agreement that they can take with them. One copy also goes into the record. Actually it is their agreement. So we tell them make an agreement that you can live with comfortably, and that's what they try to do.

Mrs. RICE. Senator Kennedy, one point I'd like to make is that usually the document is not legal binding, but it is most important to the disputants. You know, we have a lady we got yesterday. We had her 2 years ago, and she still has her agreement. She brought it into court. So she is willing to deal with that in addition to what's happening at this particular point. People feel that it's really important to them when they sit there.

Senator KENNEDY. You think in this sense that is a more powerful factor than if it was legally binding or do you think they should be legally binding, too?

Mrs. RICE. I have kind of mixed feelings about that, I really do, Senator.

Senator KENNEDY. How about Mr. Drummond, do you have any feelings about having it legally binding if they agree to it? What's your sense?

Mr. DRUMMOND. I think so, yes. Another feature that I liked about it was when we left the mediation with the other parties, we all left in good faith. Prior to that we had hard feelings towards one another. But when we left the court it seems we left in good faith. We shook hands as a matter of fact, and since then I haven't had any problem.

Senator KENNEDY. I think that this might be somewhat different even from a court proceeding where there is a winner and a loser, and you may get a court decision, but you may not be shaking hands at the end of the resolution?

Mr. DRUMMOND. From the court, yes. This is what I liked about it, we left in good faith and it has been that way since.

Senator KENNEDY. Are you missing a day from work today, Mr. Drummond?

Mr. DRUMMOND. No, I'm working for Harvard University, and they are paying me. [Laughter.]

Senator KENNEDY. We will certify it was a long hearing. [Laughter.]

Mr. DRUMMOND. I have to be back at 12:30. Thank you very much.

Senator KENNEDY. Thank you very, very much. My thanks to all the panelists for their very helpful testimony.

Our final panelists will be John Saltonstall, representative of the Massachusetts Bar Association, chairman of the subcommittee on dispute resolution, Mr. Jeff Perlman of the U.S. Chamber of Commerce, and Eric Zwider of the New England Council. It's nice the see you again, John.

Mr. SALTONSTALL. Nice to see you, Senator.

Senator KENNEDY. We welcome you here, Mr. Saltonstall. Would you start off, Mr. Perlman.

PANEL OF BUSINESS EXPERTS:
STATEMENT OF JEFFRY PERLMAN, U.S. CHAMBER OF COMMERCE AND JOHN SALTONSTALL, MASSACHUSETTS BAR ASSOCIATION

Mr. PERLMAN. Thank you, Senator, good morning. On behalf of the National Chamber, the New England Council, which is a nonprofit organization designed to promote economic development in the northeast, its president, seated on right, Eric Zwider, and myself, I want to indicate our pleasure in supporting legislation designed to upgrade local and state small claims courts as well as mediation and arbitration procedures.

[The prepared statements of Messrs. Perlman and Saltonstall follows:]

PREPARED STATEMENT OF JEFFRY L. PERLMAN

I am Jeffry L. Perlman, associate director of consumer affairs for the Chamber of Commerce of the United States. On behalf of the National Chamber, I want to express appreciation for the invitation to testify on the Dispute Resolution Act of 1979.

The Chamber of Commerce of the United States is the world's largest business federation. Our membership is composed of more than 76,000 business firms, 2600 local and state chambers of commerce and 1200 trade and professional associations. Our interests in, and support of, the underlying concepts embodied in the Dispute Resolution Act represent our membership's desire to strengthen small claims courts and other consumer-business dispute resolution mechanisms,

In general, we support the Dispute Resolution Act which authorizes Federal assistance to local and State communities to improve their small claims courts procedures and informal complaint handling mechanisms. This legislation will provide individuals and businesses with forums for resolving consumer, business and interpersonal problems in an effective, expeditious, fair and inexpensive manner.

Further, the mandates of the bill are consistent with a recognition that to be effective these mechanisms must reflect the individual needs of the community. We are confident that this legislation will provide an incentive for states and local communities to reevaluate their existing minor dispute resolution mechanisms and to create new mechanisms and amend or eliminate old ones, according to their effectiveness.

However, we oppose any participation of the Federal Trade Commission (FTC) in this legislation. All determinations of criteria and eligibility should be made by the Justice Department. I am proud that, to a significant degree, the Dispute Resolution Act tracks the National Chamber's Model Small Claims Court Act and much of our consumer redress program, "Up With Consumers." The National Chamber will continue to assist business in developing company complaint-handling procedures, arbitration, mediation and conciliation mechanisms in their companies, trade associations and local communities. This is due substantially to the fact that the National Chamber, as a federation of business enterprises, local and State chambers of commerce and trade and professional associations, provides a singularly appropriate vehicle to implement activities designed to achieve these objectives.

The National Chamber has always believed the most effective way to resolve a minor dispute, be it between consumer and business, or personal, is through direct contact between the parties. Often, the disputing parties have an ongoing business or personal relationship. Avoiding the adversarial rigid posture of the courts is important to insure the continuance of that relationship. Unfortunately, not all disputes can be resolved directly between the parties. In those instances, the Chamber has recommended that the parties turn to mediation or arbitration procedures or other third party complaint resolution services. If formal adjudication of claims is necessary, swift and non-complex judicial procedures, such as small claims courts, should be broadly available at the local level. If the general public is to rely on our judicial system to handle the minor, as well as the serious problems, such judicial procedures must be fair, expeditious, accessible, effective, dignified and of minimal cost to the parties.

As I have indicated, the National Chamber has encouraged businesses and States to adopt similar consumer redress programs and to act quickly and effectively to solve existing problems. However, we recognize that in some instances, the Federal Government can play a constructive role in advancing useful programs. We know, for example, that in many parts of the country no procedure exists for effective resolution of minor problems without protracted litigation. For the last two years we have been attempting to promote new programs and revisions of existing procedures and small claims courts. Our field personnel have been involved with business and consumer groups around the country to establish a working relationship that would highlight the need for change in the current small claims court system. However, we have found in some instances that minor consumer problems—the redress of grievances or complaints involving goods and services—have taken a back seat at the State level to other pressing consumer needs, such as energy and inflation. Of course, we recognize the priorities that State legislatures must establish in order to complete their calendars within short legislative sessions. But, passage of legislation such as the contemplated bill will help States recognize the continual need of consumers to have these minor problems resolved.

The inability to obtain a refund or delivery of a product or service paid for may not appear to be of as great significance as solving energy or employment problems within a State. But, to the consumer who has been wronged, the need to obtain justice is of equal importance, and legislatures must be provided with the incentive to realize this. The proposed legislation will enable States to take immediate steps in this direction. Hence, we support the promotion of effective consumer redress through a cooperative functioning of public and privately-sponsored informal resolution mechanisms, which will make available to consumers more avenues of redress and, therefore, increase the speed with which satisfaction can be obtained.

The Dispute Resolution Act will assist programs which recognize that dispute resolution will be most effective when both public and private devices are utilized. Through its support of numerous procedures, the act recognizes that most companies will do anything within reason to amicably settle a dispute. This recognition will provide the necessary support for dispute resolution plans utilizing the talents and experience of consumers and businesses.

Unfortunately, as we have stated, for many persons, procedures for resolution of minor claims and disputes are unavailable or ineffective. Therefore, the development of informal dispute resolution mechanisms will encourage participants to resolve their differences quickly and inexpensively, without protracted litigation.

Some action by the States has taken place already. Kentucky, Michigan, Arkansas, and Texas have made favorable changes in their judicial systems. Other States have considered establishing consumer redress programs but have been unable to schedule hearings or move on the bills. Some States also have made changes through State administrative law. However, far too few have adopted such programs to date. With the incentive provided for in the Dispute Resolution Act, we expect the next State legislative sessions to result in the examination and establishment of better redress mechanisms on the State level.

At the outset, we noted the National Chamber's opposition to any involvement by the FTC. This legislation is intended to encourage local persons to solve local problems. It is a move away from big government. Since this bill will assist in creating local judicial and quasi-judicial procedures, it will not require assistance of the FTC, whose alleged expertise is in substantive rulemaking. Any Federal criteria should be set by the Justice Department.

Legislation such as this bill—a bill which transcends ideological lines and enjoys the support of the administration, consumer and business groups, as well as that of lawyers' groups and representatives of State and local governments—is a significant step in the right direction. This bill, in facilitating the establishment and improvement of informal dispute resolution mechanisms and small claims courts, with its careful restraints on government intervention and its reasonable price tag, ultimately may solve the problem of how to provide effective consumer redress.

Further, this legislation stands to spawn exciting new ideas not presently on the horizon. It should increase citizen participation in the judicial system through arbitration, mediation and similar devices. It will place people in forums they understand without subjecting them to the intimidation of a major court room confrontation.

The Dispute Resolution Act will benefit both the consumer and the business community. With the earlier caveat regarding the role of the FTC, we support the Dispute Resolution Act.

PREPARED STATEMENT OF JOHN L. SALTONSTALL, JR.

I appear here as chairman of the dispute resolution subcommittee of the Massachusetts Bar Association in response to your Chairman's suggestion that the Committee on the Judiciary would be pleased to have the Association's views in regard to the proposed Dispute Resolution Act.

I am happy to report that the board of delegates of the Massachusetts Bar Association, acting on the joint recommendation of its future planning committee and its dispute resolution subcommittee, voted at its last meeting to endorse the Dispute Resolution Act.

The subjects with which the proposed Dispute Resolution Act deals have long been matters of active concern to the Massachusetts Bar Association. Indeed the Association's Office of Delivery of Legal Services was specifically created more than a year ago as a focal point for many of these concerns. It is ably staffed and has the full cooperation of the Massachusetts Bar Association.

The dispute resolution subcommittee, of which I have the honor to be chairman, numbers among its distinguished membership several individuals who have already appeared before your committee today. It looks forward to working with your committee and with the Department of Justice in furthering the objectives of the proposed dispute Resolution Act and it desires to commend the initiative and imagination of your chairman and Senator Ford for producing this important legislation.

Speaking as a private citizen and not as a representative of the Massachusetts Bar Association, I would like to make a few suggestions in regard to the proposed Dispute Resolution Act:

First, the definition of the term "dispute resolution mechanism" in 3(d) of the act seems to me to be unduly restrictive. I would eliminate the reference to "courts of limited jurisdiction" because, many of the innovative programs whether of mediation or otherwise, which your committee is considering are now handled in courts of general jurisdiction. Also I would revise in the same definition the reference to "disputes involving small amounts of money." I recognize that the effort here may be to allay the fears of the organized bar as to possible loss of substantial business, but the chosen form of words may imply that the act will be primarily concerned with commercial disputes.

Second, the funding of $15 million per year authorized by section 7 of the act to provide grants to the several States, to units of local government and to nonprofit organizations may be inadequate to carry out the important purposes of the act.

Third, there may be a concern in some quarters that the administrative machinery contemplated by the act may in some way duplicate or overlap the LEAA machinery already in place. So perhaps it would be useful if the legislative history should indicate an intent to avoid such duplication.

Mr. PERLMAN [continuing]. We at the National Chamber feel particular pride in seeing this type of legislation developing strong support in the U.S. Congress. The chamber of course, and as the world's largest, has long been aware of the need for redressing consumer problems. Quick and satisfactory resolution of consumer problems is quite simply good business. Recognizing this need, the National Chamber 5 years ago put together our own consumer program entitled Up With Consumers.

Like this legislation we are discussing today, Up With Consumers envisions upgraded small claims courts as well as new and improved mediation and arbitration proceedings. In order to promote citizen participation, our small claims proposal incompasses many of the proceedings that would likely grow out of this legislation. We suggest

advisory panels, Saturday and evening court sessions, raising jurisdictional amounts which are often limited to $100 or $200, very small filing fees, limited use of attorneys, and like most of the earlier witnesses today have suggested, arbitration and mediation alternatives.

I'm proud to say that our program has been adopted at least in part in Kentucky, Arkansas, Texas, and very recently in Michigan. We hope that the impetus toward improved programs which is provided by your legislation will continue. We believe this legislation will greatly support local communities in offering justice to the so-called small problems as well as to the larger ones.

Further, we believe this legislation stands to spawn exciting new ideas not presently on the horizon. It should increase citizen participation in the judicial system through arbitration, mediation and similar devices. It will place people in forums they understand without subjecting them to the intimidation of a major courtroom confrontation.

The Dispute Resolution Act will benefit both the consumer and the business community. We support the Dispute Resolution Act. Thank you.

Senator KENNEDY. Mr. Zwider, would you like to comment?

Mr. ZWIDER. Yes, just a brief comment. This particular item is not an agenda item with our New England Council during its 1979 program. However, when Jeff called last week and indicated that the Chamber of Commerce of the United States agreed with something that you were doing, I had to come here and witness that. [Laughter.] To add our endorsement to it.

Senator KENNEDY. I'm trying to get you to come along on a few other things as well.

Mr. PERLMAN. We will do our best.

Senator KENNEDY. Trucking deregulation, for instance, the National Association of Manufacturers are way ahead of you fellows. Let me ask you, would you tell us about the areas or the types of disputes involving businesses which would not be amenable to resolution of disputes? Can you define the ones that do lend themselves to mediation?

Mr. PERLMAN. Well, Senator, I think as an earlier witness suggested, two points. First is I think one of the advantages in the bill that you have introduced is that it will offer the opportunity to get out and make these kind of studies and determine what may or may not be appropriate, but at the outset it seems to me that there's not necessarily any type of small business problem which wouldn't be amenable to resolution other than the types one of the witnesses I think suggested earlier, such as the case of a bad check.

Those problems which may occur in a business setting, but which are governed by fraud or other criminal laws, may or may not be appropriate to this sort of small claims court system. But I think we have to await, as the earlier witnesses suggested, fuller information.

Senator KENNEDY. Do you see the mediation process as being a legitimate way of resolving some of the consumer disputes and other disputes?

Mr. PERLMAN. Absolutely. I think and I hope that we can keep many of these disputes out of small claims courts. You need only look, I think, to Ford Motor Company, General Motors, Whirlpool, Sperry-

Hutchinson, and others who have begun these kind of procedures, mediation and arbitration. And while they are still at the early stages, they seem to be indicating tremendous success. If it can work for them, it certainly ought to be able to work in a local community setting where the people know one another.

Senator KENNEDY. How do you prevent the situation where Dispute Resolution programs become sort of a debt collection agency?

Mr. PERLMAN. Senator, I thought you were going to ask that question. I confess that I had a little help there. If I may, let me change the question to how do you encourage citizen participation in these programs.

Senator KENNEDY. Maybe you can answer that question and then answer mine. [Laughter.]

Mr. PERLMAN. I hope one will satisfy you. I don't think there are any guaranteed answers. Maybe the best way is working to create courts that are effective when they are used and believed in, and the public can then be substantially relied on to spread the word. I don't think this is going to happen overnight. We heard too many stories. Potential users of small claims court are aware of sitting for hours, waiting for a judge or having a judgment which the marshal never collects. I myself have been in that situation.

Also, I'm hopeful and confident that the local bar associations and other civic organizations, such as the New England Council, the local chambers of commerce will recognize their obligation to advertise a program if it's successful.

Further, I suspect that increased mediation and arbitration, which I suggested earlier, will lead to a growing public awareness of the possibility that these programs can work. Now, back in 1972, I grant you that it's already 6 years or 7 years back, the National Institute for Consumer Justice published a report that suggested that 75 percent of the Bostonians were unaware of the existence of a small claims court here.

Now, if you start out with only a quarter of the population knowing about the court, it's inevitable that few will show up in that court. In Philadelphia, that same report, related that 75 percent of the people who indicated any interest in small claims courts had problems with their filing or attendance hours. These were during the day. They were kept waiting for three-quarters of a day, lost $50, $60, $70 in pay, in order to recover a $35 judgment.

So we have got to first of all make sure that these type procedures are effective. If the Federal Government puts money in these things and then they flop, we are in a worse position than when we started. But if we can make them work, it's my feeling that the American public is smart enough to get the word around with a little assistance from the local bar associations, etc.

Now, just in answer to your first question, if this doesn't work, our Up with Consumer program has also included the suggestion maybe it would be possible to limit the court time of nonindividual claimants in the small claims court without giving any percentage at this point whether they could take 50 percent of the time or whatever. That may be a possible alternative also.

Senator KENNEDY. Mr. Saltonstall. One reason that is given for the fact that many citizens with disputes don't have the means of resolving them is the high legal cost.

Mr. SALTONSTALL. No question about it.

Mr. KENNEDY. It often times costs more to litigate than the matter in dispute is worth. Is there any identifiable cost-effective cutoff for litigation?

Mr. SALTONSTALL. Well, I think it depends a good deal on the area that you're talking about, the part of the country, whether it's rural or city, whether the lawyer is young or old, a few factors like that. But I would think that if the matter is worth less than, say, $2 or $3,000, it's not going to be worth litigating unless you have an extraordinary arrangement.

Now, it may be some day the use of paralegals will be sufficiently broadened and with the blessing of the court they will have limited participation, making things a lot cheaper. I think the use of paralegals is something that's very hopeful in terms of future reduction of legal expense.

Senator KENNEDY. Well, this is certainly a factor in the mediation process that's been described here. I think it offers a substantial sense of hope to a lot of people who fall below the $2,000 area and who can still get some degree of satisfaction. Given the type of report that was prepared by our distinguished group of jurists, the trial courts of the Commonwealth, the District Court Department, and the other testimony we have heard today, what is the bar association doing now to try and explore this further in other jurisdictions around the Commonwealth?

Does the bar have any role in doing this?

Mr. SALTONSTALL. Yes. I believe that we are backing legislation that would increase that kind of use of that kind of device, Mr. Chairman. I know that all of the people that I have talked to and all of the official pronouncements of the association that I have seen seem to agree with what Judge DiBuono and his colleagues have done in that regard. I think it's an important contribution.

Senator KENNEDY. Well, we want to thank you very much. I want to thank all of you. I appreciate your testimony very much. The committee will stand in recess.

[Whereupon, at 11:30 o'clock a.m., the hearing was adjourned, subject to the call of the Chair.]

ACCESS TO JUSTICE

TUESDAY, FEBRUARY 27, 1979

U.S. SENATE,
COMMITTEE ON THE JUDICIARY,
Washington, D.C.

The committee met at 10:40 a.m., in room 2228 of the Dirksen Senate Office Building, Senator Edward M. Kennedy, chairman of the committee, presiding.

Senators present: Senators Kennedy, Heflin, and Cochran.

Also present: Burt Wides, counsel; Richard Allen, counsel for Senator Heflin, and Henry Reumpler, counsel for Senator Cochran.

Senator KENNEDY. This morning we hold our second in a series of hearings on efforts to improve access to justice for all Americans. These hearings are part of the Judiciary Committee's broad, systematic inquiry into the present inadequacies and inequities in citizen access to civil justice.

OPENING STATEMENT OF SENATOR KENNEDY

Our Nation pledges its citizens equal justice under law, but that promise requires that all our citizens have adequate access to the halls of justice. Millions of Americans are denied that access. They are denied justice by swollen dockets and delay. They are denied justice by costs which they either cannot afford or which are disproportionate to their claim.

For these millions of Americans, the frustration of legal rights without any real remedy can only lead to a sense of injustice. It can only lead to corrosive cynicism with a legal system open to the rich and powerful, but not to them.

Full access to justice requires a system in which ordinary citizens can enforce their rights, a system which is fair, speedy, and humane, and one which they can afford.

Earlier today, we began confirmation hearings for what will be an unprecedented increase in the Federal judiciary. Their addition will be a major contribution to the availability of justice. Other measures now pending before the Senate or about to be introduced will also have a substantial impact. Even with these specific steps underway, however, the goal of access to justice for all citizens will remain an uncompleted task. It will continue to be a formidable challenge for each branch of government: for the courts themselves, for the Congress and for the executive. It presents a challenge to State and local governments, as well, to the private bar, and to the many other groups deeply involved in this effort.

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The continuing upsurge in Federal litigation will place strains on our Federal courts, even with the new judges and the auxiliary mechanisms to assist them resolve disputes.

This series of hearings the committee will hold throughout this session will look beyond the pending measures and try to focus on where we go from there. A fresh look is needed at the fundamental question of what should be the business of the Federal courts in the eighties and how that business can be most effectively conducted.

What kinds of cases should have first call on the limited resources of the Federal system?

Can new procedures be designed for at least some of those matters which will remain in Federal court, to permit their resolution more efficiently?

How should one assess the impact on the courts of proposed legislation which would create new causes of action?

Finally, the committee will review the state of access to justice in State and local courts. With due regard for the concerns of federalism and the more limited role for the Federal Government in this sphere, the committee will consider what additional leadership and assistance Congress can provide in such areas as the delivery of legal services and the cost of litigation.

These issues are intricate and interrelated. The committee will seek the views of jurists, practitioners, scholars and other interested parties to determine what additional areas are appropriate for congressional action.

The committee will try to identify the priority lines of inquiry, to learn where more information is needed, and to determine what specific questions must be answered before we proceed to resolve those issues.

We must keep in mind that our ultimate goal is improving access to justice. This means more than deciding what can be moved out of the courts to other arenas or how litigation can be made more efficient: We must not become preoccupied with streamlined procedures for their own sake. We must be concerned with the results. What is the impact of each reform on protection of individual rights, on perceptions of fairness, and on the quality of the product in the way disputes are resolved? In short, we must carefully weigh the criteria by which we assess proposed changes in our system of justice.

Today we will hear from the American Bar Association and I am pleased to welcome the distinguished president of the association, Mr. Shepard Tate, and his colleagues. Mr. Tate has taken a very active role in providing leadership in all aspects of the association's work to improve access to justice, both civil and criminal justice, particularly in his support for alternative forms of small dispute resolution and a national defense services center to assure counsel in criminal cases.

Senator Metzenbaum.

OPENING STATEMENT OF SENATOR METZENBAUM

I'd like to add my welcome to the distinguished president of the American Bar Association, Mr. Tate, as well as to Mr. Johnson, Mr. Zelenko and Mr. D'Alemberte, able chairmen of three ABA committees.

Mr. Chairman, citizen access to justice is a matter of urgent concern to us all. Crowded court calendars and technical judicial barriers frequently frustrate thousands of Americans who seek redress of their grievances through the courts.

Shortly, I will be introducing 2 bills designed to enhance access to justice for the ordinary citizen who has found it increasingly difficult to file a lawsuit in Federal courts. I believe these measures will go a long way toward meeting the President's commitment to improving citizens access to the courts.

We all know that Federal courts have become overburdened in recent years due to an ever-increasing caseload. Increasingly, this has resulted in the development of judicial policies which greatly restrict citizens access to the courts. While I support the need to reduce the tremendous caseload that impairs the effectiveness of our Federal court system, I believe the right of all citizens to obtain judicial redress must not be compromised. Taken together, the two bills I will be introducing will significantly reduce the caseload of Federal judges while at the same time reopening the courtroom doors to certain citizens who have been the victims of several recent Supreme Court decisions which unfairly deny them access to courts.

The first bill, which is cosponsored by the chairman of this committee, will transfer approximately 25 percent of the Federal caseload to State courts by abolishing Federal court jurisdiction based on diversity—a transfer which is desperately needed to unclog the dockets of virtually every Federal court in the country. The legislation would also abolish the amount in controversy requirement for Federal question cases. Thereby permitting any citizen who wishes to do so to litigate his or her Federal claim before a Federal court. These changes are strongly supported by the chief justices of the 50 States and the Judicial Conference of the United States.

The second bill is designed to strengthen the right of citizens to contest unlawful government actions in the Federal courts.

Recently, in response to their backlogged dockets, Federal courts have been narrowing the class of persons entitled to sue by imposing an overly restrictive definition of "standing." When a plaintiff is dismissed for lack of "standing" this means that his or her case is thrown out of court without any consideration whatever of the merits.

Last session Justice Douglas, in testimony before this committee, strongly criticized this trend:

> [T]he American dream teaches that if one reaches high enough and persists, there is a forum where justice is dispensed. I would lower the technical barriers and let the courts serve that ancient need.

The legislation I will introduce with Senators Kennedy and Ribicoff seeks to eliminate certain barriers to "standing" that have prevented Federal courts from hearing meritorious citizen complaints against illegal or unconstitutional governmental action.

In short, this legislation recognizes that citizen access to the Federal courts to redress unlawful governmental action is essential to the democratic process.

It is our hope that these two bills, along with the major court reform package Senators Kennedy and DeConcini will be offering this week, will make our Federal court system more efficient and responsive to the needs of all citizens.

PANEL OF ABA REPRESENTATIVES:

STATEMENT OF S. SHEPHERD TATE, PRESIDENT, AMERICAN BAR ASSOCIATION, ACCOMPANIED BY THOMAS JOHNSON, CHAIRMAN, CONSORTIUM ON LEGAL SERVICES AND THE PUBLIC, ABA; BENJAMIN ZELENKO, CHAIRMAN, SPECIAL COMMITTEE ON COORDINATION OF FEDERAL JUDICIARY IMPROVEMENTS; AND TALBOT D'ALEMBERTE, CHAIRMAN, SPECIAL COMMITTEE ON RESOLUTION OF MINOR DISPUTES, ABA

Senator KENNEDY. Mr. Tate will introduce his colleagues, but I note that Mr. D'Alemberte, who is here, testified at our first hearing a few weeks ago in Boston on alternative mechanisms for dispute resolution. Mr. Tate has a very comprehensive statement which we will make part of the record, involving both civil and criminal justice issues. We will look forward to your testimony.

[The prepared statement of Mr. Tate follows:]

PREPARED STATEMENT OF S. SHEPHERD TATE

I am S. Shepherd Tate, a practicing lawyer from Memphis, Tennessee, and the current president of the American Bar Association. It's a pleasure to appear before you today to contribute to the important mission upon which you are embarking with this hearing—the exploration of potential ways to improve access to justice. Many components of our association deal with aspects of this subject, and I am pleased to be accompanied today by the chairmen of three of them: Thomas Johnson, of Rockford, Illinois, chairman of the consortium on legal services and the public; Benjamin Zelenko, of the District of Columbia, chairman of the special committee on coordination of Federal judicial improvements; and Talbot D'Alemberte, of Miami, Florida, chairman of the special committee on resolution of minor disputes, who testified at your hearing in Boston 2 weeks ago.

In 1906, Dean Roscoe Pound, then a young Nebraska lawyer, delivered his historic address on "The Causes of Popular Dissatisfaction with the Administration of Justice" at the 29th Annual Meeting of the American Bar Association. In the course of his remarks, he stated, "Our administration of justice is not decadent. It is simply behind the times. * * *" It seems appropriate that you, Mr. Chairman, as you begin your stewardship of the Judiciary Committee, and we, as the association begins our second century of existence, should take a broad look at the administration of justice and seek to ensure that our justice system is indeed up with the times and meeting this Nation's needs.

The subject we address today is enormous, and our treatment of it here necessarily must be cursory. Its enormity is demonstrated by the fact that almost 80 years after Pound's speech, when a 5,000 member organization has grown to 250,000, we are still struggling for answers.

To begin, I would like to outline three components of the access to justice theme and discuss our association's involvement in each: access to legal services, access to courts, and access to innovative techniques for dispute resolution, including nonjudicial approaches. All three, of course, are relevant to both Federal and State justice systems.

I. ACCESS TO LEGAL SERVICES

The civil legal needs of the poor in this country have received considerable attention and support from Congress in recent years. A legal services program which was held at an inadequately low level of funding for 5 years has finally begun to receive the financial support it needs. Nevertheless, at the end of the current fiscal year, there will still be almost three million indigent citizens resident in areas which have no formal legal services programs of any kind. The administration's recommended budget figure for the Legal Services Corporation for fiscal year 1980 appears inadequate to assure even minimum access to legal services in these areas. The ability to have one's legal rights vindicated should

not depend on the vagaries of geographic location. Adequate funding to ensure the completion of the corporation's "minimum access" goal in the coming year should be a high priority.

While a system has been established for addressing the civil legal needs of most of the poor, an indigent accused of criminal conduct finds, all too often, despite the assurance of the sixth amendment and a long line of Supreme Court decisions, that he has no effective legal voice to represent him.

The majority of all persons who pass through our criminal courts each year require the appointment of counsel. In many metropolitan areas, the percentage of such persons runs as high as 80 to 90 percent. Yet the public funds devoted to providing defense services have been grossly inadequate, amounting nationally to only about 1½ percent of total criminal justice system expenditures. Society's failure to provide adequate defense services contributes to miscarriages of justice, court congestion and delay at both the trial and appellate levels, multitudes of petitions alleging ineffective representation, and expensive retrials to correct prejudicial errors made at trial.

The American Bar Association has recommended that the Federal Government assume its share of the responsibility for implementing the sixth amendment guarantee of the right to effective assistance of counsel by establishing a Center for Defense Services to supplement the efforts of State and local defense programs. The center would provide training services, research assistance, and financial support for State and local efforts on the criminal law side of our justice system. Such a Federal initiative is long overdue, and we encourage this committee to study closely this innovative recommendation.

The private bar, of course, plays a substantial role in meeting the legal needs of the poor through pro bono contributions of time, talent, and service. A recent ABA "Law Poll" survey of lawyers in this country revealed that 60 percent contribute of their time to provide public interest legal services; that two-thirds of those making such contributions do so in the poverty law area; and that the median number of pro bono hours contributed by those who make such contributions is in the 70 to 80 hours per year range. While much is being done voluntarily by the private bar, we are striving to encourage even greater contributions by lawyers. But it is impractical and inappropriate to think that constitutional rights and national needs of the kinds we are discussing here can or should be met by the part-time volunteer efforts of one profession. A public responsibility requires a public commitment.

There are many in our society who are not within traditional poverty guidelines, and yet find it difficult or impossible financially to make their views heard when important societal decisions affecting their lives are made. For example, many citizens and groups have valuable contributions to make in Federal administrative agency proceedings, but cannot afford the required time or money. Hence, to the disadvantage of the public, they do not participate.

Legislation such as that to facilitate public participation in agency proceedings, introduced by you, Mr. Chairman, in the 95th Congress as S.270, would make such involvement possible. We support the principles of this legislation and anticipate working with you on it.

The same logic—that is, the need to assist those with important public policy concerns to obtain their resolution through appropriate legal channels—has caused us to advocate a limited form of fee-shifting in the courts. We favor limited, carefully drawn legislation permitting a court to award fees to a prevailing private party, in litigation with the Federal Government, when two conditions are met: (1) The action results in a substantial public benefit or the enforcement of an important public right, and (2) the economic interest of the party is small in comparison to the cost of effective participation, or the party does not have sufficient resources adequately to finance the litigation. Translating such principles into workable legislation will not be without its difficulties, but we believe the effort should be made.

There are occasions when citizens lack an effective voice because they find themselves in an institutional setting where a pattern or practice of deprivation of their constitutional rights may occur. S. 10, the rights of the institutionalized bill, would permit the Attorney General of the United States, in carefully defined circumstances and with appropriate safeguards, to bring actions or intervene on behalf of such citizens. This legislation would afford access to those occasional but egregious cases where severe institutional abuses occur.

At the association's midyear meeting in Atlanta earlier this month, we approved a recommendation that the Supreme Court appoint counsel to represent

indigents seeking Court review of State court convictions, or seeking post-conviction or clemency remedies, in death penalty cases, and that the Criminal Justice Act be amended to provide for compensation of appointed counsel in such cases. The act currently permits compensation of counsel for only the first level of post-conviction appeal, and many indigents find themselves seeking review of such convictions before our highest court without the benefit of counsel.

Reform of the grand jury system, which we favor in a number of particulars, is another essential means for providing access to legal services. For example, witnesses appearing before grand juries should be entitled to have legal counsel present. The Supreme Court has declared that defendants are entitled to counsel at virtually every stage of a criminal proceeding, and a grand jury proceeding is certainly a crucial stage in the criminal justice process, especially for a target witness.

Finally, in the area of access to legal services, the profession has moved in recent years to facilitate access to attorney services in ways which do not involve congressional action. In addition to efforts the pro bono area, the association has substantially amended its Model Code of Professional Responsibility to expand greatly the types of advertising which attorneys may employ; has encouraged the use of institutional advertising by bar associations to make citizens more sensitive to whether they have legal problems requiring counsel; and has been a leading force in seeking to increase the availability of prepaid legal services plans for the middle-class citizen.

II. ACCESS TO COURTS

Access to the courts may be improved in a variety of ways: increasing the number and quality of the personnel; increasing efficiency; streamlining procedures to reduce both costs and delays; and diverting selected matters from the courts, thereby affording greater access with respect to those that remain.

Last year, Congress responded to the deficiency in the number of Federal judgeships by passing the Omnibus Judgeship Act with its merit selection provisions. The President, the Attorney General, and this committee are now embarked on the demanding task of processing the nominations for the 152 new judgeships. The 8-year gap between the last increase in judgeships and this one, however, created problems which threaten to recur if some change is not made in the process. The Congress should develop some system for more frequently reviewing the needs of the Federal judiciary, and addressing them.

We have been fortunate in this country that the Federal bench has attracted highly qualified members of the bar, and our association has been pleased to be of assistance to the President and the Senate in evaluating candidates for judicial office. To ensure that this quality will not be diminished or diluted, we need to select our judges solely on the basis of rational and articulated standards of merit. But we also need to concern ourselves with the problem of disciplining those few judges who do not live up to the standards we expect of our judiciary. The American Bar Association supports the establishment of a mechanism other than impeachment for dealing with the problems of unfit judges and ensuring that they will not affect adversely the interests of justice. Access to a court is no access at all if a judge cannot or will not properly perform his or her role in the judicial process.

Our association has also favored the creation of a new Federal court, the National Court of Appeals, to assist with the growing Supreme Court docket. Unlike some of the proposals which have been suggested for such a court, we do not favor a system which would result in denying access to the Supreme Court by making the new court the final arbiter of certain cases. We also do not support, at this time, proposals to permit the transfer of cases from circuit courts of appeals to the new court, believing that it is desirable to have issues percolate in the lower courts before a national resolution is reached.

We do believe, however, that a national court of appeals to which the Supreme Court could refer cases would permit substantially more cases to be decided on the merits by a national court. An important factor in our support of such a new court is that the Supreme Court would both create the docket for the new court and retain the power to review any of its decisions.

Legislation which would substantially increase access to our judicial system passed both Houses of the 95th Congress, and died in the adjournment rush at the end of last year. I refer to S. 1613, a bill to increase the civil and criminal

jurisdictions of U.S. magistrates, and to upgrade the magistrates' corps. As reintroduced and pending with this committee, the legislation will empower magistrates to try any civil action, with or without a jury, if the parties consent. Criminal jurisdiction of magistrates would also be somewhat expanded. This legislation is a partial answer to the access problem, especially in those districts where delay is so severe, as to constitute for some litigants, a deprivation of access.

One cannot address the question of access to the courts without referring to legislation to curtail or eliminate the diversity jurisdiction of the Federal courts. To transfer the diversity caseload to State courts does not improve access overall. In many areas of the country, State dockets are more clogged than Federal dockets. The situation in the Federal courts will be improved further when the 117 Federal district judgeships just created have been filled. Further, despite protestation to the contrary, local prejudice does continue to exist, and availability of a Federal forum can minimize its effect. Finally, our association and many other bar associations throughout the country are convinced that continued diversity jurisdiction will promote migration of ideas between the State and Federal systems, with resultant improvements to the advantage of litigants in both.

Let me call to your attention three additional areas which warrant congressional attention in relation to efforts to improve access to our courts.

For some time now, the association has supported elimination of statutorily created priorities for the calendaring of cases in the Federal courts. These have grown piecemeal and do not necessarily give priority to the most important matters. Further, the priorities are often conflicting. We are convinced access will be substantially improved if the courts can control their calendars.

At our Atlanta meeting this month, the associaation also supported legislation to abolish obligatory Supreme Court review by appeal, except for appeals from determinations by three-judge courts. This change would permit the justices of our highest Federal court to exercise their judgments in selecting those cases which are of greatest importance to our citizenry.

The issue of court priorities is also of growing concern as a result of the Speedy Trial Act and its implementation. In at least one Federal court, the Act has resulted in an almost total denial of access for those with civil cases. Established as a means of assuring that a defendant's constitutional right to a speedy trial would not be abridged, it has drawn sharp criticism even from the defense bar, which has argued that the act does not permit adequate time to prepare for trial. Our association supported enactment and is studying what, if any, amendments should be considered. Although not prepared to make recommendations at this time, it does appear that the grave impact of the act on access in both civil and criminal matters warrants congressional attention.

Three more areas in which the association has recently devoted substantial resources to improving the operations of the courts and the justice system should be mentioned. First, the association's section of litigation undertook a study a few years ago of abuses in discovery. The result was a detailed report spelling out a variety of ways in which this pretrial process could better serve its functions of narrowing the scope of legal and factual issues to be resolved at trial, rather than being used as a tool for harassment and delay.

The other two projects are just now coming into existence. They are projects developed by our president-elect, Leonard S. Janofsky of Los Angeles, as a major focus during his year as president. The first, and the one of greatest relevance to your deliberations today, is the project to reduce court costs and delays. The project is premised on the realization that many citizens and groups are effectively barred from the courts by the high cost and delays in litigation and, therefore, often must live with losses which the law might recompense. Our association is determined to demonstrate that the court system can be made to work for the average citizen and has launched a 5-year, $1.6 million program, to do the following: Review existing judicial reform efforts which seek to reduce litigation costs and delay; select for implementation various model programs for changes in the courts; encourage experimentation with new ideas where appropriate; work with all judicial reform groups to bring about actual implementation of various approaches; and continually monitor, evaluate, and report on these efforts. An action commission, under the able leadership of Seth Hufstedler, a former president of the California state bar, is already in place.

The other project, which is now in final planning stages, would develop and test a model program for the teaching of non-trial skills for lawyers and would seek to make such a program accessible to virtually all lawyers in the country. Modeled on the highly successful programs of the National Institute of Trial Advocacy, which emphasize "do-it-yourself" teaching techniques, the project offers the promise of enabling lawyers to improve their skills in client counseling, negotiation, legal planning, drafting documents, and other areas which will directly benefit the consumer of justice, the client, and will favorably impact on court congestion and access.

While neither of these projects is dependent upon or calls for Federal legislative activity at this time, these efforts in the private sector are obviously steps toward the achievement of our common objectives, and the commission expects to develop legislative recommendations for congressional consideration.

III. INNOVATIVE TECHNIQUES FOR DISPUTE RESOLUTION

While seeking to improve access to lawyers and the courts, we are exploring, as you are, the use of legal processes which may not involve either lawyers or the courts. It is possible, of course, to minimize or eliminate the need for such processes by statutorily simplifying certain legal relationships—for example, by decriminalizing certain offenses, or by simplifying probate laws. My comments here, however, will not deal with such substantive changes in the law, but rather with innovative processes for resolving disputes.

In 1976, our association cosponsored a conference in St. Paul, Minn., on the 70th anniversary of Roscoe Pound's address to which I have previously referred. The conference sought to address two principal topics: "What types of disputes are best resolved by judicial action and what kinds are better assigned to another more appropriate forum?", and "Can the interest of justice be better served with processes less time-consuming and less expensive?" The conference discussions led to the appointment of a "Pound Conference Follow-up Taskforce," under the chairmanship of then Judge Griffin Bell. In August 1976, the task force published a report with numerous recommendations for justice reform. Rather than detail those recommendations in my testimony, I would like to submit a copy of that report for inclusion in the hearing record.

Among the principal recommendations contained in the report are that a variety of innovative dispute-resolution techniques be explored: arbitration, mediation, revitalized and expanded small claims courts, and a new concept called a "neighborhood justice center." When Judge Bell assumed the post of Attorney General, one of his first actions was to implement the last recommendation by establishing three such centers.

But much more experimentation, analysis, and refinement needs to be undertaken. The 50 States and local jurisdictions should be encouraged to try a variety of means for assisting our citizens to achieve prompt and fair settlement of their problems, whether within or without the formal judicial system. A major vehicle for doing so would be the passage of the proposed Dispute Resolution Act, S. 423, sponsored by you, Mr. Chairman, Senators Bayh and Metzenbaum of this committee, and others. At your hearing in Boston 2 weeks ago, you heard from Mr. D'Alemberte and Professor Frank Sander of our special committee on resolution of minor disputes about our views and work in this area, and I shall only reiterate here our strong support for passage of this legislation.

The experimentation with neighborhood justice centers and other techniques for improving access to justice should not be viewed as a one-time affair. A structure or mechanism for conducting an ongoing national program of research and experimentation in improving the justice system in all its aspects, including alternative dispute resolution approaches, should be established by the Federal Government. Such a program offers the promise of returning large dividends to society for a very modest investment. We have recommended that a national institute of justice be established to perform such a role. We are pleased that the administration's LEAA reform bill reflects such a concept, although we continue to believe that the national institute of justice should be fully independent and not housed within the Department of Justice.

We understand that your committee will be holding hearings on many of the specific issues we have touched on briefly today, and we would welcome opportunities to work with you and testify in more detail on these matters.

In conclusion, I would like to quote a passage from the Report of the Pound Conference Follow-up Taskforce:

> It is important to keep firmly in mind that neither efficiency for the sake of efficiency, nor speed of adjudication for its own sake are the ends which underlie our concern with the administration of justice in this country. The ultimate goal is to make it possible for our system to provide justice for all. Constitutional guarantees of human rights ring hollow if there is no forum available in fact for their vindication. Statutory rights become empty promises if adjudication is too long delayed to make them meaningful or the value of a claim is consumed by the expense of asserting it. Only if our courts are functioning smoothly can equal justice become a reality for all.

I would only add that we are committed to achieving the objectives of this quote, not only as they apply to the courts but to the many other access issues we have discussed today.

Thank you, Mr. Chairman and members of the committee. My colleagues and I would be pleased to respond to any questions you may have.

Senator KENNEDY. Mr. Tate?

Mr. TATE. Mr. Chairman and members of the committee, I am S. Shepherd Tate, a practicing lawyer from Memphis, Tenn., and the current president of the American Bar Association. It is a pleasure to appear before you today to join with you in exploring potential ways to improve access to justice. Many components of our association deal with aspects of this most important subject, and I am pleased to be accompanied today by the chairman of three of them: On my far right, Thomas Johnson, of Rockford, Ill., chairman of the consortium on legal services and the public; on my left, Benjamin Zelenko, of the District of Columbia, chairman of the special committee on coordination of Federal judicial improvements; and Talbot D'Alemberte, of Miami, Fla., chairman of the special committee on resolution of minor disputes, who testified at your hearing in Boston 2 weeks ago.

In 1906, Dean Roscoe Pound delivered his historic address on "The Causes of Popular Dissatisfaction with the Administration of Justice" at the 29th annual meeting of the American Bar Association. In the course of his remarks, he stated, "Our administration of justice is not decadent. It is simply behind the times."

Seventy-three years later, we find ourselves wrestling with many of the same issues which disturbed Pound and his contemporaries. We have made much progress since 1906, but I do not worry that either your committee or our association will find itself lacking important work to do in the foreseeable future.

In my written testimony, I have touched upon many "access" issues of concern to us. I will not reiterate that testimony here, but rather, will touch upon some of the more important issues and problems. These include: One, the costs of litigation are too high; two, delays in the courts are too long; three, legal services are not uniformly available; and four, alternatives to traditional ways of resolving disputes are only beginning to be explored.

These problems and issues exist on both the civil and criminal sides of our justice system, and it is difficult to deal with one side without dealing with the other. I have discussed in my written testimony several access issues in the criminal law area, and, as just mentioned by the chairman, this includes the ABA proposal for a Center for Defense Services, which proposal was unanimously adopted just 2 weeks ago by

our house of delegates at its meeting in Atlanta, Georgia. And this is a priority with our association.

I now understand that your primary interest today, however, is in the civil side, and so I will confine my oral remarks to the civil sector, asking, however, that my written statement be included in the hearing record.

The first general category of access issues I will mention is access to legal services. While some steps have been taken to remove lawyers from certain dispute resolution processes, the services of a lawyer are needed in most such situations, and the lack of access to an attorney can and often does translate into a lack of access to justice. Great strides have been made in the last 15 years in making legal services available to middle income and poorer citizens. The legal profession, which a former president of our association characterized as the last of the great cottage industries, has finally begun to have its industrial revolution.

Prepaid legal services, standardized forms and automated equipment, storefront legal clinics, the use of paralegals, relaxations of ethical rules regarding advertising, government funding of poverty law offices, computerized legal research—all these have contributed to making legal services much more widely available than before, and we are continuing to try to augment such efforts.

We are also seeking to improve lawyers' competence to represent clients effectively by developing model programs for the teaching of trial and nontrial skills of lawyers and by making such programs accessible to virtually all lawyers in the country. There are matters now pending before Congress which, if acted upon favorably, can give a real boost to the availability of legal services: First, legislation like S. 270, your bill of the last Congress, Mr. Chairman, to encourage public participation in agency proceedings. Second, legislation permitting limited fee-shifting in the courts where substantial public benefits and public rights are involved. Third, the rights of the institutionalized bill, which would provide Department of Justice representation for those in institutions who have suffered a severe deprivation of rights. And fourth, increased appropriations for the Legal Services Corporation, which financially still cannot provide even a minimum level of legal services in every part of the country, and still will not be able to do so in fiscal year 1980 unless a larger appropriation than that recommended by the President is granted.

A second broad area is that of access to courts. We have been made painfully aware that many citizens and groups are effectively barred from the courts by the high cost and delays of litigation, and therefore often must live with losses which the law might recompense.

Our association is determined to demonstrate that the court system can be made to work for the average citizen and has launched a 5-year, $1.6 million program to do the following: Review existing judicial reform efforts which seek to reduce litigation costs and delay; select for implementation various model programs for changes in the courts; encourage experimentation with new ideas where appropriate; work with all judicial reform groups to bring about actual implementation of various approaches; and continually monitor, evaluate and report on these efforts.

While this project is focusing on State courts, we expect it will yield results applicable to the Federal courts as well.

Our section of litigation also completed recently a study of the discovery process and has made a number of recommendations for cutting down on abuses in the process which add unduly to the length and cost of proceedings.

There are a variety of ways in which Congress can improve access by increasing the capacity of the Federal courts to respond to citizen claims: First, by reviewing more regularly the need for additional Federal judgeships; second, by creating a national court of appeals, with reference jurisdiction only and with the Supreme Court having control of its docket and the ability to review any of its decisions; third, by eliminating statutory priorities for court calendars, which, while well-intentioned, have created havoc with the dockets of many district courts; fourth, by eliminating the obligatory appeals jurisdiction of the Supreme Court; fifth, increasing the jurisdiction of Federal magistrates; sixth, by providing a means other than impeachment for dealing with the problem of unfit judges, and seventh, by preserving the right of citizens to gain redress in the Federal courts in diversity of citizenship cases.

While we believe that the courts can be made to work for the average citizen through improvements such as these, we also believe that many disputes could be handled effectively through innovative, creative techniques. Experimentation with such means of dispute resolution has accelerated in recent years with the establishment of three Neighborhood Justice Centers by the Department of Justice and with new uses of arbitration, mediation and small claims courts, but much more needs to be done, and it is perhaps in this area that the most notable achievements in access can be brought about.

The 50 States and local jurisdictions should be encouraged to try a variety of means for assisting our citizens to achieve prompt and fair settlement of their problems, whether within or without the formal judicial system. A major vehicle for doing so would be the passage of the proposed Dispute Resolution Act, S. 423, sponsored by you, Mr. Chairman, Senators Bayh and Metzenbaum of this committee, and others. At your hearing in Boston 2 weeks ago, you heard from Mr. D'Alemberte and Professor Frank Sander of our special committee on resolution of minor disputes about our views and work in this area, and I shall only reiterate here our strong support for passage of this legislation.

The experimentation with Neighborhood Justice Centers and other techniques for improving access to justice should not be viewed as a one-time affair. A structure or mechanism for conducting an ongoing national program of research and experimentation in improving the justice system in all its aspects, including alternative dispute resolution approaches, should be established by the Federal Government. Such a program offers the promise of returning large dividends to society for a very modest investment.

We have recommended that a national institute of justice be established to perform such a role. We are pleased that the administration's LEAA reform bill reflects such a concept, although we continue to believe that the national institute of justice should be fully independ-

ent and not housed within the Department of Justice. I have touched only very briefly on a host of issues, Mr. Chairman. They, and others are dealt with more extensively in the statement I have filed. My colleagues and I would welcome any questions you may have.

Senator KENNEDY. Thank you very much.

Your complete statement will be inserted in the record.

Mr. TATE. Thank you.

Senator KENNEDY. In your first category—access to legal services—you have put out a very strong statement, and you made some very noteworthy observations.

The ABA Consortium on Legal Services, which Mr. Johnson chaired, reports that research by the bar, and I quote:

> Disclosed a gap amounting to a chasm between reality and the ideal in the average citizen's access to needed legal assistance.

In the case of the poor, the consortium concluded that their legal needs, civil as well as criminal, still greatly exceed presently available resources. You indicated that funding for the legal services corporation proposed by the administration would be inadequate to provide even a minimal level of services in every part of the country. Your written statement notes that at the present time there are still almost 3 million indigent persons residing in areas which have no minimum legal services program.

Now, the Legal Services Corp. defines minimum coverage as at least two lawyers in the legal service-type program for every 10,000 citizens. That is a truly minimal standard. We have 3 million indigent Americans without even that, and I suppose there are in fact numbers of others, migrants and some of the illegal aliens that are here.

What do you think would be an inadequate funding level for the legal services program?

Mr. TATE. Mr. Chairman, we understand that the administration is talking about $291 million this next fiscal year, and the Legal Services Corporation has made a request for $337.5 million, and we support that request.

As you well point out, there are many areas where there is no or very little representation, and for the most part this is based on geography. These areas are usually the small towns or entirely rural areas, whereas so often the big cities have the legal services support.

Senator KENNEDY. From your own estimate, even if that was provided, would that meet the need, if they got full funding?

Mr. TATE. It is our opinion this would meet it, the "minimum access" goal, because then it would give greater services to the areas that are not being taken care of now because of geographic location. We think geography should not be the problem, and there should be more money to provide services in these areas, not just in the big cities.

Senator KENNEDY. Given the kind of pressures that are going to be on the Congress in terms of budget, what are the alternatives? What can be done in the States and local communities? What can be done by the bar association and others? We are talking in terms of realities, of what will probably be appropriated. Realistically, I would think it would be difficult to get the full amount you have described here as the request of the Legal Services Corporation. So we are going to have a shortfall, and we are going to be talking about probably millions who are going to be denied minimal type of services. So what should we expect from states or local communities?

Mr. TATE. Mr. Chairman, I think you will find that more and more state and local bar associations, and the lawyers there, are doing increased pro bono work. One of the facets of this is in the legal services area for the indigent. We have found this to be true, too, in the study that we have made on the need for the center for defense service, where we believe that there is a public responsibility, even though many of the lawyers are doing pro bono work.

Senator KENNEDY. Is that true in these rural areas we were discussing, the places that you have identified as the areas of most important need? I mean, is there a compensating factor of increased pro bono work in those areas or is the increase in pro bono work being undertaken in the areas where there may be more accessibility to legal services?

Mr. TATE. I think that first statement of yours is correct. We had an ABA "Law Poll," which sent out a survey to the lawyers of the ABA, and we found that 60 percent contribute their time to pro bono, and of this 60 percent two-thirds of them were doing it in the area of legal services for the poor.

We think that this should be increased, and this is something I have been quite interested in as president of the ABA.

Senator KENNEDY. How did this vary over the period of the last 3 to 5 years?

Mr. TATE. I do not know that we had a poll or survey, and we do not have the empirical data. We are still trying to get more and more, as we go along, from the various local and State bar associations, through the surveys we made. We hope to have this a continuing sort of survey.

Senator KENNEDY. Did you make a special effort to try to find in the surveys where there is a shortage of legal services? Did you try to distinguish between them and areas well-served, or did you just sort of make a broadly stated policy?

Mr. TATE. I think the latter. I think it is a broad stated policy. This is something that our model code of professional responsibility demands of every lawyer, and we urge that they do so, on the thought that they will get personal satisfaction out of doing it while benefiting the public.

I am not one in favor of mandatory pro bono. I'm absolutely against that, and I think the satisfaction comes out of doing the job and being able to do it well. So we encourage it, and we have got the public interest.

Senator KENNEDY. Certainly the satisfaction for the lawyer.

I suppose the other side is the person that is not getting services. I suppose they are not getting much satisfaction without any services.

Mr. TATE. That is right. That is why we want to see this access improved in this way, by greater services, not only from——

Senator KENNEDY. What suggestions do you have for us outside of just additional appropriations? Given the general sort of climate and mood, given the kind of problem that you have been able to identify, what can we expect?

Do you think this is something that is going to have to be left to the bar associations, local and State bar associations? Do you have any suggestions to us about what we can do, other than more money, appropriate more money?

Mr. TATE. Do you have in mind only in the poverty areas or overall?

Senator KENNEDY. I mean specifically on the 3 million indigent persons residing in the areas. We will come to some of the other things that can be done for moderate income persons. But in terms of access to legal services for the poor, those that are being excluded, what can be done?

Mr. TATE. Well, as I say, each of the members—250,000 members of the ABA—are encouraged to do more pro bono work in this particular area, and this is something each of the bar associations are doing. Some of them have kind of a checkoff arrangement so that you can check off your bar dues, to say that you would like a portion of your bar dues to go into some particular endeavor to help in pro bono areas. Others allow you to put in an extra amount of money in case there is something that you would like to see done and you might not have particular expertise in the field that they are working on. So the lawyers are encouraged in this.

Senator KENNEDY. Well, that is an imaginative program, I mean, the checkoff. There is a dollar checkoff at elections, and quite frankly, I think it has made some difference in terms of the participation.

Mr. TATE. We are trying to get broader participation all through the bar.

Senator KENNEDY. That is being encouraged and supported? Are you getting responses on that?

Mr. TATE. That is done, Mr. Chairman, basically, on local and State levels, rather than through an ABA national program. We are encouraging any sort of innovative techniques or mechanisms that can be done in local and State bars to have more involvement, to have people provide more pro bono services to those who cannot pay, the indigent.

Senator KENNEDY. Could we talk just a little bit about the prepaid legal services program, the ABA's efforts to increase the availability for these programs, and improved legal insurance for the citizen. Maybe you could tell us just a little bit about what the data suggests about the prepaid programs, whether they are likely to be able to take care of unmet needs for legal services of people of moderate income.

We are particularly interested in the senior citizens, people who are just outside of the level of being eligible in terms of the legal services program. Many of the elderly people on retired income are virtually excluded, and yet I think, as all of us would understand, elderly people have as much of a problem or difficulty in terms of pursuing their legal interests, particularly after they have reached 65 and retired, as any other group. I am just interested in what your record shows on it.

Mr. TATE. I might say with respect to the elderly, that this is one of the things I have been quite interested in as president. And we have just appointed a blue ribbon commission of both lawyers and nonlawyers, on the rights and problems of the elderly. And that commission is working right now.

In the prepaid area, you know, the ABA started this whole thing going with its Shreveport plan. That was back in 1969. And then in

1975, we founded the American Prepaid Legal Services Institute which has held, I think, seven regional hearings and conferences on this. Mr. Tom Johnson has been very active in this as chairman of our consortium.

Tom?

Mr. JOHNSON. Mr. Chairman, before I comment specifically on the prepaid area, I should also supplement what Mr. Tate said in the area of encouraging pro bono activity by local lawyers. The association has, as you may know, arranged for a hearing or series of conferences across the country, which are being sponsored by the ABA, at which State and local bar associations bring the lawyers of the community together with community leaders, to try to encourage the lawyers to participate in more pro bono activity, whether it be by dues checkoff, establishment of a talent bank, voluntary work in poverty law, or whatever. The prepaid area, as you know, is directed more to middle income people, people who do have the ability to pay premiums, either through their employment or individually, and who, by paying premiums over a period of years, are able to afford legal services when the need arises.

The American Bar Association has been extremely interested in prepaid over the years. The American Prepaid Legal Services Institute, which Mr. Tate referred to, is a clearinghouse and monitoring organization that was established by the American Bar Association and has been supported by the American Bar Association since 1975.

The principal area, I believe, in which the organized bar has done a good deal, a great deal to support prepaid legal activity is to amend the code of professional responsibility, or encourage the state associations to amend their codes of professional responsibility, which have been thought to contain restrictions which prohibit the effective marketing of prepaid plans or effective organizing of group plans.

There is still a continuing need to do that, and we have made some dramatic changes, but further changes are necessary.

I think it is fair to say that the success of the prepaid plans has varied widely across the country. In some States, the insurance department of the State has held that this is insurance and has not authorized commercial carriers to write insurance coverage. That is true, for example, in the State of Illinois. We are hopeful that this restriction on commercial carriers can be lessened so that both commercial carriers and organized bar associations can provide prepaid legal service plans across the board.

It is apparent, I believe, that organized labor feels that prepaid legal services is a worthy goal for negotiations, and we have reason to believe that that will encourage such plans across the country.

I do not think, however, we would say that prepaid is the answer to providing legal services to those who need it in the middle income range, although it is certainly a step in the right direction. We have high-priority programs in that area.

Senator KENNEDY. Well, what are we going to do for the middle income people? I do not expect that we are going to find any one answer. I am just trying to find out. The prepaid programs, based upon your experience, how significant has that been?

Mr. JOHNSON. Prepaid is beneficial because it is a way to help middle income people pay less fees. The other way to get unmet legal need is to reduce the legal fees. The comments you quoted from earlier were from a report of the consortium, which in turn was a response to the monumental survey on legal needs, which I am sure the committee is familiar with. If you are not, we will be happy to furnish a copy of the survey report to you, which discloses that there was a significant number of cases where middle income people recognized the need for a lawyer and yet did not obtain a lawyer.

The whole second area of the organized bar's efforts to get at this problem relates to the reason why we believe many of these people did not go to a lawyer; namely, they feared the high cost of legal services. The consortium report from which you commented expresses a concern that there is a need to delawyerize the way legal services are provided. This can be done through preventive mechanisms to help a person avoid the problem before it occurs, so that the public will not have the legal problem in the first place, or by simplifying legislation, so that when they do have a problem it is not as expensive for them to have that problem remedied and would take less lawyer time to do it.

Then there is the whole area of changing the way legal services are provided, at least for routine legal services, by standardization of frequently performed tasks, by the use of high-speed document production equipment, by the use of para-professional legal assistants, and by specialization and concentration of practice, so that the lawyer who becomes well versed in a certain area of law does not have to spend so much time with a given problem, and therefore does not have to charge as much. There are eight committees of our association who are involved in what I think may generally be referred to as delawyerizing the process.

I think, however, there are still a significant number of complex matters, nonroutine matters, where there is simply no substitute for the traditional way legal services have been provided and no substitute for trained legal talent. In those areas we believe they cannot really be delawyerized, and it is dangerous, wishful thinking to think that such services can be mass produced or delegated to nonlawyers.

Mr. TATE. Mr. Chairman, in response to one thing that Mr. Johnson mentioned, I have been quite interested in trying to promote the efforts of several of our sections which are encouraging new techniques in law office management. We have had a very fine committee, headed by Dean David Link of the Notre Dame Law School, on new methods of law office management. Their first effort is an issue of the American Bar Association Journal coming out in March. It has 32 pages of seven different articles of new techniques. This is going not only to every member of the American Bar Association, but 150,000 nonmembers as well, where we are pointing out methods of cutting down the costs of operating the law office. Hopefully, then, those reduced costs will be passed on to the clients. I know you would be interested in that.

Senator KENNEDY. I think all those developments are helpful, particularly when we think of a moderate income person who is able to afford a lawyer, in terms of the costs, but it would not be justified,

because the lawyer's fees would exceed the amount of the claim, even if they are successful. So the reduction of the total costs in the whole process is important. Let me just ask you, in terms of additional opportunity to test the prepaid programs concepts, do you have any suggestions of steps that we should be thinking about?

Mr. TATE. The best thought that we have in this, American Prepaid Legal Services Institute, which is, as we mentioned, American Bar Association established. And they are monitoring what can be done in the various States, and are making suggestions.

As we mentioned, they have had something like seven regional conferences to encourage prepaid assistance throughout local and State bars.

So I guess that is the best thing—Mr. Johnson might have some other thoughts to supplement this. We will get to you, as quickly as we can, whatever studies they have to come up, or will come with on the success of their efforts, of the various States.

Mr. JOHNSON. I believe there is something specific though, Mr. Chairman.

As you know, the Internal Revenue Code does have a special tax provision whereby employers can deduct the cost for prepaid legal services without it being income to the employees.

That is a special tax treatment which I believe you were somewhat skeptical of at the outset, Mr. Chairman, and it's being employed on an experimental basis.

I believe it is absolutely fair to say that it is absolutely critical for that special tax treatment to continue. Without benefit of that way of handling matters, the future of prepaid legal insurance is much more depressing. We would hope that, in due course, those kinds of deductions could even be extended to private individuals who might wish to purchase a prepaid plan from a commercial carrier, from a bar association, rather than having it furnished by their employer. But we realize this is an experiment, and it really is not timely to make that kind of proposal until we have the benefit of reevaluation of the experimental program.

Senator KENNEDY. When did these six regional meetings conclude?

Mr. JOHNSON. There were seven national conferences over a period of several years. We have the transcripts of those conferences available, and would be pleased to furnish them, if that would be helpful.

Senator KENNEDY. Well, what I am looking for—and maybe your ideas would be useful as to what common threads emerge from those various conferences about inhibitions—you mentioned one, the advantages, obviously, in terms of tax, but whether there are recommendations you would have for us in terms of inhibitions toward these prepaid programs I know, for example, in the health area, we were dealing with that for about 5 or 7 years, just permitting the development of alternative discovery systems, prepaid programs, maintenance organizations, and we wrestled around with that for 7 or 9 years.

Now, we have got 300—400 to 500, who were in various support kinds of activities. We just faced enormous kinds of inhibitions.

We can take a number of medical procedures, prepaid programs versus other reimbursement mechanisms, whatever criteria you wish to use, to show that, in terms of savings alone, it has been rather significant.

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I am interested in what kind of inhibitions exist in development of it, and maybe you could just submit some recommendations.

Mr. JOHNSON. Mr. Chairman, I should point out that there is a need for actuarial data, and we recognize that, and without that data, your commercial carriers are going to be hesitant.

I should also point out that the American Bar Association is not in this problem alone, and there are other consumer and labor organizations involved, one of whom is the Resource Center for Consumers of Legal Services whose director is here today.

Senator KENNEDY. That would be helpful, too.

Who else do you think we ought to be asking the same kind of questions of?

Mr. JOHNSON. Miss Sandy DeMent is here today, and she is a genuine expert in this sphere of prepaid, and I would hope that in future sessions, you would turn to her association, too.

Senator KENNEDY. Let me ask about the state of legal advertising. What kind of correlation is there between advertising and the availability of services?

What kind of observations have you made?

Mr. TATE. Well, as you well know, the famous case of *Bates* v. *State Bar of Arizona* back in 1977 was very significant, and I became involved somewhat in this, because at that time they asked me to head up a task force to bring back an association response to that case.

Mr. Johnson and I both were on it, and we had a lot of public hearings and studied a great deal of material, and came up with a proposal which was adopted by our house of delegates, after a recommendation came from the board of governors, about ways that the ABA model code of professional responsibility should be changed. As you and I know, the ABA role is just a recommending process to the States, because the States admit lawyers, and they discipline lawyers. They are the ones that actually adopt the code. Not only did we send out this proposal, but we also sent out an alternative proposal for the States' consideration.

Thirty-four of the States now have changed their codes of professional responsibility, pursuant to the *Bates* case.

Frankly, from the surveys that we have conducted, we have not found many lawyers advertising. Our Law Poll showed about 3 percent.

We see various reasons for this. One, I think some of the lawyers have been waiting for the States to make changes in their codes of professional responsibility.

Two, many lawyers say they do not need to advertise.

Three, you have to recognize that there is some peer pressure and some concern among the legal profession that there would be advertising. Our commission on advertising, the establishment of which was one of the recommendations of our task force, is going around the country studying what advertising is being done. They are going to make recommendations as to how advertising might be more effectively handled, and also they are giving a good deal of thought to institutional and national advertising.

Of course, they are looking at work that is being done also in other professions.

Senator KENNEDY. Did you look at the cost, as well, what the impact has been on costs from advertising?

Mr. TATE. Yes, and some of the implication that we have had is that unless a great deal of money goes into the advertising program, it has not been effective. Just a little shot here or a shot there, a little ad that is put in the newspaper, and the like, has not been effective. The information that has come into the commission is that it takes a very carefully studied, planned advertising program to be effective. We have found, as you may know, that some of the clinics have effectively used a mass advertising program, and we have found many young practitioners and many sole practitioners are advertising more than you would find in the big firms.

So I think this is a slow process, and I think, frankly, it is going to be some time before you see any great results in the advertising area.

Senator KENNEDY. When will we have the results of the study?

Mr. TATE. The commission made a report at our midyear meeting that was concluded in Atlanta a couple of weeks ago today. As a matter of fact, I think they hope to come up with something by the annual meeting in Dallas. It is going to take longer than that, of course, to complete their study, but I think in August they will have some further recommendations that will be available. Of course we will see that that information comes to you, Mr. Chairman.

Mr. JOHNSON. I think it's fair to say, Mr. Chairman, in responding to your question: "Does advertising lower the cost of legal services? Does it increase access?" that it is a little premature to answer that question.

We have, however, some evidence, at least in some areas, that advertising has resulted in a reduction of cost of advertised services, and, in fact, there are service areas where there has been a dramatic change in the advertised price of services. It will take some more time, really, before we know whether this has really decreased the actual cost to the consumer. But that is one of our prime questions in this area.

Senator KENNEDY. You know the other side of the coin, of course, and I think references were made to it earlier, is the concern about over-legalization in our society—as part of our culture and in our tradition. There is concern about a growing trend towards that.

On the one hand, you want to ensure an adequate representation to those that are in need of legal services but are not able to get it for a variety of reasons. On the other hand, we have a system which many feel is moving towards over-lawyering.

Mr. Tate, how would you view that broader type of issue? What is your sense about it? How do we come to grips with that particular issue and reconcile the need for better delivery of legal services with the fear that perhaps we are geting too dependent upon litigation and formal legal process to resolve issues, questions, and disputes?

Mr. TATE. Well, first of all, my own reaction is that we are not over-lawyering. We hear this from time to time. We had a survey by the American Bar Foundation. It took 6 years and had 14 million bits of computer information. The result of that is that there were many people who did not know a lawyer, who did not know the services they performed; they did not know what fees they charged, and they were fearful of going to a lawyer.

This is something we recognize, and that we are trying to knock down those barriers of lack of information. We also have published on the ABA level, a little pamphlet on the American lawyer, how to choose and use one, which tells you about how to find a lawyer if you have a complaint, how to handle the complaint, and whether or not you need a lawyer.

Now, we are constantly trying to make lawyer services more available. Our lawyer referral is something we have changed through our informational service to tell people about lawyers.

Many associations have put out directories. Many associations are doing whatever they can, even in the changing of rules of advertising, to let people know where the lawyers are, what their utility is, and what their prices are.

Frankly, I think we hope to find greater numbers of people coming to lawyers in the future by means of these and other programs.

Senator KENNEDY. Let me turn to the question of access to the courts; particularly the Federal courts. One of the questions that we are going to be dealing with is what are the most appropriate cases to leave within the Federal courts. As we constantly review our court system, we find different areas in which there is an appropriate Federal nexus, and we find that there are additional rights which ought to be protected. I think what we probably fail to do over any period of time is to use a systematic evaluation of what should be left in the Federal courts, and what ought to be moved out, changed, or altered.

Members of this committee and others agree that we just cannot keep passing more laws which add to the caseload without paying attention to the results for the judicial system. But it is important to pay attention from the proper perspective.

There is an increasing trend to scrutinize recent or new proposed legislation which would add causes of action in the Federal courts. Such so-called impact analysis is important and useful. However, I am concerned that in focusing on the judicial "impact" of new proposals or very recent laws which authorize lawsuits in Federal court we may adopt an unwarranted bias toward the status quo. Such impact analysis implicitly assumes that what has traditionally been in the Federal courts has a higher priority—some sort of grandfathered claim—on our limited judicial resources than business which would come under new legislation.

Yet clearly we should not be ruled by the legal priorities of American society 50 or even 25 years ago. If despite a controlled expansion of the Federal judiciary and efforts to conduct litigation more efficiently, we must still make a choice among the kinds of cases which the Federal courts will hear, we need criteria by which that choice can be made.

We have not really developed a mechanism for looking at it from a zero-based budgeting perspective, so to speak, or a zero-based jurisdictional point of view. I am just wondering if you would make a comment on this about how we ensure, that the cases with the greatest public impact, those legal issues which reflect the most pressing national concerns of American in the eighties, be heard in our Federal courts?

Are we going to be able to do that in the future?

Mr. TATE. One quick observation, and I am going to call on Mr. Ben Zelenko, who is going to go into this. This is his particular field.

This is one reason we think this national institute of justice will be very helpful to analyze this whole issue of impact and the like.

We understand that even now the Department of Justice is having a study made as to whether or not there should be the feasibility of judicial impact statements.

Mr. Zelenko, will you respond to that?

Mr. ZELENKO. Mr. Chairman, the other side of access is the capacity of the courts to deal with the problems that come before them, and your question is a fundamental question.

We are only beginning to look at and try to decide what cases must be tried in the Federal courts.

The Federal courts are very scarce resources. We owe a great deal to about 58 judges in the South who in the sixties and the seventies made the civil rights enactments of Congress live, and these 58 jurists really were the mechanism by which those laws became a reality. Now, with the increase in judgeships, you have about 600 judges in the system for 225 million people. It is a very small bureaucracy, and the Congress really has not, over the years, tried to figure out which are the cases that require Federal court attention.

You know when a bill is enacted creating a new right, the opponents say "You are going to flood the Federal courts." If you are a proponent, you are confident that the courts have the capacity to deal with it.

I think it is helpful to look at the access question and the capacity of the courts in four areas: One area is by expansion of the number of judges, expanding the number of personnel. That is one way to meet the needs, and you have done that.

One of the things we are thinking about now is whether the process by which we have expanded the number of judges is the best process.

Years ago we used to have a judgeship bill every year, like holiday bills, and which judgeship was deleted was more the result of a toss of the coin than anything else.

Then we asked that quadrennial surveys be done so that the judgeships needed would be reviewed every 4 years. This last go-around showed that that did not really work out. It postponed an increase in judicial manpower for about 10 years, until this last statute was enacted. Now, there is some thought, I understand, at the Judicial Conference level, to recommend an annual review. Some States have tied the number of judgeships to the population.

I am not suggesting any one criterion, Mr. Chairman, but I am suggesting that the enlargement process be reviewed. Enlargement, of course, has some limitations. Because this is a pyramid, you can expand so far at the bottom, but you are not expanding at the top. All those appeals end up at the Supreme Court, so there's a certain inelasticity to the system.

That is one question—the numbers of people to ensure capacity. Another question would be substitution—substituting other forums than the Federal court to try cases: In the criminal area, this might involve allowing certain crimes on Federal property to be treated under

State law rather than in the Federal courts. Disorderly conduct in a national park perhaps should be disorderly conduct under State law, but not in the Federal courts. It is really not of great Federal interest.

That kind of thing we really have not been doing.

Substitution also includes using other personnel. For example, magistrates, where that is feasible and constitutional, can provide justice quickly and can free the district courts to hear other matters, and we support that.

But we have also supported a little bill that the Department of Justice never recommended—a bill to eliminate statutory priorities for calendaring civil cases.

There are between 29 and 35 statutory priorities which conflict. They say, for example, that an appeal from the National Labor Relations Board shall be heard ahead of all other appeals on the docket, or that a tax question shall be heard before any other appeal on the docket. We are told that in some circuits, some civil litigants will never have their case heard because of priorities for other types of cases.

Now, priority is perhaps a conservation measure, a way of determining how the courts do their business. Let them control their own dockets.

Of course, the American Bar Association has also supported creation of a national court of appeals as a way of helping the system to dispose of inter-circuit conflicts. We understand, for example, that the last time this was examined, there were approximately 55 inter circuit conflicts each term which went unresolved.

The Supreme Court does not have the capacity to decide them.

These are some of the kinds of issues, Mr. Chairman. I could go on much further. We just recommended in Atlanta——

Senator KENNEDY. One point I want to pursue and then I am afraid we will run into a time problem.

I think we have to work out a continuing mechanism to evaluate what is in the Federal court, whether it ought to stay there, and whether there are other mechanisms, for handling it because other cases have a higher claim on the Federal courts—the way we have evolved standards to decide the balance of more judges at some particular time.

What we need to have established now is an ongoing review, a way of looking at what business now is in the Federal courts, and of saying, "that ought to stay there and some ought not to be there."

As we deal with newer issues and say, look, this is important in terms of national interest, and that ought to go on in and something else ought to come on out, such a process will become increasingly necessary.

I am just wondering whether the bar association can help us in terms of trying to fashion that kind of continuing type of review.

Mr. ZELENKO. Our committee—and I think Mr. Tate wants to talk about the national institute of justice as well—but our committee serves as a coordinator among the Congress, the executive branch, the bar, and the judicial branch and that is just the kind of thing that we are concerned about, Mr. Chairman. This judicial impact that you mentioned earlier is a very troublesome issue.

"Judicial Impact" often would be used as a code word against the enactment of new legislation creating new rights.

Senator KENNEDY. That is right; that is my concern.

Mr. ZELENKO. Obviously, any new legislation creating any new rights is going to have some impact on the court.

Senator KENNEDY. Let us be a little bit more specific. Would you agree that we ought to look at what is in the courts now, as well as looking at recommendations for new legislation——

Mr. TATE. Absolutely.

Senator KENNEDY.——that both should be considered in Congress? Do you think that is important?

Mr. TATE. Absolutely.

Senator KENNEDY. Senator Cochran has been enormously patient, and I have to excuse myself. But I know that he is very interested in this area.

I would like to yield to him for whatever time he may need.

Senator COCHRAN. I would like to just welcome the president of the American Bar Association to the committee. Shep Tate has considerable connections in the State of Mississippi.

One of our counties in Mississippi, Mr. Chairman, is named for his grandfather, great-grandfather. Of course, we thought for a long time that Memphis is really a part of Mississippi. They have always denied it and somehow prevailed in that controversy.

But I was interested to note that you pointed out that one of the problems that clogs the courts is the enormous number of diversity cases that come before the Federal courts.

However the ABA is in opposition to doing away with diversity jurisdiction within the Federal courts. I presume this is a point of departure from legislation that is before the Congress now which would do away with that as a way to get into the Federal courts.

The other bar associations or groups, such as the American Trial Lawyers Association, American College of Trial Lawyers, do they share that view with the ABA?

Mr. TATE. Senator, let me answer it this way.

That particular proposal, to do away totally with diversity or to curtail it, came before the American Bar Association from Mr. Zelenko's committee.

It was argued very vigorously and thoroughly in the house of delegates, which is our legislative policymaking group of about 360 persons, and it was defeated.

The American Bar Association then made a poll of State and local bar associations, and they were greatly in opposition to changing even the resident plaintiff jurisdiction. They were totally opposed to any change.

Now, as you mentioned, the American College of Trial Lawyers position is, as I understand it from talking with members of that association, that they are not opposed to the limited curtailment of not having diversity jurisdiction available where the resident plaintiff files the case.

Of course, we think for many reasons diversity jurisdiction should not be changed because things have been going on for about 200 years successfully. We think one of the problems has been overcrowded courtrooms because there has not been a change in the number of judges. We hope now with the 117 new Federal district judges that this will be taken care of,

Another point is that you are just shifting the caseload from the Federal court over to the State court, and it is true that some State courts are overcrowded. So when we are talking about access to justice, you might be denying someone the right to get to court.

There are other problems. As you well know, local prejudice still exists in some cases. Also, there exists the problem that you have multi-district cases like an aviation crash, where you need to have cases in the Federal court.

Mr. Zelenko, do you have any further input on that?

Mr. ZELENKO. No.

Senator COCHRAN. We have had some hearings on legislation as a result of the Supreme Court decision in the *Illinois Brick* case. It involves giving the indirect purchaser a right to sue in an antitrust case for alleged price-fixing.

There is concern that has been expressed by some witnesses that this will increase litigation and will cause another burden to be placed on our Federal courts, particularly in view of the discovery procedures that are involved in protracted litigation, that sometimes is involved in antitrust litigation. What is your judgment about our expanding that right of standing, maybe, to bring such cases in the Federal courts?

Mr. TATE. It is my understanding, Senator, this time the American Bar Association has not taken a position on that proposed legislation arising out of the *Illinois Brick* case.

This is my understanding.

Of course, on the discovery issue, we have our Section of Litigation's Study that made proposals about how to cut down some of the delays and eliminate some of the abuses in discovery procedures, and that matter is being given constant attention by the ABA.

Senator COCHRAN. Well, is this a recommendation that is going to be submitted as a request for change in the law, or will this be a rule-making matter that would be directed towards the Supreme Court?

Mr. TATE. As to changes in the Federal Rules of Civil Procedure, it would be the latter. It would not be for legislation, it would be for the court.

Senator COCHRAN. So in your judgment, even though there are abuses in the discovery process, there is no current recommendation that the association is making for legislation in that area, even in antitrust litigation?

Mr. TATE. Not that I know of.

Mr. ZELENKO. Not that I know of.

Mr. TATE. I understand we have various sections and committees studying this right now, but there is no proposal in the way of legislation at this time.

Senator COCHRAN. One problem that you pointed out in your testimony is that there are statutory priorities that tend to deny some persons an early opportunity for access to the courts, as far as court calendars are concerned. I notice in your written statement you spend some time talking about the Speedy Trial Act and the problems that it has caused in that area.

We have before us a proposed revision of the entire criminal code, as you may know. It occurs to me that that legislation may afford us

an opportunity to include some changes in that Act, or maybe some of the others, which prescribe these statutory priorities.

I would urge you, if you do have some specific recommendations, although you say you do not have an amendment that has been finalized at this time, if you are looking toward making some recommendations, the earlier those can be made to the committee, the greater opportunity some of us who are interested in making some changes in that area will have to get amendments prepared and be ready to offer them when the committee is marking up that bill.

I would be very interested in taking an active role in the committee in making those changes that would be appropriate.

Mr. TATE. Thank you, Senator. We will get those proposed amendments to you just as soon as they come out of our committee and have approval by our association.

Senator COCHRAN. There might be even a need to develop a special bill to deal with these other statutory priorities, because not all of these priorities relate to criminal matters.

I understand the witness talked about tax cases and labor appeals, and those other kinds of matters that do have the benefit of statutory priority.

I think that is a very important point that you make, and we ought to look very carefully at how we can change that to improve access to the courts.

Mr. ZELENKO. Senator, if I may, I would be happy to supply you with a copy of our recommendations that the association approved and and the accompanying report and to try to give you some legislation that would affectuate the report.

Senator COCHRAN. With an identification of all the statutory priorities that are involved? It may be that some are very worthwhile, and we need to preserve them and protect their rights. But maybe there are some which are arbitrary and would serve no real need any longer.

One other matter that I want to ask you about—and then I know time has run out on us—and that is in regard to the statements you made congratulating the chairman. I wish he was still here. I know you are not going to back out on your congratulations.

He is taking the lead in making some changes that are needed, but one in particular that you referred to as the rights of the institutionalized person's legislation, which would provide the Department of Justice representation for those in institutions who have suffered severe deprivation of rights.

This included in it a list of those matters which you say in fact unfavorably will provide a boost to the availability of legal services.

It occurs to me that that really would add to the problem. You talk about being guilty of disturbing the peace in a national park, and you have to have that handled in the Federal court.

I think about the Natchez Trace Parkway that runs through the State of Mississippi. If you are caught speeding on the parkway, that is a Federal court matter.

Now, you are suggesting that we add another set of rights that only the Federal courts can redress, giving the Attorney General the right to come in and bring suit against States or other political subdivisions that might have severely denied rights of due process to individuals

in institutions, whether they be penal or mental, or what other kinds of institutions you might consider.

I wonder about that.

Did the ABA, or the Uniform Commission on State Laws, come up with a uniform law that is being recommended to the States, whereby institutionalized persons can be protected and their constitutional rights protected through State procedures?

If so, wouldn't that be more appropriate than having a brand new Federal law giving Federal courts more work to do than they now have?

Mr. TATE. Senator, I do not know of any uniform law that the ABA approved on that subject. No one here at the table seems to be familiar with it.

Of course on this particular bill that we have been talking about, there are built-in safeguards where the Attorney General of the United States would not just rush in and take action in the State.

There have been certain proposals, for example, to require you to exhaust all available remedies, or to make a definite showing that the State has not taken action, before the Federal Government would move into this area.

In other words, they are trying to safeguard State action wherever possible.

Mr. ZELENKO. I would add one other thing, Senator. Even if there are some jurisdictional matters now in the Federal courts that perhaps should be diverted to the State courts, that does not argue against the creation of new substantive rights.

And, of course, the legislation which you were referring to—relating to the rights of the institutionalized—which is in this committee and in a House committee, may deal with the creation of new substantive rights, and may have an impact, certainly, on the Federal courts.

One of the problems is assessing the impact and determining what criteria you would use to determine the impact of any new bill or any new law, for example, trying to find out how many cases are likely to occur, and what length of time is required to process these cases. I am presently serving on a panel for the Department of Justice which has let a contract to determine the feasibility of judicial impact statements.

It is questionable to begin with, Senator, whether you can actually make a judicial impact or justice resource statement as you do in the environmental field. We are looking at that right now.

Senator COCHRAN. Well, one observation is that you refer to the exhaustion of other remedies, and would it not be appropriate to include in that legislation that pursuit of your remedy in State court is required in advance of going into Federal court as part of your exhaustion of the remedy requirement?

Mr. TATE. Senator, as I recall, I pointed out that that was one of the proposals.

I do not think that the American Bar Association was supporting that particular approach. Our view favored the administrative remedies being exhausted, but did not require exhaustion in the State court system.

Senator COCHRAN. Well, it might ought to be considered. I just pitch that out as something that may have merit; it may not.

Well, thank you for being here, and I appreciate your testimony. And I think you have been quite helpful to the committee.

This is a very serious problem, and we know that more and more we are finding Federal courts being closed to prospective litigants because of expense, because of delays.

There is a definite need in my judgment for this committee to try to look for ways to improve the situation, rather than just constantly enacting new laws, providing new Federal remedies where the State remedies might do just as well, to protect the rights of litigants and citizens.

I hope that it is in this direction that we can move, looking at the totality of our justice system and not just assuming the Federal courts can better deliver justice just because it is a Federal court.

Thank you very much.

Mr. TATE. Thank you, Senator.

I speak also on behalf of my colleagues who are here with us today.

Senator HEFLIN. Well, I appreciate your being here, gentlemen. I am sorry I couldn't hear all of your testimony, but there are certain times that the presence of Alabamians requires my presence over some of my friends in the American Bar Association, but I am delighted to see you.

I am going to be chairman of a subcommittee, which was given the title of Jurisprudence and Governmental Relations. One of the proposals that we have made for our jurisdiction is to have an area of concern, or investigation, and perhaps proposing remedies in connection with the entrance into the judicial systems of the Nation, and the exit out of the judicial systems. One issue which you mentioned—the question of the evaluation of the impact of legislation, substantive legislation on the courts—would come within such investigation.

If we are given this jurisdiction, which, of course, we have got to clear so that we do not step on the toes of senior subcommittee chairmen or senior subcommittees that are already in existence, we will be interested very much in that.

I know Chief Justice Burger came out several years ago advocating the implementation of impact statements. I will, of course, be talking with a lot of you individually on that issue. I do want to throw out one thing which I would hope you would give some consideration, and this deals with the diversity issue. If a procedure can be worked out by which the potential for bias in State courts can be minimized through a preemptory right of change of venue such might be supported by persons who now favor keeping the diversity jurisdiction.

I am not at this time advocating even that position, but if that can be done in some manner, I would like to have your thoughts on what its effect would be.

The primary reason in the past for diversity in cases that are based upon State law has been, of course, the bias that could exist, or the prejudice that could exist.

If there is a procedure either through State action or through Federal action, that would give people who are nonresidents a change of venue, this may have some effect of minimizing any possibility of bias that could result if you did not have some change of forum.

So I would appreciate it if you would give some thought to that.

I would like to discuss that with you. I have been discussing it with several people.

Generally, I am interested in the American Bar Association's positions on all of these issues as we move along. I do not have any specific questions today that I want to go into.

I have a lot of reservations about creating any system that metes out second-class justice, and I would like to discuss that with you.

I certainly do not want to go back towards any concept of old justice-of-the-peace days.

So any procedure or mechanism that creates second-class justice I think will be harmful in the long run, and I think we ought to guard against that.

Mr. TATE. Apropos that, I think that there was a question earlier as to whether or not people in some of these alternative mechanisms for resolution of minor disputes felt that they were being given a position as second-class citizens.

Mr. D'Alemberte might want to respond to that.

Mr. D'ALEMBERTE. I think the judge knows that I spent time in my life battling with JPs in Florida, as you did in Alabama. That was never an institution that I admired very much.

I would not favor any system that reestablished JPs.

There were great abuses. Those abuses occurred in large part because we had people not skilled in law and not subject to judicial qualification commissions and a number of other problems that we both identified. There were successful efforts in our States to rid ourselves of JPs.

I think when we eliminated them, we looked around, though, and saw that there were some community disputes or neighborhood disputes that were not being handled very well in our formal procedure, and it is something we always knew.

When neighbors are fighting, they may be fighting over the conduct of a loud barking dog or whatever other cause. They ultimately get into some kind of fight.

We know that the judicial system has never handled those things very well because the court really will not do very much for those people. They have to go back and live next door to one another.

I am convinced that these alternatives are at least worth exploring. The exploration should include the uses of mediation and perhaps arbitration techniques applied to those neighborhood community disputes.

So as long as there is an absence within this context of judicial power, so may settlement not be imposed on these individuals without their consent.

Too much coercion, in my judgment, destroys the process, but there are some things going forward in this country, including the Department of Justice's Neighborhood Justice Center Program, which seem to offer some prospect of not second-class justice, but a better form of dispute resolution.

We are also looking at alternatives of arbitration that are available within small claims courts. Sometimes these are staffed by volunteer attorneys and have been highly successful. People have had more time to discuss their problems and work them out among each other, and those rather excite me.

If I thought they were heading back to the JP system, I could not face you because I know how hard a battle it is against those kinds of abuses.

I think these alternative approaches present another set of problems that frankly have been inadequately studied. One of the great geniuses of the Dispute Resolution Act, that is being sponsored, as you know, by the Chairman and others on this committee, is that it would allow a period of experimentation and would not have any imposed alternatives, but would allow a community's bar association and judicial system to experiment with possibilities of applied mediation and arbitration techniques as alternatives, but not to establish a second-class justice system.

I do urge you to visit these neighborhood justice centers. There is a good one in Atlanta.

Senator HEFLIN. I would like to direct your attention to a paper published as part of a series of papers prepared by the National Conference of the Judiciary, which was held in Williamsburg, in 1978. The paper was written by Professor Novack of the University of Illinois Law School. I was on that committee that worked with him; however, the written content is his. The paper is called, as I remember, the American System of Justice. In it, he raises quite a number of questions pertaining to alternate dispute settlement procedures and some constitutional questions involved.

I tried to locate that paper a while ago and I could not find it. But it does raise a lot of issues, I think, that have to be considered and I would like to refer you to it, and if you have an opportunity to read it, do give me your thoughts about it.

Mr. D'ALEMBERTE. I have seen a study done by an American University professor that raises some questions. Frankly, not all are resolved in my mind. I think there are a number of questions to be asked about this process.

But I think the bar is now endorsing a program of experimentation and an effort to find out whether, for instance, mediation techniques really will work in certain contexts. It is clear to me it will not work in some contexts.

Senator HEFLIN. I believe the paper concludes that there ought to be a period of exploration and experimentation to determine those things. There are several issues raised there.

Mr. D'ALEMBERTE. One of the things that excites us is that this seems to be one answer to the problem of the courts, and there may be some things that can be successfully diverted from the court system and maybe handled more successfully.

But I say maybe because it is still a question that we will know only after a competent period of experimentation. The genius of the bill is that it allows the experimentation and allows the assessment of these experiments, and allows these questions to be answered. I hope very much you will be able to support the legislation.

Senator HEFLIN. Mr. Tate, one other question about the position of the American Bar on the National Institute of Justice.

I think this differs from the Department of Justice's concept and approach on this and your position is that it ought to be an independent body?

Mr. TATE. Senator, we still stand fast in our view that it is far better to have an independent national institute of justice rather than having it under the Department of Justice, yes.

Senator HEFLIN. I believe all of my other colleagues have gone. Is there anything else that any of you want to say?

Mr. TATE. Nothing other than the fact that we appreciate the opportunity to be before this committee and to make this presentation.

Senator HEFLIN. Well, I suppose if there is nothing else to be said, we will adjourn this hearing.

Thank you.

[Whereupon, at 12 noon, the hearing adjourned.]

Office of the Attorney General
Washington, D. C. 20530

March 16, 1979

Honorable Wendell H. Ford
Honorable Edward M. Kennedy
United States Senate
Washington, D. C. 20510

Dear Senators Ford and Kennedy:

The Justice Department supports and appreciates your efforts to seek expeditious consideration by the Senate of the Dispute Resolution Act, which would create a Dispute Resolution Program in the Department. This program would make a significant contribution to the efforts of this Administration to improve the quality of justice in the United States.

The proposed Act addresses a problem in this country that has been too long neglected. The disputes and controversies that arise between people in the course of their daily lives may not be of great individual magnitude, but collectively they are very important. At the same time, they are matters of State and local jurisdiction and, therefore, matters of State and local responsibility. There are, however, two appropriate and important roles that the federal government should play, which this bill is intended to fulfill. One is to gather together from all of the States information on minor dispute resolution processes, to make that information available to each State, and to conduct research and demonstration projects. These functions are clearly beyond the capacities of the individual States and, therefore, appropriate for the federal government. The bill creates a Dispute Resolution Resource Center that would fulfill this role.

In addition, because this area has been identified as one of pressing national importance, it is fitting for the federal government to provide seed money funds to spur experimentation with new and improved dispute resolution mechanisms by States and localities whose limited budgets make such innovative projects difficult to initiate. That is what the Dispute Resolution Act makes possible through a seed money grant program.

It is our present intention that this program should be operated out of appropriations of the Department of Justice without the necessity of additional funding at this time.

I look forward to early Congressional action on this legislation (S. 423).

Sincerely,

Griffin B. Bell

Griffin B. Bell
Attorney General

AMERICAN BAR ASSOCIATION

OFFICE OF THE PRESIDENT
S. SHEPHERD TATE
AMERICAN BAR CENTER
CHICAGO, ILLINOIS 60637
TELEPHONE: 312 / 947-4042

PLEASE REPLY TO:
1800 M STREET, N.W.
WASHINGTON, D.C. 20036

January 15, 1979

Honorable Ted Kennedy
United States Senate
Washington, D. C. 20510

Dear Senator Kennedy:

With the 96th Congress having just begun, I write to express our hope and expectation that this will be a legislative session marked by the implementation of many important improvements in our justice system. One of the more important, and one of my priorities as Association president, is the prompt enactment of the proposed Dispute Resolution Act.

You and Senator Ford are to be complimented for your successful advocacy of this legislation last year, and for working with your colleagues toward the unanimous approval of this legislation for the second consecutive Congress. The beginning of the 96th Congress this week presents you with another opportunity to modestly assist states and localities in the development of new, and the improvement of existing, forums for the resolution of many important, though relatively minor, disputes.

The American Bar Association is convinced that your legislation would provide the two tools needed by citizens and government institutions at the state and local level to improve their access to forums to help resolve everyday disputes. First, your bill would establish in the Department of Justice a resource center for the collection and dissemination of information about the usefulness of such existing dispute resolution mechanisms as mediation, arbitration, fact-finding and small claims courts. This clearing-house would provide an inexpensive means of assisting state and local governments to utilize effective approaches to dispute resolution and avoid pitfalls which may have occurred elsewhere.

Second, the legislation would establish a modest -- $15 million per year -- program to help state and local governments and citizen groups to establish new, or improve existing minor dispute mechanisms which the citizens of that jurisdiction determine to be best suited to their needs.

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Letter to Senator Kennedy
Dispute Resolution Act
Page Two

The wisdom of the bill's limited and balanced approach has attracted the support of the Justice Department, U.S. Chamber of Commerce, the Consumer Federation of America and various organizations of judges and lawyers. The ABA is pleased to be a part of this distinguished and diversified group of supporters.

The Association congratulates you on the manner in which the bill pending in the last Congress was carefully prepared to respond to the interests of liberals and conservatives, Republicans and Democrats. As president of the ABA, I heartily encourage you to reintroduce the Dispute Resolution Act and offer the Association's full support in working toward prompt Senate approval.

Sincerely,

S. Shepherd Tate

SST/CHB/spe
cc: Hon. Wendell Ford
Hon. James McClure

GRASSROOTS
Citizen Dispute Resolution
CLEARINGHOUSE

4401 FIFTH AVE., PITTSBURGH, PA. 15213
TELEPHONE: (412) 621 - 3050
Program Secretary: Paul Wahrhaftig

A Program of the Middle Atlantic Region of the American Friends Service Committee

January 26, 1979

Senator Edward Kennedy
Room 1414
Dirkson Office Building
Washington, D.C. 20510

Dear Senator Kennedy:

I am writing about the proposed Minor Dispute Resolution Act, this year's version of Senate Bill 957. I understand that you are thinking of re-introducing it this year.

I would like to make some suggestions for possible revisions before the bill is re-introduced initially in the Senate. I do this from the point of view of the Director of a National Clearinghouse for Dispute Resolution Programs, a copy of a flier of this program is enclosed for your reference. I am writing this as a preliminary letter assuming that the Bill might be introduced momentarily. I intend in the near future to do a more thorough critique of the bill to suggest some possible specific amendments.

At this stage we can deal with general principles and it seems to me that one of the most important is to learn from last year's problems. The bill was labeled as a Consumer Bill. That meant when it went to the House it went to two committees, the Consumer and Justice Committees. It is not terribly surprising that it died since I am informed that no consumer bill has passed the House in six years. Even if they did go through fairly readily to let the Bill go in to two committees just overly complicates the problem. Third as long as this is seen as a Consumer Bill, it really is not one that is very high on any consumer organization's lobbying agenda so support is weak. Therefore it is less likely to get through the Consumer Subcommittee than a more popular bill.

The bill can achieve the same ends originally envisioned without it being a "consumer" bill. All that would be needed in redrafting would be to eliminate references to the Federal Trade Commission. Jurisdiction should be given over handling minor disputes or neighborhood based disputes and minor criminal matters. Consumer considerations would be covered by these categories.

I would suggest in redrafting that your office might take the approach that I intended to do in drafting my proposed amendments; that is to start with the House Bill that almost made it last year. There were some good changes made in that particularly in removing the language excluding criminal matters.

Sincerely,

Paul Wahrhaftig

cc. Norma Taylor
Ray Shonholtz
David Collins

National
Consumer
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Eleven Beacon St.
Boston, MA 02108
(617) 523-8010

Mark E. Budnitz
Executive Director

Robert A. Sable
Deputy Director

February 15, 1979

Senator Edward M. Kennedy
Judiciary Committee
United States Senate
Washington, DC 20510

Alternative Methods of Access to Justice

Dear Senator Kennedy:

The National Consumer Law Center has long been active in promoting improved access to justice for the poor. This has included support of the general concept behind the dispute resolution bills proposed by you and Senator Ford. On May 5, 1977, I testified before and submitted a Statement to the Senate Commerce, Science and Transportation Committee in regard to S.957. On August 4, 1978, I submitted a statement to the House Interstate and Foreign Commerce Committee, Subcommittee on Consumer Protection and Finance, which was considering both the Senate-passed bill and two House measures. I have enclosed those Statements because most of my remarks apply to the bill the Senate will be considering in the current session.

Instead of repeating the points already made in my previous Statements, I would like to concentrate on two issues which arose repeatedly during the Boston hearing on February 13, 1979, namely, the quality of justice in alternative forums and the need to involve the community.

Quality of Justice

I was heartened by your frequent questions about the nature of the justice which is provided in alternative forums. At times, you asked whether people receive second class justice there; at other times, you asked what types of cases should be excluded from consideration in these forums.

I believe your questions were well taken. I fear that the quality of justice in some of these forums may well be inferior and the Congress should hesitate to fund programs without careful review of how they will operate. The poor quality will not be the result of uncaring staff and decisionmakers utilized by

these programs, but rather will be caused by bringing disputes to the wrong type of forum, or a forum which cannot do the entire job which needs to be done. (Professor Sander has written about the need to tailor forums carefully so they can best deal with different types of disputes.)

Consumer cases provide excellent illustrations of the inability of alternative forums to do an adequate job. Typically, a consumer will stop paying a merchant or creditor because of dissatisfaction with the quality of goods which have been purchased. Mediation may seem like a perfect solution. There may be a continuing relationship between the parties and a mediator may be able to successfully bring the parties together to work out a solution acceptable to both. When the process is described, both consumer and merchant will think mediation provides the best mechanism for resolving the dispute. The problem is that ordinarily a mediated solution under these circumstances may mask far more serious problems than will ever be discussed in mediation. (They seldom arise in arbitration either.) Specifically, there may be wholesale violations of federal and state consumer protection laws present in the case, but the consumer will never have the opportunity to gain the benefit of them in these alternative forums. There may be mass patterns of unfair and deceptive practices. But unless the alternative justice program, on its own initiative, discovers these and refers them to appropriate enforcement agencies, they will continue to plague consumers.

Let us suppose a consumer transaction involves a door to door sale of encyclopedias bought on credit. The consumer stops paying because some of the books arrive late and others arrive damaged. The typical mediated (or arbitrated) solution is for the company to replace the damaged books and agree to promptly deliver those which have not yet arrived. The consumer agrees to resume monthly payments and to pay back the payments s/he previously withheld. Often the company will waive its right to delinquency charges so the consumer believes s/he has obtained the best remedy available.

The alternative forum will rarely, if ever, investigate to see if the company supplied the consumer with disclosure of the right to cancel the door to door sale within three days, as required by law, nor will it check the calculation of the finance charge or Annual Percentage Rate to verify its accuracy and conformity to legal requirements. The mediator will not check with the regional FTC office or state Attorney General office to learn if this company has engaged in the same or similar practices against many others. The merchant may have committed acts which, in a court

of law, would entitle the consumer to triple damages, but in mediation or arbitration the consumer will feel fortunate to have delinquency charges waived.

My point is not that Congress should exclude consumer disputes from inclusion in a bill to provide funds for dispute resolution mechanisms. To the contrary, as I argue in the statement to the House Subcommittee, consumer disputes are probably the best types of cases for these forums. However, it is important to provide in the bill minimum standards and safeguards to insure that funded programs carefully operate their mechanisms in a way which does not result in second class justice. Also, it is important that alternative mechanisms be completely voluntary. Persons cannot decide whether or not to choose the mechanisms in a voluntary manner unless they know the benefits and drawbacks. Usually, the benefits are emphasized and the process is described. Rarely is the person told that consumer protection statutes (or other applicable law in different kinds of disputes) may apply to his/her case, but that the decisionmaker is not equipped to apply these laws. A voluntary choice requires full disclosure.

Mediation was the process discussed almost exclusively at the Boston hearing. It is important to remember that several other modes are also available and may be more appropriate in some settings and for certain types of cases. In addition, money should be available for improving small claims courts. To the extent small claims courts were mentioned at all at the Boston hearing, they were referred to as an historical example. Many jurisdictions still do not have small claims courts. A recent comprehensive study of these courts found that, by and large, they do an adequate job. [Ruhnka and Weller, Small Claims Courts, A National Examination (1978).] However, serious deficiencies were found in most of the courts. As the authors explain, many of these problems can be solved, but it will require additional funds. Money should be available to small claims courts from the federal legislation.

Several of the speakers at the Boston hearing commented that an alternative mechanism should be part of a community's institutional establishment. That is, it should directly relate to other organizations in the community. Religious organizations and schools were specifically mentioned. One judge recommended that the mechanism be run in conjunction with and as a part of the court system (e.g., small claims courts). That is, a judge would retain jurisdiction and would at least supervise the workings of the mechanism to insure that the quality of justice is adequate. Such a setup would alleviate the fears set forth

above about the mechanisms ignoring important laws designed to protect parties and the masking effect of mediation and arbitration.

It is appropriate for other kinds of groups in the community to receive funding under this Act as well. In the consumer field, local consumer protection agencies should be eligible since they are a necessary component of some communities' efforts to launch a comprehensive attack on widespread and endemic abuses. Community based and operated programs should also be funded. To limit funding only to programs patterned on the neighborhood justice model would unduly restrict the entire effort. Many different kinds of organizations using different approaches can make important contributions.

Community Involvement

In addition to the quality of justice, the second major issue discussed at the Boston hearing was the vital element of community involvement. The witnesses from the Dorchester Urban Court demonstrated the importance of including community people in the planning, staffing and evaluation of dispute resolution programs. This is essential if the program is to become an integral and organic part of the community. Unless it is recognized by the people of the area as a legitimate community institution, it will not be able to effectively utilize processes such as mediation, which to a large degree must rely for their success on the trust of the community in the dispute resolution program.

For these reasons, the bill should specifically require community involvement in the planning, staffing and evaluation of all programs funded by the dispute resolution legislation.

I request that this letter be made part of the record of the Boston hearing.

Sincerely yours,

Mark Budnitz
Executive Director

mb/kh
enclosures

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STATEMENT BEFORE THE SUBCOMMITTEE ON
CONSUMER PROTECTION AND FINANCE,
HOUSE INTERSTATE AND FOREIGN COMMERCE COMMITTEE

Concerning
DISPUTE RESOLUTION ACTS, S.957, H.R.2482, H.R.2965

MARK BUDNITZ
EXECUTIVE DIRECTOR
NATIONAL CONSUMER LAW CENTER, INC.
ELEVEN BEACON STREET
BOSTON, MASSACHUSETTS 02108

August 4, 1978

INTRODUCTION

The National Consumer Law Center has been providing specialized legal assistance to lawyers for low income consumers since 1969. We are active in major litigation, legislative proposals and administrative proceedings. The main focus of our current work is on consumer credit and energy. A central theme of much of our work in every subject area has been improvement of consumer's access to effective forums. For several years we concentrated on ensuring due process rights to notice and the opportunity for a hearing before a judicial forum prior to deprivation of property. Now we are working to improve small claims courts, facilitate access to federal courts, and develop alternative controversy resolution mechanisms.

TO PROVIDE USEFUL RESULTS, THE ACT SHOULD NOT COVER EVERY TYPE OF DISPUTE

It is commendable for the House to seriously consider legislation such as S.957 which attempts to deal with all types of minor disputes. The National Consumer Law Center believes this comprehensive approach should be the ultimate goal of a dispute resolution system. However, the Center fears such a broad scope in this initial, experimental stage will result in a too diffuse, and therefore ineffective use of limited funds. We believe that this program should not merely provide one-shot funding for an ad hoc variety of mechanisms, but rather should establish a systematic

and replicable method to determine what types of mechanisms have the greatest impact on the resolution of minor disputes. The types of disputes which are dealt with and the mechanisms funded should be such that Congress can review this program and determine its success as a guide to future appropriations decisions. To accomplish these objectives, the program must be manageable in scope and likely to produce useful evaluations of the mechanisms which are funded. In addition, the program should not be so diverse that careful planning requires inordinate delay before local mechanisms begin to receive funding. For these reasons, the Center favors the approach of the two House bills and the original S.957, which confined the program to one broad kind of dispute.

The wide variety of disputes which exist, the great number of different types of mechanisms which are worthy of consideration, and the multitude of perplexing questions which pervade each type of possible mechanism result in this being an area of vast complexity. Congress should decide at the outset in what broad areas funding under this Act should be concentrated. Otherwise this program could go off in a thousand directions and result in our learning little about how best to deal with minor disputes.

For example, the Senate passed S.957 would permit the Department of Justice to fund mechanisms to deal with every conceivable type of dispute. It might decide to establish forums to deal with

everything from marital disputes to dog nuisance cases, from personal injury actions to tenant controversies with the local housing authority, from consumer complaints to neighborhood quarrels. Alternatively, the Department might decide to concentrate exclusively upon funding mechanisms which follow their neighborhood justice center model.

The Center opposes both approaches. Useful evaluations of mechanisms' effectiveness require meaningful comparisons of different approaches. This Act should provide resources to adequately fund several different models for handling a limited number of kinds of disputes. It may even be necessary to fund several mechanisms which adopt the same model. For example, a small claims arbitration unit may achieve very different results in a rural district from those produced in an urban ghetto.

If dozens of different mechanisms are funded to deal with a dozen types of disputes, resources will be spread too thin to allow meaningful comparisons among several different approaches to the same kind of controversy. Not enough money will be available to establish strong mechanisms with sufficient staff and other resources. Therefore, in evaluating different mechanisms, it will be difficult to ascertain the extent to which their relative inefficiency and ineffectiveness was due to applying an inferior aproach or to unsatisfactory funding.

On the other hand, this Act should not provide funding solely or primarily to forums which follow only one model to handle many

kinds of controversies. Different types of disputes require very different types of mechanisms. Each kind of dispute resolution mechanism must be carefully tailored to the unique features of the targeted type of dispute. (Sander, "Varieties of Dispute Processing," 70 F.R.D. 111.) For this reason, it is impossible to have one mechanism effectively handling many kinds of controversies. In addition, it will be very difficult to evaluate the effectiveness of a mechanism which is trying to handle all variety of disputes. It will be hard to separate its level of performance in resolving landlord-tenant cases from its ability to settle neighborhood quarrels, family disputes, etc. Finally, there is little likelihood that valid comparisons could be made among mechanisms if each handles a great many types of disputes.

Because of the scope of S.957, the Subcommittee must confront this issue. To more graphically demonstrate the complexity of designing effective mechanisms, I have set forth some of the significant factors which must be considered and some of the crucial questions which must be answered.

The design of each mechanism should be based upon key features of the disputes involved. For example, should a third party impose a solution, using coercive powers if necessary, or does adequate solution require compromise and accomodation by both parties? Has the legislature passed substantive laws which apply to the dispute? (E.g., consumer protection statutes.) If so, should the mechanism be required to apply them?

The proper design of the mechanism must account for the characteristics of the parties using the mechanism, their relationship to each other, and their relationship to the mechanism. Will most non-individuals using the mechanism be government, large scale landlords and business, or mom and pop stores? Will most parties before the mechanism have a close, continuing relationship? If so, the mechanism must seek to resolve the immediate problem in a delicate fashion which will not ruin the long-term relationship. Will most cases be between persons using the mechanism once in their lifetime who have a controversy with persons constantly before the mechanism? (E.g., a consumer who has a dispute with a merchant who uses the mechanism as a handy method for collecting bills.) (See Galanter, "Why the 'Haves' Come Out Ahead: Speculations on the Limits of Legal Change," Law and Society 97 (Fall 1974).)

What type of third party intermediaries should be involved? Examples include judges, arbitrators, mediators, conciliators, referees, and factfinders. Each one of these types is appropriate for certain kinds of disputes, and not for others. Even the definition of what each of these types is and what each is supposed to do varies considerably from mechanism to mechanism. (See, for example, the precise meaning given to several of these terms by the AAA's Family Dispute Service.)

What is the nature of the relief which will best resolve the dispute? It might be an award of damages or equitable relief

(injunction, rescission, restitution, reformation of an agreement). It could be something far less formal and coercive; it might be referral to a specialized agency. A mechanism which requires the more formal types of relief may also have to adopt more formal procedures or at least safeguards such as ability of the parties to appeal to a judicial forum.

Is the objective of the mechanism to relieve court congestion or to provide a forum for controversies presently lacking one?

The above listing of relevant factors is not meant to be exhaustive. Rather, it is intended to illustrate the great complexity of designing mechanisms to accomplish the "effective, fair, inexpensive and expeditious" resolution of the many different kinds of disputes which arise in daily life. To be done correctly, it will take the Department of Justice and/or the FTC a great deal of time and resources to identify all of the different types of disputes which are appropriate for funding under this Act, to decide whether to fund mechanisms to deal with every kind of dispute, to develop criteria of minimum performance for mechanisms, and to determine which applicants to fund. Presumably, while the federal agency is conducting this research, no local programs will be funded. This delay will frustrate the Act's objective of providing speedy relief to those in need. If the scope of the Act were more limited, a shorter planning time would be needed, and money could be provided to deserving grantees far sooner.

For these reasons, if mechanisms are funded to deal with every kind of minor dispute which occurs in substantial numbers, there is little likelihood the Act will result in significant progress toward developing those mechanisms which will best resolve these controversies.

AT THE LEAST, THE ACT SHOULD BE LIMITED TO DISPUTES INVOLVING AN INDIVIDUAL AND A BUSINESS OR INSTITUTION.

In order to avoid the problems created by including all minor disputes within this Act, Congress should limit its scope. The Center suggests that, at a minimum, the Act should be confined to cases involving individuals who have controversies with businesses and institutions. Thus limited, it will be far more feasible to evaluate each mechanism, compare it with others, and ultimately reach a determination as to what structures are the most effective.

Disputes between an individual and a business or institution are generally "transaction" disputes, and should be distinguished from "personal" disputes in which the controversy is between two individuals. A transaction dispute usually involves a contract or statutory entitlement, two parties of greatly disparate bargaining power and resources, no personal animosity, and statutory or well-established uniform rules or standards. Often the transaction involves a necessity of life such as shelter, food, heat, a bed, etc. The dispute is "objective" in the sense that it will usually be resolved by a decision in favor of one

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side, often with an amount of money or other measurable award being made. Therefore, data can be collected to determine the effectiveness of the mechanisms. This data can be compared with established forums such as small claims courts, similar mechanisms in other places, and data from previous studies.

On the other hand, personal disputes are "subjective." The underlying cause is usually related to a communications problem or a clash between personalities, cultures, life-styles, etc. There is often an on-going personal relationship and the applicable normative standards are vague, individualized or non-existent. Personal disputes are often resolved in a satisfactory manner by getting the parties together to talk things out. Procedures such as conciliation and mediation often work well. A variety of potential local resources exist. These include churches, community relations agencies, community centers, social agencies, etc.

It would be difficult to evaluate the effectiveness of mechanisms dealing with these kinds of disputes. Neither party is right, neither is wrong; satisfactory resolution does not result in one party winning something. The fact that some parties may continue to come to the mechanism time after time may be an indication that the mechanism has failed. Alternatively, the problems between the individuals may be intractable and their continued resort to the mechanism may demonstrate its effectiveness in providing a constructive forum which temporarily makes life

bearable. Because of these characteristics, the Center believes it is inadvisable to include these controversies in the initial years of this program.

While local private and public social agencies are often equipped to deal with personal disputes, there are usually no effective forums to handle an individual's controversy with a business or institution. The individual's grievance cannot be successfully dealt with by voluntary informal action. (Best and Andreasen, "Consumer Response to Unsatisfactory Purchases...," 11 Law and Society 701 (1977).) Often the business or institution has adopted internal rules for dealing with individual complaints. Because of their failure to comply with these rules, the individual needs a forum to guarantee application of these rules. Because necessities are so often involved in such transactions, the law has accorded individuals specific rights in many of these situations. The individual needs a formal and effective mechanism in order to assert those rights. Until now, with the exception of small claims courts, society's answer to this problem was the regular civil court. However, the courts are inadequate because they are geared toward litigants with plenty of time and money. They are well-suited only for those of equal bargaining power or those who can purchase the services of a lawyer who can compensate for the litigant's lack of equal bargaining power. The minor dispute is particularly unsuited to the regular court system.

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The small claims court theoretically solves most of these problems. However, many studies have demonstrated that in reality they fall far short of achieving their objectives. This Act could provide the money needed to make them into viable forums. In addition, other types of mechanisms could be even more effective and this Act could make funds available for research and experiments to determine optimal structures.

Without viable mechanisms, society's normative standards and much of the law, which provides individuals with rights when they enter into transactions with businesses and receive entitlements from institutions, will never penetrate to the level of people's day to day dealings. While it would be beneficial to provide federal funds to facilitate mechanisms to better work out personal disputes, it is far more important and appropriate to use such funds to better insure that individual rights are not denied in transactions with businesses and institutions.

CONSUMER CONTROVERSY MECHANISMS ARE THE MOST APPROPRIATE ONES TO RECEIVE FUNDING UNDER THIS ACT

The money appropriated under this Act could be most effectively used by funding mechanisms to handle consumer disputes. Ample evidence exists to justify choosing this area. Studies have shown that there are millions of consumers with complaints, but that most consumers never even pursue their complaints. (Best and Andreasen, supra.) Even so, public complaint agencies handle hundreds of thousands of complaints every year. (The California

Bureau of Automotive Repair receives about 30,000 complaints a year. The Consumer Protection Division of the Massachusetts Attorney General's Office has processed 41,000 complaints since 1975.) In addition, industry sponsored mediation takes care of many thousands more. Everyone acknowledges that inadequate resources result in huge numbers of consumer disputes being handled inadequately or not at all and that the majority of consumers' complaints are never even considered.

In addition, a great amount of fact-gathering and analysis has already taken place. (See generally, Yngvesson and Hennessey, "Small Claims, Complex Disputes: A Review of the Small Claims Literature," Law and Society 219 (Winter 1975).) Therefore the Department of Justice and the FTC would not have to start from scratch but could build upon the foundation already laid. These disputes involve individuals and businesses and are therefore ideal for funding for the reasons discussed in the previous section of this Statement.

Finally, there are many agencies and organizations which are ready, willing and able to receive funding to handle consumer disputes and which have the capacity to develop effective, fair, inexpensive and expeditious mechanisms.

THE ACT SHOULD CONTAIN MINIMUM SAFEGUARDS AND PERFORMANCE STANDARDS

Although grantees of funds under this Act should be allowed flexibility to encourage innovation and experimentation, the Act should contain tighter provisions to insure that the mechanisms receiving funds dispose of controversies in an effective and fair manner. I have attached my testimony on S.957 before the Consumer Subcommittee of the Senate Commerce, Science and Transportation Committee. Most of the points made there are applicable to the bills under consideration by this Subcommittee. I will briefly summarize them here, and urge your reading the entire testimony in order to fully understand the Center's position.

This Act should not result in greater barriers to individuals seeking access to the courts. Although mediation and arbitration can be useful tools, individuals should be provided a free and knowledgeable choice whether or not to use them. If they believe they have a legal right to vindicate, they should be allowed to seek judicial relief in the first instance. Individuals should not be forced into mandatory non-judicial procedures where the decision-maker is either not trained in the law and/or not required to apply the law.

Individual users of the mechanisms should be involved in the preliminary planning of these structures, both at the federal level, at which national priorities are set, and at the local

level. No mechanism should receive funding unless there has been meaningful public participation in the local grantee's planning. The individual consumers of these mechanisms should also be involved in the implementation and evaluation stages.

Each mechanism should be tied in with appropriate law enforcement agencies. These mechanisms will often hear and decide disputes in a private setting which fosters informality, flexibility in scheduling, etc. Despite the advantages of privacy, it should not result in hiding illegal patterns and practices from the scrutiny of public agencies. For example, if 60% of a mechanism's cases involve tenants suing for security deposits owed by one landlord, or a merchant who never delivers purchased merchandise, this information must be recorded by the mechanism and relayed to the proper officials.

This Act should not allow funding for business-sponsored mechanisms. While the Center does not oppose industry initiatives, it is improper for federal money to be used for this purpose. First, it is a misuse of scarce resources to give money to industry for providing a service which industry should offer as part of sound and fair business practice. Second, it is impossible to expect an industry sponsored mechanism to be able to achieve the objectivity required to refer cases to law enforcement agencies when industry is sponsoring the procedure. Finally, there is no way to avoid the appearance of a conflict of interest in an

industry sponsored forum. It is inadvisable to provide federal money to allow business to police itself.

CONCLUSION

The National Consumer Law Center is pleased that the Congress is aware of and sensitive to the need for federal funding to encourage and develop forums to resolve minor disputes. We urge Congress to enact legislation to insure funding mechanisms which will indeed provide effective, fair, expeditious and inexpensive mechanisms. This will require setting a more modest goal than that established in S.957, by limiting coverage to consumer controversies, or at most to disputes between individuals, business and government.

STATEMENT TO THE CONSUMER SUBCOMMITTEE OF THE
SENATE COMMERCE, SCIENCE AND TRANSPORTATION COMMITTEE

In Regard to
THE CONSUMER CONTROVERSIES RESOLUTION ACT, S.957

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MAY 5, 1977

The National Consumer Law Center, Inc. has been providing specialized legal assistance to lawyers for low income consumers since 1969. We currently receive funding from the Legal Services Corporation to render such assistance, from the Community Services Administration to assist lawyers for the poor with energy problems, from the Federal Trade Commission to represent low income consumers in rulemaking proceedings and from the Law Enforcement Assistance Administration to study consumer fraud. We have published two model consumer statutes as well as model utilities regulations. We have published a four volume Consumer Law Handbook as well as numerous articles. In addition to assisting scores of legal services attorneys on hundreds of cases each year, our assistance is frequently requested by Congressional committees, state Attorneys General offices, public counsels, state legislators, etc. An attorney from NCLC was a member of the Board of Directors of the National Institute for Consumer Justice which conducted the most comprehensive study of small claims courts ever done.

As Executive Director of the Center, I am generally in charge of implementing the Center's work program. More importantly for purposes of this statement, I am specifically responsible for the Center's substantive work in the area of small claims courts. In this connection I answer all the requests legal services lawyers make of the Center relating to small claims courts, monitor legislative developments, and so forth. I am a member of the

Steering Committee of the Litigation Section's Committee on Consumer Rights of the American Bar Association. This committee is currently developing a project to experiment with various ways of handling small claims cases. I am also a member of the Small Claims Committee of the Massachusetts Public Interest Group. Finally I have represented many low income clients in small claims courts over a period of several years.

The National Consumer Law Center supports the objectives of the Consumer Controversies Resolution Act. For too long, consumers have been denied access to effective, inexpensive and fair mechanisms for resolution of their disputes with businesses. There are still areas of the country which do not have small claims courts, and those which do exist often have become little more than collection mills for business. The approach of this Act is to encourage states to develop sound dispute mechanisms by supplying federal funds while leaving the details of each state system to the discretion of local jurisdictions.

Because local conditions and resources vary greatly from place to place, we believe it would be inadvisable for federal legislation to condition receipt of funds upon observance of detailed Congressional requirements regarding the exact structure of consumer controversy resolutions mechanisms. In addition, there has not been enough experimentation and study of different strategies and procedures for anyone to be confident that any particular structure is invariably the best.

However, we believe the Act must be strengthened by inserting additional minimum standards and safeguards to insure that federal money is not spent to create or perpetuate systems which do not adequately serve the needs of consumers.

Diversion of Consumers From Judicial Hearings and Decisions Based on Law

The Act should contain safeguards to prevent funding systems which unfairly deny or delay a consumer's opportunity to appear before a judge. From several quarters, proposals have recently been made to solve the problem of court congestion and of judges being bothered with "small" cases, by directing those cases to others. In regard to the federal courts, the suggestion has been made to refer Truth in Lending cases to magistrates. A bill submitted last month by Senator Garn would provide for federal funding to states which establish controversy mechanisms for dealing with disputes over the collection of debts. S.1130, Fair Debt Collection Practices Act, 123 Cong. Rec. No.53, March 25, 1977.

The U.S. Chamber of Commerce has proposed a Model Small Claims Court Act which in several respects is designed to keep cases away from the judge if at all possible. For example, a trial before a judge is recommended "only when an irreconcilable dispute exists." Model Act, Comment to Section 5.1. A judge may

impose mandatory mediation, and arbitration is also encouraged. Mediators and arbitrators are not required to base decisions upon the law. Many low income, poorly educated and timid consumers will be afraid to file suits under the Model Act because they risk being held in contempt of court if the judge finds they didn't try hard enough to settle the case before filing in small claims court. Sections 4.2, 5.2 Comment, 7.3 Comment. The Model Act fails to account for situations in which the consumer has valid reasons for not contacting a merchant to try to resolve a dispute. See Informal Dispute Settlement Mechanisms under the Moss-Magnuson Warranty Act, 40 Fed. Reg. 60200, n.82 (December 31, 1975)(hereafter referred to as Warranty Mechanisms).

One common result of these proposals will be to deny most consumers the opportunity to have their cases decided by a judge. This is the inevitable effect of forcing the consumer to go through alternative procedures such as business sponsored mechanisms, mediation and arbitration. Low income consumers, single parent heads of household, and the elderly lack the time, patience and resources to persevere through a multi-layered process. Consequently, many drop their claims altogether before getting to a judge. Warranty Mechanisms, 60116, 60200, n.84. Alternatively, both consumer plaintiffs and defendants are cajoled or pressured into settlements far less favorable than they deserve.

The language of S.957 should be strengthened to prevent funding to states which, like the Chamber's Model Act, unreasonably

exclude potential consumer plaintiffs and which unreasonably deny or delay the consumer's day in court before a judge by requiring arbitration and mediation.

Federal Judge Leon Higginbotham has expressed my concern:

> ...By all means let us reform that process, let us make it more swift, more efficient, and less expensive, but above all let us make it more just....Let us not, in our zeal to reform our process, make the powerless into victims who can secure relief neither in the courts nor anywhere else.
> Higginbotham, "The Priority of Human Rights in Court Reform," 70 FRD 134, 159.

Mediation and arbitration can be excellent ways to afford consumers fair and swift relief in urban areas with congested small claims courts and a long delay between filing a claim and getting to trial. However, these mechanisms can also be inappropriate in many cases and subject to abuse. For example, most non-lawyer mediators and arbitrators cannot decide cases in accordance with substantive law because present consumer law is far too complex. The best they can do is to base decisions upon "common sense" or a "rough sense of justice."

A consumer complaint based on allegations of a merchant's misrepresentations is probably governed by the state's contract law as well as a fairly new Unfair and Deceptive Acts and Practices Law. The latter often incorporates by reference the regulations, orders and decisions made pursuant to the Federal Trade Commission Act. A complaint in regard to the quality of merchandise often is governed by the terms of the Uniform Commercial Code, and the

federal Magnuson-Moss Warranty Act. The former's provisions can in most cases be applied correctly only by reading the interpretations of the Code made by the local jurisdiction's courts. The latter must be read in conjunction with lengthy and complex FTC regulations. Any case involving credit must apply federal Truth in Lending, the arcane FRB Regulation Z, and state Retail Installment Sales Acts. In light of the need to understand and interpret such complicated statutes, court decisions and regulations, non-lawyer mediators and arbitrators are clearly unqualified if cases are to be decided under the law.

The Chamber of Commerce directly meets this problem in its Model Act, concluding that arbitrators (and presumably mediators), even if they are lawyers, cannot "realistically" be expected to be able to decide cases based on the substantive law. Therefore, they are authorized simply to follow "good common sense." Comment to Section 5.2.

S.957 would permit funding of state plans following the same approach and this will be detrimental to consumers. As Senator Ford stated when introducing his bill, these cases "may be legally complex." Cong. Rec. S3794, March 9, 1977. Common sense does not provide any guidance in striking the delicate balance between the need for a free marketplace which is not unduly tied down by legal constraints, and the need to protect consumers from unfair and abusive practices. We have left it to our legislatures to determine that balance, and the courts are supposed to

enforce that balance by applying the law. S.957 should not provide the occasion for depriving consumers of their opportunity to have the law applied to their controversies. The Act should be amended to prohibit mandatory mediation or arbitration. Arbitrators and mediators should always be lawyers. See "Redress of Consumer Grievances, Report of the National Iinstitute for Consumer Justice, Recommendations 21 and 22 (hereafter referred to as NICJ). Consumer controversies should be resolved in accordance with applicable consumer protection laws.

One other feature of mediation and arbitration deserves mention: both occur in private. This can be beneficial to consumers because it is less formal and formidable than a public courtroom. However, the private nature of the proceedings can also enable unscrupulous businesses to avoid the public and judicial scrutiny which a courtroom hearing necessarily involves. The version of the Consumer Controversies Resolution Act considered by the Senate last year, S.2069, sought partially to avoid this result by declaring that a resolution mechanism is responsive to national goals, inter alia, if it

> provides for the identification and correction of product design problems and patterns of service abuse by (A) maintaining public records on all closed complaints; (B) bringing substantial authority and meaningful influence to bear on compliance to correct patterns of product and service deficiency; or (C) providing information to government agencies responsible for the administration of applicable laws so they can perform their remedial deterrent tasks more effectively. Sec. 8(B)(6). Cong. Rec. S13303, August 4, 1976.

S.957 should contain a comparable provision to insure that cases involving gross abuses and patterns of improper business conduct are dealt with in a manner which will deter their reoccurrence rather than being hidden in private arbitration or mediation proceedings.

Consumers Need Support Services

Consumers, particularly those of low socio-economic status, will not use consumer controversy resolution mechanisms unless a great deal of support is provided. Studies have shown that the small claims court and other mechanisms will continue to be used primarily by business against consumers unless consumer claimants are informed about the use of these mechanisms, assisted in preparing their cases, and assured of an effective procedure for collecting judgments. The Act should contain additional minimum standards to require an adequate level of these support services for consumer plaintiffs. Moreover, consumer defendants must also be assisted. The Act authorizes funding of mechanisms which allow businesses, including assignees and collection agencies, to use the resolution mechanisms to sue consumers. Unless consumer defendants are guaranteed sufficient support services, the mechanisms cannot be consistent with the Act's purpose of assuring all consumers fair resolution systems and of promoting "better representation of consumer interests."

The Act does provide minimum standards for resolution mechanisms in Section 7, but these should be strengthened in the following ways: Subsection (b)(2) provides for paralegal assistance. However, as Professor William Statsky stated in testimony before the 93d Congress on a precursor to the present bill: "The keynote of effective paralegal participation in the delivery of legal services is training." Hearings Before the Subcommittee on Consumers of the Committee on Commerce. 93d Congress, Second Session on S.2928, March 27, April 17, 18, 1974 (hereafter referred to as 1974 Hearings). If a consumer does not have a lawyer, it is crucial that the consumer have the assistance of a skilled paralegal, not just a former assistant clerk or a clerical person who has been given the title of paralegal in order for the state to receive funding under the Act. Therefore, the Act should require at least a training program in which paralegals would be instructed so they can meaningfully assist consumers.

Section 7(b)(3) provides that the mechanisms be open during hours and on days that are convenient for consumers. Busy courts should also schedule cases so a person is not instructed to come to court by 9:00 a.m. only to wait until 3:00 p.m. for his or her case to be called. In addition, when introducing the bill, Senator Ford mentioned courts "located miles away from the consumer's residence" as an important deficiency in present systems, and Senator Metzenbaum noted the inaccessibility of these resolution proceedings in rural areas. However, the bill does not require the state plan specifically to address how the

state will bring mechanisms within the geographical reach of those now excluded. At a minimum, the recommendation of Charles McKenney of Sears, Roebuck Co., should be followed. He suggested requiring a suit brought by a business to be filed in the district where the consumer resides. 1974 Hearings, p.114. See also, NICJ, Recommendation 12.

Section 7(b)(4) provides that adequate arrangements for translation be provided. This should be strengthened by requiring in Section 7(a)(2) that the public information program include projects specifically aimed at and in the language of non-English speaking consumers. Section 7(b)(4) should require that translators be available to assist parties in filing papers, preparing their cases, presenting their cases at the hearing and in proceedings to collect judgments. Brochures should be published explaining the use of and procedures employed in the various mechanisms available, and these should be published in languages other than English, where a sizable number of the local population speaks other languages. Finally, court forms, especially the summons, should at least have a warning in languages other than English, that the document is important and a translator is available at the office of the dispute resolution mechanism to explain the document.

Section 7(b)(6)(D) permits assignees or collection agencies to use the mechanisms "but only in a manner consistent with the purposes of this Act." The Act leaves to the state's discretion

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whether or not to permit lawyers to represent parties. However, if the mechanism is to present a fair procedure, provision must be made for consumers to be represented when the opposing party is a business, assignee or collection agency. Many large retail stores, utility companies and collection agencies use small claims courts regularly and employ very experienced, highly skilled non-lawyers to represent them. NICJ Staff Study on Small Claims Courts, p.204. Consumers, particularly the indigent are at a distinct disadvantage trying to proceed alone against such an adversary. The Act as presently drafted does not require a level of assistance which assures that consumers will be adequately protected under these circumstances.

The Chamber of Commerce's Model Act requires the small claims courts to attempt to retain a lawyer who would serve as court-appointed counsel. This lawyer would be appointed to represent indigent litigants upon request. Persons serving in this counsel role could be full-time salaried court attorneys, legal aid lawyers, upperclass law students, or pro bono attorneys. Section 7.1 of the Model Act. S.957 should contain a similar provision. If the state allows lawyers to represent parties in the resolution mechanism, the Act should either require a state to have a court appointed counsel, or at least a sound system for referring indigent parties to a panel of pro bono attorneys, to a legal aid office which agrees to take these cases, or to a law school clinic. If the indigent consumer cannot get assistance from any of these sources, the consumer should be permitted to have the

case dismissed. Letting lawyers into the mechanism does not automatically defeat the Act's goals of speedy and inexpensive proceedings. Small claims courts have devised methods of allowing lawyers in but limiting their role so they don't delay the proceedings unnecessarily with formalistic legal technicalities. Denying low income consumers ready access to lawyers when they face skilled business adversaries will often defeat the Act's goals of funding mechanisms which will provide fair and effective resolution of disputes.

If the mechanism adopts a rule banning all lawyers, including law students, then the mechanism should be required to establish a system of paralegal consumer advocates who could assume the role of representing consumers. See NICJ Recommendation No. 18.

Section 7(b)(6)(F) states that consumer controversy mechanisms should provide a procedure to insure that default judgments are ordered only if the defendant was given adequate notice of the claim and the plaintiff had established a prima facie case in open court. We urge that this section be strengthened to provide a standard for judging adequate notice. For example, S.957's precursor, last year's S.2069, provided that if a person other than the defendant accepted service, the judge must find a relationship between that person and the defendant sufficient to assure that the defendant in fact received notice. Section 8(c)(6)(A).

S.2069 also required the judge to find that the defendant understood the nature of the claim and the proceedings. This should be included in S.957 as well, since businesses, assignees and collection agencies are allowed to use the mechanisms. Low income clients are often baffled by court forms such as the summons, and most courts for some reason seem unable to draft such forms in plain English. One method to ameliorate this problem is to require the business plaintiff to send along with the summons a court-approved explanation of the mechanism's procedure, the defendant's rights, and how the defendant can protect those rights. In California, Sears acomplishes this voluntarily by sending each defendant a copy of the California Department of Consumer Affairs' pamphlet on Consumers and Small Claims Courts. 1974 Hearings, p.117. This Act should include a provision to assure that any mechanism which receives funds establishes a comparable procedure to assure not only that the defendant receives notice of the claim (see Section 7(b)(6)(E)), but that the defendant is provided an understandable explanation of what is happening. Section 7(b)(1), requiring forms, rules and procedures easy for potential users to understand, is inadequate because it would allow the defendant to receive only a summons, which is inherently intimidating and does not provide the defendant with much of the information he or she needs to protection his or her rights.

Another method to help insure that the defendant understands the nature of the claim and the proceedings is to require bi-lingual

court forms and pamphlets.

Mechanisms funded under this Act should be required to adopt methods such as these to prevent default judgments from occurring. When the consumer defendant is defaulted, the Act should require the mechanism to provide a procedure which will allow the defendant to remove the default judgment easily when this is justified. First, the mechanism should be required to notify the defendant that a default judgment has been rendered, explaining the consequences and what the defendant can do to have the judgment vacated. Second, the defendant should be entitled to have the judgment vacated upon a showing that the plaintiff did not follow required procedures in instituting suit, notifying the defendant, etc. Finally, the judge should vacate the judgment once the defendant makes a minimal showing that he or she has a defense which may require a decision for the defendant or a reduction in damages. Because of the technical nature of removing a default (to be able to show plaintiff did not follow proper procedures requires precise knowledge of those procedures), indigent defendants should be provided counsel for purposes of the hearing to remove the default.

Studies have demonstrated that most consumers do not use small claims courts, and those who use them once, often do not use them again because they are unable to collect their judgments. Section 7(b)(6)(G) fails to provide adequate minimum standards to assure that mechanisms receiving funds will adopt procedures to

correct these problems. At the very least, the Act should incorporate the recommendations of the National Institute for Consumer Justice. The NICJ found that many plaintiffs do not understand how to collect judgments. To remedy this, the NICJ suggests that court personnel be available to advise plaintiffs on how to collect judgments and should actually commence the process for the consumer if necessary. Recommendation 26. Although Section 5(f) of the Act authorizes states to use federal funds to compensate personnel who assist consumers to collect judgments, nothing in Section 7 requires the state to have such personnel. Instead, Section 7(b)(2) provides that a mechanism is responsive to national goals if assistance, "including paralegal assistance where appropriate," is available to consumers in collecting judgments. Far more affirmative language is needed. As soon as judgment is entered, the mechanism should take the initiative in contacting and advising the plaintiff on how to collect and how the mechanism's personnel can assist. The Act should require at least this minimal procedure.

Even preferable is the scheme set out in the Chamber of Commerce's Model Act which provides for the court to arrange a judgment satisfaction plan immediately after the judge renders a decision in the case. Section 8.2. (This procedure is followed in some Massachusetts courts.) If necessary, the plaintiff can resort to a salaried court official for enforcement of the judgment. (The NICJ also recommends collection by a salaried collector.)

Consumer plaintiffs and defendants need all of the support services described above. Without them there is great danger that the controversy resolution mechanisms funded under this Act will at best serve upper and middle income consumers who have the education, experience and resources to persist without the services, or at worst serve only the interests of business and collection agencies.

Involvement of Low Income Consumers in Planning, Execution and Evaluation

Low income consumers need fair, accessible and effective controversy resolution mechanisms more than any other segment of the population. What to others are small claims and judgments, are a month's rent, food and utilities to the poor. In order to assure that the mechanisms funded by this Act are responsive to the needs of the indigent, the Act should provide for greater input from them. In this regard we support Section 5(d)(3) which requires that a state plan include satisfactory assurances that low income consumers have participated in the development of and have commented on such plans. However, Section 5(c)(1) should provide for publication of cooperative agreements in local community newspapers as well as the Federal Register to better assure that those most affected by the grant will be notified. We also believe each state should be required to establish an Advisory Panel which includes low income consumers to help assure

that the plan is properly implemented and to provide an institutional framework for continual input from consumers who wish to support improvements as time goes on.

Last year's S.2069 contained provisions to assure that consumers, particularly low income consumers, have input during the funding agency's review process. For example, part of the State Administrator's annual report had to include comments made by low income consumers on the effectiveness of mechanisms funded under this Act. Section 7(c). S.957 leaves to the FTC full discretion as to what information will be required in the annual report. We recommend some minimum requirement to guarantee input from low income consumers in the review process. In addition, the state should be required to distribute its annual report widely so consumers can read it and respond to it.

Finally, the Act authorizes funding of nonprofit organizations to accomplish any of the provisions of Section 5(f). I assume this would allow funding of business sponsored mechanisms. We believe the Act should contain minimum standards for funding of such mechanisms beyond listing the allowable uses of such funds. Our concerns are related to the appearance of a conflict of interest which is inherent in business sponsored mechanisms, and the absence of data demonstrating that consumers are adequately protected in these proceedings. See NICJ Recommendation 3 and accompanying comment; NICJ Staff Studies on Business Sponsored Mechanisms for Redress, p. 119. Compare the strict requirements

imposed by the FTC for Informal Dispute Settlements Mechanisms under the Magnuson-Moss Warranty Act, 40 Fed. Reg. 60190 et seq., December 31, 1975. At a minimum, the Act should include last year's S.2069, Section 6(c) provision that grants should not be provided to organizations whose mechanism "does not fairly represent the consumers of the services provided."

The State Survey

In addition to the provisions of Section 5(e), states should be required to include in their survey an analysis of provisions in their laws which could preclude or hamper a mechanism from achieving the goals of the Act. For example, the state may have statutes, decisions or court rules which exclude or severely limit the particpation of paralegals and law students. State law may require a corporation to be represented by an attorney. State laws sometimes make it considerably more difficult to collect judgments from corporations than from individuals or other entities. State law may limit the type of remedy the mechanism can provide so severely that consumers will not be able to obtain meaningful relief. Laws such as these will have a great effect on the state's ability to devise a plan consistent with the goals of the Act. Therefore the Act should specifically require an analysis of state laws which may conflict with the purposes of the Act.

Transfer of Inappropriate Cases

Some cases are not appropriate for the expedited and more informal procedure of consumer controversy resolution mechanisms. This is particularly true for complicated cases, cases where the consumer needs a lawyer and the mechanism prohibits this, and cases requiring the decisionmaker to have substantial legal knowledge to decide the case and the mechanism does not provide arbitrators, mediators or small claims judges who are lawyers. A typical example of an inappropriate case is one in which the consumer needs discovery. He or she needs a copy of the contract, the company's payment records, interrogatories, etc. Without discovery, the consumer defendant often cannot successfully assert legitimate defenses. Another illustration is the defense which rests upon an interpretation of an arcane provision in a Federal Reserve Board Regulation upon which numerous court cases and staff opinion letters have been based. The Act should require that a state mechanism provide for transfer of such cases to the appropriate forum if justice requires, unless both parties agree to stay in the mechanism.

Conclusion

While the National Consumer Law Center supports the objectives of this legislation, we urge careful consideration of our recommendations. Adoption of our suggestions would not result in the

federal government requiring the states to conform to a rigid nationally imposed blueprint for consumer controversy mechanisms. Rather our proposals are designed to assure that the goals of this Act are carried out.

END