RESOLUTION OF MINOR DISPUTES

JOINT HEARINGS

BEFORE THE

SUBCOMMITTEE ON COURTS, CIVIL LIBERTIES, AND THE ADMINISTRATION OF JUSTICE

OF THE

COMMITTEE ON THE JUDICIARY

AND

SUBCOMMITTEE ON CONSUMER PROTECTION AND FINANCE

OF THE

COMMITTEE ON INTERSTATE AND FOREIGN COMMERCE

HOUSE OF REPRESENTATIVES

NINETY-SIXTH CONGRESS

FIRST SESSION

ON

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JUNE 6, 7, 14 AND 18, 1979

Serial No. 25

(Committee on the Judiciary)

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CONTENTS

HEARINGS HELD

WITNESSES

Additional Statements

Appendixes

Appendix 1.—Bills

Appendix 2.—Additional Materials Submitted by Witnesses

Appendix 3.—Additional Materials

Appendix 4.—Additional Correspondence

RESOLUTION OF MINOR DISPUTES

WEDNESDAY, JUNE 6, 1979

HOUSE OF REPRESENTATIVES, SUBCOMMITTEE ON CONSUMER PROTECTION AND FINANCE, COMMITTEE ON INTERSTATE AND FOREIGN COMMERCE, AND SUBCOMMITTEE ON COURTS, CIVIL LIBERTIES, AND THE ADMINISTRATION OF JUSTICE, COMMITTEE ON THE JUDICIARY,

Washington, D.C.

The subcommittees met, pursuant to notice, at 1:30 p.m., in room 2141, Rayburn House Office Building, Hon. Robert W. Kastenmeier (chairman of the Subcommittee on Courts, Civil Liberties, and the Administration of Justice) presiding.

Present: Representatives Kastenmeier, Danielson, Gudger, Preyer, Railsback, Sawyer, and Broyhill.

Staff present (Subcommittee on Courts, Civil Liberties, and the Administration of Justice): Michael J. Remington and Gail Higgins Fogarty, counsel; and Joseph V. Wolfe, associate counsel.

Staff present (Subcommittee on Consumer Protection and Finance): Edward H. O'Connell, counsel; and Margaret T. Durbin, Staff Assistant, Minority.

Mr. KASTENMEIER. The committee will come to order.

The Chair would like to announce that we expect other members of our two subcommittees to join us shortly.

The House is in session this afternoon, and there may be votes taken periodically, and sometimes it causes conflicting demands on members' schedules.

This afternoon the Subcommittee on Courts, Civil Liberties, and the Administration of Justice of the Committee on the Judiciary and the Subcommittee on Consumer Protection and Finance of the Committee on Interstate and Foreign Commerce commence hearings on legislative proposals to promote the creation of mechanisms to resolve minor disputes.

Three specific bills, H.R. 2863, H.R. 3719, and S. 423 are on the table. These bills differ in ways that will be explored and debated during these hearings.

Without objection, and before we begin testimony on the specifics of the legislation before us, I ask that the text of the three bills be inserted in the hearing record.

[The bills are reprinted in app. at p. 247.]

Mr. KASTENMEIER. The two subcommittees are sitting in joint session this afternoon because two of the bills have been jointly referred. We could have proceeded individually, but this is a sign of our desire to work together in an open and efficient manner.

It also recognizes that this is important legislation directed at a pressing social need. For my part I hope that the two subcommittees can formulate a proposal that is mutually agreeable to both committees. Then we can successfully process a consensus piece of legislation through the House and proceed, hopefully, then to action in the Senate.

Before greeting our first witnesses let me explain how we are going to proceed.

The two subcommittees are planning 4 days of hearings during which we will receive testimony from a diverse, extremely well-qualified list of witnesses. I will chair the first and third days of the hearings.

Congressman Preyer, as acting chairman of his subcommittee, will chair the second and fourth days of the hearings.

Now, I would like to greet our first witnesses and with the permission of the witnesses we will change the order somewhat.

To accommodate the possibility that one of the witnesses may be pressed for time, I hope we will be able to proceed expeditiously. I will ask as our first witness an individual who has appeared before the Judiciary Committee on several occasions, a thoughtful, eloquent, and competent spokesman for the needs and views of the State courts. I would like to call forward Hon. Robert J. Sheran, chief justice of the Supreme Court of the State of Minnesota.

Chief Justice Sheran has served in his present capacity since 1973 and prior to that he was an associate justice on the same court. He has been active in the American Law Institute, the American Bar Association, and currently is chairman of the Committee on Federal-State Relations of the Conference of Chief Justices.

We are very pleased to welcome you back, Justice Sheran.

We have your statement, which together with the many appendixes I assume you will want to offer for the record. I will accept the same for the record, without objection. You may proceed as you wish, Justice Sheran.

[Justice Sheran's statement follows:]

STATEMENT OF ROBERT J. SHERAN, CHIEF JUSTICE OF THE SUPREME COURT, STATE OF MINNESOTA AND CHAIRMAN OF THE FEDERAL-STATE RELATIONS COMMITTEE OF THE CONFERENCE OF CHIEF JUSTICES

The Conference of Chief Justices is grateful for this opportunity to comment on the Dispute Resolution Act as proposed in H.R. 2863 and H.R. 3719. We support this legislation in principle and commend the Commerce and Judiciary subcommittees for the long and thoughtful consideration they have given to it.

As leaders of state judicial systems, members of the Conference are all too familiar with the complexity of the problems involved in providing appropriate forums for the resolution of so-called minor disputes. We recognize the necessity for new approaches, outside the court as well as within, if we are to meet the obvious needs. The pending bills, we believe take the correct approach in proposing experimentation with, and evaluation of, a wide variety of alternatives to formal adjudication and by providing for a national information clearinghouse and technical assistance program.

Such an approach can build on encouraging new programs underway in a number of states and hasten needed development in many others. It defines an appropriate federal role while leaving development and operation of new programs to those closest to the people to be served.

We have some concern, however, with the fact that the program would be administered by the Attorney General of the United States. The federal judiciary, as you know, goes to the Congress, and not to the executive branch, for

the authority and funds to conduct research and demonstration programs within the judicial branch. It does not submit to direction or oversight by the Attorney General.

State judiciaries cannot, of course, deal directly with Congress. But we feel the separation-of-powers doctrine should apply to them as well in their dealings with the Federal Government. While we do not see this program, with its limited scope, threatening the independence of State court systems, we are reluctant to endorse a procedure by which the Attorney General of the United States could use program funding decisions to affect policy decisions of state judicial officials.

The proposed Federal program would, of course, involve many nonjudicial grantees; private agencies as well as those of State and local governments. But a sizable judicial involvement would appear necessary if the program is to achieve its greatest potential.

The Conference of Chief Justices does not now have a recommendation to make for dealing with this particular separation-of-powers dilemma. But we have just completed work on draft legislation designed to deal in part with the more difficult and pervasive separation-of-powers problems that have arisen in connection with federal grants to state courts through the Law Enforcement Assistance Administration.

We hope to bring this legislation to the attention of Congress in the near future. It proposes creation of a State Justice Institute to administer a discretionary grant program, principally in the research and development field, for improvement of State court systems. The Institute would be an independent agency, chartered along lines of the Legal Services Corporation, but its functions would be more in line with those of the National Institute of Corrections adopted, of course, to judicial needs.

The proposed Institute is not structured to be an operating agency but to provide an appropriate mechanism for administering Federal funds designated for improvement of State judicial systems. In this sense, the proposed State Justice Institute might serve a role in connection with the Dispute Resolution Act. But any such role would be complicated by the fact that the funds under this act would be destined for nonjudicial as well as judicial programs.

The problem here, as with the LEAA legislation, is that State and local courts, functions of the independent third branch of government under all State Constitutions, are combined for Federal program purposes with nonjudicial agencies. As I have indicated, there is not a simple solution to this dilemma. But we have hopes that the State Justice Institute proposal will help us in dealing with it.

One manner in which these concerns for the separation-of-powers could be lessened in significant degree would be for the Congress, through legislative history if not in statutory language, to make it clear to the Department of Justice that it would like to see the various programs of the Dispute Resolution Center contracted out to existing nonprofit organizations qualified to perform them.

In addition to the separation of powers issues discussed, the Conference of Chief Justices will have a continuing concern for the types of relationships, if any, which should be established between the judiciary and nonjudicial dispute resolution forums. These will be matters for decisions in each State and locality but there is a concensus which within the judiciary. I believe, on the need for court officials to be informed, at least, about new programs in the nonjudicial field. Certainly judges of small claims courts now functioning effectively in many States would take this view. It is the view of Hon. James D. Rogers, respected judge of the Hennepin County Municipal Court in Minneapolis, who has extensive experience on the largest court in Minnesota's statewide conciliation court system. In remarks at a recent national conference on minor disputes, Judge Rogers, who also serves as chairman of the Metropolitan Courts Committee of the National Conference of Special Court Judges of the American Bar Association, outlined the many advantages small claims courts can offer and urged the conference participants to "include the judiciary in both the planning and the program" of whatever plan they adopt. "Either arbitration or mediation must have the judiciary available to either enforce the agreements," he said, "or to be the last resort where there is failure of solution." Because Judge Rogers views are more authoritative in this area than any I can offer, I would like to append his statement to my own and make it available for the hearing record.

If it is agreeable with the committee, I also would like to append materials provided by Justice Ben F. Overton of the Florida Supreme Court that describe

the program he initiated in 1977 when he served as chief justice. The Florida program, funded in part by a grant from LEAA, is providing the state's local communities with the clearinghouse, research, and technical assistance programs proposed at the national level by the Dispute Resolution Act. It is, in my view, an impressive illustration of what a State court system can do by providing leadership in the search for improved methods, both judicial and nonjudicial, for the resolution of minor disputes. And it strengthens my belief that State courts—historically responsible for more than 95 percent of the work of dispute resolution—should be used to the fullest extent possible as the Nation moves to improve its ability to resolve citizens' disputes, however small in monetary terms, or low on the scale of criminal conduct, in a manner all will recognize as effective and just. We have many assets including improved administrative structures, a vast store of experience and knowledge, dedicated personnel and, in most instances, public acceptance.

Because the pending bills provide for short-term Federal funding, and because they would give "special consideration to projects which are likely to continue in operation after expiration" of Federal grants, it seems to me that new programs tied into judicial structures with public funding would, in many instances, best meet the goals of the act.

We are, therefore, pleased that the bills provide for judicial participation in the program at both the State and Federal levels.

In closing I will comment briefly on two specific aspects of the bills. First, we believe the broader provisions of H.R. 2863 which would appear to cover minor criminal as well as civil matters, are preferable to those of H.R. 3719 which appear limited to minor civil disputes. For instance, conciliation may provide a better solution than criminal prosecution in many cases involving minor thefts or assaults if the parties are friends, neighbors, or are related to one another. And minor civil disputes, as we know, can escalate into minor criminal acts.

Second, we also believe nonprofit organizations should be explicitly authorized to receive grants from the Dispute Resolution Center under the provisions of section 6 as they are to receive grants from the Attorney General under section 8.

That concludes my prepared remarks. I will be happy to respond to any questions you might have.

RESOLUTION 2—CITIZEN DISPUTE RESOLUTION ACT

Whereas, the Conference of Chief Justices recognizes the need for additional dispute resolution programs and resources if each citizen is to be provided a just remedy within the law for all legitimate grievances; and,

Whereas, the just resolution of many grievances can be accomplished through mediation and arbitration procedures; and,

Whereas, S. 957 as amended (No. 1623) would create a national resource center and provide funds to assist courts, states, localities and non-governmental organizations in developing new mechanisms for the "effective, fair, inexpensive and expeditious resolutions of disputes." Now therefore, be it

Resolved that the Conference of Chief Justices endorses the principle of federally funded technical assistance and demonstration programs designed to improve dispute resolution mechanisms, but with the understanding that such federally financed programs recognize the constitutional responsibilities of the judicial branch of state government in the resolution of citizen disputes; and that federally financed programs, at the national, state and local levels, be conducted in keeping with the doctrines of separation of powers and state sovereignty.

Adopted in New Orleans on February 10, 1978.

STATEMENT BY JUSTICE BEN F. OVERTON OF THE FLORIDA SUPREME COURT

As Chief Justice in 1977, I created a special committee chaired by Justice Joseph W. Hatchett of our court, to evaluate present citizen dispute settlement programs and to assist in development of new centers in this state. We presently have 10 centers in full operation and four in the development stage

These projects are people programs and are designed as an avenue of communication for citizens to *mediate* their problems expeditiously and with little or no cost. They are used in disputes where there has been a prior relationship, i.e., neighbors, landloard and tenant, husband and wife, boyfriend and girlfriend.

Our programs are not mandatory and their purpose is mediation not arbitration. All of the programs appear successful. The majority are operated through

the office of the chief judge of the circuit in which it is located although we have some programs operated by prosecutors' offices, one by a local bar association, and one by a non-profit corporation.

The structure is flexible and we have intentionally avoided any strict uniform rules of operation. We do have a suggested manual of operation for guidance. The purpose of the programs is to bring people together to talk out their problems and we have no fixed way to accomplish this purpose.

In my personal view, the most effective of our programs and those that have been easiest to initiate are those that we have developed and supervised through the existing court and administrative staff. The court gives to the program and image of impartiality removed from politics. The court program also have a broader coverage of the types of disputes resolved. For instance, in programs operated by the prosecutors, most disputes concern minor criminal matters. Court operated programs will encompass landlord and tenant, small claims matters and domestic disputes in addition to minor criminal problems.

Citizen dispute settlement centers are an effective tool to resolve minor disputes between individual citizens, and their development should be encouraged.

A detailed report of the programs in Florida is attached.

Citizen Dispute Settlement: The Florida Experience

By Michael L. Bridenback, Kenneth R. Palmer, and Jack B. Planchard

IN RECENT YEARS state and federal courts have been called on to resolve ever-increasing numbers and types of problems and disputes between individuals, groups, and organizations. This escalation in litigation has resulted in overburdened court systems and intolerable claims on costly and time-consuming procedures and formal adjudicatory mechanisms not necessary to the successful resolution of relatively simple cases. Unfortunately, the response from state court systems has too often been an automatic cry for a greater commitment of the type of resources needed for the handling of more serious criminal and civil cases. The problems peculiar to the filing and resolution of cases more appropriately classified as "minor" have been largely ignored.

The impact of the growing number of minor disputes on the total workload of any state court system is difficult to assess with precision, but it appears to be significant. For example, in 1977, there were approximately 898,000 new case filings (excluding traffic) in Florida state courts. Of this total, 48 per cent were misdemeanor and small claims filings. Misdemeanor cases comprised 74 per cent of the total criminal caseload, and small claims cases represented 42 per cent of all civil cases filed in that year.

While, of course, not all misdemeanor and small claims actions can be categorized as minor in terms of their relative severity, complexity, or financial implications, a sizable percentage (estimated at 75) can be. In addition, although "minor" in terms of the call on scarce judicial resources, these disputes are regarded as extremely important to the involved parties. Florida's experience suggests that these cases often may remain in the system for an inordinate time owing to scheduling problems and backlogs caused by the over-all increases in caseload. And when they finally receive attention, they are dealt with less thoroughly than may be desirable because of limited resources. Often a finding of guilt, innocence, or liability fails to resolve the true problem between disputants and, more specifically, the reasons for the dispute. This is especially true with respect to various small claims actions in which complainants,

Photograph by Harold J. Lambert

even with judgments in their favor, may encounter considerable difficulty in receiving the compensation provided for as a result of the court's disposition.

When there is an ongoing relationship between the disputants (family members, neighbors, landlord and tenant, for example), the problem is likely to reoccur or become even more aggravated if the underlying causes are not dealt with. There is usually little preventive benefit in handling these cases through regular court processes. Because of delays, costs, and uncertainty of results, many disputants may simply choose not to pursue a resolution in the courts at all. The tensions generated by the dispute grow and can erupt in violent "self-help" or other antisocial conduct.

A more recent and innovative response to this problem has been the development and implementation of citizen dispute settlement programs throughout the country. Many of the pioneer efforts were patterned after the night prosecutor program in Columbus, Ohio, which in turn was based on the use of mediation techniques to resolve disputes arising from minor criminal actions between persons who knew or dealt with one another regularly.

The publication *Neighborhood Justice Centers: An Analysis of Potential Models* describes the Columbus program as being operated by the city attorney's office of Columbus, and program services are provided by consultants from the Capital University Law School under contract. The program was established in November, 1971, as a joint effort of the law school and the city attorney. Law Enforcement Assistance Administration block grant funds were received in September, 1972, providing the opportunity to expand. The project is now a part of the city's budget.

The Florida Supreme Court has taken the initiative to expand citizen dispute settlement throughout the state.

Cases are referred to the project by the screening staff of the prosecutor's office and also are accepted by clerks on the project staff when the prosecutor's office is not open for business. The project processes a wide range of cases, including interpersonal disputes, bad checks, violations of city ordinances, and some consumer complaints. Once a case is accepted, a hearing is scheduled for approximately one week later. Hearings are held in the prosecutor's office in the evening, with law students serving as mediators. The students are trained in mediation techniques and attempt to resolve the disputants' problems through discussion. Disputants are often referred to social service agencies or to graduate student social workers on the staff of the project.

The successful Columbus program and similar projects in other major metropolitan areas, including Miami (Dade County), spawned a lively movement to create alternative dispute resolution mechanisms for civil as well as criminal complaints. The American Arbitration Association's "4-A" programs were developed along similar lines and have been implemented in New York City, Rochester, and a number of similar metropolitan areas. The Boston Urban Court has also implemented dispute resolution programing.

The mediation component of the Boston program is administered by Justice Resource Institute, a nonprofit organization. The program was established in December of 1975 and is funded by the L.E.A.A. Cases are referred from a number of sources and include a wide range — family and neighborhood disputes, landlord-tenant disputes, and disputes involving friends. Once a case is accepted, a hearing is scheduled within a week of the date the parties agree to submit to mediation. Hearings are held in the storefront offices of the program. A panel of mediators, largely lay community people, hear the case with the sessions typically lasting two hours. The mediators receive training through the Institute for Mediation and Conflict Resolution. Social service referrals are available to both disputants and are offered at various stages of the process.

As the number of minor-dispute resolution programs has increased, attention has turned to the manner in which information about the concept should be disseminated. The L.E.A.A. identified the Columbus program as an "exemplary project." A new initiative by the Department of Justice and the L.E.A.A., commenced in 1977, calls for the establishment of neighborhood justice centers on a pilot basis in Atlanta, Kansas City, and Los Angeles. It is the hope of the L.E.A.A. and the Department of Justice that the knowledge gained from the intensive evaluation of these efforts will facilitate the growth of the citizen dispute settlement movement.

At the same time the American Bar Association has established a Special Committee on Resolution of Minor Disputes under its Section of Administrative Law. This committee, which is headed by Sandy D'Alemberte of Miami, is charged with the responsibilities of providing technical assistance and conducting research on the requirements for and the operation of nonlitigious alternatives to formal court processing of minor disputes in state court systems.

In spite of the emerging importance and popularity of the citizen dispute settlement concept, however, relatively little attention has been given the re-

quirements for the development and co-ordination of a successful state-wide program. The Florida Supreme Court has broken ground in this regard by identifying those needs. Its formulations are the result of three years of monitoring of the rapid growth of and reliance on citizen dispute settlement projects at the local level in Florida.

As mentioned earlier, one of the pioneer programs evolved in Miami. Because of the success of that program and the widespread interest of Florida's judiciary, a number of programs were established throughout the state. Other fully operational projects now are located in Orange (Orlando), Duval (Jacksonville), Broward (Ft. Lauderdale), Pinellas (St. Petersburg/Clearwater), Polk (Bartow/Lakeland), Alachua (Gainesville), Hillsborough (Tampa), Brevard, and Collier counties. Palm Beach (West Palm Beach), Monroe (Florida Keys), and Volusia (Daytona) counties are in the initial stages of planning and implementation. There are at least six other Florida communities investigating the potential of these programs.

The common goals of these programs are to provide an alternative forum to the courts for citizens to work out meaningful solutions to interpersonal conflicts, to reduce the time necessary for citizens to obtain a hearing and resolution of their complaints, and to reduce substantially the cost of handling these disputes for the litigant and for courts.

In spite of the similarity in their established objectives, however, the programs vary significantly in structural organization and operating procedures. Of the ten programs now operating, four are set up under the supervision of the court, three operate under the auspices of the state attorney's office, two are supported by local bar associations, and one is supported by a private nonprofit corporation.

The funding sources also vary—there are L.E.A.A. grant funds, Community Employment Training Act funds, state or local general revenue, and funds from the American Bar Association. Some of the projects have been funded through a combination of resources, depending on their budgetary requirements.

There also are significant differences in budgetary requirements. For instance, the programs in Brevard and Alachua counties originated in prosecuting attorneys' offices and are supported through the regular operating budget of those offices. No additional funding was requested. In contrast, the Miami program has a budget of approximately $100,000 a year obtained from the Metropolitan Dade County government. The other programs vary in fiscal requirements from $40,000 to $130,000 a year.

Caseloads range from approximately 400 to in excess of 3,000 a year, depending on local policies dictating the types of cases handled. While most of the programs have concentrated in the criminal area, a few have branched out into civil, domestic, consumer, and juvenile matters. The distribution of caseloads by case type varies from program to program.

And staffing is not uniform. For example, some have volunteer mediators, while others use paid professionals. Some mediators are graduate students or university faculty members with backgrounds in the social sciences or psychology. Others use a cadre of mediators comprised largely of lawyers or lay citizens trained in mediation techniques.

Two programs that exemplify the disparity are those located in Duval (Jacksonville) and Pinellas (St. Petersburg) counties. The Duval program is sponsored by the state attorney's office, while the overseer of the Pinellas program is the circuit's chief judge's office. The state attorney's budget provides funds for the Duval program, along with a $40,000 supplement from the L.E.A.A. to operate a youth mediator program, while the Pinellas program obtains financial support from L.E.A.A. ($131,000 a year). The Duval program operates from the state attorney's office, while the L.E.A.A.-funded program is in a branch courthouse as well as the main courthouse.

According to a recent study conducted by the Florida State Courts Administrator, the type and volume of cases handled by these two programs also differ substantially. Duval disposes of 50 to 60 cases a month, of which 83.6 per cent are criminal. The five primary types of disputes dealt with are assault and battery, assault, animal nuisance, criminal mischief, and neighborhood. In contrast, Pinellas handles 150 to 160 disputes monthly, consisting of 72.8 per cent civil cases. The five major types of cases are landlord-tenant, recovery of property or money, neighborhood disputes, assault and battery, and consumer problems.

The primary referral sources also differ in that 98.9 per cent of the Duval cases are referred by the state attorney, while only 17.5 per cent of the Pinellas cases originate from this source. In addition, the disputants involved in the Pinellas program are referred by a wider diversity of sources (law enforcement 23.5 per cent, clerk of court 10 per cent, and city hall 9.3 per cent).

The mediators utilized to settle disputes do not differ substantially in their professional backgrounds and areas of expertise, but those working for the Pinellas program receive $8 to $10 an hour for their services, while in the Duval program they are volunteers.

In fact, these variations demonstrate the flexibility of the citizen dispute settlement mechanism as a viable alternative for almost any jurisdiction. As a result, the Florida Supreme Court announced in 1977, as one of its major priorities, the need to investigate and evaluate existing programs in order to determine how and why they are successful and how their continued growth and expansion could be encouraged and supported.

Florida's Judicial Planning Committee, with the support of the staff of the Office of the State Courts Administrator, identified several immediate problems and needs:

- There was a lack of definitive guidelines to assist in the development of programs based on the experience of those that already existed.
- There was a lack of mechanisms for co-ordination and technical assistance to provide support and encouragement for the development of programs.
- There was a need to ensure that new programs be developed in co-operation with, rather than in conflict with, established state-wide procedures.
- There was a need to develop streamlined methods for screening disputes appropriate for citizen dispute settlement programs.
- There was a need to develop improved training for program staff.
- There was a need to provide better information about the citizen dispute settlement concept not only to courts and the criminal justice community but also to the public.
- There was a need, because of limited funding sources, to develop strategies for financing programs and improving their cost effectiveness.

Based on these preliminary findings, the Florida Supreme Court established

a Special Advisory Committee on Dispute Resolution Alternatives by administrative order in January, 1978. That committee now functions under the leadership of Justice Joseph W. Hatchett and includes representatives of the judiciary, the legislature, various state attorneys' offices, local government, and other affected public, consumer, and citizens' groups.

The supreme court also has instituted a state-level project believed to be one of the first of its kind in the country. This project will provide a research, technical assistance, and training mechanism for C.D.S. programs through the Judicial Planning Coordination Unit of the Office of the State Courts Administrator.

The advisory committee plans to address the following:

- A thorough assessment of the existing programs.

The assessment will have two major thrusts. The first will involve documentation of the manner in which the individual programs are organized, staffed, operated, and funded. The second thrust will gather data on a large sample of cases handled by the various programs over the last year. The objective will be to document the impact of the programs in terms of the effective disposition of their caseloads.

A unique characteristic of the planned research is that the research methodology will be developed and executed as a co-operative venture between those working at the state and local levels. The study will provide data and information that the staff of the individual programs themselves feel they need to monitor and evaluate their own efforts.

- The preparation and dissemination of guidelines for the establishment of C.D.S. resources in new jurisdictions.

This will be one of the primary products of the study. Subjects to be covered by the guidelines will include: (1) the identification of problems and obstacles to program planning and implementation and solutions to them; (2) selection of program objectives; (3) program organization; (4) staffing; (5) workflow or paperflow and the relationship to court and other dispute resolution procedures; (6) operating procedures; (7) referral resources; (8) operating hours; (9) program location and facilities requirements; (10) budgetary requirements, funding alternatives, and application procedures; (11) training requirements and offerings; and (12) consulting or technical assistance resources.

- The establishment of the capability to provide direct consultative technical assistance to local dispute resolution programs.

The primary consulting resources will be individuals in other C.D.S. programs. Additionally, consultants from the American Bar Association, the neighborhood justice center program, and programs in other states may also be relied on.

- The development and implementation of a comprehensive orientation and training program.

Orientation and training are two aspects of program administration at the local level that may be well suited to development on a state-wide basis. First, the development of training by program personnel on mediation techniques is often regarded as a lower priority than other local funding requirements. Thus paid mediators are recruited from such fields as social work, the law, and the ministry on the basis of an assumption that they have expertise in handling mediation settings. Lay persons recruited to serve as hearing officers on a voluntary basis may have no such skills. Finally, while training on the techniques employed in the mediation hearing may be too costly for a local program, the subject matter is relatively universal and may be developed state-wide and offered regionally.

Of equal concern is the general lack of knowledge of judges, prosecutors, public defenders, law enforcement officials, and others on the role and function of C.D.S. programs. The committee will meet this need by developing local orientation procedures as well as ensuring the integration of C.D.S. materials into the continuing education programs offered by the various bar and professional associations.

- The development and pilot testing of alternative public information or education strategies.

As in the area of orientation and training, it is the committee's view that various public education strategies and materials directed at promoting public awareness of and reliance on C.D.S. programs might be more cost effective if developed state-wide. The subject matter is fairly standard and yet the cost of launching a sound public education effort may be prohibitive for any single program.

- The assessment of C.D.S. programs compared to other judicial and nonjudicial dispute resolution alternatives.

Finally, the committee will assess the relationship between C.D.S. programs and other types of dispute resolution procedures, including criminal, small claims, juvenile arbitration, and administrative procedures, the latter having recently been provided for by act of the Florida legislature, as well as those associated with domestic relations cases.

The committee will also document methods to ensure that new programs are integrated as smoothly as possible into the local environment.

- The establishment of the capability to monitor the activities and growth of citizen dispute settlement and related programs on a continuing basis.

The Dispute Resolution Alternatives Committee, in concert with staffs of local programs, has undertaken an ambitious task. If it succeeds, substantial benefits will be realized by each of the programs in existence as well as those that will be established. The committee's existence and mandate attest to the Florida Supreme Court's commitment that there is a legitimate role for citizen dispute settlement resources at the local level. If operational problems cannot be solved satisfactorily by local projects individually, the state can make a meaningful contribution by filling the void. At the same time, every effort must be made not to centralize control of the local programs because of the need to tailor them to the unique requirements of their individual jurisdictions.

It is expected that through this partnership, citizen dispute settlement programing will continue to develop and grow as a complementary alternative to the more formal judicial and nonjudicial dispute resolution processes available in Florida. It is the hope of the supreme court that Florida, through this initiative, will contribute vital experience and knowledge to the other states. ▲

(Kenneth R. Palmer is the judicial planning administrator in the Florida State Courts Administrator's office. Michael L. Bridenback is a staff associate in that office and is serving as staff director of the Florida Supreme Court's Special Advisory Committee on Dispute Resolution Alternatives. Jack B. Planchard also is a staff associate in the court administrator's office and is associate staff director of the special committee.)

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ADDENDUM II

DISPUTE RESOLUTION INFORMATION AND TECHNICAL ASSISTANCE SERVICE

STATE COURTS ADMINISTRATOR, DISPUTE RESOLUTION ALTERNATIVES COMMITTEE

I. What is the dispute resolution technical assistance service?

It is a centralized information and consultation resource for local jurisdictions who are interested in developing or who have implemented alternative dispute resolution mechanisms including citizen dispute settlement programming, juvenile arbitration, family courts, etc.

II. Who administers the dispute resolution technical assistance service?

The service is administered by the Florida Supreme Court and the Office of the State Courts Administrator.

III. Who is eligible to utilize the technical assistance services offered by the office of the state courts administrator?

The following organizations, agencies or individuals may utilize the service: Judges, Court Administrators, State Attorneys, Court Clerks, Existing CDS Programs, Colleges and Universities, County and City Commissioners, Local Bar Associations, other interested local governmental agencies, interested private and community organizations.

IV. What are the major functions of the technical assistance service?

The primary function of the service is to provide technical assistance through on-site or written consultations to jurisdictions interested in developing an alternative dispute resolution mechanism or to existing dispute resolution alternative programs where a specific problem or need has been identified. Consultations are directed at providing local personnel with the free advice and guidance of experts in the field of dispute resolution at the local, state or national levels, as well as that of persons in Florida who have successfully developed and implemented programs.

A secondary function of the service is to act as a central clearinghouse for all information related to dispute resolution, and to create channels of communication among those who have an interest in the dispute resolution field.

V. What kind of technical assistance services are available?

Technical assistance services are available in the following areas:

New program development:

1. The conduct of needs and resource assessments.
2. Documentation of existing procedures.
3. Identification and projection of program requirements related to: Personnel, funding, goals and objectives, procedures, referrals, training, and monitoring/evaluation.
4. Forms and records development.
5. Statistical/recordkeeping procedures.
6. Workflow/paperflow.

Program funding (new or existing programs):

1. Assessment and projection of funding requirements.
2. Identification of funding sources.
3. Development of application for funding.
4. Organization of presentation to funding source.

Program staff training (new or existing programs):

1. Administrative.
2. Intake.
3. Mediators.

Public education/information/relations.

Specialized needs or problem assessment and resolution including:

1. Forms development.
2. Evaluation.
3. Statistical/recordkeeping procedures.
4. Procedures documentation.
5. Case selection criteria.
6. Other TBA.

Special research/evaluation in specific areas such as:

1. No shows rates.
2. Participant satisfaction rates.
3. Program effectiveness.
4. Benefit/cost analysis.
5. Other TBA.

VI. What technical assistance resources will be utilized?

The following organizations and/or individuals may be utilized in the provision of technical assistance:

Statewide:

Local staff in existing programs.
DRA committee members and staff.
Private consultants.
University personnel/consultants.
Local attorneys interested in dispute resolution.
Executive agency or legislative personnel.
Other TBA.

Nationwide:

Neighborhood Justice Center Evaluation Project—Institute for Research.
American Arbitration Association.
Institute for Mediation and Conflict Resolution.
ABA Committee on Minor Dispute Resolution.
ABT Associates.
U.S. Department of Justice.
National Association for Dispute Resolution.
Grass Roots Citizen Dispute Resolution Clearinghouse.
Individual DRA program staff.
Private consultants.
Other TBA.

VII. What are the procedures for requesting technical assistance from the office of the State courts administrator (OSCA)?

The procedures for requesting technical assistance are as follows:

Identification of a problem or need by local jurisdiction.

Contact representatives of the Office of the State Courts Administrator by telephone or letter.

If the request can be satisfied by staff, the information will be provided directly by phone or letter.

Request for assistance of a scope beyond the immediate capabilities of the service staff will be handled in the following manner:

1. Upon receipt of the request, a meeting will be scheduled between the staff of the Office of the State Courts Administrator and the jurisdiction requesting the assistance to discuss the nature of request in detail.
2. A review of the resources which may be appropriate for providing the assistance requested will be conducted by the OSCA staff. (See question # VI)
3. Selection of consultant or consultants to provide the technical assistance will be made jointly by the OSCA staff and the recipient jurisdiction.
4. At the convenience of the recipent jurisdiction, an on-site visit by the consultant(s) will be scheduled by the OSCA staff or written input by the consultant(s) will be solicited.
5. The provision of technical assistance requested by consultant(s) selected. The nature of the TA will vary by the type of assistance requested and, thus, the procedures for providing the TA will be developed in detail after the selection of the consultant(s).
6. The filing of a report by consultant with the recipient jurisdiction and the OSCA.
7. Evaluation of TA provided by both the recipient jurisdiction and the OSCA.
8. The conduct of a follow-up assessment of results/impact of TA.

VIII. How will the TA provided to an individual jurisdiction be evaluated?

A post-technical assistance evaluation will be completed by both the jurisdiction receiving the assistance and the OSCA. The recipient of the assistance will be asked to rate the overall performance of the consultant while the OSCA staff will only address the TA report submitted by the consultant.

IX. Is there a limit on the duration of the technical assistance provided?

Yes, the duration of the TA will be limited to no more than ten days of on-site consultant assistance, unless it can be exceptionally justified.

If it is determined by the Office of the State Courts Administrator that the subject matter of the TA request is not appropriate, the reporting jurisdiction will be advised.

X. What other services are available?

The following services are offered:

Maintenance of an updated bibliography on relevant articles, papers and reports written on Dispute Resolution.

Maintenance of files on all in-state DRA programs and selected out-of-state programs.

The conduct of research in specialized areas.

Periodic notification of workshops, seminars, etc., on dispute resolution to local jurisdictions.

XI. Who should be contacted to participate or utilize the service?

The contact person is: Mr. Mike Bridenback, Office of the State Courts Administrator, Supreme Court Building, Tallahassee, Fla. 32304. (904) 488-8621.

The Judiciary and Minor Dispute Resolution

Presented by: Hon. James D. Rogers, Judge, Hennepin County Municipal Court, Minneapolis, Minnesota, Chairman Metropolitan Courts Committee, National Conference of Special Court Judges, American Bar Association

The goal of this conference is the solution to the problem of minor dispute resolution in your community. Thus you question why should a member of the judiciary be a part of this program and the solution, as we are looking for new avenues, not wanting to tread the old ones. I hope that when we are finished you will find there is a place for the judiciary in the solution.

We all should be careful that our terminology is understood. We use the term "minor." We mean size, not importance. We well know that even the smallest claim has great significance to the parties.

I would like to give you my thoughts and feelings based upon my experience and background as to where the judiciary fits into the total plan of minor dispute resolution. We should clearly understand that the courts of this country do not need to increase their caseload. But on the other hand, they cannot shirk their responsibility for handling the resolution of disputes.

When I went on the bench, I felt the court must be innovative, meet new challenges and find new solutions. We in Hennepin County feel we have been very innovative and met the challenge. When we found a solution that worked, I was convinced that this was the answer for all courts. I have long since learned this is not true; that what may work for one court or community is not necessarily the answer for another court or community. If you come to this conference expecting a pat solution to take home and put in operation, I am sure you will be sadly mistaken, but I feel that the ideas you receive can be the basis for your program. Whatever plan or program you adopt must involve or include the judiciary in both the planning and the program. Either arbitration or mediation must have the judiciary available to either enforce the agreements or to be the last resort where there is failure of solution. In some areas arbitration or mediation will reduce caseloads in the court. In others it will increase the caseloads. The latter will be true where there is not present an easily accessible small claims court. It is vitally important that the legislation now before the present congress (which narrowly failed in the last congress) is adopted, but this must include funding for the judiciary. If not, the problems will only be compounded. Let me cite two examples of experiences in this area.

First, the Department of Transportation established the ASAP Program which increased the alcohol related driving charges 200 percent or more in many courts and only provided minimal funding and assistance for the courts to deal with this influx of cases. Second, the LEAA program provided millions of dollars for law enforcement agencies; yet in most states less than 5 percent of the funds went towards dealing with the court-related problems resulting from the influx of cases.

A major fallacy is that minor disputes and small claims are purely the problem of urban America. These problems exist all over this country, and the only difference is volume and degree. All of these problems need and deserve an answer.

When I first went on the bench, Minnesota still had the justice of the peace system. They have now abolished all of the justice of the peace courts, and these

have been replaced with full-time courts, and this is good. A number of my friends who were JP's told me, "We do a better job than you can in putting out local brush fires," and they had a strong point in this area. We all must find ways to put out the local brush fires, but we cannot revert to the justice of the peace system.

What does the judiciary have to offer as a solution? What are its advantages and disadvantages, and why should it be used? The judiciary has small claims courts. Where there is no small claims court functioning, these in most cases can be established without new legislation. All that is needed is a little pressure on the local court. The court solution has the advantage in that it can be placed in operation in a short period of time with very little or no start-up costs. It gives the parties a final, legally binding and enforceable answer to their dispute. It is the fastest procedure to an ultimate solution and functions at a low cost to the taxpayer. The major disadvantage is that it is a solution in an adversary situation. It is always more desirable to have people work out an agreeable settlement. But sometimes the costs are high, and the question is, should the taxpayer be expected to bear this burden?

In November 1978, the National Center for State Courts released an excellent publication entitled "Small Claims Courts—a National Examination" by John C. Ruhnka and Steven Weller. This study covers 15 small claims courts in all parts of the country and of varying population sizes. It is an excellent sampling of the courts and their activities. I know of no other study of such depth on this subject and written in such an objective fashion, and I highly commend it to you.

I would like to point out a few examples of how small claims courts are presently meeting the challenge. Obviously, I will revert to my own experience in our Hennepin County Conciliation Court. Our court started in 1915 and is one of the oldest in the country. The name "Conciliation Court" comes from a Scandinavian court discovered by a Minneapolis judge on a visit to his ancestral homeland. Because of its long existence, the court is well known in the community and is used extensively. There is a $1,000 claim limitation, but basically no other limitations, so it is available to all in need. The filing fee is $2.00 which the legislature may raise to $5.00 this year. The cost of handling a case is approximately $12.00, and in this day and age with the obligation of all branches of government to be cost conscious, this is an extremely reasonable level of expenditure for dealing with minor dispute resolution.

In 1978 the court processed over 29,000 cases, and in 1979 will process over 32,000 cases. Cases are heard daily in the Government Center and on a regular basis at the four suburban court sites. Claims can be filed at the Government Center or any of the four suburban court locations every day that the court is open. The cases are heard within six weeks of filing. There is a right of appeal, if the parties are dissatisfied, to the County Municipal Court. The appeals are heard within four months. The appeal rate is approximately 1½ percent. Thus we feel we have met certain of the essentials of minor dispute resolution, being accessibility, low cost and rapid final disposition.

We have been using lawyer referees for over eight years. This has worked well. It has freed up judges for other work and has lowered our costs. We pay the referees $75.00 per day. We have adopted certain innovations to improve our functioning. We have grouped the automobile accident cases so that they are heard at one setting. It was found that a number of claims were being filed against launderers and dry cleaners, a field that needed expertise. Thus we enlisted the help of the local representatives of the National Institute of Cleaners & Launderers. They have provided us, at no charge, with an expert at these hearings. We set special calendars for collection matters, and it should be pointed out that the accusation which is made that small claims courts are collection agency courts is not true as only 25 percent of our volume are collection agency matters, and as you will find from the National Center report, the allegation does not bear water throughout the country.

In addition, we have set special calendars for housing matters which I will go into in more detail a little bit later.

To help the litigants understand the court, an easy-to-understand guide has been published and widely distributed throughout the county, and you have a copy of this publication. Recently a four-minute audio-slide show was placed in operation on the counter of the clerk's office next to the courtroom. This explains the court procedures and is designed to alleviate some of the uncertainties of the litigants before going into court.

Some might allege that the one weak spot in the system is that there is no procedure within the court for the collection of the judgment. We are now in

the process of providing further information to litigants as to the steps they should take to collect a judgment when it is not paid by the losing side. To a certain degree the problem of collection is also true with arbitration and mediation.

The court provides one aspect that no other method provides, and that is what I call "the black robe syndrome." Many people really want to have someone to tell their problems to, and is true even if they lose. They feel satisfied if a judge (even a referee) in a black robe listens patiently to their complaints.

The court offers what I call a situs or setting advantage. The location of the minor dispute resolution proceedings is in most cases all important. For problems between neighbors a local setting is fine, but for disputes between merchants and consumers or landlords and tenants this may not be true.

We must remember that the ultimate goal is justice, and to accomplish this goal we must not only do justice, but we must appear to do justice. Thus whose turf or ground we are on may greatly affect the appearance aspect. I am not so naive as to think that the courts are loved by all, but they do provide a neutral ground, and dedicated judges can overcome the other problems.

Other communities have programs that Hennepin County has not yet adopted. Portland, Maine, has mediation as a part of the small claims court. This is also true of New York City in the Manhattan and Harlem courts and the court in San Jose, California, has added both mediation and arbitration. In areas such as San Jose and New York City with ethnic and language problems which we do not have, this has been a great addition to the service provided by the court. These are just a few examples of meeting the various local needs by the judiciary.

At the present time the National Conference of Special Courts Judges of the American Bar Association (under the direction of the Honorable Robert Beresford of San Jose, California), the National Judicial College, University of Nevada, and the American Bar Association Special Committee on Housing and Urban Development Law are establishing an educational program and seminar to be conducted at the National Judicial College for judges throughout the United States to assist them in establishing or improving their procedures for handling small claims in dealing with minor dispute resolution.

The most rapidly growing area of minor disputes is in the housing field. These matters basically fall into three categories: First, code violations which are criminal in nature; second, eviction matters; and third, claims for damages, rents or deposit refunds. The last two are civil in nature. The eviction and code matters can only be handled within the judicial system. The claims matters can be handled outside of the system. Obviously, it would appear that the total answer to all housing matters should not be separated but should be handled within one system. This does not necessarily require establishing a housing court. At the present time the American Bar Association Special Committee on Housing and Urban Law Development is making an exhaustive study in this area with HUD support. This program is known as the National Housing Justice and Field Assistance Program. The report of this committee will be published in early 1980 and should be of great help and assistance to communities in dealing with their problems in all three of the areas mentioned.

In addition to this report the committee is producing a quarterly information bulletin and also is producing in cooperation with the Law School of Washington University, St. Louis, Missouri, the issue of the Urban Law Annual which is to be released in June, 1979 which will be solely devoted to housing matters and will be the only presently known compilation of this magnitude dealing strictly with housing matters.

To return to my provincial nature, we feel we have made great strides in handling housing matters without establishing a separate housing court. These matters are probably the most emotion-packed next to domestic disputes.

Thus we embarked upon a program whereby we have brought together representatives of both the landlord and tenant groups and formed a committee headed by one of the judges. This committee meets regularly. The committee has agreed upon a form of summons and information folder to be attached to the summons in eviction matters. These are written in simple, understandable language to assist the parties, particularly tenants, in knowing their rights and in preparing themselves for the court proceedings. The committee has agreed upon a system of a hearing officer working with the judge in eviction matters to handle the defaults and thus reduce the time of litigants being required to wait in court.

Eviction matters in the court are increasing at the rate of over 1,000 a year, but with this system we are able to manage the caseload.

Code violations are set for one day each week. The City Attorney's office has assigned one assistant to handle these matters, and he is well prepared and versed in the code and brings with him the inspector to court even on the defendant's first appearance. The goal is compliance, not prosecution, and this approach has been highly successful.

The housing claims in conciliation court are set on a special calendar. We have a group of 14 lawyers who are well trained in housing matters who handle these calendars. We have regular refresher programs for them.

We have been successful in Hennepin County because of three factors: the great help of our former administrator, S. Allen Friedman, the willingness of the judges to try new innovations and the support of the Hennepin County Board of Commissioners.

I hope that you will find the materials which you have received, including our annual report, the Conciliation Court Guide and eviction forms, of interest and help to you. We welcome your inquiries and visits to see our system.

In the making of your decision how to handle the problems of minor dispute resolution in your community, don't leave the judiciary out of your planning, whatever route you take. Look to the institutions that you already have, as both you and I have an obligation to the taxpayer to be cost conscious. Tailor your program to meet the needs of your community. There is no nationwide solution. Beware of the loud voices as all too often in this area it has been found that they are dealing with emotion and not sound reason or understanding. Bear in mind that the ultimate goal is justice, and to accomplish this goal you must not only do justice but appear to do justice.

TESTIMONY OF HON. ROBERT J. SHERAN, CHIEF JUSTICE OF MINNESOTA; CHAIRMAN, COMMITTEE ON FEDERAL-STATE RELATIONS CONFERENCE OF STATE CHIEF JUSTICES; ACCOMPANIED BY HARRY SWEGLE, WASHINGTON LIAISON, NATIONAL CENTER FOR STATE COURTS

Judge SHERAN. Thank you, Mr. Chairman.

The Conference of Chief Justices is grateful for this opportunity to comment on the Dispute Resolution Act as proposed in H.R. 2863 and H.R. 3719. We support this legislation in principle and commend the Commerce and Judiciary Subcommittees for the thoughtful consideration they have given to it.

I appreciate the privilege of being able to file this statement. I will make some general observations with respect to the subject matter of this hearing, and then respond to such questions as may be considered appropriate.

The Declaration of Independence has declared that all men are created equal and equally entitled to life, liberty, and the pursuit of happiness. We know that if over 200 million of our citizens are to pursue life, liberty, and happiness, each in his own way, there are bound to be many conflicts and disputes which require resolution.

We know that in a society which places great emphasis upon the manufacture and distribution of goods, particularly consumer goods, many of these disputes will relate to the products which are made available in such abundance to our citizens. Housing is essential. Frequently housing is available only on a rental basis, so there are bound to be controversies and disputes springing from the relationship of landlord and tenant. As our population tends to become more urbanized, drawn together more tightly into the large metropolitan areas, there will be conflicts between neighbors living in such proximity one to another as to bring to the surface differences which in an earlier and more agrarian society might not have surfaced.

We know too that as family ties become less strong, as the commitments to family unity become less deeply felt, we will have our share of family disputes that require resolution. There is a joint Federal-State responsibility that disputes of these kinds find resolution. From the standpoint of the citizens the problem is to find a method of dispute resolution; to them, whether Federal or State governments provide it is not all that important. The imperative is that some method be provided so that disputes can be resolved and people can get on with more constructive efforts in more productive fields.

That is why the Conference of Chief Justices has committed itself to the belief that the responsibility for the resolution of disputes, whether they be minor or great, is a joint Federal and State responsibility. We have committed ourselves to cooperate with the institutions of Federal Government and most specifically the Congress of the United States, in exploring the problems and suggesting reasonable solutions for them.

We believe that in many significant respects the Dispute Resolution Act, which for consideration by this joint committee, recognizes the proper allocation of authority and responsibility between Federal and State Governments. We think it entirely appropriate, for example, that the Federal Government establish an institution which would serve as a clearinghouse for information with respect to minor disputes, which would provide technical assistance to the States in providing an answer to the small dispute resolution problem, and which would make available seed money in some instances to get suitable programs started. We believe, however, that the basic responsibility for settlement of small disputes as well as major disputes must continue to be in the States. It is important to bear in mind that from a standpoint of volume, somewhere between 90 and 95 percent of the disputes and controversies occurring in the United States are and will continue to be resolved through State court systems.

It is important then that State court systems fulfill their responsibility in addressing these problems and that the Federal Government be vigilant to avoid intruding in an area which by its nature is better reserved for the States. But insofar as the functions that are outlined in these bills are concerned, we see them as being appropriately Federal functions in providing funding, technical assistance, an informational clearinghouse.

We think it important to recognize the role of the Federal Government calling to national attention the existence of such problems as the inability of State court systems to provide effective means for the settlement of all minor disputes. We recognize and pay deference to the leadership of the Chief Justice of the United States, and others, in directing our attention to the fact that there are many disputes which have not been given appropriate forum and that there are methods by which these disputes can be addressed and settled, such as mediation, conciliation, and arbitration, which could be employed more effectively than they have been in the past, but which should supplement State court systems and State court services rather than replace them. This is so because there exists within our State court systems an institutional character; a vast fund of experience in dispute resolution; established administrative structures; a deep commitment to the duty of resolving disputes in order to improve the well-being of the public generally.

In dealing with those problems, there should be no intrusion upon the independence of State judicial systems or any allocation of function which is not fully consistent with the doctrine of separation of powers. This is the reason why the Conference of Chief Justices has some reservations about the legislation, springing from the fact that the administrative authority, the fund allocation authority, is placed in the Office of the Attorney General of the United States, not for lack of confidence in that Office or its incumbent, the fact is that we regard the Attorney General of the United States as one of the great exponents of the independence and worth of State court systems—but because we believe the problem to be as simple as this:

If the Federal Government believes that the Office of the Attorney General of the United States as a part of the executive branch of the Government should not control the operation of the Federal court system, then the Office of the Attorney General of the United States should not significantly influence the operation of State court systems by control of funding decisions or in other ways.

We appreciate the fact that the problem presented here is not easy to resolve. We have addressed it and now have a task force report which has the approval of the executive committee of the Conference of Chief Justices which deals specifically with the question.

It proposes that the distribution of Federal funds in aid of dispute resolution in the States should be through a Federal institution created by the Congress, separate and independent from the executive department of the Federal Government with policy decisions determined by a board comparable to the Legal Services Corporation appointed by the President, confirmed by the Senate, and made up of people experienced in State judicial systems. In due course a bill embodying the creation of this institution will be presented for consideration by the Congress.

In the States there have been experiments in the field of dispute resolution which are consistent with the principles which I have mentioned and which I think you will find useful to examine as you proceed further with analysis of this bill.

Those with which I am most familiar occurred in the State of Minnesota where we have in Hennepin County, our most populous county, a conciliation court where we are able to process some 30,000 minor disputes per year at a total cost of approximately $10 per dispute with a user cost of approximately $2 per dispute.

The persons who act as judges, referees arbiters, whatever the proper term might be considering their function, are not judges, but are lawyers who are recruited or volunteer for the purpose and who are able to carry out what is generally regarded as a very effective minor dispute resolution process within the judicial system itself. In addition, the municipal court in the county of Hennepin diverts to neighborhood resolution centers for conciliation and mediation approximately 10,000 matters which would be misdemeanor prosecutions Resolution on a neighborhood mediation and conciliation basis is at approximately a 90-percent level of success.

Of all the States in the Nation which have been able to put together minor dispute resolution mechanisms within the judicial system. I think that the State of Florida has been most successful. I am going to defer any questions in that regard to Talbot D'Alemberte, who is from Florida, whose direct experience is greater than mine. He will be testifying shortly.

In summary, then, members of the committee, the Conference of Chief Justices supports H.R. 2863 and H.R. 3719. We believe it would be better to cover both civil and criminal matters.

We have the reservations which we have mentioned with respect to the placement of the authority for fund allocation in a part of the executive branch of the Federal Government. We tender as our solution to the difficulties the task force report and accompanying legislation which will soon be available to those of you who are interested in reading it.

I would be pleased to respond to any questions.

Mr. KASTENMEIER. Thank you, Chief Justice Sheran, for that statement. It is very helpful.

Both the subcommittees are aware of the work of the Conference of Chief Justices and the State judicial task force that has produced a report which I think many of us would like to avail ourselves of at some time in the future on the sensitive question of Federal-State judicial relations.

In that regard, to what extent do you see the minor dispute mechanisms created as extensions of or adjuncts to the State courts rather than as alternatives that might incidently handle matters which might otherwise go to the State judiciary.

If in fact they are the latter, then it seems to me the question becomes what is the interest of the State judicary and will Federal funding conflict with this interest. Depending on how one answers may be very important. So, are these dispute resolution mechanisms extensions of or adjuncts to the State judiciary, or are they quite separate and different animals?

Judge SHERAN. To begin with, Mr. Chairman, I acknowledge that if mediation, conciliation, and arbitration employed in minor dispute resolutions are separate and distinct from the judicial process, the concerns that I have expressed may not be relevant.

But it is very difficult to have an effective mediation, arbitration, or conciliation service without being able to move the problem into the court systems for enforcement.

The enforcement of judgments would have to be done by recording the judgment in a court employing the mechanism for judgment enforcement through the courts. Neighborhood resolution of disputes which might otherwise be misdemeanors, for example, cannot be fully effective unless someone makes a determination in the court system that the case be diverted from criminal prosecution to neighborhood resolution or conciliation.

Conciliation or mediation at a neighborhood level is going to be more effective if the participants know that the alternative is a return to court, and the processing of misdemeanor complaints.

In short, Mr. Chairman, my view is, and our experience in Minnesota suggest it to be a fact that processes of dispute resolution in the neighborhood of minor disputes are inextricably interwoven with the State judicial system.

If I am mistaken in that, and that is a judgment matter for this joint committee, then the other concerns that I have expressed are less significant.

Mr. KASTENMEIER. I suspect you are correct, although one model that was discussed last year with the subcommittee in great detail—

in the San Francisco area, appeared to be a mechanism unrelated to the State court system, excepting insofar as perhaps a district attorney may know of a case and may acquiesce in its being disposed of in an informal way.

On the other hand, as you suggest, many other mechanisms can clearly be tied to the judicial system.

Judge SHERAN. I think in fairness this should be said:

State court systems should not try to impress their modes of dealing with things upon other forms of dispute resolution if they can work as well or almost as well separated from the court system. I have serious reservations as to whether it can be done, but I think that is a judgment call for this joint committee.

Mr. KASTENMEIER. I would now like to yield to Chairman Richardson Preyer, the gentleman from North Carolina.

Mr. PREYER. Thank you, Mr. Chairman, and I am honored to sit with your distinguished committee here today.

Mr. Chief Justice, we appreciate having you here. I used to be a judge and my wife still likes to hear people call me Judge since she says that makes her feel that I have a real job.

I wanted to ask you, as far as the administrative procedures of this go, you suggest something like a State Justice Institute that would be set up federally but would be an independent body, something like the Legal Services Corporation. One problem with that is a political problem, a kind of problem I didn't have to deal with when I was a judge, namely, that right now the public is skeptical of setting up a lot of new institutions. In fact, we are busy trying to dismantle some, trying to put an agency out of business.

Let me ask you the way you might ask a doctor for his second best advice. Assuming that political imperative was such that we felt we couldn't set up a new independent agency, do you see any other institutions that are existing today that might be able to do the job?

For example, something called the National Center for State Courts, could they handle this situation or the Federal Judicial Center? Do you know of any existing bodies that might be able to handle this?

Judge SHERAN. I would like to answer that question in two parts:

The fact of the matter is that Federal funds have been made available to State court systems principally through the LEAA for the past 10 years, with the allocation of these funds being made through the LEAA, which is a part of the Office of the Attorney General of the United States.

I would have to acknowledge, and I think this would be true of practically every chief justice, the Federal funds that have been made available have been made available with a minimum of intrusion upon State court operations and have been used with great success. So it can be done and is being done. But we have had less success than we would have had if we had not been involved in a process which treats the judiciary, a system of corrections and a system of criminal apprehension, as being all part of one homogeneous mass. Restraints on what we were able to do have come from that. I think that we would have been able to direct the employment of these funds more effectively had we not the separation of powers problem which I have mentioned before. But it did work and good results were achieved.

People have looked to other institutions as being a better place to put the authority. One thought was the Federal Judicial Center which, though it is a Federal agency, is a part of the judicial branch of Government, more closely related to the State judiciaries. But my impression is that the Federal judiciary is not interested in taking on the problem of allocating Federal funds to State courts, their position being, as best I understand, that if they perform the functions of operating a Federal judicial system, this is about as much as they are equipped to do or care to do.

The National Center for State Courts is an institution which is policy-directed by State court systems. At the National Center at Williamsburg, it has a staff of people who provide aid and technical assistance to the States. But my impression is that the National Center for State Courts has not wanted to assume the responsibility of fund allocations as between competing activities in the States or as between competing States. It has felt that its function should be to act on a contract basis for the States or State agencies carrying out a project employing their technical skill and resources to implement a funding determination already made. The National Center of State Courts would have a very significant role to play were we to move ahead with the State Institute for Justice, but it would be in the form of implementing programs which had been decided upon by the State Institute of Justice rather than making the funding and policy decisions that would have to precede the implementation program.

In summary, I must acknowledge that there are ways of doing it other than the establishment of a separate corporate entity. Our belief is that to establish such an entity would be much the better way to accomplish the same results with greater efficiency. The political problems that follow from that I don't profess to have any particular competence in dealing with.

Mr. PREYER. Thank you.

Mr. KASTENMEIER. The gentleman from Michigan, Mr. Sawyer.

Mr. SAWYER. I have just a couple of reservations and I would like to just throw them out to see what your response is, Justice Sheran.

Wouldn't this function seem to fit more properly with the operation of a prosecutorial office or a district attorney's office? I know from experience that a number of these offices delegate a couple of lawyers to handling these matters, since most of them really are kind of quasi-petit criminal in nature. For example, somebody throwing garbage over somebody's fence, or trespassing, or hitting somebody's kid or something like that.

Don't you think that such offices are a proper place as opposed to a judicial system for handling these matters?

Mr. SHERAN. In Hennepin County, that is where the responsibility is placed—in the city prosecutor's office—and it works out effectively, but I think it works out effectively because the city prosecutor and the Hennepin County court administrator have worked out between themselves a method of operation that makes it possible for them to cooperate effectively.

Mr. SAWYER. I was a county prosecutor. For awhile we delegated two lawyers to spend their time on this. They used to affectionately call it the "bitcher's bench," because you kind of got that impression. Until they are in that business I don't think anyone fully appreciates the volume of these neighborhood disputes, that just seem to fester

and go on. They are not called to a lawyer's attention normally, and probably not much to a judge's either. However, they are certainly there, and they are tinder for all kinds of more serious trouble. Up until recently we just could not afford to allocate lawyers' time to these matters, it would keep the lobby full all day.

It just seems to me, though, that most of these kinds of complaints come initially to the police agencies, who then politely refer them to the prosecuting attorney's office, because they do not know what to do with them. Then it is sort of the buck stops there and you try to work the problems out. I just wonder if maybe LEAA, assuming we were going to go with such a program, I just wonder if maybe LEAA might not be an agency that could handle that kind of problem. It is an agency already in place which deals with the prosecutorial function quite extensively and also with the courts. What would you think of that approach?

Mr. SHERAN. The significant work that I know about has been done through the city prosecutor's office. The city prosecutor's office has to work with the courts, No. 1, in securing diversion of cases from the misdemeanor calendar to the neighborhood settlement process. It must look to the courts to deal with the fines or imprisonment for those people who come back in the court system as misdemeanants subject to prosecution.

Mr. SAWYER. Most of the types of disputes I am talking about, it is up to the prosecutor to introduce them into the court system. Usually these are the kinds of petty disputes which are potentially serious, that you try and work out, knowing that the court system is burdened. Since these cases are already in the court system, it is not so much a question of diverting them before they are introduced into the court system.

Mr. SHERAN. Before charge?

Mr. SAWYER. Right.

Mr. SHERAN. Yes.

Mr. SAWYER. Which is where 90-odd percent of the kinds of things I am talking about are.

Mr. SHERAN. To the extent that it is true, that you can deal with these problems without involving the court system, then I see no reason why the court system should impose its authority on the process.

In the county in which I have experience, which is the county of Hennepin, they deal with 10,000 minor disputes through neighborhood resolution center in the course of a year at an approximate cost of around $40. Through our conciliation court system we resolve 30,000 problems in the civil, not in the criminal field, at a cost of about $10 a unit. If you can categorize the disputes and take those out of the court system that are not affected by it in any way, I see no reason why the court system should be turf protecting, so to speak, in the dispute resolution department.

I think that the bulk of disputes including small disputes are going to find their way into court one way or another to be dealt with effectively, and if I am right in that—I am not 100 percent sure that I am—then I think the State court system should have some significant part in the decisionmaking process at the State level.

Mr. SAWYER. Thank you.

Thank you, Mr. Chairman. That is all.

Mr. KASTENMEIER. The gentleman from California, Mr. Danielson.

Mr. DANIELSON. Thank you, Mr. Chairman.

Mr. Chief Justice, it is a pleasure to hear you again. I tend to share some of the feelings of all of my colleagues here apparently. My concept of what we ought to be doing may not be exactly on all fours with all of them, but I do not think that ultimately the minor dispute resolution should be a Federal function.

We are dealing with people at the really genuinely grassroots level, and I really do not see much of an appropriate role for Federal jurisdiction. I do hope we can do something, however, in the way of financing the experimental basis for dispute resolution so that we can have some models set up, we can carry out the experimentation as to what works and what does not work, and hopefully State, county, and local governments will take advantage of the experience and then go ahead and do it themselves.

I fully agree with Mr. Preyer. We have already entered into an era of austerity. Those who think it is just coming I do not think are really in touch with the home community too well. I think the public will accept the use of Federal funds to experiment in this matter and set up pilot projects, but today not a permanent involvement.

As to Mr. Sawyer's comments, the gentleman from Michigan, it is true that district attorneys, prosecuting attorneys, receive a great deal of this sort of work that comes in off the street I guess or is just referred there, but I think that a lot of people in the area that I represent are sort of turned off against courts, against prosecuting attorneys, and we have a city attorney in Los Angeles who is a civil counterpart of the prosecuting attorney, not the criminal part. A lot of people are very reluctant if not afraid to come in and talk to these people. When they see a city hall, they go the other way, and that is why I would really like to see the dispute resolution facilities out in the neighborhoods, where people can attend them without feeling that they are going to court.

Most of the people in my district who would use these services cannot stand the sight of a courthouse or the sound of the word lawyer or court. It is just something that they do not want, so if we can work in that direction—and I am supporting the bill. I think the role of the Federal Government here should be to provide a little bit of financing and some experimentation and sort of an overall assistance to State and local government until we get these programs on the way, but then I think we should get out of the way. That is really my attitude.

I certainly welcome your experience from Hennepin County. I know you people have done very well up there. I think people do well in many parts of the world, but we are talking about, as Mr. Sawyer said, quasi-criminal and small civil matters, but nevertheless very heated, and we have got to find some way to calm them down.

I thank you. I yield back my time.

Mr. KASTENMEIER. The gentleman from North Carolina, Mr. Gudger.

Mr. GUDGER. Thank you, Mr. Chairman. I merely want to thank Chief Justice Sheran for bringing us this important message and pointing out ultimately such attempts at resolution of grievances and disputes as may be undertaken by arbitration and similar functions may have to rely upon the courts for enforcement, and that the problem of simple process still is a judicial and an administration of justice function, where the court's interest must be recognized.

I am particularly gratified to see this Resolution No. 2 adopted on February 10, in which the Conference of Chief Justices recognizes that it is proper for the Congress to relate to this problem, and feels that it can be done within the constitutional and other strictures which you have pointed out to us. Thank you for your comments.

Mr. SHERAN. Thank you.

Mr. KASTENMEIER. The committee thanks you for your appearance again today, Mr. Justice Sheran.

That concludes testimony from Chief Justice Sheran. The House is voting on the floor, and the committee will recess for 10 minutes.

[Recess.]

Mr. KASTENMEIER. The committee will come to order.

Now we are very pleased to hear from our second witness, Prof. Daniel J. Meador, Assistant Attorney General, Department of Justice. Mr. Meador is head of the Department's Office of Improvements in the Administration of Justice. He has been of enormous help to the subcommittee and to the House Judiciary Committee.

For my colleagues I would like to list some of his credentials. Before coming to Washington Mr. Meador was professor of law at the University of Virginia; prior to that, dean of the University of Alabama Law School, a Fulbright scholar, a law clerk to Chief Justice Hugo Black, and an author of a number of books and articles.

Throughout his life he has been a motivating force behind improving the delivery of justice in the United States. Indeed, we are saddened by the thought of losing him back to law teaching in August, but in any event, a great deal of what he has been interested in is being processed by the Congress, and assuming that some good portion of it will in fact be enacted, it will be a testimonial to his work and his influence and his inspiration in the past several years.

I am pleased to greet Professor Meador.

Professor Meador, you may wish to introduce your colleague.

TESTIMONY OF DANIEL J. MEADOR, ASSISTANT ATTORNEY GENERAL, OFFICE FOR IMPROVEMENTS IN THE ADMINISTRATION OF JUSTICE, U.S. DEPARTMENT OF JUSTICE; ACCOMPANIED BY PROFESSOR MAURICE ROSENBERG, COLUMBIA UNIVERSITY SCHOOL OF LAW

Mr. MEADOR. Thank you, Mr. Chairman. I appreciate those generous remarks. I am heartened by the prospect that some legislation will get enacted.

With me today is Prof. Maurice Rosenberg of the Columbia University School of Law. He has been nominated by the President to become Assistant Attorney General to head the Office for Improvements in the Administration of Justice commencing in August, when I depart, subject, of course, to the anticipated agreement of the Senate. I am delighted to have him here. He is in town today, and I thought it would be a welcome opportunity to introduce him to these two subcommittees and to this process that our Office is so often involved in with the Congress.

I am delighted to have this opportunity again to testify for the Department of Justice in support of the Dispute Resolution Act. I have submitted a statement for the record, and I would like simply to

supplement that briefly and then answer whatever questions the committee may have.

Mr. KASTENMEIER. Without objection, of course, your statement will be received for the record.

[The statement follows:]

STATEMENT OF DANIEL J. MEADOR, ASSISTANT ATTORNEY GENERAL, OFFICE FOR IMPROVEMENTS IN THE ADMINISTRATION OF JUSTICE

Mr. Chairmen and members of the subcommittees: It is a pleasure to appear before these subcommittees on behalf of the Department of Justice in support of the Dispute Resolution Act (S. 423, H.R. 2863 and H.R. 3719). Dispute resolution legislation, as endorsed by the President in his February 27, 1979, message on civil justice reform, can contribute significantly to the provision of full and equal access to justice for the people of the United States.

A basic requirement in providing access to justice is the establishment of speedy and inexpensive forums for the resolution of disputes. Traditionally, in this country, courts have been the principal official institutions through which individual rights have been protected and the civil and criminal laws have been enforced. In the past, courts were forums of last resort for disagreements that were severe enough to benefit from the procedural formality of a trial. Numerous less formal public and private institutions were used to settle the relatively minor disputes of everyday life. These institutions included justices of the peace, neighborhood policemen, churches, schools, and the family. In contemporary American life, however, the role of these institutions has diminished. As a result, today many minor disputes either go unresolved or else find their way into court. Those that are unresolved often grow into larger controversies that cause anguish to individuals and sometimes lead to violence and criminal activity that can cost society dearly.

Those minor disputes that result in court action often enter a forum that is not ideally suited to resolve them. Courts depend for their legitimacy upon a degree of procedural formality, including adherence to rules of evidence and procedure and the right of appeal, all of which contribtue to the need for representation by counsel. Each of these elements may help to produce accurate findings and impartial justice, but each increases the cost and delay of dispute resolution. Consequently, the expense of resolving a small dispute through full-blown adjudication may exceed the value of what is at stake. This expense is borne not only by the parties to a dispute but also by society as a whole. Courts are expensive to maintain, and the more they are burdened with disputes that belong in other forums, the less efficient they become at handling the business for which they were designed.

Additionally, adjudication is not the process best suited for the settlement of all controversies. It requires that there be a winner and a loser, and it focuses on the immediate matter in issue and does not examine and consider the underlying relationship between the parties. Indeed, judicial procedure by its nature is adversarial and tends to intensify hostile attitudes. It is, therefore, often inappropriate for solving controversies in which the parties share an ongoing association.

Because certain types of disputes are best resolved through some mechanism other than a trial, we cannot provide a remedy for all controversies simply by increasing access to traditional courts. Although streamlining court procedures will help to reduce problems of cost and delay and will allow the court to process more disputes of the type they can most effectively handle, it is necessary to explore and employ non-judicial alternatives to dispute resolution as well. Rather than attempting to force disputes into existing forums, we must experiment with new forums that are adapted to fit the disputes.

In line with that approach, the Department of Justice has established three experimental Neighborhood Justice Centers that employ mediation techniques to resolve disputes. Experiences to date show that the major categories of cases involve disputes between landlords and tenants, consumers and merchants, neighbors, and family members. During the first year of their operation, the three Centers resolved a total of 1,614 cases, 1,014 through hearings and 600 in the prehearing process. The final evaluation report on these Centers will not be available until next fall, but we find these preliminary results encouraging. They have strengthened our belief that further experimentation with alternative approaches to dispute resolution is warranted.

Any of the bills now before these subcommittees, S. 423, H.R. 2863 and H.R. 3719, would allow the federal government to play a constructive yet appropriately limited role in fostering experimentation in this area of primarily local concern.

The bills each have two principal components. One is a dispute resolution resource center that would act as a national clearinghouse of information and experience on minor dispute procedures. The proposed center would make the information it gathered available to each state, it would conduct research and demonstration projects, and it would provide technical assistance to state and local governments and other interested groups to improve existing mechanisms for dispute resolution and to create new ones.

The second component would consist of a seed money grant program that would assist states, localities, and private nonprofit organizations in establishing new or improving existing dispute resolution mechanisms. The grant program is carefully designed to limit the federal role to that of assisting in the initiation of projects without assuming continuing long-term financial responsibility for the support of these projects. Under the program, applications would be submitted to the Department of Justice by the agency or organization that would operate the project. Federal funding for a project would begin to taper off after the second year for which funds were available under both House bills and after the first year under S. 423. Funding would terminate altogether after the fourth year.

Under both House bills the grant program is structured to promote experimentation with innovative proposals by requiring the Attorney General—pursuant to criteria established in conjunction with an Advisory Board which he would appoint—to consider the national need for experience with a particular type of program. The Attorney General and the Board, however, would also be required to take into account the population density and financial need of states in which applicants are located, in order to ensure that the money will reach those areas where it is most needed.

The grant program will allow support for mechanisms to resolve disputes in a variety of substantive areas and a variety of general and specialized forums. For instance, to resolve disputes involving family members or consumers, the program could fund projects that are not limited to any single subject matter, such as Neighborhood Justice Centers; the program could, however, also fund specialized projects such as consumer action programs or family dispute mediation centers. General and specialized forums could be funded to handle other interpersonal disputes such as those between neighbors, and other economic relationships such as those involving landlords and tenants.

It is expected that the program will fund formal, as well as informal, dispute resolution mechanisms. Formal approaches to minor dispute resolution, such as small claims courts, would benefit from the program. Although some localities have successfully established small claims courts, other communities have been less successful or have not tried to develop such mechanisms. This program would help to generalize the experience of the more successful communities, as well as to fund experiments to improve aspects of the operation of existing small claims courts—for example, through the improvement of means for enforcing small claims judgments. This broad range of experimental programs will help us to determine what disputes are best suited to what means of alternative resolution.

The bills place administration of the Dispute Resolution Program with the Attorney General and leave to his discretion the specific location of the program in the Department of Justice. We think that discretion is best left to him because of the number of unresolved variables remaining. Until the amount and sources of funding available to the program are determined, it will be difficult to assign responsibility within the Department. At this point, however, it seems clear that the Office for Improvements in the Administration of Justice will play some role in administering the program, though the exact parameters of that involvement have not been determined.

There is experience within the Department of Justice in the administration of grant programs. My office directs the Federal Justice Research Program which awards contracts for the conduct of research into various aspects of our justice system. The Department's Antitrust Division administers a grant program to state attorneys general to bolster state enforcement of antitrust laws. In addition, of course, the Law Enforcement Assistance Administration distributes hundreds of millions of dollars every year in grant money to states, localities, and private organizations. Consequently, there is no dearth of expertise or precedent for the management of the grant program within the Department.

52-434—80——3

The location of the resource center likewise would be determined by the Attorney General. One possibility would be to arrange with private non-profit organizations through competitive bidding for the operation of the resource center. In this way, it would be possible to avoid large operating expenses and the creation of new bureaucratic structures, while at the same time drawing on the knowledge of outside experts in the dispute resolution field. Alternatively, the center could be located in proximity to the grant program, wherever that might be.

I wish to emphasize that the Department of Justice supports adoption of the Dispute Resolution Act as a limited, experimental program. We do not believe that it should be a separate, new grant program. Rather, it should be funded out of existing Department funds for fiscal years 1980 and 1981. This approach is consistent with the need to restrain federal spending while responding to the justice requirements of our society.

In conclusion, this legislation would help communities to provide effective redress for a broad range of minor disputes. By experimenting with alternatives to a formal hearing before a judge operating under strict rules of evidence and procedure, we can point the way toward fair but considerably less costly and time consuming resolutions. The Department of Justice supports the prompt enactment of legislation to create this valuable program.

Mr. MEADOR. On behalf of the Department, I want to commend both subcommittees for collaborating on this act and for scheduling this hearing so early in this Congress. We share the hope and expectation voiced by the chairman just a while ago that these subcommittees will work together and produce a bill which has a high degree of consensus.

These three bills go back in their development to 1977. At that time, and as a result of a high degree and widespread degree of interest in this whole matter of dispute resolution, there were considerable discussions about legislation that would enable the Federal Government to play a constructive and yet limited role in the development of this movement. There were a number of conversations among representatives from executive departments and agencies of the Government, Members of Congress, private groups, lawyers, judges, and others. That process culminated in the development of S. 957, which passed the Senate in the 95th Congress.

Two hearings were held last year, as the chairman noted, one by each of these two subcommittees. Indeed, as you know, the House took up the matter on the floor. The bill got a majority vote but was not enacted because of the two-thirds requirement under the suspension rule.

The point in my reciting all of this is simply to underscore the fact that the bill has had a substantial degree of consideration from a wide perspective, and we believe that the legislation is now ripe for enactment.

The interest in this measure comes about through a set of conditions in our society which have been mentioned by Chief Justice Sheran. I will not detail them at any length. I would, though, underscore that it is important to keep in mind the conditions in society which this whole movement and this bill are aimed at.

In any civilization where a large number of people live together, there inevitably will be a whole range of controversies erupting from time to time. These disputes are spread out along a spectrum. On the one end, there are the very minor daily irritants that go away almost as quickly as they arise, or which get settled quickly between the parties. Controversies range from those minor things on through disputes that are more difficult and irritating, which require some kind of third-party assistance or judgment to resolve. And they range all the

way to the other extreme, to the most violent and large-scale disputes that can disrupt whole segments of society.

Now in Anglo-American history, we have had quite an array of means for resolving this spectrum of disputes. These means have involved both the formal and the informal, the official and the unofficial.

As Chief Justice Sheran mentioned, in this country we have unfortunately suffered an erosion of many of the institutions and means which, in decades gone by, have worked to iron out many of these disputes. It is a sad fact, and we need not here go into the causes, that institutions such as the school, the family, and others have diminished in their authority and influence. The result has been something of a void in American life today in the requisite array of informal ways and means of settling disputes.

That vacuum has, in turn, resulted in two things. One is that many disputes simply are not getting resolved very well at all, and therefore are causing festering irritations in society, and sometimes escalating into even worst disputes. The other result has been an overreliance on the courts. There has been this overreliance because the demise of alternative means has meant that there has been nowhere else to go in many situations.

There has also been an overreliance on the courts because of the American tendency to overdo almost everything. We tend to overwork and overdo good things. We build automobiles too large, use too much gasoline, use too much electricity, and so on, across wide areas of life. And so it has been with the courts. Historically they have proved to be very valuable institutions in American life, and hence there has come to be a tendency to overrely on them, even for situations where they are not the best suited institutions.

Courts are not the best means for handling many disputes, for several reasons. One is that they are too expensive. It simply costs too much to go to court in relation to what is at stake in many instances. A lot of work is being done to reduce expense, but even with the best of luck it is going to be quite a while before we make any real headway on that. Even then, it is doubtful that we will ever get to the point where, for a good many disputes, the expense of going through a judicial process is reasonable in relation to what is involved.

A second reason why courts are not the best means for settling some disputes is a more subtle and intangible matter of inconvenience, cost to the parties in terms of emotional upset and involvement, loss of time from jobs and other activities. Delay is a serious problem also. A lot of work is likewise being done on this problem, but here again, even with the best of progress, it is going to be quite a while before we make substantial headway in reducing those undesirable byproducts of the judicial process. In any event, it is unlikely we will ever resolve them in a wholly satisfactory manner.

A third reason why courts are not the best institutions for resolving many disputes is that the judicial process is not well adapted to some kinds of problems; some kinds of controversies. The judicial process is an adversary process. It tends to sharpen hostilities, to harden positions, to result in an either/or stance and an either/or outcome. There are situations, especially where you have relatively close and ongoing relationships among the disputants, where that kind of process is not the best adapted to achieve a lasting and sound solution. This is most easily visible, I think, in the internal family dis-

pute, but it can also be seen in disputes between neighbors, possibly between landlords and tenants, and other situations where you are dealing not between strangers but between people who have ongoing relationships and will continue to have relationships long after a particular dispute has gone away.

Therefore, because of this whole combination of factors—conditions in society, the inappropriateness of courts as a means for settling certain types of disputes—the movement has gained momentum in recent years to look for other ways to solve problems. As a result, there is a search for so-called alternatives to the courts or alternative dispute-resolving procedures. This is a healthy movement, and it should be fostered, stimulated, and encouraged. That is what Congress can do through enactment of this legislation.

This is not a situation of second-class justice as against first-class justice, although it has been characterized in that way by a few people. In my view, that is an inappropriate way to look at the matter. To use an analogy, if a merchant has the problem of delivering a diamond ring across town, he can do that through dispatching a deliveryman in a 4-cylinder small car or even on a motorbike. On the other hand, if a merchant has the problem of delivering a refrigerator across town, he has to have something else—a pickup truck, a van, or some other much larger vehicle.

That is not a question of first-class or second-class delivery means. It is a matter of tailoring the means to the problem that is involved. And so it is with disputes. Disputes run across this whole spectrum in size, in nature, and we need means that are tailored to the dispute at hand. It is not necessary to have the same kind of process for every kind of dispute.

An understanding of this concept lies at the heart of this movement to provide a nonjudicial alternative to resolve certain types of disputes. I think it is very important.

There is much experimentation now going on. You have heard some of these alternatives mentioned by Chief Justice Sheran when he discussed the Minnesota program. You will hear from other witnesses in the course of these hearings about other projects, other procedures that are now in place, and you of course know about the neighborhood justice centers that the Department of Justice is sponsoring.

All of these I view as experimental. Holmes said, "All life is experiment." I think that is particularly true in this search for new and alternative dispute-resolving procedures. We do not want to set ourselves into a concrete mold too quickly. We do not want to decide now for all time what is the best means or whether the procedure is best located at this agency or that agency. We need the greatest possible degree of flexibility and experimentation at this stage, so that we can learn more over a period of years ahead. After we have gained some experience, we can gradually evolve the best design for procedures to resolve the differing types of disputes. That is the idea behind these bills.

Any one of these three bills would further that process, and the Department of Justice is happy to support any one of the three. They are substantially similar, with only a few small differences among them, and the Department has no strong preference. We encourage the enactment of any one of the three or any hybrid combination of the three.

The program is placed in the Department of Justice by all three of these bills. That location of the program evolved out of the processes running back to 1977. There was no clear consensus early on as to where the program could best be located. I think the fact is that there is no ideal location. There can be arguments made against any one location.

In a way, the Department of Justice came into it almost by default. No other agency or organization seemed to want it or seemed to think that it was the best place, and the Department of Justice agreed, and willingly agreed, to take it on. However, an affirmative case can be made for the Department of Justice as the location for the program.

More and more in recent years, we have come to realize that the Department of Justice has a much broader function in our Government and in the life of the country than law enforcement investigation and advocacy as the Government' lawyer. I like to think of it as an evolution toward what you might call a "ministry of justice" concept. We have a leadership role to play in improving justice at all levels in this country, in spotting problems in the justice systems of the State and Federal courts, in advancing ideas to cure those problems, and in administering programs which foster the improvement in the quality of justice.

The dispute resolution program fits into that concept of the Department of Justice. We should not confuse this program with what I believe is a somewhat different matter. That other matter is the best means of providing Federal funding to the State courts. Whatever the level of Federal funding that may be provided to State courts, we do need an effective and well designed means of getting those funds to the State courts with the fewest problems possible. I think a serious reconsideration of how that is done is highly appropriate for the Congress, but I do not think it should be confused with the administration of this program, which is not primarily a State court program. There is of course a relationship, but the very idea of this program is to concentrate on developing alternatives to the courts, not to provide funding to the courts themselves.

Of course, one point of impingement is that the bill do contemplate work on the small court problem, and there is an impingement on the State judiciaries. Yet the primary thrust of the bill is not to provide better funding to the State judiciaries to help them in their traditional and primary roles.

Mr. Chairman, I think with that I will stop and attempt to answer any questions the committees may have.

Mr. KASTENMEIER. Thank you very much, Mr. Meador, for those comments.

Mr. Rosenberg, do you have any comments of your own?

Mr. ROSENBERG. Mr. Chairman, my only comments are that I am delighted to be here at these hearings, and I am particularly delighted and gratified by your recognition of Mr. Meador's contribution to improvements in the administration of justice through his tenure in office.

Mr. KASTENMEIER. Thank you.

I have several questions but before I proceed I would like to yield to my colleagues. First I would like to recognize the gentleman from Illinois, Mr. Railsback.

Mr. RAILSBACK. Mr. Chairman, I want to thank you for yielding to me. I would like to echo what the chairman said about what is going

to be the potential loss to the Department of Justice when Professor Meador leaves and returns to teach. As I recall the legislation that has passed through this committee, many of the bills have been either directed or initiated or helped by Dan Meador, so we are going to miss you and want to wish you the best.

Let me just ask you about the desirability of having an advisory board. How important is it in your opinion to the Department of Justice to have an advisory board, perhaps participating in selecting priority projects?

Mr. MEADOR. On the whole, I think an advisory board or committee could be quite useful. It was not in the original legislation. It is not in S. 423. From the Department's standpoint, however, we do not object to an advisory board. I think it could have positive virtues in bringing a spectrum of views to bear on the development and approval of projects and project applications, and it might work to insure a more balanced program of projects running across the whole range of types of disputes as well as possibly geographically. So on the whole we are fairly supportive of that idea, although it is not at all an essential part of the program and the bill.

Mr. RAILBACK. My understanding is that right now there are three LEAA-funded projects relating to neighborhood dispute resolutions or community dispute resolution. What has been the experience of the Department as to the kind of disputes best resolved by those tribunals, or is it too early to tell?

Mr. MEADOR. It is somewhat too early. I can give you a few figures. There is substantial monitoring being done of those projects, and an evaluation report will be available in the fall and winter of this year. We have some interim figures, but there has been no overall evaluation yet of the effectiveness and the quality of the work of these centers.

To date there have been something over 1,600 disputes settled by the 3 centers. The major categories of disputes that have been resolved in these centers are what could be called neighborhood disputes, disputes among persons living close around each other—disputes between customers and merchants, landlords and tenants, that kind of thing, and family disputes.

Approximately 45 percent of all matters that have come into these centers have been resolved through the centers. Now, of the remaining 55 percent of matters that were not resolved, we do not have detailed breakdowns. A large portion of those were not resolved because of the failure of the other party to the dispute to come in. As you know, these centers have no coercive power. It is entirely consensual and voluntary, and one of the major obstacles to settling some disputes is the unwillingness of the other party to come in. But even so, they have settled 45 percent of everything that has come in the door.

Mr. RAILSBACK. I was going to ask you to give us kind of a profile of the various centers, but I do understand that we are going to have another witness that apparently is the chairman of the board from the Atlanta Neighborhood Justice Center, so I think I will defer my question at this time.

Thank you very much.

Mr. KASTENMEIER. I would like to yield to the gentleman from California.

Mr. DANIELSON. I will pass.

Mr. KASTENMEIER. The gentleman from North Carolina.

Mr. BROYHILL. Thank you, Mr. Chairman.

Representing the Commerce Committee here today in these hearings, I am particularly glad to see you here, Mr. Meador.

Let me ask you a question or two concerning the funding of this program. It is my understanding that the Department is not recommending new funds at this time. Is that correct?

Mr. MEADOR. Correct.

Mr. BROYHILL. Where would the funds come from to administer this program? Would they come from LEAA?

Mr. MEADOR. Yes. It is the position of the administration that LEAA funding could be used to carry out this program, and we do not endorse or seek additional new funding for it.

Mr. BROYHILL. Then why would it be necessary to have a new program? You have a program operating under LEAA now, as you just testified, with free centers, and of course perhaps LEAA funds could expand the program.

Mr. MEADOR. We think it is important to have the sanction and express endorsement of Congress for this program. It is a two-part program: one is to create a resource center, and the other is to have a grant program to finance experimental new ventures.

It is arguable that one could proceed without the legislation. The three neighborhood justice centers are a limited experience. We believe that, in order to provide a sounder footing, we need legislation of this kind to give an express endorsement and authorization for the Attorney General to proceed in a much more systematic way involving a much more substantial amount of money than is involved in the three neighborhood justice centers. One could argue we might be able to proceed without it, but we would rather not. We think that Congress should place its stamp of approval on a program of this kind.

Mr. BROYHILL. Very briefly, how much is being expended per annum in the operation of these three centers?

Mr. MEADOR. In round figures it is in the order of $200,000 per center for the operations. That does not include the amount of money being spent on the evaluation, data gathering, and monitoring that will go into the final report on how they operate.

Mr. BROYHILL. And you contemplate spending how much for fiscal years 1980 and 1981 on this program?

Mr. MEADOR. The assumption has been—and here again there is no final decision on this—that if we were left to operate it out of LEAA funds, we would contemplate funding somewhere in the range of the amounts of money specified in the bills, which is to say on the order of $2 to $3 million for the resource center, and on the order of $10 to $15 million for the grant program.

Mr. BROYHILL. Who would administer the department within the department, which office?

Mr. MEADOR. No decision has been made on that, and there has been a deliberate decision not to try to settle on that until the legislation is enacted. There are several possibilities. I will just mention two or three for illustration.

One is that it could be housed in LEAA itself, that LEAA could be the locus of the administration and operation of the program. A second possibility is that it could be in the office which I head, and which Professor Rosenberg will come into in August, the Office for Improvements in the Administration of Justice. A third possibility is that it

could be set up as a separate but not wholly independent office within the Department of Justice operating under the Associate Attorney General or the Deputy Attorney General, something of that sort. A fourth possibility is that it could be in the proposed National Institute for Justice, if Congress creates that as pending legislation calls for.

So those are some possibilities, but it simply has not been decided. We thought it better to wait to see if Congress would enact the legislation, and then work out how best to administer it.

Mr. BROYHILL. I thank you for your response. As you know, having testified before the committee last year chaired by our colleague Mr. Eckhardt of Texas, that one of the concerns that the conference committee had, of course, is that of consumer disputes. We have felt that there should be more impetus on consumer disputes in this legislation. We felt that there is a need for an inexpensive, a fair, easy way to resolve consumer disputes, and as you very well testified, as documented here today, the cost of litigation is high and the present judicial system sometimes provides little relief for consumers, and so the fact that consumer issues in recent years have become more and more known.

As national issues become national in scope, for example, we have passed a number of laws in the area of consumer areas granting rights to consumers. For example, in the Magnuson-Moss Act, where we have a procedure for class actions under certain circumstances where there has been a breach of warranty. We passed a Truth-in-Lending Act. We passed an Unfair Election Practices Act, and so forth. In other words, what we are saying is that the use of Federal funds to promote or improve alternative mechanisms for the resolution of consumer disputes in these areas and so forth we think is perhaps appropriate.

Now, on the other hand, I am concerned that where we are going to be emphasizing in this legislation the settling of neighborhood disputes, domestic disputes, as you pointed out, landlord-tenants disputes and family disputes and so forth—and some of these are petty criminal acts—it seems to me that this should better be left to the States and that we have less justification for spending Federal moneys in these areas.

I wonder if you would at least comment on this, the differences between the two committees that have jurisdiction over this bill.

Mr. MEADOR. From the standpoint of the Department of Justice, we take no real exception to the heart of what you have just said. namely that consumer disputes are a very important category of disputes, which should be addressed and will be addressed on any program, under any one of the bills. We view that they are a major category of dispute which needs attention as part of this search for better and alternative means. It is completely the contemplation of the Department that they would not be neglected. Indeed, consumer disputes form a major category of the matters already dealt with by the three neighborhood justice centers.

Our other view, which may or may not be inconsistent with your own, is that we do not believe that the legislation in any program of this sort should be confined exclusively to consumer disputes, as important as they are. We believe that we have a spectrum of disputes here today which are troubling to the American people because of inadequate means of dealing with them, and that consumer disputes are simply one category of a whole family of disputes which need attention.

It would be possible, of course, to set up a program that would deal solely with consumer disputes. That could be done. We simply believe that the momentum in this effort and movement toward developing new and alternative means should be fostered all across the board. The climate of opinion we think is right. The interest is there in other areas, and we see no inconsistency in attempting to deal with matters other than consumer disputes at the same time that we are dealing with them.

It may be that there are some common techniques, common procedures, that can be employed in all of these. On the other hand, it may develop that they are discrete categories of cases and that you do not have an interchangeability of procedures. All of that we will find out more about as we go along, but it just seems to us in the national interest we should try to deal with all of them.

Now as to matters of peculiarly State and local concern—neighborhood, family matters, and so on—we certainly think you are right on that. There is no intention on the Department's part, nor is there any contemplation in these bills, that dispute-resolving procedures in these matters would become a permanent, large-scale Federal enterprise. The role of the Federal Government here is very limited, as was I think expressed earlier by a member of the committee. The role is one of stimulating new procedures, financing some innovative projects, providing a little startup money to help States, localities and private organizations develop these procedures. The program has a 5-year limit. The money is relatively modest. So we think this kind of limited Federal role is very appropriate to achieve one of those objectives in the preamble of the Constitution, to insure domestic tranquillity.

Mr. BROYHILL. One final question, Mr. Chairman. And it ties in with what Mr. Meador was saying at the end there. Is it the Department's thought that this program should have an end to it at some time? I know, of course, you favor this as an experimental program, one from which we can get answers, get some more facts and so forth. But you are not contemplating this as a permanent program, are you?

Mr. MEADOR. No. we go with the 5-year provisions.

Mr. BROYHILL. You feel that it should be a 5-year program.

Mr. MEADOR. Yes; and of course at the end of that time if Congress thinks some features of it should be continued—for example, the resource center might seem to have some appeal—of course it can enact new legislation. But we do think the bill is well designed with a 5-year sunset, so to speak.

Mr. BROYHILL. Thank you very much.

Mr. KASTENMEIER. The gentleman from North Carolina, Mr. Gudger.

Mr. GUDGER. Thank you Mr. Chairman. I always enjoy tremendously the testimony of Attorney General Meador. And I am particularly enjoying it today, I believe, because I am the son of a lawyer and the grandson of a justice of peace.

I see that in his remarks he gives credit to the justice of the peace for having been an important part of our system of justice at an early time in our history, and to have been able to dispense with problems that were peculiar to those days and time.

And now perhaps as his function has passed into history, we are finding a need to replace this particular person or this particular agency within our society.

I particularly commend you for pointing out that in the typical judical dispute there is a situation of winner and loser. And yet in so many of our community problems there is a sustained dilemma which cannot be resolved by a simple win or loss result.

I think the historic justice of the peace served as a catalytic agent, an ameliorating agent, someone who got neighbor back to living comfortably with neighbor in many instances, and not by harsh administration of law, but by applying judgment and compassion and sympathy to problems that required all three of these aspects.

I would like to hear you comment just a little bit further on that, General Meador. That is, how you see that there could be developing in our society a machinery whereby these sustained problems, the domestic problems, the neighborhood trespass problem, the spite fence problem, could be dealt with through new concepts of community mediation.

Mr. MEADOR. Well, I suppose the best way to comment concretely on it is simply to point to the experiences to date in the neighborhood justice center that I know something about. However, I should say you will have the head of one of them and the chairman of the board coming in here later who can go into much more detail.

The idea is to have a place convenient at hand. The very name of it, "Neighborhood" suggests that it is nearby, conveniently located, so you you can walk or drive a very short distance to get there and not have to go all the way downtown to the courthouse. It is inexpensive, informal. You walk in. You tell your problem to a staffer who is there, who then matches your problem up with a trained mediator—there are about 30 mediators in each center to call. They have different specialties, so to speak. Some are better trained and experienced in consumer matters, others in family matters, others in neighborhood matters, and so on.

The staff person matches up the mediator with the problem. The mediator takes over, attempts to get the other person in, and they talk it out.

The idea is to reach a practical adjustment of the problem. It may or may not stictly comport with what a court would do it the matter. The point is to resolve the matter at a lower level before it escalates into an all-out adversarial battle in court, where you need a third party judgment which imposes a settlement, so to speak, on the parties. The idea is that if the matter can be worked out in a way in which both agree, it is likely to be more lasting, to have more sticking power, so to speak, and also to leave the parties in a better position as between each other. This has been the case, I think, so far in those experiences.

There are all kinds of ways the mediator works these out. Sometimes it is by a payment of money. Sometimes it is by an agreement to provide certain other services in lieu of those which were provided. Sometimes it is an agreement simply to stop doing what you are doing in exchange for somebody else stopping doing what they are doing.

The typical process involves a written understanding of agreement at the conclusion which embodies what the parties agree to do. Apparently there is some value in having a written document which each party agrees to and signs. The legal enforceability of those documents is one of the frontier questions that really has not been probed very far, and we have little experience with whether they are legally enforceable. But if you get to that point, the original procedure has really failed, because the supposed settlement of the dispute has come undone.

I am not sure whether all that answers your question. You will hear a great deal more about this from the people who operate one of these centers.

Mr. GUDGER. Thank you very much, General Meador. I yield back.

Mr. KASTENMEIER. I would like to recognize the third gentleman from North Carolina, Mr. Preyer.

Mr. PREYER. Thank you, Mr. Chairman. And thank you, General Meador, for your very interesting testimony.

I wanted to ask one question following up on what Mr. Broyhill discussed.

The Commerce Committee puts more emphasis on consumer disputes, while the Judiciary Committee puts more on criminal or quasi-criminal disputes. And I think you indicated you feel this sort of resolution should go across the board, consumers as well as criminal-type problems.

One concern I had was if we fund this out of LEAA, if we use LEAA funds to stimulate local solutions, will we be barred under the LEAA law from doing anything about civil disputes?

The reason I ask that question is I understand on the new LEAA law, which is a bill which has come out of the House Committee here, there is a section that says—

> Notwithstanding any other provision of this title, no agency or other entity that is established by this title shall concern or involve itself with the civil justice system, civil disputes, or any other civil matter.

Do you view that as barring the LEAA from using funds to stimulate local solutions to civil problems?

Mr. MEADOR. If those provisions were in the finally enacted bill, it certainly at the least would pose a serious obstacle, I think, to the full implementation of the program in these bills here today. I am not prepared to say it would outright prevent it, but it would certainly create a problem.

You have put your finger on a difficult subject here, because we talk about using LEAA funds for this program. The whole LEAA problem is difficult because you don't know whether at any one point in time you are talking about LEAA funding as it now is, as it might be under the House bill, or as it might be under some other bill, or what.

Our position has been that given LEAA as it has been, and still is under existing law, and given something like the level of funding that is in the administration-backed funding proposal, that funding this program was feasible out of LEAA. I think if LEAA comes out with the prohibition you mentioned on civil justice, it would substantially impair the program, although I don't know that it would completely prohibit it.

As you know, by custom and evolution LEAA funding has been devoted to a number of matters which are essentially civil, on the theory that they are closely and intimately related to criminal matters, and that the criminal and civil after all cannot be neatly severed in many situations. So it may be that under that theory, even with the prohibition that you mention, there could still be some programs funded. But I think that would have to be seriously thought through, and it would be a problem. As you may know, the Department of

Justice believes that the LEAA funding should not be so restricted, that funding should be made available for both civil and criminal programs in the new reorganized version of LEAA.

Mr. PREYER. Thank you. I would like to ask a few questions dealing with the differences between the House bill and the Senate version.

The House versions have a provision for an advisory board, while I understand the Senate version does not.

Do you object to having an advisory board to assist this program? And would you give the board more substantive authority? Do you think we need an advisory board?

Mr. MEADOR. We do not object to that board. As I said a little while ago in response to Mr. Railsback's question, we do not have any objection to it. Indeed, I can see some positive values in such a board. I don't think it is essential, though. I think the program could be run very well without it. However, it does meet the concerns from some people about having broad-gauged input and perspectives brought to bear on the projects. I do not think it should have any authority beyond what its name indicates, an advisory body that the Attorney General and the administrators of the program would look to, to help them make the final judgments on what to fund and not to fund.

Mr. PREYER. Perhaps this question has been asked already when I wasn't here. If so, just stop me. But the Senate version of the bill also has a national priority projects provision, which would be entitled to have money. We don't have that in the House bill on the theory that we would have greater flexibility in the program if you didn't mandate that use. Do you have any feeling about that situation?

Mr. MEADOR. We don't have any strong feeling on that. I think the functional effect of the House bill would be about the same. The whole point as to try to assure that there would be some effort in the administration of the program to evaluate the various procedures that were going on across the country and to identify those that did seem to be particularly promising and effective, and then to promote a wider usage of those. I think the language in the House bill, both House bills, points in that direction, among the criteria, factors and so on. So I don't think it makes much difference whether you include or do not include the national priority project language.

Mr. PREYER. Finally, there has been the fear expressed by some that if you set up alternative forms to litigation, you are in effect going to create a forum for second-class justice for the poor or disadvantaged persons. Do you have any comment about that or any thoughts on how that could be avoided.

Mr. MEADOR. Yes. I think it certainly can be avoided. And I do not think it is a necessary result of these programs at all. It is a matter of tailoring the procedure to the nature and kind of dispute. We simply don't use the same procedure.

We should not use the same procedure for every kind of dispute, any more than an angler uses the same kind of lure for every fish or a hunter would use the same kind of weapon for every game he was going after. To me this is just commonsense. If you have a dispute over a barking dog, you don't need the same kind of procedure that you need, for example, in an antitrust overpricing case, involving perhaps millions of dollars overcharged to several hundred thousand consumers. All in all, you can draw all kinds of contracts and analogies. That is what is involved here, it seems to me.

It is clear we do need to take care that we don't assume a posture of saying that because a dispute only involves a $100 or a squabble between neighbors, it doesn't really make much difference how we treat it, and what we do with it.

We want quality justice, but tailored to the nature of the matter at hand.

I view these programs as broadening and increasing access to justice in the properly understood sense. I say that because today for many, many matters the only place to go is to a court, and if that is the only place to go, you don't have access to effective justice in many cases because of the inappropriateness of the court for reasons I have mentioned earlier on.

So I do not share the fear that poor persons will be shunted to this court. I do not think it is a necessary result. I think that it is a customary note we should always bear in mind, that we don't want second-class justice for anybody.

Mr. PREYER. Well, I think that is a very good answer. You have in effect turned that argument against the users of it by pointing out on the theory that the law forbids both the rich and the poor from sleeping in the park; where you provide a magnificent court, you price the poor out of business in that court, you are denying them justice.

Thank you, Mr. Chairman.

I appreciate your testimony very much, Mr. Meador.

Mr. KASTENMEIER. Indeed, it is very useful for the gentleman from North Carolina, Mr. Preyer, to raise the question of the prospects for the LEAA and changes in it. It may be a very, very uncertain host at best for this enterprise.

I think we might be well cognizant of it. Since its future is governed by a separate legislative process and by otherwise separate funding, it seems that it is well to be aware of the difficulties.

I take it you are not in any way concerned at all about the separation of powers argument cited by Justice Sheran here. You have indicated that you don't really regard the programs as creating forums that are part of the existing State justice system or adjuncts to it as such, is that correct?

Mr. MEADOR. Let me qualify my statement just a bit on that. I don't mean to suggest that these various dispute-resolving forums and procedures would not be part of a State system of some kind, State justice system in the broadest sense. I think they would have to be so considered. They are certainly not Federal forums, at least in any long-range or permanent sense. They are local and State, or even private in some situations.

And yet what I did mean to say is that they are not intimately or centrally part of the State judicial systems in my view. They might be considered adjuncts to it. They are certainly related to the problems with which courts deal, namely, settling disputes. Yet they are quite different in kind and different in approach.

The phrase "alternatives to the courts" I think is expressive of this idea. There is a search here to develop procedures outside the courts and the traditional process. It is for that reason that I am suggesting we don't have to look at the problem of funding these

enterprises as though we are talking about funding the State courts themselves. I think that is a separate problem that does need attention.

There is no objection whatsoever to the suggestions of Chief Justice Sheran that the Congress ought to look hard at this, and indeed give some serious consideration as to whether there is not a better way to structure a conduit for getting Federal money to the State court systems. But I am just suggesting that we should not treat the two things here as though they are one and the same.

Mr. KASTENMEIER. In fact, really almost by a description of the purposes as you stated, we don't actually know the nature of each innovative enterprise that may be funded. We do not know what form it will take precisely at this point in time. Isn't that correct?

Mr. MEADOR. Correct.

Mr. KASTENMEIER. Although I suppose each person tends to have a model in mind. Am I correct?

Mr. MEADOR. Yes, sir.

Mr. KASTENMEIER. And if that is the case, the model you might have in mind is the neighborhood justice center, since you have experimented with it, and since it is an alternative dispute resolution mechanism of a sort. That would be the most referred to model in terms of your frame of reference, is that right?

Mr. MEADOR. Well, it is one. I certainly don't want to limit it to that. You have other things, such as the Conciliation Service that Chief Justice Sheran talked about, which is actually based in the prosecutor's office. We have the small claims courts, which can use a great deal of attention and improvements in making them fit the needs of citizens better. And there are other varieties of mediation and conciliation services which have grown up around the country in recent years. So I don't want to be overly restrictive and suggest that that is the one model that the Department of Justice is fixed on. That is the one that we experimented with but we are not limited to that at all.

Mr. KASTENMEIER. Do any models you have in mind emphasize or focus on types of problems—for example, is there any model of a forum that specializes in criminal law, or criminal misdemeanors, as opposed to civil disputes?

Mr. MEADOR. I am not certain that I can cite to the committee offhand any one project that is confined to criminal matters as such. I will be glad to look into this and submit in writing if I do find such, if the committee wants it.

There are specialized programs that do limit themselves to a particular kind of dispute. For example, there are family conciliation services, there are consumer projects, and perhaps others of a specialized nature. These are unlike the neighborhood justice center which you might call a nonspecialized general dispute settling center.

I think we ought to have projects of both kinds. We need to experiment in the specialized projects, concentrating on one kind of dispute. But we also need more work of a broader, more generalized type.

Mr. KASTENMEIER. The reason of course for the question is to determine what you may have in mind as to the scope of these various enterprises.

Mr. MEADOR. On that question, I would urge the committees not to limit the scope of the program any more precisely than it is already

limited in the bill. Because of the rudimentary state of our knowledge, the early stage historically speaking in the exploration and development of these procedures, it is desirable to leave as much running room as possible for experimentation.

It seems to me any one of the bills does define the purposes, the criteria, the objectives, the parameters, so to speak, of what is intended here. In other words, a field is staked out within which a lot of room is left to finance projects of quite varying sorts. And to me that is good, that is the strength of the bill. And I would urge the committee not to try to narrow it down any more rigidly.

Mr. BROYHILL. Would the chairman yield at that point, because that raises a question in my mind.

Which bill are you referring to—the House Judiciary bill, the House Commerce bill, or the Senate bill?

Mr. MEADOR. Well, we can live comfortably with any one of the three. The statement I just made in my own mind I would apply to any one of the three bills.

Mr. BROYHILL. Under section 3, the definition of dispute resolution mechanism in the Senate bill includes disputes involving small amounts of money or otherwise arising from the course of daily life. The House Judiciary bill includes minor disputes. And the House Commerce bill includes minor consumer disputes and other minor civil disputes.

It seems there is a great range of difference there.

Mr. MEADOR. Well, I am not sure that I can perceive that difference. Obviously there is a difference in the choice of language. But the functional effect of this language does not seem to me to be radically different.

The enactment of any one of those three provisions would in my mind leave a lot of leeway to administer the program over a sizable spectrum of disputes. Maybe if that is an erroneous interpretation of the bill, it would be helpful to be set right on it.

Mr. BROYHILL. Perhaps we need to study this a little bit and get back with you at a later time.

Mr. KASTENMEIER. Again, I want to express my appreciation and that of the two subcommittees for your appearance here today. You have been most helpful and most candid in replying to questions and aiding us in our deliberations.

Mr. MEADOR. Mr. Chairman, if I may add one closing note. In the event that I do not have occasion to reappear before either of these committees, I would just like to say that I personally and on behalf of the Department have appreciated very much the cooperation and help of all of you in these bills over the last 2½ years.

I look forward to further work with you and look forward to the day of enactment of some of them. And I do appreciate your cooperation in helping these mutual interests.

Mr. KASTENMEIER. Thank you for your statement. I hope we will have occasion to have you as a witness before you leave.

Now I am very pleased to greet two witnesses who have been very patient indeed. They are here designated to represent the views of the American Bar Association.

First, Talbot (Sandy) D'Alemberte, a practicing attorney from Miami, Florida, Mr. D'Alemberte has served as a State senator in the Florida State Legislature. At present he is chairman of the ABA's Special Committee on Resolution of Minor Disputes.

With Mr. D'Alemberte is Prof. Earl F. Johnson, Jr., University of Southern California Law School. Professor Johnson is director of the university's program for the study of dispute resolution policy. He has an illustrious background in legal services, having served as Director of OEO Legal Services. He is coauthor of a recently published book entitled "Outside the Courts—A Survey of Diversion Alternatives in Civil Cases."

Professor Johnson is a member of Mr. D'Alemberte's committee.

You are both welcome. You may proceed.

TESTIMONY OF TALBOT D. (SANDY) D'ALEMBERTE, CHAIRMAN, SPECIAL COMMITTEE ON RESOLUTION OF MINOR DISPUTES, AMERICAN BAR ASSOCIATION AND PROF. EARL F. JOHNSON, JR., UNIVERSITY OF SOUTHERN CALIFORNIA LAW SCHOOL, MEMBER, SPECIAL COMMITTEE ON RESOLUTION OF MINOR DISPUTES

Mr. D'ALEMBERTE. Thank you so much, Mr. Chairman. This subcommittee and the other subcommittee have both been generous in allowing the American Bar Association to present testimony.

At your hearings last year, Mr. Chairman, we had two members of our committee, Prof. Frank Sander, who testified before you at some length, I believe, with him was Mr. Ron Olson. The House Commerce Committee was generous to Mr. Johnson and myself in allowing us to testify on the legislation last year.

And you have yet to hear from a fifth member of our committee, Jack Ethridge, who is the chairman of the board of the Atlanta Neighborhood Justice Center which has been referred to in previous testimony.

You have been very generous with your time.

I am sorry that Maurice Rosenberg is away, because one of his favorite people to quote is Yogi Berra, and Yogi says that you can observe an awful lot of things by just watching. As we sat here we have observed first of all this committee is obviously terribly well grounded in what we would otherwise like to talk about, and that is the basic philosophy of alternative dispute resolution. And having had contact with committee members, and particularly with your staff people, that is not at all surprising to us.

We start off, then, by expressing appreciation to Gail Fogarty and to others on your House Judiciary staff—Mike Remington, of course, and Ed O'Connell of the Commerce Committee.

We will abandon our prepared statement, if we can, and proceed, if we may, to make several comments about the legislation before you.

Mr. KASTENMEIER. Without objection, your statement will be received.

[The statement of Mr. D'Alemberte and Professor Johnson follows:]

STATEMENT OF TALBOT D'ALEMBERTE, ESQ., CHAIRMAN, AND PROF. EARL F. JOHNSON, JR., MEMBER, SPECIAL COMMITTEE ON RESOLUTION OF MINOR DISPUTES FOR THE AMERICAN BAR ASSOCIATION

Mr. Chairman, and members of both subcommittees, I am Talbot D'Alemberte of Miami, Florida, and I am Chairman of the American Bar Association's Special Committee on Resolution of Minor Disputes. My colleague is Professor Earl Johnson, who is also a member of the Association's committee. Professor Johnson is Director of the Program for the Study of Dispute Resolution Policy at the University of Southern California, where he also teaches law.

We are pleased and honored today to be designated by the ABA President, S. Shepherd Tate, to reiterate the Association's strong support and continuing advocacy for prompt enactment of the proposed Dispute Resolution Act. We certainly hope that the concerted efforts of you, Mr. Chairman, and your colleagues, will result in prompt subcommittee-level approval of the pending legislation in order that both full committees and the House of Representatives will be able to implement the needed improvements in the justice system which this proposal would foster. And I would also like to express the ABA's gratitude for the fine and competent assistance of your counsel, Ms. Fogarty and Mr. Remington, and for the Consumer Protection Subcommittee's counsel, Mr. O'Connell, all of whom have been most helpful to the Association and our committee.

Professor Johnson and I discussed in some detail during your hearings last year the reasons why the Association's President for the past 2 years, has considered passage of this legislation a top priority. The record compiled at those hearings—at which Professor Frank Sander and Ron Olson, who also are members of the ABA committee, testified—was complete and we are content to rely upon it. Today, we would like to concentrate our attention on some of the particular provisions of the three bills before you.

NEED FOR LIMITED FEDERAL ASSISTANCE

The Association's Board of Governors, in May 1977, expressed support, in principle, for the "enactment of legislation such as the Consumer Controversies Resolution Act [Dispute Resolution Act], or legislation of similar support, 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 (emphasis added)." All of the bills pending before you appear to recognize that, by definition, the most appropriate means of assisting citizens in resolving their everyday disputes is best determined at the state and local level, whether by such government entities as the courts, or by voluntary citizen, consumer or law-related organizations.

The improvement of existing, or creation of new, mechanisms for resolving relatively small disputes is, as Professor Sander pointed out last year, based on a composite of the needs to increase access to the justice system, to reduce court backlogs (perhaps), and to provide a more diverse—and better—range of methods by which disputes may be resolved. We are not talking about a so-called "second class" system of justice, to which would be relegated cases of apparent insignificance. To the contrary, if we thought this legislation fostered such a system, we would be vehemently opposed to it.

What this bill will do, we hope, is to assist state and local agencies and nonprofit citizen, consumer, business and law-related organizations, in creating more access, and improving the means of access, to dispute resolving mechanisms. So many of the kinds of civil and minor criminal matters which could be resolved through mechanisms assisted by this bill are not now resolved by any mechanism—whether judicial or outside the courts—we foresee this legislation as assisting the disputants in finally having a forum to help resolve their disputes.

Our intent should be clarified through a discussion of some of the more important provisions of the bills pending before you.

CRITERIA FOR DISPUTE RESOLUTION MECHANISMS

Section 4 of all pending bills stipulates that grant recipients must "provide satisfactory assurances" to the Attorney General that a dispute resolution mechanism will meet certain basic procedureal criteria. Based on the sound principles of federalism and separation of powers, we think that small claims courts, or any other instrumentality of a state court system, should be explicitly exempt from such requirements. Otherwise, with a few exceptions, these criteria appear to be no more than that which a state or local entity would otherwise employ to assure the success of a program and the prudent use of funds to run that program.

However, the particular provisions of section 4 contained in H.R. 2863 appear to most clearly state the necessary criteria: sections 4(4) (B) and (C), which do not appear in the other bills, are important expressions of intent with which

we agree. However, the language of subsection (C) might be stated more clearly if it were written to "Promote the use of arbitrators, mediators, conciliators and other dispute resolution professionals, and to discourage the use of the adversary process in dispute resolution." We do favor the use of persons other than lawyers in minor dispute resolution mechanisms, but the language, "promote the use of nonlawyers" does not give clear guidance as to what type of person is to be preferred.

Also, subsection 4(a)(5)(E) in S. 423 is not desirable if the legislation is to remain true to the notion that state and local entitites can best determine the qualifications of professional arbitrators, mediators, and others in their jurisdiction.

Finally, the phrase "State system" included in part (6) of section 4 of the Senate bill does not as clearly express that intent that state instrumentalities coordinate their efforts as does comparable language in the House legislation which does not include the phrase "State system". The legislation does not intend the creation of a centralized, unified "minor disputes system"—especially since many dispute resolution mechanisms are or will be privately run. Thus, the language in section 5 of the House bills (page 6) might be amended in subsection (1) to read: "Sec. 5. Each State is hereby encouraged to develop, and to assist localities and nonprofit organizations in the development of—."

DISPUTE RESOLUTION RESOURCE CENTER

While the grant-funding aspect of the legislation is the largest component of this bill, the proposed Dispute Resolution Resource Center is a necessary and natural complement to the grant program. Indeed, we think the resource center should and will be the most significant part of this legislation in terms of its long-range impact, and that most worthy of continuation once grants have ceased. Indeed, the institutionalization at the state and local level of diverse forms of dispute resolution mechanisms is the goal of this legislation; once the initial four-year period of broad-based experimentation and expansion is completed, the continued existence of the modest Resource Center is all we envision as a necessary complement to the continuation of local projects and expansion of new projects.

Thus, our perception of the future of alternative dispute resolving entities is founded on our faith in and support for local initiative in partnership with a national center for research, information dissemination and the provision of technical assistance.

The Association's Special Committee has given a great deal of thought to the structure and purposes of a resource center to conduct empirical research of state level activities in order to be able to provide technical assistance to prospective projects. Such activities now are conducted on an ad hoc basis: various organizations within the past few years have held conferences and symposia at which information on developing programs is exchanged; a number of articles and studies have compiled information on particular projects, or on the experience in a number of projects with a particular dispute resolution mechanism; and such organizations as the American Bar Association, the National Center for State Courts and the American Arbitration Association are often viewed as informal resource centers when they are requested to provide information they have gathered to citizen groups, state courts, and others interested in establishing dispute resolution mechanisms.

Following the ABA-sponsored National Conference on Minor Disputes Resolution in May 1977, the Special Committee discussed with the American Arbitration Association and the National Center for State Courts the concept of pooling their expertise in creating a consortium-based resource center. Because none of the groups had sufficient resources to actually implement this idea—and because the idea was receiving serious consideration in Congress as a part of the Dispute Resolution Act—the proposal remained at the concept level. Nevertheless, from those discussions we urge that the Dispute Resolution Resource Center's work be based on this notion that no single entity or individual will have the requisite range of expertise upon which the Resource Center work should be based. Rather, the proposed Center's reliance upon diverse sources of expertise should allow the Center's work to be most useful to states, localities and nonprofit groups.

Finally, the question of the location of the Dispute Resolution Program, of which the Resource Center will be a part, should be resolved. The Association's

Board of Governors suggested that the Justice Department's Office for Improvements in the Administration of Justice would be an appropriate "home" for the Program, and we agree. That office, so ably headed by Assistant Attorney General Meador, was created two years ago by Attorney General Bell to focus the Department's innovative thinking in both civil and criminal law. The expertise which has developed over the past two years could be used productively in carrying out the functions of the Dispute Resolution Program.

However, because this Office was created by the Attorney General, and not by Congress, it might be beneficial to include in this legislation a provision specifically creating an Office for Improvements in the Administration of Justice which would house the Dispute Resolution Program. Since we would not otherwise wish to dictate to the Attorney General how to manage the Justice Department, we see no particular need to provide more than the language, "* * * to perform such functions as the Attorney General may authorize."

We are pleased to note that neither House bill contains the provision—now included in section 6 of the Senate bill—for the certification of "national priority projects". Such a provision seems contrary to the intent of the legislation to foster experimentation, and improvement of existing mechanisms, at the state and local level. A particularly beneficial program in one jurisdiction, for instance, of arbitration of consumer complaints, may not fit the existing needs of consumers in another jurisdiction. Rather, since the very purpose of creating a Resource Center is to create a single, national source of information about diverse types of dispute resolution mechanisms, we see no purpose in forcing what will likely be a meaningless "national priority" stamp on a particular project or mechanism.

DISPUTE RESOLUTION ADVISORY BOARD

In passing, we would note our support for the use of a representative Advisory Board (established in section 7 in both House bills) to periodically consult with the Attorney General. While we express no opinion on the need to explicitly provide for the consultative authority of the FTC Chairman, as suggested in S. 423 and H.R. 3719, we do note that many other independent agencies and Executive Branch departments might be useful sources of advice and information. Thus, we suggest that the Attorney General and the Advisory Board merely be authorized and directed to seek the guidance of appropriate federal agencies and departments.

FINANCIAL ASSISTANCE

The financial assistance component of the Dispute Resolution Act, as proposed in all three bills, is geared to complement, and effectuate the work of, the Resource Center. As such, the principle of state and local discretion in the use of funds should be paramount. The ABA Board of Governors specifically suggested that such discretion should be encouraged through a "revenue sharing" approach, which the elimination of the "national priority projects" language would permit.

Furthermore, our Board urged that the record-keeping and other administrative burdens imposed on a grant recipient be as minimal as possible. Without discussing such requirements in detail, we would suggest that the research needs of the Resource Center and the requirements of financial accountability, be the primary purposes for what administrative burdens are imposed.

Mr. D'ALEMBERTE. We have several glosses as we go forward that we would like to put on the prepared statement, if you would allow us to make some corrections as we go along.

I might say that, with your permission, we will split this presentation. We have been inspired by your example of having the Judiciary and Commerce Subcommittees get together, and we now bring a practicing lawyer and a professor to testify, much in that same spirit.

I would like to just comment briefly that our authorization to be here comes from the American Bar Association and through its resolution adopted in May 1977.

Three separate American Bar Association presidents whom we have served have been very, very supportive of this legislation, and the concepts contained in all three pieces of legislation now before you.

We do join with the earlier witnesses in urging passage of legislation along these lines. We do have some very specific comments to make.

We join with the comments made earlier in saying that we think the genius of this legislation is that it allows experimentation at the local and State level. We don't think it dictates a thing to States. We don't find it offensive to principles of federalism. And we don't find it offensive to lawyers.

We as lawyers and members of the American Bar Association are very much conscious of the great expense of many forms of litigation, and we are also very conscious of the fact that a number of citizens really do not have adequate access to our courts. So we do very much approve the concept of the legislation.

There are several comments that we would like to make, if we may, and then we would yield to questions.

First of all, relating to section 4 of the draft, I refer now to the bill, H.R. 2863. Like you and others of the House, Mr. Chairman, there is a comment in our statement, prepared statement, which was issued to you, which commented on the problem of federalism and separation of powers.

I think after consultation we both agree that really those comments were perhaps appropriate when addressed to the Senate legislation.

There was a provision in the Senate bill that possibly could be construed to refer to the qualifications and tenure of people who would be working within the State judicial system or perhaps employed by State or local government. And that created some fears of some people that we think would not be created by the drafts that are before you in the House legislation in either form, either the Commerce or the Judiciary draft.

So we don't think at this time that there is any great problem with federalism or separation of powers in the legislation as it is being proposed.

I would like to pause just a moment to specifically comment on a subsection of H.R. 2863, and that is the section which deals with the desirability of having nonlawyers participate in the process.

I think we are in agreement that the adversary system may not be the appropriate system to handle certain types of disputes. And the American Bar Association is on record as encouraging alternative dispute mechanisms. We wonder, however, if it would be appropriate to express that in a more positive way rather than a negative way.

One suggestion that I have is some language to change section 4(c) to read as follows: "Promote the use of arbitrators, mediators, conciliators and other dispute resolution professionals and to discourage the user of the adversary process in dispute resolution."

This is our suggestion in lieu of the language which would simply say that you would use nonlawyers.

The only other comment that I would like to make before yielding to Prof. Earl Johnson is the comment again directed towards the Senate bill.

The Senate bill has a definition of State system in its definitional section, and it picks up in section 4 of the Senate bill reference to that State system.

As I think the other witnesses have said before you today, one of our ambitions is to see a really rather wide range of experimentation go

forward. And the concept of having a State system it seems to us is inappropriate, and we would much rather see that language eliminated.

We have some alternative language to suggest if it were necessary to address that concept.

We believe that the business of this bill is to promote experimentation, not only by State and local government, but also by private organizations.

And we concede that many times private institutions, nonprofit corporations operating at the local level may well have something to propose, but it would not fit necessarily within any concept of a State system.

So again our criticism on that point is directed toward the Senate version, and we would recommend that you really look to the House versions and eliminate that concept.

If I may, I think you have made an excellent introduction to Professor Johnson. You did neglect only, Mr. Chairman, to say that at one time he was also a prosecuting attorney and he practiced in Florida. And that is one reason that we were able to get not only the academic and the practicing lawyer together, but a person from California and a person from Florida.

I do commend to you Professor Johnson's book. I understand his royalty proceeds are not so great that it is not affordable. But he has studied the subject a great deal. I think all who know him know he speaks from a great deal of expertise.

Mr. JOHNSON. Mr. Chairman, I am going to be addressing only a couple of issues. One of those is the Resource Center.

In that sense I am mainly going to be underscoring what Assistant Attorney General Meador said in his statement about the Resource Center, his feeling that the Resource Center in all likelihood could not be operated entirely by Government employees, that it required too much expertise that is not readily obtainable by Government employment, and that some or all of the functions might well have to be contracted out.

We feel the same way. We have given considerable consideration to the Resource Center and what it might do, and what kinds of personnel it might need, and what kinds of expertise it might need. And at one time in fact we were giving some consideration to seeking to fulfill a large part of that role.

We have been convinced by our own examination that it is going to require contracting out for a great deal of this; that no single outside organization, whether it be the ABA or the National Center for State Courts, or the American Arbitration Association, or any of a number of other organizations one might think of has all of the expertise necessary for this kind of thing.

We feel it important that there be sufficient flexibility in this act for the Department of Justice to look for the expertise where it exists, to contract with a consortium of organizations or with individual organizations to discharge its tasks.

It seems to have been drafted that way, and it certainly seems to be construed by Mr. Meador to allow that.

I did want to also address one other issue, which was the issue of the national priority section that was in the Senate bill and is not in either one of the House bills.

We are pleased to note, in fact, that it is not in the House bills. We think it is preferable to leave the maximum amount of discretion to whoever is going to be the grant giver in this situation. But in that same vein, we were concerned a bit about section 8(g) of H.R. 2863, which creates a preference for existing programs and would suggest that—well, it would certainly be open to the interpretation of discouraging innovation by new entities and could even be interpreted, it would seem to us, as to allow pre-emption of the field by existing institutions such as courts.

Mr. KASTENMEIER. If I might interrupt. We are again being interrupted by a vote on the floor. If you have no time problem, I propose we recess for 10 minutes. We will return so that you can complete your statement and we have questions we would like to ask you.

The committee will stand in recess for 10 minutes.

[Whereupon a short recess was taken.]

Mr. KASTENMEIER. The committee will come to order.

When we recessed, we were in the process of hearing from Professor Johnson.

Mr. JOHNSON. I think I can complete my comments in just a couple of minutes. I was addressing the issue of section 8(g) of H.R. 2863 which creates funding priority for existing programs, and I am merely suggesting that the language seemed strong enough that it might create too great a presumption in favor of existing institutions, small claims courts, and other such institutions, and might discourge innovation.

I don't see any problem with taking the factor of existing institutions into account to avoid duplication and that sort of thing, but as stated, I think it is overbroad and it creates, I think, an undesirable implication.

As lawyers we have been exercising our prerogative, or what we often take as prerogative, to nit-pick on rather small points that we think are important, but in terms of——

Mr. KASTENMEIER. What funding priority are you thinking about in section 8?

Mr. JOHNSON. I think it is 8(g), page 16, of H.R. 2863.

Mr. KASTENMEIER. Yes. That is a good point. Thank you.

Mr. JOHNSON. As I say, we were spending most of our testimony on what are rather picayune points probably in this legislation which we think is of considerable importance, but yet are not the really important thing which is as far as we can see getting this legislation passed this year.

We think that it is the kind of legislation that is of extreme importance. It has taken a long time for this country to recognize the significance of so-called minor disputes and to begin looking at ways other than the traditional judicial process to resolve such disputes.

I hope that we will not miss the opportunity that we have at this point in our history because of recent developments and recent interests to mount what I think could be one of the most important programs in the area of justice that this country has seen.

Mr. KASTENMEIER. Thank you for your comments. I would like to yield to Mr. Preyer of North Carolina.

Mr. PREYER. Thank you, Mr. Chairman. We appreciate the comments of the two experts on this.

Do you think we ought to try to clarify in legislation whether these programs should be for both civil and criminal matters, or do you think that is necessary?

Mr. JOHNSON. My own personal view is that that should be left open in the statute because so many disputes have both dimensions to them and what started as a criminal complaint often turns out to be basically a civil dispute between the parties.

At the same time sometimes essentially what starts off as a civil dispute, comes into the system as a civil dispute or is brought to the center as a civil dispute, may turn out to also have some criminal aspects to it as you dig deeper into the dispute.

So I think it is important that whatever institutions are set up, whatever experimental programs are set up, have the option of dealing with disputes that are characterized by the formal system as either civil or criminal.

Mr. PREYER. Do you think there ought to be any sort of protection that would apply to potential criminal defendants or civil litigants?

Mr. JOHNSON. Let's begin with the hardest case, the criminal case. I don't know of any of these institutions, the ones that exist at the present time, that aren't voluntary in nature, that is, if someone is a criminal defendant and is asked if he would like to have his case mediated rather than going through the formal system, he has that option, and if lawyers are not going to be present in the other forum or whatever, he voluntarily elects to go that route. That, I think, provides considerable protection.

In terms of the civil litigant, most of these, at least the existing ones, and I would suspect that future ones also, end up with a resolution of the dispute that has come into writing of some form and that you end up with a written agreement that disposes of the issues.

Mr. D'ALEMBERTE. I might say, Mr. Preyer, that we have had some experience in Florida, as was alluded to earlier by the Chief Justice. We have, I think, 10 of these in one form or another in active operation. We do have one decision in Florida which indicates that statements made during the process of mediation are privileged, and that is a judicial decision and is from a lower court, has not yet reached our appellate courts.

I, frankly, still I personally have the worry that there will be indications when we may have such problems, but we don't seem to have any large outbreak of such problems and so far as I know only one decision in Florida related to that subject.

Mr. PREYER. On the question of where this program ought to be located, Judge Sheran suggested a new independent body, justice body or something like this. It is presently in the Attorney General's office.

Do you have any thoughts as to where it should be located?

Also, in connection with that, Mr. Meador talked about funding from the LEAA. I wondered if I could get your opinions on where it ought to be located as far as the funding,

Mr. D'ALEMBERTE. To address the second question first, I personally am very apprehensive about the administration suggestion that this very excellent program be tied in with LEAA. From my viewpoint, sitting many miles away from this capital city, it seems to me that the future of LEAA is too uncertain and I would very much hope that you would not adopt that suggestion made by him.

I like virtually everything else he said. I do agree with him that the decision as we followed the legislation and the concept that the decision come to the Department of Justice was really through process of elimination after considering various other Federal agencies.

ABA has no real heavy suggestion or junior suggestion about where it should go. We feel quite comfortable with it in the Department of Justice, such as Mr. Meador's office, but there are probably places it could be placed that would make us less comfortable.

Again, I mention LEAA and it is only a personal remark, but again I hope this excellent job you have designed that does so many things as identified by committee members would not be lost in the confusion that seems to surround the future of LEAA at this time.

Mr. JOHNSON. The only further comment I would make is that I think that we are dealing with a bill that hopefully will pass this year and has to consider what exists as of this time. It may be that a year or two down the line there will be a reorganization of many of the programs in the justice area, the creation of some kind of separate organization, and as many of some kind that conceivably could adopt this program or could push this program could be transferred, but in the present time and in the interim at least it seems the Department of Justice would be the most appropriate vehicle.

Mr. PREYER. Mr. Chairman, I won't impinge on the 5-minute time this late in the afternoon.

I noticed you mentioned using Yogi Berra to start with so I will close with a quote from Sam Goldwyn who said when bidding farewell to a group, "don't think it ain't been lovely."

I will say it has been lovely to have you here.

Mr. D'ALEMBERTE. Thank you, Mr. Preyer.

Mr. KASTENMEIER. The gentleman from North Carolina, Mr. Broyhill.

Mr. BROYHILL. You were here before when I was speaking to the other witnesses from the Department of Justice and I was expressing some concern that the bill, other than the Commerce Committee bill, does not emphasize consumer disputes to a special degree.

I have a couple of concerns and one of them, of course, is that there is a Federal interest in this whole consumer area.

We have passed legislation which I mentioned before—the Magnuson-Moss Warranty Act, the Truth-in-Lending Act, Unfair Debt Collection Practices Act, and so forth. In other words, there can be some justification going to the House and saying that there is a Federal role here to play and that we should provide some Federal moneys and providing some help in setting up these dispute settlement mechanisms which are focused toward consumer disputes.

Now, if you go toward neighborhood disputes, domestic disputes, and so forth, I think the argument could be justifiably made that this is not an area for spending Federal tax moneys and should not be enacted.

I think this is a very real, practical, political problem in this Congress, that I just don't think that we are going to be able to pass a bill in the House if we are only going to be dealing with what has come to be called the barking dog case.

So, next, I want to get your comments.

Mr. D'ALEMBERTE. Both of us will comment briefly on that because I know Professor Johnson has some thoughts.

My own observations would be in the nature of the way citizens get those services of dispute resolution, Mr. Broyhill; it seems to me that today they go to the court system. They go to it in most instances identifying a place to go and they receive various kinds of services within that structure.

As we see experiments with the neighborhood justice system, I still think it is advantageous for the citizen to know that there is a place to go where a wide range of disputes can be resolved. I think, on analysis, we look at the number of the operations. We would say that quite a lot of the caseload indeed do deal with consumer disputes, but I think it is awfully important for that consumer to know where the delivery services are for dispute resolution. I almost think you should favor this act because it is easier for the consumer to find his or her way to that dispute resolution mechanism if you allow the experiments to have a general dispute resolution facility.

I concede in many of these, a rather large percentage of their caseload will indeed be consumer direct and clearly consumer disputes, but I don't think we do very well either in our formal court system or in some of these alternative systems to balkanize them and to have a large number of them and confuse the public through that balkanization.

I do know Professor Johnson has some observations.

Mr. JOHNSON. Just a couple.

First, since this is an experimental program and we are trying to learn how to best resolve disputes, it is very common that you learn what would be best in terms of resolving consumer disputes by a mechanism that you try out to resolve interpersonal disputes or landlord-tenant disputes or whatever.

The second comment I would make is that this is a grantmaking program. It is not one that we would depend, it would seem to me, for its constitutionality on the commerce clause in any sense, and the Federal Government, it seems to me, has a stake in improving the way disputes of all kinds are resolved in society. It would seem to me that although the consumer dispute is an extremely important category, there are many other extremely important categories such as landlord-tenant, and so forth.

I think it would be a mistake to restrict it just to consumer disputes.

Mr. BROYHILL. Thank you.

Mr. KASTENMEIER. The gentleman from North Carolina, Mr. Gudger.

Mr. GUDGER. Thank you, Mr. Chairman.

I would like to ask Mr. D'Alemberte a question about his proposed change in the language in the subsection which presently reads, "Promote the use of nonlawyers in the resolution of disputes" to the language "promote the use of arbitrators, mediators, conciliators, and other dispute resolution professionals."

Would not the net effect of the change in this language be to bring aboard a great number of lawyers inasmuch as lawyers have become rather prominent in this area of expertise as mediators, conciliators, dispute resolution professionals?

Mr. D'ALEMBERTE. Perhaps so, and I really have no particular brief even for the language we have suggested. Our reaction to the language as proposed in the bill is that it is negative and you probably could turn it positive.

What we found in some of the experiments going on—and we have one in my own county, Dade County, Miami, Fla.—is that lawyers are

not very expert in mediation techniques particularly. Indeed, before lawyers can be used, they have to go through a training program that teaches them something about mediation. You have to educate them out of the adversary system.

Indeed, we may be educating them into the techniques used by those JP's that you mentioned that we had in our system some years ago, so we really don't think that lawyers have any great expertise particularly in mediation techniques and our intention by my suggestion of change in language is not to try to create other positions for bar members.

Indeed, we would like to see these experiments go forward using nonlawyers, and, frankly, that is where people have more contact with the community in some instances and people don't have the commitment to the adversary system that many times we, as lawyers, have.

Mr. GUDGER. I suspect that adopting your language we could make it clear in the committee report that we are considering the use of that language as implying a desire to remove from the adversary procedure and from the adversary profession those who participate in this particular function.

Mr. D'ALEMBERTE. Yes, sir.

Mr. GUDGER. One other question I would like to address to Professor Johnson. I understand that you are director of a dispute resolution program at the University of Southern California. I am particularly concerned about this funding mechanism. We have two patterns, one of them the LEAA pattern which seems to fit the research portion or could at least afford a source at a time of austerity for research and development.

The other, of course, would be a program somewhat similar to the victim of violent crimes bill which the Judiciary Committee reported out favorably this past week and which would apply a Federal contribution into those States which have or hereafter put into place a method of compensating victims of violent crime, such as California has.

Do I understand that you strongly support any other method than the LEAA method, Dr. Johnson, or are you merely saying that you perceive that this ought to stand on its own bottom without being referred into the LEAA structure?

Mr. JOHNSON. I think it should stand on its own bottom in the sense of it could be very well within the Department of Justice or whatever, but I think it should not be part of LEAA as such because the personnel there are oriented primarily toward criminal process, criminal procedure, police procedures, and so forth.

It is not the ideal place to locate for that reason and for several other reasons. In terms of the machinery for how the grants are made, this is basically as I see it, except for the resource center part of it, a grant making program to encourage and evaluate experimentation and I think that there are a number of models within Government, and most of them we will exemplify in this piece of legislation, for accomplishing that part of it.

I don't think one has to follow the LEAA pattern. You could look to a lot of other agencies that have handled their grantmaking powers very well and I see nothing in this statute that would interfere with the very effective program of grantmaking.

Mr. GUDGER. Do you see some advantage in Federal participation on a matching basis with those States which are already on their own initiative developing programs in this area?

Mr. JOHNSON. Well, I think that the formula set forth in this statute is probably the best way to approach it because what you are trying to do is encourage innovation, as I see it, and certainly as this statute portrays it, and it seems to me that this pattern of 100-percent funding for 2 years followed by a gradual easing of the Federal contribution for 2 more years is the best way to bring about innovation in local communities and I think is preferable to merely matching some existing funding that may exist at the local level for these kinds of programs.

Mr. GUDGER. Thank you.

Mr. KASTENMEIER. The Chair recognizes the gentleman from Illinois, Mr. Railsback.

Mr. RAILSBACK. Yes.

I want to also commend you and say that I happen to agree with your general statements that you think we should not try to constrain or limit the use of minor dispute resolution tribunals to perhaps any one particular category.

I really have no trouble with setting up, as an experiment a minor dispute resolution tribunal that would, maybe, deal with primarily consumer-type disputes. However, it does seem to me that given our experience and maybe even the experience in England, that we are well advised to proceed cautiously with a too general or broad approach, and see how successful we can be at dealing with landlord-tenant or even minor criminal cases.

Do either one of you happen to be familiar with the English experience?

Mr. JOHNSON. I am somewhat familiar with some of the small claims tribunal experiments there and also with their administrative tribunals which they use to handle what we would call social security and public housing and many rental cases.

I am more familiar with something a little bit closer to home, that is, Canada, and their rentalsman offices that have begun to spring up in a number of provinces, that at least a couple of the provinces have exclusive jurisdiction over all landlord-tenant matters.

Mr. RAILSBACK. Recently some of us as part of a trip to England visited with some of the judges there. We also met with some of the administrative tribunal heads. During our visit we learned that there is something like 20,000 lay people that actually sit in judgment. These lay people sit in panels of three and determine a tremendous number of minor criminal disputes and remove a tremendous caseload from the English court system.

Let me ask you this about your criticism of section 4.

Is your criticism directed at any particular subsection, or is it just generally your fear about perhaps our infringing on the traditional separation of Federal and State powers?

Mr. D'ALEMBERTE. Mr. Railsback, we have to apologize to you. I said earlier, I think at a time when you may have been out briefly, that Professor Johnson and I did not get together entirely. We did have some criticism directed toward section 4 of the Senate act, and, frankly, we much prefer section 4 in each of the two House bills, and the only

criticism that we made at all, and it is minor, frankly, was the nonlawyer language of subsection C of section 4, sub (4), I believe it is. Yes, sir. Section 4, sub (4) C which is the language "promote the use of nonlawyers in the resolution of the dispute."

That may not be bad language. We haven't come up with language that is entirely clear ourselves. Our thought was that it might be useful to speak positively in terms of the skills that you want people to have rather than negatively in terms of a profession or degree that he might have concerned because there are even some lawyers who are capable of mediation.

I don't count the number high. If our profession improves and picks up on this kind of program as we hope they would, you may find that there will be some greater number at a later time.

Mr. RAILSBACK. Has anyone asked you already to maybe share with us a profile or the statistical information about the University of Southern California Minor Disputes Center? Have we really gone into your experience at all as far as how it is set up?

Mr. JOHNSON. We are a research center and we are doing a number of things, but among the things we are doing is examining various models for resolving disputes not only in the United States but elsewhere, and I happen to be on the board of a neighborhood justice center in Los Angeles, but our center is not itself directly involved in resolving any sorts of disputes.

We have, as I say, been examining a number of models both here and elsewhere and would be happy to share with the committee and the committee staff reports from those examinations that we had completed and so forth.

Mr. RAILSBACK. As your statement recognizes, there seems to me, anyway, to be a major difference between the Senate-passed bill and the approach taken by the Commerce Committee's and the Judiciary Committee's bill, and that is whether to establish a national priority project system or to set up an advisory board.

I take it that both of you agree and strongly support the concept of an advisory board type system rather than any kind of an earmarking of certain project.

Is that correct?

Mr. D'ALEMBERTE. Yes, sir.

Mr. RAILSBACK. And that is generally because you believe that the thrust should be to encourage experimentation, whether with consumer-type tribunals or landlord-tenant or those that may handle a whole range of various disputes. Is that correct?

Mr. D'ALEMBERTE. Yes, sir.

Mr. RAILSBACK. Thank you.

Mr. D'ALEMBERTE. Mr. Railsback, there is an evaluation, interim report, published by the Department of Justice on the three different neighborhood justice centers established by them. I am sure it is available to your staff, and you have a member of our committee, Judge Ethridge, who is chairman of the board of the Atlanta Neighborhood Justice Center, who is coming before you the next week with Linwood Slayton, who is director of that program, and he will probably be able to give you a lot of the details you are looking for, but we do have some materials both in our ABA offices and Professor Johnson's center. We will try to get that additional mailing to your staff.

Mr. RAILSBACK. Thank you very much.

Mr. JOHNSON. May I add one other research project we are involved in is in conjunction with the University of Wisconsin Law School, and I am sure that Congressman Kastenmeier, the chairman, will be able to obtain a great deal of information about that particular facet of our work, as well.

Mr. KASTENMEIER. I just have one or two questions. In terms of the neighborhood justice centers, their experience is rather short, but since you have been able to follow them from your perspective, would you say they have been successful without reservation, or do you have some reservations about that particular model and the way it has worked?

Mr. D'ALEMBERTE. Earl is more closely associated with the Los Angeles one and I would defer to him.

Mr. JOHNSON. I think that they are successful with reservations, that they are evolving experiments. I can only speak really for the Los Angeles one and say that it is evolving, that it is improving, that it is, I would say, certainly at least a qualified success, and there is very definite progress in it.

The major problem that we faced is the problem that was alluded to by somebody earlier in the presentations, having to do with the failure to get the responding party to come to the mediations quite frequently, and it has taken us a long time, since we are not using coercive methods in any sense, to solve that problem. It is not that nobody would respond, but that was an early problem, particularly, I might add, in the context of landlord-tenant disputes and to a lesser extent consumer disputes, where the tenant might want to mediate or the consumer might want to mediate, but the landlord felt he had all the chips or the storeowner felt he had all the chips and did not want to bother mediating the issue.

The problem is easing, and I think that our rate of mediation, successful mediation, has doubled or tripled within the last few months, and we are also beginning to add some additional elements to the neighborhood justice center program. We are in the process of developing an arbitration component to add to the mediation component at our center, so I think it is too early in the game to say whether that particular experiment has been a 100-percent success, that it has proved some things, that we have learned a lot, that it is improving a lot, I think are all safe statements.

Mr. KASTENMEIER. You have heard Assistant Attorney General Meador, who preceded you. Do you think that the program should have a useful life of about 5 years, and then that it be sunsetted out of existence? Do you have more or less the same expectation in terms of life of the program as Mr. Meador?

Mr. D'ALEMBERTE. I guess I would endorse Assistant Attorney General Meador's approach to that, and that is that I would certainly hope that Congress would look at that again. Frankly, there is an awful lot we do not know at this time. If you want my advice, I would guess that you would want the resource center around somewhat longer than that. It seems to me that the resource center is the thing that is most needed today. It is just extremely urgent that someone be the clearinghouse and the wisdom collector and disseminator and evaluator for everything that is going on, so that we do not keep making the same mistakes in communities all across the country.

There really is a movement going on here. My hope is that this legislation will make that movement very much alive and that the resource center could really be useful, it seems to me, and my guess is it can be useful, far beyond the 5 years. A relatively small amount of Federal money and grants will really encourage this movement to grow, and I think it is entirely reasonable to have a 5-year sunset on that.

I would carry on with obviously the resource center also, although it is my guess that you will want to keep that alive a longer period of time, but then I really do not know, and I think it is entirely a reasonable approach to sunset.

Mr. KASTENMEIER. Your suggestion is that we could use more affirmative language in the bill than the current provision, "promote the use of nonlawyers in the resolution of disputes." Although I share the apprehension of the gentleman from North Carolina, Mr. Gudger, it is a matter of fact in these mechanisms, as we contemplate them, that they would very largely be made up of nonlawyers. Certainly the ABA must realize that.

Mr. D'ALEMBERTE. I do realize it entirely.

Mr. KASTENMEIER. I do not want to misunderstand the implication of your suggestion.

Mr. D'ALEMBERTE. No, sir; and I think the criticisms made toward the language we suggested may indeed be valid. I am not sure that either set of language really picks up the thought that we think you want to express. You really want to move out of the traditional adversary process for certain types, or at least you want to encourage expectation in that, and we wholeheartedly endorse that.

We are not attempting to see more lawyering go on in these types of tribunals, Mr. Chairman. It just strikes us that the real thought you had was really a more positive thought than that, and although we have reviewed Mr. Mark Green's testimony, he has some rather unkind things to say about the American Bar Association. At least I hope on this subject that you will find that we believe we have a constructive support of this legislation, and I repeat again what Professor Johnson said, that any of these individual comments we make about either of the two bills, we are really picking at a nit somewhat. We think both bills are excellent and we think the most important thing is to see legislation like this is adopted and funded, and we repeat again our great hope that this will not get caught up in the confusion surrounding LEAA at this time.

Mr. KASTENMEIER. Well, in any event I would like to take this occasion to commend and congratulate you both, Mr. D'Alemberte and Professor Johnson, on your testimony. It is positive testimony overall and very supportive of the endeavor of the two subcommittees that are undertaking this jointly. On behalf of the committees I express our thanks and gratitude to you for participating. We may later of course in deliberations on this legislation want to contact you again at least for your further comments.

I would also like to thank indeed my colleagues in this rather long session on the opening day on the hearings. We will be gathering tomorrow morning under the chair of the gentleman from North Carolina, Mr. Preyer, at 9:30. Until that time, the subcommittee stands adjourned.

[Whereupon, at 5:22 p.m., the joint committee adjourned, to reconvene at 9:30 a.m., Thursday, June 7, 1979.]

RESOLUTION OF MINOR DISPUTES

THURSDAY, JUNE 7, 1979

HOUSE OF REPRESENTATIVES, SUBCOMMITTEE ON COURTS, CIVIL LIBERTIES AND THE ADMINISTRATION OF JUSTICE, COMMITTEE ON THE JUDICIARY, AND SUBCOMMITTEE ON CONSUMER PROTECTION AND FINANCE, COMMITTEE ON INTERSTATE AND FOREIGN COMMERCE,

Washington, D.C.

The subcommittee met, pursuant to notice, at 9:50 a.m., in room 2123, Rayburn House Office Building, Hon. Richardson Preyer presiding.

Present: Representatives Preyer, Broyhill, Kastenmeier, Danielson, Gudger, and Moorhead.

Staff present (Subcommittee on Consumer Protection and Finance): Edward H. O'Connell, counsel; and Margaret T. Durbin, staff assistant, minority.

Staff present (Subcommittee on Courts, Civil Liberties, and the Administration of Justice): Gail Higgins Fogarty and Michael J. Remington, counsel, and Joseph V. Wolfe, associate counsel.

Mr. PREYER. The committee will come to order. Today, the Consumer Protection and Finance Subcommittee, in conjunction with the Subcommittee on Courts, Civil Liberties and Administration of Justice of the Committee on the Judiciary, will hold its second of 4 days of hearings on three dispute resolution bills. These bills attempt to encourage the development of inexpensive, fair, and easy-to-use mechanisms for resolving consumer and other minor disputes. Yesterday, we heard the legal communities' perspective, and today we will delve into the consumer and business side of this problem.

Let me hasten to add at this juncture that when we talk of minor disputes in these hearings, we are, in fact, talking about real and nagging problems that, if not resolved in an acceptable manner, can compound into a festering sore upon our society.

Unfortunately, as we say in the laws "The smallest possums climb the highest trees sometimes."

These minor disputes have shown themselves increasingly to be inappropriate for handling under the traditional legal system. It has been many years since Alexis de Toqueville, in his inciteful commentary on our lifestyle, pointed out the propensity of Americans to take every controversy to court. Our increasing complex, urban and industrial society, however, has overburdened the adversarial system to the point where even such an authority as Judge Learned Hand said: "I must say that as a litigant, I should dread a lawsuit beyond almost anything else short of sickness and death." If such an authority as Judge Hand held such feelings, one can imagine what John Q. Public feels.

This, of course, is the rationale of these hearings—to get an overview of the problem in order that we can make some considered judgments as to how best solve the problem. I am looking forward to the contribution the witnesses today will make.

We are honored to have one of the fathers of one of the three bills to open our hearings this morning, Bob Eckhardt, distinguished Congressman from Texas. Congressman Eckhardt, we will turn the floor over to you at this time.

TESTIMONY OF HON. BOB ECKHARDT, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF TEXAS

Mr. ECKHARDT. Thank you, Mr. Chairman. It is very appropriate that this bill be before the subcommittees that you have mentioned; indeed, the very titles of those subcommittees indicate the purpose of the legislation.

I know that today people are very much afraid and negative with respect to lawyers. They almost approach the position that Dick had, in Henry VI, where he said: "The first thing we do we kill all the lawyers."

This, of course, is not what this bill does, but it does provide a means of obtaining justice without the use of lawyers, and indeed I think this may even be welcomed by lawyers.

I remember when I first started in practice, I felt I was running a kind of free legal aid clinic. At that time, I was the chairman of the Committee on Usury of the Travis County Bar, and most of the cases I got were so small as far as recovery is concerned, and so difficult, as the chairman has said, the smallest possums climb the highest trees, and the smallest fees seem to go with the most difficult cases—that anyone would welcome removing this from the area of ordinary legal practice.

Also, the public conceives of the remedy for consumer complaints as being totally inadequate. The Harris Poll found that 79 percent of the public believes it to be a waste of time to complain about consumer problems. And indeed there are many consumer problems associated with certain goods and services.

For instance, the Harvard Business Review and the Law and Society Review have found that in certain categories of goods and services, as for instance dentures and hearing aid purchases, approximately one-fourth of all the transactions result in some type of complaint.

So there can be no question but that this legislation is of extreme importance. It nearly passed in the last session but got caught in the last days of the session where it had to get a two-thirds vote to get through, and that way it was stopped.

I think in this session we need to look at some of the questions of detail. I understand that there have been some recommendations that this be done within the LEAA function. I don't think that the bill should necessarily preclude using LEAA personnel for administering the problem, but it should certainly not be financed through the very relatively sparse funds of that agency.

The authorization for LEAA this time is $446 million, a $200 million cut from the expenditure of last time and only $30 million of that is discretionary. It is true that LEAA has financed some neighborhood

justice centers, but these have been limited largely to interpersonal disputes in which there is some kind of an ongoing relationship, as, for instance, between neighbors or between landlords and tenants, and so forth, and the disputes involved have to do largely with questions that involve a criminal question.

The disputes that are addressed here are largely civil disputes, and I think that should be kept in mind. Certainly if we merely utilize funds which are already badly needed in the area of avoidance of crime and in criminal matters, if we merely divert those funds to this purpose, we have done no good at all. As a matter of fact, we may have done harm. It may be a backward step.

I would suggest that there be the same kind of emphasis in the ultimate bill on the resolution of civil disputes that existed in the commerce bill last time. There is a slight difference between the judiciary bill and the commerce bill in that respect. I don't think it is really terribly meaningful as far as the intent of the two subcommittees, but the Judiciary Committee refers to minor dispute settlement, and the Commerce Committee talks about civil disputes. I think it would be advisable to limit it to civil disputes, particularly in view of the fact that LEAA is already doing some things with respect to criminal disputes.

There is another thing that I think should be brought out, and that is that this type of small dispute settlement is not taken care of by the small claims court. In the first place, the small claims courts tend to be over utilized by various businesses concerned with collecting their bills and by landlords and in areas that are more typically judicial in nature.

Besides that, the small claims courts don't cover all of the country, nor all of the people in the country. Somewhere around 40 million people are in rural areas in which there are no small claims courts, and, therefore, that is not an answer to the question that you are addressing here.

I would further suggest that you retain the Commerce Committee's provisions of making the Federal Trade Commission a consultant in connection with these matters, because we have gone into this pretty deeply in Congress, and delegated authority to the Federal Trade Commission to make rules in questions involving unfair and deceptive practices. We have also passed the Magnuson-Moss bill—which deals with warranties—that is closely related to this question, and the Federal Trade Commission is uniquely knowledgeable in the area of consumer disputes.

I am not suggesting that the FTC administer the program. I think it should be administered in the Department of Justice, and, furthermore, I think that in your delegation of that authority to the Department of Justice, the delegation should be broad. As I said before, you don't necessarily take it out of LEAA. I think that should be a choice that the Department of Justice should make as an administrative matter, and I don't think the statute should dictate the question.

In short, I think that your two subcommittees can come out with a much more thoughtful account than we had last time, because you have a little bit more time at it, and I applaud the fact that you are working together in joint hearings this time. We just didn't have time

52-434—80——5

for that last time. It is a very important issue, and I hope that we will see the passage of an adequate law this time.

[Mr. Eckhardt's complete statement follows:]

STATEMENT OF HON. BOB ECKHARDT, BEFORE THE SUBCOMMITTEE ON CONSUMER PROTECTION AND FINANCE

Mr. Chairman and Members of the Subcommittee on Consumer Protection and Finance, it is a pleasure to appear in support of H.R. 3719, the Dispute Resolution Act. This bill meets the need for dispute resolution mechanisms that are accessible, informal, and inexpensive.

Some would suggest that the inefficiencies of the judicial system be solved according to Shakespeares' exhortation in Henry VI: "The first thing we do, let's kill all the lawyers." However, as an attorney myself, I am reluctant to espouse this alternative. Instead, I propose H.R. 3719 to remove the need for lawyers in the resolution of many minor disputes.

The magnitude of unresolved consumer and commercial disputes has clearly been demonstrated. In 1973, the National Institute of Consumer Justice recommended that federal funds be made available to stimulate state and local governments to establish and improve small claims courts. Consumers need accessible forums for resolving controversies with vendors, manufacturers, and providers of services. A recent national survey of consumer attitudes by Louis Harris revealed that 79 percent of the public believes it is a waste of time to complain about consumer problems because nothing will be achieved. Research published in the Harvard Business Review and in the Law and Society Review showed that for certain categories of goods and services, such as denture and hearing aid purchases and appliance repairs, consumers experienced problems in one-fourth to one-third of all transactions.

Frequently, the time and expense involved in trying to resolve a complaint seems so great in comparison to the dollars involved in the original purchase that consumers just don't bother to pursue a solution. The sum of all these small complaints adds up a great burden on the American marketplace. A manufacturer or vendor who reduces his or her costs at the consumers' expense, and gets away with it, puts responsible businesses at a competitive disadvantage, lowering standards throughout an industry. Equally important is that the frustration and hopelessness felt by a consumer with no practical system for redress contributes to cynicism and alienation, despite the increasing number of consumer protection laws at both the state and federal levels. If the individual consumer has no practical way of enforcing statutory rights, such laws create only empty promises.

During a time when inflation is a major public concern, I am in agreement with the relatively low level of funding ($15 million annually for grantees, $3 million annually for the administration of the program) requested in H.R. 3719. However, I oppose any suggestion that the program should be funded out of existing LEAA appropriations. I realize that LEAA now has statutory authority and funds for promoting grievance resolution mechanisms in the criminal law area. But, the total funds available to LEAA are already subject to many demands, and simply adding civil disputes to the list of LEAA responsibilities would pay statutory lip service to the purposes of H.R. 3719 without putting up the necessary resources. I don't see why Congress should tell LEAA to reduce its crime prevention activity in order to fund civil controversy resolution programs. Therefore, I strongly urge that a separate authorization provision be retained in the bill.

As to the question which organizational entity should administer the funds, I would be inclined simply to designate the Attorney General and allow him to decide which departmental unit should have the delegated responsibility. I am not opposed, for example, to allowing LEAA to have administrative authority, assuming of course that both the Commerce and Judiciary Committees exercise vigorous oversight to ensure that consumer disputes are given adequate emphasis.

Finally, I have been asked to elaborate on the role of the FTC in the administration of this program. The Chairman of the FTC would have solely a consultative role in advising the Attorney General on such matters as the criteria for awarding grants, the identificatio nof dispute resolution mechanisms which are most effective and fair to all parties involved, and the submission of the annual report relating to the administration of the program in the Department of Justice.

As my earlier testimony pointed out, the need for emphasis on the resolution of consumer disputes is well documented. The Federal Trade Commission was established to promote competition in the marketplace and to discourage deceptive or unfair business practices. It therefore is well equipped to offer the benefit of its experience in dealing with grievances arising from commercial transactions. Additionally, the FTC possesses some specific expertise in this area. The Magnuson-Moss Warranty Act, which was passed in the 93d Congress and marked up by this Subcommittee, is administered by the FTC. That law encourage the establishment by warrantors of informal disputes settlement mechanisms and the Commission has set minimum requirements for such programs. As a consequence, the FTC's familiarity with the practical aspects of establishing workable guidelines for dispute resolution can assist the Attorney General in the same task.

I believe that all Americans should have access to forums which provide just settlements for minor civil disputes. Rights become illusory if adjudication is too long delayed or the value of a claim is consumed by the expense of asserting it. The bill, H.R. 3719, will enable us to take a major step forward in making justice available to the ordinary citizen.

Mr. PREYER. Thank you very much. We appreciate your testimony, and you have cleared up several questions I had in mind. Since you were chairman of the Consumer Finance Subcommittee last year, I am interested in your views on the role of the FTC. You do view it as a consulting role. Also, you indicated that it should be administered in the Department of Justice.

Do you have any thoughts about whether an arm of the judiciary, such as the Federal Judicial Center of the Administrative Office of U.S. Courts, would be an appropriate administrative unit, or would you leave it with the Attorney General at the Justice Department under a broad grant of authority?

Mr. ECKHARDT. I think I would leave it with the Justice Department under a broad grant of authority, and one broad enough, for instance, to delegate it to the Judicial Center or other appropriate agency.

Mr. PREYER. Thank you.

Mr. Kastenmeier?

Mr. KASTENMEIER. Thank you, Mr. Chairman.

How does your bill differ from the bill you introduced last year?

Mr. ECKHARDT. I don't think it differs very much from the last bill. It differs from the bill that is in the Judiciary Committee in that it refers to civil actions rather than all actions, and in that way would exclude criminal actions or activity, and it differs in putting the Federal Trade Commission in a consultative position with respect to the operation. I think that is substantially the difference between the two bills.

Mr. KASTENMEIER. Last year you had before you in your subcommittee a bill in one form which was somewhat modified when it went to the floor, as I recall.

Was not your bill of last year modified from the point of introduction to the form it took when it reached the floor?

Mr. ECKHARDT. It was somewhat, yes.

Mr. KASTENMEIER. So does this bill reflect the proposal that reached the floor, or does it reflect the bill as originally introduced?

Mr. ECKHARDT. As it reached the floor and in addition to that, it is reduced in the amount of money involved. Last time, it was $20 million; this is $15 million, plus the $3 million for administration.

Mr. KASTENMEIER. Why did you reduce the amount of money?

Mr. ECKHARDT. For tactical reasons.

Mr. KASTENMEIER. That is a good answer.

I am interested in your reasons for excluding criminal matters when so many of the laws enacted by Congress, several of which origi-

nated in the Commerce Committee, affecting consumers, in fact, involve criminal sanctions, whether it is truth in lending, packaging labelling requirements, there have been a whole series of bills all involving criminal sanctions.

To the extent that any consumer involved in some sort of dispute could allege the criminal aspects of any of these laws, why should these be excluded necessarily?

Mr. ECKHARDT. Well, if the dispute involves both criminal and civil matters, it would be covered, I think, by virtue of the fact that civil disputes are covered. After all, the process envisaged here is a process which involves not criminal sanctions, but first, if possible, mediation and then possibly prearrangement or preagreement for compulsory arbitration. So it is not typically criminal in nature with respect to the application of the remedy in this bill.

But there is another significant fact, and that is I do not like to see a situation in which those enforcing criminal law—which seems to me to be a matter of right to the person injured—I do not like to see those enforcing criminal law to say "Go over here and try your other remedy first; try an agreed remedy first." It seems to me that we have a tendency to withdraw the extension of a person's right to be represented by the State in a criminal matter when we afford another remedy of an informal type.

Mr. KASTENMEIER. Of course, it can be argued that the more typical case is just the opposite. Very often, let's say, the victim of crime is required to appear in court. He doesn't get restitution, and he doesn't get the satisfaction, whatever that may entail, of confronting the person who offended him. In some of the models which might well be covered by this legislation, these things may take place.

In fact, to the extent that criminal matters may be included, it would be for the purpose of giving the secured party some satisfaction not otherwise given to him by law.

Mr. ECKHARDT. Well, that might better be handled under LEAA's present program of neighborhood justice centers. LEAA's entire program is supposed to be designed for preventing crime, and they do presently administer neighborhood justice centers devoted entirely to criminal process. As a matter of fact, these have even been somewhat objected to on grounds that they may tend to move into the field we are now dealing in in this bill.

Mr. KASTENMEIER. As a matter of fact, it is my impression that much of the resources are devoted to settlement of civil disputes, and it was testified yesterday that these are models which might be followed under this legislation. There are several neighborhood justice centers that were established by the Department of Justice on a trial basis during the last year or so. A very high percentage of the cases that they handle are civil disputes.

Mr. ECKHARDT. What I am suggesting, though, is that that program does have typically the criminal reach, and it would not be necessary to duplicate that in this bill, though this bill might well take some of the load off of those centers with respect to civil matters.

But I understand that is a very, very limited program as far as things like consumer disputes are concerned.

Mr. KASTENMEIER. They do purport to include consumer disputes among the disputes.

Mr. ECKHARDT. It is my understanding that they are supposed to be with respect to interpersonal disputes and largely to those that are likely to be recurring. Now, they may reach into the consumer field, but I understand the department has been criticized for extending it that far because of the mandate of the LEAA Act with an emphasis on prevention of crime.

Mr. KASTENMEIER. Do I understand that you would prefer that these be exclusively consumer?

Mr. ECKHARDT. Not exclusively, but I think that this is the area in which the greatest need exists. Well, let me put it this way: To a certain extent the disputes that are typically neighborhood disputes, the kind of dispute that has been somewhat perjoratively labeled the barking dog-type of dispute, the creation of a remedy may proliferate or increase the number of complaints. The fact that you can complain about a minor nuisance may create more complaints that would be settled informally without a process of this type. But in the area of consumer disputes, I think you have some very real disputes that simply go without resolution unless you have a remedy.

In other words, you have a universe of cases which is more finite and more limited and in which there is a crying demand to settle them. In the case of interpersonal disputes, it seems to me that the universe is very flexible; it could increase with the opportunity to find an area of complaints.

So I would give an emphasis on the consumer dispute side personally, but I would not exclude the other type of dispute from the legislation.

Mr. KASTENMEIER. At this point, Mr. Chairman, I will yield back.

Mr. PREYER. Thank you.

Mr. Broyhill?

Mr. BROYHILL. I would only comment on the gentleman's answer to the last question. I have a concern about getting support for this bill in the House. I think that if we take a bill to the House that is billed as one that would be to set up these centers just to settle barking-dog cases that we are going to have a very difficult time getting a majority to vote for it. I think we could legitimately show that we have a Federal interest inasmuch as we have passed consumer legislation in recent years in the area; for example, that Magnuson-Moss has a warranty section in it, where they have a right of class action under certain circumstances; truth-in-lending legislation, and other legislation of that type that have been passed, I think it could be argued that there is a legitimate Federal interest there.

So I would hope that there would be a great deal of emphasis on settling of consumer disputes in setting up programs of this kind.

Thank you, Mr. Chairman.

Mr. PREYER. Thank you.

Mr. Gudger?

Mr. GUDGER. Thank you, Mr. Chairman.

I commend the gentleman for his bill and for the way in which he has dealt so forthrightly with the distinctions between it and other legislation pending and considered in the last session.

I am troubled perhaps about this concept more from the standpoint of the authorization which your bill and others propose whereby the Federal commitment could be as much as 100 percent in these grants. I look upon the problem as being this: In each State presumably we now have some efforts being made to develop new dispute resolution processes below the Small Claims Court level or as alternatives to resort to the Small Claims Court process. I know we do in North Carolina, and I am sure you do in Texas, and I am certain Louisiana does likewise. Yet I see that each of these States has a pattern of history which is perhaps unique to that State, and I certainly know that Texas has the common law, and Louisiana does not have the common law, and the processes of the two States are bound to be vastly different by just history and definition.

My concern is this: Why do you not perceive that the States should bear a bigger share of this burden rather than from the Federal Government to undertake to bear the entire load?

Mr. ECKHARDT. What we purport to do here is establish a program that would be totally governed in each of the specific dispute settlement cases by the State or by even a private nonprofit corporation, and what we purport to do is put up front-end money for the establishment of such programs but to withdraw gradually the Federal presence in the case.

On pages 16 and 17 of the bill, we provide for the first and second year being 100 percent, 75 percent for the third and 60 percent for the fourth, and, of course, this is only a 4-year appropriation.

So presumably if it is extended, and if it is a success, even a smaller amount would be granted in any successive bill until it is phased out as a federally financed program.

The question you raise, though, also bears on this question of the civil or consumer dispute-type process. Many disputes have to do with goods that are nationally manufactured and in which information concerning that dispute obtained in one of these dispute settlement centers might be useful in another, as, for instance, a toaster or a washing machine, or something with an internal defect or the service afforded with respect to such machines. So I think we do have a Federal concern in this area perhaps larger than in even larger types of disputes.

We have a total amount involved which exceeds that involved in many lawsuits. One reason why we have been able to move on this matter across the aisles is that Mr. Broyhill was very much concerned about some of the problems involved with class actions. He felt that the class action procedure opened the gate maybe too wide and might create too litigious an atmosphere with respect to small dispute settlements. In conceiving of this as an alternative we must also conceive of it as having a national consequence with respect to products produced and sold nationwide.

Mr. GUDGER. Thank you for that.

Let me phrase another aspect of the same concern in this fashion. Traditionally, of course, the judicial mechanism for dealing with small claims has largely been the responsibility of the State systems. Now, nowhere in your bill do you refer to a State participation or State contribution. You refer to State and local mechanisms and that sort of

thing, but in the funding machinery you do not refer to the State mechanism.

Now, my interest is this: I can see how if we follow the LEAA route presumably we are going to be funding through a State planning structure, whereas if we do not follow this LEAA route and set up a system independent of that, then we can have grants direct to the grantee, which may be a local community structure or which may be a nonprofit corporation at the local level and may not have the State involved, and it may be that you desire to leave the State out inasmuch as that could represent a cost of putting some of these programs and trial mechanisms on the line.

Is that one of your concerns?

Mr. ECKHARDT. That is correct, and, frankly, I personally do not favor doing it through the LEAA process, but I would not preclude that, because I think that is more typically an administrative question that should be left to the executive department rather than financing it in the statute.

Mr. GUDGER. Thank you very much, Congressman Eckhardt. I yield back the balance of my time.

Mr. PREYER. Thank you.

Mr Moorhead?

Mr. MOORHEAD. I have no questions.

Mr. KASTENMEIER. Mr. Chairman, I know there is a vote on, but I need clarification on one point. Is Mr. Eckhardt's view of the scope of his bill that it would not tolerate administratively or otherwise being located in LEAA? That appears to be totally antithetical with your view of what the bills function is.

Why would you want it to be funded through LEAA?

Mr. ECKHARDT. I would not want it funded through LEAA, and I am unequivocal on that proposition, but who would administer another program on other funding is another question, and I would not necessarily preclude LEAA from administering a program based on other funding as this bill provides.

Mr. KASTENMEIER. You would not object to LEAA administering a consumer program?

Mr. ECKHARDT. I would personally not desire it, but I would not preclude it in the legislation. I would simply delegate authority to the Justice Department to administer the program.

Mr. PREYER. Thank you very much, Mr. Eckhardt. Your comments have been very helpful, and we are grateful to you for all of your basic work on these bills.

We now have a vote on, and the committee will stand in recess for about 10 minutes. When we return, we will hear from Mrs. Esther Peterson.

[Brief recess for members to vote.]

Mr. PREYER. The committee will come to order again.

We are very pleased to have as our next witness Mrs. Esther Peterson, the Special Assistant to the President for Consumer Affairs and Director of the U.S. Office of Consumer Affairs.

Thank you for being with us today, Mrs. Peterson. Your statement will be made a part of the record. We look forward to your testimony in any form you care to present it.

TESTIMONY OF ESTHER PETERSON, DIRECTOR OF THE U.S. OFFICE OF CONSUMER AFFAIRS, ACCOMPANIED BY RICHARD CUFFE, DEPUTY GENERAL COUNSEL, U.S. OFFICE OF CONSUMER AFFAIRS

[The prepared statement follows:]

STATEMENT OF ESTHER PETERSON, DIRECTOR, U.S. OFFICE OF CONSUMER AFFAIRS, BEFORE JOINT HEARINGS OF THE CONSUMER PROTECTION AND FINANCE SUBCOMMITTEE OF THE INTERSTATE AND FOREIGN COMMERCE COMMITTEE AND THE SUBCOMMITTEE ON COURTS, CIVIL LIBERTIES, AND ADMINISTRATION OF JUSTICE OF THE JUDICIARY COMMITTEE

Mr. Chairman: It gives me great pleasure to appear at these joint hearings to present my views concerning the proposed "Dispute Resolution Act." I believe that the time has come for enactment of this legislation that, to use the language of the bills, will "assist the States and other interested parties in providing to all persons convenient access to dispute resolution mechanisms which are effective, fair, inexpensive, and expeditious." This legislation has been passed by the Senate on three different occasions, and it probably would have been adopted by the House last year but for its consideration under the suspension of the rules procedure. In addition, President Carter has endorsed the enactment of legislation of this type in his February 27, 1979, message on civil justice reform.

The value of this legislation lies with its recognition that dispute resolution is a dynamic process which must be fashioned according to the needs and desires of the program participants. Accordingly, this legislation does not inhibit, but rather encourages maximum flexibility and experimentation in designing program and forums for the resolution of minor civil disputes.

Convenient, uncomplicated, and expeditious resolution of minor disputes is a goal which has frequently eluded the consumer movement. Too often, citizens with legitimate grievances involving product purchases, household services, or performance of warranty obligations are buffeted back and forth between sellers and manufacturers, regulators and service providers, or franchised dealers and corporate officials without ever obtaining satisfaction or resolving their complaints. I can speak with personal knowledge of the widespread dissatisfaction of consumers with many of the structures which the government and the commercial sector have established for the processing of consumer complaints. Letters with the common characteritsics of frustration arrive at my office daily, and far too many detail unsuccessful attempts to resolve the problems through dealers, distributors, manufacturers, or others in the chain of commercial product distribution. While some progress has been made in establishing mechanisms to handle consumer complaints by enlightened segments of the business community and some State and local governments, further expansion is largely contingent on the availability of funds to assist in these efforts.

These observations are certainly supported by the results of a national survey of consumer attitudes which was undertaken by the Marketing Sciences Institute and Louis Harris and Associates, Inc. This study entitled "Consumerism at the Crossroads" revealed that 79 percent of the surveyed public believed "that it is a waste of time to complain about consumer problems because nothing will be achieved." As the findings of this legislation suggest, an unresolved minor dispute may be of minimal social or economic magnitude, "but taken collectively such disputes are of enormous social and economic consequence." There can be little doubt that all parties suffer when disputes remain unresolved. Businesses lose customers, consumers get ripped off, and the frustration of individuals reduces the public's faith in the system of laws governing this country.

Based on our experience in processing citizen complaints, we have found that most often the only practical means of obtaining redress for the typical consumer problem is resort to a small claims court. However, given the practical impediments which frequently restrict their accessibility to a significant segment of the population, small claims courts may not be providing the public service that was intended in their creation.

The small claims court systems have been the subject of numerous studies that have identified their shortcomings and recommended remedial action. Among the more authoritative examinations of small claims courts is the 1973

report of the National Institute for Consumer Justice (NIJC) entitled "Redress of Consumer Grievances." It is encouraging to note that many of the specific provisions of Section 4 of the bills, the "Criteria for Dispute Resolution Mechanisms," implement the recommendations of the NICJ report to make small claims courts more accessible and easier to use by the average person. Lest there be any misunderstanding, I recognize that these bills are not solely designed to remedy the faults of small claims courts. Rather, these measures envision the application of funds to other forms of dispute resolution such as arbitration, conciliation, or mediation. Clearly, maximum experimentation in fashioning forms of dispute resolution is essential if the goals of the legislation are to be achieved.

Before discussing some of the details of the bills, I think it is appropriate to establish on the record that this legislation is not an attempt by the Federal government to seize control of the Nation's small claims court systems. Nor is this legislation intended to result in extensive Federal involvement with attempts by State and local governments to create more responsive means of resolving minor civil disputes. Lastly, these measures should not be viewed as being solely intended to alleviate the congestion which characterizes many of the court systems throughout the Nation. To the contrary, this legislation should be recognized as having the narrow purpose of assisting State and local governments and non-profit organizations for a limited period of time in their attempts to address the public's need for expedious and uncomplicated ways of resolving small sum civil disputes.

All of the bills under consideration are worthy attempts to address the Nation's needs for readily accessible means of informal dispute resolution. However, I believe that certain attributes are essential for the achievement of stated goals of the Act. Among such desirable characteristics are:

1. Affording maximum flexibility to grant recipients to create or improve mechanisms according to their perceived needs and desires;
2. Requiring concentrated effort by grant recipients to inform the public of the existence and purpose of funded mechanisms;
3. Creating a centralized source of technical information and resource reference;
4. Insuring a prominent role for the Federal Trade Commission in the operations of the dispute resolution program and its resource center; and
5. Emphasizing the use of grant funds for the resolution of small sum disputes arising from commercial marketplace transactions.

Section 4 of the bills, "Criteria for Dispute Resolution Mechanisms," establishes minimum standards for mechanisms to be eligible for funding under the Act. These criteria generally afford maximum flexibility to recipients to fashion dispute resolution mechanisms according to their perceived needs rather than under strict federally-imposed guidelines. Of particular importance is the fact that although subsection (4) requires that a dispute resolutions mechanism provides for "reasonable, fair, and readily understandable forms, rules, and procedures, which shall include those which— . . . (C) permit the use of dispute resolution mechanisms by the business community," the actual extent or nature of the use of the mechanisms by the business community is left to the discretion of the funding applicant. Thus, the proposed legislation will result in the award of Federal funding assistance with a minimum amount of attached "Federal strings."

Section 4(7) and Section 5 of the House bills address the need for public information programs to apprise "potential users (regarding) the availability and location of the dispute settlement mechanisms." I believe that this feature is absolutely essential if we are truly intent on increasing the use of existing mechanisms and encouraging the public to resort to new or improved dispute resolution programs. Experience has shown that there is a direct correlation between the lack of public awareness of the existence of dispute resolution mechanisms or small claims courts, and the public's general skepticism toward the utility of making complaints about legitimate grievances.

It should be further noted that public information programs are particularly important for low income consumers. As a group, low income consumers are more frequently victims of unresolved complaints or disputes than other people. Thus, every effort must be made to fashion mechanisms and related public information programs in ways which will encourage low income consumers to resort to the mechanisms in the face of unresolved complaints or arbitrary denials of essential services.

Section 6 of the House bills requires the establishment of a "Dispute Resolution Program" and a "Resource Center" within the Department of Justice.

The Center's responsibility for serving as a centralized source of information, technical assistance, research, and evaluation, should greatly enhance the prospects for attaining the objectives of this legislation.

Clearly, all funded parties will benefit from the exchange of information concerning attempts to fashion new or improved mechanisms. In addition, the availability of information and technical advice from the Center will reduce the potential for ventures into experiments which are unlikely to produce favorable results.

In general, I am pleased that the proposed "Dispute Resolution Program," as contained in the House versions, negates any suggestion that grant recipients must create additional bureaucratic entities in order to qualify for funding under the Act. However, I believe that care and vigilance must be continuously exercised to insure that the judgment of funding recipients is afforded broad deference by the national administrators of the Program. In my view, the key to successful implementation of the Act will be the ability of grant recipients to develop or improve mechanisms which best suit their particular needs and desires.

Section 7 of the House bills requires the establishment of a "Dispute Resolution Advisory Board" which would consult with the Attorney General and Center regarding the operations of the Program. I support this provision as it will insure that the public, through designated representatives, will participate in the decisionmaking process of the Dispute Resolution Program. The specified composition of the Advisory Board generally insures that the various aspects of society which have direct interest in reducing the frequency of unresolved disputes are involved in the operations of the Program. In addition, the presence of the Board should generally insure that the grants are not awarded in furtherance of any particular narrow interest.

Section 7(e) of H.R. 3719 provides that the Chairman of the Federal Trade Commission (FTC) shall advise and consult with the Attorney General and the Center "in the same manner as the Advisory Board." I support this provision as it insures that the Nation's principal consumer protection enforcement official will be able to convey to the Attorney General and Center the Commission's vast experience and expertise in dealing with consumer problems arising from commercial marketplace transactions. In addition, the advisory role of the FTC Chairman will enable the Center to benefit from the Commission's direct involvement with dispute resolution mechanisms which have been created under Section 110 of the Magnuson-Moss Warranty Act and applicable FTC regulations.

Section 8 of the House bills, "Financial Assistance," establishes the administrative criteria for the award of grants to eligible recipients. Of particular interest is subsection (C) (7) of H.R. 3719 which requires that applicants "set forth the nature and extend of participation of interested parties, including consumers, in the development of the application." This provision is essential for unless the public actively participates in the development of plans and programs to be funded, citizen acceptance of new or improved dispute resolution mechanisms may be lacking.

Section 8(E) (2) of both House bills prohibits the use of grants funds "for the compensation of attorneys for the representation of disputants or claimants or for otherwise providing assistance in any adversary capacity." While I understand the reason for this provision, there is a problem regarding the use of attorneys which concerns me. In my view, the record should reflect a recognition that disputants should be on equal footing when it comes to using the mechanisms. When only one party to a dispute uses a lawyer in presenting his or her case, the other party is clearly disadvantaged. Since the purpose of this legislation is to create dispute resolution mechanisms which are both uncomplicated and inexpensive, I would hope that the implementing regulations will address this concern in an appropriate manner.

I believe that Section 8 should be amended to impose an affirmative obligation on grant recipients to maintain public records of processed complaints in order to identify product design problems or patterns of abuse by individual parties or firms in a manner which would not be administratively burdensome. Grant recipients should also be required to refer to appropriate law enforcement authorities any evidence of alleged criminal wrongdoing which is brought to their attention by citizens utilizing the mechanisms. Mandatory maintenance of records of complaints to dispute resolution mechanisms could provide a basis for the subsequent development of information which would aid in the prevention of disputes. In my view, there is a pronounced need for citizens to have access to comparative information concerning locally-purchased consumer products and services. While certain product comparison publications presently exist, there is

a paucity of similar information on local consumer services. Clearly, the presence of comparative information on consumer services could have the beneficial effects of encouraging identified marginal providers to improve the quality of services in order to compete in local markets, and supplying a means for consumers to avoid providers whose service is likely to result in dispute-causing situations.

Before concluding my remarks, allow me to express my concern regarding the idea of using $15 million to establish programs in all 50 States for the resolution of all types of minor disputes. Informal dispute resolution is, as I said earlier, an idea whose time has come. The need is clear, but there exists a danger that the funds may be spread too thin to have any meaningful impact if the bills are enacted in their present form. I do not question the propriety of establishing locally-based forums for the resolution of minor non-commercial disputes. In fact, the funds should be applied to a variety of dispute resolution procedures and uses at the local level since regardless of the type of complaint, citizens need readily available means for the prompt resolution of disputes.

However, the genesis of this legislation was the 1973 Report of the National Institute for Consumer Justice. That study suggested that mechanisms for the resolution of disputes involving consumer goods and services were generally unavailable, inaccessible, ineffective, or unfair to most citizens. In view of the fact that consumer problems constitute the vast bulk of unresolved disputes confronting American citizens, I think that this legislation should emphasize the use of grant funds for mechanisms to resolve such disputes. This suggestion is generally in accord with the language of Section 2 (a) (1) of H.R. 3719. Unlike the comparable section in H.R. 2863, this section specifically refers to "disputes involving consumer goods and services," an emphasis which I believe should be included in the final version of this legislation.

Lastly, I do not believe that funded mechanisms should be allowed to handle any type of criminal proceedings—felonies or misdemeanors. As I read Section 3 (4) of H.R. 2863, the definition of "dispute resolution mechanism" does not limit the jurisdiction of funded mechanisms to civil cases as is done in the same section of H.R. 3719. The nature of criminal proceedings requires close attention to safeguarding constitutional rights and they are, therefore, incompatible with the informal character of most dispute resolution entities. Where there is both a civil and a criminal component of a controversy, however, a mechanism should be able to seek resolution of the civil side of the case. The criminal side should be pursued through the more traditional procedures.

In closing, I wish to praise the proponents of all three bills. While I may not agree with some of the details of the proposals, I wholeheartedly support the objective of the Federal government assisting State and local government and nonprofit organizations in the creation of improvement of dispute resolution mechanisms.

In my view, a modified version of this legislation as I have outlined today offers citizens the best means for reducing the instances of unresolved disputes and their corresponding negative societal impact. I urge you to move swiftly and enact this important piece of legislation.

Thank you for giving me the opportunity to testify at this joint hearing.

Mrs. PETERSON. Thank you. I appreciate the opportunity to be here with you.

I have with me today Richard Cuffe who is the Deputy General Counsel of the Office of Consumer Affairs. I would appreciate filing my complete statement for the record and summarizing the position that it contains. I know you have gone into this subject in-depth with many people and I would certainly like to contribute.

I think in providing my views I want to say, first, that I feel that the time has come for the enactment of this legislation which, in the language of the bill will, "assist the States and other interested parties in providing to all persons convenient access to dispute resolution mechanisms which are effective, fair, inexpensive, and expeditious."

As you know, the legislation has been passed by the Senate on three different occasions. I am hoping this year that we will be able to get it through the House.

This type of legislation has been endorsed by the President and I think it has a wide degree of support throughout the country.

The value of this legislation lies with its recognition that dispute resolution is a dynamic process which must be fashioned according to the needs and desires of the program participants.

Unfortunately, we have a tendency to often feel that we can sit up here in Washington and design structures and ways to cure local problems. In my view, I think that increasingly we must learn to rely on local people to fashion solutions as they see fit, with Washington helping by giving the means so that they can devise thing that help themselves. I think that informal dispute resolution is an area where the Federal Government really needs to help.

Thus, I favor legislation that does not inhibit but rather encourages maximum flexibility and experimentation in designing programs and forums for the resolution of the minor civil disputes.

I speak in behalf of this legislation from a long history of experience in dealing with consumer disputes. I think from the time I first started working with this problem way back with President Johnson, and even before that with President Kennedy, the letters of frustration came to me from people who could not get a fair, and equitable resolution of their problems. Unfortunately, I think it is a growing problem.

So it is extremely important that we have convenient, uncomplicated and expeditious means for the resolution of minor consumer disputes. Certainly it is a problem that the consumer movement has tried to do something about, but we have been somewhat frustrated because we have not yet succeeded in developing the means for accomplishing this important task.

This is another reason why we feel very strongly about this legislation.

Too often citizens with legitimate grievances involving product purchases, household services, or performance of warranty obligations are buffeted back and forth between sellers and manufacturers, regulators and service providers, or franchised dealers and corporate officials, without ever obtaining satisfaction or resolving their complaints.

People send me letters with thick files describing continuous referrals back and forth without ever receiving any resolution. You, as Congressmen, have sent us similar letters from constituents with these problems.

I can speak with personal knowledge of the widespread dissatisfaction of consumers with many of the structures which the Government and the commercial sector have established for the processing of consumer complaints. I am really happy to report that in the Office of Consumer Affairs, we are working very hard with the various Federal agencies which deal with consumer complaints.

We had a meeting yesterday of all the complaint handlers throughout the Federal Government to see if we can't bring their efforts together and find improved mechanisms for taking care of these problems.

While some progress has been made in establishing mechanisms to handle consumer complaints by enlightened segments of the business community and some State and local governments, further expansion is largely contingent on the availability of funds to assist in these efforts.

I do want to congratulate those areas in the private sector who have made strides in developing expeditious but fair processes for complaint resolution. There are many examples of that effort, but it is not enough. It does, however, show that such mechanisms can be developed. It is also heartening to know that some States have been doing a great deal in these areas, but unfortunately, this problem frequently gets the short end of the stick because funds are not always available. Thus, we have not been able to develop these mechanisms to the extent we should.

All the bills under consideration are very worthy attempts to address this Nation's need for readily accessible means of informal dispute resolution, However, I believe that certain elements are essential for the achievement of the goals of the act. I would like to list the ones I feel are necessary to that end.

First, afford maximum flexibility to grant recipients to create or improve mechanisms according to their perceived needs and desires. Again, it is the flexibility at the level of the users that is very important to encourage.

Second, require concentrated effort by grant recipients to inform the public of the existence and purpose of funded mechanisms.

I think one of the principal responsibilities that must be carried with this program is to be sure that people understand and learn how to use the funded mechanisms.

Third, create a centralized source of technical information for research and reference, so that we can exchange the information that we learn in developing these programs.

Fourth, insure a prominent role for the Federal Trade Commission in the operations of the dispute resolution program and its resource center.

Due to its competence and experience in the field, the FTC can be a tremendous help in advising the Department of Justice regarding the operation and administration of the program. In general, I think we have to work harder toward using competence and expertise in the Federal Government, by encouraging greater communication between the agencies, and bringing all this knowledge to bear in a constructive way.

Fifth, emphasize the use of grant funds for the resolution of small sum disputes arising from marketplace transactions. This, I think, the studies have shown, is one area where dispute resolution has been somewhat neglected. It doesn't mean that other disputes can't be handled, but as I watch and study this problem, I am convinced that consumer dispute resolution is an area where more needs to be done. Thus, I hope we can have the emphasis there.

Related to this idea, I would like to express my concern with the idea of using $15 million to establish programs in all 50 States, for resolution of all types of minor disputes.

Informal dispute resolution is, as I said earlier, an idea whose time has come. The need is clear, but there exists a danger that the funds may be spread too thin to have any meaningful impact if the bills are enacted in their present form.

I do not question the propriety of establishing locally based forums for the resolution of minor noncommercial disputes. In fact, the funds should be applied to a variety of dispute resolution procedures and uses at the local level, since regardless of the type of complaint, citi-

zens need readily available means for the prompt resolution of disputes.

However, the genesis of this legislation was the 1973 report of the National Institute for Consumer Justice. That study suggested that mechanisms for the resolution of disputes involving consumer goods and services were generally unavailable, inaccessible, ineffective, or unfair to most citizens.

In view of the fact that consumer problems constitute the vast bulk of unresolved disputes confronting American citizens, I think that this legislation should emphasize, if at all possible, the use of grant funds for mechanisms to resolve such disputes.

My fuller statement goes into detail on the points I have raised, but I would like to say I want to congratulate the proponents of these three bills. I may not agree with some of the details, but I heartily support the objective of the Federal Government assisting State and local governments and nonprofit organizations in the creation or improvement of dispute resolution mechanisms.

In my view, a modified version of this legislation, as I have outlined today, offers citizens the best means for reducing the instances of unresolved disputes and their corresponding negative societal impact. I urge you to move swiftly and enact this important piece of legislation.

I thank you.

Mr. PREYER. Thank you very much, Mrs. Peterson. Your long experience in this field and the respect with which you are held in this field give a great deal of meaning to your support. We appreciate it.

I want to mention one question in your written statement. On page 11 you urge a mandatory maintenance of records of complaints to dispute resolution in order to help solve problems by revealing patterns of abuse.

I can understand why that would be a good idea, to collect such statistics and to have such records. But I wonder if that doesn't run counter to the experimental and to the no-strings attached approach of this program.

You emphasize the experimental nature of it. In other words, I don't think you would want us to set up these programs as a sort of recordkeeping statistic collecting agency necessarily.

Mrs. PETERSON. I should preface my response by saying that I was a member of the Federal Paperwork Commission, and I am aware of the occasions when Congress unintentionally imposes on the public and the private sector, many of these recordkeeping requirements that are subsequently determined to be burdensome.

On the other hand, my experience has been both in the private sector and in the public sector, that we need a barometer. We need indications of growing problems. I shall never forget working with the private sector in a number of areas where I went and said, look, there are many problems here. Tell me please, how we can work toward solutions.

I recognize your problem and I think your point is well taken. If the program could only be devised in a careful way, so that it can be used constructively as a way of indicating trends and difficulties, the public would certainly benefit.

I would be reluctant to say that we shouldn't keep recordkeeping to a minimum. Let's be sure it is not records for records' sake. Let's be sure it is useful and integrated into what we are trying to do.

Mr. PREYER. Thank you, Mrs. Peterson.

Mr. Kastenmeier?

Mr. KASTENMEIER. Thank you, Mr. Chairman. I would like to express my admiration for Mrs. Peterson, too. I think she has contributed enormously over the years to public policy, consumer affairs to be sure, but many, many other areas as well.

One of the difficulties which you must be aware of is that of alternative dispute mechanisms. It has been around for a long time, and has been encouraged and proposed, although not reduced to legislative form in this connection.

The merger or wedding of that particular idea in the original Senate legislation and what we have before us, is really a merger of a couple of different ideas, both of which have had separate genesis.

In that regard, you must be aware that the Justice Department, represented by the Assistant Attorney General, yesterday testified for a broad-gaged bill. The Justice Department hopes that all minor disputes will have some hope of reconciliation through a program of this sort.

Now, of course, one can well understand why someone more particularly concerned with consumers would feel that the emphasis should be there and the other things are merely collateral and possibly to be tolerated in creating these mechanisms.

The reason I raise this is because I am not clear on who speaks for the administration, who speaks for the President in terms of whether this should be broad or narrow.

Should this be another commercial court, or should it be broadly gaged in terms of what it handles?

One of the difficulties is, and I think that you reflected this, that there really isn't a great deal of money in any of the bills. This reflects, I guess, current fiscal realities.

Therefore, it has to do with whether we are really underwriting many courts or many alternative mechanisms or whether this is essentially innovative. We do not want to underwrite every alternative dispute forum in America, but rather certain ones that show promise, innovation, imagination, ingenuity in responding to these problems.

We are encouraging selective alternative models aimed at helping the States, local units, and private entities to develop effective mechanisms which were created as demonstration models for the alternative forums which will one day exist.

So I would ask you whether, if this is the concept, must we not be so selective as to zero in, let's say, on consumer forums alone in that connection.

Do you see what I am driving at?

Mrs. PETERSON. Yes. I appreciate the point that you are taking. I guess from my point of view—and I have not had a lot of experience in the other areas, I must be frank with you about that—I have felt usually that there are numerous mechanisms for the resolution of other types of disputes.

From my point of view, and I am speaking from my experience on this problem, I see the frustrations of the consumer area which has been so sorely neglected and the far-reaching effects of them. This is extremely difficult. However, I don't think any of us would want it to be narrowly limited to that area alone.

I agree with you that we have to be innovative and find whatever are the best ways. But I am so afraid if we don't emphasize this way of trying to solve the frustrations of marketplace, consumers that we would be missing a problem in our society that is becoming increasingly critical.

I don't think that the suggested emphasis means that the funded mechanisms will deal exclusively with consumer disputes. I would like to ask my attorney here whether that is so or not.

I recognize my bias, Mr. Congressman, in these feelings because consumer problems are so heavy on me due to their constant increase and the lack of innovative ways of dealing with them.

But I am so afraid that it will be put off if we don't really emphasize consumer dispute resolution. That is the principal area that I feel very strongly about, but I would like to think about it. I don't want to have a closed mind on it.

Mr. CUFFE. I have nothing else to add except that our idea of this bill is that it would afford the maximum flexibility to State and local governments and nonprofit organizations to fashion mechanisms according to the manner and the need that they perceive exists at their level.

We don't want the Federal Government coming in and dictating how one particular forum should be established over another. We would certainly not suggest that any type of civil dispute would be excluded from consideration before these mechanisms.

Mr. KASTENMEIER. I appreciate that statement. Let me be candid, too, at least from a Judiciary Committee standpoint, this should not be seen as an alternative to the failure of the Congress to enact a consumer protection agency or a consumer advocacy agency. This is not the sop or the cure for the deficiency in that connection.

Mrs. PETERSON. I think if that bill had passed, I would have been here just the same. This legislation is a tool to make possible the equity that we are always trying to develop in the marketplace.

Mr. KASTENMEIER. Thank you, Mr. Chairman.

Mr. PREYER. Thank you.

Mr. Danielson?

Mr. DANIELSON. Thank you, Mr. Chairman.

I have no questions to ask I am terribly sorry to say.

Mrs. PETERSON. I have never known you not to have a question for me.

Mr. DANIELSON. As usual, you do such a magnificent job that I have nothing unanswered in my mind. I know that she has put her blessing on it and adding that to that of my chairman here I don't know how this can fail.

Mrs. PETERSON. I have put blessings on other things that have failed, as you all know.

Thank you.

Mr. PREYER. Mr. Gudger?

Mr. GUDGER. Thank you. I, too, want to express my admiration for this lady who has done so much for improvement in our society and

has dedicated so much of her time and energy over the years to important works.

I would like to comment briefly, or have you comment further, if you will on your observations on page 10 of your written manuscript.

You mentioned that section 8(e)(2) of both House bills prohibits the use of grant funds for compensation of an attorney for the representation of disputants or claimants or otherwise providing assistance in an adversary capacity.

You go ahead and I think very properly point out that if such funds are denied to one litigant, the other litigant may be having an advantage because that litigant may be able to afford counsel.

What do you see as the function of your Legal Aid Service in this particular context? Do you see this as a place where the Legal Aid Service should be provided on one side or on the other side or on both sides in controversies which come before these forums? It does present the problem of possibly having federally-funded attorneys on each side of a controversy which could be an expensive and dangerous thing.

Mrs. PETERSON. I think your point is something that we need to be careful about. I want to be absolutely sure that no one is denied and that things can go forward.

It seems to me that there can be a legal advisory role of some kind. I am not a lawyer and I would like to ask my counsel to speak on this point.

Mr. CUFFE. Our idea in this regard, Congressman, was to make sure there is parity between the parties who use the funded mechanisms. We would certainly not preclude the idea of utilizing professional legal counsel to advise, not necessarily in an adversary capacity, and assist people in trying to resolve their disputes on their own.

One of the principal attributes of this bill is that it would fund mechanisms that would allow people to resolve their own disputes as opposed to making these minicourts, if you will. These should not be minicourts.

Mr. GUDGER. I think you added to what is already a very important comment in your written testimony. I am glad to have it brought up and developed just to the extent that it is now. It at least addresses our attention to it.

Secondly, I would like to mention that Congressman Eckhardt testifying here earlier this morning pointed out that the neighborhood grievance, the barking dog case, these kind of things, if they are to be subject to a forum of this type for their resolution, might tend to incite more neighborhood disputes and tend to encourage neighbors to go to court, so to speak, rather than resolve their differences between themselves.

Mrs. PETERSON. I think that would be unfortunate because, goodness, I think one of the essential things is to try to work out differences without having to go to superior authority. I think that would be unfortunate if it had that effect.

Mr. GUDGER. Do you see this forum as possibly affording an opportunity for the resolution of neighborhood grievances? Now your address certainly strongly suggests that the forum be for the protection of consumer interests and as an avenue to resolve these marketplace disputes.

But don't you see, also, that if a plan is evolved in some state, particularly where rural communities can have a method of working out

without the expense of judicial determination controversies between neighbors over trespasses and small claims and controversies, don't you see that this might be a proper function of this new forum?

Mrs. PETERSON. It certainly could be a valuable function. I think the whole point is emphasis. The local people working on this problem can be the determinants in saying how it should be fashioned. However, I don't want us to emphasize that type of dispute resolution over this other extremely important area that I am concerned about today, that is, helping people resolve problems which arise in the commercial marketplace.

Maybe I could relate my concern regarding the emphasis for funding to inflation because the letters have increased from consumers with marketplace problems. People want to know where there are cost saving shortcuts, and what I can do to help them in these inflationary times. So I don't want us to lose sight of the positive economic aspect of helping the consumer in these areas. Certainly we ought to help. If we find a lovely and easy way to do it, I am all for it.

Mr. GUDGER. Thank you very much. You are an excellent advocate. If I were disposed to be against this, I know you would dissuade me against by bill.

Mrs. PETERSON. Thank you. I hope you will never be against me.

Mr. PREYER. I don't think we identified your lawyer.

Mrs. PETERSON. This is Rich Cuffe, who is the deputy director of the office of consumer affairs.

Mr. PREYER. Mrs. Peterson, after all the nice things that have been said about you here this morning, you must know how the pancake feels after the syrup has been poured upon it.

Mrs. PETERSON. Yes; it is very bad nutrition. One should avoid sweeteners these days.

Thank you very much.

Mr. PREYER. Our next witness is Mr. Jeffrey L. Perlman, the associate director of the consumer affairs division of the Chamber of Commerce.

TESTIMONY OF JEFFREY L. PERLMAN, ASSOCIATE DIRECTOR, CONSUMER AFFAIRS, U.S. CHAMBER OF COMMERCE

Mr. PERLMAN. Thank you, Mr. Chairman. I will summarize my statement, if I may.

Mr. PREYER. All right. Without objection, your statement will be made a part of the record.

[The prepared statement follows:]

STATEMENT OF JEFFREY L. PERLMAN ON DISPUTE RESOLUTION
(H.R. 2863, H.R. 3719 AND S. 423)

I am Jeffrey L. Perlman, Associate Director of Consumer Affairs for the Chamber of Commerce of the United States. On behalf of the National Chamber, I wish to express appreciation for the invitation to testify on the Dispute Resolution Act of 1979.

The National Chamber is the world's largest business federation. Our membership is composed of more than 80,000 business firms, 2,600 local and state chambers of commerce and 1,200 trade and professional associations. Our interest in, and support for, the underlying concepts embodied in the Dispute Resolution Act represent our members' desire to strengthen small claims courts and other consumer-business dispute resolution mechanisms.

We support dispute legislation which will authorize federal assistance to local and state communities to improve their small claims courts procedures and informal complaint handling mechanisms. In fact for several years we have sought similar type action on the state level with our own program we refer to as "Up With Consumers". Legislation should provide individuals and businesses with forums for resolving consumer, business and interpersonal problems in an effective, expeditious, fair and inexpensive manner.

Further, dispute resolution legislation must recognize that effectiveness demands that it reflect the individual needs of the community. We are confident that federal legislation can provide an incentive for states and local communities to reevaluate their existing minor dispute resolution mechanisms and to create new mechanisms and amond or eliminate old ones, according to their effectiveness.

The inability to obtain a refund or delivery of a product or service paid for may not appear to be as important 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.

Unfortunately, for many people, 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 difference quickly and inexpensively, without protracted litigation.

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, this legislation recognizes that most companies will do anything within reason to settle a dispute amicably. This recognition will provide the necessary support for dispute resolution plans utilizing the talents and experience of consumers and businesses.

This bill 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. It is a significant step in the right direction. In facilitating the establishment and improvement of informal dispute resolution mechanisms and small claims courts, the bill with its careful restraints on government intervention and its reasonable price tag, ultimately may solve the problem of how to provide effective consumer redress.

Let me now turn to specific consideration of the proposals. All three, H.R. 2863, H.R. 3719 and S. 423 have much to recommend them. However, in our opinion, H.R. 2863 is the superior bill. H.R. 2863 is a broad bill which will provide financial assistance to those groups which develop mechanisms to resolve minor disputes. It anticipates many ideas as well as recognizing the interested parties.

Let me make specific reference to several of H.R. 2863's sections which I believe are critical to the success of this approach to settling consumer complaints. Sections 4(7) and 5(2) encourage states to develop information programs aimed at potential users of the dispute mechanism. Good advertising is of importance to the success of any mechanism. No matter the merits of a mechanism: it is wasted if no one knows it exists.

Additionally, we appreciate the bill's recognition that success often requires that a dispute mechanism must go to people rather than vice-versa. We strongly support ideas such as evening and Saturday hours as well as holding court or arbitration hearings in the locations where people live and work. Too often a court date during the middle of a weekday afternoon, scheduled six months after the problem occurred is simply ineffective. The National Chamber's "Up With Consumers" program incorporates many of the same ideas. I am happy to state that this program which includes reforming small claims courts has received favorable recognition in several states including Kentucky, Michigan, and Arkansas. With the incentives provided for in the Dispute Resolution Act, we expect the next legislative sessions to result in improved redress mechanisms on the state level.

Equally important is Section 6(b)(5)(A) calling for mechanisms which are fair, expeditious, and inexpensive. It is very important that consideration be given to cost. If a program is not cost effective, it will fall under its own weight. People want programs where the cost does not exceed the benefits. If the program is too expensive, people will refuse to fund it. Failure will inevitably lead to frustration resulting in further deterioration of minor dispute resolution mechanisms.

While H.R. 2863 is a good bill we have several concerns with it. Section 4(4)(E), permitting the use of dispute resolution mechanisms by business, insures that business, and especially small business, will have a vested interest in a programs success. However, the section should be amended to the mandatory language of H.R. 3719. If a businessman understands he can utilize the mechanisms, he is more likely to support them. Without the confidence of business, any resolution mechanism lacks a substantial amount of important community support. Businessmen, if not permitted to utilize the dispute mechanisms when they have been victimized, will inevitably see the dispute mechanisms as denying justice rather than promoting it. Such an attitude would cripple, if not destroy, any new program. H.R. 3719 correctly recognizes this concern and has properly provided for it. H.R. 3719's language should be included and emphasized in any dispute resolution bill.

Section 6(b)(4) calling for a "comprehensive survey of dispute resolution mechanisms is a valuable idea. This section should specifically state that participation by a private organization is voluntary. It should be perfectly clear that private organizations cannot be forced to make expenditures of time or money, or be forced to disclose any records simply because the proposed Dispute Resolution Resource Center is making a survey.

Thirdly, Section 6(b)(9) should be clarified to insure that grants and contracts go only to those groups whose primary interest is dispute resolution. No bill should promote the creation of groups simply to benefit from federal largess.

Several additional concerns not in H.R. 2863 need expression. The National Chamber strongly opposes Federal Trade Commission (FTC) participation in this program. The Justice Department has expertise in the development of legal and quasi-legal procedures. By working in cooperation with local communities, the Justice Department can structure procedures without the need for FTC involvement. The FTC deals mainly with substantive trade rules, usually involving large companies. There is no reason to believe the FTC, which many times is a division force, can provide any ideas which will have not been contemplated by Justice, the Center and the local community.

Further, I shall enunciate what I believe is a concern shared by much of the Committee. We are convinced this program should not be assigned by the Justice Department to the Law Enforcement Assistance Administration (LEAA). Dispute resolution mechanisms are civil in nature and should not be identified with LEAA which deals with criminal programs. Furthermore, LEAA is undergoing substantial reorganization. A new civil program such as this one could well be given little priority in a broad reorganization.

Finally, the Justice Department should detail existing staff to this program. This will result in a fast start up, while insuring that an employees job is not dependent on this program lasting forever. We all want this program to be successful. Nevertheless, it is experimental. If it fails it should not be continued simply because employees fear for their jobs.

Further, this legislation stands to spawn exciting new ideas. 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.

Because H.R. 2863, the Dispute Resolution Act, will benefit both the consumer and the business community, we support it.

Mr. PERLMAN. On behalf of myself and the National Chamber, I appreciate this invitation to be here. However, I do confess to find myself in somewhat of a dilemma. Before the committee are three bills. I can't say I support one bill and oppose the others. My dilemma is that all three have substantial merit.

The underlying concepts embodied in the Dispute Resolution Act represent our members' desire to strengthen small claims courts and other consumer-business dispute resolution mechanisms.

We support dispute legislation which will authorize Federal assistance to local and State communities to improve their small claims courts procedures and informal complaint-handling mechanisms. In fact, for several years, we have sought similar type action on the State level with our own program we refer to as "Up With Consumers."

Legislation should provide individuals and businesses with forums for resolving consumer, business, and interpersonal problems in an effective, expeditious, fair, and inexpensive manner.

As I said when I began, all three bills have merits. However, since on balance we believe H.R. 2863 is broader in scope and more likely to deal with more and varied problems, we believe it is a superior bill. Let me, therefore, address several comments to it.

First, we very much support H.R. 2863 as well as the other bills encouraging States to develop information programs aimed at potential users of the dispute mechanisms. It seems crystal clear to me that a major problem with all dispute mechanisms is that too often no one knows they are there. Good advertising is of importance to the success of any dispute mechanisms. No matter what the merits of a mechanism, it is wasted if no one knows it exists and is therefore not used.

Equally important, section 6(b)(5)(a) calls for methods that are inexpensive. "Inexpensive" does not appear in S. 423 and we hope it is an oversight. We hope that the program will be cost effective because if it is not, it will inevitably fall under its own weight.

People want programs where the cost does not exceed the benefits. If it is too expensive, communities and their citizens will refuse to fund it. Failure of new programs because of cost will inevitably lead to frustration resulting in further deterioration of minor dispute resolution mechanisms.

While H.R. 2863 is a good bill, I have one significant problem with it. Section 4(4)(E) permitting the use of dispute resolution mechanisms by business assures that business, and especially small business, will have a vested interest in the program's success.

However, we believe that the section should be amended to reflect the mandatory language of H.R. 3719. If a businessman understands he can utilize the mechanisms, he is more likely to support them. Without the confidence of business, any resolution mechanism lacks a substantial amount of important community support.

Businessmen, if not permitted to utilize the dispute mechanism when they have been victimized, will inevitably see the dispute mechanisms as denying justice rather than promoting it.

Such an attitude would cripple, if not destroy, any new program. H.R. 3719 properly recognizes this concern and has properly provided for it. We hope that 2863 would do likewise.

Let me, if I may, press two additional concerns. The national chamber strongly opposes Federal Trade Commission participation in this program. The Justice Department has primary expertise in the development of legal and quasi-legal procedures. By working in cooperation with local communities it can structure procedures without the need for FTC involvement. There is no reason to assume the FTC can provide significant ideas which have not been contemplated by Justice, the advisory center, and importantly, the local community.

Finally, let me echo a concern shared by much of the committee. We are concerned enforcement of dispute resolution should not be assigned to LEAA. Dispute resolution mechanisms are primarily civil in nature and should not be identified with LEAA which deals primarily with criminal problems.

Furthermore, since LEAA is undergoing substantial reorganization, we are concerned that a program such as this would be given little

priority in a broad reorganization. This legislation should increase citizen participation in the judicial system through arbtration, mediation, and similar devices.

Hopefully, it will place people in forums they understand without subjecting them to the intimidation of a major courtroom confrontation. Because H.R. 2863 will benefit both the consumer and the business community, we are happy to support it.

Thank you, Mr. Chairman.

Mr. PREYER. Thank you, Mr. Perlman.

We appreciate the Chamber of Commerce support for this program. Let me ask you, about the one area you want to keep the FTC out of it. I realize that to mention the FTC to a member of the Chamber of Commerce is like mentioning the FEC to a Congressman. We both each react rather violently.

But it has been brought out that there have been a number of substantive bills recently that deal with consumer matters, the Magnuson-Moss Act, equal credit opportunity laws, warranty act.

Don't you think anyone who is a conciliator or mediator involved in resolving a consumer dispute, should know something about those laws? Wouldn't the FTC be helpful in advising on that? I am not saying they are going to run the program.

Mr. PERLMAN. I hope not.

Two things, Mr. Chairman:

First of all, it seems to us that we should not forget that what we are really talking about, hopefully, is local community problems, almost exclusively small problems. If they are not small problems, they end up in superior court or Federal court.

So we have to assume that between the advisory center of the Justice Department and community itself, most of these problems should be capable of answers.

Now, when you deal with something like Magnuson-Moss, for example, certainly the FTC has the primary expertise and, in fact, primary jurisdiction.

So if the Justice Department were to inquire, I can't see how anyone could forbid the Justice Department from inquiring of the Federal Trade Commission, or for that matter, of OSHA, or any agency. You may have a problem involving individual citizens which has to do with someone being injured, so you could call in OSHA, or you have another type of problem and you can call in the Consumer Product Safety Commission, and there are tens of agencies that could have particular expertise.

But in terms of something like Magnuson-Moss, if the Justice Department asked the Federal Trade Commission a question, certainly they should answer, but nothing beyond responding.

Mr. PREYER. Maybe informal consulting, indirect consultation, or something.

Do you feel this is cost-effective legislation? That is an important consideration these days in budget consciousness.

Mr. PERLMAN. I didn't hear the question.

Mr. PREYER. Do you think this is cost-effective legislation?

Mr. PERLMAN. I think it can be. As I see what we are trying to do, what the Congress is trying to do, is develop local systems within certain parameters. I think the key is that the Congress or the Justice Department only approve those systems which they determine are cost-effective, so I hope that the Justice Department would not approve of anything which was going to cost so much that after the grants ran out, the program was going to fall, because the State or local community would refuse to fund it.

Mr. PREYER. I think what I am getting at is, have businesses had experience using these mechanisms, and have they found it saved them any money? You might not be able to answer that right at the moment, but if you do have the opportunity to look in your files in that connection, we would be interested in knowing of any specific examples of cost savings for businesses through the use of conciliation or mediation techniques.

Mr. PERLMAN. Mr. Chairman, two things: Let me poll some members to get an impression of that, but I can tell you that many of the bigger businesses today have set up, in effect, arbitration proceedings, themselves. They must be effective because they seem to be expanding them nationwide, the major corporations that can afford to do it, and they must be working. But I will poll some of our members and respond to you.

Mr. PREYER. That was my impression that it must be working, and it must be cost-effective, and if we can have any documentation of that, it would be helpful.

Thank you very much.

Mr. Kastenmeier?

Mr. KASTENMEIER. Thank you, Mr. Chairman.

I certainly appreciate your testimony. I thought it was excellent, brief, and to the point, and I want to congratulate you, Mr. Perlman.

As I understand it, you do not really seek a narrower bill, but endorse the broader bill at least in terms of minor disputes resolution. That is to say, it is not limited to any single form of dispute.

Mr. PERLMAN. Mr. Kastenmeier, we believe that all types of problems, not just consumer problems—there are very serious problems that you have to be concerned with. We have heard so much about the barking-dog case today, but the barking-dog case, where the two neighbors get into a fight, the next thing you know, too often it ends up in a city court as an aggravated assault and battery, with one person testifying against the other person. There is no resolution to that. How do you determine to take one person's word over another? And a criminal sanction based on charge of aggravated assault, doesn't solve that problem. I hope that the Advisory Council can find an alternative answer because they don't exist for that kind of problem in the courts today.

Mr. KASTENMEIER. I appreciate that. Let me test you a little further on that point.

What would be the Chamber's reaction to allowing the envisioned programs handle cases with potentially criminal ramifications: for example, a consumer dispute over a change in an odometer, or false labeling, or a charge of minor shoplifting or vandalism?

Mr. PERLMAN. Within the parameters of due process seems what you are suggesting, in a way, is a criminal small claims court. I have no problems with that as long as we remember that we are talking about due process requirements. My only problem is that I am concerned in some of those cases when we are put in a criminal milieu, as it were, we

don't have answers on how to work them out. Criminal sanctions are not satisfactory for certain problems, be they against business, be they against consumers, be they against landlords, or be they against the tenant. We have to find alternatives to some of the criminal sanctions we have now.

Mr. KASTENMEIER. Yes, I appreciate your comments.

You have indicated reservations about the Federal Trade Commission, specifically the chairman and about LEAA, being involved in the program. What other alternatives do you see? Do you think the Justice Department alone should be able, with the Advisory Council, to handle this, or do you see a role for any other agencies or entities?

Mr. PERLMAN. As I suggested earlier, I understand that certain agencies have certain expertise, and if we decide to start specializing a certain type of problem that may involve OSHA, it may be that the Justice Department may have to go to OSHA and say, help us work this out, but by-and-large I don't think we are talking about problems which are national in scope. We are talking about individuals dealing with other individuals, be they a private businessman or be they a landlord. It is not the situation by-and-large, which is resolved by a substantive trade rule in Washington by the Federal Trade Commission, or a rule that OSHA promulgates for big business or large industries. Those, as I understand this legislation, really are not, by-and-large, the kind of problems we are trying to reach. I understand we are trying to reach those problems that have nowhere else to go, that are not getting involved, and I feel like the Justice Department, along with the local communities, which are more aware of their problems than anyone, that they should be able to work it out.

Mr. KASTENMEIER. If you know, what is the view of the FTC with respect to its involvement in minor dispute resolution? Do you know if they have a position, whether they want to be involved?

Mr. PERLMAN. I have only heard the talk around town that the FTC is anticipating a major—well, major may be overstating it, but a substantial role in advising and working with the Justice Department.

Now, that may have changed in the last day or so, but I have seen nothing in writing which indicates that it has.

Mr. KASTENMEIER. One last question, and that is on the mandated coverage point you made. What is your answer to designing programs, to make them original forums created with funds or aid, which will principally have consumer disputes. And then another one which might be created to have interpersonal disputes, but not really any business or consumer business.

I can appreciate the apprehension a businessman or others might have in ensuring the program is designed to be accessible to businesses, consumer complaints, but I am concerned that no program could be designed that, in fact, does not limit some elements of the programs we would want to look at.

Mr. PERLMAN. I think that is certainly true. I don't think there is necessarily any place for consumer disputes in a particular mechanism which is dealing with landlord/tenants. I think it may be necessary in certain instances; the mechanism may be too weak, does nothing for the landlord/tenant or may do the aggravated assault, the trespass, those sorts of cases; but it seems to me only fair at the time we have cases involving consumers against business that business should have an equal opportunity to bring it case.

Mr. KASTENMEIER. That is your point, that in terms of consumers and businesses a forum not be designed to favor one as opposed to the other.

Mr. PERLMAN. That is right. Obviously there are certain situations where consumers have no business in the case, either; they are not acting as consumers, but they are acting as assault and battery situations, or something like that.

Mr. KASTENMEIER. Thank you for your excellent testimony.

Mr. PREYER. Thank you.

Mr. Danielson?

Mr. DANIELSON. I don't have much to add in my questioning. My perception of these disputes and the settlement procedures that we are going to have to work out move pretty much along the line that fundamentally they should not be Federal problems. I don't think they basically are Federal problems, and I think that our legitimation here as a Federal intervention is basically one based on the concept that governments are formed to provide domestic tranquillity.

I think the consumer aspect comes in largely because we have a constitutional basis, and that would bring in Interstate and Commerce and that is a long way around to reach a spiked fence.

But the way I look at it, the largest number of problems that the people of our country have are problems which are, monetarily speaking, at least, not capable of being resolved in courts; they are not cost-effective at all.

It is sort of like if you have a boil, which hurts; it is severe. You can hardly afford to be checked into the hospital. You don't go to the Mayo Clinic with a boil. And that doesn't mean that it is not real, that it is not painful, that it doesn't need treatment. We seem to have approached this type of resolution in the medical field with some neighborhood clinics here and there, where people can go for first aid, shall I say, or for the proper treatment for things that do not justify going the whole gamut of the general circuit of medical hospitals; but you still need treatment.

The same is true with disputes. We keep hearing the word consumer, and it is very real, but that is just one part of the whole problem; that is, the relationship between a buyer and a seller, and the buyer for some reason or another is not pleased with what he bought from the seller, and you have a dispute.

If we could have a forum, if you are buying a Cadillac, and you have a problem, I suppose you can go to court because, in the first place, if you have a Cadillac, you can afford to go to court.

But if you bought a skateboard and the wheel dropped off, it is not as bad as a DC–10, that is true, but if the wheel comes off, you are mad because you bought that skateboard, and you can't afford to go to court over that wheel.

Maybe that is a ridiculous example, but it is not too far from what I am driving at. Suppose you bought a $100 bicycle and the wheel is defective. You can't go to court to get that wheel replaced or corrected. There should be a facility where the people can go to an impartial competent person and just simply and honestly lay out the facts, be willing to be questioned a little bit, and have the opposite party invited in, because this is not a coercive process, as I see it. We are getting too formal if we start to coerce. Let the merchant come in and explain what was wrong with that bicycle and probably if

the impartial person were to say, "Look, why don't you just give him a new wheel here, and get it fixed. Wouldn't you be hapy if the bicycle worked? That is what you wanted in the first place." Maybe they could go out smiling, and I think that is what we are talking about.

I have seen spiked fences between neighbors, each one building his or hers a little higher than the last layer of the neighbor's, and they put ugly signs on there, calling them names and whatnot. In L.A., we finally reached a point where they have limits; you can't go but so high. It helps, but it doesn't resolve it.

My concept is that we have a legitimate function here, and I am going to suport whatever kind of bill we can compromise on, but I think we should provide the funding, or help provide it, at least, for any one of many different potentially feasible solutions to this dispute problem. I think we should keep track in a simple but effective manner of what is the effect of using this procedure or that procedure, some prototypes, pilot plants, and disseminate that information to the local and State governments for their use as they see fit, and I think that is where we can do our greatest good, to try to help serve as a catalyst to get this sort of think working, but to keep our hands out of the procedure and let it be done at home.

What we are talking about is the kind of dispute settlement that in ages past used to be handled by the clergy of a community, the patriarch of the extended family within that comunity, the person who had earned through a lifetime of activity the respect of the community, whose judgment was relied upon, in some cultures the so-called godfather. That is what we are really talking about.

Now, I know in England they have a similar little thing that has become pretty big; they have magistrates there who are unpaid, distinguished citizens of a community or village who give a certain amount of their time, and they can resolve a lot of disputes, but theirs is a part of the formal legal system, and they can render judgments, and so on.

I don't mean to go that far, but why couldn't some of our retired lawyers give a little bit of time. The Bar Association should be interested in that. We have retired judges who could enjoy life a lot more and live a lot longer and make a tremendous contribution if they would give a day a week, a group of them, and let the neighbors come in and tell their story, and here you have an impartial person who understands many of the implications, so let them give some counsel and advice. I think that is the direction we have to go, because we cannot set up a formal court with compulsory process able to levy or render judgments which can be executed, and so on. Once we get into that, we are in the court structure. We already have small claims court. I think we should get at a way to let people talk out their problems, get some advice from an impartial person who is respected as to what might be able to resolve the conflict, and that is all we may be able to do.

That is a gold question I asked.

Thank you very much.

Mr. PERLMAN. It is a pleasure to agree with you.

Mr. PREYER. Thank you.

Mr. Gudger?

Mr. GUDGER. Thank you, Mr. Chairman. I have just one question that I would like to have clarified.

Assuming that the bill that is recommended here, or presented by the subcommittees and brought to the floor of the Congress, is roughly similar to H.R. 2863 in that it does not specifically bring FTC into the act and does not specifically contemplate or project substantial commitment of these local forums to resolution of criminal disputes and retains the experimental characteristics with the Department of Justice, bring it on the line speedily as your comments have urged, how far can we expect the Chamber to go in its endorsement?

You say you support the legislation in principle. Do you expect to work actively for it?

Mr. PERLMAN. Yes, sir, we think this is a very good idea. We are firmly committed to this. As I say, we have very few problems with H.R. 2863. We would like to see the mandatory business language, but it is a good idea. It is something whose time has come. It needs to be done. There are problems out there, as Mrs. Peterson suggests, and we have our own program that we have been supporting for the last 5 years, something called "Up with Consumers," trying to promote small claims courts throughout the country and arbitration and mediation procedures. We are not new to our support of this, and I think we will support this concept long and hard.

Mr. GUDGER. Thank you very much.

Mr. PERLMAN. Thank you, sir.

Mr. PREYER. Thank you very much, Mr. Perlman. We appreciate your testimony.

Mr. PERLMAN. Thank you, Mr. Chairman.

TESTIMONY OF CONSUMER PANEL, MARK GREEN, DIRECTOR, CONGRESS WATCH, WASHINGTON, D.C., SHARON NELSON, LEGISLATIVE COUNSEL, CONSUMERS UNION, WASHINGTON, D.C.

Mr. PREYER. Our final witnesses today is a consumer panel consisting of Mark Green, director of Congress Watch, and Ms. Sharon Nelson, legislative counsel of Consumers Union.

We are delighted to have you here today. It is good to see you back, Ms. Nelson. You are very familiar with this hearing room. You served on the Commerce Committee staff and helped formulate the committee bill, I understand. And your paper you have submitted here is, in effect, a mini-Brandeis brief, and we are appreciative of it since you are probably as knowledgeable about this as anybody in the country. That brief will receive careful consideration.

We are glad to have you here, and I don't know which one of you is prepared to proceed. Both of your statements will be made a matter of the record, and we will call on you to proceed in any way you see fit.

[The statements of Mr. Green and Ms. Nelson follow:]

STATEMENT OF MARK GREEN, DIRECTOR, PUBLIC CITIZEN'S CONGRESS WATCH

Public Citizen appreciates this opportunity to testify before both your interested subcommittees on a subject little-noticed yet fundamental—can average citizens have their consumer complaints heard and answered?

For decades the answer has been "no." In the early part of this century, Roscoe Pound, then Dean of Harvard Law School, called it "a denial of justice" to force anyone to hire a lawyer for a small claim and observed that because lawyers were not taking up many small cases was no reason to conclude the cases were unworthy of adjudication. "May it not be that we have been assuming

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1 OF 8

too lightly that what is unprofitable for the lawyer is unprofitable for the law?," he said.

Three-quarters of a century later, unfortunately, we can still ask that question. President Carter was surely correct about the misallocation of legal resources when he estimated last year in his speech before the Los Angeles Bar Association that "90 percent of the lawyers represent just 10 percent of the people." For this the established bar must bear much of the blame. Thus, the American Bar Association's earlier defense of "minimum fee schedules," now declared to be illegal price-fixing by the Supreme Court, and its prohibition of attorney fee advertising and "unauthorized practice of law" committees are examples of its guild mentality. So has been the ABA's struggle against group legal services.

The result: high fees operate to price most Americans out of the market for justice in this country. Surveys of unmet legal needs, from the early 1940s through the ABA's most recent effort in 1976, indicate that fully two-thirds of all Americans do not have ready access to lawyers; when the 1976 survey asked respondents whether most lawyers charged more than they were worth, 62 percent agreed.

If some Americans want to buy Cadillacs, they are free to do so. But if others want Toyotas, the choice should be theirs. So too with the legal justice system. The alternative of low-cost, quick remedies must exist for those who can't afford the Cadillacs and Covington & Burlings. A mass society must make available forms of mass justice.

Our society often doesn't, as the Courts, Civil Liberties and Administration of Justice Subcommittee's own hearings on access to justice demonstrated. The cost of courtroom justice is bad enough. In addition, there are no small claims courts in nine states (Arizona, Delaware, Louisiana, Mississippi, Montana, South Carolina, Tennessee, Virginia, and West Virginia), and in several other States the courts serve only a few urban areas. An estimated 41 million Americans lack access to small claims court. And even a program that has proven its value by resolving 80 percent of the 5000 disputes it handled annually—the Consumer Help Center of New York City, jointly run by Channel 13 and NYU Law School—ended 2 years ago when no new funding was found.

Americans not only lack the access; they have the need. In a study of 2,500 urban households, conducted by Arthur Best for the Center for Study of Responsive Law, 1 purchase in 5, or 20 percent, generated dissatisfaction—although only one-third of these problems were reported to anyone. In only 1.2 percent of those instances where buyers had problems did they go to a third party for resolution—even though the seller failed to resolve their complaints about half the time. (Best & Andreasen, "Consumer Response to Unsatisfactory Purchases: A Survey of Perceiving Defects, Voicing Complaints and Obtaining Redress," 11 Law & Society Review 701 (1977). Two seminal studies in 1972—the final report of the National Institute for Consumer Justice and the Small Claims Court Study Group's report on "Little Injustices"—document how consumer problems go unanswered. One jurisdiction which has provided a substantial consumer office—New York City via its Department of Consumer Affairs—received 247,606 phone calls, letters and personal interviews on consumer problems in 1977.

Though we may be talking about what are considered "little injustices," the scope of the problem is anything but "little." Studies of local consumer fraud—including "The Dark Side of the Marketplace," David Caplovitz's "The Poor Pay More," Sen. Philip Hart's many studies, and Professor Philip Schrag's Counsel for the Deceived—indicate the prevalence of everyday ripoffs that altogether can destroy the quality of life for many urban residents. The Kerner Commission in the late 1960's, for example, asserted that local consumer fraud was a significant cause of urban riots. A $50 overcharge may be inconsequential to a white collar civil servant or corporate employee, yet it can mean some meals skipped to a lower income family. And many $50 overcharges in a community can have a widespread, repercussive effect. "It is unlikely that the force of law can be marshalled to address 'little injustices,'" included anthropologist Laura Nader, in a seminal Yale Law Journal article of April, 1979, "unless they are reconceptualized as collective harms."

Public Citizen supports the concept of a modest Federal program—involving an overseeing office in the Department of Justice and a discretionary grant program—to provide seed money to inspire new dispute resolution mechanisms at the state and local level. S. 423, H.R. 2863 and H.R. 3719 are all useful, good-faith and parallel attempts to accomplish this purpose. In our view, though, H.R. 3719 would be the best vehicle to work from, for several reasons.

The primary one is that it tries to ensure, especially as compared to H.R. 2863, that the Justice Department not allow "neighborhood disputes" to crowd out "consumer disputes." The former—battling neighbors, the noisy disco in a quiet community, the petty offense—to be sure, are real and often unresolved by the formal legal process. Yet several years ago former Senator John Tunney was promoting legislation to provide up to $95 million to help resolve the millions of small consumer complaints annually. The result in H.R. 2863 is a $10 million grant program to resolve small complaints annually—not consumer complaints but all complaints. What happened is that a "consumer controversies" bill became a neighborhood justice center bill due to Justice Department insistence. But that Department already has experimental programs in three cities to test its laudable idea of neighborhood justice centers. And if the $10 million simply comes out of LEAA's own budget, as President Carter has initially said it would, it is reasonable to assume that the dispute resolution program and "Resource Center" would have a strong "neighborhood dispute" bias rather than a consumer dispute emphasis.

As explained previously by John Beale, an attorney in the office of Assistant Attorney General Dan Meador, "We feel that the process of dispute resolution is basically the same for all these types of matters." The similarity is that both involve disputes our courts are now not equipped to handle. But there are important differences as well. Consumer disputes often involve people who are not in a continuing relationship (how often do we buy a lawnmower or hire a moving company?) and where the relationship is inherently imbalanced, as the seller knows how to cut the corners of the law while the consumer is innocent. Neighborhood disputes usually involve people not unequal in sophistication, who know each other, and where the potential for self-correction is therefore greater. While there is a body of substantive precedent that, if applied to consumer complaints, can solve them, there is rarely such established precedent to deal with neighborhood squabbles; the latter turn peculiarly on the facts of the case and social history of the relationships. Consumer disputes can be resolved by judges aided by paralegals; neighborhood disputes by social workers aided by lay analysts.

Finally, it is not uncommon for the Federal Government to involve itself in commercial cases under the commerce clause, especially where there is such a substantial record of need and failure as there is for small consumer complaints. But Federal jurisdiction over, say, domestic and neighborhood conflicts is far more unusual and tenuous. And where is the comparable record and studies of neighborhood disputes?

Annual funding for the grant program should be $20 million. If both noneconomic and economic disputes as part of the program, a lesser figure would mean the drop in the bucket would be split in half. I am not unaware that this is supposedly an austere and budget-conscious Congress. But a measure seeking $15 million passed the Senate unanimously last year and one seeking $20 million got a substantial majority (but not a two-thirds majority on Suspension) in the House last year. For a bill supported by groups from the Chamber of Commerce to Public Citizen and without any serious institutional opposition, this authorization level should not be inconceivable. H.R. 2863's $10 million grant program is too modest.

H.R. 3719, in Section 7, provides that the chairman of the Federal Trade Commission be encouraged to advise and consult with the Attorney General, as can the Advisory Board. H.R. 2863 makes no such provision and excludes the FTC chairman from the Advisory Board. But if this program is to help resolve both neighborhood and consumer disputes, it seems to tilt grossly in the former direction to have the Justice Department and LEAA so instrumentally involved and the consumer voice of the FTC so specifically excluded.

The "Findings and Purpose" of H.R. 3719, in (1) and (4), appropriately emphasize the role of consumer disputes. H.R. 2863, in its parallel section, seems to go out of its way to avoid the concept. Given the history and purpose of the bill, this omission is unwarranted.

The price of getting S. 423 reported out on the consent calendar last year and this year was, among other provisions, Section 4(a)(5)(5), which "permit[s] the use of dispute resolution mechanisms by the business community, including, but not limited to, small businesses, corporations, partnerships, and assignees." The problem with this approach is that it requires local mechanisms to allow the business use of dispute mechanisms, even though many jurisdictions prohibit such business access. The reason is that business entities tend to crowd out consumers. A study done by the Connecticut Public Interest Research Group of small claims

cases filed in Hartford, Connecticut from May to September 1976 revealed that 83 percent of all cases involved corporate plaintiffs versus individual defendants. Another survey showed that corporations brought 22,000 of 29,000 Washington, D.C. small claims cases filed in June, 1972.

Ideally, this provision should be struck entirely; allow each jurisdiction to determine whether, or to what extent, to allow business use of dispute mechanisms. In the alternative, the general language of the two House bills is preferable to S. 423, which is unnecessarily specific and goes so far to enshrine the access of collection agencies---institutions that too often distorted small claims courts into de facto collection agencies.

In conclusion, Public Citizen supports a dispute resolution bill which contains: (a) a resource center studying and coordinating these experimental programs, (b) the awarding of grants by the Attorney General after consultation with an advisory board, as we suggested in earlier testimony, and with the FTC, (c) grant criteria that stresses need, diversity, experimentation and the likelihood of continuation, (d) restrictions on the compensation of lawyers in dispute programs and (e) adequate funding.

One final caveat. Section 6(b)(9) of both bills allow the Resource Center to contract out for studies and projects. While this provision may be standard language, it carries the potential for mischief. Several analysts of these measures have indicated that this provision would permit much of this program to be simply contracted out to the American Bar Association, which has the resources and interest to perform many of the functions of the Center. But not the independence to do so. The bar, no doubt, has much to contribute to helping resolve small disputes. But its price structure and "ethics" code has often worsened the problem of average citizens being squeezed out of an expensive justice system. A reinforcing triangle of the Justice Department LEAA and the ABA is not, I think, what the original sponsors of a dispute bill had in mind and it is not what Public Citizen thinks is ideal.

We urge your committees to improve on S. 423—which suffered the burden of having to obtain unanimous consent—in order to assure citizens that for a wrong there is a remedy.

STATEMENT OF SHARON NELSON, LEGISLATIVE COUNSEL, WASHINGTON OFFICE, CONSUMERS UNION, BEFORE THE SUBCOMMITTEE ON CONSUMER PROTECTION AND FINANCE OF THE COMMITTEE ON INTERSTATE AND FOREIGN COMMERCE AND SUBCOMMITTEE ON COURTS, CIVIL LIBERTIES, AND THE ADMINISTRATION OF JUSTICE

Mr. Chairman: On behalf of Consumers Union [1] I wish to thank you for your invitation to testify at this joint hearing today. The three bills pending before the Subcommittee, H.R. 2863, H.R. 3719, and S. 423, would establish grant programs to assist the states, localities or nonprofit organizations in providing "effective, fair, inexpensive and expeditious" mechanisms in which ordinary citizens could attempt to resolve minor disputes.

H.R. 2863, introduced by Mr. Kastenmeier, and H.R. 3719, introduced by Congressmen Eckhardt and Broyhill, would establish virtually identical programs within the Justice Department to provide federal grants to states, local governments, and nonprofit organizations to establish or to improve small dispute resolution mechanisms. The major difference between the two House bills is the emphasis on the types of the disputes to be resolved within the federally funded forums. H.R. 2863 has a broader emphasis and appears to favor the establishment of mechanisms which can handle all types of minor disputes relatively efficiently and inexpensively. H.R. 3719 appears to emphasize those small claims that are usually handled on the civil side of the state courts and which in predecessor legislation were known as "consumer controversies." H.R. 3719 thus contains language which reflects an emphasis on consumer protection. The concepts and purpose of the Senate bill is similar to the House bills, but the basic administrative scheme of S. 423 differs substantially from the House bills. S. 423 would create an entitlement program under which a certain amount of money would be allocated to each state for dispensation to various parties within that state who apply for funds.

[1] Consumers Union is a nonprofit membership organization chartered in 1936 under the laws of the State of New York to provide information, education and counsel about consumer goods and services and the management of the family income. Consumers Union's income is derived solely from the sale of Consumer Reports, with over 2 million circulation, regularly carries articles on health, product safety, marketplace economics, and legislative, judicial and regulatory actions which affect consumer welfare. Consumers Union's publications carry no advertising and receive no commercial support.

Consumers Union long has been interested in activities that would improve citizen access to the judicial system. Thus, we sued the State Bar of Virginia for its restrictive lawyer advertising rules—a case decided as a companion case to *Bates* v. *State Bar of Arizona*, 433 U.S. 350 (1977). Our advocacy offices often have participated in administrative, legislative and judicial proceedings in support of reforms that would tend to make our legal and judicial system more accessible to all our citizens. Consumer Reports frequently has reported on developments in the provision of legal services. Through the years, we have commented on how institutional arrangements could be improved to better serve the consumer who has been injured in the marketplace, including improvement of small claims courts.[2] We believe that the concepts and purpose of all three bills pending before you are meritorious and we generally endorse them. While this legislation presents a good start to solving a constant and vexatious consumer problem, we think it could be improved in certain respects which will be discussed in detail below.

NEED FOR THIS LEGISLATION

No one would dispute the validity of the concepts and purposes of this legislation. In fact, this legislation traditionally has enjoyed the support of the business community and the legal profession as well as major consumer groups.

The need for mechanisms for the redress of minor disputes has been well-documented in legal literature.[3] Provision of redress for small claims has a considerable history in Anglo-American law. In England, small debt courts were created by statute in 1606.[4] In the United States, early attempts to provide simple justice for small claims led to the establishment of the rural justices of the peace courts. However, in 1913, Roscoe Pound of the Harvard Law School noted:

> [I]t is a denial of justice in small causes to drive litigants to employ lawyers and it is a shame to drive them to legal aid societies to get as charity what the state should give as a right.[5]

In that same year, as a response to the problem described by Pound, the first operating small claims court was established in Cleveland. The original purpose of the small claims court was to provide legal redress to those claimants likely to be discouraged by the delay, the expense, and the procedural technicalities of trial court proceedings. The idea proliferated so that a small claims court system now exists in nearly every state. Despite the enthusiasm of the early small claims movement, the small claims courts never became truly experimental. States were content to merely enact enabling legislation based on earlier models.

However, as the movement for consumer justice grew in the 1960's, the small claims court movement was again revived. Law review articles discussing specific small claims statutes and their operation in specific courts began to appear. Excellent empirical studies also were released which described the disparity between the actual operation of the courts and the goals they were intended to achieve.[6] In 1971, a Presidential Commission, the National Institute for Consumer Justice, a nonprofit corporation, was established to study thoroughly the inadequacy of existing procedures for resolving disputes arising out of consumer transactions. In 1972 it published its report on small claims courts in the United States.[7] Another nationwide study was carried out by the Ralph Nader affiliated Small Claims Courts Study Group, which in 1972 published its report entitled, "Little Injustices: Small Claims Courts and the American Consumer." Both of these studies were concerned chiefly with only one class of small disputes—those between individual citizens seeking resolution of disputes arising in the marketplace.

Between 1960 and 1970, nine States enacted or amended their small claims statutes. Nineteen more States adopted new procedures for small claims courts

[2] See, for example, Consumer Reports, October 1971, at p. 624 calling for reform of small claims courts and Consumer Reports 1979 buying guide issue at p. 356 which provides advice on how to use small claims courts.

[3] See, for example, Yngvesson and Hennessey, "Small Claims, Complex Disputes: A Review of the Small Claims Literature," Law and Society (winter 1975), and the bibliography contained in Johnson, Kantor and Schwartz, "Outside the Courts: a Survey of Diversion Alternatives in Civil Cases," published by National Center for State Courts (1977).

[4] "Small Claims Courts," 34 Columbia Law Review 932 (1934).

[5] Pound, "The Administration of Justice in Modern City," 26 Harvard Law Review 302 (1913).

[6] See Yngvesson and Hennessey, *supra*.

[7] National Institute for Consumer Justice, *Staff Studies on Small Claims Courts*, Boston, Mass., 1972.

from 1970 to 1976.[8] As will be discussed further below, many of these States made fundamental policy changes in the operation of their small claims courts. These efforts, as well as increasing interest in alternative methods of dispute resolution, indicates that there is substantial state interest in improving access to justice for those citizens who cannot afford to hire a lawyer.

SCOPE—TYPES OF DISPUTES DESERVING FEDERAL ATTENTION

While certain provisions of the pending bills represent substantial improvements over previous versions of this legislation, we have serious doubts about the efficacy of attempting to solve all problems of minor dispute resolution in a $10 or $15 million program. Given the limited amount of money authorized, we think that the program should have a narrow and well-defined focus, not an amorphous "go out and do good" mandate. Thus, while small crimes and small domestic relations problems might also receive short shrift in the state courts, we would strongly recommend narrowing the focus of this modest program and restoring to the bill its original emphasis on those minor civil disputes which usually occur between buyer and seller in the marketplace.

The arguments for establishing a broadly based dispute resolution program within the Department of Justice are (1) that all small dispute resolution procedures are virtually the same and (2) that the division of disputes into substantive categories would not be cost effective. In our opinion, including domestic and neighborhood quarrels and minor criminal cases in one forum with economic disputes neither addresses real world problems nor reflects sound principles of dispute resolution. The needs of a recently separated husband and wife locked in an emotional child custody battle for a forum to settle various issues are not the same needs as those where a consumer contends a term of an automobile loan from the local bank violates a provision of the Truth in Lending Act. In the former case, social workers, representatives from the community and others who understand the dynamics of separation and divorce may be needed to facilitate dispute settlement. However, in the consumer's case, a person who has the ability to read the law and apply it to the case would probably be the arbiter of choice. Social workers anxious to smooth the ruffled feelings of the consumer and the banker would be viewed as superfluous, if not downright irritating. Thus, the requirements and resources needed to resolve one type of small dispute are not necessarily the same as those needed to resolve another.

Indeed, one should not assume that small disputes necessarily mean "simple" disputes and for that reason relegate all of them to non-judicial forums. As stated by one of the leading judicial advocates of alternative dispute resolution:

> So called minor disputes are as likely to involve rules of law as disputes involving larger sums of money, and the volunteer lawyers [at the San Jose Court] feel that parties in such disputes are as much entitled to have them resolved in accordance with the law as those engaged in major law suits.[9]

While some "informal" mechanisms may be appropriate for resolution of minor domestic relations cases or juvenile delinquency cases, they also may be singularly undesirable for consumers seeking to enforce a statutory right under the Magnuson-Moss Warranty Act, or the State's mini-FTC Act, or local consumer protection law. Experimentation with mechanisms employing varying degrees of formal procedures clearly should be encouraged under this program, but hard won consumer rights and remedies should not be foregone simply for the sake of informality.

The use of Federal funds for assisting the States and local governments in improving dispute resolution for their citizenry are most appropriately confined to consumer disputes. Traditionally, the criminal law, landlord and tenant law, and domestic relations law are matters of State, not federal concern, while marketplace disputes have shown an increasing disregard for state boundaries as consumers cross state lines to make purchases and manufactured goods are distributed nationally or regionally. The resolution of consumer disputes has a direct impact on interstate commerce and, thus, the subject is appropriate for federal intervention and assistance. However, the use of federal funds for the resolution of domestic relations matters or small criminal matters should be lower priority for this program.

[8] Ruhnka and Weller, "Success in Small Claims: Is a Lawyer Necessary?" 61 *Judicature* 176, at 178 (1977).
[9] Beresford and Cooper, "Neighborhood Courts for Neighborhood Suits," 61 *Judicature* 185 (October 1977).

Thus, Consumers Union would recommend that the legislation should emphasize the clear need for mechanisms capable of handling consumer disputes. If the resources and expertise offered by such mechanisms also lend themselves to the solution of other minor disputes, such as those between landlord and tenant and neighborhood disputes, that would provide a windfall benefit, but these kinds of dispute settlements should not be the focus of the program.

The current LEAA authorization bills, as passed by the Senate and reported by the House Judiciary Committee, contain a $50 million per year authorization for new entities to be established in the Department of Justice—the National Institute of Justice and the National Center for Justice Statistics. The functions of Center for Minor Dispute Resolution proposed in these bills may duplicate some of the functions contained in the LEAA authorization. The responsible committees of Congress should clarify their intent with respect to each Justice Department agency's responsibilities. Further, if Congress determines that it is wise to spend federal money on traditional state responsibilities such as domestic relations and juvenile justice systems, then the appropriate institution for administering such grant programs may already reside in the existing, amply funded LEAA.

FUNDING CRITERIA

Section 4 of all three bills contains the criteria for funding applications. While specific provisions of all three bills may differ in certain significant respects, the general structure of section 4 is quite similar in all bills. The Eckhardt Bill is unlike the other two insofar as it makes all the requirements listed in section 4 absolutely mandatory, not merely suggestive. We tend to favor the approach taken in S. 423 and H.R. 2863. The bills authorize the establishment of a demonstration program and thus a hortatory approach seems wiser insofar as it does not dictate a model which all applicants must emulate.

Many of the section 4 requirements are clear and unassailable. Easy to understand rules and procedures are essential; assistance, including paralegal assistance, to persons seeking the resolution of claims as well as the collection of judgments should be provided. Mechanisms receiving money under this act should be open at night and on weekends so that people do not have to take time from work to file and process a claim. We agree that where there are large non-English speaking populations, there should be adequate arrangements for translation.

These basic criteria were derived from the National Institute of Consumer Justice staff recommendations for small claims courts. However, as this legislation has evolved, some previously specific recommendations have become so generalized or so refined that it is now difficult to tell exactly what is intended by the language of certain provisions. For example, S. 2928, introduced in the 93d Congress, expressly forbade the practice of "sewer service." While the language of the predecessor bill was not elegant, the "sewer service" prohibition has been reduced to ensuring that "all parties to a dispute are directly involved in the resolution of the dispute." (S. 423, § 4(a)(5)(A); H.R. 2863 & 3719, § 4(4)(A).) Presumably, this requires adequate notice and measures to prevent abuse of default judgments. However, the precise meaning is not clear. Further, one of the major problems with small claims courts discussed in the NICJ Study was the inability of people who had successfully won a judgment to collect it. An applicant seeking funding should not have to resort to extensive research in the legislative history to find out that the statutory requirement of ensuring that "the resolution is adequately implemented" means that judgments should be relatively easy to collect. We would recommend that the Committee reports provide explicit examples of what is intended by each requirement mentioned in Section 4.

Section 4(6) of the House bills is somewhat more troublesome. In the past, Consumers Union has endorsed the requirement that a mechanism receiving federal funds be required to maintain open records on closed cases in order to identify patterns or practices of consumer abuse or fraud, to correct patterns of product or service deficiency, and to provide other law enforcement agencies with information so that they, in turn, can perform their remedial or deterent tasks more effectively. Such an approach would benefit not only the actual claimants who bring a dispute to a given mechanism but also a much larger class of consumers by encouraging the early detection and prevention of unfair and deceptive practices. Section 4(6) of the House bills lacks such specificity. Section 4(6) states that "consultation and cooperation with community and with governmental agencies" is to be encouraged. Consultation when?

Cooperation with whom? These are questions that we would like answered before we would endorse this provision. This provision is especially problematic as part of the Kastenmeier bill which would encourage treatment of criminal and domestic relations matters in mechanisms funded by this program. In such cases, there may be certain privacy rights as well as basic constitutional protections which could be violated by an overbroad mandate to consult and cooperate with community or governmental agencies.

Section 4(a)(5) of the Senate bill and section 4(4) of the Kastenmeier bill require mechanisms funded by the program to observe reasonable and fair rules and procedures. H.R. 2863 and S. 423 each include a list of examples of such rules and procedures which, among others, suggest that the business community be permitted to use the dispute resolution mechanisms funded by this bill. The Eckhardt Bill would require business access as a mandatory requirement. The subcommittees should know in this respect that 15 states now bar assignees and collection agencies from suing in small claims courts. Those states are California, Colorado, Georgia, Idaho, Kansas, Michigan, Missouri, Montana, Nebraska, New Jersey, New York (also corporations and insurers), North Dakota, Oklahoma, Texas and Utah. The New York City small claims court also bars associations, partnerships, and corporations. And the Jefferson County, Kentucky, Consumer Court bars assignees and all non-consumer plaintiffs.[10] In addition, some states have attempted to try to prevent the small claims courts from being a mererly glorified collection agency by limiting the number of claims that any party can file in a given period of time. Colorado, Kansas, Missouri, Nebraska and Ohio have done this by statute. Other courts have imposed similar limitations by court rule.[11]

While prohibitions such as these may have the effect of funneling consumers as defendants into more expensive trial courts, our federal system requires that such policy decisions concerning the jurisdiction of the various state courts remain matters of state prerogative. Therefore, we recommend that the language of the bills should be clarified in order to make clear that it is not the Congress's intent to make such states ineligible for funding. The language of these paragraphs should be qualified by the phrase "if state law permits."

All three bills pending before these subcommittees require assistance to claimants involved in a dispute resolution mechanism. This provision should be retained. The high cost of obtaining adequate legal representation is part of the problem of small dispute resolution. Eight States have attempted to rectify the imbalance which results when only one party is represented by an attorney by banning lawyers entirely from the small claims court and letting the parites deal with each other on a *pro se* basis. They are: California, Colorado, Idaho, Kansas, Michigan, Nebraska, Oregon, and Washington.[12] Such a ban has, in turn, created the phenomenon of the professional business defendant who also can outmaneuver the unrepresented consumer in the court room. Thus, the answer may lie not so much in rules on the appearance of attorneys but in assuring that participants are adequately advised by well-trained paralegal personnel. The evidence presented by Ruhnka and Weller in their study of the Rochester, New York small claims courts would tend to support this conclusion. They found that plaintiff satisfaction and success rate depended on the advice on how to prepare for trial that plaintiffs had received—either from an attorney or court appointed personnel.[13]

Many commentators remain undecided with respect to determining the appropriate role for attorneys in various types of dispute settlement mechanisms. As noted above, eight states prohibit representation by an attorney in their small claims courts. None of the pending bills directly address this issue. However, all three bills contain a section which would prohibit the use of federal funds appropriated under this Act for the compensation of attorneys. (H.R. 2863 and 3719, §8(e)(2) and S. 423, §7(d)(2).) Apparently, this provision was inserted in order to assure that the funds appropriate under this bill would not be used as a "back door" mechanism to fund legal service attorneys. However, the proscription of the use of funds for attorneys providing assistance "in any adversary capacity" is overboard. We would recommend deleting the section in its entirety and leaving the decision to local decisionmakers. This would be consistent with the experimental nature of the funded projects.

[10] Ruhnka and Weller, *supra*, at 178.
[11] *Id.*
[12] Ruhnka and Weller, *supra*, at 178.
[13] *Id.*, at 184.

ADMINISTRATIVE SCHEMES

S. 423 contains an administrative scheme that is essentially an entitlement program. It establishes a formula by which a limited amount of funds will be allocated to each state. If applicants from that state submit an application for funding which meets the national priority project designation contemplated by the bill that applicant will be funded. A portion of the appropriated funds are also reserved for discretionary grants by the Attorney General. We believe that S. 423's administrative scheme is overly complex in the context of a $15 million authorization. If applicants from 50 States applied, each state would be entitled to less than $150,000. Such incentives are scarcely big enough to encourage anyone to apply. No allocation should be provided for.

We also think that S. 423's National Priority Project concept represents a much too patronizing attitude by the federal government. It assumes that all wisdom resides in Washington and gives the Attorney General much too much power to make decisions for state and local governments concerning states and local needs. We would, instead, favor the approach taken in the two House bills which set forth substantive goals the mechanisms are to achieve, but leave the specific details of the means for achieving those goals to the applicants. These bills authorize a demonstration program. Thus, it would seem wise to encourage as much experimentation with various modes of dispute resolution as possible in order to determine the most successful means of achieving statutory goals. Specific and clear statutory guidance with respect to the substantive goals the problem is to achieve would help to insure that federal money is wisely spent by the Attorney General and the program is administered according to the Congressional intent. We think that the House bills' approach to disbursing the money would allow the states and localities the flexibility they need to respond to the needs of their citizens, and would also encourage innovation.

With respect to the development of the grant application, all three bills require that the applicant "set forth the nature and extent of the participation of interested parties" in the development of the application. (S. 423, §7(c)(6); H.R. 2863, §8(c)(7); H.R. 3719, §8(c)(7).) The Senate bill and the Eckhardt bill specifically require description of the role played by consumers in the development of the application. We think that this language should be made stronger. This legislation merely requires a pro forma statement with respect to public participation by representatives of the constituency the mechanism is intended to serve. Such participation should be required in this experimental program in order to insure that federal money is spent wisely on programs which meet the actual needs of the citizens in a given locality. Thus, we would recommend changing the language to require that the applicant provide "satisfactory assurances that consumers, including low income consumers, have participated in the development and have commented on such plan or plans."[14]

Section 6 of each House bill establishes a Dispute Resolution Resource Center and assigns to this Center the performance of certain functions. We support authorizing the Center to survey mechanisms that already exist in each state and to provide a clearinghouse function and technical assistance to states and other grant recipients. However, we are concerned about the legislative language in Sections 6(b)(5) and 6(b)(7) of the House bills. Section 6(b)(5) of H.R. 2863 gives the Advisory Board and the Center the authority to identify "the most fair, expeditious and inexpensive" mechanisms or aspects of such mechanisms. Mr. Eckhardt's bill requires identification of "effective and fair" mechanisms. Perhaps the selection of only two or three adjectives from the findings and purpose section was unintentional, but for the sake of clarity and uniformity, we would recommend authorizing the Board and the Center to identify "effective, fair, inexpensive and expeditious" mechanisms.

Section 6(b)(7) of the House bills requires the Center and the Board to identify disputes which are most amenable to resolution through mediation and other informal methods. We are concerned that this section will relegate adjudicatory proceedings to a last priority position in this program. We believe that to do so would be a grave mistake. The House bills would seem to encourage funding mechanisms in which decisions could be rendered through compulsory mediation or arbitration procedures where the consumer is not provided with legal or a paralegal advocate or, for that matter, where the decisionmaker is not

[14] See, for example, the description of community involvement in the San Jose Neighborhood Court in Beresford and Cooper, "Neighborhood courts for Neighborhood suits," 61 *Judicature* 185 (1977).

a lawyer but is authorized to decide cases based not upon substantive law but upon common sense or his or her rough sense of justice. If this is the underlying intent of this section, we would have to vigorously oppose it. We find that the use of the word informal and the underlying assumption that informality is always a virtue very troublesome. This ambiguity probably stems from the lack of clear program focus in both bills. An informal remedy may be appropriate for one type of dispute but not for another and, as we argued above, we would be very chary of relinquishing substantive legal rights for the sake of informality. We would recommend deletion of this paragraph in its entirety and reliance instead on Section 6(b)(5) as we have recommended amending it.

We are also curious about the intended meaning of Section 6(b)(9) of the House bills. This provision would allow the Justice Department to contract out all the responsibilities for administering the Center. This would be an unfortunate result. Although it is conceivable that an academic or legal institution may have the expertise appropriate for performing some of the Centers assigned functions (data gathering, etc.), other functions such as providing technical assistance and identifying meritorious projects are probably best left to relatively neutral and accountable government employees.

Section 7 of both the House bills establishes an advocacy board to advise the Attorney General on the operation of the program. We are not entirely sanguine about advisory groups in general, and are dubious about the results that will be forthcoming from a board composed of only three representatives of user groups (community organizations, consumer organizations, and business organizations).

Section 7(e) of the Eckhardt Bill requires the Attorney General to consult from time to time with the Chairman of the Federal Trade Commission. The Federal Trade Commission has experience with informal dispute settlement mechanisms established under the Magnuson-Moss Warranty Act. Such experience and staff expertise should be useful to the Attorney General in setting up the program authorized by these bills. Moreover, the Consumer Protection Bureau of the Federal Trade Commission receives a substantial volume of mail from dissatisfied consumers and is acutely aware of the need for adequate dispute resolution mechanisms. In order to avoid duplicative or wasteful federal efforts in this field, the Federal Trade Commission and the Justice Department should be required to coordinate and consult with one another. We support this provision.

Section 8(b) of each House bill requires the Attorney General to prescribe procedures for submitting applications and awarding grants. Section 8(b)(4)(B) requires the Attorney General to take into account certain factors in deciding to award grants to applicants. We have no trouble with the Attorney General taking into account population, population density, State financial need, etc., but after the Attorney General has taken them into account, we think the Congress should clearly state what weight should be given to each set of factors. For example, is a rural population (which the Senate Commerce Committee estimated to be vastly underserved by small claims courts) in a State with a balanced budget to be rewarded with an award at the expense of a very densely populated but poverty-stricken area on the eastern seaboard? The intent of this section should be made explicit.

Section 8(c)(8) of each House bill and section 4(a)(5)(E) of the Senate bill requires the applicant to describe the qualifications, period of service and duties of persons who will be charged wtih resolving or assisting in the resolution of disputes. However, a specific exception is made for judicial officers. This exception makes the requirement nonsensical. Apparently, the provision was added in the Senate during the 95th Congress to alleviate certain Senators' concerns that such a requirement would allow the Federal Government to dictate eligibility requirements to the states' judges. The problem this provision was intended to solve was the problem of local political officials appointing lay people with no legal experience or knowledge who then often acquired a lifetime pecuniary interest in the fees they charged for dispensing "rough justice." Requiring an applicant to merely state the "qualifications, tenure, and duties" of the potential decisionmaker should not infringe on state rights. The exception for judicial officers should be deleted.

Section 8(h)(2) of H.R. 2863 contains an absolute limitation of $200,000 on the amount any one project may receive. We think that this is an unnecessary curb on the Attorney General's discretion.

CONCLUSION

In summary, we support the passage of a small dispute resolution bill which will fund primarily consumer dispute resolution mechanisms and which will allow the states, localities, and nonprofit organizations the flexibility to select innovative and sound dispute resolution programs truly responsive to local needs. We appreciate this opportunity to provide these comments on H.R. 2863, H.R. 3719, and S. 423 and hope they will be useful to you in obtaining the enactment of an effective dispute resolution program.

Thank you.

Mr. PREYER. Mr. Green, you are listed first. We will call on you, if that does not violate the rules of courtesy.

Mr. GREEN. I will speak first because of reasons of the alphabet, not expertise. You are right about Sharon's knowledge on the subject.

Chairman Preyer and Chairman Kastenmeier and members, Public Citizen appreciates this opportunity to testify before both your interested subcommittees on an often little noticed but very fundamental problem, can consumer wrongs be remedied?

A society that has a justice system which services only those who can afford the high cost of lawyers really is not a justice system at all. Too often that is what characterizes our justice system in America today. There is a need unfilled. In a study of 2,500 different households conducted by Arthur Best for the Center for Study of Responsive Law, he found that one purchase in 5 or 20 percent generated dissatisfaction. Yet of those only 1.2 percent were instances where buyers went to third parties in order to try to correct problems that they had not had satisfaction with. This is often referred to as "little injustices." But the scope of the problems really is anything but little, as Mr. Danielson, I think, indicated.

The Kerner Commission, for example, in the 1960's, indicated that local consumer fraud was one of the significant causes of urban riots. A $50 overcharge perhaps to you or me is an inconvenience and annoyance, but to a poor person in this country it could mean meals skipped. And many $50 overcharges can add up to millions of dollars and have repercussive and corrosive impacts on a community. As anthropologist Laura Nader said in a Yale Law Journal article of last month:

> It is unlikely that the force of law can be marshalled to address little injustices unless they are reconceptualized as collective harms.

The bills before us are all imaginative, well intended, and parallel efforts to try to address this problem. We think there are advantages and disadvantages to all of them, and let me describe those from our perspective. In the early 1970's, Senators Magnuson and Tunney proposed a $95 million consumer controversies act, and now we find that three-quarters of a decade later, it has evolved into a dispute resolution act, one $10 million grant program, not for consumer complaints, but all complaints. This is, in part, because of Justice Department advocacy.

In addition, recently, President Carter has indicated that $10 million would simply come out of LEAA's own budget to administer the program. We have anxiety that the so-called neighborhood or interpersonal disputes could potentially crowd out the consumer's dispute, since we are dealing with obviously a very small amount of money compared to the problem nationwide.

We would have a few recommendations.

First, money. Last year, a $15 million bill passed the Senate unanimously; a $20 million bill got a substantial majority in the House but not a two-thirds majority. For a bill sponsored by groups from the

U.S. Chamber of Commerce to Public Citizen, without any serious institutional opposition, and even given that it is a supposedly austere-minded Congress, we think it not impossible to contemplate a $15 million to $20 million program, especially since both consumer controversies and non-economic controversies will probably end up in the synthesis bill that the two subcommittees produce.

We do, second, prefer H.R. 3719's provision for the Federal Trade Commission. If, in fact, you think of this bill as a consumer bill and a Justice bill, and if you want to house it in the Justice Department, which we don't oppose, why not at least have the Federal Trade Commission have a mandatory consultative role? If we are seeking a kind of rough parity, why exclude the Federal Trade Commission, which does have an ear to the ground and fingers on the consumer pulse in this country—if I can mix metaphors.

Third is the point mentioned by the previous witness about mandating the use of any dispute resolution by the business community. We think that inadvisable. Perhaps a score of States go the exact opposite way and prohibit business associations from the small claims courts. Whether they are right or wrong, we could discuss, but they have made the local judgment that these institutions often push out individual consumers. And we know how small claims courts, according to many studies, could turn into collection agencies. I am ideologically surprised that the Chamber of Commerce is recommending this, because it would put the Federal Government in the position of attaching a mandatory string and ordering local entities to permit business associations, even if that local entity doesn't want to. Normally, I thought that the States' rights—Chamber of Commerce is opposed to that kind of string attached by the Federal Government.

One final point. There are provisions in both House bills to contract out the various studies by the dispute resolution center and other analyses, which is normal, I suspect, in bills like this. But many of the staff and commentators of this legislation have predicted that that could lead to a substantial bulk of this program simply being contracted out wholesale to the American Bar Association.

I think the ABA has a lot to contribute in this area. They have a lot of expertise but they don't have the necessary independence. A lot of the problems of individuals being priced out of courts, one has to conclude, traces to American Bar Association canons of ethics. At least the Supreme Court has concluded that in six decisions in the last two decades, and I would be anxious, in conclusion, if a program which began as a consumer dispute mechanism ends up in the Justice Department administered by the LEAA, without new funds, part of which is contracted out to the American Bar Association, and which excludes specifically the Federal Trade Commission.

All those points would create an unwarranted tilt in the program toward the neighborhood resolution and away from the consumer resolution. Public Citizen would like to see a greater parity. I think the bills are not that far apart and a consensus is quite possible and predictable.

Thank you, Mr. Chairman.

Mr. PREYER. Thank you.

Ms. Nelson?

Ms. NELSON. Thank you, Mr. Chairman. On behalf of Consumers Union, I wish to thank you for your invitation to testify before these joint hearings today. The three bills pending before the subcommittee, H.R. 2863, introduced by Congressman Kastenmeier, H.R. 3719, introduced by Congressmen Broyhill and Eckhardt, and S. 423, would establish programs to assist the States, localities, or nonprofit organizations in providing effective, fair, inexpensive, expeditious mechanisms in which ordinary citizens could settle minor disputes.

Consumers Union has long been interested in activities that would improve citizen access to the judicial system.

We believe the concepts and purposes of all three bills before you are meritorious and we generally endorse them. While this legislation presents a good start to solving a constant and vexatious consumer problem, we think it could be improved in certain respects.

Obviously, the first way in which we think it could be improved is the scope. This question has been extensively discussed before you this morning. Mark noted for you the background and record upon which this legislation has been based. We also think that the scope of the legislation should reflect the fiscal conservativism that is extant in this Congress. There should be a narrow and well-defined focus for a $10 million or $15 million program, not an amorphous go-out-and-do-good-for-all mandate.

However, I think the problem can be divided into two different questions. The first question is, how many grants should go to what kind of mechanisms, and second, what percentage of the grants funded by the Federal Government should be for setting "consumer disputes" and what should be for other kinds: neighborhood disputes, domestic relations cases, small crimes, and the like.

We recognize that all of these disputes are deserving of treatment, but we are talking about priorities in a Federal program, and we think that the record indicates that small economic civil disputes are and have been totally ignored for a long time. If I may, I will illustrate.

In our written testimony, on page 5, we discuss the kind of case where a husband and wife perhaps, locked in a long-time child custody case, have engaged in a minor assault. The need for a forum for them to resolve their dispute is totally different than the need of a consumer with a complaint against his local bank for violation of the Truth-in-Lending Act for a forum to resolve his dispute with the bank.

A social worker or representatives of the community would be the arbiters of choice in the first case. In the second case, a social worker anxious to smooth the ruffled feelings of the banker and the consumer would be viewed as superfluous, if not downright irritating.

We don't think that the first case needs to be excluded from mechanisms funded under this act. If they can come in and be resolved there, so much the better. However, we think the emphasis and priorities should be on the economic civil claims that can be easily resolved and such mechanisms funded by a Federal program.

As Mr. Broyhill and others have noted, traditional responsibilities for domestic relations matters and small crimes have traditionally been with the States. On the other hand, a Federal presence in consumer matters has been well established.

Finally, we note that LEAA authorization bills have been moving through the Congress (passed by the Senate, and reported out of Judiciary) which contain two new entities, one, the National Institute of Justice, and the second, the National Center for Justice Statistics. They each have a $28 and $22 million price tag attached. We are not sure what their functions will be, but we think that the functions of this program and those programs should not overlap.

We generally endorse the funding criteria contained in all three bills. We have problems with a couple of specific provisions.

Section 4(6) of the House bills contains a requirement that mechanisms funded under this bill consult and cooperate with community and governmental agencies. There was a predecessor provision in this bill which Mrs. Peterson discussed which would have required a mechanism to maintain open records on closed cases in order to identify certain patterns of consumer abuse and fraud and to turn over such information to other Government enforcement agencies. We endorsed that provision.

However, we are concerned about the intent of this provision in a program with an emphasis on solving all types of disputes. There may be certain privacy rights and constitutional protections which could be foregone with a broad mandate to consult and cooperate with such agencies.

We would recommend that the committee make its intent clear with respect to that requirement.

The second point has to do with the requirement of promoting business access to the mechanisms. As Mark discussed, this requirement is mandatory in the Eckhardt bill and suggestive in Mr. Kastenmeier's bill and the Senate bill.

We would be disappointed if the committees ignored the fact that 15 States now bar assignees and collection agencies from using their small claims courts. I have named those States in my written testimony.

We think in this area that the committees should observe the traditional notion of federalism—use the States as laboratories in experimenting with different responses to different problems. Rather than making a Federal requirement that business entities have access, the bill should leave that decision to the local and State decisionmakers.

We have the same kind of comment with respect to the bill's ban on lawyers. I believe that eight States prohibit the appearance of lawyers in their small claims courts. I am not assuming that small claims courts will be the only ones funded under this bill. But such bans are one of the State responses to small claims problems. We would hate to see those States be ineligible, or the other 42 States be ineligible for funding because they permit lawyers in their small claims courts.

Finally, with respect to the administrative schemes contemplated in all three bills, we suggest at page 12 in our testimony that a requirement for public participation be included in the application.

With respect to Federal Trade Commission participation, we think that the role the Eckhardt bill and the Senate bill contemplate for the FTC is appropriate. It is a consultative role. It requires merely that the Attorney General and the chairman of the Federal Trade Commission talk to each other from time to time. We think that is appropriate. They do it now with respect to antitrust matters, and the like.

And the FTC has some experience. It promulgated a rule on informal dispute settlement mechanisms a few years ago. Unfortunately, only the homeowners warranty group has been certified. But there are experiments going on now. Chrysler and the Association of Better Business Bureaus are setting up a settlement program and the Council for Better Business Bureaus is funding a program for all auto dealers in Des Moines.

The Trade Commission is evaluating these programs and probably they could respond to your question as to how cost effective they seem to be.

That concludes my statement. Thank you very much.

Mr. PREYER. Thank you. We appreciate the testimony of both witnesses.

Ms. Nelson mentioned a point that if we follow Mrs. Peterson's suggestion of collecting statistics or data from these dispute resolution mechanisms in order to determine patterns of abuse, that then we may run into some constitutional problems or some privacy problems.

In that same connection, in your statement you comment on section 4 that consultation and cooperation with community and with governmental agencies is to be encouraged.

Now I wonder if you could expand a little bit on what kind of consultation and with whom you are thinking there? I think there, again, we could get into some privacy problems and perhaps some constitutional problems.

Ms. NELSON. With respect to the predecessor requirement, the requirement was the mechanism should maintain records on closed cases, not open cases but cases that had come to some degree of closure, final judgment or whatever the resolution is. That was in the context of, again, the small economic claims.

The notion was that agencies like the local consumer protection division of the attorney general's office in a State would have access to those records in the case of used car auto dealer fraud or something such as that.

If there had been a substantial number of such cases, he would be able to find people who had been wronged and that sort of data would be useful in bringing an indictment or class action suit in that sort of situation.

My point is that in the context of a dispute settlement mechanism that is handling more cases than civil economic claims, that is handling disputes between husband and wife, parent and child, something that might amount to an aggravated assault in the criminal justice system, that requiring just consultation and cooperation might be an invitation to some kind of abuse.

I think if in the bill, as it is finally drafted or emerges from committees, if it is clear what the focus of the program is and what those requirements mean in each context, that will satisfy our problem with the provision as drafted now.

Mr. PREYER. Thank you.

Just one more question to either of you.

The Senate bill suggests that a portion of the funds be used for "national priority project." Now, I wondered whether you think that is a good idea or bad idea, and also the House versions have visions for an advisory board and the Senate doesn't.

I wondered what your reaction to that was?

Mr. GREEN. I think the Senate bill's national priorities concept is unnecessary. I would like to leave it to the discretion of the Attorney General in consultation with the Federal Trade Commission and the advisory board that you recommend.

Public Citizen thinks the advisory board in both House bills is a good idea. It brings together people who would be using, and be expert at, a small settlement mechanism; that that would be a good collaboration with the Attorney General.

We are anxious that a priorities concept has almost a patronage aspect to it. You want to give each State something. Some States, though, may have very adequate mechanisms, and other States may be lacking them entirely. Some States may have a population that really needs new mechanisms, and others not.

I think you should leave that to the discretion of the Attorney General rather than mandating it in the act.

Ms. NELSON. I would quite agree with that. I think it is too small a program and too experimental at this stage to have Washington telling the States and localities what they need.

With respect to the advisory board, we don't have any terrible problems with it. I think it might be useful. I am not sure how. It depends, I think, as most things do, on the personnel on the advisory board and how successful they will be.

Generally, some advisory boards are useful and others are just surplusage.

Mr. PREYER. Thank you.

Mr. Kastenmeier?

Mr. KASTENMEIER. Thank you, Mr. Chairman.

Both the witnesses seem to take the position that the scope of the legislation should be relatively narrow, that is to say, more consumer oriented than similar to other minor disputes.

Mr. Green, you personally and as a representative of Congress Watch, and I think Ralph Nader, have been an active proponent of proposals to broaden standing to bring suit in Federal court.

Why in this regard do you seek to limit standing to appear before or have access to these minor dispute forums? Aren't these positions inconsistent?

Mr. GREEN. No; we are for liberalized standing to sue whenever the substantive grievance is in Federal courts. This program, though, is a finite program with a certain dollar amount, $10 or $15 million, which is a drop in the bucket in a sense. We would be anxious if that drop is cut in further small pieces if you put too much jurisdiction in the program.

It is not inconsistent because conceptually it is easier to support a Federal measure which tries to reform commerce. It is more traditional, as Mr. Danielson indicated, for interstate commerce to be regulated or affected by the Federal Government.

Second, there is a very substantial empirical data base on small consumer grievances. Some of the publications, the Little Injustices report and others that Mrs. Peterson mentioned, have documented the extent of small consumer abuse that goes unremedied.

This is not to say that interpersonal dispute is not real and not serious and not frequent. I just don't know how frequent and I don't

know whether this bill, given its original inception and its evolution, is the right home for it.

In my testimony I did say that we don't oppose the concept of having both economic and noneconomic neighborhood disputes in one measure. We just want to be careful that there is more of a balance than I think is in some of the bills before us.

One final point: you mentioned before truth-in-lending and small shoplifting. You asked a prior witness should they be included. Truth-in-lending can be, but rarely is, a criminal matter.

But for something that is criminal, albeit a misdemeanor, these alternate mechanisms would be an inappropriate home because of the whole array of constitutional rights that are attached to it.

Mr. KASTENMEIER. You are familiar with the fact that many minor criminal matters are diverted from the criminal justice system and don't necessarily end up requiring the individual to be prosecuted and convicted and penalized pursuant to law.

I am talking about vandalism, shopliftings, changing of odometers, false labelings, and so forth. I guess those are typical problems that somebody may confront in the commerce and consumer-communities. The question is whether a brand range of disputes ought to have access. Or do you see it principally as a collection agency type of operation. Or in the alternative, is it more a consumer complaint vehicle instead of Sears and Roebuck having its consumer complaint department serve as an intermediate forum for those disputes only.

Ms. NELSON. May I try to answer that?

Mr. KASTENMEIER. Yes.

Ms. NELSON. As a law student I worked in the King County, Washington prosecutor's office in the juvenile division. I was familiar with several LEAA funded diversion projects that we had in King County.

I think the point we are trying to make is that those LEAA already exist and LEAA already is spending money for just those sort of deserving projects. We, of course, have a built-in bias, but we do think consumer disputes are equally deserving and in a small program we hate to see them be swallowed by the others.

I think we all concede that a young person in trouble deserves help. But we are talking about the structure of this particular program and we are talking about allocating these limited dollars. That is why I thought it useful to break the question into really two questions: that is, what percentage of grants should go to different categories of dispute settlement mechanisms and what kinds of disputes should we attempt to resolve in those forums?

I think there really are two questions that the committees will have to face. Should the Attorney General when making funding decisions decide to fund the mechanism that purports to solve the whole universe of problems or should he fund the mechanism which purports to solve merely one aspect of the problem?

Let's save what we have been calling consumer controversies, landlord: tenant, and small torts and leave the juvenile justice and domestic relations matters out. I think that is what the Congress will have to decide with this legislation.

We are advocating that the primary focus, the greatest percentage of grants go to those small economic civil dispute settling mechanisms.

Mr. KASTENMEIER. Well, you both understand that whatever money Congress appropriates for this purpose, if indeed it does, we will not be able to underwrite all such forums in America. Rather it will be used selectively for certain innovative ones and certain ones worthy of emulation as models.

What you are suggesting is that those models be very confined, very limited, in terms of standing; namely, that these are consumer forums only and that other problems would not necessarily be embraced.

I think you are well aware that there are such forums that do handle both consumer and all other types of disputes. These are community endeavors. It is said they are relatively new but tend to work well, at least that has been stated in past testimony. I don't understand your position.

Mr. GREEN. Let me try to be more precise.

Public Citizen would desire it be limited to commercial economic disputes. I don't see that as a narrow area. I see that as something that is enormously broad. However, we don't object if the final bill contains both types of disputes.

Mr. KASTENMEIER. But not including false labeling, shoplifting, vandalism, and changed odometers, and those sorts of things?

Mr. GREEN. False labeling or consumer odometers are consumer abuses, so they would be contained. Shoplifting, although commercially related, I think is a different category. It is not a company engaged in a premeditated and general consumer violation. It is an individual criminal act.

The second point is that while we do not prefer, we don't object to a bill such as yours which has a broader purpose, because there is a very substantial argument to be made for these interpersonal disputes.

One final point. The LEAA is already experimenting with the neighborhood resolution centers, and so one might argue that it is unnecessary to deal with it in this bill, as it is currently drafted.

Mr. KASTENMEIER. One other thing I want to be clear on and that is the access. This perhaps is a point of dispute between yourselves and the preceding witness representing the chamber of commerce.

Should access of the business community include access by assignees, such as collection agencies?

Mr. GREEN. We think not. There are some strings in this bill, to call it that, because there is a great consensus behind them. The mechanisms should be open on weekends. They should be bilingual, if necessary, et cetera.

The issue of mandatory access by assignees is a controversial one, at a minimum. Different States have resolved it differently. That is the kind of controversy that I think should preclude the Federal Government in this bill from insisting on a certain standard at the State level.

Ms. NELSON. I have nothing to add to that statement.

Mr. KASTENMEIER. Would the phrase: "Except as precluded by State law" or something to that effect cure that problem?

Mr. GREEN. Yes; it would.

Mr. KASTENMEIER. Thank you, Mr. Chairman.

Mr. PREYER. Thank you.

Mr. Danielson?

Mr. DANIELSON. I have no questions. Thank you, Mr. Chairman.

Thank you, both of you, for your testimony.

Mr. PREYER. Mr. Gudger?

Mr. GUDGER. I have no questions. Thank you.

Mr. PREYER. Thank you. We appreciate your being with us here today and your written statements as well as your testimony will be very helpful to us.

Ms. NELSON. Thank you, Mr. Chairman.

Mr. PREYER. The committee will stand in recess until June 14.

[Whereupon, at 12:20 p.m. the subcommittee adjourned, to reconvene Thursday, June 14, 1979, at 9:30 a.m.]

RESOLUTION OF MINOR DISPUTES

THURSDAY, JUNE 14, 1979

HOUSE OF REPRESENTATIVES, SUBCOMMITTEE ON COURTS, CIVIL LIBERTIES AND THE ADMINISTRATION OF JUSTICE OF THE COMMITTEE ON THE JUDICIARY, AND SUBCOMMITTEE ON CONSUMER PROTECTION AND FINANCE OF THE COMMITTEE ON INTERSTATE AND FOREIGN COMMERCE,

Washington, D.C.

The subcommittee met, pursuant to notice, at 10:02 a.m., in room 2141, Rayburn House Office Building, Hon. Robert W. Kastenmeier presiding.

Present: Representatives Kastenmeier, Scheuer, and Broyhill.

Also present: Gail Higgins Fogarty and Michael J. Remington, counsel; and Joseph V. Wolfe, associate counsel, Subcommittee on Courts, Civil Liberties, and the Administration of Justice.

Edward H. O'Connell, counsel, and Margaret T. Durbin, staff assistant, minority, Subcommittee on Consumer Protection and Finance.

Mr. KASTENMEIER. The subcommittee will come to order.

Today the Subcommittee on Courts, Civil Liberties, and Administration of Justice and the Subcommittee on Consumer Protection and Finance resume a third day of joint hearings on dispute resolution act legislation.

There are three bills pending in the House on the subject. H.R. 2863, H.R. 3719, and S. 423. All would stimulate the development of informal methods of resolving minor disputes, primarily in the nonjudicial nonadversarial setting.

Last week we heard testimony from the U.S. Department of Justice, the President's Special Assistant for Consumer Affairs, the American Bar Association, the Conference of [State] Chief Justices, and various representatives of consumer and business groups.

I might note that all witnesses supported the concept of a limited Federal program to encourage development of improved dispute resolution mechanisms. However, there were different comments on the scope of disputes to be covered and the amount of funding of such legislation.

Today's witnesses have unique expertise in the area of dispute resolution. The first panel, which represents neighborhood justice centers, includes Judge Jack P. Etheridge, who is a senior judge of the Fulton Superior Court, Atlanta Judicial Circuit, and also a member of the faculty of the College of Criminal Justice at the University of South Carolina. He is chairman of the board of the Neighborhood Justice Center of Atlanta, Inc., as well as a member of the ABA's Special Committee on Resolution of Minor Disputes, and chairman

of the National Conference of State Trial Judges (ABA). The second member of that panel is Linwood R. Slayton, Jr., a practicing lawyer, who serves as the director of the Atlanta Neighborhood Justice Center.

After these witnesses, we will have a second panel and the Chair will introduce those three persons when that panel is called for.

Therefore, I would at this time like to welcome the first panel, Judge Jack Etheridge and Mr. Linwood Slayton.

We are pleased to have you. If you wish to proceed either directly in your statement or in any other fashion, you are free to do so.

[The prepared statement of Judge Jack Etheridge follows:]

STATEMENT OF JUDGE JACK ETHERIDGE, CHAIRMAN OF THE BOARD, NEIGHBORHOOD JUSTICE CENTER OF ATLANTA, INC.

Mr. Chairmen and Members of the Committees: I am Jack Etheridge, from Atlanta, Ga., where I serve as a senior judge of the Fulton Superior Court, Atlanta Judicial Circuit. I am chairman of the board of the Neighborhood Justice Center of Atlanta, Inc. I am a member of the American Bar Association's Special Committee on Resolution of Minor Disputes and currently have the honor of serving as Chairman of the National Conference of State Trial Judges of the American Bar Association. I am a member of the faculty of the College of Criminal Justice at the University of South Carolina.

Everyone who is affected by the growing complexity of life is touched by an increasing need to avoid disputes or to resolve them as quickly as possible.

Very briefly, I will discuss that recognition as it has been exemplified in the creation and operation of Neighborhood Justice Centers.

At the outset may I point out however, a very fine statement of Robert M. Cover in the foreword to the April issue of the Yale Law Journal devoted to Dispute Resolution (vol. 88, number 5, at page 912, 1979). He observed: "There is a growing realization that, just as no important institution serves only one function, so no important function in a society is performed by a single institution." The resolution of disputes can, of course, be accomplished by institutions other than the courts. Effective alternatives to courtroom dispute resolution do exist. Some, useful at other times, have lost their effectiveness. Others, through trial and error, become effective, and hold great promise.

One of these might be the Neighborhood Justice Center. You will be presented with a good bit of information about those now in existence in the course of these hearings, I am sure. Based on observation of their work, one may conclude that they serve a great social need.

As you know, with the encouragement of the attorney general, and with funds of the Law Enforcement Assistance Administration, centers were established in Los Angeles, Kansas City, and Atlanta.

It is important to note that they were not created out of wholecloth, or by legislative of executive fiat. In order for them to have been created, much work was done on the local level by voluntary work. While each of the centers have the same mission, they operate somewhat differently. Los Angeles is organized under the aegis of the Los Angeles Bar Association, Kansas City under the City Council as a unit of city government, and Atlanta is an independent non-profit corporation. These centers, and others like them, cannot fulfill their true function, however they may be organized, simply as additional government agencies. Their heart and soul is their commitment toward citizens helping each other.

The great and encouraging aspect of the legislation you are considering is that it provides for experimentation and the encouragement of the participation of citizens, neighbors, not only as policymakers, but as mediators—not as judges or jurors, but as peacemakers.

I hope you will not forget that local communities have an immense reservoir of talent, and a resourcefulness for meeting local problems which does not often exist here in Washington, and which cannot be adequately provided for in narrowly drawn legislation.

There are a growing number of dispute resolution centers throughout the country. They take many different forms. My brief reference this morning will be limited to the three centers I have referred to earlier. They have been intensely evaluated and we have learned much from their work.

A first requirement is that those who set out to establish a center do so with a commitment not toward reform of the existing judicial establishment, but toward helping disputants quickly and fairly get their disputes settled. This does not require an attack on the judiciary, or the legal profession. It requires an open mind.

Few things for instance, have been more encouraging to us in Atlanta than the whole-hearted acceptance of the center by the judges and lawyers of the area. Matters are frequently referred to our center by lawyers. It is seen not as a threat but as a welcomed resource. I am pleased to attach, as an indication of that, a recent Resolution of the Young Lawyer's Section of the Georgia Bar Association. (See exhibit 1.)

The President of Atlanta's center is a brilliant young attorney. Several members of the board of directors are attorneys, and these include the director of the Atlanta Legal Aid Society.

The support of the local bench is evidenced by the fact that some 61 percent of the matters dealt with by the center are referred there by the Courts. The Treasurer of the center is also the Court Administrator of the Circuit, and on the board are such persons as the chief probation officer of the juvenile court and the clerk of the civil and misdemeanor court of Fulton County.

We constantly receive unsolicited statements of support from the judiciary such as the following:

"When I act as a magistrate in this court, I refer as many family disputes and petty matters as I can to your center, and the results have been good. I find that it gets out of the system cases which never should be there and are costly in human factors as well as taxpayers dollars.

"I recognize that these disputes must go somewhere. I feel that we have too often failed to establish other agencies that can create the atmosphere of the community to handle matters that should be kept at the community level—matters that are the result of social conditions brought on by urbanization and that lay in the domain of the gray area (of the law).

"We have used the courts as a great rug under which we sweep human souls and statistized them as criminals.—Hon. Dan Duke, State Court of Fulton County, 1979."

One is impressed at the support that can be found throughout the country from the bench and bar for these centers and for the idea of the development of alternative techniques for dispute resolution.

You will be interested that the National Conference of State Trial Judges has adopted as one of its goals the support and promotion of Neighborhood Justice Centers.

In writing legislation one must constantly ask whether that which is contemplated will work. I am convinced that this legislation will, if it permits flexibility. Not every community will have the disposition to adopt such an organization as Atlanta's, or of that of Kansas City or Los Angeles. But one can learn from the other, and then can adapt the experiences of others to their own unique situation.

In addition to the need for generous and continuing support from local leaders in establishing dispute resolution centers in the first place, well trained mediators are indispensible.

Our experience has taught us that with thoughtful training of about forty hours the mediators can handle the most complex and tension-filled situations. In Atlanta, and I am sure it is true in Kansas City and Los Angeles as well, we have had an abundance of people who have sought to become mediators. We now have 54 mediators. They serve virtually on a volunteer basis. For each mediation session, they are paid $15. Our mediators come from all walks of life, and from a wide socio-economic spectrum. To observe their work and their successes, is an inspiration. It is a reminder again that it does not require the whole panoply of a courtroom, with its flags and robes, it gavels and deputies, to achieve a just result.

When the mediator wins the consent of both parties to the ending of their dispute, justice has usually been served. Data indicates that 96 percent of those engaged in mediation, complainant and respondent alike, have been satisfied with the process.

The three Centers each have five staff members. In addition they make use of volunteers, such as law and graduate student interns. Because of a large number of volunteers in the Atlanta Center I have taken special pride in viewing it almost as a school of justice. Our volunteers are both young and old. They serve in

many helping capacities. Often one is assigned to a warrant office, or to attend court and act as a referral person. Throughout their work at the Center they are closely supervised.

The Neighborhood Justice Centers can recognize the interdependence of dispute processing. They can often ameliorate the injustice of judicial techniques and outdated procedures. They can help restore the age-old confidence that must exist in a decent, livable society where we are dependent on each other.

The Centers are demonstrating that one may have confidence that with their help, one may work out disputes, although sometimes miniscule, sometimes enormous—but almost always agonizing and frequently potentially devastating.

It is difficult, indeed impossible, to quantify the success of the Centers. I want therefore, to point to examples which are most encouraging. Both have to do with what I believe to be the greatest contribution you can make in supporting this legislation. It is the teaching by example that can be done. Just as judges are teachers, so too are legislators. I point to two gratifying phenomena arising from the government's support of these Centers. One is the establishment of studies throughout this country on how our system of justice can more fairly resolve disputes. Only last week, as an example, the President of the Georgia Bar Association created a committee to be headed by Judge Charles Weltner, a distinguished former member of the Congress, to look into the matter of improved methods of arbitration and mediation. Lynwood Slayton, who will present testimony here today, will be on that committee and I have been asked to serve as a consultant to it. As you know the American Bar Association and other States are studying this subject as well. (See Exh. 2)

Another phenomenon might be one of the most surprising and gratifying of all. Studies are showing that those who have been through the process of mediation are increasingly reporting that because of that experience they are avoiding other disputes, or are solving them themselves without violence! What an incalculable gain it would be to find that disputes are not only being successfully settled, but that a significant number are being avoided! One can hardly dare for more.

I urge that you draft legislation as broad as possible to allow the consideration of the resolution of a wide range of disputes. Much work can be done, and will be done soon, in the improvement of small claims courts. What is needed in addition, the great opportunity here, is the provision for the support of alternatives to courtroom resolutions.

A Resource Center is vital in order that lessons learned can be shared. While the funds proposed for distribution to the States is quite minimal, it does at least represent a beginning, which is of critical importance.

I am persuaded that if encouragement is given by the Congress to States and local communities to make a start, and lessons learned throughout the country can be applied, this Congress will have made possible in a substantial way, the promise of the Founders and the Constitution that the protection of one's property, and the pursuit of happiness shall not be a shallow one. It will be a promise that can be made good.

Exhibit 1

RESOLUTION

Whereas, all manner of effort should be considered with respect to reducing court case loads in the overcrowded courts of the State of Gerogia and elsewhere, and

Whereas, both the interests of justice and judicial economy are served by processes which expedite out-of-court resolutions of minor disputes, and

Whereas, the Neighborhood Justice Center of Atlanta has been assisting in the resolution of such disputes since approximately March of 1978 and has succeeded in doing so in a very high percentage of the cases referred to it by the courts, government agenices, legal services organizations, and law enforcement personnel, and

Whereas, studies presently underway are expected to demonstrate that said mediated resolutions promote considerable savings in the courts, other public assistance and legal services agencies, and among the disputants, and

Whereas, the Honorable Griffin Bell, United States Attorney General, has cited the Neighborhood Justice Center of Atlanta as an excellent program seeking to resolve the problem of congested courts,

Therefore, be it hereby resolved, By the Younger Lawyers Section of the State Bar of Georgia that it recognizes that the Neighborhood Justice Center of Atlanta is performing a useful service to our courts and to members of the Atlanta community and the Younger Lawyers Section hereby commends—for their excellent effort, diligence, example, and imagination—the officers, staff, and volunteer mediators of said Neighborhood Justice Center of Atlanta, as well as the judges, court officials, and others responsible for aiding in the Center's successful performance to date.

This 24th day of March, 1979.

Exhibit 2

[The Atlanta Journal and Constitution, Sunday, June 10, 1979]

Arbitration System May Keep Disputes Out of Courtroom

(By Beau Cutts, Constitution Staff Writer)

Savannah.—The State Bar of Georgia will conduct an in-depth examination of a major new means of resolving legal disputes outside traditional court procedures, the new president of the State Bar said in an interview.

The result of the new system would be quicker, cheaper service for the public and a cut in the heavy case load in the courts, said Kirk M. McAlpin, an Atlanta lawyer who became president of the bar on Friday.

The State Bar of Georgia was created by judicial order of the Supreme Court of Georgia. Membership in the organization is mandatory for lawyers practicing in Georgia.

McAlpin received his law degree in 1948 at the University of Georgia and has practiced law in Savannah until 1963 when he joined the Atlanta firm of King and Spalding. He is in the litigation section of the firm. Trying libel and environmental cases has occupied a considerable amount of his courtroom time in recent years.

Highlights of the interview follow:

Question. For your years as president of the State Bar, do you have in mind some program of particular public interest?

Answer. One of the areas I think of great interest to the public is mediation and arbitration. This would be a way to settle many matters out of court by the parties in dispute, selecting a qualified lawyer to help them reach a decision.

Question. How are you developing this concept?

Answer. I have appointed a committee to examine the potential in this area. That committee will be chaired by Charles Weltner, a Superior Court judge of Atlanta. They will make recommendations which will help the program we face every day—and overload of cases in our courts.

Question. The delays, especially in civil cases, are almost intolerable in some courts.

Answer. This development I am discussing could have a great impact on the public and the courts. When somebody has a dispute, he wants it resolved immediately, and he has every right to.

Unfortunately, with the limited resources given our courts, cases have to wait their turn. If we can find a way to shorten those cases, the public will be better satisfied.

Question. How would arbitration work? Like an unofficial court?

Answer. Let's say we had a contract for you to deliver 1,000 cartons of goods to me, and a dispute arose over your delivery. Under arbitration, I would have a lawyer and you would have a lawyer. We would voluntarily enter arbitration and be bound by the decision of the well-respected lawyer acting as the arbitrator.

Question. Would the mediation process—reaching a compromise by mutual agreement—as well as the arbitration be geared primarily for businesses or individuals?

Answer. For individuals, primarily, and perhaps, small businessmen rental disputes for payment of merchandise, debtors.

Debtors very much so where his wage may be garnished unless he can get a quick resolution when he thinks he is right.

TESTIMONY OF HON. JACK P. ETHERIDGE, SENIOR JUDGE, FULTON SUPERIOR COURT, ATLANTA JUDICIAL CIRCUIT, AND CHAIRMAN OF THE BOARD, ATLANTA NEIGHBORHOOD JUSTICE CENTER; LINWOOD R. SLAYTON, JR., DIRECTOR, ATLANTA NEIGHBORHOOD JUSTICE CENTER; AND EDITH PRIMM, DEPUTY DIRECTOR

Judge ETHERIDGE. Thank you, Mr. Chairman.

I am very pleased to be here and appreciate the invitation very much. As you have already indicated, Linwood Slayton is joining me here. He is the director of the Atlanta Neighborhood Justice Center. And to my left is Ms. Edith Primm, associate director of the center, who has done a superb job there.

Because of that and her knowledge in this whole area, I have asked her to come so that if there are questions from the committee, she might respond.

As of course this committee knows very well indeed, there are effective alternatives to courtroom dispute resolution. The critical question and the great challenge that we have is to find the best ways to use those alternatives and the best methods to use them so that people who have disputes can have them resolved in a fair and prompt way.

One of the things that has happened in the last 2 or 3 years has been the experiment of dispute resolution centers as we have called them, neighborhood justice centers.

As you know, there have been three of them developed under the aegis of the Justice Department and with the assistance of LEAA with its funding. Those have been in Los Angeles, Kansas City, and Atlanta.

I would like to take a few moments to chat about those centers. This will be only a very brief comment.

The first thing I want very clearly to say is that the creation of such centers arose from voluntary work. It was sacrificial work on the part of a great number of people and not by any legislative or executive fiat. I think it needs to be said more and more that things of this sort don't just happen because of someone's idea. They happen because people are willing to contribute their time and effort on the local level. That certainly has been true of these three centers.

What they have undertaken to do is to be free enough to experiment with techniques. You will hear later during the morning, I am sure, some results from the evaluations that have taken place, and very intense evaluations indeed have occurred.

One of the marks of these centers has been the sense of freedom they have felt to experiment with techniques.

Now we find our need is to evaluate those experiments and see what is working. One of the lessons we have learned is that the legislation which would effectuate this movement, and I think it is a movement now across the country, that is, the recognition that alternative dispute resolutions should be used and can be used outside the setting of the courtroom, should not be narrow, but should indeed be broad in its form.

Now, having some experience on the bench for a good many years, and serving this year as chairman of the National Conference of State

Trial Judges, I would like to express what I think to be the general sense of acceptance of this idea by the bench and the bar.

I look not only to the experience of knowing a good many judges and lawyers around the country, but from the experience of attending and teaching at the National Judicial College and also in Georgia.

I think it is very important for there to be an understanding that discussion of alternative dispute resolutions does not imply an attack on the judiciary or legal profession. I don't think it is perceived as such by either of those groups.

Let me give you two examples. Attached to my brief statement is a resolution by the younger lawyers section of the Georgia Bar Association, a very large and effective group in our State. They have, as you will see, unsolicited by our neighborhood justice center, proposed and adopted a resolution which is very flattering and very supportive.

The Atlanta center, as is true of Los Angeles and Kansas City, is greatly supported by the bar. Many of the members of our bar are lawyers. The president of our neighborhood justice center in Atlanta is a lawyer. I just don't think that it can be contended that there is any difficulty with the support of the bar generally for these techniques.

Similarly, and I think interestingly, the bench across the country favors this. The committee has received statements already that would indicate that. The local bench in Atlanta, for example, has been extremely supportive. We have many of our cases referred from the courts. We have on our board the court administrator of the circuit, probation officers, chief probation officers, and so forth and so on.

So we have learned that we should not be worried about the lack of support from those two important and, I think, indispensable groups.

I would like to read a paragraph or two from a judge who wrote us an unsolicited letter which I think sums up in a beautiful way what many judges feel. He says,

> When I act as a magistrate in this court, I refer as many family disputes and petty matters as I can to your center, and the results have been good. I find that it gets out of the system cases which never should be there and are costly in human factors as well as taxpayers dollars.
>
> I recognize that these disputes must go somewhere. I feel that we have too often failed to establish other agencies that can create the atmosphere of the community to handle matters that should be kept at the community level—matters that are the result of social conditions brought on by urbanization and that lay in the domain of the gray area (of the law).
>
> We have used the courts as a great rug under which we sweep human souls and statisticized them as criminals.—Honorable Dan Duke, State Court of Fulton County, 1979.

This is part of a letter that Judge Dan Duke wrote to our center. I would like to point out something that we have learned from experience in the Atlanta Center and I think it is true in the others as well.

Indispensable to this concept is the use of mediators. Mediators are people who are drawn from the community, who came to these centers voluntarily, who have been carefully selected. Miss Edith Primm has done a brilliant job in developing that in Atlanta.

They have been used very heavily to mediate disputes. They come from all walks of our community. Our mediators come from highly

trained graduate students to those who have barely any education at all, but do have the temperament to do this job.

We have found that this has a tremendous impact in the community because each of these mediators in almost every case become missionaries for this concept. You are going to hear later data that show that over 90 percent of those, either complainants or respondents who have used the mediation process, have been pleased with it. I think that is something that is distinct from any other programs that have been developed of this sort. That is to say, the wide use of people of the community to be peacemakers, not judges, not jurors, but peacemakers among fellow members of their community.

Our staff in Atlanta and the other two areas has consisted of only five people full time. But we have used volunteers from law schools and others to do a variety of different types of work for the center. We think that this has been a very fine use of these people.

Finally, I would like to point out two things that I think are exciting. I think they have come in some measure from the use of the Neighborhood Justice Centers and their visibility which has been good.

One is that throughout this country there are studies being made, actions being taken in this area, which I think would not have been taken but for what has happened with the centers.

Two immediate examples I would point to that I know about well. One is that only last week the president of the Georgia Bar Association announced that the major thrust of the Georgia Bar Association will be the study of alternative methods of dispute resolution.

The chairman of a special committee will be a distinguished former Member of this Congress. Judge Charles Weltner, Mr. Linwood Slayton, and I will be active with that committee.

I think that is an enormous tribute to the encouragement of this Congress and the Justice Department and others have given to this whole concept.

Finally, and I would close with this point. It is one you will not find in the data. It will not be quantifiable, and I am not certain that it can ever be something that you can put on a chart in any way. It is so exciting, it is so significant, that I want to call it to your attention.

In the evaluation of the work done by the centers, every other person in Kansas and Los Angeles who has had disputes mediated has been interviewed. I mean every one of them. Every other one in Atlanta has been interviewed because of the difference in the volume.

One of the things that these people are volunteering has been, I think, surprising and I want to share that with you. These people are saying that as a result of the mediation process they went through, they have subsequently avoided other disputes which they say they would not have been able to avoid had it not been for what they learned through this process.

In many areas of life, people get in fights because one gives them a bad look or something as silly as that to us. But it is very real to them. I think that what happens with alternative dispute resolution, what happens when you offer them a chance to have a dispute mediated by someone who is not a judge, is that we are teaching and we are being taught. I think that is a lesson that is coming from this that is enormous and can have an impact across this country that is, while unmeasurable, tremendous.

Mr. Chairman, members of the committee, I thank you again for the chance to appear. I will be delighted, of course, to answer any questions at the proper time.

Mr. KASTENMEIER. Thank you, Judge Etheridge. I think the panel will forbear in questions until we have heard from your colleagues. Now, I would like to recognize Mr. Linwood R. Slayton, Jr.

[The prepared statement of Linwood R. Slayton, Jr., follows:]

STATEMENT OF LINWOOD R. SLAYTON, JR.

Mr. Chairman, Honorable Committee Members and Friends, thank you for affording me the opportunity to share my views on the proposed Dispute Resolution Act today.

My name is Linwood R. Slayton Jr. Esq. I am and have been the Executive Director of the Neighborhood Justice Center of Atlanta, Inc. since its inception in late 1977. I am an active member of the State Bar of Georgia and was formerly the Director of Planning and Evaluation for Economic Opportunity Atlanta—the local community action agency in Atlanta.

In my capacity as Executive Director of the NJCA, I have dealt with the myriad day to day administrative, programmatic, political and policy-related issues and concerns attendant with the successful operation of a metropolitan, comprehensive dispute resolution program.

I have many specific concerns which I feel are relevant to the deliberations of this body. My concerns may be loosely grouped in the areas of:

A. Legislative policy considerations.
B. Programmatic considerations.
C. Program impact considerations.

A. LEGISLATIVE POLICY CONSIDERATIONS

After carefully reviewing H.R. 2863, H.R. 3719 and S. 423, I offer the following observations and recommendations:

Proposed scope of dispute resolution legislation

The NJCA has handled a very wide array of disputes involving money claims, neighborhood problems, domestic and intra-family matters, merchant-consumer controversies, landlord-tenant disputes, and a host of other relatively minor problems which require the assistance of third parties to facilitate effective resolutions. We have seen first hand the potential effectiveness of mediation as a dispute resolution technique—irrespective of the characterization of the problem as civil or criminal in nature. The reality is that the vast majority of disputes we have handled are multifaceted, that is, they typically involve some combination of civil (money and/or property concerns) and criminal (violent or disorderly behavior) overtones.

For this reason, we feel and our experience suggests that the scope of the enabling legislation being considered should be as wide as possible. The language reflected in H.R. 2863 is general enough to enable programs to handle minor civil and "criminal" disputes as the need arises. Comparatively, the language in H.R. 3719 and S. 423 limits the type of disputes to be handled to consumer and civil problems in the main.

The Atlanta NJC receives from 60–70 percent of its cases by referral from the local courts. Our court referred cases are both criminal (misdemeanor offenses e.g. disorderly conduct, simple battery, assault, criminal trespass, abandonment, theft by taking or deception) and civil (small claim cases involving monetary disputes over less than $300, landloard-tenant and merchant-consumer matters). It is important to note that it is the minor criminal case in which one party swears out a warrant against his/her spouse, lover, roommate, friend or neighbor that I am referring to—not stranger versus stranger crimes involving violent behavior and/or severe injury to another. It has been our experience in Atlanta that it is unwise if not impossible to look at a case as a "criminal" matter exclusively because there is always a related monetary and/or civil aspect involved as well.

Example: Mr. A and Ms. B have been living together but are experiencing problems. They agree to separate and Mr. A vacates their apartment leaving Ms. B with two children and the furniture. Two weeks later, Mr. A asks Ms. B for

the color television that they purchased jointly and she refuses. Mr. A angrily goes over to the apartment, kicks down the door, slaps Ms. B in the face and removes the television to his new apartment. Equally incensed, Ms. B take out a warrant against Mr. A for battery, criminal trespass and theft by taking.

Query: Is this a "criminal" matter that should best be resolved by a judge in a formal court of law pursuant to the statutes of the State of Georgia? In fact, the dispute arose over the color television which Mr. A had helped to purchase. Clearly, if the parties' differences over the television can be resolved to their satisfaction, the likelihood is strong that there will not be a repetition of the "criminal" behavior displayed.

This example points to the very real fact that the kinds of problems which are handled by our center do not fit into neat categories which happen to be consistent with existing legal and statutory definitions. The NJCA is in existence to help people to resolve their problems expeditiously, informally and in a manner that is most likely to encourage long-lasting results. This is true whether a case is civil, criminal, both or neither. The obvious conclusion of this point of view is that we strongly suggest that the Committee endorse and pass H.R. 2863 which will permit programs funded thereunder to handle both "criminal" and civil disputes and to handle all appropriate problems in the same manner.

Related to the general topic of the scope of the proposed legislation is the fact that each of the different bills vary somewhat with respect to funding levels. The proposed $200,000 per project ceiling included in H.R. 2863 makes sense and should help to ensure that a maximum number of jurisdictions will be able to benefit. On the other hand, the other two bills provide for annual funding of $15,000,000 as opposed to $10,000,000 as included in H.R. 2863. Our experience in Atlanta suggests that a quality program which handles from 3000–4000 disputes per year can be operated with a maximum federally funded budget that does not exceed $200,000.

Finally, we find it difficult to envision any meaningful role that the Federal Trade Commission could perform as proposed in S. 423. This, of course, is consistent with our position regarding the needs for centers to deal with both civil and criminal matters. The NJC pilot effort was administered by the U.S. Department of Justice's National Institute of Law Enforcement and Criminal Justice. This office provided the necessary leadership and support to help to make the NJC concept a workable reality. They should be commended for their input during the critical field test phase. Similarly, the Atlanta NJC will be funded for an additional year by LEAA's Court Adjudication Division. All indications suggest that the Justice Department is the appropriate federal agency to handle the NJC type programs. I do not anticipate any problems with LEAA in the coming grant period (July 1, 1979–June 30, 1980) primarily because they have had considerable experience in administering court-related projects of this type.

B. PROGRAMMATIC CONSIDERATIONS

A primary programmatic concern involves the question of program thrust. Specifically, should a dispute resolution effort seek to alleviate court congestion or facilitate greater access to justice? This is not a simple question which should be treated lightly. Rather, the chosen direction will shape the image and policy of individual programs. In Atlanta, we opted to align our program with the court as much as possible. Today we are handling from 120–150 court referrals per month. This represents about 60–70 percent of our monthly caseload.

The Atlanta approach, I feel, is consistent with our position that there is no real need to distinguish between civil and criminal cases—they are all "people problems" which must be resolved quickly, inexpensively but effectively.

There continues to be considerable debate over whether a program should be system-based, i.e., linked to the courts, police and/or the prosecutor or community based, i.e., not linked to any institutional referral source but seeking cases solely from the population to be served. Objectively, I believe that the answer to this query is contingent upon the desire of those in the justice system to work with dispute resolution programs. It is clear that centers must have the ongoing support and cooperation of the courts to be effective in reducing court congestion. There does not seem to be any clearcut answer which can be applied across the board in all jurisdictions. The key, I feel, is rationally assessing the relative merits of available approaches and making a decision that will work best in a particular locale. Therefore, enabling legislation should be flexible enough to permit a wide range of options rather than restricting the options potential grantees might have in establishing new projects.

The experience we have had in Atlanta is indicative of the potential value inherent in aligning a private, non-profit group with the formal justice system machinery. Unlike the Los Angeles NJC which relies primarily on self referrals (walk-ins for cases, the Atlanta NJC encourages and receives case referrals from the courts, police, city and county service agencies, other community organizations, Legal Aid, the organized Bar, the Better Business Bureau, and walk-ins. In one sense, the structure of the Atlanta effort enables us to enjoy the best of both worlds, i.e., we are closely linked with the courts but have complete independence and flexibility to accept cases from any source. Also, our autonomy lends us much more credibility with the disputants than if we were a part of the courts of any part of the system.

C. PROGRAM IMPACT CONSIDERATIONS

We are often asked whether the existence of the NJC has resulted in a reduction in court congestion. While the complete data is still being assembled by the Institute For Social Analysis (ISA), the national evaluation contractor, a cursory review of court filings in the State Court of Fulton County reveals that in 1978 there was a 4.5 percent reduction in the number of civil cases filed as compared with the 1977 level. Of importance is the fact that NJCA staff and volunteers are physically present at the Small Claims filing desk to divert potential litigants and to channel appropriate complaints to the NJCA. Similarly, in 1978 there was a 17 percent increase in criminal warrants over the 1977 level. Of importance here is the fact that the NJCA does not receive criminal case referrals prior to the issuance of a warrant or an arrest. Instead, once a warrant is issued or an arrest is made, a probable cause hearing is held. It is at this point that the presiding Judge will decide to refer a case to the NJCA for mediation and to continue the case for thirty days so the matter can be mediated and resolved. If the mediation works and the disputants resolve their differences, the court will dismiss the case, in effect, removing the case from the calendar and the docket.

Another frequent question posed is whether the existence of the center and the emphasis placed on facilitating out of court settlements contributes to the development of a "second class justice system?" We think not! While it is true that more people who are poor and disadvantaged tend to be served by our program than those who might be considered to be middle and upper income level, this is a direct function of the population which interfaces with the justice system. A frequently told play on words involves a poor, black man who recently faced criminal charges in court. When asked about his recent experience in court, he replied: "I went to court looking for justice, and that's exactly what I found—JUST-US." The fact is that the poor, blacks and other minorities come into contact with the system much more than their upper and middle class counterparts. This is true regarding incidents involving criminal matters as well as small claim complaints. Thus, the congested condition of our courts must be endured by those who use the courts most frequently. Logically, any alternative which can expedite the handling of a problem, eliminate the costs to the parties, and result in resolutions which stand the test of time is preferable to the formal justice system so long as the alternative does not curtail or deny anyone's legal rights or options.

Potentially, the greatest impact the NJCA may have had may not be measurable. I refer to the fact that the center has handled a large number of domestic cases, many of which are referred as criminal cases involving charges of assault, battery, criminal trespass, etc. Domestic cases tend to involve a danger-laden situation—if the basic problem is allowed to fester and is ignored, violence may ensue as people feel they have no other viable alternative. Atlanta has been referred to as the domestic homicide capital of the country. The historical unwillingness of the police and the courts to intervene in domestic squabbles has been a serious problem. Prior to the inception of the NJCA, many couples with domestic problems had no place to turn otherthan the courts or the police. The courts either had no time, jurisdiction or interest in intervening, rendering the parties in the same or a worsened condition. We have resolved over 200 domestic disputes in Atlanta in our eighteen months of operation with over 75 percent of these cases remaining resolved after a thirty day follow-up period. Potentially, at least one life has probably been saved as well.

Costs are also a relevant concern that must be explored. Efficiency and relative effectiveness involve multiple criteria, one of which is cost-effectiveness. Clearly, the more cases a center processes and resolves, the more cost effective it will be.

In Atlanta, we are proud that our cost per referral averages about $75 and our cost per resolution averages about $175. These figures include all operational costs incurred including startup costs. A more realistic profile is $60 per referral and $130 per resolution (April, 1979 data). Comparatively, a misdemeanor case which goes to trial will average at least $500 in total costs (court costs, judge and court personnel, attorney fees, time lost from work, etc.) In Atlanta, we have been able to control our costs while maximizing service by relying very heavily on volunteer resources. We have found that the program is a natural haven for attracting dedicated and committed volunteers who wish to channel their energies towards something worthwhile and needed. We have about 60 active volunteers who serve as mediators and court intake volunteers. Mediation presents a unique opportunity for a volunteer to see the fruits of this labors immediately. For this and other reasons, mediation is viewed as a real helping experience by our volunters who represent a true asset to our program.

I trust that these observations and constructive suggestions will be afforded the consideration they are due. I know that the need for viable dispute resolution programs is real. There are a tremendous number of people who are having very real problems and find it difficult to obtain assistance in resolving same. We have filled this void most effectively in Atlanta and feel that our experience can and should be replicated in other jurisdictions in America. Thank you.

Mr. SLAYTON. Mr. Chairman, I, too, appreciate the opportunity to appear before the body today to share some of my views on the act and hopefully share with you some of the experiences we have had in Atlanta in attempting to run a quality program.

My name is Linwood Slayton, Jr. I am and have been executive director of the Neighborhood Justice Center of Atlanta, Inc. since its inception in late 1977. I am an active member of the State Bar of Georgia and was formerly the director of planning and evaluation for Economic Opportunity Atlanta, the local community action agency in Atlanta.

As the executive director I have had ample experience in all aspects of running a dispute resolution program from the very beginning to the end of the final field test period. It has been a very challenging and rewarding experience in many ways and rather frustrating as well in some respects.

My concerns today can be loosely grouped into three different areas.

The first is legislative policy considerations. In reviewing the three pieces of legislation that have been offered and are being debated, I think one common question emerges and that is whether or not we feel, those of us who have been operating programs, the scope of the legislation should be wide enough to deal with programs involving civil and/or criminal matters as well as neighborhood disputes and other interpersonal problems.

Our experience has been in Atlanta that the larger or wider the scope or jurisdiction of a program, the more effective it can be.

The reality is, as we have seen it, that problems that people have do not fit into neat categories. They are simply problems that people have. They may have some civil ramifications or criminal ramifications, but they are simply people problems.

Toward that end we handle a wide range of disputes in Atlanta involving monetary claims, neighborhood problems, domestic problems, merchant consumer controversies, employer-employee problems—problems.

That is, I think, the critical question: Do we have the capability and track record to suggest that dispute resolution in a neighborhood setting is effective and desirable irrespective of the type of controversy or dispute?

We think it is. The reality is that a vast majority of disputes we handle are multifaceted. Very often they involve some combination of civil, money, or property concerns, and in many instances criminal kinds of problems, that is, violent or disorderly behavior may occur as a result of the disputants' own efforts to come to some resolution on their own initiative.

Sometimes these problems do flareup into violent behavior and the police or courts become involved in a criminal way. The fact of the matter is, though, that the problem that causes such "criminal" behavior typically involves an interpersonal dispute. We attempt, then, to deal with that aspect of the problem irrespective of whether it has been categorized by the courts or system as criminal, or civil.

For this reason we feel that the scope of the legislation that hopefully will be passed this session should be as broad as possible to embrace both minor civil and criminal disputes, consumer controversies, or neighborhood problems.

The fact of the matter is that Atlanta received 60 to 70 percent of its cases by referral directly from the local courts. Our court-referred cases are both criminal and civil, criminal cases being misdemeanor offenses, things like disorderly conduct, criminal trespass, etc.

Civil cases tend to involve typical small claim court type cases with a monetary threshold of $300 or less. We are involved with a number of landlord-tenant matters and consumer matters, all of which emanate from the courts, the State court in Fulton County in particular.

It is important to note, I think, that the criminal cases, the kinds of cases I am talking about particularly, are cases where one party will go to a court angry and attempt to swear out a warrant against a person, wife, girl friend, former friends, neighbor. We are not talking about offenses involving extremely violent behavior or severe injury.

Our experience shows that it is unwise, if not impossible, to look at a case as a criminal matter exclusively because it came to us from the criminal court in Atlanta. We find that there are a number of related or collateral matters that embrace civil kinds of complaints and problems.

For example, if you have a situation where Mr. A. and Ms. B. have been living together but are experiencing problems. They agree to separate and Mr. A. vacates their apartment leaving Ms. B. with two children and the furniture. Two weeks later, Mr. A. asks Ms. B. for the color television that they purchased jointly and she refuses. Mr. A. angrily goes over to the apartment, kicks down the door, slaps Ms. B. in the face and removes the television to his new apartment. Equally incensed, Ms. B. takes out a warrant against Mr. A. for battery, criminal trespass, and theft by taking.

Query: Is this a "criminal" matter that should best be resolved by a judge in a formal court of law pursuant to the statutes of the State of Georgia? In fact, the dispute arose over the color television which Mr. A. had helped to purchase.

Clearly, if the parties' differences over the television can be resolved to their satisfaction, the likelihood is strong that there will not be a repetition of the "criminal" behavior displayed.

This points out the fact that it is very difficult, if not impossible, to separate a criminal and civil case. It is simply a problem and we are there to help people resolve those problems.

The next point I wanted to deal with also in terms of legislative scope is the fact that many of the bills make mention of the fact that there is a proposed $200,000 per project ceiling. We think that makes sense. We think it will insure that a maximum number of jurisdictions will be able to benefit from the legislation.

Similarly, the bills have different maximum levels of funding. Obviously, from a program operator's point of view, the more money that is available, the better. However, our experience in Atlanta suggests that a quality program can be operated which handles from 3 to 4,000 disputes a year with a maximum funded budget of not to exceed $200,000. So I think that does make sense.

I think coincident with that, however, we need to again stress the point Judge Etheridge made that you need and you must, in our experience, have a quality corps of volunteers to supplement the paid staff in these programs.

In fact, we have logged in from 2 to 3,000 volunteer hours in Atlanta in the 18 months of operation. Those volunteer hours are provided in a number of capacities, most of which involve court intake work where our volunteers actually are physically present in court, receive referrals from the judge who handles cases or refers cases to us. They interview complainants at the small claims desk to see if they are willing to use our process as opposed to going through the formal complaint system.

We found that to be a very effective way to provide volunteers in a meaningful capacity and to get maximum benefit of their services to the center which then enables our paid staff to do the work they are best equipped to do, that is, to maintain and operate the flow of cases that come through the center.

Let me move now to my second topic and that is some programmatic considerations. I think a primary programmatic concern involves the question of the thrust of the program. I think specifically the question should be put, should a dispute resolution effort seek to alleviate court congestion or facilitate greater access to justice? This is not a simple question which should be treated lightly.

Much thought and deliberation went into the plan in Atlanta and I think our board made some very wise decisions, that is, we opted to align our program with the courts to the extent possible.

In an effort to maintain a sense of independence and autonomy, we are not a part of the court structure. We are not a part of the county bureaucratic machinery. We are a private, nonprofit corporation operating independently, physically, and structurally from the system, and we are perceived by the people who use the center that way.

I think that makes a difference and needs to be considered. The fact of the matter is that when people understand that we operate in a two-story home in a residential neighborhood more or less with a very informal setting, it makes a difference to encourage people to talk very frankly and candidly and openly about the problems that bring them to the center.

We are talking about very personal kinds of matters in many instances, domestic disputes involving husbands and wives. Perhaps they have gone along for years and years and years and much of the mediator's task involves getting that rapport and confidence established so people can really talk and get things on the table.

We think our structure facilitates and lends itself to this kind of experience and it has proven to be fairly effective. I think there is a related question as to whether the program should be system based or community based. System based refers to the question of whether they should be linked formally or informally to the police, courts, or the prosecutor's office, or community based referring to whether or not we should seek cases solely and primarily from the target population.

There is no standard answer to that question, I think. I think what needs to be done is consider what will work best in each jurisdiction. Therefore, toward that end legislation should be flexible enough to permit potential grantees a wide range of options rather than in any way attempting to restrict the options that they might have in establishing programs and projects if this legislation in fact does pass.

We think our structure and our system gives us the opportunity to enjoy the best of both worlds, that is, we are closely linked with the courts but have complete independence and flexibility to accept cases from any source.

The fact of the matter is that while 60 percent of our cases do come from the court, the remaining 40 percent of cases come from a wide range of sources, the Better Business Bureau, the Governor's Office of Consumer Affairs, the Legal Aid Society, the organized bar itself, local poverty programs, community action agencies, and various governmental social service agencies are referring cases to us.

Most encouragingly—and this is very consistent again with the judge's remarks—we are getting a number of situations where people who came through the process have referred their friends and neighbors to us. They say, try the neighborhood justice center. They helped me and maybe they can help you.

The people at the center seem to really care. That makes a difference.

So we are seeing an increase monthly in the number of walk-in cases that come into the center, unsolicited and not referred by formal organizations or institutions. To us that says the message is getting across and we are doing a job.

The third and final area is the question of program impact. We are often asked whether the existence of the center in Atlanta has resulted in any reduction of court congestion. I think the representative from the Institute for Social Analysis, Mr. Cook, will speak to that.

But we have found in 1978 in the State court of Fulton County there has been a 4.5-percent reduction in the number of civil cases filed as compared with the 1977 level. I think what is important here is that our volunteers and staff are physically present at the small claims desk where we divert potential claimants from entering that system.

It is very encouraging to them to know that they do not have to file a filing fee and there is no 30- to 60-day wait that they might have had if they went through the formal system.

Perhaps very interesting to them also is the fact that use of the system, the center itself, will not waive any rights that they might have to use the formal court process if mediation fails or we are not able to get a voluntary agreement from the party being complained against to participate.

Similarly, in the State court of Fulton County in 1978 there was a 17-percent increase in criminal warrants issued over the 1977 level. What is important here is that our staff, and our center does not receive a

criminal case prior to the issuance of a warrant, so as a result the cases do enter the system:

We are able to get involved at the earliest point and that is at the point where a judge would hold a preliminary hearing, a probable cause hearing, and rather than binding the case over will refer the case to us for 30 days to see if we can settle it, and if we are effective in doing that, the case, 9 times out of 10, is dismissed.

I think another question that has emerged considerably and which I may as well deal with straightforwardly is the question as to whether or not the existence of the center contributes to any development of a second-class justice system.

We think not. We think that while it is true that more people who are poor and disadvantaged tend to be served by our program in Atlanta than those who might be considered to be middle or upper income level, the fact of the matter is that this is a direct function of the population which interfaces with the justice system.

I am frequently told a play on words that we hear in Atlanta sometimes involves a poor black man who recently faced criminal charges in court. When asked about his recent experience in court, he replied, I went to court looking for justice and that is exactly what I found, just us.

The fact is that the poor, the blacks, and other minorities come into contact with the system much more than their upper and middle income counterparts. This is true regarding criminal matters as well as small claim matters.

So, I think, then, in answering the question of second-class justice, the congestion of our courts must be incurred by those who use the courts more frequently. Therefore, we are serving the segment of the population that has been referred to as poor, disadvantaged, minority.

Any alternative that can expedite the handling of the problem, eliminate the costs to the parties, or at least abate them somewhat and result in resolutions which stand the test of time is preferable to the formal system so long as that alternative does not curtail or deny anyone's rights or options legally.

Now perhaps, the greatest impact we may have had is one that cannot be measured. I refer to the fact that the center has handled a significant number of domestic cases, many of which come to use in the form of criminal cases involving charges of assault and battery, criminal trespass and abandonment.

The fact is that the domestic cases involve a danger-laden situation. If the problem is allowed to fester and is ignored, violence tends to ensue. Some people refer to Atlanta as the domestic homicide capital of the country. I think the historical unwillingness of the police and the courts to intervene in domestic problems has been a concern and has resulted in this sense of helplessness when domestic problems do emerge.

Prior to our existence, there were not too many resources around where domestic problems could be handled. We have resolved over 200 domestic disputes in Atlanta in our 18 months of operation. Seventy-five percent or more of these cases have remained resolved during the followup period.

We think that at least probably one life may have been saved as a result of the existence of the center and the fact that people have a

forum where they can sit down and intelligently, rationally, most of the time, discuss their problems and work out a solution they both can live with.

Finally, in terms of costs, we have been asked if we are cost effective. It is difficult to answer that. The data is still being computed. Right now we are averaging about $75 to $100 a case referred to us, and about $175 to $200 as a resolution cost. These costs, in my view, are fairly high inasmuch as they do include the startup costs and all the various administrative costs that are associated with setting up the program as a pilot program.

We think it is realistic to look at $50 to $60 per case as a reasonable projected figure once the program is operational on an ongoing basis and the startup costs have been absorbed.

By comparison, in talking with some of the members of our board who are active in the courts as administrators or clerks of the court, they estimate that it takes at least $500 to run a case through the formal justice system, when you consider attorney's time, court time, judge's time, clerk's time, the various court costs, time missed from work, et cetera.

So by comparison we do think we are cost effective and we would welcome any more definitive statements and studies from researchers and evaluators that will support that.

In conclusion, I would like to say that the experience has been an interesting one. We think we are providing a meaningful service, and more importantly, we are helping people. That I think needs to be the primary point and focus of this deliberation.

I thank you again.

Mr. KASTENMEIER. Thank you, Mr. Slayton, for a very informative statement.

The Chair would also like to acknowledge the presence at the table of Miss Edith Primm, deputy director of the Neighborhood Justice Center of Atlanta. It is my understanding, Miss Primm, that you did not have a formal statement to make.

Ms. PRIMM. That is correct.

Mr. KASTENMEIER. I would like to ask Mr. Slayton, you referred to court referrals and other institutional referrals through the Neighborhoor Justice Center of Atlanta.

You also indicated that this was not necessarily—that you arrived at this system in Atlanta and suggested by implication that perhaps Kansas City and Los Angeles were doing things differently.

Mr. SLAYTON. Yes, sir.

Mr. KASTENMEIER. In what respect? Do they rely on walk-in and other types of contacts?

Mr. SLAYTON. Los Angeles is considered to be what you might call a community-based model in that they solicit and seek community referrals, self-referrals, and walk-in cases primarily. They are not tied to the courts in any formal manner. They have attempted to solicit referrals from some area small claims courts in the outlying areas of the city.

But by and large their mission has been to test the feasibility of a community-based model, self-referrals. As a result, their caseload has been somewhat less than that of ours in Atlanta. Kansas City is a

part of the city government structure and seeks to get the bulk of its referrals from police and the prosecutor's office.

Inherent, I guess, in their problem—Kansas City's—is that the program is a part of city government and only serves the city's residents. The courts, however, are county operated. This creates problems in that it has been difficult for the Kansas City program to work effectively in the county court system.

We in Atlanta opted to aline ourselves as closely as we could with the court simply because we felt that that made the most sense in our jurisdiction.

I think my statement really is to suggest that there is no one pat answer for every city or every jurisdiction. I think you need to look at where the need exists and where you think you can do perhaps the more effective job.

That is what we attempted to do in Atlanta to a large degree, I think, because of the involvement in the preliminary planning of the members of our board and the wisdom that they demonstrated and the experience that they had. I think that was part of the judge's point.

Mr. KASTENMEIER. One of my concerns relates to the perception of the role of a prosecutor in these various models. Some people assume that the prosecutor will be more directly involved, but many assume that as a matter of fact the prosecutor should never be present in the minor disputes resolution forum.

Indeed, he may know and approve of the ongoing attempt to resolve a particular conflict which may involve a violation of criminal law. He may act upon that informally. But he does not actually participate in any of these proceedings, does he?

Mr. SLAYTON. No. In Atlanta we have not been involved at all with the prosecutors. I guess our court system is set up somewhat differently in that you do not have to go before the prosecutor to get a warrant. You can go before the clerk of the court. The only time the prosecutors get involved in our system is when probable cause has been found and cases are bound over for trial at the misdemeanor level or the felony level.

But in those jurisdictions where they do interface directly with the prosecutor's office, to my knowledge the prosecutors are not involved in the actual mediation system itself. It is a case involving the two disputants and the third-party neutral mediator.

Many jurisdictions, I think, have responsibilities to report back to the prosecutor as to the outcome with varying degrees of detail. We, for example, report back to the judge simply that the case has been mediated, that the parties have resolved it between themselves and have reached a written agreement.

If the parties themselves want to provide the judge with a copy of that agreement, and sometimes he may ask, that comes from the parties as opposed to coming from us.

So, to answer your question, the prosecutors are not involved in the forum itself.

Mr. KASTENMEIER. Let me ask Judge Etheridge whether he sees any problem with the lack of formal procedures, or whatever else he might proposed in connection with protecting disputants against the use of

their statements as evidence against them in subsequent criminal or civil proceedings.

Is there any way that these dispute forums can literally do without formal due process guarantees and yet be mindful of protection of those who innocently and unknowingly may be involved in the informal dispute resolution process?

Judge ETHERIDGE. That is a very important question and one which concerns us and has from the very beginning.

First, I would say that the mediation process almost universally is strictly a voluntary one. If either side at any time wishes to withdraw, they may do so. If it happens to have emanated from a court, it will go back to that court.

So that, first, both sides are involved on a voluntary basis, seeking to have their dispute not judged but mediated.

Second, we do not know of any instance in the country yet where this has been a problem. You are speaking, of course, of the privilege that might be a problem here. We don't know of any case that has arisen. There is a decision from a trial court in Florida which has ruled that the mediator is privileged and upon subpena, is not compelled to testify as to what might have been said during the mediation, during the dispute.

As far as I know, there is no other opinion, no other decision on that question.

But if there were, I think that would be a State question, not a question for the Congress to deal with, if it had to do, of course, with State law.

Therefore, it seems to me that addresses itself to all of us who are concerned about this. The dilemma, and I am not suggesting it is a bad one, but the dilemma is, of course, the protection of due process on the one hand and the effective disposition of a dispute on the other.

As we all know, sometimes injustices are done in the name of due process. We want to avoid that realistically. We don't see that as a major problem. We have not had that as a problem in the last 18 months that we have been in business.

Mr. KASTENMEIER. I would like to yield to the gentleman from North Carolina, Mr. Broyhill.

Mr. BROYHILL. Thank you very much.

We appreciate so much your coming to share your experience with us. This is most valuable to us as we are considering bills before both of these subcommittees.

The question that I have—I suppose I should direct this to Mr. Slayton since he does have the experience of or the responsibility of directing the program.

I might preface the question by saying that our subcommittee on the Interstate and Foreign Commerce Committee has been primarily interested in consumer matters. The question is: Is this mechanism useful in resolving consumer disputes?

Mr. SLAYTON. Very much so, Mr. Congressman. The fact of the matter is that consumer-merchant controversies, as we label them for statistical purposes, represents the highest single category of type of cases that we handle.

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Mr. BROYHILL. What percent?

Mr. SLAYTON. Twenty-one percent of our cases when they enter the process are merchant-consumer controversies of various types. What we have found in the merchant-consumer cases is that they are most likely to be conciliated as opposed to be resolved through mediation. That is, once a complaint comes to us, either by phone or referral from whatever source, we then, in turn, contact the party being complained against, typically the merchant.

We explain to him or her that a complaint has been filed and that the nature of the complaint is thus and so. We solicit from them a response as to whether or not that, in fact, fairly represents the situation and whether or not they are willing to come in on a voluntary basis at their convenience to mediate the matter with the complainant.

Typically, what happens is that if there is any validity at all in their minds—the merchant's mind—to the complaint, they will agree to resolve the matter there to our staff person. They will tell them: have the party call me, come see me, I will refund their money, exchange their product or whatever the nature of the controversy might have been; I am too busy as a businessman to come there and sit down for an hour and talk. I owe her the money; I will pay her the money.

On the other hand, if they feel there is no validity whatsoever to the compaint, typically they will be the ones to refuse to participate voluntarily using a number of reasons.

What we have attempted to do to avoid or get around this traditional reluctance on the part of some of the merchants is to conduct field mediations. Many times we have conducted mediations in their offices simply because one reason they refused to come voluntarily is because they are too busy; they have to run a business and earn a living, so we bring the disputant to them.

We have been very effective, I believe, in resolving those that can be resolved. Typically, when you get into that situation, you have an imbalanced situation many times. We are dealing with contracts many times, and they feel, and correctly so, that the merchants have law on their side, so let the people sue them. They will take their chances in court.

Sometimes we are not able to persuade them otherwise. But in terms of sheer numbers, 21 percent of our cases are consumer-merchant controversies and they are most likely to be resolved as a conciliation matter than a mediation matter. If they reach mediation, we are able to solve it at the same rate as any other case.

Mr. BROYHILL. Judge Etheridge, I wonder if Ms. Primm might give you an example of a mediation situation which she is familiar with.

Ms. PRIMM. A recent example was Tuesday of this week. We had a complaint in which a lady had taken her watch to be fixed, and all she needed was a crystal on the watch. The watch was sent somewhere in Ohio. A month later, she hadn't gotten the crystal or the watch. This dispute was a total $4, and, anyway, the lady had gone to the small claims court to file a complaint, and we, in fact, sent a mediator to the jewelry shop because the man called and said he would be happy to come except he had a one-man operation. So we sent the mediator down and actually mediated the dispute in the lobby of the office building where most jewelry shops are in the city. So, over a $4 complaint, we were able to get this done.

One other comment: The greatest proponents of our center are the clerks in the Fulton County Small Claims Office of the State court. I can never go into that court, which I do frequently, without the clerk stopping right in the middle of mid-sentence and saying, "There is a lady from the Justice Center; why don't you take your claim there?" And I have to throw up my hand and say, "I don't have a file; wait a minute." So, when we are not down there, they are so enthusiastic about what we are doing, they hand out the brochures, and people call us, and we feel having somebody down there is crucial, but we get a tremendous number of cases because the clerks feel it is effective.

Mr. BROYHILL. You answered several questions I had. And one other question I have is with respect to your comments about finance. How would you anticipated you would continue the operations of your neighborhood justice center? Would this be transferred to the State or to the city, assuming that financial assistance from the Federal Government would expire sometime in the future?

Mr. SLAYTON. We think there are a number of options, many of which we are pursuing. The Fulton County Commission, we think, is the logical source of funding in that 60 percent of our cases come through the courts of the county. Of course, we do have somewhat of a proposition 13 situation in Atlanta like everywhere else where resources are tight. We suspect that a good portion of the block grant that goes to the State can be allocated and earmarked for dispute resolution purposes around the State.

I think the point that Judge Etheridge made that the organized bar is active and interested in this problem suggests that there may be funding protection at some point down the road there.

We work very closely with the number of volunteer and private organizations, such as the Junior League. Many of our voluntary mediators are Junior League members. I don't think it is too unwise to say that down the road we think they would be willing to support financially some portion of the program.

I think to be effective a program needs to get resources from a number of contributors, as well as State and local government and, to some extent, the Federal Government. So I don't envision, however, any situation where the program can become self-sustaining just to charge fees and things like that. I think when we do that we will change the character of the program somewhat.

So, I think there are a number of options, local options, State options. and private resource options that can sustain the program over a period of years.

Mr. KASTENMEIER. I regret to interrupt at this point, but the second bells for a recorded vote have sounded, and those of us here have to leave for the House floor. Therefore, we will recess for 10 minutes. I know the gentleman from New York, Mr. Scheuer, has questions. If the panel will be patient, I think there are some other questions several of us might want to ask. Accordingly, the subcommittee will recess for 10 minutes.

[Brief recess for Members to vote.]

Mr. KASTENMEIER. The meeting will come to order.

When we recessed, the gentleman from North Carolina was in the process of asking questions, so I think we will call on the gentleman from North Carolina, Mr. Broyhill.

Mr. BROYHILL. One other question with regard to financing. Do you have any additional financing at this time other than the Federal grant?

Mr. SLAYTON. We are just in the process of hopefully processing a 1-year extension grant through LEAA for a total of $160,000 roughly, 10 percent of which is required to be a local match. We have made a request to the City Council of Atlanta as well as the Fulton County Commission to come up with the match. That is the only additional moneys now that we are attempting to generate.

However, we are also in the process of hopefully contracting with the State to provide some training to the people in the area of education in dispute resolution which will generate some funds as well that we can apply to the match requirement.

So, at this point, those are the only non-Federal resources that are hopefully looming on the horizon.

Judge ETHERIDGE. May I add to that, because I think I want to make a little more optimistic statement than that, because we are not worried about it. We feel good about the fact that the county commission has been very supportive and impressed, and we think they will appropriate funds, but there is something else I would like to comment on.

In our group of mediators, plus our staffing, we have developed a very, very fine expertise in the field of mediation. This is a special skill, and thanks to Ms. Primm's work in overseeing this mediation, we have a highly qualified group of mediators, and we are not embarrassed at all to say to anybody in the country that they are available to train others in mediation. As Mr. Slayton just indicated, we believe we will shortly have a contract with the State to train various State employees in the field of mediation. We think this is an evangelical kind of thing to do, and we are going to do that.

One of the things we are determined to do in Atlanta is to accomplish these two goals: One, that we would be self-sufficient with respect to the Federal Government, and two, that we will replicate or see that things are replicated that work in Atlanta. For example, almost every week—Ms. Primm might wish to comment on this—we hear from other people around the country. She has taught in Reno, Nev., at the Judicial College, and she and Mr. Slayton are going about the country teaching in this subject. We use mediators to teach, and we think we can use that kind of skill to generate funds for the center—as, for example, the contract with the State. We are trying to use every imaginative way we can to be self-sufficient, and just as importantly to share what we think are the very important lessons that are being learned in this field. We recognize that the Atlanta Center, like Kansas City and Los Angeles, exist principally because they are experimental and their mission is to do such a good job that others around the country will adopt this technique, and we think greatly enhance access to justice, greatly improve court congestion, though we don't want to promise too much there, and greatly enlarge the participation of people in the communities, in the whole area of dispute resolution.

Ms. PRIMM. I would briefly like to state along those lines I think the most encouraging thing about this potentially 95 percent sure contract from the State of Georgia in the field of education, teaching

mediators, people to mediate educational problems, is that this contract came completely out of the blue. We all know a lot of people in the State and Judge Etheridge knows a lot of people elsewhere, but as far as this particular contract, these people came to us and said we have heard of your good work; we need mediators; we want you to do it; and that was particularly gratifying to us, because it was not an area in which we had concentrated any particular efforts.

Second, I think the point Judge Etheridge made about the mediators being sort of the public relations people, it really has proven to be so. We have found over and over again that the mediators sell the program, whether they be at a party or at a meeting, or whatever.

We found last year when the State Bar of Georgia asked us to participate in the street law seminar which emanated from Washington to in fact teach educators all about law so they would understand what their students were talking about, and maybe help them to stay out of the judicial system, if possible, they came to us and said would you do a 2-hour component on the center on mediation. We decided quickly that the best way to do that would be to demonstrate a mediation rather than talking for 2 hours. That has been our format all through this whole 18 months, and every time we do it, we have an overwhelming response and enthusiasm for the process because people are excited by the process when they see it.

Mr. KASTENMEIER. One of the concerns, particularly of consumer groups who are interested in minor dispute resolution, is that the various bills do not contain a great deal of money. The limited resources—and indeed I note that they are cut back from even last year's bill—will have to underwrite resolution of many types of minor disputes. Therefore, from a consumer standpoint, these groups hope the forums would be more or less consumer-oriented. This is because they feel there are so few dollars to go around that it would not fully give impetus to the resolution of consumer disputes.

I wonder if you have any comment on that.

Mr. SLAYTON. I think it is very difficult, if I hear your question correctly, to talk about priorities in terms of types of cases. We think that there is very little difference in handling a case, whether it is consumer or anything else. We don't handle consumer cases any differently than any other kind of case. I don't think emphasizing consumer disputes at the expense of other disputes will be helpful in the long run. I think that people need to know any kind of a problem they might have can be potentially handled by a center is a valuable resource.

The fact of the matter is, as I mentioned earlier, that the bulk of our cases, 21 percent, again the single largest category is consumer disputes.

The only way I guess I can respond to your question is simply saying that giving us or having the flexibility, shall we say, to deal with as wide a range as possible of disputes will probably enable us to do more in the area of consumer cases, period. If we become labeled as a consumer-only program or a landlord/tenant-only program, then I think over a period of time people will lose sight of the fact that we can and do have the capability to handle any other number of types of disputes.

Mr. KASTENMEIER. For example, let's discuss the situation of a merchant who has difficulty collecting from persons. Should that merchant have access to an informal forum due to the fact that if he went

through normal litigation, like a garnishment proceeding, or some other—it differs from State to State—whatever it may be, that that litigation would be more expensive and slower and less likely to resolve the dispute? Should these considerations apply to the merchant in an equal manner as they apply to the consumer?

Mr. SLAYTON. We think they should. We have not had a significant number of complaints that emanate from merchants. We have had some. What we do find related to that, however, is that many times consumers who have been served with initial kinds of indication that legal action may ensue if they don't become current financially, will come to us and say you help me. We will contact the merchant or the creditor, and if they are willing to come in and sit down and work out payment schedules, that has been effective. I think Edie might want to add to that.

Ms. PRIMM. One of our most successful and earliest cases involved just such a situation in which a furniture company had a default judgment against a gentleman, and they were going to put a lien on his property. He was a taxi driver, and this company had made over 50 contacts in a 2-year period, and the man's defense was he had been living with a woman, and they bought the furniture, and then she left and took it with her, and that he shouldn't pay for it. So he didn't understand that his name was on the contract. The furniture company had been very sympathetic, and they were willing to meet, if we would take a mediator to their company. So we did, and I went with the mediator, and we got down to, I think the outstanding agreement was $350. He finally didn't pay the last $10, but within 2 years they collected $30. In about 8 months they got the balance of the $350, except minus $10; so they were pleased with it.

Mr. KASTENMEIER. Judge Etheridge, I assume that you have had some working knowledge of various alternatives, various forms other than the model used at Atlanta designated neighborhood justice center.

Is it part of your expectation that the models underwritten will differ greatly from the neighborhood justice center, or will you tend to emulate that which you locally have found working so well? In the question I am asking, for example, obviously there is extensive use of what is termed mediation here and obviously in the Atlanta institutional referral, and other models don't seem necessarily to involve that. Some are very passive in their form of resolution. Are you familiar with those other types of models and do you think they are worthy of funding in terms of variations?

Judge ETHERIDGE. I am familiar, though I say with great deference to you and the others of the committee and Dan McGillis here, that I am no expert on anything, but certainly if I may respond with that disclaimer, yes, there are many alternatives, and yes, I think we should try as many as we can. But we have somehow got to stop inventing the wheel again every time. We have just got to stop that. Our system of justice can't tolerate that. The people of this country need disputes resolved. We don't need to start out in every State, 50 States, with a new neighborhood justice center idea. We have done that.

To the extent those things are working, they need to be replicated someplace else, if appropriate. That is why the resource center is extremely important. It is an incredible waste of money to restudy the

same thing over and over again. It is unfair to the public and shouldn't be tolerated.

So the resource center, I think, is extremely important in that it will collect those things which will have succeeded and hopefully wash out those things which were flighty ideas, which were good, but which are flighty and didn't work.

There are many different models, as you know. In Columbus, Ohio, they have the night court situation. There are all sorts of bad checks kinds of courts. JP's, if properly trained, can do things, which should be encouraged, Judge Beresford, in San Jose, has a court that deals with civil complaints, and so forth, and I think those things ought to be encouraged. I think the only limitations that we have is our closed mind, and I think that the system can be used to get outside the courtroom environment and deal with problems in other environments.

Mr. KASTENMEIER. I want to make sure I understand you, because I think what you suggested is that we should stop experimenting, that we already have learned enough about this, and it is a question of replicating the successful models. Is that what you said?

Judge ETHERIDGE. No, I didn't say that. We should replicate that which is successful, but we should never stop experimenting. When you see a good lawyer, he never stops thinking up new ideas, and one should always try that. By no means would I suggest we should stop experimenting. We should stop trying the same things that have been failing year-in and year-out. For example, we have got to figure out that at least in many of these courts we are deciding the wrong question. It is not appropriate to stigmatize someone as a criminal when he has been trying to resolve the dog barking problem. The question is how do you get the dog to stop barking. That can be solved by getting the two neighbors together and putting the dog in a pen or something like that. Don't you see? What we have done is say because of the court of law, it, therefore, must deal with the other question: who is the criminal? And that is a box we should get out of, you see.

No, I think this is one of the most exciting fields, and I think the reason the Federal Government should keep on keeping on here is that you can teach this country that there are other ways to achieve justice, not just in the confines of the rigid judicial system.

Mr. KASTENMEIER. The committee is very indebted to you, Judge Etheridge, you, Mr. Slayton, and Ms. Primm, for your appearance this morning. You have been very helpful, primarily because you have first-hand experience which we can apply to our assessment of what the legislation ought to look like, or what it should accomplish. I compliment you all.

Thank you very much.

Next will be the last panel of the morning. It consists of Dr. Daniel McGillis, research fellow at the Center for Criminal Justice, Harvard Law School. He has done extensive research on the subject of the dispute processing mechanisms. He is co-author of a LEAA monograph on neighborhood justice center analysis of potential models.

Also, Dr. Royer F. Cook, president, Institute for Social Analysis, Reston, Va. His company has been evaluating the three neighborhood justice centers referred to before (Atlanta, Kansas City, and Los

Angeles). He has issued an interim report which was published last December, with the final report due next December.

Also, Ms. Linda Singer, director of the Center for Community Justice in Washington, partner of the law firm of Goldfarb, Singer & Austern. She has practiced law for the past 11 years, which at the same time authoring several books. She recently worked as consultant for the Legal Services Corporation, on the issue of resolution of minor disputes. Ms. Singer is well known to this committee, having worked with it on occasions in the past.

Panel, please come forward. You are welcome, and you shall determine who shall proceed. In any event, I will ask, without objection, that all your statements and the statements of the preceding witnesses, with attachments, will be a part of the record. These statements will be reprinted in the formal hearing record at the start of your respective oral testimony.

PANEL ON RESEARCH: DR. DANIEL McGILLIS, RESEARCH FELLOW, CENTER FOR CRIMINAL JUSTICE, HARVARD LAW SCHOOL; DR. ROYER F. COOK, PRESIDENT, INSTITUTE FOR SOCIAL ANALYSIS, RESTON, VA.; LINDA R. SINGER, ESQ., DIRECTOR, CENTER FOR COMMUNITY JUSTICE, WASHINGTON, D.C.

Dr. McGILLIS. Thank you, Mr. Chairman. I appreciate the opportunity to comment on the proposed dispute resolution legislation and its prospects for improving our delivery of justice. I have been conducting research on a range of mechanisms in the past few years, and I thought in the next few minutes, I would comment briefly on three issues that I touch on in my written statement: the types of local programs I think should be funded; the quality of justice that is likely to be rendered by these programs; and the issue of how to encourage local funding of projects.

[The statement of Dr. Daniel McGillis follows:]

STATEMENT OF DR. DANIEL MCGILLIS, RESEARCH FELLOW, CENTER FOR CRIMINAL JUSTICE, HARVARD LAW SCHOOL

Mr. Chairman: I am a researcher at Harvard Law School's Center for Criminal Justice. I have been conducting research on innovative dispute processing mechanisms and recently coauthored a monograph for the Department of Justice titled: "Neighborhood Justice Centers: An Analysis of Potential Models." The study was commissioned by the National Institute of Law Enforcement and Criminal Justice to provide a review and analysis of representative projects providing mediation and/or arbitration for the processing of minor civil and criminal disputes. The study was conducted under a contract awarded to Abt Associates, Inc. (A copy of the monograph is attached).

I appreciate the opportunity to comment upon the various versions of the Dispute Resolution Act now being considered in Congress (H.R. 2863, H.R. 3719, and S. 423). The bills respond to a well documented need for improvements in our current methods of processing disputes. Numerous research studies and governmental commissions have established the major problems of the courts in handling minor disputes including limits in access due to high costs, extended delays, and practical limitations in the use of adjudication to resolve complex underlying conflicts between disputants. The Dispute Resolution Resource Center and the program of financial assistant to innovative projects can provide substantial guidance in efforts to reduce these chronic problems in our processing of minor disputes, and the drafters of the current bills should be commended for their careful and thoughtful preparation of this legislation.

I would like to comment briefly regarding a number of facets of the bills in light of what I have observed in my research on dispute processing mechanisms.

APPROPRIATE TYPES OF DISPUTES FOR PROCESSING

The three bills seem to address substantially different types of disputes. The Senate version refers to "disputes involving small amounts of money or otherwise arising in the course of daily life" as the appropriate focus of the proposed dispute resolution mechanisms. Mr. Eckhardt's bill uses the phrase "minor consumer disputes and any other minor civil disputes," and Mr. Kastenmeier's bill (H.R. 2863) refers to mechanisms for the resolution of "minor disputes."

The phrase disputes "otherwise arising in the course of daily life" in the Senate bill can presumably be construed to expand the bill to include a wide range of additional non-monetary disputes. But this phrase does not appear widely throughout the bill, and "state systems" are concisely defined as all state sponsored mechanisms "for the resolution of consumer disputes and other civil disputes not involving large amounts of money." The Office of General Counsel of the Law Enforcement Assistance Administration notes in a recent document that, "the general rule of statutory interpretation is that if the statuory language is clear and unambiguous, it means exactly what it says; but if the language is ambiguous, it must be interpreted in accordance with the legislative history." My reading of the Senate bill and the Eckhardt bill is that the language quite clearly rules out the inclusion of criminal justice mechanisms. If this is not intended, this point should be clarified in the bill's legislative history (e.g. committee reports, statements by floor managers of the bill in floor debates, etc.) or through a revision of the language of the bill. The phrase "minor disputes" in the Kastenmeier version seems appropriately broad, and I recommend that this language be adopted in the House version of the bill and in any subsequent conference with the Senate.

The importance of clearly including both civil and criminal mechanisms has been noted by the American Bar Association in a letter from its president to Senator Kennedy on March 7, 1978; by Professor Frank Sander of Harvard Law School in his testimony before the House Subcommittee on Courts, Civil Liberties and the Administration of Justice on July 27, 1978; and by Raymond Shonholtz, Director of the San Francisco Community Board Program, in his testimony before the same committee on August 2, 1978. The arguments for inclusion of both civil and criminal matters typically include: (1) the great difficulties in categorizing numerous minor disputes as strictly civil or criminal (e.g., an assault may be prosecuted as a criminal charge or treated as a tort case in the civil courts or both), (2) the common circumstance of civil disputes leading to criminal acts (e.g., a longstanding unpaid debt among neighbors resulting in a fistfight), and (3) the potential confusion and alienation of citizens if their case is rejected for processing by a mechanism designed to increase access to justice due to what the citizen perceives as a lawyer's "minor technicality."

All of the projects which I studied in my research for the Department of Justice processed both civil and criminal matters. The Miami, Los Angeles, and Atlanta dispute settlement projects categorize 25, 59, and 60 percent of their caseloads respectively as being civil in nature (consumer/merchant, landlord/tenant, etc.). Many of the mediation and arbitration projects have developed close working relationships with their local Small Claims Courts, consumer programs and related mechanisms as well as with the police, prosecutor and criminal courts.

Recent research has indicated the striking need for alternative means of processing many minor criminal matters. And preliminary date suggest that such processing is, in fact, effective. Research on the New York courts by the Vera Institute of Justice and on the Washington, D.C. courts by the Institute for Law and Social Research (INSLAW) both have persuasively demonstrated the courts' difficulties in handling criminal cases in which the defendant and victim had a prior relationship. Such cases comprise a large proportion of the court's caseload (e.g. 56 percent of violent crime cases and 47 percent of combined violent and property crime cases in New York City). In New York, the majority of such cases are dismissed due to lack of complainant cooperation. In Washington 75 percent of assault cases involve persons with prior relationships and nearly 90 percent of these cases are dismissed. Both studies call for alternatives to the present choice between full prosecution and outright dismissal and recommend mediation as a promising option. A recent study of five Florida media-

tion projects has strongly supported the use of mediation in criminal cases. The research was sponsored by the Florida Supreme Court and involved a study of over 2,500 mediation cases. The researchers concluded that the projects were effective for both civil and criminal cases but that "disputants referred to (mediation) programs by criminal justice personnel were the most likely to appear for scheduled hearings, reach agreements, and be satisfied with the (mediation) process." Preliminary research findings from the Institute for Social Analysis study of the Justice Department Neighborhood Justice Centers (in Atlanta, Kansas City, and Los Angeles) also indicate that criminal justice system referrals are more likely to result in hearings than other types. Assault and battery, assault, and harassment make up a large proportion of many project caseloads (e.g. approximately 37 percent for the five Florida projects). Some assault cases among acquaintances can eventually lead to homicides, and the INSLAW data for Washington, D.C. indicate that 75 percent of homicides occur among individuals with prior relationships. Mediation can provide a valuable alternative to the dismissal of such assault cases and may provide a means for reducing spiraling violence among acquantances.

In short, the application of a sharp distinction between minor and civil and criminal cases does not seem to be practical or advisable in light of the experience of projects processing both types of cases. The testimony last year of highly regarded experts before the House Subcommittee on Courts, Civil Liberties and the Administration of Justice has outlined these difficulties in detail. The civil/criminal distinction is particularly indefensible in the conduct of research by the Dispute Resolution Resource Center. The apparent limitation of comprehensive surveys of state and local dispute resolution mechanisms to civil forums in S. 423 and H.R. 3719 would result in a large expenditure of funds for data of highly dubious utility. Citizens simply do not consistently respect the legal distinctions between civil and criminal matters and bring many of their "civil" cases to the police, criminal prosecutors, clerks of criminal courts and so forth. Some of these agencies simply reject these cases out of hand while others provide valuable referral services, attempts at mediation, etc. These mechanisms would need to be carefully studied in any comprehensive study of state mechanisms for the resolution of minor disputes.

Both the California and Florida state legislatures have recently developed proposals for state support of new dispute processing mechanisms (see California Assembly Bill 2763 and Florida Senate Bill 1296), and both of these bills have taken the approach of clearly specifying both criminal and civil mechanisms. A similar broad approach should be taken by the federal government in its development of the Dispute Resolution Program. Limiting the bill to civil mechanisms would be very harmful to the financial assistance portion of the program by severely constricting room for experimentation and would also be harmful to the Resource Center's research because of the complex interdependencies of the criminal and civil dispute processing mechanisms to be studied.

LOCAL FUNDING

Many apparently successful programs terminate after the federal funds run out. Rein and Miller have written extensively about the problems of transferring federal demonstration projects to local funding, and have noted, "What about the morning after the wedding? Who will pay for felicity during the long years ahead, at steadily increasing prices? Cities have limited tax bases. Boards shy away from projects with increasing budgets—the standard of efficiency is often measured by low cost, not high yield. Who will keep the project going?" Criminal justice projects funded by the Law Enforcement Assistance Administration block grant funds have often experienced great difficulties in receiving continued funding from local governments even if impressive achievements have been documented by the projects.

The Resource Center could explore optimal levels of funding for projects to avoid the common problem of extremely well funded federal demonstration projects which no city budget could hope to support. Some projects have been quite successful with relatively modest budgets (e.g., $43,000 per year in Columbus and $65,000 per year in Rochester). One technique for keeping costs low is the use of volunteers. The Atlanta Neighborhood Justice Center has involved many volunteers in case intake; the Chapel Hill, North Carolina Dispute Settlement Center is totally run by volunteers with a projected annual cost of approximately $3,500 including the cost of renting an attractive office suite. A recent Gallup Poll (November 30, 1978) reported that 69 percent of those surveyed stated that "they would be willing to engage in specific neighborhood activities including assisting in the performance of some neighborhood social services" on a volunteer basis. Many projects have verified Gallup's finding; for example, in San Jose over 300 people volunteered to serve as mediators following a newspaper description of the local project. Citizens appear to find involvement in dispute settlement projects to be very rewarding, and projects should tap the vast reservoir of volunteer help available to them. Possibilities for using "free" community space for project services should also be investigated (e.g., churches, YMCA's, schools, etc.), and sliding scale charges for new projects could be explored.

The new dispute processing mechanisms could provide a major reform in our society's ways of handling disputes but to accomplish this achievement they need to be institutionalized in local budgets. At present, little is known regarding methods for institutionalizing successful projects, and the Resource Center could study this problem in its efforts to assist the new projects funded by the Dispute Resolution Program.

Four additional problem are likely to appear in the course of the implementation of the Dispute Resolution Program. These problems will need to be dealt with primarily by the administrators of the federal and local programs rather than by the legislature but are sufficiently important to warrant mention on the record and consideration in legislative drafting.

THE QUALITY OF JUSTICE

Careful consideration needs to be given to the quality of justice rendered by the new alternative mechanisms for dispute processing. Three major fears have been voiced recently in this regard, (1) will the programs provide a crude and imprecise form of justice? (2) will they primarily serve the disadvantaged and be identified as second rate justice for the poor? and (3) will they inhibit the conduct of needed litigation for major and recurrent abuses of the disadvantaged by the powerful?

The concern regarding imprecision and unfairness in alternative forums requires sophisticated comparative research for an answer. Some observers fear that since the new mechanisms will not provide the full panoply of due process safeguards, their judgments may be unsound. Chief Justice Warren Burger has challenged this view and has suggested that we suffer from "our willingness to assume that the more complex the process, the more refined and deliberate the procedure, the better the quality of justice which results." He added that we should "inquire whether our fascination with procedure, with legal tests—often now involving three or four tiers deep—has not led to a smug assumption that conflicts can be solved only by law-trained people." Anne Strick has cataloged pressures in the adversary system which at times can lead to imprecise judgments in here recent book "Injustice for All." Earl Johnson, of the University of Southern California, has provided a concrete example of the potential paradox in the differing precision of adjudication and alternative approaches. He notes, "Ironically, in the real world even due process notions actually may weigh more heavily in favor of the amateur, informal forums. As a practical matter, in 'minor' criminal and civil cases, the disputant's choice may be between a hurried five-minute hearing before an overworked, often distracted judge, and a leisurely, thorough one or two-hour examination of his case by a panel of laymen . . . It would require some sophisticated research to ascertain whether a professional judge can uncover more salient facts and render a sounder judgment in five or ten minutes than a lay tribunal could in an hour or two. But it is not self-evident that, given the practical constraints of time and resources, the court would yield better results. The fairer forum may well turn out to be the less formal one." The Resource Center should commission research to investigate the relative precision and fairness of such mechanisms as mediation and arbitration in comparison to adjudication.

The concern regarding alternative projects being viewed as poverty program efforts is a very legitimate one. Even if research demonstrated that such projects rendered very just decisions, the appearance of second rate justice might still attach to them if only poor people used them. Efforts should be made to encourage the use of these projects by a wide variety of individuals drawn from all socio-economic groups. The Resource Center should monitor the types of clientele using these mechanisms and investigate ways of insuring their use by the middle class as well as the poor.

The third concern noted earlier is the fear that non-judicial dispute resolution mechanism will inhibit needed litigation of recurrent abuses. This concern also warrants efforts on the part of the Resource Center. Patterns of abuse by some companies, landlords, etc. may indeed require adjudicated solutions. Mechanisms for identifying patterns of abuses should be incorporated in projects if deemed appropriate so that victims of an individual or organization which has received repeated complaints could be advised that given the offender's past record adjudication may be advisable. Staff members of the current Neighborhood Justice Centers have noted that they readily spot repeat offenders. When project caseloads become very large a systematic means of identification will probably be needed. Mediation projects cannot become involved in any adjudicatory efforts because of the possibility of the project losing its image of neutrality. Clients can be advised that adjudication may be necessary, however, without violating the project's neutral position.

In short, concerns regarding the quality of justice rendered by non-judicial dispute settlement projects require careful attention. As was noted earlier, research may indicate that the innovative projects are even superior to adjudication in precision in some circumstances.

JUDGING PROJECT SUCCESS

At present the complex trade-offs between different project goals have not been carefully thought out (e.g. high quantity vs. high quality case processing, time consuming but high impact group dispute resolution vs. more rapid individual dispute resolution, justice system assistance vs. community assistance, etc.). In the absence of such a conceptualization many projects and funding sources appear to have resorted to caseload size as the prime index of project achievement. Such a criterion for success can lead to competition among different agencies in a community for cases and an unwillingness to refer cases to other perhaps more appropriate forums. The caseload size criterion also discriminates against projects relying on community rather than justice system referrals because of the additional time required by these projects to develop credibility, projects which focus upon time consuming intergroup disputes, projects which attempt in part to serve as a referral clearinghouse, etc. The Atlanta N.J.C. has noted that its goal for monthly case hearings is approximately 75 per month. This would result in 900 hearings per year. How can the adequacy of this goal be assessed? In comparing the goal to the achievements of other similar projects it can be seen that 900 hearings per year is less than half the number occurring in the Miami Citizen Dispute Settlement Project and yet project costs are quite similar (approximately $125,000 for Atlanta and $150,000 for Miami). But the Miami project hearings are approximately half as long in duration as the Atlanta hearings (roughly 40 minutes in Miami vs. 80 minutes in Atlanta); the hearings are held in space donated to the project (courtrooms) rather than in a separate facility having a more relaxed and informal atmosphere, and the Miami project has a higher ratio of referrals proceeding to hearings perhaps due to the use of court stationery to request respondent attendance rather than the less coercive project stationery in Atlanta. If the Atlanta project were willing to decrease hearing length so that mediators could process more cases per session, use free but formal government facilities for hearings and apply more coercion to respondents to attend hearings, then the higher goal of 2,000 hearings per year might be appropriate.

Evaluated data are needed to determine what types of modification may in fact be appropriate. The directors of the Miami project stress that the reduced hearing length is not harmful to the quality of settlements, the use of courtrooms for hearings increases the seriousness of disputants and willingness to deal effectively with their problem, and the implicit coercion in the project's letters to respondents is appropriate to increase respondent attendance; respondents can not be helped by the project if they refuse to particiate. (The Rochester American Arbitration Association project fund it necessary to change from project to court stationery early in its existence to increase respondent compliance.) At present, discussions regarding such issues as hearing length and type of facilities for hearings are conducted virtually in a vacuum, and detailed data are needed to inform these discussions. For example, merely the knowledge that the use of court stationery appears to increase respondent attendance at hearings is insufficient. These respondents may be less likely to adhere to agreements because they

are less interested in compromising in the first place and only attend due to fear. In short, data are needed linking revised procedures to the effectiveness of case processing (durability of settlements, client satisfaction, etc.) as well as to more superficial outcomes such as increased numbers of hearings. It should be noted that even when such data become available other factors will still influence choices among project components. For example, in the sense of the use of coercive letters to respondents, some projects may reject such a procedure on philosophic grounds even if a higher rate of respondent attendance and durable resolution is demonstrated. Other projects may feel that such coercion is legally inappropriate because the disputants are pressured into quasi-judicial proceedings without due process safeguards. This concern may be particularly relevant in the case of arbitration. A careful balancing of empirical data with value judgments will be needed in the development of projects. The implications of differing philosophies and goals of projects for caseload size, cost per case, durability of settlements, and related issues should be made explicit and investigated.

OVERPROMISING POTENTIAL ACHIEVEMENTS

Many researchers have noted the problems with exaggerated claims for programs and the resulting disappointment when the inflated goals are not met. Toby has characterized the war on poverty as an exercise in the politics of unrealistic expectations, and a quote in a Time article in May 1966, roughly two years after the program began, stated that, "the war on poverty has been first in promises, first in politics, first in press releases—and last in performance." Edelman's book on Politics as Symbolic Action amply illustrates the problems with overpromising results for social programs. Individuals involved in the development of the Dispute Resolution Program should keep the lessons of earlier programs in mind when program goals are developed and should carefully consider the potential future problems resulting from exaggerated and grandly stated project goals. New dispute processing mechanisms may have a profound impact upon court caseloads, system costs, neighborhood tension, and other variables in the future once programs are firmly established and integrated into referral networks. In the short run, however, programs will need to be carefully nutured. They are unlikely to have massive impacts overnight, and researchers and the public should not be misled to anticipate immediate, dramatic results.

EXCESSIVE BUREAUCRATIZATION

Researchers have long warned about the tendencies of organizations to become overly bureaucratized. Nejelski notes that this "formalism" results in organizations following "the letter of the law and not its spirit. Their motivation can be merely self perpetuation, not service to their clients." This trend is often accompanied by efforts to modify informal structures into highly formal ones. For example, Nejelski points out that, "The juvenile courts and workmen's compensation tribunals after a few decades develop the same rules of evidence, adversary proceedings, hearing officers who want to be called judges, and burdensome backlogs which they initially replaced." This type of transformation could potentially occur in any new dispute proceeding forum if program operators and funding organizations did not guard against the possibility. Nejelski has noted Jefferson's draconian solution for this problem—a thorough restructuring of the instruments of government every twenty years. Presumably, this response could be avoided if conscientious efforts were made to resist "formalization." In any event, program developers should be aware of the well documented tendency of organizations to become rigid, overly complex, and unresponsive to their clientele.

ADMINISTRATION OF THE PROGRAM

Both House versions of the Dispute Resolution Act have improved upon the Senate bill by revising the administration structure of the program. In particular, (1) elimination of the national priority program mechanisms, (2) the change to total discretionary funding, and (3) addition of a Dispute Resolution Advisory Board all seem to be advisable. These provisions should be maintained in any House-Senate conference on the bill.

I would also strongly advise that the Dispute Resolution Program consider funding comprehensive networks for the processing of minor disputes in number of jurisdictions in addition to the funding of isolated projects around the country.

Such "comprehensive networks" would be comprised of a number of new or improved mechanisms in a single jurisdiction processing different types of disputes with different approaches. Possible approaches include mediation, arbitration, ombudsmen, and related procedures, and variations within the procedures (e.g. lengthy mediation hearings focused upon improving communication for disputants with ongoing personal relationships vs. brief phone mediation efforts for persons with transitory relationships). An attempt would be made in these jurisdictions to coordinate the various mechanisms through appropriate central screening and referral mechanisms and disputants could proceed voluntarily to mechanisms providing greater coercive settlement if less coercive methods failed. Present research on the relative effectiveness of different types of approaches of dispute resolution for different types of disputes could aid in the structuring of such comprehensive networks. Such a coordinated experiment would have many benefits. Present efforts to develop isolated projects without taking other existing mechanisms into account have at times resulted in turf problems among programs, difficulties in developing referral arrangements, and related problems. The development of comprehensive networks would take advantage of the many already existing dispute processing mechanisms sponsored by such groups as state Consumer Protection Divisions, the Better Business Bureau, professional Boards of Registration, courts and prosecutors. I am currently conducting a study of alternative dispute processing mechanisms in Boston and have found thus far that public awareness of the many such mechanisms in Boston is very low and coordination among the mechanisms is unsystematic and often totally lacking. Assistance to the states in improving and coordinating such mechanisms is an essential role for the proposed federal funding. Effective coordination of currently existing and new mechanisms may be the best method for insuring efficient program operation and ultimate institutionalization of such projects in local budgets.

Once again, I would like to stress my support for the Dispute Resolution Act and my appreciation for the opportunity to testify before this joint hearing of House Judiciary and Commerce subcommittees. The Dispute Resolution Act could serve as a valuable catalyst in improving America's system of justice, and the new mechanisms created by the Dispute Resolution Program are likely to raise provocative and fundamental issues regarding the relationships of individuals to one another and to their society.

Dr. McGILLIS. In regard to the types of programs to fund, it seems clear to me that we need to experiment broadly. I think that the need for improved access to justice in the consumer housing, minor criminal areas and others is very well documented, and I won't go through the litany of problems experienced by both citizens and the courts in these areas. I think you are all well aware of them.

As you know, some jurisdictions have begun to test new dispute processing mechanisms, and the projects vary widely in their characteristics. This is a healthy situation. We have heard already this morning about some neighborhood justice center efforts which take a broad approach, attempting to handle a wide range of civil and criminal matters. This is sort of the one-stop shopping approach where they hope to avoid problems of citizens being hassled by having to go repeatedly to different agencies.

I am sure you have already heard from experts in the consumer area about the high level of specialization in some consumer mechanisms and housing mechanisms. Other major project variations include who runs the program, such as the courts versus more informal groups; dispute processing technique such as face-to-face mediation, versus phone mediation, and what-not.

The problems addressed by the different types of mechanism, I think, are very similar and have a basic core that is constant, and that is why I feel that we should fund a wide range of different sorts of mechanisms. I know some previous witnesses have said we really are

mixing apples and oranges when we group together both consumer mechanisms and criminal dispute projects. I think we are probably dealing with two different varieties of apples and not apples and oranges, and the conceptual similarities are greater than the differences.

The Federal Government can play a useful role in funding experiments in these areas, and we might find we need compromise approaches we haven't seen yet, such as group of specialized programs for housing, domestic disputes, and other matters, all housed under one roof. In some other jurisdictions we might find that we simply need to coordinate the already existing mechanisms, and that, in fact, a project that would screen cases and publicize the existence of the screening mechanism might be all we need.

I think the Federal effort, if the bill is passed, would be likely to have a huge impact at the present time because of the momentum we are seeing nationwide in this area, and I think it is a momentum that will fade in due course if such legislation is not passed to support it, and to provide a central clearinghouse for information and experimentation.

You probably know that citizens in many jurisdictions have shown a great deal of interest in these programs. For example, a program in San Jose advertised for mediators and received 300 applicants for only 18 slots as volunteers. The Boston attorney general's program on consumer mediation has 115 mediators at any given time and hundreds more who would like to serve in that capacity. So I feel that citizen interest is very high. A lot of programs are being spontaneously developed around the country, but they need Federal guidance in helping to ascertain what works and what doesn't work, and the relatively small investment of $15 million in program funding, I think, could pay off enormously, but if it was only put into the consumer area, I think that we would be squandering this great momentum occurring across the country for handling a broad variety of types of disputes. As Mr. Slayton said earlier today, the consumer area might actually benefit from a wide range of disputes being handled and a wide variety of mechanisms being funded, because that might increase the visibility of the whole operation, ultimately increase the number of consumer matters handled.

Mr. KASTENMEIER. May I interrupt here on one point, and this is one of the primary questions confronting the committee. You mentioned, in passing, the Boston panel or whatever it is?

Dr. McGILLIS. Attorney general complaint.

Mr. KASTENMEIER. On consumer mediation. Does this involve minor disputes?

Dr. McGILLIS. This is a program that has been established for a number of years under the attorney general's office in Massachusetts. They have established 27 programs, I believe, statewide, including one in Boston. Interestingly, they did that with only $200,000 funding as leverage—they received an appropriation of $200,000, and they got the various Massachusetts jurisdictions, to provide matching United Way money, and other local funds, and they simply used $200,000 as an incentive fund to set up the 27 mechanisms. These programs use mediation. It is by telephone, as a rule. The mediators are students and

retired persons typically, and they found, as Linwood Slayton has mentioned, that these consumer matters are oftentimes very much amendable to telephone conciliation. You don't have to bring the parties face to face often.

Mr. KASTENMEIER. I guess my question is, as one who prefers a broad approach to the minor dispute resolution program, should we make a consumer mediation model such as Boston has or someplace else has impermissible under the legislation; that is to say, must each model be exclusively broad? I would like to know the answer to this question because Mr. Eckhardt and Mr. Broyhill are concerned about it.

Dr. MCGILLIS. Absolutely not. I think we have to investigate the effectiveness of specialized mechanisms as well as the broad ones. I think the bill would make a serious mistake in funding only broad programs, because it might turn out that the Attorney General-type office or the executive office of consumer affairs-type model under the Governor might be best, for consumer problems, because you might need the clout of sponsorship by a high authority. Also the people in such an office might be able to be trained in consumer protection legislation more thoroughly than in broad neighborhood justice centers. But we don't know that yet. It could also be that a broad program like the Atlanta one could end up being a better approach for the consumer and have a higher rate of success.

So I think it is an open question. I think the consumer advocates might be right. We don't know. I think we should spend the money broadly and find out, and I think in the long run the consumer groups will, in fact, benefit from this. Certainly none of the neighborhood justice centers are anticonsumer in any way. These programs seek out consumer matters, just as they also seek out the other types of matters.

I have just two other brief points. I think the resource center can clearly provide a wide range of services, and in particular, I would hope that it would provide some useful insights into the quality of justice rendered by the projects. As you know, some have said mediation projects will provide a crude and imprecise form of justice. I think we need research in this area comparing mediation programs to the courts. I suspect that the long hearings that you get in many of these programs, 1½- to 2-hour hearings, might provide a greater degree of justice than you get before a harried exhausted judge who has 15 minutes to spend on a case, but we need sophisticated research on the comparative equity of case outcomes, disputant satisfaction, durability of settlements and related measures.

Some others have said these nonjudicial projects are going to be second-class justice for the poor. Linwood Slayton noted that earlier today. I think that is a critical point. I would hope the resource center would monitor caseloads around the country and attempt to find ways to encourage middle-class usage of the programs so they don't have the image of being programs for the poor.

Others have said the projects will inhibit needed litigation of recurrent abuses that occur. For example, in the Massachusetts Attorney General's office, I know Paula Gold, who operated that program for a long time, has an anecdote about an auto dealer that had 500 complaints registered against it at the complaint section of the attorney general's office. Each was mediated, and she was very frustrated and said, we are not in the business of using public funds to set up a complaint office for this auto dealer, and that, in fact, matters like this should eventually be litigated and the recurrent abuse should be dealt with. I tend to think she is right. These programs should provide data on the number of complaints they have for different types of merchants and efforts should be made to litigate recurrent abuses. In Massachusetts, with the attorney general program, they have such data on a computer, in a number of cases.

Finally, I would like to note a few points about encouraging local funding. You know that we have a long history of Federal projects that appear to be successful and the programs subsequently are not institutionalized for various reasons. I think we really have to worry a lot about ways of encouraging local funding. One way, of course, is to keep prices down, and some of the programs around the country are quite inexpensive, and yet process a great many disputes. The Columbus night prosecutor program Judge Etheridge mentioned, handles about 9,000 interpersonal mediations a year and costs only $43,000, and it is because of the way it is structured. It uses free space, and low cost mediators who are students. I wouldn't necessarily recommend the model of law student mediators, but I think we have to look at models that are inexpensive and see if we can do the same thing elsewhere, perhaps with heavy use of volunteers in the program.

We could also use free space in churches and day-care centers. I know the San Francisco program uses day-care centers. I sat in on a mediation hearing there a few weeks ago, and the presence of pictures of Bugs Bunny on the wall and Donald Duck certainly lighted up the atmosphere quite a bit.

I would argue that we need to stress low-cost approaches. I will give an example. In Chapel Hill, N.C., people there have provided money out of their own pocket for the rental of space to set up a pilot program. I think this is extremely impressive. The program is headed up by a bartender. He is the executive director in Chapel Hill, and the program is processing cases and has developed relationships with the DA's office, the police, and other agencies. They will need funding eventually, but they are talking about seeking only $5,000 to $6,000.

I think we have to investigate some groups that are attempting these extremely low-cost efforts, using heavy voluntary resources.

Finally, I want to say that in addition to focusing on individual types of projects, I hope the resource center can provide insights into how to coordinate dispute processing mechanisms. At present, many disputants have no way of locating appropriate judicial or nonjudicial forums. It is chaotic. We are doing a study in Boston under Ford Foundation support, looking at existing mechanisms for mediating disputes, and we are finding scores of programs that are doing some sort of mediation oftentimes with very small caseloads, We have to focus on some of the existing mechanisms as well as the new ones we want to develop. I think the Federal role there could be very important in trying to coordinate the current resources as well as developing new ones.

In closing, I think this coordination issue is perhaps one of the most important because ignorance of the existing mechanisms can clearly be as much a bar to access to justice as the more traditional barriers of cost, delays, and related problems.

52-434—80——10

Mr. KASTENMEIER. Thank you. Now, I would like to recognize Dr. Royer F. Cook.

Dr. COOK. Thank you, Mr. Chairman. I appreciate the opportunity to be here today.

At this point, I would like to request that the written statement be submitted to the record.

Mr. KASTENMEIER. Without objection.

[The written statement of Dr. Royer F. Cook follows:]

STATEMENT OF DR. ROYER F. COOK, PRESIDENT, INSTITUTE FOR SOCIAL ANALYSIS

For the past 1½ years, the Institute for Social Analysis has been conducting evaluation research on the Neighborhood Justice Centers, developed and supported by the Department of Justice and located in Atlanta, Kansas City, and Los Angeles (Venice/Mar Vista). This evaluation will be completed in December of this year. The main purpose of this statement is to provide available information about how the Centers have been operating, the types of cases they have been handling, and what kind of impact they have had on people who have brought their disputes to the Centers. In addition to discussing these results to date, implications will be drawn for the elements of the proposed bills and for the shape of future disputes resolution mechanisms.

Neighborhood Justice Centers (NJCs) are designed to process minor disputes through mediation and arbitration, rather than through formal court action. Such Centers may be more appropriate forums than the courts for achieving fair and lasting resolutions of disputes among citizens, and they may also help to relieve the court caseload. In order to assess the strengths and deficiencies of the Neighborhood Justice Centers, the Institute for Social Analysis is conducting and independent evaluation of the Centers. The major goals of the evaluation are the following: (1) Determine to what extent the NJCs have established an effective alternative in the community to resolve minor disputes; (2) Determine how well the Centers are attracting a variety of cases from both criminal justice and community sources of referral; (3) Explore whether or not the mediation process contributes to a reduction of conflict in the community; (4) Analyze the process by which the concept and procedures of Neighborhood Justice Centers are institutonalized; and (5) Assess the responses to the NJCs from the community and the criminal justice system. To meet these objectives, two basic kinds of data are required: (a) Process data—detailed information on the number and types of cases coming into the Centers, and information on how each case was handled (mediated, referred, etc.); and (b) Impact data—information about how the NJC experience has affected the disputants several months later, and information about how agencies in the community and criminal justice view the NJCs.

At the outset of project operations, ISA placed full-time Research Analysts on the staffs of the Centers. A data collection mechanism was developed which routinely gathered information on all the cases coming into the Centers—the referral sources and the characteristics of the cases and their disposition. These process data provide a continuing up-dated depiction of the NJCs' caseload and their characteristics. In order to assess the impact of the Centers on the disputants, interviews are being conducted with disputants approximately six months after their case was handled by the Center. Data collection on these disputant interviews is not yet complete. However, preliminary analysis of the disputant interview data has been conducted; these results are reported below.

CASELOAD RESULTS

Four categories of data were gathered on all cases handled by the Centers: (1) Disputant characteristics (age, sex, race, etc.), (2) Case types (domestic, assault, neighbor assault or harassment, landlord-tenant, etc.), (3) Referral sources (judge, police, self, etc.), and (4) Case dispositions (resolved via hearing, hearing but no resolution, etc.)

During the first year of NJC operations (through April of 1979), 3,628 cases were handled by the three NJCs. Altogether, nearly half (45 percent) of these cases were resolved as a result of a hearing or prior to a hearing. The cases came from a broad range of sources—(1) judges, (2) prosecutor or clerk, (3) police, (4) community agencies, (5) self (walk-ins), (6) legal aid, (7) government agency, and (8) others. Most of the cases (62 percent) were referred by the criminal justice system, although a sizable percentage of cases (38 percent) were referred by other agencies. With the exception of judge referrals, the majority of cases handled by the NJCs do not reach a hearing. However, 82 percent of the cases referred by the judges reach a hearing, and 84 percent of these cases are resolved. For all other sources of referral (except the police) almost as many cases were resolved prior to a hearing as through a hearing.

A wide variety of types of cases were handled by the NJCs, including (1) Domestic assault or harassment (8.3 percent); (2) Domestic settlement (7 percent); (3) Family disputes, not couples but relatives, parent/child, etc. (5.2 percent); (4) Neighborhood assault or harassment (7.7 percent); (5) Neighborhood nuisance (7.3 percent); (6) Dispute between friends (9.7 perecnt); (7) Landlord/tenant disputes (17.3 percent); (8) Consumer/merchant disputes (21.2 percent); (9) Employer/employee disputes (9.4 percent); and Others (6.8 percent). Interestingly, the cases are evenly divided between the two broad categories of (1) domestic/family, neighbors, and friends; and (2) landlord/tenant, consumer/merchant, employee/employer, and other. In fact, 48 percent of the total cases were in the former category and 52 percent in the latter. Considerably more of the cases in the first category (domestic, friends, etc.) than the second were resolved through hearings, while the more civil types of cases (landlord, consumer, etc.) were more often resolved without a hearing.

The characteristics of the disputants vary among the three NJCs, reflecting the different demographic compositions of three cities. In Atlanta, both complainants and respondents (not representing corporations) are predominantly Black with median annual incomes below $6,000. The majority of corporate respondents (e.g., landlords, merchants, etc.) are white. In Kansas City, complainants and respondents are nearly evenly divided between black and white, with a small number of hispanics; median annual income of disputants is also under $6,000. In Los Angeles (Venice/Mar Vista), the majority of complainants and respondents are white, with the others a fairly even mix of hispanic and black. Median income of disputants is between $6,000 and $12,000. In short, the disputants tend to reflect the racial composition of the communities which they serve, but they appear to be attracting a disproportionate amount of lower income people.

These data show that the Neighborhood Justice Centers were able to attract and process a sizable caseload during their first year of operation. (It should be noted that 59 percent of the total caseload was handled by Atlanta alone—they handled 2,147 total cases.) More importantly, perhaps, these data indicate that one dispute center can attract and process a wide variety of case types, from interpersonal cases to consumer oriented cases.

IMPACT RESULTS

Information about the impact of the NJCs on the disputants and on the courts and the community is currently being gathered; the collection and analysis of these data will be completed by October 1 of this year. However, the collection of an important segment of the impact data is nearly complete—the follow-up interviews with disputants whose cases were mediated—and preliminary analysis of these data has been conducted specifically in preparation for these hearings. Although these data are preliminary, they provide initial answers to several important questions about the status of agreements and the disputants' perceptions of their experiences with the NJCs at a point about six months (on the average) after attending a hearing:

(1) Do disputants view the agreement as a satisfactory one?
(2) Do disputants feel that they have kept the terms of the agreement?
(3) Do disputants feel that the other party has kept the agreement?
(4) Are disputants satisfied with the mediation process?
(5) Are disputants satisfied with their overall experience at the NJC?
(6) How do the answers to the above questions (1)–(5) vary according to type of case?

For present purposes, we shall use the analysis results from the Atlanta NJC, mainly because impact analyses have not yet been conducted in aggregate (i.e., combined across all three Centers) and the Atlanta Center has mediated the largest number of cases (475), more than Kansas City and Los Angeles combined. Results from Kansas City and Los Angeles will be discussed briefly.

From the 475 cases mediated in Atlanta, 252 cases (53 percent) were randomly sampled for follow-up interviews. In each of these cases, interviews were held with both the complainant and the respondent, or with only one disputant if both could not be reached.

When complainants were asked if they were satisfied with the agreement, 84 percent said yes; and 89 percent of the camplainants claimed to have kept the agreement terms. (Although when asked if the other party has kept the agreement terms, only 71 percent of complainants said yes; 74 percent of respondents said yes.) Two other related questions point to a high level of disputant satisfaction with the experience. When asked if they were satisfied with the mediation process, 92 percent of the complainants said yes; 88 percent of respondents said yes. When asked if they were satisfied with their overall experience at the NJC, 90 percent of the complainants said yes; 91 percent of the respondents said yes.

There are only slight variations in disputant satisfaction and in maintenance of agreement terms as a function of type of case. Only 62 percent of complainants in domestic assault/harassment cases claim to be satisfied with agreement terms (compared to 84 percent over all cases), although other interpersonal case satisfaction rates range from 84 to 96 percent. Respondent satisfaction is high across all case types with the exception of the disparate categories of family disputes (64 percent satisfied) and consumer/merchant disputes (68 percent). Other respondent satisfaction rates range from 80 to 100 percent. When disputants are asked if they have kept the agreement terms, there are virtually no differences across case types. However, when complainants are asked if the other party has kept the agreement, the civil-type cases (landlord/tenant, consumer/merchant, employer/employee) register negative responses in only 8–15 percent of the cases, whereas negative responses occur for 30 percent of domestic settlement cases, 31 percent of the neighbor dispute cases and 44 percent of the family dispute cases. When respondents are asked if the other party has kept the agreement, 22 percent of landlord/tenant respondents and 21 percent of consumer/merchant respondents say they have not. As one would expect, smaller percentages of respondents than complainants in interpersonal disputes claim the other party has not kept the agreement, ranging from 0 to 30 percent.

Across all case types, complainant satisfaction with the mediation process is high (83–100 percent), with the lowest being consumer/merchant cases. Respondent satisfaction is least in family dispute cases (58 percent). Overall satisfaction with the NJC by complainants and respondents reflect these same trends; i.e., complainants somewhat less satisfied with the NJC in consumer/merchant cases, whereas the respondent is less satisfied in family disputes.

The results from the NJCs of Kansas City and Los Angeles are highly similar to the Atlanta results. In Kansas City, levels of disputant satisfaction with the agreement, the mediation process, and the NJC itself are high; ranging from 73 percent (complainant satisfaction with agreement) to 88 percent (complainant and respondent satisfaction with NJC). Complaints and respondents claim to have maintained agreements in 88 percent and 85 percent of cases, respectively; although only 68 percent of complainants and 72 percent of respondents believe that the other party has kept the agreement. Interestingly, the results from Kansas City are very positive, but consistently just below the levels of disputant satisfaction and resolution maintenance displayed by Atlanta. As in Atlanta, there is little variation across different types of cases. Satisfaction appears somewhat less with interpersonal cases than more civil types of cases; agreements hold at a moderately high rate, with little variation across case types.

In Los Angeles (Venice/Mar Vista), levels of disputant satisfaction are also moderately high (ranging from 73 to 86 percent claiming satisfaction across various indices), but the proportion of disputants satisfied is, on most indices, slightly below those of Kansas City and Atlanta.

In summary, these preliminary follow-up analyses show that the overwhelming majority of citizens whose disputes have been mediated or arbitrated in the Neighborhood Justice Centers are satisfied with the process and the outcome, and continue to abide by the agreement. There are indications that interpersonal disputes provide somewhat less satisfaction and maintenance of agreement than consumer cases, although differences are neither large nor consistent. Indeed, the central message of these impact results is that a broad spectrum of types of disputes, from domestic to consumer/merchant, can be resolved effectively and satisfactorily within the same dispute resolution mechanisms.

ISSUES AND IMPLICATIONS

The above results have several important implications for the direction of future dispute resolution mechanisms and for the shape of H.R. 2863, H.R. 3719, and S. 423. Because the major difference between H.R. 2863 and H.R. 3719 seems to be the types of disputes that would be handled by the propose mechanisms, we shall first address the question of how the effectiveness of the NJC dispute resolution process varies according to the type of case. To begin to answer this question, we must view the dispute resolution process as encompassing at least two stages: (1) The attraction of cases to the Center and to a hearing, and (2) the extent to which disputants are satisfied with the process and hold to the agreement.

Our data show that there is virtually no difference between interpersonal and consumer/civil cases in the number of cases which are attracted (or referred) to the NJCs. However, a considerably higher percentage of interpersonal disputes reach a hearing than do the consumer/civil cases. We believe this occurs for two reasons. First, the interpersonal disputes carry a higher level of implicit coercion because the large majority were referred from the courts. Second, in the consumer/civil cases the respondent (the landlord, the merchant, the employer) often refuses to show. Thus, at the first stage—getting a case to hearing—the Centers seem to do better with interpersonal cases than with consumer/civil cases. At the second stage, achieving a satisfactory and lasting resolution, there are indications that the consumer/civil cases perform slightly better than the interpersonal cases; satisfaction levels and maintenance of agreement terms appear somewhat better with the consumer/civil cases. But these differences are neither large nor consistent and the overwhelming impression is that both types of cases yield high levels of satisfactory and lasting resolutions.

We believe that these findings argue for the broader definitions of case type found in H.R. 2863. It seems clear to us that with interpersonal disputes, mediation-based resolution mechanisms provide an effective and much needed alternative to the courts on the one hand and long-term counseling or therapy on the other. To the extent that either type of case (interpersonal or consumer/civil) presents certain limited difficulties in reaching a hearing, or achieving a satisfactory agreement, these are matters for further research and development under the auspices of the proposed Dispute Resolution Resource Center.

The second issue I would like to address relates to the need for providing sufficient resources for outreach—generating cases from criminal justice agencies, the community and from walk-ins. The NJCs found that outreach activities—becoming known among community residents and organizations, gaining the trust and cooperation of the courts and other agencies—consumed a tremendous amount of staff time and program resources. Such efforts were most apparent in the Los Angeles NJC where the thrust of the program was toward the generation of community-based referrals, mostly "walk-ins". These programs are attempting to counter deeply ingrained perceptions and attitudes on the part of citizens and public officials; they should have additional assistance in changing these perceptions and attitudes. Such assistance may come from various sources. The Resource Center should include a program of applied research to develop and test improved methods of outreach. The Resource Center should also insure that the technical assistance that it provides includes a sizable component on outreach. Finally, dispute resolution programs supported by this legislation should have ample resources allotted to outreach and caseload generation, particularly if the program is to be directed rather exclusively toward the generation of community-based referrals.

Dr. Cock. And rather than reading my written statement, I want to take just a few minutes to summarize the partial results of our research to date on the neighborhood justice centers.

Let me first discuss the data on the numbers and types of cases that have been handled by the justice centers in Atlanta, Kansas City, and Los Angeles. During the first year of operations the centers handled a total of 3,628 cases, nearly half of which were resolved.

Interestingly, the Atlanta Center alone handled 2,147 cases, which is 59 percent of the total cases.

These caseloads indicate to us that the centers are responding to a genuine public need for this kind of service. We also found that the cases were evenly divided between the two broad categories of interpersonal disputes and consumer-civil disputes. Forty-eight percent of the cases across the three centers are interpersonal disputes, and 52 percent were consumer-civil. So when we look at the caseload, what we see is a very respectable and, I think for Atlanta, very impressive caseload generated during the first year of operation. Second, we see that the caseload was a highly varied, well-balanced one.

We are in the process now of conducting followup interviews with disputants 6 months after they attended a hearing. What we have found is that a very high proportion, 80 to 90 percent, of the disputants say they were satisfied—satisfied with the agreement terms, with the mediation process, and with the overall experience at the justice center.

Also, a large majority of the complainants and respondents claim that the agreement terms are still holding 6-months later.

Now, while there is virtually no difference in the number of interpersonal cases and consumer-civil cases attracted to the centers, a higher percentage of interpersonal disputes reach a hearing than do the consumer-civil cases.

We think this has something to do with the fact that the interpersonal cases carry with them more implicit coercion because they typically come from the courts. On the other hand, the consumer-civil cases as Linwood Slayton pointed out, often do not reach a hearing because the respondent refuses to participate. Many of them also do not need to reach a hearing because they are conciliated.

However, there are indications that consumer civil cases achieve a slightly more satisfactory and lasting resolution than the interpersonal cases, but these differences in satisfaction and permanence of resolution are neither large nor consistent. So to summarize these follow-up results, I would say that the interpersonal cases appear to perform better in the sense that they more often reach a hearing. However, there are indications that the consumer-civil cases seem to perform a bit better, in that once they do get to a hearing, they seem to achieve a more satisfactory and lasting resolution.

What these findings seem to argue for in our view is the broader definitions of case type found in H.R. 2863. It seems to us that both types of cases can be handled under one dispute resolution roof, as I believe the Atlanta people have suggested, and Dr. McGillis has suggested.

Thank you.

Mr. KASTENMEIER. Thank you, Dr. Cook.

Miss Singer?

Ms. SINGER. Thank you.

I have a written statement on file.

[The written statement of Ms. Linda R. Singer follows:]

TESTIMONY OF LINDA R. SINGER, DIRECTOR, CENTER FOR COMMUNITY JUSTICE

I am pleased to testify in support of H.R. 2863 and H.R. 3719, both bills entitled the "Dispute Resolution Act."

As Executive Director of the Center for Community Justice in Washington, D.C., I have long been involved in the design, operation and evaluation of alternative mechanisms for the resolution of disputes. The Center is active in the search for appropriate techniques—including mediation, arbitration, and conciliation—for settling conflict in institutional settings such as prisons, schools, and hospitals, as well as in the larger community.

Our work has convinced us that there is a far-reaching need for the systematic development of many forms of dispute resolution. The evidence, presented to your committees during these hearings and in testimony last summer, is overwhelming. The complexity of American life and the size of the institutions with which citizens must deal continues to grow. The potential for conflict is great. Often, however, family, neighborhood, religious and government institutions, which once mediated among individuals or between individuals and institutions, no longer play this dispute-settling role.

Recourse to the courts is not always the answer, and not simply because of docket-crowding. For many disputes that do not involve major legal issues or large amounts of money, the adversary legal process consumes too much time and money, polarizes the positions of the parties, transfers initiative and responsibility from the parties to their attorneys, and obscures substantive issues with procedural niceties. Our search for new alternatives should keep in mind the attributes that made the older, more personalized methods of resolving disputes so effective: simplicity, timeliness, accessibility and finality.

With these considerations in mind, I enthusiastically support these two bills and what I view as their paramount goals: improving the access of all citizens to methods of achieving justice; and developing forums best suited to resolving specific categories of disputes. In supporting alternative dispute resolution mechanisms, I do not believe we will be creating a "second-class" system of justice somehow inferior to the courts. Rather, we will be creating supplimental mechanisms to do what the courts cannot do, in a way that emphasizes the personal participation of the disputants themselves.

In order to create the most appropriate means of resolving disputes, our most pressing needs are for experimentation and innovation, carefully observed and evaluated. This legislative effort will succeed not by simply causing the few existing prototypes to be multiplied, but by stimulating creation of a wide variety of experimental models, the most successful of which will serve as the basis for a more widespread network of dispute resolution mechanisms. To this end, H.R. 2863 and H.R. 3719 correctely refuse to confine the disputes to be settled to any narrow category. It is apparent that mediative techniques offer promise in civil, as well as criminal disputes, in personal as well as economic matters, and in issues affecting groups as well as individuals. The freedom and incentive to experiment with many types of disputes is essential.

The bills also encourage diversity by defining "grant recipient" to include nonprofit organizations as well as State and local governments and government agencies, to date, private, non-profits groups have made some of the most important contributions to the art of non-judicial dispute resolution. The legislation will enable them to continue to do so and broaden their base of support. The need for diversity also is acknowledged in Section 7 of each bill, which provides for an Advisory Board, with members drawn from a variety of public and private, professional and volunteer organizations interested in dispute resolution.

The criteria set out in Section 4 for the selection of grant recipients represent a sound attempt to promote unfettered access to efficient, timely means of resolving disputes. The emphasis in this section is on reducing the sort of barriers that currently result in only a small proportion of civil disputes coming to the attention of lawyers or a court. Section 4 of H.R. 2863 contains two provisions that are not contained in H.R. 3719; one emphasizes the goal of voluntariness in dispute resolution; the other requires grant recipients to promote the use of non-lawyers in resolutions. Both provisions encourage uncoerced citizen involvement in dispute resolution and ought to be retained.

Other language is important in ensuring that the funds appropriated in fact encourage innovation and result in viable models for dispute resolution. Section 8 wisely incorporates a limitation on individual grant size and directs the Attorney General to give preference to those projects likely to continue after the withdrawal of federal funds. These requirements should decrease waste and encourage innovative approaches to management, particularly the use of community volunteers.

During the early years of the program, evaluation should receive as much emphasis as the actual operation of pilot programs. Many practical and philosophical questions about dispute resolution mechanisms remain to be answered. For example, in what ways is it appropriate to encourage individual disputants to participate in a dispute resolution mechanism? Is coerced participation ever appropriate? What factors produce a fair process and make the resulting agreement (or decision) acceptable to both sides? How far toward the consideration of root causes should mechanisms go in search of the solution to social or interpersonal problems? What are the relative advantages of neighborhood-based mechanisms as opposed to those centrally located or attached to departments of government? In what circumstances is arbitration appropriate if mediation fails? Should arbitration agreements signed under the auspices of a dispute resolution procedure be enforceable in court? Should statutes of limitation, statutes of fraud, the Uniform Commercial Code, and other legislation apply to non-judicial disputes and, if so, under what circumstances? How can mechanisms compensate for disparities in the parties' information or abilities, particularly in disputes between individuals, such as consumers, and organizations? Should statutes require organizations, to participate in informal dispute resolution? In what circumstances, if any, should the previous resolution of similar disputes have precedential value?

Section 8 provides for an independent investigation of the performance of the Resource Center and the extent to which the Act's purposes have been achieved, to be completed by 1984. This provision is a necessity both to evaluate progress and to determine the direction future work and legislation should take. That investigation should determine the extent to which projects funded under the Act have contributed to answering questions such as those raised above. In this regard, Section 6 charges the Resource Center with conducting research and surveys to identify successful existing mechanisms and to determine the types of disputes most amenable to mediation and other techniques. Among the responsibilities of the Attorney General under Section 8 is the establishment of procedures for evaluating the effectiveness of projects funded under the Act.

These provisions should insure that the projects will adequately test dispute resolution models in all areas of major importance. As the program progresses, it should be possible to use the results of the evaluations to make the Section 4 criteria more specific, and to identify those issues to be addressed by later projects funded by the Act. I believe that thoughtful, careful evaluation will carry out the emphasis of this legislation on innovation and experimentation, speed the development of effective model mechanisms, and prevent the expenditure of money on inadequately designed projects.

If the proposed legislation is to provide increased, timely access to appropriate dispute-resolution forums for all citizens, then inevitably it must direct attention to those disputes that occur between individuals and large organizations. Due to the increasing complexity of life and the concentration of power in governmental and corporate bureaucracies, unorganized individuals often find themselves in conflict with manufacturers or retailers of goods, landlords, schools, welfare departments, and other organizations. There are obvious disparities between such organizations and their clients in power and resources and in familiarity with legal problems and procedures.

Although many types of organizations have a continuing relationship with individuals as clients, customers, or employees, few have attempted to develop effective mechanisms for responding to individual complaints. Nor have many other experiments in dispute resolution been concerned with such problems. For example, the design of the LEAA-funded Neighborhood Justice Centers specifically limits them to disputes between individuals or between individuals and small, neighborhood businesses.

Mediation probably cannot work effectively if the power of the parties is significantly unequal. Consequently, one task of new mechanisms concerned with disputes between individuals and organizations is to equalize the power of disputants enough for non-judicial techniques to work. H.R. 2863 and H.R. 3719, by their broad scope and explicit reference (in Section 4) to use of the mechanisms by businesses, have the potential for advancing this important effort significantly.

Because of the importance of the goals of this legislation, and because the program can and should take a creative approach to the funding and evaluation of grant recipients, the statute should assign administrative responsibility to a specific office within the Department of Justice. I believe that the Office for Improvements in the Administration of Justice is the best choice for this responsibility. OIAJ has a clear interest in the area of dispute resolution, together with the ability to give research and evaluation central priority and to use the results to plan future program directions. Unlike the Law Enforcement Assistance Administration, OIAJ is not limited primarily to criminal justice concerns; its broader scope is especially important since most of the disputes to which this legislation is addressed are civil. The grant of administrative authority to OIAJ should speed the organization and initial work of the program; it is my only proposal for substantive change in the bills.

H.R. 2863 and H.R. 3719 in combination are necessary because too many Americans, of all social classes, lack access to forums that will fairly and speedily resolve disputes in which they are involved. The legislation will help promote the highest standards in the design, implementation and evaluation of more effective dispute resolution systems. It receives my enthusiastic support.

Ms. SINGER. What I would like to say this morning is that I support both House bills. They are very close together. I would prefer either of those bills to the Senate version because of their greater scope for innovation and diversity, because of their use of an advisory board to oversee the program, and because of their more realistic timing.

I would like to focus on what I believe ought to be the emphasis of both the resource center and the grantmaking program that are envisioned under the bills and on possible places for administration of the dispute resolution program.

As the section 8 criteria of both House bills make clear, you do not envision just another grantmaking program that will spread a little bit of money to each State to do the same thing. It is clear that today there are an insufficient number of prototypes existing to deal with the full range of disputes that occur.

I think it really would be wasteful if all that happens under this legislation is that we spread small claims courts and neighborhood justice centers throughout the country. I agree with Dan McGillis and his emphasis on the need to encourage the creation of a number of diverse models to deal with different kinds of disputes.

For example, there are disputes that occur in communities between different ethnic groups or that involve the possible resolution of social questions. Other examples include whether a new highway ought to be built, or a new jail, or disputes between individuals and the large institutions from whom they buy most of their goods, and the large Government agencies with which they must deal.

If we are going to create a large number of models, we are going to have to find out what works and what doesn't work. Thus I think that together with an emphasis on diversity there should be an emphasis on research.

I personally am not a researcher, although I am a member of a research panel this morning. But I have discovered in the course of my work with alternative forms of dispute resolution that we still need to find answers to a whole range of important questions.

For example, we still know very little about why some people use courts, some people use alternatives, and some people use nothing at all when they have disputes.

We need to know what minimal elements are necessary to make a process fair and easy to use. We need to focus on what adjustments in a process are needed when disputes occur between individuals and institutions that have greater power and expertise.

I think it is important to note, because we have heard so much about neighborhood justice centers this morning, that no large institutions

participate in neighborhood justice centers. They were not designed to handle disputes between a consumer and Sears, Roebuck, although they have had good success with the consumer and the local jeweler. The fact is that right now most of us buy goods and services not from the corner store but from stores as large as Sears, Roebuck.

There are other models that are trying to deal with some of these problems in different parts of the country. Some still have to be created. The Better Business Bureaus, for example, have been trying to arbitrate disputes between consumers and large automobile manufacturers. Prisons, high schools and universities have been experimenting with alternative ways to deal with disputes with inmates, teachers, students, and staff.

Housing courts and landlord-tenant arbitrators are trying different approaches to problems between landlords and tenant groups. We need to know which of these things make sense and for what kinds of disputes.

We also have a number of legal questions that still have not been answered about some of these mechanisms. For example, what is the enforceability of an arbitration conducted in a neighborhood justice center or of an agreement reached between two people through mediation?

What should be the standard of confidentiality concerning what goes on in a neighborhood justice center? What is the relevance of technical, legal requirements that sometimes favor the establishment, as Linwood pointed out earlier, but sometimes were passed for the specific reason of favoring the little person, like the Truth in Lending Act or recent landlord-tenant reforms?

Should these things have a place in a neighborhood justice center, and if they do, what does that do to our emphasis on simplicity and taking out the legal technicalities?

Finally, as Dan mentioned earlier, we need to develop ways of feeding information that we obtain from resolving individual complaints into law enforcement and regulatory mechanisms that are set up to deal with pervasive or systemic problems.

I believe that the funding priorities under this bill should take the need for specific information into account and that those priorities should change as the program progresses in order to reflect new information that is gathered during the early stages of the program.

With these considerations in mind, I have concluded that this program would best be administered in one of two alternative ways: First, through a special office in the Justice Department, such as the Office for Improvements in the Administration of Justice, aided by a strong policymaking advisory board, perhaps on the model of the present National Institute for Corrections, which is part of the Department of Justice but which is run by an independent board.

A second alternative that I believe you ought to consider is the creation of a nonprofit corporation, such as the Legal Services Corporation, that would be well situated to use some of the expertise from the private sector in administering this program.

In either case, I hope that the mechanism that is created to administer this program will make use of the large number of diverse organizations and individuals in the private sector that have already accumulated a good deal of expertise in this field. There is no one

organization or even group of individuals right now with a monopoly on creativity or expertise.

If this program accomplishes one thing, I hope it will maintain and encourage the diversity that has already begun to grow.

Thank you.

Mr. KASTENMEIER. Thank you, Ms. Singer.

If anything, with that long list of rather provocative questions, you have given us pause in moving forward with this legislation without perhaps even more information.

First, I would like to recognize the gentleman from North Carolina, Mr. Broyhill.

Mr. BROYHILL. I was interested in your comment, Ms. Singer, about the appropriate agency to administer this program.

The administration testified that they wanted some flexibility. I am not sure if you are familiar with the testimony that they submitted.

Ms. SINGER. No; I am not.

Mr. BROYHILL. Now, as I understand it, you are being more specific. You are not endorsing the Justice Department administer this program and that they give authority to whatever office within the Justice Department that they so desire?

Ms. SINGER. I am not familiar with the administration's testimony. I do know that there has been some controversy over whether this program ought to be administered by LEAA. I think that that would be a bad idea because that agency has quite properly focused on the criminal justice system and the focus of this bill is on civil justice.

I do think that wherever in Justice this program goes, if in fact it does go into the Justice Department, it is important to provide it with a strong advisory board with the kind of diversity that you have already envisioned in your bill.

Such a diverse board could help to bring a number of different perspectives to this program. There is obviously a dilemma with a program that is set up with a 5-year sunset clause as to whether you want to create a whole new agency to run it or give it to an existing agency.

I think that good arguments could be made on both sides. If you saw your way clear to create a nonprofit corporation to administer this program, I think there would be some great advantages in flexibility and in continuity, regardless of whether the next attorney general happens to share the strong interest of the present attorney general in creating alternative dispute resolution mechanisms.

Mr. BROYHILL. I think I have detected the thread, at least one thread, in the testimony that you gentlemen have given as well as the testimony that was given prior to yours that one of the key elements in the successful operation of one of these centers is the effective training of personnel.

My question is: Are there institutions or programs or organizations that can help perform these functions at the present time of training mediators?

Dr. COOK. Yes, there are. In fact, the justice centers used a variety of training organizations to train their mediators and staffs. Kansas City used the American Arbitration Association and the Institute for Mediation and Conflict Resolution to train their arbitrators and mediators.

Los Angeles put together a local package of trainers which consisted of mediation trainers—people trained in mediation and arbitration previously—and behavioral scientists—psychologists, clinicians, and that sort. In Atlanta, as I recall, they also put together a combination of AAA people and local resources.

In all three cases we were impressed by the level of training and by the effectiveness of the training. I thing there are, in almost any location, sufficient resources to put together a good training team.

Mr. BROYHILL. Thank you.

Mr. KASTENMEIER. Dr. Cook, you state that in the centers there is a disproportionate amount of lower income people. Could you elaborate on that statement? Is it because they cannot afford another forum or what do you believe?

Dr. COOK. Well, we are not really sure yet why that is. Some answers to that question will come out of our impact data. What we have had thus far is that the median incomes in two of the cities of the disputants, Atlanta and Kansas City, are below $6,000.

In Los Angeles the median incomes are between $6,000 and $12,000, due primarily to the cost of living in Los Angeles, I believe.

As to why that is the case, I would first of all concur with Linwood Slayton's remarks, that these in effect are the kinds of people who are coming to the justice system. This is true certainly in Kansas City and Atlanta.

Now we have more walks-ins, considerably more walk-ins, in Los Angeles. This could be part of the reason why the income levels are higher in Los Angeles.

In fact, I think that considerable efforts should be made toward developing outreach methods that will reach a broader band of citizens.

Mr. KASTENMEIER. Have you been able to determine, for example, to what extent the legal profession generally supports the legislation? Maybe in part the legal profession creates a need for it?

Dr. COOK. We have not looked at that question specifically. We suspect that it is a combination of custom with the population that is using the centers at this point and an economic problem; that many of these people are not accustomed to using lawyers.

Perhaps Dan or Linda have something to say on that.

Mr. MCGILLIS. I think it is clear in many cases that middle class and upper middle class individuals purchase various types of social services. They might see marriage counselors or hire lawyers to negotiate out of court for them rather than going to the courts. Many justice center clients are poor and cannot afford such services.

So that has some effect on the distribution of the caseload that we are seeing. But I think we need more research on the role that the legal profession has in creating a need for justice center.

Mr. KASTENMEIER. Dr. Cook, in your report, what shortcomings do you find in the neighborhood justice centers, either conceptually or operationally? Is there a pattern of shortcomings in terms of falling short of the expectations?

Dr. COOK. I think so. There are some aspects of the centers that need attention and I think need research. Again, I would mention the outreach problem. Los Angeles spent a tremendous amount of time resources in attempting to publicize their center, to make it known throughout the community. They were on television a number of times.

They had public announcements on TV and radio. They appeared in shopping centers. They put a tremendous amount of work into the effort to try to gain more public awareness.

A couple of months ago we did a community survey to find out what the level of awareness was in the Venice-Mar Vista area, the target area. Only 30 percent of the citizens had even heard of the justice center.

Mr. KASTENMEIER. Was one of the problems that the caption is a euphemism really? These are not really neighborhood justice centers. They are metropolitan minor dispute centers, aren't they? They must have a range of hundreds of thousands of people in Atlanta, Los Angeles, and Kansas City they would potentially reach.

Dr. COOK. That is possible. In Los Angeles, because they are a community-based program and have attempted to generate walk-ins, the great majority of their referrals come from their target areas, from their neighborhood, in fact.

In Kansas City and Atlanta that is not the case since their referrals come through the justice system, they come from virtually all over the city.

Mr. KASTENMEIER. Miss Singer, to what extent are you serious about raising questions about ethnic or political disputes as potentially being at least conceptually within the reach of some of these centers? Up to this point we have assumed that political disputes and public issue disputes, essentially ethnic disputes, probably belong in other forums.

Ms. SINGER. I am quite serious. In fact, models already exist. In New York, for example, the Institute for Mediation and Conflict Resolution has successfully mediated disputes among ethnic groups about, for example, access to public housing. A certain number of units were going to be built, and the question was which people would be able to live in them.

Are the Puerto Ricans going to get those houses or are the Jews who also live in the community? Exactly that dispute was successfully mediated last year. Disputes over whether an industry can be built in an area or a highway or a dam, over the objections of environmental groups, are now being mediated routinely by an Office of Environmental Mediation, supported by the Ford Foundation.

There is a new group formed called the jail coalition that comprises groups from the far left to the far right. The reason that that group can exist as a mechanism for reform is that it is chaired by a mediator whose job it is to assist in resolving differences among the group. The Kettering Foundation has just funded an experiment in three midwestern cities to try to have mediators help local, State, and Federal officials work out budget processes on an annual basis.

So, I don't think I am being fanciful. The models are scattered. They have not gotten as much publicity as some of the others you have heard about. We obviously need a lot more research before we know how cost effective they are. I suspect they are extremely cost effective.

Mr. KASTENMEIER. In terms of an analog, of course, the Legal Services Corporation suggests itself and you are certainly very knowledgeable about it. You know that the statutory authorizing legislation is very circumscribed with reference to just what program attorneys can do and cannot do, for example, in terms of getting into lobbying, activities.

Wouldn't you think that the same limitations would apply here in terms of scope? Shouldn't we describe, let's say, the general parameters beyond which you would not expect these dispute forums to go in terms of politics?

Ms. SINGER. I would hope to see much more diversity in these programs than we have seen in the legal services programs, which were established with a narrower function in mind. We have had much more experience and much longer experience providing lawyers for por people in civil cases than we have had providing alternatives to the justice system itself.

Also, I think your bills have made it clear that we are not funding advocacy when we establish this program. The point is to fund tribunals or forums rather than advocates. As a result I believe the bills are much less politically divisive, and therefore less controversial, than if they funded advocates for particular groups.

I think the controversial questions this legislation will present are what kind of program should receive priority and how should we divide our attention and funds between replicating successful models and encouraging a whole new group of models.

As I think I have made clear at this point, I would vote not for replication with this limited amount of money but for creativity.

By the way, I apologize for giving you more questions than I have given you answers. The answers don't exist. I assure you that if I had the answers I would have shared them. On almost every one of the issues that I have raised, people will argue passionately on both sides with equal conviction and equally little data. I think the function of the resource center under this program has got to be to provide data that will allow us to find the answers to all the questions I have raised.

Mr. KASTENMEIER. Thank you.

Dr. McGillis, have you had an opportunity to evaluate the interim report of the neighborhood justice centers? Would you care to comment?

Dr. MCGILLIS. Yes; I found the report very interesting. In fact, I am currently working on a document for the National Institute of LEAA that will take the findings from that report and from other national evaluations that are going on now and try to combine them into a picture of what is happening around the Nation.

You might be aware that the Florida Supreme Court recently sponsored a study of five Florida mediation projects. That paper just came out in the last 4 weeks. It is a very interesting evaluation that has many of the same measures as Dr. Cook's study, but also has some different ones, has a somewhat different focus.

So I will be attempting to put them altogether and try to make sense of these national level ones plus some local evaluations.

I think the ISA evaluation Dr. Cook talked about shows that we have some real problems in generating sufficient caseloads in some of the cities. I think we are going to have to pay a great deal of attention to the causes of those problems.

We can point to other programs around the country that have much larger caseloads. Admittedly, these programs are quite new, the Department of Justice ones. But it gives me some pause for concern.

I am concerned about other new programs that might be funded under this legislation. Just how long does it take to gin up a program to have a cost-effective caseload?

Mr. KASTENMEIER. Well, there certainly are drawbacks to becoming a large program serving a large group of people in a city or metropolitan area. You can increase your case intake and look very good, but you lose really what might truly be called a neighborhood or community identification. You also may decrease the quality of justice rendered.

Dr. MCGILLIS. I agree that we have to worry a lot about the quality of the justice and how much attention we can give to the people. With regard to your comment about neighborhood identification in Atlanta and Kansas City, both programs are centralized and serve the entire cities.

Mr. Slayton and I talked in the recess about how the Atlanta project could become neighborhood based and develop a very large caseload so that they handled a substantial part of the court cases that are misdemeanors and small claims. Right now they probably process about 2 or 3 percent of the total court caseload.

Linwood pointed out the current logistical problem of funneling all project cases through a building that can only accommodate 6 or 7 cases at once. He pointed out that it might be better to decentralize the program in neighborhood offices, perhaps church basements and schools. Perhaps in each area you could have additional mediators who might be local volunteers. Then you would not have this bottleneck problem of a facility that can only handle 3,000 or 4,000 cases a year even if it is going flat out.

These satellite offices in the neighborhoods would provide the Atlanta project with the "neighborhood identification" you mentioned.

There is a program in Coram, N.Y. which is on Long Island that is attempting to do this, locating branches in free community space. I think that is the ultimate direction the neighborhood justice centers will need to go in.

Mr. KASTENMEIER. On behalf of the committee, we would like to thank you, Dr. McGillis, Dr. Cook, and Ms. Singer, for your contribution here today. I think perhaps we have not used you as fully as we might, but the hour is late.

I will only conclude by saying that you have made, I think, a very worthwhile contribution to the dialog and to the record that we will base our judgments on.

Thank you.

That concludes this morning's hearing. Next week we will have our last scheduled hearing under the chairmanship of the able gentleman from North Carolina, Mr. Preyer. The time and date of that hearing will be available to the press.

Until that time, we are adjourned.

[Whereupon, at 12:12 p.m. the subcommittee adjourned.]

RESOLUTION OF MINOR DISPUTES

MONDAY, JUNE 18, 1979

HOUSE OF REPRESENTATIVES, SUBCOMMITTEE ON CONSUMER PROTECTION AND FINANCE OF THE COMMITTEE ON INTERSTATE AND FOREIGN COMMERCE, AND SUBCOMMITTEE ON COURTS, CIVIL LIBERTIES, AND THE ADMINISTRATION OF JUSTICE OF THE COMMITTEE ON THE JUDICIARY,
Washington, D.C.

The joint subcommittee met, pursuant to adjournment, at 11 a.m. in room 2123, Rayburn House Office Building, Hon. Richardson Preyer presiding.

Present: Representatives Preyer, Kastenmeier, Scheuer, Gudger, Mazzoli, Broyhill, and Railsback.

Staff present: Edward O'Connell, counsel; Margaret T. Durbin, staff assistant, minority, subcommittee on Consumer Program and Finance; Michael J. Remington and Gail Higgins Fogarty, counsel; and Joseph V. Wolfe, associate counsel, Subcommittee on Courts, Civil Liberties, and the Administration of Justice.

Mr. PREYER. The subcommittee will come to order.

Today the Consumer Protection and Finance Subcommittee, in conjunction with the Subcommittee on Courts, Civil Liberties and Administration of Justice of the Committee on the Judiciary will complete its 4 days of joint hearings on three dispute resolution bills, H.R. 3719, H.R. 2863, and S. 423.

Both subcommittees have heard interesting and thought-provoking testimony so far and after looking at the witness list, I am confident that today we will continue in this vein.

At this juncture I would like to reiterate a point Chairman Kastenmeier initially brought out on June 6, when he opened these hearings; that is, the very fact that we are holding joint hearings indicates that the subcommittees recognize that this is important legislation and one in which we both think we can make an important contribution.

I am sure that as a result of these hearings the two subcommittees will be able to agree upon a proposal that will pass both committees and gain acceptance by the House of Representatives.

As a final preliminary thought I, personally, and in my role as acting chairman of my subcommittee, would like to thank Chairman Kastenmeier, his subcommittee members and staff for their cooperation during these hearings.

These hearings truly have shown, as Chairman Kastenmeier said, "* * * our desire to work together in an open and efficient manner."

This morning we will hear from a panel of public officials who will give their perspective on the dispute resolution bills. The members of

52-434—80——11

this panel are Bruce Ratner, Commissioner of the Department of Consumer Affairs of New York City, N.Y. and the Honorable Jeanne Malchon, Community Commissioner of Pinellas County, Clearwater, Fla., on behalf of the National Association of Counties.

Mr. Stanley Van Ness, Public Advocate of the State of New Jersey was to be with us this morning, but he hasn't been able to be here. However, his statement has been submitted and will be made a part of the record.

[The statement of Mr. Van Ness follows:]

STATEMENT OF STANLEY C. VAN NESS, PUBLIC ADVOCATE OF NEW JERSEY

Good morning Chairman Scheuer and members of the Consumer Protection and Finance; and Courts, Civil Liberties, and Administration of Justice Subcommittees.

I am Stanley C. Van Ness, Public Advocate of the State of New Jersey, and I thank you for the opportunity to comment on H.R. 2863, H.R. 3719, and S. 423, the various versions of the "Dispute Resolution Act." The director of our office of disput settlement could not accompany me this morning as our department is hosting the first national conference on dispute resolution in New Jersey beginning tomorrow.

I would like to state at the outset that I support the basic provisions of all three bills before you. However, before preceeding to the substance of my testimony, I would like to present some brief background concerning our department.

The department of the public advocate was established in 1974, partly in response to the crisis of confidence in government at all levels that followed the Vietnam/Watergate era and partly in recognition that in several important areas, the broad public interest was not being appropriately represented. New Jersey's Governor Brendan Byrne and the legislature conceived the department as a means of restoring the public's confidence in government by providing citizens with a way to have a voice in the administrative decisionmaking process. I raise this point to illustrate that the department of the public advocate was established in the same spirit that brought the Dispute Resolution Act before the U.S. Congress.

We believe that this legislation will make our governmental and judicial systems more responsive to the needs and interests of our citizens, particularly in light of escalating demands being placed upon those systems by increasingly complex issues and elusive solutions.

The department of the public advocate is comprised of six divisions, in addition to the New Jersey office of the public defender, which represents all indigents in the State accused of committing crimes under State law.

Our division of mental health advocacy represents individuals in New Jersey facing possible involuntary commitment to a State mental institution. It also works toward reforms in the area of patients' rights. The office of advocacy for the developmentally disabled plays a similar role on behalf of victims of mental retardation and physical handicaps.

Our division of rate counsel represents the public interest in all utility rate proceedings before our Public Utilities Commission.

Our broadest mandate under the public advocate statute is the division of public interest advocacy, which functions as a government financed public interest law firm. Staff attorneys represent the public interest on a wide range of issues by intervening in and instituting administrative and legal proceedings. The office of citizens complaints, within our department, serves as the State's "ombudsman," receiving and investigating complaints by citizens concerning the action or inaction of State agencies.

Lastly, we have an office of dispute settlement that provides mediation, conciliation, and arbitration services as a neutral third party to governmental agencies and community groups in public interest disputes. The office also conducts training programs in the negotiation process for governmental agencies, community groups, and individuals.

Our experience so far in a wide range of disputes has been very positive. We have successfully conciliated or mediated disputes involving environmental concerns, college and public school problems, local and State service complaints, and dislocation of neighborhoods in redevelopment areas. By helping to resolve

these matters before they were taken into courts of law—and most of them would have eventually ended up there—I believe that our negotiations were able to protect the public interest without prejudice to any of the parties involved. I would like to share briefly two examples.

The only comprehensive facility in New Jersey licensed to treat and dispose of hazardous wastes, a service that is essential to our large chemical industry, experienced a serious explosion and fire in 1976 that prompted our State department of environmental protection to close the facility. In the aftermath of the tragedy, local citizens and the township in which the facility was located vigorously opposed reopening it under any circumstances, even after the department of environmental protection indicated it could re-open. As a result of the negotiation process coordinated by our staff, the facility and residents came to an agreement that opened the facility's operation to public scrutiny, more fully involved the public in safety planning, and allowed the facility to reopen. The agreement was reached nine months after the accident. Had the matter not been resolved, or had the citizens forced to file suit, the delayed re-opening of the facility would have posed potentially serious environmental consequences around the State, economic repercussions in our large chemical industry, and would have deepened the bitterness between the facility and the local citizenry. I was particularly pleased with the resolution of this dispute because it was relatively quick and protected the essential interests of all the involved parties.

Another significant dispute we were involved in concerned the effect casino gambling development in Atlantic City was having on the hispanic population. The hispanic community claimed they were being displaced from their community. Our office was brought in after some 400 irate Hispanic citizens jammed the city council chambers and presented a list of 15 demands. Our negotiators were able to establish a process that resulted in the resolution of these demands of the community group using concilliation and mediation. By resolving this dispute, our office of dispute settlement was able to ensure the protection of the economic interests of the city and the interests of the hispanic community, while avoiding potential conflict.

Another very productive service that our office of dispute settlement has provided is training in negotiation techniques. We have conducted an active training program throughout the State that has involved some 500 people from government agencies and community groups. This involvement by no means is to suggest that all individuals attending these programs will become crackerjack negotiators. However, by equipping individuals with an awareness of the value of the negotiation process and the skills to make it work, I am hopeful that we have enabled people to resolve their own disputes in a way that will avoid open conflict and litigation.

The experience of our office of dispute settlement is encouraging, becaus it has been able to keep certain disputes out of our court system while facilitating resolutions that have been fair to all parties involved. No amount of administrative or judicial efficiency is justified if the interests of the parties involved, especially those with limited resources, are not protected in the process. In this regard, I am not so much concerned with overburdening our court system per se, As I am with taking out of the system disputes that may be fairly resolved by other, less costly and time-consuming methods. That is the true challenge before us: To design dispute resolution mechanisms that are more appropriate to the nature of the particular dispute while fully protecting the interests of all parties.

Our experience suggests that mediation, conciliation, and arbitration have much to offer in dealing with more localized types of disputes. I support the measures before you because they would support these mechanisms in the States in a way that would ensure both fairness and efficiency.

While perhaps our experience through the office of dispute settlement is directly relevant to the bills currently under your consideration, my overall experience with the department of the public advocate further supports the encouragement of nonadversarial dispute resolution. This experience has led me to view the issue of alternative, non-adversarial conflict resolution within a broader context of institutional reform. Based on that perspective, I would like to offer three observations that I believe are germane to your deliberations.

First, as was documented by a number of witnesses before Congressman Kastenmeier's subcommittee in last summer's hearings on S. 957, our policy-making and justice systems are today subject to varied, and increasing demands, many of which these systems are ill-suited to deal with effectively. Court dockets

and regulatory agendas continue to grow, and judges and administrators are expected to deal competently with a wide range of complex problems, each with a different social, economic, and political impact. In this connection, I should note that it is not rare for a State judge to hear a murder trial and an environmental dispute on alternate days, or for an administrator to be expected to formulate and implement broad policy plans and at the same time to be presented with disputes generated by the effects of programs he or she administers.

Second, the variety and extent of these demands on our systems and the increasing complexity of the disputes that grow out of them, suggest to me that we must be open to new ways of doing things. We must carefully restructure our institutions to be more responsive to the reality and variety of problems as they actually exist. There is, for example, a great difference between an individual consumer problem and the issues posed in the debate over nuclear power. It seems clear that these problems demand different institutional responses.

Third, and this is something that as an attorney I have come around to perhaps rather slowly, is my belief that less formal, non-adversarial processes are more appropriate for certain disputes and issues. This realization has been prompted by the operation of the various divisions of our department, as well as the success of our office of dispute settlement.

In the criminal area, for example, I am optimistic about the potential of the diversionary mechanism known as pre-trial intervention. This program avoids the costs and stigma of a trial and the devastating consequences of possible conviction by suspending the criminal process and diverting the accused to a pre-adjudicatory probationary-type program, the successful completion of which would result in the dropping of charges. Cases such as those which are appropriate for pre-trial intervention might also be effectively and fairly handled by community-based justice centers.

In the public interest area, we have been able to resolve a number of complicated cases that would have involved costly and lengthy trials by achieving out-of-court settlements. One case that challenged the validity of our State civil service examination system was resolved when the opposing experts were able to arrive at a meeting of the minds. Another case in which we challenged the total treatment scheme of the State's largest mental hospital was settled after a long and complicated negotiation process. However, as long and complicated as that process was, it was far more expeditious than the trial that would have resulted had the negotiations failed to result in an agreement. I note in this regard that it is our policy to litigate as a last resort; as a rule, we attempt to resolve disputes through negotiation before taking a matter to court.

While the kinds of disputes I have alluded to thus far would go beyond the scope of the bills before you, I believe that our general experience with the success and effectiveness of non-adversarial resolution provides an important perspective.

However, I must be candid in pointing out that in complex, broad public policy cases such as these, I feel very strongly that the parties must retain their right to be heard in a formal court of law. While many disputes may be resolved through negotiation, I would not be willing to forego the ultimate procedural and substantive safeguards of a formal trial. I do not feel, however, that this view is inconsistent with the purposes of the bills you are considering. This legislation merely encourages and supports efforts to provide access to non-adversarial dispute resolution processes, rather than impose such processes on certain classes of disputes.

The dispute resolution proposals under your consideration encourage and assist states and localities in the development of mechanisms and institutions best suited to their own particular needs. This is a new and developing field, and no one has all the answers. It is my judgment that the best approach for the Federal government is to encourage experimentation and facilitate the sharing of information rather than to apply preconceived guidelines. What works in one area may be inappropriate in another, for a variety of reasons. In reflecting this awareness, these bills represent a wise course for the Federal government at this time.

I would also like to comment briefly on the question of the appropriate Federal agency to administer the dispute resolution program. I understand that this was of some concern to Congressman Kastenmeier's subcommittee in last summer's hearings on S. 957. It is my understanding that witnesses before the subcommittee suggested two alternative institutional arrangements to administering the program through the department of justice: forming a new agency or non-profit corporation, similar to the legal services corporation, or having the program administered by the existing legal services corporation. It is my view that all of the suggested methods would be workable.

I understand that concern was expressed about the Department of Justice administering the program for fear that the agency's legalistic, adversarial orientation might dilute its commitment to the dispute resolution program. I do not see this as a problem under any of the proposed administrative alignments, as long as the program is administered and staffed by individuals who are expert in their field and committed to the concept. I have had to wear two hats, those of advocate and objective third party, and because I was willing and able to rely on qualified, expert dispute resolution staff, our office has not been hindered by the more formal, legalistic approach of the majority of our department.

My only concern if this program is administered through the Department of Justice is that an equal emphasis be given to consumer disputes, as well as civil matters. I would also recommend the participation of the Federal trade commission chairman on the advisory board.

In closing, I would like to state that of the three bills the subcommittee are considering. I would favor H.R. 3719. I base this judgment on the fact that H.R. 3719 contains both the higher funding level and the dispute resolution advisory board. In contrast, H.R. 2863, although it contains the advisory board, is funded at the lower level, and S. 423 does not include the advisory board.

One of the greatest problems faced by alternative dispute resolution programs in these times of fiscal conservatism, including our own program in New Jersey, is lack of financial support. The Federal government could be of tremendous help in this regard. Also, the advisory board could be a valuable vehicle for facilitating the regular input of the public and other relevant interests, and could provide needed guidance to the dispute resolution resource center.

Finally, I would like to urge the committee to favorably report out a dispute resolution Act. Such an action would represent a much needed reform, one that would help to offer fairer, more effective, and more efficient justices to our citizens.

Mr. PREYER. At this time we look forward to hearing from Commissioner Ratner and Commissioner Malchon.

It appears Mr. Ratner is not here. Perhaps he will be here in a few moments. If he comes in, we will hear from him, and make his statement a part of the record.

Ms. Malchon, we will be delighted to hear from you as spokesman for county officials, who will be heavily involved in this type of program. If you would proceed any way you choose.

TESTIMONY OF COMMISSIONER JEANNE MALCHON, PINELLAS COUNTY, CLEARWATER, FLA., NATIONAL ASSOCIATION OF COUNTIES, ACCOMPANIED BY DONALD MURRAY AND HERBERT JONES, NACO CRIMINAL JUSTICE PLANNING STAFF

Ms. MALCHON. Thank you, Mr. Chairman. I am delighted to have this opportunity to speak for the National Association of Counties on this very important matter today.

I am a county commissioner of Pinellas County, Fla. I also serve as a member of the advisory committee of the Florida Supreme Court on Dispute Resolution Alternatives, and I serve as chairperson for the law enforcement subcommittee on the National Association of Counties' Criminal Justice and Public Safety Steering Committee.

I would, if I may, Mr. Chairman, like to add at this point that prior to becoming a county commissioner some 6 years ago now, I have been very active in volunteer civic affairs for a period of some 15 years, particularly involved in activities with the League of Women Voters, having served as local and State president, and a member of the national board.

So, I do bring the perspective of not only the government official, but also hopefully the citizen, to this testimony and my remarks today.

You have copies of my prepared testimony, and I will not read that. There are just five points that I would particularly like to emphasize, that we touch upon in the testimony.

First, is that both the costs and the limits of the present system have been stretched about as far as can be tolerated from the point of view of local elected officials and the citizens whom the system serves.

We have the well-known, well-publicized tax revolt going through the country, which limits the ability to finance increases, both in personnel and facilities for the present court system as well as the ensuing aspects of it, correctional institutions and so on.

We have in our own State now just had the legislature adjourn, and in the closing moments of the session, as a compromise, they placed a 5 percent cap on the increase in revenue from local ad valorem taxes on local governments.

I fear that we are going to be experiencing more and more of this kind of thing. So that from a very practical point of view, we have to look for viable alternatives.

Second, and no less important, perhaps even more importantly, is the need for serving our citizens better. We are certainly all aware of the frustration and alienation being experienced by members of the American public today. We know it is no myth.

Unless people can be served more immediately and more efficiently, and at less cost to them, in the resolution of minor disputes, many of these will ge unsolved and will fester to the point where they become violent or criminal acts of one sort or another.

The litigation process, as we know it today, is a forbidding process to many people, it is a costly process, it is formal, it is rigid. One of the things about it, of course, is that in a litigation situation there are winners and losers. It is an either and or situation, which almost mandates that half of the people are going to come away from the process dissatisfied or unhappy.

The mediation process, we are finding, does result in compromises which, while they may not be completely acceptable or satisfactory to both parties are partially so, and therefore more inclined to have a satisfactory result.

The third point that we want to make is that any of the bills that are before you do not, in our opinion, have the degree of flexibility that should be incorporated in legislation for this purpose.

Differing communities throughout the country have differing problems. The scope of disputes to be covered by such a program should allow for minor criminal disputes, or criminal situations as well as many juvenile acts.

One of the big problems that people are acutely concerned about today is vandalism and that kind of thing in neighborhoods. Many of the formal processes that we have today do not provide for a resolution of these disputes without very lengthy formal and rigid processes, and sometimes with less than satisfactory results from the point of view of everybody all the way around.

The structure should be flexible. We have some question about the provision in the bills which would in fact create a new agency. We are wondering if the process could not be housed in some existing or even a proposed agency, such as the National Institute of Justice.

We also think that at the local level there should be flexibility for these programs to be carried out, either by private organizations, nonprofit organizations, under the aegis of the courts, or whatever other program or agency seems suitable in a given community.

We feel very strongly that the success of these programs depends very much on the motivation of the people who are going to put them together, the ability that they have and so on. This can vary greatly from community to community.

The last point that we want to stress under the flexibility aspect of it is the referral process. We think that the bills probably limit the referral process too much to a formalized structure, either the States attorney, prosecuting attorney, district attorney, whatever it is.

In some of the programs in my own Pinellas County, in my own State, the referral process is far more open than that, even allowing people to come in off the streets, not even to be referred by any agency.

But it also allows for referral by social agencies, churches, and other appropriate groups.

I myself utilize it in referring citizens who call me with complaints for which there is no other alternative, and have done this most successfully.

The fourth point is our concern that there be greater provision in the bill for local government involvement.

As we point out in the prepared testimony, this is essentially and will be essentially a county program. We feel that there needs to be, both in the grant application review process and in the evaluation process input from local governments.

We don't necessarily think that you have to set up another board or anything to do it from the local point of view. We have existing now such groups as the local criminal justice planning councils, regional planning councils, all who either through the LEAA process, the A–95 review process, are skilled and trained and have staff who do this kind of thing.

We think there should be some local government input, more than is indicated or provided in the bill.

The fifth point is the matter of funding. As you well know, there are several of these pilot projects in operation throughout the country. We have several of them, perhaps a major proportion of them, based upon population, in my own State of Florida.

They do differ greatly. All of the approaches being used have met with some degree of success, some better suit some communities than others.

We don't feel that this should be entered into on a pilot basis at this point. We feel that has been and is being done.

There needs to be some research done and evaluation of those projects which have been very successful, but what we need now is for help to local governments to go ahead and institute those programs that have proved successful. The reason for this, of course, is obvious.

There is an overlapping period, a phase-in period, before these programs begin to really reduce the load on the existing system, and therefore reduce the costs or the rate of increase in the cost.

In the meantime, to institute these programs local governments are going to have to pick up a dual expense burden in putting in the new

programs while still continuing the old programs at the level that they are.

So, there is a very great need for help to local governments to get these new programs into operation.

I think the fact that the bill addresses a phase-out period of reducing appropriations is good. The appropriation should be adequate to do this wherever there is a need and where these programs can serve a purpose, rather than on a pilot or experimental basis, as the figures in any of the bills would seem to indicate.

If you look at our testimony of the cost of the programs that are in effect right now, you would see that the funding of the bill would perhaps allow 100 programs throughout the country. We don't feel that that is sufficient.

I think, Mr. Chairman, that that covers the main points that I wish to emphasize in the prepared testimony. At this point I would be happy to try to answer any questions that you or members of the committee might have.

I do have with me Mr. Herb Jones and Mr. Don Murray of the NACO Criminal Justice Planning Staff to answer any questions that I might not be able to.

[The statement of Ms. Jeanne Malchon follows:]

STATEMENT OF JEANNE MALCHON, COMMISSIONER, PINELLAS COUNTY, FLA., REPRESENTING THE NATIONAL ASSOCIATION OF COUNTIES

Mr. Chairman, I am Jeanne Malchon, County Commissioner of Pinellas County Florida, member of the Advisory Committee to the Forida Supreme Court on Dispute Resolution Alternatives and Chairperson for Law Enforcement on the National Association of Counties Criminal Justice and Public Safety Steering Committee.

Mr. Chairman, I appreciate the opportunity to appear before this joint committee hearing to present the views of the National Association of Counties regarding proposed legislation designed to assist states and local governments in establishing better mechanisms for resolving minor disputes.

THE NEED FOR DISPUTE RESOLUTION PROGRAMS AT THE LOCAL LEVEL

The National Association of Counties strongly supports the expanded use of conciliation, mediation and arbitration in resolving minor disputes. We are convinced that the indiscriminate processing of minor cases through the courts is not only costly, but grossly ineffective in resolving individual conflict. We are anxious to promote the development of neighborhood justice or dispute resolution programs nationwide—including its potential for reducing citizen frustrations, relieving overcrowded court dockets, and for getting at the underlying factors that precipitate conflict. Unfortunately, only a small number of counties—certainly less than 50—have implemented such programs.

The reality, Mr. Chairman is that most of our county courts receive "minor" cases too late, after the initial conflict has intensified, when the disputants are so acutely frustrated that they have no where else to turn. The reality is that in the vast majority of counties, an individual's only option in resolving minor conflict is to settle the dispute themselves or go to court.

Although most minor disputes involve technical violations of the civil and criminal law, many are in reality social services cases in need of immediate attention. We do not believe that citizens should be compelled to go to court to obtain social services or that the court is the most appropriate agency for making such referrals. Most dispute resolution programs employ social workers to assist disputants in receiving social services. A large proportion of cases never reach the hearing stage because the dispute resolution staff is able to refer the disputant to a social service agency, which is able to resolve the disputant's problem. In many instances, the staff provides followup services after hearings.

Dispute resolution centers are the way of the future for our criminal justice system. The overcrowding of court dockets, the lack of confidence, interest and cooperation of victims and witnesses, the long court delays gives support to this concept.

THE COUNTY ROLE AND NEED FOR ASSISTANCE

The Bureau of the Census determined that in fiscal year 1976, counties and municipalities financed $12.1 billion in criminal justice expenditures, largely through property taxes—out of the national total of $19.7 billion. Certainly, the passage of Proposition 13 and its rippling effect have heightened the need for efficiency, but especially for more effective methods in solving minor disputes at the county level.

Unlike municipal governments, whose largest expenditure is for police, counties invest substantial tax dollars in every functional area of criminal justice: Policing, prosecution, indigent defense, courts and corrections. In fiscal year 1976, municipalities spent less than 6 percent of their criminal justice dollars for courts, while counties spent almost 26 percent of approximately $1.2 billion.

In the long run, we anticipate that the expansion and use of mediation and arbitration in settling minor disputes at the county level has the potential for substantial cost savings. For example, the annual operating budget of $120,000 for the Community Mediation Center in Suffolk County, N.Y., is estimated to be approximately half the cost of one judge and his staff at a total of $250,000. If the program can be designed to divert cases from the formal adversary process in a court setting to the informal process of a mediation center, a settlement that is more satisfactory to the disputants, at a lower cost, is possible. The savings result from the use of community volunteers trained as mediators coupled with the reduction in processing cost through referrals from the police and district attorney's offce.

The present costs of maintaining our criminal justice systems are rapidly increasing—too fast for county officials to meet both operating and capital expenditures from the local tax base. While total criminal justice expenditures in the nation increased 14 percent from fiscal year 1975 to 1976, the expenditures for county governments increased 19 percent. Our local systems of justice are heavily supported by the most regressive of local taxes, and most of us face fiscal emergencies.

Although NACo anticipates long-term savings in court costs for counties who develop dispute resolution programs, we do not envision any short-term savings. The hard reality is that counties who are willing to experiment with new dispute resolution mechanisms at the community level will, in the short run, be asked to assume the costs of a brand new system, on top of exising judicial expenditures. The growth of mediation and arbitration programs at the local level may not result in any immediate reduction in the backlog of court dockets, number of judges or in our yearly expenditures for the maintenance and operation of court facilities. In the foreseeable future, our best hope is that we can cut into the rate of increase for such expenditures by making the courts more effective.

The county is a uniquely suitable place to initiate dispute resolution programs. The courts and many agencies that provide human services must come to the county governing board for approval of their budgets. The counties' responsibilities in criminal justice, its efforts to maintain public health, physical and mental, to supply vocational training, to provide social services (including welfare), to fund education (these vary by county, but most counties have comprehensive responsibilities) have already created a structure than can institute comprehensive community-based services. Large urban counties or consortia of counties are eligible to receive and spend manpower training and placement monies under the Comprehensive Employment and Training Act of 1973. This skeletal structure for change can be fleshed in with the collaboration of community resources—private groups, volunteers, and the school system.

For these and other reasons, the following platform amendment to the criminal justice section of the American County Platform was adopted at NACo's 43d Annual Conference in Atlanta, Ga., July 11, 1978:

G. Mediation/Arbitration of Minor Disputes—To help relieve overcrowded court dockets for both criminal and civil charges and to increase citizen participation, reduce the costs in processing minor disputes and to guarantee a full presentation of the issues, counties are encouraged to establish mediation and arbitration programs or a combination thereof, which rely on discussion and

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compromise rather than criminal prosecution or civil litigation. The definition of minor disputes can be determined by the courts, the prosecutor's office, and/or by the legislature.

Examples of such cases might include domestic disputes, juvenile disputes, landlord tenant disputes, etc. Legal representation is not necessary, but would be permitted.

WILL PROPOSED LEGISLATION MEET THE NEEDS OF COUNTIES IN IMPLEMENTING DISPUTE RESOLUTION PROGRAMS?

A. Purpose and scope

Although S. 423, H.R. 3719 and H.R. 2863 support the implementation of dispute resolution processes, S. 423 and H.R. 3719 would limit the purpose of such legislation to resolving minor civil disputes. Only H.R. 2863 is sufficiently broad enough to be consistent with NACo policy. H.R. 2863 would simply limit the scope to "minor disputes." The line between civil and criminal is too narrow for arbitrary distinctions. There are many minor criminal cases that could benefit from the mediation process. There are even more juvenile cases that could benefit and are implicitly excluded.

B. Dispute resolution resource center

H.R. 2863, S. 423 and H.R. 3719 would all create a Dispute Resolution Resource Center to serve as a national clearinghouse for the exchange of information, to provide technical assistance to State and local government and to provide basic research. The development of such a center has our total support. We need to know what works and what doesn't work and we desperately need technical assistance from the Federal Government and from State government in implementing programs. The Community Relations Service in the U.S. Department of Justice, for example, has a long and distinguished track record and this type of service should be utilized in providing technical assistance to State and local governments.

C. Funds

Although NACo believes that all of the proposed bills contain inadequate authorizations, H.R. 3719 and S. 423 are more realistic with a total yearly authorization of $18 million as opposed to $12 million in H.R. 2863. The Federal Government is currently spending about $600,000 for three justice centers for 18 months. Of this amount, roughly $150,000 per center went for operational costs; the balance represented special developmental expenditures. At a rate of $150,000 per center, the $15 million set aside in H.R. 3719 and S. 423 for State and local grants would support only 100 justice centers in the United States. Considering there are 18,000 cities and 3,104 counties, such funding would barely scratch the surface of the problem.

D. Review of grant applications

Both H.R. 3719 and H.R. 2863 requires that the chief executive officer, attorney general, and chief judicial officer in a State be given the "opportunity to submit written comments" on any application for financial assistance submitted by a local government or government agency, or a nonprofit organization. We question the wisdom of such a requirement—other than to insure statewide coordination of effort. Surely, a local nonprofit organization could generally be more informatively judged by a local government than by State officials, far removed from local operations. These bills are silent on any review by local government.

SUMMARY,

In summary, NACo supports a dispute resolution act that would cover all minor disputes, be they civil or criminal.

Mr. Chairman, at a time when our Nation has focused on prevention in our health care system, it is equally appropriate that we begin to create for our systems of justice, strategies that can help prevent violence. A dispute resolution act, which is adequately funded and recognizes the crucial role of local government can achieve this objective. We need to get at the underlying factors that precipitate violence long before it occurs.

Mr. PREYER. We would be glad to have them join you at the table here.

Thank you very much for your testimony, which is put very succinctly and to the point. It is very helpful.

On the question of funding, what level of funding do you think would be more adequate? Put it that way.

Ms. MALCHON. That is very difficult, to put a precise or even a ballpark figure on at this point, sir. What we are currently engaged in now is doing some research as to the programs that are effective, but certainly most of the major metropolitan areas could benefit from some such program as this.

So, I would say that statistically, whatever number of metropolitan areas, multiplied by the 100,000 to 150,000 figure that we have utilized in existing programs would be somewhere in the neighborhood.

Obviously, there are certain less densely populated areas that could also benefit from such a program. I would say that perhaps they would be far fewer in number.

Mr. MURRAY. Mr. Chairman, the three pilot programs that are currently supported by LEAA. I think the estimates are operationally it is costing about $150,000 a year. These are new efforts, but at that rate, as Ms. Malchon indicated, you could fund, using the most liberal of the bills that have been proposed, only 100 programs in the United States, with that kind of expenditure at the local level.

The difficult in the short run, as also has been indicated, as Government is asked to take on, or to fund a new system, and still fund the old system at the present time—in the short run, it is going to be difficult to see any savings.

Ms. MALCHON. Our own Pinellas County program, our annual budget for that, a LEAA grant, is some $200,000. Of course, ours, as I say, is a rather comprehensive program and covers all of these aspects that I have addressed.

We are, of course, expecting that to be phased out after the next fiscal year, and then hopefully with the cooperation of our municipal governments in our county, we will pick it up locally.

Mr. PREYER. What is the population of Pinellas County?

Ms. MALCHON. A total of 750,000 people.

Mr. PREYER. One of the basic tenets of the legislation is that Federal funds would cease after 5 years, after the phase-in period. With the sort of pressure on local financing which you have just described, do you think that is a realistic assumption, that these programs would be——

Ms. MALCHON. Yes, sir, I do. I think this is a local government function. As I said, local governments need help because it will be a dual situation in the beginning years. They need help to get it underway.

Theoretically, it is a local government function, and it should reduce the burden—if we cannot actually reduce costs, certainly we can reduce the rate of increase in those costs of the formal judicial system.

Mr. PREYER. We also have budget pressures on Congress, as well as at your State level. So that one thing that is important to Congress at this time, a budget conscious Congress, is whether the dispute resolution bills are cost effective. It is a hard thing to come up with hard information on that.

Do you have any evidence or any proof that you could give us to show the cost effectiveness of these programs?

Ms. MALCHON. I hesitate to say that we have proof, Mr. Chairman, because the program and the whole concept is relatively new. I can provide for the committee reports from our own local program and those in Florida.

The Naco staff is presently, as I say, researching the other programs that are in operation around the country. Our own figures—and I am sorry that I do not have that report with me here today—indicates that we are picking up many cases that perhaps would not be in the formal courts anyway.

What we are finding is that it is reducing the situations where these escalate into acts of violence or some other kind of situation that would ultimately impact not only on the courts, but on the correctional systems and the whole criminal justice system.

I think at this point we can only have projections rather than hard proof.

Mr. MURRAY. Mr. Chairman, if I could just add to that. The adversary system we think in many instances obscures the underlying factors that precipitate conflict. Courts are operating under the rules of evidence, don't always get at the underlying factors that precipitate a conflict.

A kid might throw a ball through someone's window. A court would be interested in did he throw the ball and not the factors that might have led up to that incident. We hope through mediation we can get at these factors and, if necessary, if social services for example are needed, that these people could get the proper referrals.

We in county government, since we have major responsibility not only in criminal justice but in the health and social services system, certainly cannot abdicate our responsibilities. We face the problems in one system or another.

Ms. MALCHON. I would like to expand upon that a little bit. One of the potential uses that we see for this system is the situations of domestic violence. These, if they go unresolved, as they do in most cases today because the parties are reluctant to press charges, the police who come to the scene are not trained, and there is no way that they can force these people into the kind of social agencies and so on—as I say, the parties are reluctant to press charges because if so it means perhaps loss of employment and loss of income.

Usually in these situations there is not only spouse abuse, but there is child abuse, which starts the whole cycle for children who become dysfunctional juveniles and end up in the criminal justice system.

If one considers the total cost of that kind of unresolved situation and could treat it early on in this kind of a setting, which has a somewhat formal procedure rather than just being shifted or referred from one social agency to the other, without any resolution agreed to by both parties.

Mr. PREYER. It is hard to put a dollar value on that.

Ms. MALCHON. It is very hard, but one thing about all of the ramifications of these festering situations that are now going unresolved, that eventually end up in some sort of violence or criminal act, I think is the potential for saving, not only dollarwise but in the social aspects of it, is just fantastic.

Mr. PREYER. Thank you very much.

Mr. Ratner has come in. Won't you join us at the table here? Mr. Ratner is the New York City Department of Consumer Affairs Commissioner, and his plane was late today. We are glad you made it.

Mr. RATNER. Thank you.

Mr. PREYER. Let me suggest before we proceed with further questioning of the other witnesses that we hear from Mr. Ratner at this time.

TESTIMONY OF COMMISSIONER BRUCE C. RATNER, NEW YORK CITY DEPARTMENT OF CONSUMER AFFAIRS

Mr. RATNER. I will make my comments brief. Basically, the city of New York and the department of consumer affairs support the legislation before the subcommittees.

First, we are at a time of extremely high inflation, a time when minor disputes become even more important. Every dollar—every penny—is crucial to the family budget now. There is no room for waste.

The second point is that we in the department of consumer affairs in New York City gets approximately 170,000 complaints, telephone calls, and inquiries a year. We feel that that is only the tip of the iceberg with respect to the total number of complaints around.

A study published in the Harvard Business Review shows that only 3.7 percent of complaints are reported to third parties. It gives us in the city a sense that even with our high volume, we are really just touching a small percentage of the problems.

Another point that we think is very important is that minor dispute resolution can be handled with a relatively small amount of money; that is, you can resolve a great volume of disputes at low cost. Our 170,000 inquiries and complaints a year are handled by a staff of only 10 people and 50 volunteers at a cost of about $300,000 to $350,000 a year.

However, I would also like to emphasize that while I think the bills are very good, I think the subcommittees ought to consider some points that could improve the bills.

First, the emphasis of programs funded by the bills should be on two things: That is, buyer and seller complaints; and land-lord-tenant complaints.

I think when you get into neighborhood or interpersonal and family disputes you run into three major problems; One, they are very expensive to resolve; two, they require social workers and other specially trained personnel; and three, they take a great deal more time than the average consumer complaint to resolve.

While I think that these interpersonal are very important and that they should receive attention, I think that the bills under discussion here should concentrate on buyer-seller and landlord-tenant relationships. I think with the kind of money that is presently being contemplated for expenditure under these programs, to extend funding to other areas would broaden the bill to the point where I don't think a good job could be done in crucial areas.

A second point of great concern is the question of business access. I know this point has been disputed and debated. To what extent should business access be permitted under the bill, under this law?

In New York City we have what I consider a very successful small claims court. It does not allow corporations, partnerships, and assignees to appear as plaintiffs. I think one of the reasons for its success is because it does not allow this business access.

While business has a right and should in fact be able to litigate claims, I think the experience in small claims courts of other jurisdictions shows that business access to these courts can have a negative impact. For example, a study of small claims courts in Hartford showed that 83 percent of the claims filed were business claims, collection claims. The court in a sense became much like a collection court.

The affective aspects of why it is not a good idea to have business access are somewhat hard to pinpoint. It is the ambience and the feeling of the small claims court in New York, as being a citizens' court, a people's court, that I think holds its attraction, and also holds the credibility of consumers and other people who use the court.

Comparing our small claims court with our housing court, which is primarily a landlord-tenant court, one can see that people's perception of the court is different. Our housing court is not regarded by many people as a very good court, a very fair court, as a court which is easy to use. I think in part this is because it is primarily a court where the same landlords appear often, so consumers see a regular relationship between a landlord and the judge or clerk. Not that there is anything illegal or wrong going on, but that perception has a very negative effect.

It is crucial for a dispute resolution mechanism to have the confidence of the public. The public should feel the systems are there for them.

If the subcommittee does decide to permit, as the bills presently do, business access, I would tend to limit it to either to a couple of days a week or to a small number of cases per year for any given plaintiff, so that mechanism does not in a sense become a collection court, and yet perhaps could be used by a small business, such as a small grocery store, for the few claims it has.

So, if there is any business access, I would try to limit it either in terms of number or days per week.

My third focal point with respect to improving the proposed legislation involves the criteria for what ought to be funded. There are three or four requirements that could be added which would encourage the creation of better dispute resolution mechanisms.

First, a funded program should make use of volunteers. Volunteers are a very important way to take limited resources and resolve a great many disputes.

Before becoming commissioner of consumer affairs for New York City I started a consumer help center with a local television station and a law school where I taught in New York. We at that time had a budget of $50,000 or $60,000 a year. We had about 60 volunteers and resolved about 5,000 disputes a year for that relatively small budget. It was because of volunteers we were able to do it. Therefore, I would include a recommendation that volunteers be part of any program.

The second point I'd like to make related to criteria for use of funds regards the question of patterns of abuse that are found by dispute resolution mechanisms.

One of the problems with deciding that disputes ought to be handled in a small, individual way is that records may be kept in a piecemeal fashion, which makes it difficult to discover a serious pattern of abuse or fraud by a company.

My agency is both an enforcement and dispute resolution agency.

We have a system whereby when a number of complaints piles up, or when a particular complaint looks like a serious matter, it is sent over to the enforcement division. This helps greatly in preventing further problems.

Therefore, I conclude that the bill ought to have a requirement that dispute mechanisms have a method of recordkeeping or identifying patterns of abuse, and that there be some plan for pointing those patterns out to appropriate consumer agencies or district attorneys, as the case may be. This is essential because, with, various small dispute resolution mechanisms, it could be possible, for example, for a violator to have 30 claims litigated without the pattern ever coming to the attention of an enforcement agency.

My last point with respect to criteria that ought to be included is the question of volume of cases and expeditious handling of cases. I think one of the problems is an area that traditionally has gotten a low priority for funding is that when funding finally comes, the funding is probably not enough to really resolve every issue in great detail. Therefore, I would make one of the criteria for funding the fact that a dispute resolution mechanism is not only accessible, but that it is set up to handle a substantial volume of cases at low cost.

I can tell you at the consumer help center and at the department of consumer affairs, if we did not have budget constraints, we would probably spend ten times as much to resolve a complaint, even though ten times as much might not be necessary.

There are economic laws that describe that phenomenon, but I just want to emphasize I think the volume question is an important criterian that absolutely must be considered when a dispute resolution mechanism is reviewed for funding.

In summary, I think a dispute resolution law is badly needed and I would like to encourage the subcommittees to pass it. I also urge you to consider some of the changes that I have recommended. I appreciate having this opportunity to testify, and would be happy to answer questions.

[The information follows:]

TESTIMONY OF BRUCE C. RATNER, COMMISSIONER, NEW YORK CITY DEPARTMENT OF CONSUMER AFFAIRS

Mr. Chairman and members of the subcommittee, I am delighted to have this opportunity to testify in favor of proposed legislation which would assist in the establishment of improved and innovative mechanisms for the resolution of minor disputes, specifically S. 423, H.R. 3719 and H.R. 2863. As Commissioner of the New York Department of Consumer Affairs, an agency charged with educating and protecting New Yorkers, in the marketplace, and as past head of the Consumer Help Center, a non-profit dispute resolution project acting through the joint efforts of New York University Law School and WNET television, I feel I can speak from experience.

I'd like to focus my comments in two main areas: first, why the passage of this legislation would be of great service to American consumers and second, how a few changes in the bills as written could make this good legislation even better.

Vast numbers of American consumers desperately need help in resolving problems they have with merchandise or services they have purchased. They need information about who to approach with a problem, how to approach that person or institution and they frequently need help in reaching a fair resolution of disputes they have with vendors. In 1978, the New York Department of Consumer Affairs handled nearly 170 thousand phone calls, letters and personal interviews with consumers who wanted help in resolving a conflict with a merchant or service company. These thousands of contacts represent just a small fraction of the

number of transactions about which consumers are concerned: a study of nearly 2,500 households conducted by the Center for Responsive Law, published in Harvard Business Review showed that people actually voice complaints concerning only one third of the problems they perceive. Of the complaints that are voiced, only 3.7 percent are referred to third parties, and of these few complaints, only about 16 percent are referred to local consumer agencies such as the Department of Consumer Affairs. In other words, according to this study, for each and every one of those 170 thousand complaints made to us, New Yorkers probably perceived over 86 more, amounting to a total of 506 million consumer problems per year in New York City alone.

During times of inflation the establishment of a system for fair resolution of consumer disputes is particularly essential. Family budgets are being stretched to the breaking point and people simply cannot afford to ignore situations in which they do not receive value for their dollars. Now, when inflation is carving away at Americans' purchasing power, fair dispute resolution mechanisms would help to insure a reasonable balance of power between consumer and business.

One of the major benefits of alternative dispute resolution mechanisms is that they would move many conflicts out of the adversary system of our courts, a system which is not always best for consumers or business involved in minor disputes. First, conducting a regular case through the courts is expensive—both to the litigants and to the state. Litigants are faced with lost work time, expensive lawyers' fees and the costs of a large amount of paperwork—frequently multiplied by counterclaims and stalling tactics. Government puts millions of dollars per year into processing documents, hiring and paying personnel, and so on, for a relatively slow-moving caseload. When a problem is handled on a less formal basis, a fair result can often be achieved through a relatively short conference in which the parties involved exchange information directly with each other, aided by an arbitrator or mediator. For example, the New York City Department of Consumer Affairs regularly resolves problems on this basis at low cost to both taxpayers and disputants. Last year, a team of 60 volunteers and 10 paid staff handled 170,000 complaints at a cost of roughly $350,000.[1] Consumer Help responded to 5,000 complaints per year in depth, conducting legal research and extensive negotiations between disputants, at a cost of $60,000.

Using alternatives to the formal adversary system to solve minor disputes serves to avoid aggravating feelings of conflict between the parties. When a case is placed before a judge in the regular legal system, litigants typically take an extreme and angry stance rather than a conciliatory one. Often a relationship between disputants must continue after a case is resolved—such as when a consumer and neighborhood store are at adds. Then it much better for community relations if those disputants achieve an agreement together rather than have a decision imposed upon them from the outside.

In addition to limiting alienation between consumers and vendors, alternative resolution systems for minor disputes could curb the feelings of alienation the public often feels with government. Providing the public with fast, inexpensive and fair dispute resolution mechanisms as an alternative to slow and complex court systems would help people recognize that governmental agencies are designed to help, not frustrate, the public. This is especially important to lower-income or minority communities. Alternative dispute resolution mechanisms would not provide a "second-class" form of justice, as some have suggested. Rather, these mechanisms would place government problem-solving resources in the communities where they are needed, lowering language, distance and financial barriers which have prevented the poor from having full access to our judicial system. For example, New York City's Harlem Small Claims Court Community Advocates have been of great service in responding to the needs of that community in helping both plaintiffs and defendants, by explaining legal rights, helping to fill out forms and in assisting in gathering appropriate evidence.

Speedy resolution of complaints would also promote good business practices, as case records could provide both industry and government with information about repeating problems.

Clearly, the benefits that would be provided by establishing innovative informal mechanisms for the resolution of minor disputes are substantial.

Having made my strong support for this valuable legislation clear, I would like to turn for a moment to a few refinements which could make these excellent proposals even better.

[1] Includes overhead such as mailing costs, telephones, copy machines and so on.

First, the focus of the dispute resolution mechanisms funded under these bills should be narrowed to include only minor civil disputes such as those involving a buyer and seller or a landlord and tenant. To attempt to include disputes such as those between neighbors or family members would stretch the funds allotted for these programs too thin. In addition, neighborhood or family disputes require special attention from social workers as well as lengthy investigation and follow-up in order to solve emotion-laden problems. These tasks should not be handled as part of a program for quick and simple dispute resolution.

Furthermore, business access to dispute resolution mechanisms established under this legislation should be limited to insure that those mechanisms will not become collection agencies for corporations. Unfortunately, small claims courts in many states have evolved in that direction. For example, a 1974–75 study conducted by the Connecticut Public Interest Research Group showed that in Hartford 83 percent of small claims court cases involved corporate plaintiffs suing individual defendants. Eight corporations brought 56 percent of the suits examined by the researchers. Massive filings by these corporations made small claims courts the tool of debt collectors rather than a court for individuals.

New York law prevents corporations, associations, insurers and assignees from suing in Small Claims Court, and this system has worked well to preserve the Court's role of serving individuals. If businesses are not to be excluded from bringing cases before minor dispute resolution mechanisms, then it is essential that their access should be limited to one or two days per week or a specified small number of cases per plaintiff per year.

More funding for dispute resolution mechanisms is clearly needed, even if the focus of this legislation is limited to the consumer and landlord-tenant areas. For example, if one dispute resolution expert could resolve as much as 20 serious conflicts per day, about 5,200 conflicts per year could be handled for that salary. Comparing this 5,200 complaints to the 506 million potenital cases per year in New York City alone makes it clear that substantial staff will be needed nationwide. When the cost of paperwork, rents, training, public information and so on is added, it is obvious that the proposed funding is inadequate. Consumers need and deserve more than $12 to $18 million in funding per year for these dispute resolution mechanisms and their administration. By way of comparison, the federal government paid $996 million to support the price of wheat during the 1977–78 crop year.

As far as the technicalities of administration goes, I would like to raise two issues. First, the law Enforcement Assistance Administration should not be heading these programs. The primary experience of the LEAA has been in criminal justice, mainly in criminal prosecution, making the past experience and orientation of this agency inappropriate to work in solving minor non-criminal disputes. This program should be administered by a federal agency familiar with civil procedures, advised by the Federal Trade Commission which has a staff knowedgeable in the expectations, problems and needs of consumers. Second, H.R. 2863 suggests that priority consideration for funding should be given to existing dispute resolution mechanisms over new mechanisms that would perform similar functions in the same area. Final dispute resolution legislation should make it clear that although federal grant money should not be used to pay for systems now funded by state and local governments, improvements in and additions to existing mechanisms should indeed have priority over similar new mechanisms. This would limit wasteful repetition of efforts within a community and make the most of the pool of experience held by staffs of existing mechanisms.

Finally, I would like to propose some improvements that might be made in the requirements for and possible uses of funds by groups receiving grants. One important change would be to require that efforts be made to train and use volunteers. Our Consumer Affairs complaint line phone room is staffed mainly by trained volunteers, some of whom have been with the Department since its inception over ten years ago. Many experienced volunteers with additional training also act as expeditors, mediating between vendors and consumers to resolve complaints. When plans are made for dispute resolution mechanisms, they should definitely include using volunteers who not only provide an essential link with the community for the exchange of ideas and information, especially valuable for effective work in minority communities, but who can greatly expand the capabilities of a program at limited additional cost.

The Senate version of the Dispute Resolution Act specifically mentions that required reasonable and fair rules and procedures include the promotion of effective means for insuring that monetary awards or agreements are paid and

that non-monetary agreements are carried out. Any final dispute resolution legislation should definitely include similar requirements. Collections have been a serious problem in small claims courts. A 1976 New York Public Interest Research Group Study of five New York cities showed that from 30 to nearly 50 percent of small claims court judgements go uncollected. No dispute resolution mechanism will be effective unless it makes provision for prompt payment of settlements.

Also, funded programs should be required to gather data on their cases and resolutions. Not only will this information be useful in determining the effectiveness of programs, but the data should be complied in such a way that reoccurring problems can be traced and dealt with, on a regional or national basis if necessary.

Finally, grant recipients should be required to show that they are handling a substantial volume of cases quickly and effectively. A program cannot be simple, fair or inexpensive if it is not accessible and fast. Funded dispute resolution mechanisms must be required to show their worth as true alternatives to slow-moving, bulky court systems by limiting their focus to appropriate, simple cases and by handling them in a volume that justifies monies spent.

In conclusion, I sincerely hope that you will give full consideration to the changes that I have proposed and that you will take all appropriate action to insure the passage of a dispute resolution bill. With high inflation, consumers need this legislation more than ever before. I'm sure we all agree that American consumers deserve a fair shake in the marketplace.

Mr. PREYER. Thank you very much. That is very interesting testimony.

Mr. Broyhill?

Mr. BROYHILL. I am interested in your statement, in which you are saying that the business community should be barred from using this system and yet at the same time your printed statement says that business groups are also barred from suing in small claims court.

What do you expect the business community to do? These are all consumer-oriented disputes. Some of them, of course, are disputes where a person just hasn't paid. Others are disputes where there may be some question concerning service that should be rendered to the consumer or some complaint about quality or so forth.

It would seem to me a mechanism such as this would resolve these disputes far easier than relying on the court system.

Mr. RATNER. Well, presently in New York City corporations and companies do sue in our formal civil court, and seem to handle their matters fairly well there. These cases are handled expeditiously and with reasonable volume.

I guess my feeling is that to have a system which would be completely open to business would lend itself to the possibility of it basically becoming a collections court. My statement to the effect that if you do have business access it should be very limited is based on our experience in New York City.

I think right now our business does have fair access to courts. In New York City the civil courts are basically a collections courts and small claims court is in a sense a citizens' court. I think that a system wherein they are separated is a good system.

Mr. BROYHILL. Does the consumer under your laws have the right to come in and to allege that the contract has been broken because of service not rendered, or because of quality complaint, and thus that we withheld payments?

Mr. RATNER. Yes; consumers have two ways of doing that. One is once they are sued in civil court, they could come in and say the product was defective, or whatever, and put in a counterclaim. Alternatively, if not sued, the consumer could initiate a suit in small claims court.

Mr. BROYHILL. As I understand a lot of State law, the consumer is not permitted to put forward that defense.

Mr. RATNER. In New York City, the consumer can put forth those defenses or counterclaims, and does.

There are a number of experiments in New York City to try and encourage greater consumer participation in the legal system. For example, First National City Bank has a tearoff summons, where the consumer can put down what their counterclaim is and send it in as opposed to appearing in court. So, we have experimented with better ways for access for the consumer when the merchant sues.

However, when the merchant does not sue and the consumer goes forward, there is a special court for that. I think that distinction is important.

Mr. BROYHILL. Well, do you anticipate that under these programs that the mechanism that is set up would have the authority to hand down a judgment against an individual consumer?

Mr. RATNER. Are you referring to any specific mechanism?

Mr. BROYHILL. Whichever ones set up—50 to 100 programs around the country. Would they have the authority? Are you assuming they would have the authority to hand down a legal judgment requiring someone to pay, or requiring—that result in garnishment, for example, of their wages?

Mr. RATNER. You are anticipating that 50 programs will be set up?

Mr. BROYHILL. Well, we are anticipating maybe 50 to 100 of these programs might be set up around the country. I had not assumed that they would be set up with that type of authority.

Mr. RATNER. I would think that you could have all different types of systems. One might be an informal telephone mediation service. Another one might be an arbitration system, with awards. Another one might be improvement of small claims court in a given jurisdiction. Another one might even be improvement of a civil court system in a rural area that handles all kinds of matters.

I wouldn't want to generalize and say all funded programs should be with or without judgments. I would think, however, the majority of funded programs probably would make awards. I would hope most systems would be of the mediation type and the conciliation type.

In my experience they are much more cost effective than a judgment system. On the other hand, in New York City our small claims court operates at night, with voluntary arbitrators, gives awards and judgments, and operates efficiently, so I would not preclude the notion of judgments and awards.

Mr. BROYHILL. I am not a lawyer. The rest of these gentlemen are, I think. But it seems to me we start getting into really setting up new types of court systems—we better stay out of it.

Mr. RATNER. I think a small claims court is not a new type of system.

Mr. BROYHILL. It just seems to me this is something that the States can do under their State laws, and the Federal Government really has no place in this.

Mr. RATNER. Looking at New York City, our small claims court is considered by people to be excellent, people have confidence in it.

Mr. BROYHILL. Yes, but why should the Federal Government be contributing to that? Why shouldn't the State and local people do that on their own, operating under their State laws?

Mr. RATNER. First of all, I think Federal money could be used to improve small claims courts around the country, including New York City. If the goal is to resolve disputes, one mechanism that works well is the small claims court. It seems to me you ought to put money into something that seems to work well.

Mr. BROYHILL. Well, I had not imagined that this was going to go quite that far. I thought that if this was going to end up as just another part of the State court system, really the Federal Government I don't think has any part in it.

I liked your part there about setting up something new and innovative, as far as setting up a disputes settlement mechanism to provide for arbitration and mediation and so forth.

We might get some information there that might be helpful. But if this is just another type of small claims court that will be set up, the States can very well do that now, operating under State law.

Mr. RATNER. The one comment I would have is that in general, again, I would not preclude the small claims court. However, I do agree with you that the most efficient method of resolving disputes is a mediation center or informal system. My experience is if our agency can handle 170,000 complaints and the consumer help center court handle 5,000 claims for a relatively small amount of money, arbitration and mediation are effective systems. I would agree with you on the general thrust of your point.

Mr. BROYHILL. Thank you. I have no further questions.

Mr. PREYER. Thank you.

Mr. Kastenmeier?

Mr. KASTENMEIER. Thank you, Mr. Chairman.

I am sorry to be here a little late this morning. I missed part of the testimony of Commissioner Malchon.

Commissioner Ratner, I take it your recommendations literally are borne out of your own experience in New York City. The result is we have to try to translate that into what it means for the entire country.

You are talking about a high intake program in a very narrow geographic area, what you recommend may, be suitable for New York City but whether it is suitable for the rest of the country is another question.

That is why I think there are those on the panel and other witnesses who may envision a broader program. One of the difficulties is not only that your model suggests consumer and landlord-tenant questions, which in the metropolitan area such as New York would be central questions, but also that there should be limited access for the business community any type of program.

One of the difficulties with that is that whatever programs are underwritten have to have broad credibility. Members of the business community has to feel that they are not merely the defendant to be dragged into these forums.

That is why I join others, certainly Congressman Broyhill reflected that concern with respect to the model that you suggest, in expressing these thoughts.

I am wondering, Commissioner Ratner, how in New York are interpersonal disputes taken care of; that is to say, how are disputes that are not consumer or landlord-tenant handled in your community? Is there any other comparable agency that presumes to reconcile minor disputes that are not consumer or landlord-tenant in character?

Mr. RATNER. When I was with the public television station and teaching law, and we set up our own consumer help center, we used to get a lot of interpersonal complaint questions. Over a period of time, we developed a list of resources where it is possible to send those sorts of cases.

In New York City there is a tremendous number of social agencies and charitable organizations that deal with the enormous number of those sorts of disputes and problems. Family problems are handled by a number of State, city, and private organizations. Neighbor disputes receive less attention. I think there is not a good forum for neighbor disputes.

Mr. KASTENMEIER. Your experience, then suggests that in a very large urban setting, specialization is so prevalent that a broadly conceived program might not succeed. This is because the community already has other resources and is used to more specialization and categorization of problems. However, in the rest of the country, the broader programs might readily be applicable to their needs.

Mr. RATNER. That is possible. New York, as you say, has developed a tremendous number of social agencies and charitable organizations, as I think most urban areas have. But in areas outside New York and other urban areas that might not be the case.

Mr. KASTENMEIER. Are you familiar with the Justice Department's neighborhood justice centers in Los Angeles, Atlanta, and Kansas City?

Mr. RATNER. I have read about them.

Mr. KASTENMEIER. You know that they are broad in scope with respect to resolving minor disputes. They handle consumer problems, as well as many, many others, even some that are criminal in nature?

Mr. RATNER. I am aware of that. It would be interesting to see what percentage of their time is spent on nonconsumer matters and how much money it takes to resolve these disputes as opposed to consumer and londlord-tenant matters.

Perhaps an analysis should be done on what is an appropriate approximate expenditure for the different types of complaints. I sense that in some of the neighborhood or domestic disputes, it would be very expensive to do a reasonably good job.

Mr. KASTENMEIER. Of course, the purpose of this program is not a permanent underwriting of all alternative dispute mechanisms in the country, whether narrow or broad, but rather to give impetus, to aid States, and communities, counties, and localities to explore with some Federal assistance and some sort of central research or other resource for comparative purposes.

Therefore, we are not necessarily concerned on a permanent basis what the immediate subsidizing of a given program is. We are hoping to inspire the use of these devices, and to encourage some innovation at the same time.

Therefore, we may not be as interested if it costs $75 on an average to dispose of a consumer dispute, and $300 to dispose of a neighbor-

hood dispute, which could involve costs to the community far in excess of $300.

It is difficult to compare oranges and apples, or whatever, but it would appear that in all areas, some help is needed in stimulating alternatives to the court system. Our citizens recognize this and that is what this legislation is all about.

I want to thank you. I am sorry to have missed Ms. Malchon's testimony. I have taken enough time.

Could I yield back the balance of my time, Mr. Chairman?

Mr. PREYER. Mr. Gudger?

Mr. GUDGER. Thank you, Mr. Chairman.

Mr. Ratner, I want to commend you upon one concept that I want to learn a little more about; that is, the concept of use of volunteers. I see from your testimony that you were able to process 170,000 complaints.

I think these must largely have been consumer complaints about the quality of goods or the fulfillment of contracts for goods and services, at a cost of $350,000, using 10 paid staff and 60 volunteers.

Would you explain to me how those volunteers functioned?

Mr. RATNER. They function in two main ways. First of all, we have a phone bank—a hotline—at our agency. That hotline has nine incoming lines and is staffed with one city paid supervisor and eight volunteers.

Each volunteer has been trained in dealing with consumer problems. They know when to refer a problem to another agency, and they are familiar with consumer law. They will often advise the consumer about how to help himself or herself, how to approach a vendor for resolution of a problem, and can tell the consumer what information we may need to help in the case.

The second use is when a complaint involves more than giving simple phone advice. When agency involvement seems necessary, we tell the consumer to write in or take the complaint in full over the phone. Volunteers then write up that complaint, send a copy of the writeup or a summary of the complaint to the merchant involved. When the merchant responds, the volunteer will contact the consumer or merchant as necessary to resolve the dispute.

Mr. GUDGER. Thank you so much.

Now, my concern is where do you derive these volunteers? From what organizations, groups, do you find this contributed civic effort?

Mr. RATNER. We do a number of things. First, we are in contact with institutions such as schools, colleges, and senior citizen programs. We also do radio spots requesting volunteers. One of our best sources is present volunteers. We ask present volunteers to recommend friends. We have always had a ready supply of people, some of whom have been with the agency for as long as 10 years.

Mr. GUDGER. I want to thank you for your very clear testimony explaining how your New York Department of Consumer Affairs functions and explaining also this consumer help center, and how that works in the more complex problems. I also want to thank you for your further explanation about your small claims court, and the community advocates group in the Harlem small claims court community. All this is very interesting. The testimony is enlightening.

Your conclusion is that whatever legislation would be passed would benefit by directing funds into existing agencies where there were such agencies, and that we should not encourage the development of programs that are more complicated than dealing with seller-buyer problems and landlord-tenant problems.

I am going to ask our other witness, Ms. Malchon, commissioner of Pinellas County, Fla., to state if she sees any prospect of using voluntary help significantly within the broader based concept that she has testified about.

Ms. MALCHON. Yes, sir. This is already being done. We are utilizing voluntary help in our Pinellas County program, and in the other programs in Florida, which are broader based programs.

I do have here a copy of a report from the Supreme Court Advisory Committee which gives some statistics individually and cumulatively, on the sources of these cases and the costs and so on of the different programs, which I would like to submit for the record for you.

Mr. PREYER. That would be very helpful, if you could leave that with us.

Ms. MALCHON. I would like to pick up Mr. Kastenmeier's point, that while this may be particularly applicable to New York, where a certain situation pertains, I think that we need the flexibility in the bill for a broader scope elsewhere.

I would just like to say that reference was made to the fact that there are social agencies to deal with some of these other problems. This is certainly true in any metropolitan area.

One of the problems that I find as a local elected official, when complaints of all nature come to me, is that it is difficult to track down one of these agencies that will deal with the problem on a comprehensive basis.

Many of these agencies will deal with one person, or one aspect of the problem, but to have an agency such as our citizen dispute resolutions center, which will deal with all of the parties involved in a comprehensive nature, to try to work out an overall compromise is what we really need, and social agencies do not serve this function.

Mr. GUDGER. Do you have any trouble thinking of a dispute resolution center in Pinellas County that would have a division dealing with seller-purchaser problems, and also dealing perhaps with landlord-tenant problems, along with a multitude of other social problems, such as juvenile problems?

Ms. MALCHON. We already have a county department of consumer affairs that I think functions much as Mr. Ratner's department does. They in turn refer some of their cases that they cannot resolve within the State statute governing consumer affairs to the citizen dispute center.

Mr. GUDGER. And then the citizen disputes center deals with it through a process of arbitration?

Ms. MALCHON. Or through mediation, yes, sir.

Mr. GUDGER. Now, one other thing.

You have, I think, very effectively described the costs and the machinery of your own Pinellas County operation. You have referred also to Suffolk County, N.Y., I believe, and its community mediation center, which is somewhat similar in concept, I think, and in cost to your own.

My problem is this. The funds which you are utilizing there in Pinellas County, are they county funds? Is it partly LEAA funds?

Ms. MALCHON. Partly. We are in our third year of a LEAA grant now, with the deescalating factor. We will be looking toward the next fiscal year to pick up the cost of it ourselves.

Mr. GUDGER. You firmly feel that the fact that you are able to deal with juvenile problems and petty criminal problems and domestic disputes and community disputes fully justifies the broad base for your particular county?

Ms. MALCHON. Without qualification, absolutely.

Mr. GUDGER. Do you feel that the Federal Government, if we do commit in this area, should commit on a gradually declining basis so that our funding would develop concepts, help bring programs on the line much as your program has been brought on the line, and then get the Federal Government out of it after 3 or 4 years?

Ms. MALCHON. Yes, sir, as I stated earlier. I believe that is a county or a local government function. The need for aid in starting off these programs—and they should be allowed to be programs that will be suitable to that particular community—the need for it is during the phase-in period while counties will have to be operating two systems, so to speak.

Mr. GUDGER. Let me ask you one final question. When you set up your program in Pinellas County, did you submit it to the state LEAA planning agency?

Ms. MALCHON. Yes, sir. It went through our local metropolitan planning unit, the local criminal justice agency on which I serve, and it went to the State advisory board.

Mr. GUDGER. But you still think that the local level rather than the State level should be the area where these concepts are developed?

Ms. MALCHON. I think there is a need for some input at both levels, to see that it fits in with overall State priorities. We have perhaps one of the unique situations in the country, where there is a good deal of cooperation between the local planning agencies and the State planning agencies.

Mr. GUDGER. Thank you so much.

Mr. PREYER. Thank you.

Mr. Mazzoli?

Mr. MAZZOLI. Mr. Chairman, I have no questions, thank you.

Mr. PREYER. Thank you.

Ms. Malchon, what is your practice as regards business access? Do you have the problem in these types of mechanisms that they tend to become collection agencies and no longer for citizens?

Ms. MALCHON. We do not have that. That is still left to the small claims court, through the regulatory process at this time. Our citizen dispute centers do not have that kind of access.

Mr. PREYER. You seem to emphasize to me in your testimony the importance of the neighborhood dispute, and the interpersonal dispute mechanisms, while Mr. Ratner emphasizes the consumer disputes.

In your particular operations, do you find that the neighborhood disputes, that these mechanisms meet the neighborhood dispute more importantly than the consumer? How do you rate the priorities, landlord-tenant, consumer?

Ms. MALCHON. As far as saying do they meet them or are they more important, I think it is a question of volume, or quantity, rather than the relative importance.

I might say that perhaps my emphasis on citizen, neighborhood kinds of things is again reflective of the fact that different communities have different problems.

I am sure that you gentlemen are aware that Pinellas County is one of the retirement centers of the country. As the current time, roughly 40 percent of our population is over 65 years age.

Obviously, with these people being retired, and being at home most of the day, having very great concern over their gardens, their yards, perhaps in some areas being adjacent to families with young children, I don't think I have to draw you a diagram of the kinds of things that perhaps we have in greater quantity than other areas might have.

So, I think our statistics would show that this is a very large proportion of our cases. This is not to say that the others are not important or as important, or dealt with just as effectively. It is a question of the mix of different kinds of cases I think will be reflective of any given community.

We should have the flexibility to be able to deal with these things as the community's needs indicate.

Mr. MURRAY. If I might add, the reason the National Association of Counties has supported the Kastenmeier bill in terms of its scope is because we recognize the difference between civil and criminal is often a hair line. It might mean a few dollar's difference.

Yet, we are faced, for example, in our jails, our county jails are just filled with people there on very minor type cases. So we are paying not only through our courts, not only through the district attorney's office, but through our jails.

We think that mediating disputes before these problems escalate into major acts of violence is the way we must go in this country. Unfortunately, countries are strapped in their efforts to support the current system.

We are currently spending over $1 billion a year. It is not if we had the money we wouldn't be interested in promoting mediation around this country. But we are strapped. Our expenditures, with inflation, are going up at a large rate, as Ms. Malchon indicated in our testimony.

We hope the Federal Government would help counties experiment with an idea that dates back to the Bible.

Ms. MALCHON. I was just going to add that, Mr. Murray. Somebody made mention of the fact that this is a new concept. It is not, really. King Solomon used it I think very effectively many centuries ago.

What we are trying to do at this point is expand upon that a little bit and institutionalize it.

Mr. JONES. We also hope that through the mediation process itself we also have to look at the clogged court dockets. We would hope that the long-range objective would be that these dockets, any delays, will not be as long.

We look at the cases now being held up, some of the major cases, the major felonies, is because we have an abundance of those minor disputes that could be settled within the neighborhood before it turns into a major dispute.

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2 OF 8

Ms. MALCHON. Just one thing out of this report. If I remember correctly—and I always hate to quote figures without picking the exact spot—the average length of time it takes to resolve these in Florida is about 11 days.

Mr. PREYER. Mr. Ratner, let me ask you one question. One of the bills, H.R. 2863, has a specific $200,000 project limitation. I would think that wouldn't be any problem in most areas of the country. Ms. Malchon talked about their $150,000, but in a large city like New York, if you would attempt something on a citywide basis of an innovative nature, do you think the $200,000 limitation would be a problem?

Mr. RATNER. I think it is probably better not to put a limit on funding, especially if we are talking about a broader bill than encompasses disputes beyond the consumer and landlord-tenant areas. In New York City, with 8 million people, I think a comprehensive program could cost over $200,000.

Mr. KASTENMEIER. Mr. Chairman, would you yield.

On that point, addressing the question, actually, as I understand Mr. Ratner's testimony, it is not that New York is asking for any program. You are testifying as to what you consider an adequate and ideal program operating in New York presently.

You have also said that there are other social programs taking care of other problems. You don't particularly contemplate New York applying for anything which might be authorized under any of these bills. Is that not correct?

Mr. RATNER. That is right. The question was whether I could contemplate a program larger than $200,000. The answer is "Yes." But we are not contemplating that.

Mr. JONES. Mr. Chairman, if I may. We talked about the use of volunteers in these dispute centers. But we have not mentioned training of these volunteers. We would strongly like to emphasize that the training of volunteers and the mediators themselves should be something that we should consider so that they can be effective and efficient in doing their jobs, in order to keep the people out of the courts.

Mr. PREYER. I think that is a good point. When Mr. Ratner was describing how the volunteers answer the telephone, with these complaints against department stores, when you think of the complications of just the Federal laws involving that these days, they have to have some pretty sharp individuals there.

What sort of training program did you put them through?

Mr. RATNER. They go through about 1 week of training in laws and jurisdiction, and then depending on their competence and understanding of the material presented, a volunteer can spend anywhere from another 2 weeks to 1 month listening in on phone calls to understand how to help a consumer. In addition, we have an update training program once a month.

The competence of the volunteers is just exceptional. I had that same experience when I was with the public television station.

We are selective. We are very careful about who our volunteers are. We think training is crucial. Without making any comparison between civil service workers and our volunteers. I would say our volunteers do very well.

Mr. PREYER. Invidious comparisons are odious.

Let me ask all of you this one general question, the last question I have.

There has been quite a bit of evidence to the effect that for one of these programs to function properly, there has to be some effective public education. The public has to know something about the program, that it is there, what it does.

I would be interested in any suggestions that any of you might have on what is the best way to get at that from your experience.

Ms. MALCHON. Generally, of course the first thing to do is to make sure that all of your social service agencies, community groups and others are aware of the program, what it can do and what it can't do. This can be done through formal communications with these agencies.

Certainly there is no substitute for the good old Speakers Bureau, arranging talks, presentations with community organizations who are always looking for programs.

Direct contacts, I think—going out and setting up a special meeting in some of the areas that might be most prone to have a need of this kind of system.

Don't wait for another group to ask you. The Speakers Bureau, certainly whatever you can do through the media.

We have had some feature stories in the local news media on our programs. All of the standard procedures I think are good.

Mr. MURRAY. If I can raise a point that I think will be raised this afternoon by Mr. Shonholtz, I think credibility and public education go together. People have faith in a process, then they are willing to listen. If they feel that the system cannot possibly respond to their problems, then they will turn a deaf ear.

The track record I think of mediation programs that we have looked at around the country is good. People have the feeling it can get at their problems, it can solve their problems.

I think they will listen to the public education message because it works.

Mr. JONES. I think we should also like to emphasize the coordination of these particular programs within a local community—not only as Commissioner Malchon has stated at the State level, where the regional, State and chief executives are involved, but to coordinate the special services, the prosecutor law enforcement, along with the courts, the mediation process itself, with the use of the media.

We hope that through the public education process, as Mr. Murray has stated, that the credibility of these programs would be much greater. We strongly emphasize the coordination within the local areas, so that every social program, law enforcement and prosecution, can be aware of what is going on within the local community.

Mr. MURRAY. Mr. Chairman, those of us in local government, recognizing as you do, I am sure, the ability of local officials to educate the public on ways they can help solve their problems is probably from our standpoint the way we see county governments going.

We see elected officials at the county government level being educators of the public on ways of solving their problems.

Mr. PREYER. Thank you very much.

Before Mr. Ratner comments, if he cares to, I would like to recognize the chairman of our Subcommittee on Consumer and Public Finance, Chairman Scheuer, who we are glad to welcome here.

Mr. SCHEUER. Thank you very much, Mr. Chairman.

I won't intervene at this point and take up valuable time. Our committee has delegated responsibility for this entire matter to Richardson Preyer. The matter is in very capable hands. I am very glad to be here.

Mr. PREYER. We do want to thank all of you for being here. We have a vote coming up right now. So, I think it would be an appropriate point to break. I did cut you off a little bit, Mr. Ratner, right at the end. Do you have anything further to say?

Mr. RATNER. Just to reiterate the importance of consumer education regarding these kinds of programs, though the media and so on.

Mr. PREYER. Doubtless you would recommend public television as a good form of public education.

Mr. RATNER. Yes, sir, it works very well.

Mr. PREYER. We thank you very much. Your testimony has been very helpful and useful.

The committee will stand in recess until 2 p.m. this afternoon.

[Whereupon, at 12:20 p.m. the subcommittee recessed, to reconvene at 2 p.m., the same day.]

AFTERNOON SESSION

Mr. PREYER. The subcommittee will come to order.

This afternoon we have a panel of program directors which will give us each a little different angle on dispute resolution programs.

First, Mr. Larry Ray, who is the assistant city attorney and coordinator of the Columbus, Ohio, night prosecutor's program. Mr. Ray has also been on 24-hour standby to get here, and we appreciate that effort, Mr. Ray. He will tell us something about their night prosecutor's program.

Our second witness is Mr. Raymond Shonholtz, the director of the community board program, San Francisco, and he will give us the point of view of a community-based forum.

Our third program director is Mr. Earle Brown, director of the Cleveland, Ohio Center for Disputes Settlement.

We have received, I understand, Mr. Brown, a written statement from your parent organization, the American Arbitration Association. Without objection, that will be made a part of the record.

[The written statement of the American Arbitration Association follows:]

STATEMENT OF ROBERT COULSON, PRESIDENT, OF THE AMERICAN ARBITRATION ASSOCIATION, IN SUPPORT OF THE PROPOSED DISPUTE RESOLUTION ACT (H.R. 2863, H.R. 3719 AND S. 423)

Mr. Chairman and Members of both Subcommittees: I am Robert Coulson, President of the American Arbitration Association and am submitting this statement to express the Association's continuing support for the proposed Dispute Resolution Act. We urge the Congress to implement the improvements in the justice process which this proposal seeks to foster.

The Association will be represented at this hearing by Mr. Earle C. Brown, the Regional Director of our Cleveland Office, who has had extensive personal experience in establishing and administering AAA neighborhood mediation and arbitration centers in Cleveland and Akron. He is well qualified to discuss this type of program. He also is familiar with commercial and labor arbitration cases administered by the Association. We have asked Mr. Brown to discuss how the AAA community mediation programs operate in Ohio, describing the kinds of issues

and parties involved and the settlements that are reached as a result of that process.

Although the bills H.R. 2863, H.R. 3719 and S. 423, vary in detail, they all relate to an attempt by the Congress to assist states and other interested parties to provide nonjudicial dispute settlement mechanisms that are effective and convenient to the public. This purpose is in harmony with the mission of the American Arbitration Association, which was created over 50 years ago to encourage the use of voluntary systems of dispute settlement, such as negotiations, mediation, conciliation and arbitration. The AAA is a nonprofit agency operating throughout the United States. It provides process management in the resolution of disputes through such voluntary techniques. Attached to this statement is a copy of the Association's By-Laws, a list of its Directors and pamphlet describing its services. The Association adminiters over 40,000 cases each year involving many kind of disputes, including consumer, commercial, labor and interpersonal disagreements of all kinds. In recent years, with support from foundations such as Ford, Rockefeller, Donner, Sloan and Edna McConnell Clark, the Association has emphasized its community-related programs. It pioneered in the creation of neighborhood mediation programs in which both civil and criminal cases are handled in a problem-solving setting, as an alternative to the adversary processes of courts.

When this legislation was originally proposed, the American Arbitration Association carried on discussions with the American Bar Association and the National Center for State Courts, looking towards the creation of a combined private research center which might be funded by such legislation and which might provide information and technical assistance to states and other interested parties seeking to make use of non-judicial dispute resolution mechanisms. The American Arbitration Association continues to be available to initiate experimental dispute settlement programs for communities that wish to make use of its experience.

We believe that it is appropriate for the Federal Government to support such work. In the past, private foundations and business organizations have shared the major burden for creating and administering such systems. We believe that a far greater use of mediation and arbitration would take place if government support were available on the terms expressed in these bills.

The level of funding for such a program turns, of course, upon your other budgetary priorities. Yet, it is well to remember that exactly when social programs are reduced, injustice falls the heaviest upon the poor and powerless. Fair treatment at least permits those who are deprived to suffer their lot with patience. It is when deprivation is coupled with injustice that the fabric of society begins to tear.

We would encourage such grants to be made for long enough periods to permit the programs to become established in their communities. These systems require time for installation and training and the building of a reputation. Three years is probably the minimum period of initial funding for such a program. Furthermore, program staff and the volunteers need to be convinced that the program has continuity. An important consideration is whether the host community will continue the program after federal funding is completed.

The line between "civil" and "criminal" of course raises important constitutional and statutory and political questions. But in fact, the community mediation programs funded by the Law Enforcement Assistance Administration (LEAA) deal with interpersonal disputes that are imbued with both civil and criminal aspects. In many cases, they are "criminal" matters primarily because they first came to the attention of the police or of the prosecutor. Their resolution may involve transforming them back into what they really are: interpersonal "civil" disputes. While we recognize that this "reality" does not dispose of your legislative concerns, it should encourage you not to become overly diverted by the "civil-criminal" debate.

To administer such a program, we would encourage you to make use of the Office for Improvements in the Administration of Justice, and to encourage continuing involvement by nongovernmental organizations that have been working in this area.

Chief Justice Burger has demonstrated his enthusiasm for the concepts expressed in these bills, as have Chief Justices of state court systems. But, in general, the federal court structure does not seem to offer an appropriate vehicle for administering a national program of this nature.

Having designated one agency to have responsibility for the program, we would urge you not to dilute such authority by requiring it to be shared with another agency.

If the Justice Department is to be the focus for the administration of such funds, care must be taken to support only those programs that seem likely to obtain further local support so that they can exist on a continuing basis. Also, the administrators of such funding programs should be careful not to inhibit the creation of similar activities by local funding sources, since experience shows that the availability of federal funds sometimes dries up the willingness of local sponsors to initiate programs on a self-sustaining basis.

At present, there is great interest in experimenting in alternative methods of dispute settlement and a consensus among many observers that the traditional adversary process of the courts often is not suitable. These alternatives have not burst upon society as a newly discovered invention. They have been a part of man's behavior for centuries. Mediation and arbitration have been known and used since the earliest recorded history of mankind, long before formal courts of justice were created and institutionalized. Voluntary systems of dispute settlement have played a part in almost every governing institution or community.

Uniquely, in modern America, the adversarial processes have come to monopolize the methodology of dispute settlement. Even nongovernmental systems of justice have become saturated and dominated by the concepts and regulations and mental habits of the rule of law.

Recently, there has been a growing recognition of the need to create forums based upon a different model. Commercial arbitration is seen as one alternative, a system under which parties are given the freedom to create their own chosen forum for resolving certain civil issues, a process that often results in more informality and problem solving than can be found in the courts. But the freedom of groups and individuals to negotiate settlements, sometimes with the help of a mediator, is an even more flexible and powerful technique. A wide variety of negotiating processes, ranging from simple bilateral contracts, to collective bargaining, to group problem solving, to democratic elections, should be available to all categories of Americans. They should be helped to understand these techniques. They should be encouraged to use them. Mediators and facilitators should be available to help them. These systems provide the highest quality of justice since they permit participation by the parties in interest.

These processes can be used to resolve antisocial behavioral problems, to adjust material and social inequities, to determine individual and group grievances and to reach agreement as to the appropriate balance between contesting interests. They can deal with disputes of almost every variety.

Many private and public organizations recognize the need to encourage such processes. The American Arbitration Association, of course, encourages the use of these techniques in many different areas of dispute. Other organizations have joined in the same effort. At these hearings, you have listened to our voices and know what we are trying to do.

Now the Congress is considering what role the Federal Government should play in this movement. You are planning to set aside a sum of money to encourage further experimentation in the use of these techniques. The American Arbitration Association supports your intention.

It is hoped that your intervention in this area can be done in a way that does not disrupt the many public and private programs that are already struggling to perform a function in this field. For example, many arbitration and conciliation forums have been established by trade associations, professional societies and community groups. In general, they are funded privately and often depend upon the voluntary services of individual arbitrators and mediators.

We encourage you to be sensitive to the fact that business mechanisms already exist for the resolution of disputes in many areas. Industry trade associations have provided consumers with a variety of remedial tribunals. This kind of voluntary justice should be encouraged by the Federal Government. No competitive systems should be established that might inhibit such private initiatives.

The American Arbitration Association urges the Congress to be sensitive to the fact that many private arbitration systems are designed on a contractural basis, voluntarily by the parties involved. Such programs resolve large numbers of disputes without burdening the courts. They are based on the constitutional right of freedom of contract, a converse of which is that parties should have the right to settle their own disputes in their own way, utilizing mediation or arbitration freely and without unnecessary restrictions.

In that connection, thought should be given to the criteria and eligibility requirements contained in these bills, to see whether each such restriction is necessary, or whether it might inhibit the full utilization of voluntary arbitration systems.

Local governments and court systems also maintain a wide range of processes, utilizing the concepts of conciliation and arbitration. The Federal Government itself provides mediation and conciliation services in many dispute areas. We hope that in your present attempt to plant new institutions in the various communities, you will take care not to trample upon the existing private and public systems which are already serving the needs of their communities.

In fact, some of the existing programs need continuing support. Many of the neighborhood justice centers and community mediation programs established under LEAA grants need continuing funds if they are to survive. Many private programs depend upon a climate of encouragement and judicial deference for their future growth. What they don't need are short-term federal grants, coupled with restrictive and expensive regulatory requirements. And sometimes the very prospect of a federal grant chills the possibility of obtaining state or local or private funding.

Private systems of dispute settlement will continue to exist long after this legislative initiative has run its course. The most lasting contribution that Congress can make is to plant "system seedlings" in those areas which are now the most barren of justice. If your money can create justice for the children of the poor, for the disadvantaged, for the powerless inmates of institutions and for unrepresented workers, you will have made a meaningful contribution to American justice. If you can motivate institutions to install systems of impartial review to enforce the human rights of their workers and customers, you will have enriched the life of many Americans, and set an example for the world.

But if you content yourselves with duplicating what has already been demonstrated and what will collapse at the sunset of your law, you will have failed to accomplish very much. Your access to funds, coupled with a current recognition that our justice system is failing, gives you a chance to swing our society away from authoritarian adversary justice. This legislation could encourage all of us to take a fresh look at dispute resolution. If Congress accepts that challenge, it should know that the American Arbitration Association is committed to the same goal.

Mr. PREYER. I gather you are here speaking not so much for the AAA official position as you are to give us testimony on your experience and reflections on these programs?

Mr. BROWN. That is correct.

Mr. PREYER. We are glad to have all of you. We will proceed in any way you wish. Mr. Ray is the first one listed here. So if he will open first.

TESTIMONY OF LARRY E. RAY, ESQ., ASSISTANT CITY ATTORNEY AND COORDINATOR, COLUMBUS NIGHT PROSECUTOR'S PROGRAM, COLUMBUS, OHIO; EARLE E. BROWN, DIRECTOR, CLEVELAND CENTER FOR DISPUTE SETTLEMENT, CLEVELAND, OHIO; AND RAYMOND SHONHOLTZ, DIRECTOR, THE COMMUNITY BOARD PROGRAM, SAN FRANCISCO, CALIF.

Mr. RAY. Thank you.

Mr. Chairman and members of the committee, I have been associated with the night prosecutor's program, coordinating that effort, for the past 2 years and worked in the program as a law student for 2 years before that.

I believe the purpose of my testimony is to provide information about the program's history and operations and its relevance to the bills at issue here.

The city prosecutor's office is often referred to as a legal emergency room. The police on the streets as well as the prosecutors in the office confront a multiplicity of minor disputes, involving neighbors, family, friends, landlord, and tenant.

Those disputes are of an interpersonal nature; that is, the people have had contact and will have contact after the crisis.

The night prosecutor's program works directly out of the city prosecutor's office in Columbus, Ohio. The types of disputes range from the assault case, in which the woman has been beaten by her husband, and shows the injuries, to the individual case where the landowner is being harassed by neighbors picking flowers or running across the lawn.

Each day in the city prosecutor's office in Columbus approximately 65 people come to file some type of criminal complaint. At least it is in their perception. We found they had very high expectations of the criminal system.

Usually they come asking for a warrant, demanding a warrant, expecting that the individual be arrested immediately, and will be held in jail until time of trial.

It takes a long time to bring their expectations down to a realistic level. When we do, they usually have determined that a formal complaint and warrant is not the answer. In fact, frequently it aggravates the situation.

The failure in the system is its inability to deal with these minor disputes. There seems to be a benefit in dealing with these disputes promptly and justly, or they can continue to escalate and undermine the confidence in society.

There seems to be a lack of communication in urban settings. The formal court does not seem to be providing the answers for these delays and frustrations. So, there needed to be an alternative.

A Capital University law professor in late 1971 decided along with the assistance of the city attorney, would attempt to settle some of these disputes through the informal hearing process. This seemed to work, using volunteer law professors during late 1971 and 1972.

At that time, they applied for a LEAA grant for the night prosecutor's program. The grant was accepted. From 1973, 1975, this program based on mediation, on informal hearings, was funded through the LEAA.

The program appeared to be so successful that after the funding ran out, LEAA funding ran out, the local city council decided they wanted to take over the total funding of it.

Since 1975, in the city of Columbus, the total funding of the night prosecutor's program has been from local sources.

The purpose is fairly simple. The purpose of the night prosecutor's program is to aid parties involved in a dispute to reach a resolution agreeable to both parties, that will be longlasting.

It seems, looking over the numbers of cases in the night prosecutor's program, that there are three types of cases that we handle: First is the situation when a criminal act has occurred, but is very difficult to prove; and yet a problem exists between the parties.

Second will be when a criminal act has occurred and court does not really seem to be the answer.

The third type would be where no actual criminal act has occurred, yet a problem exists between the parties which is brought to the attention of either the police department or the prosecutor's offic

In each of these types of cases, it seems some type of intervention is needed. Mediation seems to work in the night prosecutor's program. It is basically a process in which a third party neutral aids the disputants in fashioning a mutually acceptable agreement.

Experience has shown when people are brought together, given a chance to work out their differences in an informal hearing setting, rather than a formal court structure, that they take this opportunity and they work together in resolving the individual problem.

Because they do work together and the agreements are satisfactory to both of them, it seems as if this agreement is longlasting rather than one handed down by an authority.

The goal of mediation is to get to the heart of the problem, not to be sidetracked by symptoms of the problem. Most of the time in a courtroom it is a decision as to whether an individual is guilty or innocent.

Whereas, in the mediation hearing that is not the issue. The issue is to find out exactly what the problem is and what is the best way to go about resolving it.

Most complainants who come to the prosecutor's office want quick action to resolve their problems. They do not want to take the time to wait 30 or 60 days for the court to resolve this problem.

Most of the time they are just desiring peace and quiet, or for the window to be paid for, or the dog to stop barking, or the kids to stop harassing them. They usually do not want punishment for the individual.

The parties seem to prefer a reasonable, satisfactory solution to a long, drawn-out legal procedure.

Frequently the people arrive at the prosecutor's office to file a complaint moments before the other party arrives. So we don't have our traditional race to the court house to see who can file the charge first, or the complaint first.

Mediation seems to be the answer in most of these cases. Mediation is not just counseling, but the real power to intervene; that is, if the mediation program did not exist, in many of our cases criminal charges would be filed or some type of legal action would be taken.

Reviewing the statistics, during 1978 the night prosecutor's program scheduled over 17,000 hearings. About half of these were interpersonal type hearings, and the other half were administrative hearings, such as bad check hearings, health department ordinance violations and motor vehicle violations.

The program has gained a lot of publicity in the area. It has been in operation for approximately 8 years now. Other communities in the central Ohio area have adopted this idea, so that several towns—one, Newark, Ohio, 40,000 population; Chillicothe, Ohio, approximately 28,000—have also received LEAA grants to start such a program.

There are several other small suburban municipalities in the Columbus area—Gahanna, Ohio, population 16,000; Reynoldsburg, population 15,000—which have also adopted the program. They have started this program totally out of local money, based on the success of the night prosecutor's program.

The five programs which are in operation in the central Ohio area prove that mediation can be successful, not only in an urban setting, but also in small municipalities, as well as small cities in rural settings.

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All of the programs revolve around the mediation concept, although all of them are operating somewhat differently procedurally.

The Columbus program operates directly out of the city prosecutor's office. The Newark, Reynoldsburg, and Gahanna programs work directly out of the city police department. The Chillicothe program operates out of the municipal courtroom.

There is a high degree of flexibility, not only in the operation of these programs, but also in the types of cases that they hold.

The most significant aspect about the night prosecutor's program is that it started out through Federal moneys for 3 years and then was funded locally. The local authorities looked at the program, found it to be a successful program, that it was relieving the courts, that it was saving the taxpayer's money.

The estimated cost of a night prosecutor's program hearing is about $20, in comparison to a court case of $200.

Any program which starts out by Federal money, should have a future plan for funding as well as the process of integration into the community.

All of the five night prosecutor's programs in the central Ohio area have been integrated into the local funding sources.

Thank you.

[The written statement of Larry Ray, Esq., follows:]

PROPONENT'S TESTIMONY (DISPUTE RESOLUTION BILL)

From: Larry Ray, Assistant City Attorney (Coordinator of Intake and Night Prosecutor Program).

Date: June 15, 1979.

In Columbus, the Night Prosecutor Program deals with one third of all criminal complaints registered with the municipal court system. During 1978, 17,219 hearings were scheduled. It is estimated that the average cost of each hearing is $20 in comparison to the average estimated cost of a criminal charge filed and processed at $200.

The Night Prosecutor Program has become a well integrated vital component of the legal system. Utilizing volunteer law professors, the program began its operations in 1971 and obtained federal Law Enforcement Assistance Administration (L.E.A.A.) moneys 1973, thru 1975. During 1974, the program was designated as an Exemplary Project by the National Institute of Law Enforcement and Criminal Justice of L.E.A.A. In the next year, the law student division of the American Bar Association awarded the program its "Student Bar Association Project of the Year Award." From 1976 to the present, the program has been fully, locally funded.

The goals of the program are: (1) To develop a procedure which would be able to rapidly and fairly dispense justice to citizens of Franklin County who become involved with minor criminal conduct; (2) to eliminate one of the burdens on the criminal justice system by reducing the number of criminal cases which cause a backlog in the courts; (3) to ease community and interpersonal tensions by helping the parties involved find equitable solutions to their problems without resorting to a criminal remedy; (4) to provide a public agency forum for the working population during hours which would not interfere with their employment; and (5) to remove the stigma of a criminal arrest record arising from minor personal disputes.

In Operation, the office of the City Prosecutor screens private citizen criminal matters and diverts the complainant into the Night Prosecutor Program. Instead of a complaint being prepared, signed, and filed with the Clerk of Courts, a complaint is taken and a hearing is scheduled for a date that does not interfere with employment, approximately one week later. The complainant is told she/he may bring a "witness" with her/him. Notice is sent to the person charged, notifying her/him that a complaint has been made against her/him of the time of the scheduled stating the reason(s) her/his appearance is requested (in terms of the criminal statute involved), and telling her/him of the time of the scheduled

hearing. All such hearings are scheduled on a docket sheet in one-half hour blocks, weekday evenings, Saturdays and Sunday.

Hearings are conducted in a private room in the office of the prosecutor. Present at the hearing are the hearing officer, human relations counselor, the complainant, the respondent, attorneys (which is rarely the case) and witnesses (if necessary). The hearing officer conducts the hearing informally in such a way that each party has an opportunity to tell her/his side of the story without interruption. The hearing officer asks questions and the parties may talk with each other in an attempt to work out a resolution to the underlying problem.

The hearing officer, acting in the role of a mediator, pays special attention to what the parties are saying in an effort to discover and reveal the basic issues which may in fact have precipitated the dispute which brought the parties into the prosecutor's office.

The human relations counselor assists the hearing officer during the hearing. The counselor provided crisis intervention counseling and referral information to the hearing participants.

The most successful resolutions have proved to be those in which the parties themselves suggest a solution and agree about what should be done. Often, the most effective solution is suggested by a witness, who in many cases, is a friend of both parties. If, however, the parties are not capable of or willing to do this, the hearing officer will suggest a solution which is palatable to the parties. An additional responsibility of the hearing officer is to inform the parties of the law and criminal sanctions which may apply. This may include criminal statutes or city ordinances which carry criminal penalties. Frequently, the parties may be informed of community agencies which may assist them in the resolution of the complaint. Occasionally, the problem involves many parties or even an entire neighborhood. In such cases, the hearing moves to a large room. These hearings usually last one hour or more.

Hearings are free flowing without regard to rules of evidence, burdens of proof or other legalities. Emotional outbursts are common with the responsibility of the hearing officer being to insure that they do not get out of control. Experience has shown that without the opportunity for the controlled display of emotionalism, shouting, and other forms of confrontation, the basic truth often does not come to the surface.

The Night Prosecutor Program has been the focus of much national attention because of its continued innovations. Chillicothe, Ohio, (pop. 28,000) is in its fourth year of operating a similar mediation program. Reynoldsburg and Gahanna, Ohio, (two suburban municipalities) have begun their own programs with totally local funding. Recently, Newark, Ohio, (pop. 40,000) has been awarded a L.E.A.A. grant to begin their program. These varieties of communities have proven that mediation works and is needed in every community.

Mr. PREYER. Thank you very much, Mr Ray.

I see in your statement that you say the opportunity for the controlled display of emotionalism, shouting and other forms of confrontation is the way that basic truth comes to the surface. That is a theory we operate on in Congress, too.

Before we have questions, unless there are particular questions of this witness, I suggest we go forward with Mr. Brown and Mr. Shonholtz, and then we will ask questions.

Mr. Brown, good to have you here today.

Mr. BROWN. Thank you very much.

There has been, of course, a formal statement submitted by the president of the American Arbitration Association, Mr. Colson.

I have not had an opportunity to take a look at it, so that I could ascertain the fact that nothing that I say will be in conflict with the president of the association.

However, I suggest that I have been a practioner of this form of conflict resolution since about 1971. I am operating at this point in five cities in northeast Ohio—Cleveland, East Cleveland, Shaker Heights, Akron, and Elyria.

I can suggest to you that I am personally listening to in excess of 180 to 200 cases a month. Whereas I feel reasonably certain that the type of mechanism that we have employed in conflict resolution is not of course suggested as an alternative to the courts, but in addition to the court system.

There is no question in my mind but that the most efficient court in our land could not handle a case, the kinds of cases that are referred to us, for so economical a cost, or with such expediency as we do with the method that we employ.

We feel reasonably certain that the courts do not address themselves to the problems of the majority of the people in the community that I am most familiar with. It does not serve.

Most of our cases of course originate in the prosecutor's office, in all of the cities that we work. Those that do not originate in the prosecutor's office originate in the courts themselves, in the city.

In the city of Elyria, for instance, a judge will stop a case in progress and refer it to arbitration. They will also do this in the city of East Cleveland, Ohio.

We have, of course—I think it is in the material available to you there—information that will suggest to you that the juvenile courts in the Summit County of Ohio, now, are fully utilizing this kind of conflict resolution mechanism that we are employing.

We call it arbitration as an alternative to the courts. However, the true practitioners of arbitration take some exceptions with the methods that we use because it is a combination of the skills of mediation, conciliation and arbitration.

We of course hope that the courts retain jurisdiction over all of the cases that are referred to us, and they do.

We like to operate, if you will, somewhere within the shadow of the man, as it is sometimes referred to, the courts or the prosecutor's office, so that the effects of it still have a certain amount of clout.

We feel reasonably sure that what we are trying to do not only is resolve the disputes between the parties that come before us, but to transfer, if you will, some of the skills that we feel are necessary to deal with any future problems that the two parties or the multiple, in some instances, parties that are involved in the dispute might of course embrace in future times.

So what we do here is to sit down and let them talk it out across a table. Sometimes they do begin to yell at each other, and sometimes they do vent their feelings. We feel this is a healthy situation in many instances because what has happened in the past, the reason that has brought them to us, is that these parties have never had an opportunity to sit down and talk with each other in the past. They just took some antisocial act against each other that resulted in one or the other parties filing charges at the prosecutor's office.

The cases that we have will vary, I suppose, from assault and battery to conversion, to even disputes involving landlord-tenant. We certainly are getting a large number of domestic disputes back in our area at this point.

As recently as 2 weeks ago, we signed a contract with the city of Akron, Ohio that we are now going to be addressing ourselves to problems involving code violations. The courts, in an effort to deal with

these landlord-tenant and code violation problems in the city of Akron, Ohio, have developed a backlog.

There are over 400 cases now in backlog in that city that we have contracted with the city to resolve through this mechanism that we are employing.

The American Arbitration Association, incidentally, does not confine itself to just this 4–A type of program. It has been involved over a period of years now in such things as the Wounded Knee uprising—I suppose that is still fresh in the minds of some who have been in Washington over a period of time.

These are the very same techniques that were employed in bringing about a cessation of hostilities there.

In the prison riots at the Massachusetts State Prison at Walpole—we were very, very active there, in that hot dispute.

The same kind of techniques we are talking about in these other programs utilizing here are the kinds of programs that were developed through the hot disputes over a period of years that the American Arbitration Association has been very, very active in.

Again, may I suggest to you that the material that I have submitted to you will give you a statistical breakdown on the numbers of cases that we are doing in some cities. It will also give to you or offer to you some of the letters of commendation that we have received, not only from the courts, from city councilmen, from county officials, but from neighborhood people who have been involved in the program.

Incidentally, the University of Akron did an in-depth study to evaluate the effectiveness of this program, and it exceeded our greatest expectations. It is something that we feel that you have taken a giant step to offer support to the existing program.

I have been very critical in the past—and this is, I suppose, a little bit away from what I came here to testify—of some of the Federal programs that have supported the kind of program that we have been doing.

I have suggested, of course, even to Mr. Bell that the large amounts of money that were appropriated for the justice centers might have been ill thought of to some degree, and not thought out.

The amounts of money that each city must have should not exceed the amount of money that that community will be capable of supporting on its own, when the withdrawal of Federal moneys come.

In some instances what has occurred is that new programs have been funded for experimental purposes when programs in other cities that have proven successful have been asked to disappear, simply because of lack of financial support for its continuation.

I sincerely hope that that is a part of this particular moment or this bill that will be clearly thought out and an effort, of course, to rectify any errors in the past that have been made, in good intentions of course, or with all good intentions.

It does not happen again. I feel reasonably certain that in every city that we have operated in we have done so with a realistic budget—by not attempting to be administrators but practitioners, in an area that we feel supports not only the effort of the community, of every community to resolve the conflict that exists at a level that cannot, of course, be addressed through the courts themselves.

The courts and the prosecutors ought to be doing pretrial work for the kinds of crimes and the kinds of problems that cannot be, of course, resolved through any other arena.

The prosecutors in the cities that we work in have recognized the effect and the help that we have given simply because we have taken a lot of the junk out of the courts—a lot of the things that eventually will result in a major conflict—simply because it has been dealt with at this point.

The law, incidentally, can only deal with the question of the innocence or guilt of a person who has been charged with a crime. But an arbitrator, a person from the community in which the conflict exists, can sit down with the parties involved in the conflict and let them, with the proper skills, to talk out their differences and eventually come up, not only with what we call an award or decision, but come up with a consent agreement that these parties may have arrived at themselves without the aid of anybody else, had they taken the opportunity to sit down and talk as they are doing at this point.

That conflict, of course, has been resolved through the method that we have employed here.

Although I have been in it—and I suspect may be longer than anybody else here—I honestly believe that we have not begun to scratch the surface in applying this means of resolving conflict in the community that we are attempting to promote here today.

As recently as 2 months ago, I sat down with the vice president of Chrysler Corp. to try to come up with some kind of an agreement, if you will, to resolve new car purchases and warrantee disputes, so that this kind of thing would stay out of litigation and then, of course, be available to individuals who cannot afford the cost of legal services.

I don't know that I have covered all the points that I had intended here, but I do suggest to you that if there are questions, that some of the material that I have submitted to you might furnish additional information. Of course, any questions that you may have I would be more than happy to answer.

Thank you, Mr. Chairman.

Mr. PREYER. Thank you very much, Mr. Brown.

Mr. Shonholtz?

Mr. SHONHOLTZ. Thank you, Mr. Chairman.

I appreciate the opportunity to be able to testify before the joint subcommittees and have prepared a statement which I would appreciate if it was made part of the record of the joint committee.

Mr. PREYER. Without objection, that will be made a part of the record.

[The written statement of Raymond Shonholtz follows:]

STATEMENT OF RAYMOND SHONHOLTZ, DIRECTOR, COMMUNITY BOARD PROGRAM, CONCERNING THE DISPUTE RESOLUTION ACTS (S. 423, H.R. 2863, AND H.R. 3719)

Thank you for the invitation to present testimony before the joint subcommittees.

Non-judicial resolution of conflicts directly addresses a pressing judicial and urban problem. Under the weight of an oppressive and unmanageable case load, urban courts, especially lower courts, have become essentially dysfunctional. It has become so serious that it is unusual for an urban municipal or lower court to hear by court or jury trial more than 5 percent of the civil or criminal cases filed. The vast remainder are either dismissed at the time of call or arraignment

(generally about 33 percent) and remainder compromised or plea-bargained from the justice system (generally about 62.5 percent).

The dysfunctional nature of the justice system has resulted in civil (including consumer) and criminal conflicts being returned to the businesses, communities, and schools from which they came with no real judicial intervention, examination, or determination. While the effect of this situation is normally lamented, almost all reformist moves are directed toward improvement in the justice/law enforcement structure. Limited attention has been paid to the impact that this revolving form of justice has on the schools, businesses, and communities of urban America.

Further, the reduction of agency and court case loads has become such an issue that equally limited attention is paid to the reality that few people decide to use the courts willingly. The reluctance often centers on the fact that: victims seldom get satisfaction or restitution; the court imposes an unacceptable formality on people; and the process is always professional, and often uncertain. Weighing the speculative return against the social, time and monetary costs, people often do not use the justice system until the situation become dire. Some resulting impacts are:

1. Perceived as an ineffectual forum, delivery neither restitution nor punishment, few people willingly participate in the justice system, and most strive to avoid it. As such the system in effect discourages the early referral of conflicts, and, accordingly, forces communities and schools to tolerate disputes.

2. The inaccessibility of the justice system, and its failure to address conflicts at an early or preventive stage directly undermines neighborhood, school and individual safety. Unattended conflicts fester, resulting in increased tensions in the home, school or neighborhood. Not surprisingly, the vast majority of assault, felonious assault, and homicide cases are between people who know one another, often involving long-standing petty disagreements.

3. The dysfunctional, and reputably ineffectual justice system, discourages citizen participation. Thus victims, often aware of the conduct of offenders, refuse to engage the law enforcement process. Experiencing no justice system deterence, offenders are encouraged to continue and/or escalate their conduct. (Accordingly, a recent Gallup Poll indicates that 64 percent of urban Americans list as their first priority neighborhood problems, specifically crime and vandalism. Refer to attachment.)

Other debilitating impacts directly impairing the quality of life in urban communities can be attributed to our failing system of justice. A law enforcement/judicial system that forces neighborhoods to tolerate civil and criminal incidents, undermines the safety of communities and schools, and encourages criminal conduct of a dysfunctional system. If citizens do not readily use the system, do not support it, and seek to avoid its impacts, it is a dysfunctional process for the administration of justice.

In large part the law enforcement/legal system within the urban areas has achieved a dysfunctional nature due to its absorption of almost all conflicts within an adversarial, adjudicatory framework. The imposition of a highly proceduralized, uniform process on all conflicts has weaken the integrity of the legal system. In short, our legal system is overreaching, over extended, and becoming discredited.

Alternative conflict resolution, like the once popular diversion concepts of a decade ago, is being viewed as the panacea for agency and court case reduction. While mediation components of law enforcement agencies and judicial system may have an impact on the entity's case load, it fails to directly respond to the system's general dysfunctional impacts on the neighborhoods and schools of urban America. This is the situation because generally agency mediation projects receive cases after they have been received, reviewed, and referred by a law enforcement agency. Such mediation projects have a very limited ability to develop into a neighborhood preventive forum, early intervention mechanism, or accessible neighborhood or school conflict reducing entity. This being the situation, it is submitted that they will have limited impact on the general citizen's confidence in the integrity and performance of the legal system.

Given the atrophy that has taken place in local conflict resolution mechanisms (churches, family, and community organizations), there is a need to revitalize neighborhood-based conflict resolution forums. The development of such forums not only relates to the conflict resolution needs of urban communities, but underscores an important national public policy in the post-Proposition 13 era. The

shrinkage of available tax dollars for social services calls for greater citizen participation in social service delivery systems.

Neighborhood residents, trained in the techniques of conflict resolution, can over time have a significant impact on the quality of life in their neighborhood and on the type and number of cases entering the traditional justice system. Moreover, such preventive oriented forums have the real ability not only to build a strong neighborhood program, but to respond positively to the negative impacts the prevailing justice system causes in the urban schools and neighborhoods.

The local merchant's dispute over the customer's failure to pay the bill, the petty theft complaint by the store owner against the neighborhood youth, the tenant who has home repair issues with the landlord or the landlord who wants back rent paid, the senior citizen harrassed by local youth, the school that is concerned with a student's truancy status, and the neighbors angry over vandalism or noise, parking or like property issues are manageable issues for neighborhood people trained in assisting others in conflict resolution. Moreover, these issues and conflicts can be received by a neighborhood prevention forum directly without having to pass through law enforcement, judicial, or other agencies. Accessibility, prevention, and expeditious conflict resolution are relevent community concerns in urban areas. Thus a community program that directly relates to the resolution of civil, criminal, and juvenile incidents arising in the neighborhood will receive broad community support. This support is based on the reality that such prevention forums are responsive to immediate local tensions and conflicts, and to the awareness that they can resolve a large number of cases presently passing from the neighborhood into the adult and juvenile justice systems.

The above comments set the context for the following critique and proposed amendments to H.R. 3719, S. 423, and H.R. 2863.

I. LEGISLATION SHOULD COVER ALL MINOR DISPUTES

H.R. 3719 and S. 423 are conceptually and procedurally similar and will be treated as complimentary bills under this analysis. Both pieces of legislation are primarily related to consumer and commercial transactions. The Findings and Purposes Section (Section 2) of H.R. 3719 and S. 423 make no mention of minor criminal cases, neighborhood disputes, senior citizen issues or other non-consumer or non-property activities. Persons charged with the administration of either of these Acts would be easily dissuaded from funding anything but commerce-oriented conflict resolution centers.

In contrast, H.R. 2863 covers the entire range of minor disputes without qualification. (Compare Section 2(a)(1) of H.R. 3719 and S. 423 with H.R. 2863.) It is submitted that H.R. 3719 and S. 423 are too narrow in subject-matter and should be expanded to include all types of minor disputes regardless of legal labels. The same training that is generally relevant for the resolution of a consumer or landlord-tenant case is applicable to the resolution of a petty theft, disturbing the peace, or assault and battery matter. The restriction imposed by H.R. 3719 and S. 423 would preclude agency and direct referral of minor criminal cases. Such a restriction is not justified by either procedural, training, referral or economic considerations.

The same analysis applies to the definitional sections of H.R. 3719 and S. 423. All reference to minor "civil" or "consumer" matters should be stricken or in the alternative specific reference to minor "criminal" cases should be included. (Refer to Section 3 in the three bills.)

II. DISPUTE RESOLUTION FORUMS IN THE NEIGHBORHOODS

Both H.R. 2863 and H.R. 3719 support a finding that "neighborhood, local, or community based dispute resolution mechanisms can provide and promote expeditions, inexpensive, equitable, and voluntary resolution of disputes, as well as serve as models for other dispute resolution mechanisms." (Section 2(a) (6).)

In contrast, S. 423 fails to mention "neighborhood, local, or community based dispute resolution mechanism" as forums promoted by the legislation. Within the above analysis and the context of these comments, this is a glaring omission. The failure to include neighborhood forums as possible recipients of S. 423 funds narrows the range of recipients to agencies (e.g., better business bureaus, small claims courts, prosecutor's consumer fraud units, etc.).

Thus in addition to the narrow subject-matter range that distinguishes S. 423 from H.R. 2863, the former would encourage the bill's administrator to fund exclusively agency oriented programs. Certainly there is little, if any, guidance in the legislation that would encourage an administrator to fund a neighborhood program over an agency program if a selection had to be made. The bill's failure to explicitly include neighborhood programs distinctly restricts the range of experimentation afforded under S. 423. Further, S. 423 discourages the development of preventive forums in urban communities, where the need for preventive conflict resolution effort is the greatest.

S. 423 should be amended to specifically include the funding of neighborhood programs. Its direction should be clear to afford an administrator sufficient encouragement and guidance in the allocation of limited resources.

III. ADMINISTRATION OF THE ACT.

Section 6 of H.R. 3719 and H.R. 2863 are exactly the same and would place the administration of the dispute resolution program in the Attorney General's Office with programmatic decision-making performed in consultation with an Advisory Board of nine persons appointed by the Attorney General. Section 6 of S. 423 would likewise establish the administration of the program in the Attorney General's Office without the establishment of an advisory board.

It is submitted that appropriate administration of the Dispute Resolution Act would best be performed by a non-profit specifically established to undertake the development, funding, research, and evaluation of non-judicial dispute resolution forums. Such an entity would have a clear and specific mission, and would not be faced with the anomaly presented in the present legislation of a federal prosecutional agency developing alternative, non-prosecutorial programs.

The non-profit could have a governing board of nine directors representing a similar range of interests as set out in H.R. 2863 Section 7(c)(1). Not being wedded to any existing governmental agency, the range of programmatic interests and experiments initiated by the new non-profit would not be subject to any political influence or bias potentially inherent in the program's administration by the Attorney General's Office.

In the alternative, location of the dispute resolution program could be legislatively mandated to the Community Relations Service of the Department of Justice. The Service (CRS) has extensive experience in mediation and conflict resolution activities. Moreover, as a department in the Attorney General's Office, it enjoys a range of responsibilities that do not require legal training. If conflict resolution programs are to develop as new justice models, it is essential that a genuine opportunity be afforded for full experimentation. The decisionmaking and administrative entities administering the Act must represent this broad attitude. Having the Attorney General's Office developing and operating essentially non-law programs may prove a contradiction in experience, mission, and experimental commitment.

As an additional alternative to the establishment of a non-profit administering body would be the enhancement of the legislation's Advisory Board. The Board instead of the Attorney General would be empowered to make, in consultation with the Attorney General decisions that affected grant requirements, grant awards, technical assistance contracts, research awards, and evaluation designs. All of the functions set forth in H.R. 2863 and H.R. 3719 assigned to the Attorney General would be assigned to the newly created, and more appropriately named, "Governing Board." Moreover, the activities of the Dispute Resolution Center set forth in Section 6 in each of the bills would be administered by the Governing Board in consultation with the Attorney General.

Recognizing the potential political arguments that might be raised to the establishment of a new non-profit agency or the assignment of new responsibilities to an existing agency (CRS), full consideration should be given to the creation of an authentic Governing Board to undertake the responsibilities set forth in Sections 6, 7, 8, and 9 of H.R. 2863 and H.R. 3719, and Sections 6, 7, and 8 of S. 423. Such a Board could exercise sufficient independence from any one point of view and encourage wide latitude in program and issue experimentation, evaluation and research. Further, such a Governing Board composed of experienced and distinguished representatives in the field of alternative conflict resolution would be able to provide genuine leadership in the development of this critically important field.

IV. FUNDING

S. 423 and H.R. 3719 allocate $3.0 million for administrative costs and $15.0 million for program costs over the statutory period running to 1984. H.R. 2863

sets out $2.0 million for administrative costs and $10.0 million for program funding for the same period. S. 423 is encumbered with an entitlement provision that would divide the $15.0 million allocation between the States and the Attorney General with one-half reserved for equal distribution among the States.

It is submitted that the $15.0 million allocation more realistically meets the experimentation, research, and evaluation need of this new field. Moreover, $2.0 million would be appropriate administrative costs. Regardless which approach is followed as set forth in Section III, above, limited amounts should be authoried for administrative costs. Given the limited sums provided for program, research and evaluation, it can be reasonably projected that a finite number of programs and introspective works are likely to be funded during the legislative period. Accordingly, a $2.0 million administrative expenditure, which represents a staff of approximately 15–20 persons, sufficient travel and consultant funds would seem reasonable.

Further, H.R. 2863 and H.R. 3719 each authorize 100 per centum funding for the first two years of the program and 75 per centum and 60 per centum for the third and fourth year respectively. In contrast, S. 423 authories only 100 per centum the first year and 90, 75, and 60 per centum for the following years. The approach taken in H.R. 2863 and H.R. 3719 are more realistic and relate to the fact that it will take any dispute resolution forum at least 12 months to become fully operational and known. To impose a fiscal limitation on it in the second years, as S. 423 would do, significantly prejudices the operational stability of the forums. In short, it is not realistic to expect a forum in the second year to generate 25 per centum local support.

Finally, in contrast to the other bills, H. R. 2863 would place a grant ceiling of $200,000 on any federally funded program (Section 8(h)(2)). This limitation should be stricken from the bill. Given the unpredictable state of the economy, the wide variance in potentially funded programs, the different sizes of communities or cities served, and the possible range of a program's activity any fiscal limitation at this juncture would severely limit the possible range of experimentation and research. It is submitted that the amount that any program should receive is a decision left with those administering the bill and the goal and budget restraints they are working with.

V. PRIVACY

Each of the three bills provide to the Attorney General broad authority to examine the books, records, files, and other papers of any of the funded programs. Recognizing the need for some fiscal accounting, relevant file review is appropriate. However, included in the legislation should be some statement that the records of a dispute resolution forum are private, and their review is only appropriate for a statistical and fiscal purposes.

This proviso is relevant and important, because many eixsting and potential forums may inform people that the information is confidential and not available in any subsequent court or agency proceeding. To avoid any mis-impression, a privacy provision should be included in Section 9 of H.R. 2863 and 3719 and in Section 8 of S. 423.

ATTACHMENT

CITIZEN EMPOWERMENT IS THE INVOLVEMENT OF CITIZENS DELIVERING A SERVICE DIRECTLY TO THEIR NEIGHBORHOOD

Gallup Poll reports that "a still larger majority, 7 in 10 (69 percent) state they would be willing to engage in specific neighborhood activities, *including assisting in the performance of some neighborhood social services.*" (Emphasis added.)

The area of greatest concern and volunteer participation: "neighborhood crime, vandalism 28 percent."

[From San Francisco Chronicle, Nov. 30, 1978]

GALLUP POLL: PUBLIC WILLING TO VOLUNTEER HELP

[By George Gallup]

PRINCETON, N.J.—A Gallup study completed recently for the National League of Cities reveals the existence of a vast resource of volunteer citizen energy that could be used in practical ways to alleviate urban problems.

Following are the key survey findings:

America's urban residents state that they would be willing to donate an average of nine hours per month to their city and their neighborhoods. Projected to the total population of the 125 million adults residing in non-rural areas, the hours available per month comes to the staggering total of approximately one billion.

About one-half (52 percent) of America's urban residents say they would be willing to serve without pay on city advisory committees to study problems facing their cities and to make recommendations.

About two in three (64 percent) express a willingness to serve on committees devoted to the specific problems facing their own neighborhoods.

A still larger majority, seven in ten (69 percent), state they would be willing to engage in specific neighborhood activities, including assisting in the performance of some neighborhood social services.

Following is the first question asked of the sample of the nation's urban residents:

"Suppose the mayor of this city appointed committees made up of average citizens to study local problems such as crime, housing and public transportation—and to make recommendations. If you were asked, do you think you would be willing to serve on one of these voluntary committees without pay?"

Here are the findings for the urban population:

Willing to serve on city (mayor's) committee?
(All urban residents)

	Percent
Yes	52
No	42
Don't know	6

To identify the specific kinds of committees, if any, on which the nation's non-rural residents would be interested in serving, respondents were handed a card listing various kinds of problems with which the mayor's committees would deal. They were then asked to indicate which of these voluntary committees, if any, they feel they would be interested in serving on without pay. Following is the question and the most frequently named problems:

"This card lists various kinds of problems that might be studied by such voluntary committees. Which of these committees—if any—do you think you would be interested in serving on without pay?"

Problems to be studied by city (mayor's) committee
(Based on those willing to serve)

	Percent
Schools and education	22
Senior citizen problems	21
Parks, playgrounds, sports/recreational facilities	19
Drug problems and rehabilitation	18
Activities for youth	18
Problems of the handicapped	17
Housing for the poor	16
Improving hospitals and health care	16
Problems of the poor	16
Unemployment problems	15
Dealing with crime	15
Courts and prison reform	13
Race relations	11
Air and water pollution	11
City beautification	10
Attracting/keeping new business/industry	10
Preservation of historic places and landmarks	9
Improving cultural opportunities	8
Noise pollution	7
Public transportation	7
Traffic control and parking	7
Sanitation, garbage, liter, etc	7
Public libraries	6

This question was asked to measure interest in neighborhood committees:

"Now suppose there were voluntary committees of the kind you just described, in this neighborhood. These would be made up of neighborhood residents who would study problems and make recommendations to local officials. If you were asked, do you think you would be willing to serve on one of these committees without pay?"

Willing to serve on neighborhood committees?

	Percent
Yes	64
No	28
Don't know	8

And here are the problems urban residents say they would like to work on:

Problems to be studied by neighborhood committees (based on those willing to serve)

	Percent
Neighborhood crime, vandalism	28
Neighborhood clean-up and beautification	22
Senior citizen problems	22
Neighborhood schools	22
Neighborhood youth activities	22
Neighborhood recreation, parks, playgrounds	17
Health care for neighborhood residents	16
Neighborhood employment opportunities	13
Neighborhood housing problems	13
Establishment of neighborhood co-operatives such as:	
Food stores, general merchandise, etc	13
Neighborhood race relations	12
Preservation of old, historic buildings, landmarks	11
Air and water pollution	11
Neighborhood parking and traffic	9
Neighborhood noise control	9
Problems of neighborhood retail business, shops, stores	8
Public transportation	8

Mr. SHONHOLTZ. Much that has been said is common to all programs. There are now approximately 50 to 60 different dispute resolution programs in the United States. They vary dramatically in form, in subject matter, and in the resolution process used.

The remarks of the two previous speakers clearly go to the merit of having conflict resolutions take care of a wide variety of business coming to our agencies, law enforcement in particular, and to our courts.

My remarks are made more broad-based, and to some degree more philosophical, and I think are appropriate within this forum.

My remarks are relevant to the type of program we have developed in San Francisco, which is a community-based model in contrast to what I call an agency-based program, characterized by the programs you heard by the two previous speakers.

By agency-based I mean that the primary referral of cases comes from one or more agency or court systems, and that the mediation-arbitration program or conciliation program looks to most of its cases from these existing institutions.

The primary purpose of an agency-based program is to reduce the caseload of those institutions.

I submit to you that there is a weighty issue before us that is worth discussing. Certainly in the few minutes that is allocated to me I would like to take this up.

As a practitioner in criminal law and civil law, my impression of the court system is that it is dysfunctional, and I think it is an issue that we need to seriously address.

The reason I say that court system is dysfunctional is not because it is overburdened with cases. It is incredibly misused. I think that the quality of statements made by the two previous speakers go to the merit of what I am saying.

The fact that their programs work so well in the agency model speaks to the fact that many of the cases coming into the law enforcement/court system do not need too expensive adversarial procedures or the immense amount of legal training and talent available in a courtroom. They simply do not need it.

If one were to look at the vast majority of cases coming into the law enforcement system and the cases coming into our courts, one would readily agree with the two previous speakers that the vast majority of those cases are in the wrong forum.

The problem is not to look at the forum at this point. It is to look at where the cases come from. The problem as such is that the cases that we are talking about that go into the exemplary programs mentioned by the previous speakers are received by those programs after the fact.

Invariably, there has been a police officer's intervention, there has been an investigation, often a criminal filing, and there has been some agency, often more than one, involvement in the case before the case is referred to the programs previously mentioned.

I submit to you that for every case that these gentlemen receive in their programs, many, many more cases exist in the communities. In fact, the reality is this: The existence in every single urban setting in this country of a dysfunctional justice system basically means that communities, the neighborhoods that you live in, that I live in, that these gentlemen and other people in this room and other people in this country live in, tolerate an extraordinary amount of tension and conflict because there is no genuine place to refer them.

There is no place to go with conflicts in this country but to the police and to courts. Consequently, you find systems set up with police departments, prosecutor's offices small claims court, or courts to handle the influx of cases.

The issue is not the resolution process. The real issue is where do you want to receive the cases and at what point in time. It is a critical issue for the two subcommittees entertaining the bills, because I think what really is at stake is the respect and confidence of people in the judiciary.

To the degree that the judiciary cannot solve and readily deal with the problems and conflicts that people have, to that degree it will lose respect and confidence. It is becoming clear that the judiciary has taken on its shoulders, for whatever reasons, and lawyers have taken on their shoulders, a wide variety, if not a monopoly, of the entire field of conflict resolution. It is essential that in order to serve the integrity of the existing institutions that we begin to deal with the type of conflicts coming to the existing forums.

If that is the case—and I submit to you that is the case, that there is in fact to few forums for people to turn to—then the issue isn't so much agency referral mechanisms but the development of new, innovative, and experimental forums in the communities that people can use immediately and efficiently.

The goal of the community board program has been to develop a neighborhood-based conflict resolution system. To resolve cases re-

ferred directly from the communities served, and not just cases processed and referred by an agency or court.

About 75 percent of the cases that we currently handle are directly referred from the neighborhood. By that I mean they are referred from church people that we work very closely with, community organizations, local schools, and mom and pop grocery stores and businesses.

We make an extraordinary effort to do outreach and community education in the areas we work, in order to let people know when and how to use the program. In fact, as one of the previous speakers mentioned, some of our most difficult cases are cases that have prior agency involvement.

The goal, it seems to me, is to reduce the tension and conflicts that are present in urban society, and to provide forums to people that they can use to address their needs. We deal with cases that come from schools, that range from truancy to vandalism and out of the neighborhoods, whether they be parking cases, noise cases, or landord-tenant. We become involved in the case at the earliest point of intervention and point of conflict raising.

The need for the devolpment of more such programs in the neighborhoods in our urban settings is essential. It is the only way in fact to break down what I perceive to be a monopoly on the ownership of conflicts in this society by the legal system.

This is not a terribly unique or novel idea. This country was not founded on the use of courts. Historically informal mechanisms, often church and school and community leadership, were used to resolved small disputes.

Much of those mechanisms are currently dysfunctional. The result has been that institutions have taken on more and more of the responsibility that rightfully belongs in the communities and neighborhoods of urban America.

To reverse this trend and to encourage neighborhood responsibility we need to train people to make the best efforts on cases that come to them.

The programs mentioned earlier, the different programs that are not here, all do different forms of training. In the community board program, anyone can become a panel member as long as they go through training.

This training consists of essentially the same type of training that a minister might receive in conciliation and communications skills. In contrast to the two previous programs mentioned, a neighborhood-based program in my mind—and I think it is an area of additional experimentation—ought not to have any legal ties.

The resolutions made in the community board program are not legally binding. We do not substitute two hours of informality for the due process that would be accorded in a court of law.

If a resolution cannot be achieved, if a problem does not work out, they have the same existing mechanism available to them as they had before they came to us. We have no experience of anybody to date using the court system who has gone through our program. We do a followup on most of the cases heard. We have a very high rate of resolution.

The need is to provide a mechanism whereby experimentation takes place to allow neighborhood people to essentially relearn, if you will, what they were doing in communities at an earlier point in history.

We have many examples currently today of this. Chinese family associations, German town communities, Jewish communities, many suburbs of ethnic and racial communities do not take their conflicts into court, nor do they take them to attorneys. They resolve them within a mechanism respected in that particular environment. I believe the resolutions they make are valid and effective.

These forms of informal conflict resolutions need to be supported. We need to value the use of trained volunteers in the neighborhood to resolve conflicts in the neighborhood, to leave disputes in the context of where they arose and to encourage the involvement of people in the resolution of those conflicts familiar to the neighborhood.

None of that exists in the agency based model. That isn't to say that I oppose it. It is doing a service. It may be reducing the level of caseloads in existing institutions and courts.

It may be providing a better service than our prosecutor, public defender and judges currently are in the ability to give genuine time and attention to real needs and problems.

I submit to you, however, if we are to do prevention and early intervention, we need to develop forms more basic and usable at earlier stages in the conflict. These forums should be in the neighborhood itself.

In the prepared testimony I made several statements about the dysfunctional nature of the justice system and its impact in the communities. Those comments come out of a broader paper that I have written that has been circulated to law enforcement, judges, and general community people in San Francisco.

The point of view that is taken in this testimony and in that paper, which has been very well received, is basically this—that a dysfunctional system of justice harms everyone in the neighborhoods and everyone in a city; that there is a need in fact to make our system of justice more functional and to allow it to work for the type of cases it is intended to serve. To achieve this result a great deal more experimentation needs to take place in the neighborhoods.

Thank you.

Mr. PREYER. Thank you very much, Mr. Shonholtz. I think you make a good point, that when we find an institution that works well in this country, we then proceed to load it down with all of our other problems, hoping it will work as well on those.

The first thing you know we have eroded the effectiveness of institutions. Schools are a good example. Since they have done a good job, we want them to teach driving and everything else everybody can think of.

So you are saying that is what has happened to our court system. Thank you very much for your testimony.

Mr. Broyhill?

Mr. BROYHILL. No questions, Mr. Chairman.

Mr. PREYER. Mr. Kastenmeier?

Mr. KASTENMEIER. Thank you, Mr. Chairman.

I want to compliment the witnesses. I think they all have had exceptionally broad experience in somewhat different models. They are exactly the people who I think we might consult with about what we are up to here.

To the extent that they differ, I am wondering whether, for example, Mr. Ray, whether your own program, which is tied in with the prose-

cutor's office, would not in Mr. Shonholtz' view suffer from identification with the dysfunctional justice system, which apparently his community boards are escaping.

Yours is very much more associated with the office, literally with the institution that metes out criminal justice, than some of the other models such as community based centers.

Does it create a problem, where the people would rather handle their controversies in their own neighborhood than be involved so closely with the prosecutor's office?

Mr. RAY. We have discussed that frequently in the city prosecutor's office. At this point, what we have been doing over the past 7 or 8 years is dealing with the complaints which come directly to our office, either through the police or the prosecutor's office.

It has very little public relations such as advertising on television our services. So, we are not promoting the bringing of complaints to our office, although we do have a lot of communication with agencies in the city.

I think Mr. Shonholtz and I both would agree, as far as the value of flexibility mediation programs. Possibly we are talking about different stages of intervention.

In the night prosecutor's program, we are intervening after the crisis has occurred; that is after a potential criminal act has occurred. Whereas in Mr. Shonholtz's program possibly there is an intervention before a criminal act has occurred, but instead when the tension has surfaced. In a community there could be both types of programs.

What we want in Columbus is to branch out and to have different programs—instead of having just one central program in the heart of Columbus, we could branch out and have different branches of the night prosecutor's program in several sections of the city. When people do have complaints, instead of coming downtown, they could go to their local night prosecutor's program. But, we have not had the funding for that sort of experiment.

I would think that bills such as these might provide the funding for such an experiment as that.

The two suburban municipalities which I mentioned briefly probably are good examples of community type night prosecutor's program, where we have a small community and the entire problem is contained within that small community.

There is much more communication with council members, with the police, and with the social service agencies in that small community than there is in Columbus.

Mr. KASTENMEIER. An issue I address to all three of you is one that arose this morning. One of the witnesses suggested that in his own experience in the city of New York, consumer disputes and landlord-tenant disputes were much more easily disposed of in sheer cost and effort than interpersonal disputes which are more difficult to resolve.

Presumably I guess we would say that criminal matters or quasi criminal matters are mostly interpersonal in nature.

He felt—and I think maybe others might share that point of view—that on the basis of sheer number of cases reconciled per dollar, that that resolution of minor consumer disputes is more cost-effective than resolution of interpersonal disputes.

Now, I don't know whether there is any data in support of this. I realize that in New York City you have a highly sensitive and successful program to learn from. I guess you can handle thousands of cases if indeed people have access to a dispute resolution mechanism and know about it.

What is your view about the economics of or the disparity in economics of handling criminal or difficult interpersonal cases versus the more simple consumer cases? Do you think that the person who suggests that the consumer case should be emphasized because of economics has a good point?

Mr. RAY. Let me take a few moments to respond to that. I think that the easiest complaints to mediate are those in which money or personal property is transferred as part of the resolution such as in the passing a bad check type of situation, or in the broken window type of situation.

The more difficult hearings are those such as the domestic violence, where there can be actually no money transferred or property transferred. They are equally as important, although they do consume more time.

I think it is important that mediation programs do not duplicate the efforts that exist in the community. In Columbus, Ohio, we seem to have a very effective small claims court.

Several years ago we were doing a lot of small claims cases, until small claims court began their conciliation program. Conciliation hearing programs, basically mimic the night prosecutor's program. So we ceased doing small claims and instead stressed the interpersonal hearings.

I would think that it is the same with consumers. We do few consumer type problems because we seem to have an effective consumer affairs section in Columbus. But in other cities, such as Chillicothe, Ohio, about half of our caseload concerns consumer type controversies because there is not an effective small claims court there.

I think a program has to be very adaptable to whatever the need is, wherever there is a lack of disputes resolution mechanisms, for whatever type of disputes, whether it be interpersonal or consumer.

Mr. KASTENMEIER. That was part of what Mr. Ratner suggested; namely, that they had effective small claims courts in New York, and they had social programs that handled different kinds of interpersonal disputes.

His own effort, the model he was talking about, was a very limited consumer model which frankly even excluded a lot of commercial cases. Yet, the model had a very heavy caseload.

In places like the greater San Francisco area, or the Cleveland-Akron area, would there not be other programs—social programs and small claims courts and other devices—available which could handle portions of what otherwise would be a broad neighborhood or interpersonal conflict.

Mr. BROWN. No question. When you get into consumer problems, cases are won and lost in consumer arbitration hearings on the presentation of evidence. You are talking about an individual perhaps less articulate than the person bringing the charge, who has no legal counsel.

52-434—80——14

You are a third person neutral, sitting in judgment in that hearing. How do you not become the advocate of the individual who cannot articulate his problems and still give a fair and impartial decision?

I don't believe it is the arena for social work activity. I honestly do not believe that.

Again, I don't want to create controversy, but I want to keep alive the theory of the two-party system. If I, as a person living in my community, am called upon to render a decision against a person where restitution has to be a consideration, I may get myself in trouble. Sometimes people make themselves a target of the brothers or the friends of whoever is called upon in that community to render a decision against a group of kids that ought to be handled through a criminal procedure, where the law, the courts, the prosecutor's office, retains jurisdiction over that case.

Now, as far as using it for consumer arbitration, I see that as a spinoff. I see it in landlord-tenant cases. What defense is there against nonpayment of rent? That is the bottom line to almost all landlord-tenant problems—again, I am going to rely on what I consider my own personal experience, to address myself to that because I tried it at the outset.

I was deputy director of public housing in the city of Akron for 5 years. I know where the landlord-tenant situation will lead you if you open up an agency to address itself to those problems.

The FTC doesn't want you to charge the consumer money. The FTC says that that in itself is prejudicial. You buy a product, you have a problem, and the only way you can get it into the courts or into an arena for resolution is that you pay a fee.

Well, if you don't charge a fee, then it has so much nuisance value. I made the mistake at the outset—and again I am taking a little more time than allotted, but that is part of my expert testimony, I suppose.

I ran an ad in the newspaper announcing my presence in the community. The television and radio stations were welcoming us to the community. They said, "If you have a problem, call Earle Brown." Then they ran another article, "if you are mad with your mate, arbitrate—call Earle Brown."

We were flooded with calls. It is an impossibility to handle that sort of thing. You try to tell a tenant that if you have a problem with your landlord, what you ought to do is go down to legal services and deposit your rent, and let's establish an escrow, so that when we bring your landlord in here and make him address himself to the problems that confront you, he cannot say that he is evicting you for nonpayment of rent.

Try, if you will, to get that party to go down and establish an escrow account for that rent. They are going to spend it. In the final analysis, when it gets to court, the judge says did you pay your rent? No. There is no defense against that.

Well, it is all right for you to live in this man's house without paying rent because he won't repair the roof if you live for free. But if he is going to charge you rent, there is a problem here, and you have no right to pay rent to a guy that won't give you a decent place to live. That is a very, very complex question.

But again, I can only suggest to you that the majority of cases that you are going to address yourself to are going to be criminal cases, where there is a man standing behind.

The alternative to coming before you as a third person neutral, with no authority beyond that given by the parties involved in the dispute—the alternative to that is to go and get yourself an attorney and go into court. That has been our experience.

Mr. SHONHOLTZ. May I respond. I think Mr. Brown and I have a major disagreement on that. I don't believe that is the case. I think that points up the need for more experimentation and the wisdom of the bills before this body.

I do not believe that it is necessary in fact to have corrosive power in order to get people to come and to resolve problems. People in many instances have problems. We get a great variety of juvenile cases, for instance, both out of the community and from juvenile court.

A principle of the program is to avoid being a diversion project: we will not take a case if the police have made an arrest; or, if the prosecutor has filed on the case; or if juvenile court intends to prosecute it.

We are not a diversion program. If the agency does not intend to take legal action, and wants to refer the case, we will accept it, and then talk to the people about their voluntary participation.

Particularly in juvenile vandalism cases and senior citizen assault cases, which we have done, our experience consistently has been that the parents invariably are looking for some forum, someplace where they can talk about the matter, where they don't have to talk against their kids, they can get some support for the kind of values and responsibility they want to see promoted in the family, in the neighborhood, and with their children.

This attitude contrasts my experience as a former public defender. Where parents came into juvenile courtrooms terrified of what would happen to their kids, knowing their kids had done inappropriate acts, but willing to stick up for them in a courtroom for fear of what the judge may do.

The approach of our legal institutions often creates ethical conflicts: You have parents giving one message to the children that they support them and, on the other hand, they are supposed to give a message to them that they don't condone the conduct. This works to erode family authority.

Using the strong principles of individual and social responsibility with youth—our program has a particular interest in elementary and junior high school age kids—community board has been able to achieve a great deal with a nonlegal forum. So I really wish to clarify, I think there is a broader range of experience than Mr. Brown is suggesting. Again, it is not to confuse the issue or indicate he is wrong. It is just to say I think there is more experience on that point.

The other issue that you raise, which I think is a critical one, concerns the amount of time domestic cases take. My experience is they take a great deal more time. They are more difficult than the landlord-tenant case. The reason for that is that you are talking about people who are essentially in a non-communication phase for a considerable period of time. They have a lot of tension and anger. So they "explode" during these hearings.

Such a hearing will take longer, and the amount of needed social resources may well be beyond a mediator, conciliator, or panel, but it may be obtained through existing social services in the area.

For instance, in the community board program most of the social service in the areas we serve, the mental health and school outreach team, for example, make their service available to the panels. At the end of a panel hearing, if it is very clear the parties need ongoing work or therapy, a referral can be made to an existing service group trained to do that type of work.

Thus, the employment of a social service does not have to wait until the case gets to court or after it explodes into violence. On this point, I would like to just add one other issue.

In the United States a little over a quarter of the homicides take place in families. Of these homicides, a little over half are between husband and wife. The other percent of homicides in the United States, the other three-fourths percent, 80 percent of them are between people who know one another.

Of that 80 percent, we are talking about people not only who know one another, but of disputes that are of long standing and quite petty in origin. These were people on constant conflict with no place to go with their fatally petty conflicts.

In fact, about 2 or 3 years ago I recall reading that Detroit had a regular policy of placing people charged with homicide of a spouse on their own recognizance, because they had just killed the only person they were interested in murdering, and they were in fact not dangerous.

In New York in the VERA study, it was learned that 86 percent of assaults are between people who know one another, over long-standing disputes, often petty in nature.

I do not understand why we should not develop a social system in the neighborhoods to deal with these problems before the violence takes place. If it is a long-standing dispute, somebody knows about it. What we need to do is have some mechanism to get that conflict to a local forum.

The other area where this appears is child beating. School people know of child beating cases long before police do. Neighborhood people and relatives know of child beating cases long before police do. And they do nothing about it.

And I submit to you the reason is because there is no forum they feel is effective or responsive. They don't think much is going to happen if they refer the case to the police. In fact, they may feel the case becomes more complicated, and they don't feel a resolution will take place. And most people will not get involved in a domestic case, unless in fact the person comes into the neighbor's house in a very terrible state.

Mr. RAILSBACK. Mr. Chairman, may I apologize for not getting here earlier.

Particularly, I missed your statement, Mr. Ray. However, I do happen to be familiar with your program. As you may know, I intended to visit it, but got tied up with the Department of Education, or one of our other bills.

I appreciate very much everything that all three of you have contributed. But I would like to ask each of you, to give us some examples of what kind of resolution is made of minor criminal disputes.

In other words, are we talking about restitution, or getting parties to agree to do something, say where you have an assault, or a burglary,

or even a crime of violence. By the same token what do you get the juvenile offenders to agree to?

Mr. RAY. Our night procescutors programs do not usually deal with juvenile respondents. Possibly one prime example of a night prosecutor case would be one that which occurred the other night in Gahanna, Ohio, which involved an elderly gentleman and a young gentleman.

The elderly gentleman was at a local grocery store. The grocery store parking lot was full. His car wouldn't start. He became very irritated. He called his wife. He attempted to save the space right beside his car so the wife could pull up beside it.

While he was attempting to save the space a young gentleman drove in with his wife and a crying baby. There were no other parking spaces. The young gentleman attempted to pull into the parking space that the elderly gentleman was saving. The elderly gentleman was upset. He was waving the tools in his hands. The young gentleman was insistent upon parking.

Rolling down the window, he used very abusive language and then rammed his car into the parking lot, almost hitting the elderly gentleman. The elderly gentleman in response to that took a tool and smashed the windshield. The police were called.

In that type of a case, it seems as if possibly both parties could have some type of complaint against the other.

The hearing was held. Basically it derived out of a misunderstanding, that the young gentleman did not know exactly why the elderly gentleman was saving the spot. The elderly gentleman was waving the tools. The young gentleman thought he was threatening him, to which he responded by rolling down his window, using abusive language.

So the misunderstandings were cleared up through the hearing. The elderly gentleman paid for the young gentleman's window, and the young gentleman apologized for the incident.

So in that case there was an apology. These individuals live in the same community, probably will have some contact with each other.

Mr. RAILSBACK. Let me interrupt to just ask if you can maybe categorize, how many restitutions would eventuate from these minor cirimnal disputes? In other words, say a juvenile offender would pay back somebody they ripped off voluntarily. Is that one major method of resolving the problem? That is what I am trying to get at. Not just one or two isolated cases.

Mr. RAY. Probably about 50 percent of our resolutions involve in one way or the other restitution. A large majority involve apologies. And then a large majority revolve around referrals to other community action.

Mr. RAILSBACK. Mr. Brown?

Mr. BROWN. We are talking in our juvenile program of roughly around $2,000 a month in restitutions. That is in Summit County. We are talking also about the possibility that the family of the charged party may be incapable of paying a financial restitution. So it becomes the responsibility of our volunteers to find gainful employment opportunities for the child.

But, again, there is a problem there also. We have by that point determined the guilt of the party who has been charged, and we try

very hard to do that. So we work out other means. We find employment opportunities that have resulted, if you will, in the fact that after the indebtedness has been satisfied, that that party now has a good employee, that they have kept for the last 3 years. And that is 2 years after full restitution was made.

Mr. RAILSBACK. OK.

Mr. SHONHOLTZ. I think basically the concept of restitution is the one generally used across the board. An example would be in our burglary cases, and in our school vandalism cases, if there isn't an exact monetary amount that the youth can pay out of his own pocket, generally the parties work out some volunteer time, in the community or at the school. That is a very common resolution in our program.

We recently did a school vandalism case with four youths, involving several hundred dollars. The principal of the school negotiated in the panel hearing with the kids what they thought their time was worth, and how serious they thought the matter was, and an agreement was made to work off the time after school to pay for the damage.

Mr. RAILSBACK. After reading some of the statistics about juvenile courts, and after actually interviewing some juveniles, I think that this kind of an approach is far more effective than when they have to go to a court that may not have time to even hear their case, and many times won't do anything. This whole approach makes a great deal of sense to me, particularly restitution.

And if juveniles don't have the means to make restitution, then I like even more the idea of helping them to get a job, which is what you suggested they are doing in Akron.

That is all I have, Mr. Chairman.

Mr. SHONHOLTZ. Mr. Chairman, would we have a chance to comment on some of the specifics in the legislation at the time when the questions by the panel may be completed?

Mr. PREYER. Why? Why don't you give us any specific comments you have right now.

Mr. SHONHOLTZ. Briefly, I would like to just state that there are four items of concern that I have in the bills generally. As you can tell from my testimony, I think the legislation is warranted, and I think the legislation's subject matter should be broad based.

Consequently, I think it should specifically include criminal and juvenile acts, so there is no confusion on the part of whoever administers the program that experimentation should be included and encouraged in this area.

Second, I do feel that the legislation ought to be clear that community-based programs are to be included in those types of programs that receive funding.

In addition, on the technical side, I have a concern, that at the end of 1983 the $200,000 limit in the bill will be to restrictive. Given the rate of inflation, the fact that the bill really spans a 5-year period, and looking at the type of programs we may want to experiment with, I question the wisdom at this stage of setting a dollar ceiling. This would be more appropriate on the administrative side of the bill than the programmatic side.

Mr. RAILSBACK. Mr. Chairman, could I just ask one question. Mr. Shonholtz, I read your statement, and I read your legislative concerns. And that leads me to ask a question that I think Mr. Broyhill wanted to ask.

Given the kind of a phaseout that all of the bills contain, obviously there is not going to be 100 percent funding over the life of one of these programs.

What comment do any of you have about the ability of the local programs to eventually become self-sustaining. Or is that going to be a real problem?

Mr. SHONHOLTZ. That is an issue. It seems some programs will want to experiment and prove a point, and that should be allowed in this legislation. There are advantages in having the resource center established and functioning, at least for 12 months before programs are funded. This will provide an opportunity to conduct evaluations that would suggest to a county or city the value of having a locally supported program.

If we look at the Federal neighborhood dispute resolution programs which range somewhere in the neighborhood of $200,000, and if you add on to that the evaluation, which is currently taking place for the three Federal centers, at $320,000, you see basically they are $300,000 programs, give or take a few thousand.

That, is expensive for Venice, MarVista, and Los Angeles, or the various areas in Kansas City or Atlanta currently operating the program.

What it does not relate to is what would be the cost if the programs were citywide in the areas currently working. That is not the situation in any of the cities in the country. They are narrowly based, with the exception of Mr. Ray's program. The issue of who is going to pick it up is a real issue. Mr. Brown's point on that is a very important one.

My concern about limiting the dollar amount at this point is to say that real experimentation is necessary, and that it is hard to assess at this stage whether you are going to be shortchanged later in failing to experiment due to the $200,000 limit.

The issue about cities and counties picking it up has to be addressed by every program that looks to this legislation for funding.

Mr. BROWN. I personally don't want to sound as if I am pushing and shoving. We have been doing it since 1968. I think we have come up at this point with as an extensive study, "we" being American Arbitration Association, as I care to be involved in.

I think some determinations have been made. I think some conclusions have been drawn. I think if you come up with an unrealistic budget at the outset, then the municipality that it serves will not be able to come forward with full support of the program at the withdrawal of the Federal dollars.

Again, I am suggesting to you that that determination as to the actual amount of money that you are going to put in ought to be made on a realistic basis prior to the announcement of that particular city that the program is going to begin in.

What do you do? Do you start new programs in new communities with the new-found Federal dollars, or do you go in full support of the programs that exist in various communities now that have been proven to be a success over a period of time. I think that is a conclusion or decision that you are going to have to make.

But, moreover, bear in mind that most cities are complaining, saying that they are bankrupt. I think if the States or the counties embraced the concept, that it would be far more beneficial to every individual community that falls within that jurisdiction.

Mr. RAILSBACK. Thank you.

Mr. SHONHOLTZ. I just have two other comments to make on the legislation, if I may.

One is on the issue of privacy. All of the bills have a very broad mandate to the Attorney General to do an evaluation of the programs. I think in section 8, S. 423, and section 9, H.R. 2863 and 3719, that the scope of the examination by the Attorney General is so broad that it suggests that the Attorney General might be able in fact, through his representatives or her representatives, to actually contact, reach, deal with the problems of the people who came to the centers.

It seems to me that that is an inappropriate scope of examination. The evaluation ought to be available for audit purposes, statistical purposes, and process purposes.

But to actually be able to examine the complete information records of the program in relation to the type of disputes, who brought the disputes, their names, their addresses and phone numbers concerns me.

And I think there ought to be legislation drafted into the bill that would clarify the scope of the examination by the Attorney General in terms of accountability.

Finally, there is the issue of the administration of the act itself. Each of the bills looks to the Attorney General to administer the act. Having spent a fair amount of time on particularly 2863, and last year on S. 423, which I had an opportunity to testify on before the House subcommittee, Judiciary Subcommittee on Courts and Civil Liberties, it strikes me there are some issues to be raised about the administration of the bill.

Recognizing that we are in a period of cutting back on the development of new entities, I am cognizant of the fact that it may be difficult to develop another separate regulatory forum for the administration of this bill.

I would, however, submit to you that there are some models around that would suggest, particularly from the Department of Labor, that a nonprofit entity, a quasi-nonprofit entity that relates to governmental interests and private interests, could be relevant and are currently operating. Those deal with manpower, and they also deal out of the Department of Labor with the screening of juvenile or youth employment proposals.

It might be possible to develop an efficient, small, nonprofit, composed of a board of directors, not dissimiliar from the board of directors envisaged in the community legislation, but that would be free and totally independent, that would not have any biases, that would represent the full spectrum of the emerging field of conflict resolution, and would in fact be a body that would encourage broad-based, wide experimentation.

That is not to cast aspersion on the Department of Justice. However, the Department is an entity with a particular mission, and that mission and history appropriately is in the prosecution of cases.

The Department consequently has attorneys in it as opposed to other people. In fact, to my knowledge the only section of the Department of Justice that does not have attorneys in it is the Community Relations Service.

Consequently, I would like to address to the subcommittee that a review take place of the possibility of developing a nonprofit for the administration of this program.

Failing that, it is suggested that the administrative responsibilities and discretionary responsibilities inherent in the advisory committee be expanded significantly. Basically developing not an advisory committee consulting with the Attorney General, but a board that is able to make decisions with the Attorney General consulting with it. Expanding the scope and responsibilities of the advisory committee to make it more in the form of a governing board for the administration of these programs, would provide distance and insulation for the type of experimentation that is encouraged by all three of these bills.

Finally, failing that, it is suggested that the Community Relations Service of the Department of Justice be looked to as an appropriate entity for the administration of the program. The Community Relations Service is a congressional-established body, and no additional legislation would be necessary to mandate this program to the Community Relations Service for its administration.

All three of these suggestions are based on the assumption that all programmatic interests need to be explored, and as much latitude provided as possible, for the development of different types of dispute resolution programs. To achieve this an entity that does not have direct or conflicting interests in the development of the programs ought to be responsible for administering the legislation.

The best example may well be the three Federal Neighborhood Justice Centers. I sit on the advisory board for the evaluation team of the three Federal centers. I am intimately familiar with their development and history.

Considerable pressure was placed on them to startup quickly, to generate cases, to respond to training and to do a variety of things in the early development of the programs out of external needs relevant to the Department of Justice. This should not be repeated in the future.

The only way to avoid this is to establish an entity free of these pressures, particularly political, that gives enough latitude and distance in the development of new forums to ensure their breadth and growth.

Thank you.

Mr. PREYER. Thank you. I think those are very good points.

I am glad you made the privacy point which is something I have been concerned with and that I think we have not brought up very often at these hearings. I think your suggestions on that are very good.

The testimony of all of you has been most interesting today, most helpful. We would like to keep in touch with you. We may have some further questions to put to you as we go down the road on this.

At this time we will adjourn the hearings. I would like to leave the record open for a week for written statements, including response to Chairman Kastenmeier's letter to FTC Chairman Pertschuk, and for any further answers to questions.

Mr. PREYER. Thank you all very much.

[Whereupon, at 4:35 p.m. the subcommittee adjourned.]

ADDITIONAL STATEMENTS

American Friends Service Committee, Grassroots Citizen Dispute Resolution Clearinghouse (Paul Wahrhaftig).
Association of the Bar of the City of New York.
California, State of, Department of Consumer Affairs (Richard B. Spohn).
Council of Better Business Bureaus, Inc. (Dean W. Determan).
Equal Justice Foundation (Michael H. Sussman and Gregg Gordon).
Legal Services Corporation (Dan J. Bradley).
Motor Vehicle Manufacturers Association (V. J. Adduci).
National Home Improvement Council (Randolph J. Seifert).
National Manufactured Housing Federation, Inc. (William R. Keyes).
National Senior Citizens Law Center (Paul Nathanson).
Ohio Mobile Home and Recreational Vehicle Association (Gene Keener).
Sears, Roebuck and Co. (Philip M. Knox, Jr.).

APPENDIXES

APPENDIX 1.—BILLS

(a) H.R. 2863.
(b) H.R. 3719.
(c) S. 423.

APPENDIX 2.—ADDITIONAL MATERIALS SUBMITTED BY WITNESSES

(a) By the American Bar Association:
(1) Sander & Snyder, Alternative Methods of Dispute Settlement: A Selected Bibliography (1979)
(2) Selected articles from ABA Special Committee on Housing and Urban Development Law, National Housing Justice and Field Assistance Program, on "Housing Justice Outside of the Courts: Alternative for Housing Dispute Resolution" (1979): (i) Dellapa, Alternative Dispute Resolution Mechanism and Housing Disputes: A Survey: (ii) Carney, The San Jose Housing Service Center: A "Comprehensive" Non-Judicial Model for Housing Disputes; (iii) Ebel, Landlord-Tenant Mediation: Project in Colorado: and (iv) Drew and Williams, Resolution of Housing Disputes Outside the Courts: A Glimpse of Five Projects
(b) By Dr. Daniel McGillis: (1) McGillis & Mullen, Neighborhood Justice Centers: An Analysis of Potential Models (1977)
(c) By Linda R. Singer, Esq.: (1) Singer, The Growth of Non-Judicial Dispute Resolution: Speculations on the Effects on Justice for the Poor and on the Role of Legal Services
(d) By Larry E. Ray, Esq.: (1) Intake and the Night Prosecutors Program—The Year in Review (1978)
(e) By Earle C. Brown:
(1) Smith & Smith. An Evaluation of the Akron 4–A Project (1977).
(2) American Arbitration Association, Cleveland Center for Dispute Resolution.

APPENDIX 3—ADDITIONAL MATERIALS

(a) L. Nader, Disputing without the Force of Law, 88 Yale L.J. 998 (1979).
(b) Macaulay, Lawyers and Consumer Protection Laws: An Empirical Study (1979).
(c) Current Developments in Judicial Administration: Papers Presented at the Plenary Session of the American Association of Law Schools (December 28, 1977).

APPENDIX 4—ADDITIONAL CORRESPONDENCE

(a) Letter from Honorable Griffin B. Bell to Honorable Robert W. Kastenmeier and Honorable Richardson Preyer (July 19, 1979).
(b) Letter from Honorable Daniel J. Meador to Honorable Robert W. Kastenmeier (August 3, 1979).
(c) Letter from Scott H. Green to Honorable Robert W. Kastenmeier (April 24, 1979).

(d) Letter from Professors Macauley, Trubek, Kritzer, Grossman and Ladinsky to Honorable Robert W. Kastenmeier (October 4, 1979).
(e) Letter from Professor William L. F. Felstiner to Congressman Robert W. Kastenmeier (October 15, 1979).
(f) Letter from Hon. Robert Beresford to Chairman Robert W. Kastenmeier (May 31, 1979).
(g) Letter from Prof. Frank E. A. Sander, to Honorable Robert W. Kastenmeier (February 13, 1979).
(h) Letter from Fay Honey Knopp to Congressman Robert W. Kastenmeier (May 7, 1979).
(i) Letter from Dr. Bob Helm to Chairman Peter W. Rodino (June 12, 1979).
(j) Letter from Nordin F. Blacker to Honorable Robert W. Kastenmeier (July 10, 1979).
(k) Letter from J. Edward Day to Honorable James H. Scheuer (June 7, 1969).
(l) Letter from Joel Edelman to Honorable Daniel Lungren (September 24, 1979).

Additional Statements

Prepared Testimony of Paul Wahrhaftig, Esq., Director, Grassroots Citizen Dispute Resolution Clearinghouse, American Friends Service Committee.

I thank you for the invitation to submit this written testimony to these hearings. I regret that there was not enough time available for me to transmit to you personally the excitment I feel for what is now going on and what the potential is for future activities in developing informal dispute resolution programs serving "people" disputes.

I have been involved with the American Friends Service Committee, a Quaker based social action organization, since 1971 in exploring the potential of using the techniques of mediation to resolve problems which today trouble communities. Our explorations, publications, and activity in the field led to the formal establishment of the Grassroots Citizen Dispute Resolution Clearinghouse in 1977. The Clearinghouse serves a national constituency of community based groups who are developing dispute resolution programs. It is also in close contact and in effect serves as a resource to agencies and governmental units exploring the same field.

We have been excited about the potential commounty based dispute resolution programs have for being a real alternative for people to handle their own disputes. They address the problem of dispute processing being over-professionalized and bureaucratized. Rather than relying on government or professionals to help people solve problems, in many instances that responsibility can better be performed by citizens in their own community structures. Hence, we see the real potential of dispute resolution not as a newly packaged informal court or agency service, but as a real shift of responsibility for problem solving to the community level. It is from this frame of reference that this testimony stems.

AN OVERVIEW

A review of the experience of programs now in the field is leading us towards some conclusions regarding the future viability of citizen dispute resolution programs. First, it would appear that almost any sponsoring unit can run a reasonable dispute resolution program that in the short term will do a credible job of resolving peoples' disputes. However, after the initial enthusiasm wears out, a second or third generation of staff come in, funding is "routinized" through conventional governmental sources, a real danger develops that the programs will cease being a fresh alternative. They will become just another facet of the system. How can this fate be prevented? As background to legislating some principles might be examined now, principles that should bear on the future viability of real dispute resolution programs.

(1) CDR programs should work with real "peoples' " problems. That sounds simple but is not. To the extent that programs are set up to lessen court or agency overload they are structured to serve only problems as defined by the host institution, not as defined by the people. Thus, in a recent workshop a prosecutor skoffed at the idea of wasting time in working on a case involving neighbors complaining about a homeowner religiously feeding pigeons in his yard. In fact, as defined by the people, extensive civil damage was involved and there was real apprehension of a shoot-out developing over the issue. To the extent courts, prosecutors and the like would never have had to bother themselves with pigeon feeding problems, the bureaucratic imperatives of their structure will encourage the staff of "their" mediation center to focus on "real" problems (as the host sees them) and exclude pigeons. Contrary—to the extent that citizens control, own and run the CDR forum it will be encouraged to expand to cover needs as citizens define them.

(2) Funding: It is urgent to establish funding mechanisms geared to the basic needs and concepts of peoples' dispute resolution. To the extent that funding structures are geared towards the needs of courts for instance, pressure will be exerted on the citizen program to conform to court values. In the end the program will tend to mimic the court in structure. For example, LEAA funded mediation centers face an evaluation method designed for analyzing court functions. The IMCR Dispute Center, originally designed to be a community related program operating in two precincts in Harlem was faced with justifying themselves to LEAA evaluators in terms of case load. Since few cases were generated from their small service area, they were encouraged to expand. Today they serve all of New York City and have an "acceptable" case load. Intake is primarily through criminal justice system sources. To seek aid in solving their problems people now go to a city funded mass agency that efficiently processes their complaint. In another five years will this forum be distinguishable from any other agency which people find irrelevant to their problems? Lost is the chance to strengthen independent community problem solving structures in Harlem. We strongly feel that IMCR's fate could well have been different if a funding source had been available geared towards developing and legitimizing real community based forums for handling peoples' problems.

A CHOICE OF BILLS

Based on the above background, we are more sympathetic to the approach taken in H.R. 2863, for it is geared more closely to the funding of non-profit volunteeristic citizen based programs. We find little positive in S. 423 that is not included or improved upon in H.R. 2863 and find ourselves very uncomfortable with S. 423's orientation towards the enhancement and legitimization of court related processes as the preferred vehicle for disputed resolution.

H.R. 3719 raises some interesting questions. While obviously based on 2863, it is very specifically geared towards consumer complaints. Whereas 2863 stresses volunteeristic processes 3719 speaks in terms of coercion. It uses the terms "adjudication" repeatedly and omits in Sec. 4(4) a discussion of establishing voluntary processes for dispute handling.

H.R. 3719 would appear to be built on the assumption that in many situations, particularly consumer situations, gross inequality in bargaining power is involved and that "voluntary" processes will only amount to window dressing akin to the traditional Better Business Bureau. That concern is real. Anthropological literature indicates that where there is disproportionate inequality of power between the parties a mediated setting is likely to favor the powerful party. (Sally E. Merry, "A Plea for Rethinking How Dispute Resolution Programs Work", to be published in 2 Mooter 4 (1979).)

Legitimate as that concern is, the bulk of disputes handled today by mediation programs in the field involve people of relatively equal bargaining power—friends, neighbors, ma and pa stores and their customers and the like. For these complaints volunteeristic, mediated, community based models do work well. They strongly need support. Would it be possible for the ultimate bill to encourage the volunteeristic mediated model as in H.R. 2863 and still allow where appropriate the "consumer court" model envisioned in 3719 for those disputes like consumer ones against large businesses where some coercion may be needed to equalize the bargaining power.

It is also worth noting that H.R. 3719 Sec. 3(4) fails to include criminal matters under its jurisdiction. Hence, where a consumer dispute ends up in punches being thrown it runs the danger of being classified as criminal and inappropriate to be handled under this legislation. This kind of rigid categorization is just the kind of thing to be avoided if the new forums are to serve "people" disputes.

H.R. 2863

We have read a draft and support the suggestions contained in Ray Shonholtz's testimony supporting an increased role for the Advisory Panel in overseeing the priority setting and grant management processes. The role under the present drafts is very vague and runs the danger of orienting the granting

and evaluation process to traditional justice system concepts. Solid input of the more broad ranging experience of the Advisory Committee should pay off in developing more flexible programs geared to serve peoples' broad problems rather than just relief of court overload.

While we share in Shonholtz's belief that the Community Relations Service is the wing of the Justice Department most geared towards the real potential of citizen dispute resolution, we do have some fears in recommending them as the appropriate agency to oversee the Resource Center. Specifically we are worried that CRS has such a low profile that it is very vulnerable towards being overlooked in the appropriation process. That weakness might jeopardize appropriations for dispute resolution.

SOME NITTY-GRITTY NOTES ON SPECIFIC PROVISIONS OF H.R. 2863

Section 6(4)(E): H.R. 3719 is an improvement here in that it leaves out the last phrase of the Resource Center's evaluation responsibility of gathering data "including the average cost and time expended in resolving various types of disputes." While cost effectiveness may be one measure of effectiveness other factors may be even more important. The effect of the program in developing a sense of independent citizen responsibility as first line problem solvers may be just as crucial or even more. However, since cost effectiveness is emblazoned in statute and the other measures are not H.R. 2863 will encourage non-creative thinking administrators to stress court-mimicing values like case load volumes. Are we building another LEAA to replicate courts? Either all criteria should be built into the statute, which is impossible, or responsibility should be given to the Resource Center to develop meaningful evaluation criteria.

Section 8(e)(1): Lists appropriate activities to be funded under the bill. In our observations the establishment of effective citizen based programs, which receive a bulk of their case load directly from the community involve considerable base building work. Enormous outreach work is involved in educating the community about the potential of this new process and how to use it. That kind of publicity and outreach work ought to be specifically listed under 8(e)(1) rather than be left to the discretionary interpretation of "other" as set forth in subparagraph (G).

H.R. 3719 omits Sec. 8 (g) which is found in H.R. 2863. We support that omission. We commonly see existing court sponsored institutions claiming that they already provide the appropriate informal dispute resolution forum. New Jersey is an example where many municipal courts have professionally staffed mediation components. However, citizens in those areas have indicated they feel that a community based model would handle many disputes which today never find their way downtown to the court mediation program. A Community model may supplement the court model or eventually supplant it. However under (g) that possibility is all but closed off. The paragraph seems unnecessarily rigid. Its omission is not likely to lead the Resource Center to fund competing programs. It will be able to use its discretion to fund the program with the better potential regardless of which got started first.

CONFIDENTIALITY

The confidentiality of the records of mediation programs is a crucial issue. Programs are oriented towards getting people to talk freely and get at the root of their problems. It is important to follow-up sometime after the hearing to do program research or humanely see if further help is needed. It would be counterproductive to have to warn the parties that anything that is mentioned about them in program records can be subject to subpoena. However, if a program is being truthful about the status of the law, subpoenas are a real possibility, and protection has not yet been firmly established under the law. One program refuses to take any funds at all for fear it would have to keep records which might be used against its clients. It prefers to work informally with volunteers who use no pencils and have short memories even if that format has obvious shortcomings.

We strongly recommend that dispute resolution legislation follow one of the positive aspects of LEAA. It should involve protection against funded programs revealing confidential information about their clients. 42 U.S.C.A. 3771 (a) provides—

"(a) Except as provided by Federal Law other than this chapter, no officer or employee of the Federal Government, nor any recipient of assistance under the provisions of this chapter shall use or reveal any research or statistical information furnished under this chapter by any person and identifiable to any specific private person for any purpose other than the purpose for which it was obtained in accordance with this chapter. Copies of such information shall be immune from legal process and shall not, without the consent of the person furnishing such information, be admitted as evidence or used for any purpose in any action, suit, or other judicial or administrative proceedings."

CONCLUSION

This is an exciting period in the development of dispute processing in this country. There is a virtual ferment of activity among citizen groups across this land to pick up and experiment with these new/old ideas of mediation and informal conflict resolution. Congress this year has a chance to enhance these peoples' efforts with a very small financial investment. We strongly urge this Committee and the Congress to support the aspirations of our citizens to retake unto themselves the responsibility of being the first line resource for solving problems.

REPORT OF THE SPECIAL COMMITTEE ON CONSUMER AFFAIRS, ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK, DISPUTE RESOLUTION ACT OF 1979 (S. 423, H.R. 3719 AND H.R. 2863)

Congress has been actively considering legislation for a number of years to provide federal assistance to study and establish mechanisms for the resolution of minor disputes.[1] The legislative proposals have undergone significant changes throughout the years, including substantial reductions in funding levels and expansion of the breadth of the legislation to encompass more than consumer disputes. While earlier bills specified procedural standards for eligibility, current proposals have omitted these details to permit the states more flexibility.

Three bills are currently being considered: S. 423, H.R. 3719 and H.R. 2863. S. 423, which was passed by the Senate in April 1979, is similar to S. 957 considered last year. Each of the bills authorizes funds for the Department of Justice to establish a Dispute Resolution Resource Center and to give financial assistance to dispute resolution mechanisms. Overall, the objectives and requirements of the current bills are similar, but there are differences in the details of implementation.

The Dispute Resolution Center would serve as a clearing-house for information on dispute mechanisms, provide technical assistance to states and local governments, conduct research and surveys, and identify, following consultation with the Federal Trade Commission, those mechanisms which fulfill the Act's eligibility standards, and are most effective and fair, and suitable for replication.[2] Under S423 mechanisms which are so identified are to be certified as "national priority projects," and are to be guaranteed a priority status and at least one-half of available grant monies. H.R. 3719 and H.R. 2863 do not establish priority projects, but do provide that priority consideration be given to existing mechanisms (H.R. 2863) or to projects which are likely to continue after expiration of the grant.

In addition, the bills authorize federal grants to states, local governments and non-profit organizations to improve existing dispute mechanisms and to experiment with new mechanisms. The bills contemplate that the federal assistance would be used as seed money to assist the states, local governments and non-profit organizations in developing and enhancing informal and alternative dispute mechanisms for consumer controversies and minor civil disputes, including civil disputes ancillary to minor criminal matters and interpersonal disputes.[3] Eligible dispute mechanisms may include small claims courts, arbitration, mediation, conciliation and other innovative forums which meet criteria established by the

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[1] This Committee has previously issued a report, supporting the objectives of an earlier version, Special Committee on Consumer Affairs, "Consumer Controversies Resolution Act," 32 Record of the Association of the Bar of the City of New York 619 (Nov. 1977).

[2] Under H.R. 3719 and H.R. 2863, an Advisory Board would assist the Center and the Attorney General in carrying out their responsibilities. The Federal Trade Commission would also be given an advisory role under S423 and H.R. 3719, but not under H.R. 2863.

[3] Each of the bills defines coverage differently. H.R. 3719 and H.R. 2863 cover "minor consumer . . . or civil disputes" or "minor disputes" respectively. While the preamble of S423 seems to limit the coverage of this bill to "disputes involving consumer goods and services, as well as numerous other types of disputes involving small amounts of money," the definitional section authorizes a broader application; namely, "disputes involving small amounts of money or otherwise arising in the courses of daily life."

Act or the Attorney General. Grant applicants are further required to set forth the nature and extent of participation of interested parties, including consumers, in the development of the application.

Grant monies would be authorized for a period of four years, with federal funding for projects to be progressively decreased each year. Funding levels for the grant program are $15 million each year under S423 and H.R. 3719, and are $10 million a year under H.R. 2863, decreased from earlier versions.

In lieu of the specific procedural due process standards contained in earlier versions, the eligibility provisions in each of the bills now allow more flexibility. S423, for example, requires grantees to provide convenient hours; easy and non-technical forms and procedures; assistance to users, including translation services for non-English speaking users and the dissemination of information about the availability of other dispute mechanisms; and "reasonable and fair rules and procedures" to insure that all parties to a dispute will be directly involved, that the mechanism will be able to reach necessary parties and that there will be adequate implementation of any decision or award. In addition, the bill requires that the mechanism's rules permit the use of the dispute resolution mechanism by the business community. While encouraging the resolution of disputes through such informal means as conciliation, mediation or arbitration, S 423 also requires mechanisms to encourage the finality of the resolution of consumer and other minor disputes. The other bills contain similar criteria, although H.R. 2873 adds a provision that mechanisms promote the use of non-lawyers in the resolution of disputes.

The federal monies may be used to recruit, train and compensate personnel engaged in the administration, adjudication and collection processes, for facilities and equipment, for research, and for the monitoring of mechanisms. However, funds may not be used under any of the bills to compensate attorneys for representing disputants or claimants or for attorneys "otherwise providing assistance in any adversary capacity."

This Committee has continuously expressed its concern over the lack of accessible, speedy and affordable mechanisms to resolve minor consumer disputes.[4] For this reason, we strongly urge the passage of a Dispute Resolution Act to study and encourage the development of alternative and informal mechanisms.

The current bills, however, may be little more than a symbolic gesture than a panacea. Through the years, the funding level of the Dispute Resolution's bills has been progressively reduced. These reductions, particularly when accompanied by extensions of the bill's coverage into non-consumer disputes, could dissipate its potential benefits. In its present form, the bills may not provide as fertile an opportunity for innovation as was hoped for. This concern grows out of limitations on the length of the federal funding program, the extension of the Act to minor civil disputes, including interpersonal disputes, and the requirement that funded mechanisms insure access to businessmen. The limited time frame could create pressure to fund existing, rather than innovative, mechanisms and could discourage experimentation or careful analysis of grant applications.

The requirement that businessmen be insured access may be counterproductive. The Committee Report[5] accompanying S957 in the House states that mechanisms should be free to experiment in the area of business access, and the Report disavows any intention to change state laws, including those like New York's Small Claims courts which limit access. Nevertheless, S423 and H.R. 3719 could be interpreted as mandating access to businesses as a prerequisite for funding, and S423 further specifies that the businesses which shall be entitled to access include corporations and assignees. We recommend that this provision be changed to encourage but not to compel that eligible mechanisms be available to the business community.[6]

The Committee is also opposed to the bills' limitations on the use of federal funds to compensate attorneys. While it is appropriate for Congress to encourage programs which do not rely on lawyers performing adversarial services, we do not feel a prohibition which flatly prohibits compensation to attorneys for pro-

[4] Special Committee on Consumer Affairs, "Toward the Informal Resolution of Consumer Disputes," 27 Record of the Association of the Bar of the City of New York 419 (June 1972).

[5] Dispute Resolution Act, House Comm. on Interstate and Foreign Commerce, 95-1654, Part I, 95th Cong. 2d Sess. 15 (1978) at p. 15.

[6] For example, H.R. 2863 reads that the mechanism should provide this and other designated procedures "to the extent possible."

viding assistance in any adversarial capacity will further the overall goal of developing experimental, and workable, mechanisms. An absolute exclusion could, for example, hamper a mechanism's effectiveness particularly in providing assistance to implement awards; raise ethical or other problems regarding the supervision of paralegals whose involvement is strongly supported; and inequitably permit the compensation of paralegals for adversarial assistance, even if an attorney's services were obtainable at the same fee. We therefore do not see any basis for an absolute exclusion of attorneys, so long as the long-term objectives of insuring speedy and inexpensive resolution of disputes are met.

Another problem is the inconsistent approach of these bills to finality of a resolution, and the failure of the bills to recognize the differences between binding and non-binding dispute mechanisms. For example, eligibility criteria require mechanisms to have procedures which would insure the finality of the resolution. These provisions are inconsistent with other provisions encouraging funding for mechanisms which traditionally render non-binding decisions, such as mediation and conciliation. For example, the bills refer to conciliation, mediation or arbitration as informal alternatives to adjudication. However, in New York and other states arbitration awards are final and enforceable. Since the bills also envision grants to non-profit organizations, we believe that it should be made clear that there is no intent to sanction contracts of adhesion by which consumers bind themselves to submit future disputes to a private arbitration tribunal and waive their right to file suit. This committee has previously disapproved such pre-commitment clauses,[7] while recommending that merchants offer arbitration to consumers as a voluntary option when a dispute has arisen.

Finally, while H.R. 3719 and H.R. 2863 authorize the Dispute Resolution Center to use the funds to provide technical assistance to state and local governments. We see no reason that other grant recipients should be denied such assistance.

STATEMENT OF RICHARD B. SPOHN, DEPARTMENT OF CONSUMER AFFAIRS, STATE OF CALIFORNIA

Mr. Chairman and Members:

We greatly appreciate having the opportunity to comment on legislation now before the House of Representatives regarding minor dispute resolution.

For too many years we have concentrated our concern and our resources almost exclusively on resolving disputes which involve large sums of money. "Minor protections, and failure to return rental security deposits have received little disputes" involving such matters as defective appliances, breaches of warranty attention. However, the magnitude of these disputes is neither inconsequential to the individuals involved nor in the aggregate to society at large. For the individual who suffers from the lack of effective methods to resolve such disputes, the result is frustration and aggravation. For society, our concept of equal justice for all stands diminished while alienation from apparent institutional difference grows.

In an attempt to improve minor dispute resolution in California, we have been conducting the Small Claims Court Experimental Project, in conjunction with the state Judicial Council and six participating courts around the state for the past two years. The project was created to test methods designed to increase accessibility to small claims court for individuals and to reduce the number of defaults.

In April, 1978, three of the courts implemented experimental programs and procedures, which included evening and Saturday court sessions, mediatiion prior to trial, free legal help for litigants, a law clerk for the judges, bilingual court staff and interpreters, simplified forms, evening hours for the clerk's office, relaxed change of venue procedures, and a preference for individuals over non-natural entities. The Department prepared a free booklet as a guide to handling a small claims case which was furnished to litigants and the public.

These programs and procedures remained in effect until March 31 of this year. During the year test period, as well as during the 5 months preceding the implementation of the experimental programs, data was collected on nearly 100,000 cases filed in the six participating courts. The results will form the basis of a report to be delivered to the Legislature this summer which will evaluate

[7] Special Committee on Consumer Affairs, "Recommendation Regarding The Use of Mandatory Arbitration Clauses by Merchants in Consumer Contracts," 31 Record of The Association of the Bar of the City of New York 350 (May 1976).

the programs and make recommendations for future actions. Although we have accumulated a great store of useful knowledge which will guide us in proposing future reforms for this judicial forum, it is clear that additional sustained experimentation will be required to fully explore the range of dispute resolution techniques available.

It is gratifying, therefore, to witness the efforts of this Congress to complete the work begun in recent years to focus more attention and resources on the field of minor dispute resolution. The Senate has passed appropriate legislation on three different occasions, and last year, our Department supported S. 957 by Senator Kennedy and others as presenting the best opportunity to provide needed funds for innovation and improvement of existing mechanisms. But for the special conditions under which it was necessary to bring the bill before the House, it almost certainly would have been adopted.

This year, again, you have before you a Senate bill, S. 423 by Senator Ford, the successor to S. 957, a well as H.R. 3719 by Representative Eckhardt and H.R. 2863 by Representative Kastenmeier. We offer the following comments in the hope they will contribute to the difficult task of fashioning legislation which will indeed, in the words of the bills, "assist the States and other interested parties in providing to all persons convenient access to dispute resolution mechanisms which are effective, fair, inexpensive, and expeditious."

A. SCOPE

The "Findings and Purpose" language found in both H.R. 2863, Sec. 2 and H.R. 3719, Sec. 2, places undue emphasis on the neighborhood dispute resolution center concept. The genesis of the current legislation resulted from a desire to improve methods of resolving consumer disputes. Data from the Small Claims Court Experimental Project show that from 40 percent to nearly 70 percent of the claims filed in the six participating courts involved consumer transactions, while another 8 to 22 percent concerned landlord-tenant disputes. Clearly, this existing judicial forum handles a sizable number of consumer disputes, disputes which it may often be impractical to resolve in a neighborhood setting because of the parties involved or the nature of the dispute. Although we support a diversity of approaches, including neighborhood and community formats, to give them apparent preeminence would seem to decrease the likelihood of allocating substantial resources to concentrate on consumer disputes which may more frequently be resolved in other forums.

The definition of "dispute resolution mechanism" in H.R. 3719, Sec. 3(4), is superior to both H.R. 2863, Sec. 3(4), and S. 423, Sec. 3(d), in specifying "any court with jurisdiction over minor consumer disputes and other civil disputes" (emphasis added). By noting consumer disputes with particularity, the definition serves as an important guidepost to those who will implement the legislation that a significant portion of available funds should be devoted to mechanisms to resolve such disputes. Because small claims court represents the primary forum available in most states for the redress of consumer and other grievances, we support specifically identifying it in the definition to ensure funds are afforded especially to this judicial alternative.

B. PROGRAM CRITERIA

All three bills provide criteria drafted in sufficiently broad language to permit experimentation, with widely varying approaches designed to deal with the many different types of disputes which arise in our complex society. Among the three bills, S. 423, Sec. 4 embodies the most desirable set of criteria generally by spelling out in slightly greater detail the components of eligible dispute resolution mechanisms such as evening and weekend sessions. Compare with H.R. 2863, Sec. 4, and. H.R. 3719, Sec. 4.

One weakness of all three bills, however, is the requirement, which could be interpreted as mandatory, that business entities be permitted to use any mechanism funded. See S. 423, Sec. 4(a)(5)(D); H.R. 2863, Sec. 4(4)(E); H.R. 3719, Sec. 4(4)(C). Such a requirement would appear to preclude federal support for various types of consumer complaint handling programs, such as those operated by our Department and by many local consumer protection agencies around California which serve in many cases to resolve disputes expeditiously, effectively, and at low cost. Because such operations do not rely on face-to-face meetings of the disputants and do not utilize an adjudicatory approach, they

may be overlooked as dispute resolution mechanisms. Nonetheless, the consumer's first attempt at resolving a problem often comes through contacting an agency with such a program. For example, during Fiscal Year 1977–78 our complaint mediation unit handled 58,000 complaints, inquiries, referrals, and other contacts. Even more significantly, this number represents only the tip of the iceberg since the Department's thirty-eight professional and vocational regulatory boards and bureaus also received additional thousands of consumer complaints and inquiries.

These complaint handling programs do not by statute accept complaints filed by businesses against individuals or other businesses because to do so would strain already insufficient resources far beyond capacity. Even with federal support, it would undoubtedly prove impractical to process such complaints. Thus, if "business use" of dispute resolution mechanisms is interpreted to require that businesses be permitted to initiate complaints, these important programs would be unable to secure funding due to the statutory limitation.

A further weakness of S. 423 is the provision which includes assignees among those who must be allowed to use an eligible dispute resolution mechanism. Sec. 4(a)(5)(D). California Code of Civil Procedure section 117.5 prohibits the filing or prosecuting of claims in small claims court by assignees except under limited circumstances. Thus, if the criterion in S. 423 is intended to be mandatory, it would effectively bar California small claims courts from receiving any funding under the legislation.

C. OVERSIGHT

We endorse the concept of an Advisory Board as proposed in the House bills. H.R. 2863, Sec. 7; H.R. 3719, Sec. 7. Having worked with an advisory committee during the Small Claims Court Experimental Project, we have found that such a body serves as an excellent source of information and ideas, a useful sounding board, and a means of avoiding isolation from the broader spectrum of interested groups. Such attributes especially commend themselves to the federal government where it seems even more difficult than at the state level to maintain a broad perspective regarding various needs, attitudes, and developments across the nation.

D. RESTRICTIONS

All three bills contain a prohibition on the expenditure of funds for the compensation of attorneys representing disputants or claimants. S. 423, Sec. 7(d)(2); H.R. 2863, Sec. 8(e)(2); H.R. 3719, Sec. 8(e)(2). We support this prohibition to the extent that it does not undercut the fundamental principle that all involved in any particular dispute resolution process stand on equal footing with respect to legal representation. We seek to ensure equality in this regard in small claims proceedings in California by barring attorneys from appearing in court except under extremely limited circumstances. See California Code of Civil Procedure sections 117.4, 117.41.

Further, through the Small Claims Court Experimental Project we have found particular success using attorneys as small claims legal advisors. Normally, they provide only advice and assistance with small claims procedure and substantive legal matters outside of the courtroom. However, their experience indicates that it can be extremely difficult in certain situations to distinguish advice from advocacy. If an opposing party has counsel, for example, should the advisor be prohibited from discussing the case on behalf of the party seeking assistance with such counsel? In fact, such a discussion might be the optimal step to achieve a settlement of the dispute. We propose to leave the difficult question of assistance versus advocacy outside the forum up to individual grantees, while prohibiting appearances by advisors in court or other proceedings as we do under California law. See California Code of Civil Procedure sections 117.18, 121.8(b), 123.1(b). As a result of our experience, we believe the prohibition in the legislation before you should be redrafted to ensure litigants equality of access to legal advice while limiting the use of attorneys in formal or informal proceedings.

We endorse the principle that many minor disputes which may normally be treated as criminal matters may be better resolved as a non-criminal justice system setting in the neighborhood. However, dispute resolution mechanisms receiving funding solely under this legislation should not primarily engage in processing criminal justice system referrals. Of course, many disputes can be characterized in both criminal and civil terms, but we believe funding for programs which develop their caseloads from criminal complaints can be adequately funded by other means such as under LEAA provisions without drawing upon the relatively small amount of funds to be authorized under this legislation.

E. FUNDING AUTHORIZATION

S. 423 and H.R. 2863 would authorize only $10 million for grants under the act, while H.R. 3719 would authorize $15 million. H.R. 2863 would, in addition, place a ceiling of $200,000 on a project in a single year. Sec. 8(h)(2). We support the authorization limit provided in H.R. 3719 and the elimination of the per year ceiling. In recent years, not only has the scope of minor dispute resolution legislation expanded, but the authorization level has shrunk at the same time. The result may well be too little money to achieve much of genuine impact and significance. In addition, to retain the per year ceiling could well foreclose experimentation on any broad scale in larger states such as California.

The national priority project approach of S. 423, Sec. 7(e)(1), should similarly be reconsidered. With the breadth of scope of the legislation as now embodied by all three bills and the limited authorization under consideration, to add a requirement that half the authorized funds be reserved for equal distribution among states which apply for grants risks a diffusion of funds to such an extent that no effective concentration on any problem, particularly consumer complaints, will be possible.

The demand to deliver a full measure of justice to all in our society cannot be ignored. With your leadership, we can take a dramatic step forward to meet that demand by providing effective, fair, and inexpensive means to settle minor disputes.

Thank you for your attention.

STATEMENT BY DEAN W. DETERMAN, VICE PRESIDENT, COUNCIL OF BETTER BUSINESS BUREAUS, INC.

STATEMENT

The programs and services of the Council of Better Business Bureaus, headquartered in Washington, D.C., are funded exclusively by business in the interest of consumers, just as they are in the 142 Better Business Bureaus and branches in most major metropolitan areas across the nation. Bureaus are engaged in two major efforts.

First, we let consumers know how to avoid marketplace disputes by providing the public with information to make them more sophisticated buyers. Last year 7.9 million oral and written requests for assistance or information on business firms were received from consumers. Our dispute prevention efforts include the broadcast media with consumer information being broadcast over 4,000 radio stations, including the four major radio networks; also, special children's TV spots using the RITTS puppets and other consumer-oriented television material are presented regularly over the three major television networks. Print media are also included as more than 650 newspapers receive our weekly Consumer Tips column. Our own Tips brochures—approximately one million of which are distributed annually—provide consumers with more in-depth information about the most critical service and product areas.

Our second major effort speaks directly to the subject before these Subcommittees. This effort is best described in the broadest category called "self-regulation." It involves the establishment of programs and procedures to stop questionable activities in the marketplace and to deal with consumer complaints about those and other activities. Among the programs in this area is our National Advertising Division (NAD), which reviews and receives complaints about regional and national advertising campaigns, and which then undertakes specific actions to stop advertising that is misleading or deceptive. Included in this process is the National Advertising Review Board which acts as an appeals body whenever a NAD decision is disputed. Our advertising standards and trade practices programs, administered by the local Bureaus, are also included in these activities. And our normal complaint handling, mediation and arbitration functions are included.

Last year, Better Business Bureaus handled more than 900,000 consumer complaints by phone and by mail. Our statistics indicate that approximately 77% of these complaints were mediated by the Bureau and settled in one fashion or another, but not always to the complete satisfaction of the consumer.

For the less-than-satisfied consumer or for the consumer complaint which is challenged by the business, 94 Better Business Bureaus in major metropolitan areas across the country now are in a position of offering voluntary but binding

arbitration. In this program, Bureau staff explain the program to the business and to its complaining customer. If the parties agree in writing, we then conduct a legally binding arbitration hearing to give a final solution to their dispute.

Each party to the arbitration is given an identical list of five arbitrators—all volunteers from the community who have gone through a special training session—together with their qualifications. The parties are told to cross-off those who are not acceptable and to give us a 1-2-3 priority listing of those remaining on the list. Bureau staff will then take the highest overlapping choice and schedule a hearing at the convenience of everyone—often in the evening or on a weekend.

If quality of workmanship is at issue, the arbitrator or a neutral expert provided by the Bureau will inspect the job in the presence of the parties. The actual hearing can even taken place at the same time and place as the inspection. We have had arbitrations actually conducted at the site of a home improvement job or in other locations where a product or a repair job could be viewed during the hearing.

After the informal hearing, in which parties may be represented by counsel or anyone else (but seldom are), the arbitrator will give a decision or award that is legally binding on the parties. The case may not be reheard by a court unless bias of the arbitrator or other prejudicial procedures or policies are proved.

This program continues to grow each year. Our status report as of January of this year shows that Bureaus conducted more than 2,100 arbitrations during the past year alone.

More important is that arbitration was offered to the parties in over 11,000 cases, and a large number of these resulted in settlement before the matter came to arbitration.

Today there are more than 4,000 trained volunteers who have agreed to serve as arbitrators. These include housewives, retired persons, government employees, lawyers, teachers, professors and others who are all unpaid! And because they are unpaid, and because the Bureau's overhead is paid by its business members, there normally is no fee charged to the consumer, although nonsupporting businesses may have to pay a nominal fee.

The business community is beginning to give even more attention to this arbitration program. In some Bureau areas, businesses have precommitted to arbitrate any dispute which they and the Better Business Bureau cannot resolve through less formal means, but the customer still has an option to use small claims courts or other means to resolve their dispute.

Particularly in the area of auto service complaints, we are seeing an intensified effort to resolve consumer disputes, with arbitration serving as a "last step" for resolution short of going to court. While we have had a large number of local automobile dealers and other repair shops precommitted to arbitrate in some areas of the country for a long time, today we see increased interest and trial participation by the manufacturers. An Automotive Test Program has recently been developed by the Council with the support of major auto manufacturers, and will be implemented on a test basis through local Better Business Bureaus. The Bureaus will publicize their coordinating and prompt handling of car-owner complaints involving alleged manufacturer responsibility or product defects with specially designated representatives in the local new car dealerships and manufacturers' area offices. Binding arbitration is available as a final step for disputes that cannot be resolved through mediation. The first test will begin in Des Moines next month.

Another example of increased interest by automobile manufacturers in resolving consumer disputes, the Council of Better Business Bureaus has worked with the General Motors Corporation to institute several pilot arbitration programs. Under these programs, GM agreed to voluntarily enter into arbitration of complaints involving interpretation of, or performance under new vehicle written warranties and the manufacturer's product responsibility for any GM vehicle which has not passed its third year in service or 36,000 miles. In the original pilot program started one year ago in the Twin Cities area of Minnesota, the following results by May of this year were reported: of the 325 formal complaints which were processed, 238 were settled through the BBB's mediation program; 56 have gone through the arbitration process; 18 were pending in mediation, and 13 awaited arbitration. Additional GM/Council pilot programs now exist in the Buffalo and San Francisco Bay areas. In the Buffalo pilot program, which began in December 1978, 149 formal complaints were processed by the end of May, 63 were settled through mediation, while 12 were at some stage of arbitration. After three and one-half months of operation in the Bay Area, the four participat-

ing BBBs had handled 110 formal complaints, including 15 cases completed through an arbitration hearing. The Buffalo and Bay Area programs are unique in that GM is bound to arbitration decisions, but the car owner is not.

The totals of all three programs as of May 30, 1979, were: 584 cases received and processed; 354 settled through mediation; 96 by arbitration; and 134 "in process."

In addition to these highly significant test projects we are currently working with Shell Oil Company to arbitrate auto repair complaints arising under its expanding Auto-Care Program and with Exxon to arbitrate unresolved disputes coming from its company-owned service stations in certain market areas. And we are working with other oil companies and auto rental agencies to develop additional programs for resolving automotive disputes. We are also arbitrating disputes involving many other leading companies, which are testing the waters to see if arbitration is the answer to the substantial number of unresolved consumer complaints.

Government agencies, too, are taking a hard look at this arbitration program with an eye toward how they can utilize it. The Federal Trade Commission has written BBB arbitration into a number of consent orders, which, in effect, precommit the company to go into arbitration if their customer wants to do so. The Attorneys General in several states (Ohio, Minnesota, Louisiana and Washington) have also written BBB arbitration into consent orders with companies that have a record of many unresolved consumer complaints. Small claims courts in a number of jurisdictions have referred cases to BBB arbitration, and the Detroit courts have a cooperative program in which arbitration information is provided to those consumers coming to file their complaints in court. We have entered into a joint arbitration program with the Montgomery County Consumer Protection Agency in the Washington Metropolitan Area, and we have assisted other governmental agencies in setting up their own arbitration programs.

What are some of the results coming from our programs? We have arbitration complaints ranging from $2.98 to $180,000, but our average case is approximately $946, almost triple previous years' averages due to an increased number of home improvement arbitrations. This average shows, we think, that a more formal dispute mechanism like arbitration usually attracts complaints that are more substantial than the bulk of complaints coming to a Better Business Bureau. Because our program is voluntary in that businesses and consumers come into arbitration after an actual dispute has occurred, we find an extremely low number of losers who refuse to go along with the arbitrator's decision. Our latest statistics reflect that approximately two percent of the arbitrators' decisions were ignored by the losers, and the courts have upheld all such decisions without a rehearing when the winners have taken their awards to court.

Although it is sometimes difficult to determine who the winner really is in some cases where there appears to be a "split award," our past figures show a fairly even division of awards between businesses and consumers, with each receiving about 40% of the decisions and the remaining 20% being split in some fashion.

Based on our experience in complaint-handling through mediation and arbitration, we have the following observations about the legislation before these Subcommittees.

First, we wish to commend the language of the proposed bills to the effect that "effective consumer redress of disputes will be promoted through a cooperative functioning of both public and privately sponsored mechanisms." We believe that any system of redress, particularly of consumer disputes, must encourage efforts of the private sector, which currently handles, and handles well, the vast bulk of consumer complaints in the marketplace. All of the governmental complaint handling agencies at the federal, state and local levels combined receive fewer consumer complaints than the Better Business Bureaus, and we receive only a small fraction of the total, because business is doing an increasing good job of taking care of its own customers.

If this were not the case, most companies would not stay in business very long. If you were to go into the consumer relations departments of our major automotive companies, you would find thousands of hard-working people with budgets far exceeding the amounts contemplated in this legislation, all functioning to deal with the complaints that arise from the hundreds of thousands of auto repairs which take place daily. You will find the automobile industry has been moving to streamline their complaint operations and trying out new programs to

make their own customers more satisfied. If this were not the case, Better Business Bureaus and governmental agencies would themselves be inundated with automotive complaints.

Such efforts by that industry and other segments of American business must be encouraged. The first step at resolving consumer dissatisfaction is the responsibility of business itself through self-regulation. Only when business cannot resolve the dispute is there a clear need for governmental action.

Government should and must be capable of dealing with all violations of law, such as fraud in the marketplace. Government mechanisms, too, should exist to handle consumer grievances with those businesses that refuse to cooperate voluntarily with responsible private sector mechanisms. And government may have to establish proper forums where no effective private sector mechanism exists.

The private sector, we believe, has a much larger role. It should be responsible for handling the great bulk of consumer grievances, as it does today in individual companies; and business-sponsored mechanisms, like Better Business Bureaus, can identify potential violations of law for referral to government. BBBs can make every effort to extend to all consumers our services, including cooperative efforts with governmental agencies such as our arbitration program.

Second, our experience with arbitration over the years has taught us other lessons which we wish to share with you in your deliberations about dispute settlement mechanisms:

(1) A workable public mechanism should strive to be non-institutional and not overly "legal" in nature. While safeguards must exist to ensure that legal rights of the parties are not denied in any dispute resolution setting, we have seen a tendency on the part of participants in arbitration hearings to avoid lawyers, legal arguments, formal evidentiary hearings and other institutional trappings of courts. If given a choice, many consumers and businesses are quick to cross-off as unacceptable any lawyers on their lists of potential arbitrators.

For example, in our largest award to date—$180,000 in a home improvement situation—both the homeowner and the contractor were represented by attorneys, but they insisted that the arbitrator not be a lawyer.

We have had fine cooperation from the organized bar in establishing our programs in all areas. In fact, in the State of Kansas and in several cities, all of our arbitrators are volunteers from the bar association. But we had to train a large number of volunteer arbitrators in one western city because the all-lawyer pool was unacceptable to many consumers and businesses. Most of our arbitrations today are being conducted by non-lawyers, and their decisions are generally fair and equitable.

(2) Although most disputes involve a breakdown of communications between the parties, many consumers complaints are concerned with product quality or with the quality of workmanship in a repair situation. Any dispute mechanism handling such disputes should be flexible enough to permit an inspection of the product or job by the decider. Often such an inspection is determinative of the result.

For example, we conducted one arbitration in a graveyard, because the survivors complained that the gravestone company had not done a proper job of lettering on the tombstone of the deceased! And we have conducted many arbitations at the consumer's home to check-out swimming pool liners, waterproofing jobs, new roofs, additions, wall-to-wall carpets, reupholstered furniture and many other complaint situations.

(3) Sometimes inspection, alone, is not enough to determine whether a quality job was or was not done. A mechanism should have access to a pool of neutral experts to be on call for the arbitrator or decider in those situations where expertise is needed. Auto repair cases often require the evaluation of an expert, who should not come from a competitor's shop. In one Bureau area, the local stock car drivers association has volunteered its membership to review auto repair jobs. In other areas we have turned to persons retired from business or to teachers who, for example, teach auto mechanics in local trade schools and high schools.

(4) Another area requiring flexibility by a dispute mechanism is dealing with disputants who are geographically separated. In our mobile society, we often have complaints involving a consumer whose marketplace problem concerns a distant mail order company, or, a repair bill in a city through which the consumer was traveling, or a former landlord holding a security deposit in a distant location. In our arbitration program, we have conducted hearings by conference telephone calls; we have had one party present at a hearing with the other party on a "squawk box" phone hook-up; and we have had arbitrations conducted by mail.

(5) Finally, we have seen many consumers who drop out of dispute-handling operations when there are too many levels of mediation, which have the result of forcing all but the most persistent complainant out of the process. Many small businesses too, cannot afford the extra time involved in multiple level dispute resolution. We feel mediation is an important step in any complaint resolution, and it should be a component part of any mechanism, but it should be a single process, conducted quickly and fairly.

In summary, Mr. Chairman, the business community is expanding and extending its efforts to provide voluntary service to consumers for the redress of grievances. Through individual corporate programs, collective industrywide endeavors, and the network of Better Business Bureaus, complaint-handling mechanisms are resolving an increasing volume of product and service difficulties faced by American consumers. These privately supported actions are a visible demonstration of the rising determination by the private sector to improve the marketplace and to be increasingly responsive to the consumer. Whenever possible this first line of complaint settlement should be recognized and strengthened in the interest of both parties and in the general public interest.

If this first line of resolution breaks down, third party arbitration can serve as an expeditious, informal, equitable and low cost procedure. When arbitration or similar forums are not available, the controversy should be referred to an available public authority. Likewise, in instances where fraud and illegalities are involved, the jurisdiction must be in the public sector. When the public agencies and processes have inadequate resources to function effectively, they require thoughtful attention.

We believe that effective collaboration between the public and private sectors, in their respective spheres, can be accomplished to the benefit of the consumer, the businessman and the taxpayer. This goal is completely congruent with the purpose of these bills:

". . . to assist the states and other interested parties in providing to all persons convenient access to dispute resolution mechanisms which are effective, fair, inexpensive, and expeditious."

EQUAL JUSTICE FOUNDATION,
Washington, D.C., June 27, 1979.

The Equal Justice Foundation is a national organization of attorneys dedicated to increasing access to justice for citizens and organizations currently denied the full opportunity to enforce their rights and remedies. Consequently, we take great interest in the series of bills (H.R. 2863, H.R. 3719, and S. 423) being considered under the title "Dispute Resolution Act."

The high costs of litigation, the inevitable delays, the stigma frequently associated with involvement with the court system, and the sheer intimidation bred by lack of familiarity with the legal process, all serve to deter the resolution of "minor" controversies. The gradual weakening of close-knit communities and ethnic neighborhoods has reduced the effectiveness of traditional internal mechanisms for resolving these disputes and "keeping the peace." Thus, small disputes fester until they become large ones, frustrating citizens, reducing confidence in government, and eventually creating even greater burdens on the civil and criminal justice systems.

With this in mind, we would like to make some brief comments regarding the proposed bills. We believe the final bill should be broad with respect to the kinds of disputes which may be handled. The parameters delineated by sec. 2(a)(1), 2(a)(3), 2(a)(4), and 2(a)(6) of H.R. 2863 seem to us superior to the corresponding sections of S. 423, which put a greater emphasis on the resolution of strictly consumer and other disputes of an economic nature. As Linwood Slayton of the Atlanta center testified on June 14, consumer-merchant disputes represent their largest single category of grievances, yet still account for no more than 21 percent of their cases. Clearly there is a high demand for new dispute resolution techniques in a number of other areas. Certain practical considerations also suggest the usefulness of a broad approach. The generally higher visibility which will result from centers handling many types of claims will reduce outreach problems and increase the effectiveness of the program in each separate category. Further, the ability to hear disputes of varying natures may allow greater flexibility in the many cases where parties have reciprocal grievances which may be of very different types. A "neighborhood justice center" can help mediate an acceptable result in such cases without the stigma attached to the loser of an "all-or-nothing" court decision.

We would not, however, go so far as to suggest that the bill should restrict funding for more narrowly defined mechanisms. One of the act's prime virtues is, the freedom left for experimentation in this still untested area, and there is a particular need to find ways of resolving consumer disputes with large institutions which may not be amenable to the neighborhood justice center approach.

Experiments in the resolution of criminal disputes should also be allowed. We therefore think the subcommittees should adopt the "dispute resolution mechanism" definition (Sec. 3(4)) in H.R. 2863 as opposed to that provided in H.R. 3719, which is limited to civil disputes. In his study, "Neighborhood Justice Centers: An Analysis of Potential Models," Professor McGillis reports that 54 percent of all criminal disputes are between personal acquaintances, and 87 percent of these are eventually dismissed due to a reluctance to drag a neighbor or friend through the criminal justice system. Yet it is precisely these grievances which, when allowed to smolder, may burst into serious felonies. Though the data is still sparse in this area, there is a strong possibility that if minor criminal disputes can be effectively resolved when they are still minor, there will be a corresponding reduction in the crime rate and degree of tension in the community.

Of course, with respect to all disputes, and criminal disputes in particular, it is important that the bill require that any funded programs guarantee that due process be preserved. This can best be done by programs that ensure that participants in the system engage in it voluntarily and with confidentiality.

Finally, we think some minor reform in the funding provision (Sec. 8 of H.R. 2863 and 3719, Sec. 7 of S. 423) would be appropriate. The bills now provide for a gradually decreasing level of federal funding. While we think this general approach is justified, a distinction needs to be made between government-sponsored and private-sponsored programs. A state or local agency will not even make a preliminary application unless it envisions the availability of its own resources two or three years down the line. A private sponsor will not have that luxury. First, it will have to secure federal funding to become established, then begin the perhaps long and tedious process of procuring funds from state, local, or other private sources. The probable need to present a considerable "track record" will exacerbate the delays. Many programs may be hard pressed to secure alternative funds within the limits now prescribed by the legislation. The bill should include slightly more liberal federal funding for private programs, and/or the Attorney General should be instructed to consider this criterion in making grants.

At this stage, it is important to fund a diversity of public and private programs, but our fear is that too many private sponsors will be unable to meet the requirements that these provisions imply. In the long run, a modest "insurance policy" for these groups may prevent federal funds from being wasted starting-up projects which cannot make the transition to other funding sources in time.

We appreciate your consideration of these proposals and would be pleased to receive any comments or suggestions you may have. (Our phone number is 452–1269.) We urge your support of this measure through the subcommittee and on to the House floor. Thank you for your time and we look forward to working with you in the future.

Very truly yours,

MICHAEL H. SUSSMAN,
Chairperson, EJF.
GREGG GORDON,
Program Director.

LEGAL SERVICES CORPORATION,
Washington, D.C., July 3, 1979.

Re Dispute resolution bills.

HON. ROBERT W. KASTENMEIER,
Chairman, Subcommittee on Courts, Civil Liberties and the Administration of Justice, Committee on the Judiciary, U.S. House of Representatives, Washington, D.C.

DEAR MR. CHAIRMAN: You have requested comments by the Legal Services Corporation and our field programs on the concept and specific language of three bills involving alternative dispute resolution: H.R. 2863, H.R. 3719, and S. 423. Also you asked for the report prepared by Ms. Linda Singer while working as a

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research consultant for the Legal Services Corporation. We appreciate your interest in our views and are pleased to respond to your request.

The report on dispute resolution by Ms. Singer is not yet ready for distribution. When the Research Institute has completed editing and typing, we will immediately forward a copy to you. We believe that the paper will be helpful to your committee in considering the effect of alternative dispute resolution forums on the poor.

We do wish to comment upon both the conceptual framework of these bills and their specific provisions. In testimony by the previous President of the Legal Services Corporation, we suggested a comprehensive approach and study to the problems of access to the federal courts. As part of that study we suggested the need to develop new dispute settlement mechanisms. We continue to believe in both a comprehensive approach and the need for alternative dispute resolution mechanisms. I do want to reiterate several points made in that testimony which are equally applicable to the legislation presently being considered.

First, a focus on the resolution of minor disputes is an appropriate starting point for improving access to our system of justice and we commend your efforts in the consideration of these proposals. However, there are a number of complex matters which also may be handled more effectively by non-judicial forums and which require technical expertise better provided by decision-makers who are not judges. Thus, we hope that you will not focus solely on minor disputes in considering future legislation on alternative forums for dispute resolution.

Second, problems exist with many of the non-judicial means of resolving disputes and we should not ignore them. Remedies may be limited and difficult to enforce. To be effective, these approaches must actually solve conflicts, not just ameliorate surface issues. Another concern is how to assure informed consent to alternative approaches and to avoid coercion. Of central importance is participation by lay-persons in both planning and decision-making regarding the establishment of these approaches. Finally, there is a danger that new forums will become institutionalized "screening mechanisms" for moving cases out of the court systems instead of attempts to deliver justice with better results and greater access by the public.

Third, there is a temptation to ease the burdens on our legal system by removing the concerns of those persons least able to affect that system—particularly the poor and minorities. That temptation must be resisted. Changes which single out one group or class for disparate treatment must be avoided, and reform, where possible, should be applied equally to all classes of litigants and all types of cases. The problems of the poor are as important and deserving of judicial attention as the problems of other groups.

We have discussed various models of dispute resolution mechanisms with lawyers in neighborhood legal services programs, both urban and rural. As advocates for poor people in a wide range of civil legal disputes, they witness every day the serious deficiency in our legal system which is the target of your subcommittee's bill. People of low and moderate incomes, unable to afford the lawyers' fees, filing fees, time, and inconvenience which are the cost of going to court, are left with nowhere to turn when the appliance dealer refuses to honor a warranty, the landlord refuses to return the security deposit, or the collection agency oversteps its bounds.

These small individual injustices have a tremendous cumulative effect. The victims conclude that our economic system is one where "might makes right" and that our legal system offers a remedy only to those rich enough to gain access to it. The cost to the nation of such cynicism and disaffection among its citizens, although hard to measure, is enormous.

The legal services programs, with the support and assistance of your subcommittee, have made substantial progress in providing legal assistance to low income people unable to afford an attorney. However, these programs do not have sufficient funding to adequately serve all eligible clients seeking assistance. Thus, even in areas with legal services programs, many eligible clients are forced to rely upon existing alternative forums to resolve disputes affecting their lives. Additionally, in an effort to conserve limited resources, legal services refers clients to alternative forums and small claims courts to settle matters which are more easily resolved there than in the traditional court system. It is critically important to legal services that alternative dispute mechanisms provide a just and convenient forum for use by the poor and those unable to afford an attorney.

The Legal Services Corporation and its field programs endorse the objectives of these bills. All would encourage states to develop forums for the resolution of

"minor" disputes—which are never minor to the victims—without imposing conditions that would stifle local experimentation. The "criteria" which must be met by any potential recipient of funding under these bills contain valuable protections for consumers, while at the same time encouraging innovation. The sponsors of the proposed legislation are to be commended for their thoughtful inclusion of such requirements as arrangements for participation by persons limited by language barriers and other disabilities, convenient times and locations for the resolution of disputes, fair and understandable procedures, and the dissemination of information about the availability of these as well as other redress mechanisms. We do suggest, however, several additional safeguards which we feel are necessary to ensure that federal funds are not spent to perpetuate current injustices.

The first of our concerns is the absence of a specific reference to judicial review in any of the three bills. We recognize that requiring these alternative forums to apply the full range of consumer protection law would replicate the defects of the present system—inaccessibility, delays and domination by lawyers. Thus, we do not propose either restrictions on the procedures of alternative forums or provisions providing automatic removal to a court upon request by a party. Nevertheless, the complex legal rules designed to protect consumers should act as a check on these alternative forums. They cannot do so unless the possibility of judicial review is present. We suggest, then, that the legislation specifically prohibit funding any grantee whose final decision cannot be reviewed by a court. The only exception would be in situations where controlled experimentation is funded.

We are also concerned that the proposed simplified and easier access to dispute resolution forums might turn out to be illusory. Though procedures of nearly all grantees will probably be far simpler than typical court procedures, many of the people who need these alternative forums the most will be unable to follow through on even a relatively uncomplicated claim without help. On the other hand, the businesses and providers of services who may use these forums frequently employ lay advocates to present their claims who are experienced in small-claims proceedings and familiar with complex institutions. We suggest, therefore, that paralegal assistance be included as part of the structure of any alternative dispute-resolution scheme. These paralegal advocates, if properly trained, would help compensate for the parties' unequal economic power and knowledge of the "the ropes." Without them, the newly-created alternative forums may become as inaccessible and intimidating to low-income people as most existing small claims courts are.[1] Of the three bills, only S. 423 specifically allows the funding of paralegals to assist persons seeking the resolution of disputes. To ensure the availability of these forums to the people who are now effectively denied redress in the courts, we urge adoption of the Senate bill's provision.

A third concern is the risk that much of the funding authorized under the proposed legislation could be awarded to business groups, trade associations and other non-profit groups unlikely to be attentive to the needs of consumers. To give effect to the legislation's promise of a fair and neutral forum, and to avoid even the appearance of a conflict of interest, we suggest a provision expressly favoring as grantees organizations which are not identified with one or the other class of parties before them.

We also think that any such legislation should require the proceedings to be public if requested by one of the parties. In some situations the parties may want to keep the proceedings confidential and private. In others, where, for example, a business or management company would be a party, an open, public hearing is one of the consumer's few curbs on overreaching. Abuse by unscrupulous businesses, no matter how infrequent, would undermine confidence in these systems of dispte settlement. For much the same reasons, we favor a provision requiring some record of cases to be kept and to be available to the public.

Apart from disclosure of individual cases, we also believe the legislation should be more specific about compiling aggregate data. One of the most useful services the Dispute Resolution Resource Center might perform is tabulating and publishing statistics dealing with the types of cases heard by each grantee. For example, a state legislature considering substantive reform of consumer law could use these records to single out problem areas for treatment.

Two other suggestions would enhance the likelihood that this program will reach the people who need it most. First, in order to soften the harsh impact the

[1] See, Galanter, "Why the Haves Come Out Ahead: Speculation on the Limits of Legal Change," 9 Law & Society Rev. 95 (1974).

system might have on the rural poor, institutional or business plaintiffs should be required to initiate proceedings in the city or county where the defendant resides.

Second, to reduce the risk that unsophisticated people will be taken advantage of, we suggest certain restrictions on default judgments. At a minimum, no default judgment should be entered unless the defendant has received adequate notice of the claim and the plaintiff has made out a prima facie case before a neutral party. An additional requirement should be that the judge, arbiter or referee find that the defendant has understood the nature of the claim. This is likely to be a problem, because of the baffling technical language of court forms. In California, Sears deals with this problem voluntarily by sending each defendant a copy of the state Department of Consumer Affairs pamphlet on small claims courts. It should be a duty of all grantees under the Act to provide some such explanation of the proceedings to defendants. If a default judgment is entered despite these safeguards, it should be vacated upon defendant's showing either that the plaintiff committed errors in instituting the action, e.g., defects in notice, or that the defendant has a meritorious defense.

A commendable aspect of both House bills is the requirement for the creation of a Dispute Resolution Advisory Board. It is essential that the legislation provide for sufficient participation by low-income people in the development, funding, and evaluation of alternative dispute-resolution mechanisms. It is our hope that the Senate will agree to the provision found in the House versions regarding the creation of such a board. In addition, we believe the legislation should include a specific minimum representation of consumers and consumer advocates on the Dispute Resolution Advisory Board.

Finally, S. 423's reservation of 50 percent of all funds for grantees that do not meet the standards set forth in the bill holds out the promise for important innovations. At the same time, care should be taken so that experimentation does not violate the rights of consumers. Most of the suggestions we have offered on these bills should apply to discretionary as well as non-discretionary grants.

We support the goals of this legislation, which are similar to many of the purposes of the legal services program: to remove the barriers that stand between people of limited means and the fair resolution of their legal problems. We believe that adoption of our recommendations will advance the goals of this legislation without imposing rigid federal requirements on the states. We are grateful for the opportunity to comment on these bills and urge your subcommittee to consider our suggestions.

Respectfully,

DAN J. BRADLEY, *President.*

MOTOR VEHICLE MANUFACTURERS ASSOCIATION,
Washington, D.C., July 1, 1979.

HON. ROBERT W. KASTENMEIER,
Chairman, Subcommittee on Courts, Civil Liberties, and the Administration of Justice, Committee on the Judiciary, 2137 Rayburn House Office Building, U.S. House of Representatives, Washington, D.C.

DEAR MR. KASTENMEIER: On behalf of eleven of its member companies[1] the Motor Vehicle Manufacturers Association of the United States wishes to express support for the principles contained in S. 423, H.R. 2863 and H.R. 3719, the Dispute Resolution legislation now before your Subcommittee. MVMA members are the major U.S. manufacturers of automobiles, buses and trucks, producing more than 99 percent of all domestic motor vehicles. We support the development of dispute mechanisms which would provide fair, expedient and inexpensive procedures for handling complaints.

States, localities and non-profit organizations must be allowed flexibility to expand existing mechanisms or develop new ones suited to their own needs and circumstances. However, we are pleased to note that, in the interest of fairness, dispute resolution mechanisms funded under the proposals would permit use by the business community. We wish to stress the need for guaranteeing such access in order to attract business support of and participation in such mechanisms. Because funding for the program will be limited we also hope that priority

[1] American Motors Corp.; Checker Motors Corp.; Chrysler Corp.; Ford Motor Co.; Freightliner Co.; General Motors Corp.; The Nolan Co.; PACCAR, Inc.; Volkswagen of America, Inc.; Walter Motor Truck Co.; and White Motor Corp.

would be given to aiding mechanisms dealing specifically with consumer controversies.

The Association also urges the Subcommittee to include a ban on payment of fees for attorneys acting in an adversary capacity. This would help ensure that informal mechanisms remain informal and do not evolve into extensions of the formal—and expensive—judicial system. The mechanisms funded under the legislation must retain their cooperative, informal character to guarantee their use by all segments of the consumer and business communities—and therefore their effectiveness and success.

MVMA strongly supports the proposal to place administration of the Dispute Resolution Resource Center under the Department of Justice. This Department, more than any other Federal entity, has the expertise and experience to administer this program. We also would like to see the Justice Department assign existing staff to the program. This would aid in getting the program "off the ground" quickly, as well as help the project retain its temporary, experimental nature, and not become another Federal "perpetual life" program. Further, the legislation should not require the Department to consult with any other specific government entity or independent organization. The broad-based Advisory Board, as set out in H.R. 2863 and H.R. 3719, would be able to provide whatever additional input the Justice Department might need.

In conclusion, we note that the Senate has passed S. 423, and we urge that your Subcommittee also report such legislation to allow early action by the House. A letter stating our position also is being sent to Congressman Preyer, in the hopes that his Subcommittee also will act quickly on this farsighted concept.

Very truly yours,

V. J. ADDUCI.

My name is Randolph J. Seifert, I am vice president and general counsel of the National Home Improvement Council, 11 East 44th Street, New York, N.Y.

The National Home Improvement Council is a trade association serving the home improvement and remodeling industry. Its membership is just over 3,000: divided into national and local members. Our 60 national members are predominantly manufacturers of material and equipment used in the industry, and include the shelter and trade publications. Our local membership is basically found in the 44 NHIC chapters in major market areas across America. Attached to this statement is a list of the National members and the chapter locations served by NHIC. The largest portion by far, of our membership is in the contractor community in these local chapters.

The Dispute Resolution Act focuses on a crucial problem in our present judicial system—providing easy access for all Americans in the resolution of minor civil disputes. According to a 1976 American Bar Association survey, two-thirds of our citizens now lack this access—a freedom intended by our founders to be the right of all and not the privilege of a few.

The judicial process has not answered the needs of people who cannot afford lawyers, and who lack the knowledge enabling them to represent themselves. It has not answered the needs of people who can neither afford nor understand the long delays of courtroom procedure. Too often the end result of these failings is an exhaustion not only of finances, but of patience, courage, and hope.

Many States, localities, private businesses, and neighborhood groups have established innovative and very successful programs for resolving disputes without resort to the courts. Although we must be careful to insure that the fundamental legal rights of our citizens are not compromised, these alternatives can be effective means for providing access to justice where none exists. They often provide a quick, inexpensive and fair resolution of disputes—a resolution which in most cases satisfies the parties.

There are approximately 20,000 businesses in the United States now using various methods of abritration in the settlement of consumer disputes. Five years ago, the Better Business Bureau began a nationwide consumer arbitration program which is in most cases free and voluntary. Of the 23,000 cases in which the Bureau has offered arbitration, more than one-third were settled after the consumer and the business had agreed to arbitrate, but before a hearing took place. Awards from this process average about $100 with the three largest complaint categories being home improvement, car repair, and appliance purchases. According to the vice president of the Counsel of Better Business Bureaus, more than 6,000 arbitrators have been trained in this nationwide program, and less than one-half of 1 percent of their awards have been challenged.

The Dispute Resolution Act of 1979 is an attempt to expand successful government and industry efforts by encouraging the states and others to experiment with various dispute resolution mechanisms which will provide all persons convenient access to justice that is fair, inexpensive, and expeditious.

This legislation embraces an idea whose time is long overdue. The Dispute Resolution Act carries the long-standing support of the Department of Justice, the Department of Commerce, the American Bar Association, Congress Watch, many members of the State judiciary, a number of highly respected scholars, and many members of Congress. We owe a debt of gratitude to all of these people who have turned this idea into a workable plan. We have a clear need, we have a clear plan, and now we must make this legislation a reality. "Equal justice under law" is the principle on which our judicial system was founded. It is the responsibility of this Congress to make "Equal access to Justice" a fundamental part of that ideal.

The Dispute Resolution Act passed the Senate on April 5th. The National Home Improvement Council strongly urges the House to pass legislation to bring this concept into law.

NATIONAL HOME IMPROVEMENT COUNCIL, INC.

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THE NATIONAL HOME IMPROVEMENT COUNCIL, INC.

The National Home Improvement Council is the nationwide trade association representing all segments of the home improvement industry in America. It was founded in 1956 as an outgrowth of "Operation Home Improvement," an industry-wide promotion carried out the preceding year at the request of the Eisenhower administration to help stimulate the nation's economy by expanding the home remodeling market.

Its purposes and objectives, as defined in its Bylaws, are as follows:

- To promote the common business interests of those engaged in the home improvement industry
- To encourage ethical conduct, good business practices, and professionalism in the home improvement industry
- To foster cooperative action in advancing by all lawful means the common purposes of its members
- To sponsor educational programs and activities for the benefit and enlightenment of its members
- To conduct programs to inform the public of the need for and advantages of maintaining homes in good condition and to thereby help improve the nation's housing inventory
- To recommend such legislation and regulations which can help stimulate home improvements and to recommend corrective action for those laws, rules or regulations which tend to discourage, stifle, or impede home improvements
- To conduct or engage in all lawful activities in furtherance of the foregoing purposes, or incidental thereto

NHIC exists to serve every segment of the home improvement industry—the contractors, manufacturers, wholesalers and distributors, lending institutions, energy industries, and publications—every type of business which benefits through the continued growth of America's dynamic home improvement market.

The governing body of NHIC is its Board of Directors, which performs the policy-making function and gives direction to the programs and activities of the Council. The Board consists of one Director from each National Member firm and one Director from each NHIC Chapter, plus the elected officers, regional vice presidents, and the chairmen of the following Industry Councils: Contractors Council, Lenders Council, Manufacturers Council, Publishers Council, Utilities Council and Wholesalers Council.

NATIONAL HOME IMPROVEMENT COUNCIL

Code of Ethics

Members of the National Home Improvement Council are pledged to observe the highest standards of integrity, frankness and responsibility in dealing with the public:

1. By encouraging only those home improvement projects which are structurally and economically sound.
2. By making, in all advertising, only those statements which are accurate and free of the capacity to mislead or deceive the consumer.
3. By requiring all salesmen to be accurate in their description of products and services.
4. By writing all contracts so that they are unambiguous and fair to all parties concerned.
5. By promptly fulfilling all contractual obligations.
6. By performing all work in a manner compatible with recognized standards of public health, safety and applicable laws.

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(212) 867-0121

WASHINGTON OFFICE
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Washington, D.C. 20045
(202) 393-0707

WESTERN OPERATIONS OFFICE
American Building Contractors Assn.
2476 Overland Ave.
Los Angeles, Calif. 90064
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STATEMENT BY WILLIAM R. KEYES, PRESIDENT, NATIONAL MANUFACTURED HOUSING FEDERATION, REGARDING THE DISPUTE RESOLUTION ACT, H.R. 3719, H.R. 2863, S. 423

This statement in support of H.R. 3719, sponsored by Mr. Eckhardt, is filed by the National Manufactured Housing Federation through its President, William R. Keyes. At the same time, a statement is also being filed by the Ohio Mobile Home and Recreational Vehicle Association, one of the state member associations of the national Federation, through its Executive Vice President, Gene Keener.

NMHF is a nationwide federation of 21 state and one regional association of manufactured housing dealers, park operators and developers, suppliers, manufacturers, and lenders. States which are members of the Federation are: Arizona, California, Florida, Idaho, Illinois, Indiana, Kentucky, Maryland, Michigan, Missouri, Montana, Nevada, New York, Ohio, Oklahoma, Oregon, Pennsylvania, South Carolina, Texas, Virginia and Washington.

In the 2½ years of its existence, NMHF has grown to represent approximately 70% of this country's manufactured housing dealers.

After we have presented the reasons why NMHF supports this legislation, the statement submitted by Mr. Keener on behalf of the Ohio MH & RV Association will explain the Consumer Review Committee which has helped to establish in Ohio a mechanism for handling complaints concerning manufactured homes. NMHF is proud to support the Ohio program, which offers an informative, practical example of how beneficial to both consumers and businesses informal dispute resolution can be.

As an organization consisting primarily of manufactured housing dealers, park developers and operators, Federation members represent the crucial link in the distribution chain between manufacturers and consumers. Our experience in this position close to the consumer has made us intimately aware of warranty, maintenance and repair issues which can arise after the purchase of a manufactured home. It is the dealer or park operator to whom consumers normally take their complaints.

We must first emphasize that the complaint record of the manufactured housing industry is a good one. About 10 million manufactured homes are currently in use. In 1975, 275,000 homes were shipped nationwide. Only about 7,000 complaints were registered with either the Department of Housing and Urban Development or the State Administrative Agency (SAA) responsible for handling manufactured housing complaints. Many of these complaints concerned only minor or cosmetic problems. Despite this outstanding record of service, the manufactured housing industry recognizes that improvement in consumer satisfaction can always be made.

The bills under consideration would help achieve this by establishing specific entities designated as complaint or dispute receivers. The beneficial impact of this special designation has been demonstrated in already operating programs, such as AUTOCAP (consumer panel for automobiles); MACAP (Major Appliance Consumer Action Panel); and HOW (warranty program for home buyers).

Moreover, Congress has already expressed its support for dispute resolution by enacting Section 110 of the Magnuson-Moss Act (P.L. 93-637). Although that provision concerns warranty disputes only, the intent of Congress to encourage non-judicial, informal mechanisms for dispute resolution is clear.

Pursuant to Section 110 and FTC regulations thereunder (16 CFR 703), the warrantor may establish a settlement procedure which must be exhausted by the consumer before the consumer can initiate a civil action. Decisions of the dispute procedure are not legally binding, although they are admissible in evidence.

NMHF endorses procedures for the voluntary resoluiton of consumer problems. However, it is important that voluntary nonprofit organizations be used, as well as governmental agencies. Because the legislation under consideration is designed to fund experimental programs, all avenues and perspectives should be explored and encouraged. The private sector undoubtedly can offer creative programs derived from its experiences which might be beyond the scope of governmental agency operations.

NMHF, like many other industry organizations, is concerned about the consumers who choose our products. While some buyers' complaints may be exaggerated, other allegations may be justified. Many NMHF members are dealers in a position between manufacturers and consumers. We realize that there are two sides to every story. We usually hear them both. Since it is impossible to make a product with zero defects, we must be ready to respond to legitimate

complaints that are filed. NMHF recognizes that the consumer is the key to this industry's future. We are prepared to meet the consumer's legitimate needs.

In many situations, the dealer or park operator has gained years of insight in negotiating disputes between manufacturers, installers, repair and service people, lenders, and consumers. Most of the problems are now handled informally, if possible, and hopefully without having to resort to traditional legal remedies.

Our experiences in this type of negotiation prove to us the immense contribution to both consumer welfare and business interests that a network of informal dispute resolution procedures could provide. The need is there for mechanisms upon which all parties can rely confidently to give impartial and complete consideration of disputed issues.

The current burden on our court system from the thousands of lawsuits filed each day serves to frustrate both the courts and those who seek relief from that forum. Many people have problems that are substantial enough to cause them inconvenience or hardship but are not considered appropriate for judicial determination. Clearly, a non-judicial alternative is desperately needed.

In the past few years, new types of mediation panels have been established. Their purposes range from screening cases before they are filed in court (for example, medical malpractice panels) to resolving minor criminal actions by arbitration rather than adjudiction. These types of innovative solutions should be encouraged. The proposed bills can go a long way towards fostering these alternatives.

Each of the bills would establish a Resource Center which would serve as a clearinghouse for the exchange of information as well as provide technical assistance and conduct research to discover the most deserving areas in which to concentrate national efforts.

Both House bills include an Advisory Board composed of government officials, business persons, academicians, community and consumer groups, attorneys and state courts. The vast range of experience that would be provided by this broad cross-section would help to promote a balanced approach to the formation and implementation of informal dispute resolution mechanisms.

Finally, and perhaps most importantly, all of the bills provide funding for state and local governments and nonprofit organizations who receive approval by the Attorney General for their plans to create or improve existing dispute resolution mechanisms. Although the federal government's maximum share of any project's cost diminishes from 100 to 60 percent by the fourth year of the grant, this significant federal contribution to local initiative can be a key factor in the success of new programs or improvements.

The eligibility of nonprofit organizations is particularly important to NMHF because it indicates that industry members who wish to develop mechanisms similar to the Ohio Association's could apply for funding to help consumers serviced by the industry. Thus, private nonprofit groups can make a substantial contribution in devising creative new systems for dispute resolution.

Although the three bills concerning dispute resolution, S. 423, H.R. 2863 and H.R. 3719, are very similar in both their goals and their specific provisions, NMHF supports most strongly H.R. 3719, introduced by Congressman Eckhardt.

The reasons why NMHF prefers H.R. 3719 are as follows:

1. In contrast to S. 423, H.R. 3719 does not include a statutory 50/50 division in the allocation of funds. S. 423 would set aside half of the funds for state grant applicants with national priority projects. All other state, local and nonprofit organization projects would have to share the remaining half. Private nonprofit groups might be deterred from competing for these limited funds. This statutory limitation could create needless frustration if the types of meritorious applications submitted for funding prove the 50/50 allocation to be inappropriate.

2. Unlike H.R. 2863, H.R. 3719 does not place a statutory $200,000 cap on the amount of assistance available to any one project during any fiscal year. NMHF believes that, as in the case of the 50/50 allocation, a statutory limit is too inflexible, although guidelines which suggest a monetary ceiling may prove useful in budgeting available funds.

3. Finally, H.R. 3719 authorizations are the most reasonable, considering the task of national importance which lies ahead of the entities participating in the program. This bill would authorize $3,000,000 a year for the next five years to cover the costs of the Resource Center and Advisory Board, and $15,000,000 a year for the next five years to be applied to funding grants for programs.

In conclusion, NMHF, whose member associations have experience as mediators in the manufactured housing industry, recognizes the valuable contribution which federal funding and coordination of dispute resolution mechanisms can provide. We urge you to review the procedures described in the Ohio MH & RV Association's statement. NMHF is proud to support this fine effort by its state member association to react responsibly to consumer demands.

We strongly support the bills before these Subcommittees today and commend you for considering them. Thank you.

NATIONAL SENIOR CITIZENS LAW CENTER,
Los Angeles, Calif., June 26, 1979.

Hon. ROBERT W. KASTENMEIER,
Chairman, Subcommittee on Courts, Civil Liberties and the Administration of Justice, Committee on the Judiciary, House of Representatives, Washington, D.C.

DEAR CONGRESSMAN KASTENMEIER: Thank you for your kind letter of June 13, 1979, asking for my thoughts concerning dispute resolution and the elderly.

I am the Executive Director of the National Senior Citizens Law Center, a Legal Services Corporation and Administration on Aging funded support center concerned with the special legal needs of the nation's elderly. In that capacity, I have become keenly aware of the shortcomings of the traditional court-oriented mechanisms for dispute resolution—especially in the context of elderly disputants. Older persons often do not have the several years required to pursue a matter through the court system; or, because they have grown up in a different era, they may distruct that strange and alien system and would prefer to have their disputes resolved in a more informal way. Thus, I believe your efforts to expand the possibilities for informal community-based dispute resolution are extremely timely and significant, not only for the population at large, but especially for the elderly.

A preliminary review of the alternative dispute resolution mechanisms already in place indicates that the vast majority of such projects are not particularly sensitive to, or focused on, the special needs of the elderly. I would thus hope that any legislation which is ultimately enacted by the Congress would in some way address the concerns of the nation's often most neglected minority—the elderly.

In many foreign countries and ethnic communities within the U.S., elders have traditionally acted in the role of dispute mediators. Often elders enjoy respect, life experience, and freedom from specific job pressures and politics. Most of the community dispute resolution projects currently underway in the U.S. do not adequately explore this new and exciting role for our older citizens. As you are well aware, a vast national resource is presently sitting idle—retired teachers, accountants, businessmen, judges, and attorneys. Experimental projects using these retired citizens will hopefully be set up under any dispute resolution legislation enacted by Congress.

Mr. Chairman, your efforts and the efforts of your subcommittee in the field of dispute resolution are extremely exciting and they hold the promise of significantly altering the way in which community disputes are resolved in the U.S. If the National Senior Citizens Law Center can in any way assist you in your work, please do not hesitate to contact me.

Sincerely yours,

PAUL S. NATHANSON,
Executive Director.

STATEMENT OF THE OHIO MOBILE HOME AND RECREATION VEHICLE ASSOCIATION, BY GENE KEENER, EXECUTIVE VICE PRESIDENT, REGARDING THE DISPUTE RESOLUTION ACTS, H.R. 3719, H.R. 2863, S. 423

This statement, in support of proposed dispute resolution legislation, is submitted by the Ohio Mobile Home and Recreational Vehicle Association through its Executive Vice President, Gene Keener. The Ohio association is composed of manufactured housing dealers, manufacturers, lenders, insurers and suppliers.

In 1976, the association, in cooperation with the Attorney General of Ohio, established an innovative dispute settlement procedure to resolve consumer complaints. The success of the program is now evident. It provides a demonstration

of the potential benefits that can be achieved in settling consumer and other types of disputes under any of the proposed Dispute Resolution Acts.

First, let us put the creation of Ohio's program in historical perspective. In 1975, several dealers in Ohio were alleged to be in violation of the Ohio Consumer Sales Practices Act. Some of these dealers went out of business, leaving behind many unsatisfied consumer complaints which threatened to damage the purchasers of manufactured housing and the public perception of our entire industry if left unremedied.

In order to help the industry regulate itself more conscientiously and to respond to consumer demands, the Board of Directors and staff of the state association, with the assistance and advice of the Ohio Attorney General's Office, created a Consumer Education Relations Program. This program is a totally separate and self-supporting division of the Ohio association.

Following is a brief description of how the plan is designed and the success the program has enjoyed so far. We should mention that our experience with the program has demonstrated that use of all of the formal steps is rarely necessary. Often we can bypass an intermediate step to resolve the complaint even sooner and more informally.

Every purchaser of a new manufactured home in Ohio receives from the Association a letter of congratulations and a Consumer Service Procedure card which outlines the available complaint process. The notice also explains that other avenues for remedying problems are available, such as the Better Business Bureau, the Office of the Attorney General and state and federal warranty laws. A copy of the letter and notice is attached to this statement as Attachment A.

For each complaint received by the association, its Board of Directors appoints a Complaint Review Committee. The Committee initially advises all complainants to contact their dealer if they have not already done so. Some complaints are resolved at this early stage. Frequently a complaint form requesting detailed information is required from the homeowner. When the form is returned to the Committee, the Committee forwards a copy to the party it beleives is responsible for the subject matter underlying the complaint. This may be the manufacturer, dealer, supplier or park operator. At the same time, a copy is sent to the Ohio Attorney General's Office.

Within 14 days the recipient of the complaint form must report in writing what action has been taken to resolve the complaint. If the recipient fails to respond, the Committee decides who is responsible for resolving the complaint and what remedial steps have been taken so far. The Committee then informs the responsible party and the Attorney General of its findings. The Committee may base its decision on information contained in the file or it may conduct a physical inspection.

If the responsible party does not respond to the findings within a reasonable time, the Committee will authorize a competent third party to take whatever actions are necessary to remedy the problem. This person's services are paid for by the Consumer Relations Program. If the Program's funds are used, the responsible party is requested to appear before the Board of Directors to explain its actions or inaction. If the Board affirms the Committee's determination of responsibility and, in addition, finds the party to be liable for the resolution of the complaint, then the party must reimburse the Program or be terminated from membership in our state association. The Attorney General is also notified of the association's action.

In a worst case situation, where the responsible party fails to respond and a third party is authorized to remedy the complaint, a maximum of 70 days is permitted from the date that the complaint form is filed. In most instances, complaints are resolved in half that time.

We in Ohio are very proud of our program and our cooperative efforts with the Attorney General's Office. After three years in operation, over 55 on-site inspections have been conducted. We have resolved over 310 complaints received in our office out of a total of 390 referred to the Association.

Most gratifying, however, are the letters of thanks that we have received from the consumers who benefitted from our dispute resolution program. Time after time these writers express their appreciation for having somewhere to go when they had problems. A recent letter from one satisfied consumer is attached to this statement as an example (Attachment B).

Furthermore, in order to reduce consumer dissatisfaction and misunderstandings which can lead to complaints, the Ohio association has fashioned a complementary program of dealer training. By instructing sales personnel about the

scope and content of their legal obligations to consumers, the association hopes to prevent situations that result in complaints. A copy of one of our training aids concerning the Magnuson-Moss Act is attached as an example of this program (Attachment C).

A Dispute Resolution Act could help fund other programs such as ours to help to expand and improve our program. Our experience has shown us that nonprofit industry associations, because they are familiar with the types of problems likely to arise, establish fair dispute resolution mechanisms which are both impartial and beneficial to their customers.

Of course, the bills before you today address more than just consumer complaints, and many informal disputes among neighbors, business partners and others would benefit from non-judicial resolution mechanisms.

However, consumer problems have been our main emphasis, and we have been pleased to eliminate much consumer and business frustration. As one person who used Ohio's program wrote to us: "If there were more places a consumer could go for help, a lot more people would not have the problems they feel they have to put up with."

We commend these Subcommittees and the sponsors for their initiative in considering this legislation. We urge its enactment.

GENE KEENER,
Executive Vice President.

CONSUMER SERVICE DEPARTMENT, MOBILE HOME DIVISION,
OHIO MOBILE HOME & RECREATIONAL VEHICLE ASSOCIATION,
Columbus, Ohio.

DEAR HOMEOWNER: Congratulations to you and your family for your recent purchase of a mobile home. The dealer, the manufacturer and our State Association, each want to commend you for your selection of the mobile home, and equally as important, we hope you will enjoy it to it's fullest advantage.

The designer of your mobile home, the craftsmanship of the manufacturer and the decorator, each carefully planned your mobile home to give you a "life style" of elegance and convenience. We want you, your family, to enjoy your mobile home to it's maximum.

Owning a mobile home is like owning a conventional type home. It is not maintenance free, and periodically requires attention the same as any other form of housing. Prior to delivery of your mobile home to you, it was carefully examined and serviced by your dealer and should provide you with years of comfortable living. Enclosed, for your convenience if needed, is a Consumer Service Procedure card.

We, the dealer, the manufacturer, sincerely hope your mobile home has been and continues to be, the pride of your family.

Very truly yours,

GENE L. KEENER,
Executive Vice President.

Enclosure.

CONSUMER SERVICE PROCEDURE[1]

1. Notify your dealer of any service requirements.
2. Notify the manufacturer if the dealer fails to respond.
3. Contact the Ohio Mobile Home and Recreational Vehicle Association, Columbus, Ohio. When a complaint is received in the Association, either by telephone or correspondence, the mobile home owner or recreational vehicle owner will be advised to contact his dealer first, if he has not already done so. The Ohio Mobile Home & Recreational Vehicle Association staff members receiving the complaint will determine the following:
   (a) Complainants' name, address, phone number;
   (b) The dealer name and address;
   (c) The manufacturers name;
   (d) Date of purchase;
   (e) Brand name; and
   (f) Name of Financial Institution holding lien.

Each complaint shall be entered into a record and a file established.

A complaint form shall be mailed to the owner requesting additional detailed information concerning the nature of the complaint and other pertinent data.

[1] Provided as a courtesy of the Ohio Mobile Home & Recreational Vehicle Association.

When the form is returned, copies are forwarded to the dealer, the manufacturer, lienholder, and/or the supplier when applicable. A cover letter shall be enclosed with copies of the complaint form being mailed, requesting the recipient to respond within fourteen (14) days. After the duration of the fourteen (14) days, if the manufacturer or the dealer fail to respond, then the Association shall directly contact the dealer or manufacturer and the consumer and arrange a meeting, mutually agreed to, whereby the complaint form shall be discussed with those principals involved.

If in the opinion of the Review Board the consumer is at fault, or partially thereof, then such report as determined by the Review Board shall be forwarded to the office of the Ohio Attorney General, Division of Consumer Frauds and Crimes, Columbus, Ohio.

4. You may contact the office of your local Better Business Bureau.

5. You may contact the office of the Attorney General, State of Ohio, Division of Consumer Frauds and Crimes, Columbus, ,Ohio.

6. You may pursue your legal remedy in the courts for damages under state and federal warranty laws.

If the dealer or manufacturer disclaim any responsibility then the complaint form shall be referred to a Review Board comprised of members of the said Association for their investigation and findings. If the dealer or manufacturer are determined by the Review Board to be responsible for the repair of the mobile home and either or both fail to do so, they may be subject to expulsion from membership of the Ohio Mobile Home and Recreational Vehicle Association, and copies of all proceedings shall be forwarded to the office of the Attorney General, State of Ohio, Division of Consumer Frauds and Crimes, Columbus, Ohio.

Note: It is resonable to expect the consumer to allow each procedure a fair period of time to be effective.

MAY 22, 1979, *Sidney, Ohio.*

OHIO MOBILE HOME ASSOCIATION,
50 West Broad Street,
Columbus, Ohio
(Attention of Patty Thornton).

DEAR MS. THORNTON: Yesterday (5-21-79) Schult's repair man came to do the work your association asked to be done on my mobile home. Today he is finishing the work.

They could not match the ceiling in the living room, so all of that had to be replaced. I may add they did not complain.

He installed complete new front entrance, new west window, sealed ends of roof where it had leaked and spot painted same inside.

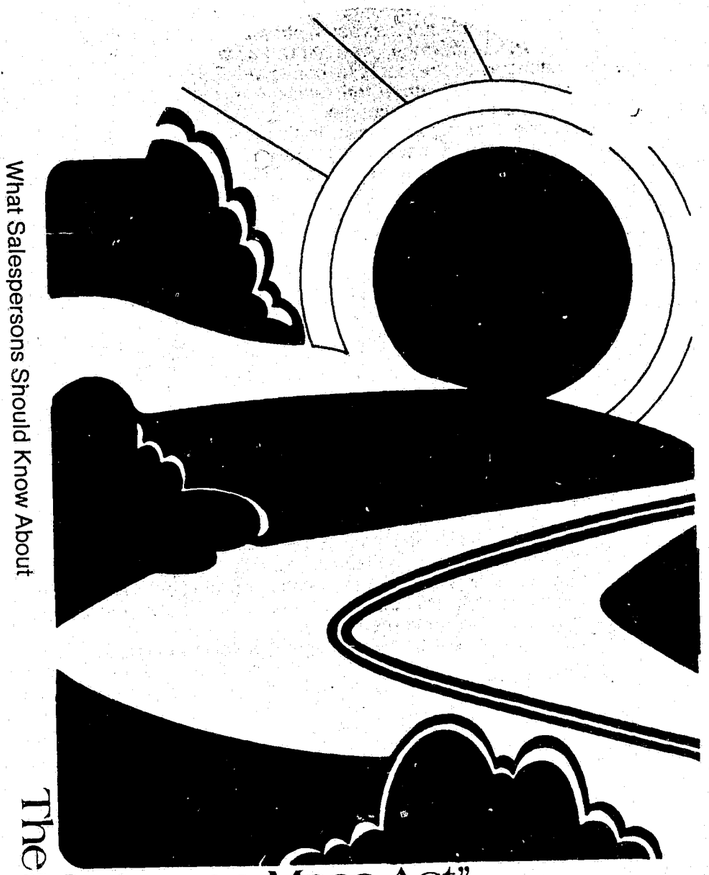
I want to thank you and all the members of your association for the interest you took to see the work was done.

If their were more places a consumer could go for help a lot more people would not have the problems they feel they have to put up with.

Thank you again your help is much appreciated.

Sincerely,

JEAN M. RHYAN.



What Salespersons Should Know About

The "Magnuson-Moss Act"

A sales training aid prepared as part of
the Consumer Education/Relations Program
Ohio Mobile Home & Recreational Vehicle Association

Today—at every level of government—laws are being adopted to protect the consumer's interests. In the main, they represent attempts to make it illegal . . . and punishable . . . to mislead, misinform or even fail to inform the consumer of information enforcement agencies deem should be conveyed. For the most part, the job of complying with these laws falls upon the retailer—in our industry's case, the mobile home dealer and his or her salespeople.

Violation of these laws is a major offense. In Ohio, violations or alleged violations in the mobile home industry have resulted in the dealer(s) having to place thousands of dollars in escrow to settle consumer complaints. Some of the industry's largest manufacturers have been compelled to sign multi-faceted consent decrees that will require millions of dollars be spent to clarify and service warranties. This, eventually, will affect both the price of their products and the very nature of mobile home dealership's business.

One of the most far-reaching laws adopted by the Federal government is known as the Magnuson-Moss Act. It deals with product warranties—guarantees about product performance, repair, replacement, et cetera.

Everyone who makes a product for sale to the public or sells any product to the public is affected by this law. It does not necessarily make it more difficult to sell a product. It does make it necessary to know more about the product and the guarantees that back it up.

The industry can and is coping with this new set of imposed requirements. It is costly . . . but less costly than failure to do so. More importantly, it must be done in order to remain in business.

We share the hope of federal, state and local government officials that, in the long run, these laws will strengthen the businesses that learn to comply with such laws.

Almost all of them have one thing in common.

When we purchase something . . . especially something with a sizable price tag . . . we want to be certain that whatever guarantees or promises that have been made about that product are kept. This includes knowing who's going to do what when it comes to backing up those guarantees.

Since July, 1975, the federal government has been involved in making certain manufacturers and dealers spell out what those guarantees are. At the same time, it has specified what must be done to satisfy the buyer if something does go wrong. The law involved is known as the "Magnuson-Moss Act."

Insofar as mobile home dealers and dealer salesmen are concerned there is nothing about all this that should make it more difficult to sell mobile homes. As a matter of fact, it can be used as a positive selling point where the buyer is particularly concerned about guarantees made about the product.

At the same time it means each of us must be more aware of the whole subject of product warranties and how to handle the subject when dealing with customers. You have a responsibility to learn as much as possible about both subjects.

About Warranties . . .

Please keep in mind that there are three types of warranties:

Warranties Made By The Manufacturer

1. Written warranties backed by the mobile home manufacturer.
2. Written warranties (on self contained components) backed by the manufacturer of products installed in the mobile home.

Warranties Made By The Dealer (and his salesmen)

1. Implied warranties imposed by law on the dealer.

Written Warranties Made By The Manufacturer

Because of the federal law, almost all mobile home manufacturers are providing more and more printed explanations of (1) who is the warrantor; (2) who is entitled to the protection of the warranty; (3) what is warranted; and (4) what the warrantor will do and for how long. Generally, these details vary from manufacturer to manufacturer. However, each manufacturer tends to be the same for all models.

It is important that you tell every prospective purchaser that all manufacturer-backed warranties are as stated in printed material provided by the manufacturer. Explain that OMH&RVA members ask every buyer to read the material that is provided by the manufacturer before they purchase the unit. Also explain this material covers the four points of information itemized in the above paragraph.

Each salesman should be aware that there are two types of manufacturer-backed warranties as explained above. It may be helpful to know the major items that are covered by each type of warranty. However, always say that the details of these warranties are spelled out in the printed literature . . . and this literature is what the purchaser can rely upon.

Implied Warranties Imposed By State Law Upon The Dealer

"Implied Warranties" are those imposed by state law. The law of Ohio provides that whether or not you put anything in writing or make any verbal representations, by law there is an "implied warranty" that the seller warrants that he has good title; the right to transfer same free and clear; that the product is fit for the ordinary purpose for which it is used; and if the buyer is relying on the seller's judgment to select the product, the seller warrants that the goods shall be fit for that purpose. A seller cannot limit the implied warranty if the limitation is unreasonable and cannot impose a time limit on the implied warranty.

What To Do

At some point, every sales presentation should include a comment about warranties. Tell the customer about the different types of warranties and the four items of specific information included in each warranty:

1. Who is the warrantor.
2. Who is entitled to the protection of the warranty.
3. What is warranted.
4. What the warrantor will do and for how long.

Any time there's a specific question about warranties, offer to let the customer see and read the manufacturer's or dealer's printed material. You can summarize what you understand it to be, but always be certain to say the printed warranty is what counts and you will be happy to have the customer read through it at his or her convenience.

Generally, mobile home dealers are making every effort to avoid verbal promises. In fact, they should not be made. All promises must be in the written contract. The risk of adverse actions is simply too great. However, where verbal promises are made, the salesman must make it clear to the purchaser that the promise must be approved by either the owner or the sales manager.

Be certain you know what your dealer is prepared to promise or guarantee the customer . . . and whether the promise will be made verbally or in writing. If in doubt, **ask!**

52-434 O - 80 - 17

SEARS, ROEBUCK AND CO.,
Washington, D.C., May 31, 1979.

Re H.R. 2863, H.R. 3719, and S. 423 The Dispute Resolution Act.

Hon. ROBERT W. KASTENMEIER,
Chairman, Subcommittee on Courts, Civil Liberties and the Administration of Justice, U.S. House of Representatives, Washington, D.C.

DEAR CHAIRMAN KASTENMEIER: Sears, Roebuck and Co. supports in H.R. 2863, H.R. 3719 and S. 423 the general concept providing for federal financial assistance to improve dispute resolution mechanisms by making such mechanisms accessible, effective, fair, inexpensive, and expeditious.

The three proposals under consideration are similar in that all would provide for the Attorney General to administer a financial grant program to support newly created or established dispute resolution mechanisms meeting specified funding criteria.

Only state or local governments, state or local government agencies, or nonprofit organizations would be permitted to receive financial aid to establish or maintain a dispute resolution program. These dispute resolution mechanisms would operate to resolve minor consumer, landlord-tenant, and neighborhood disputes, for example, by such methods as arbitration, mediation, conciliation and adjudication.

Each bill would provide for the establishment within the Justice Department of a Dispute Resolution Resource Center which would serve as a clearinghouse for information exchange on dispute resolution mechanisms. The centers would also provide technical assistance to state and local governments and to grant recipients to improve and establish dispute resolution programs.

In 1978, Sears submitted written comments to both the House Commerce and Judiciary Committees on S. 957, a bill identical to S. 423 which is now being considered along with H.R. 2963 and H.R. 3719 by the House Courts Subcommittee and Consumer Protection Subcommittee.

The following comments reflect our continued endorsement of the concepts embodied in the instant proposals, upon which hearings will soon commence. We think it appropriate to give you our views on the bills at this time in order to help develop the record. Since S. 423 tracks the language of S. 957, our comments, modified to consider H.R. 2863 and H.R. 3719, are similar to those we submitted on S. 957 in August, 1978.

Sears has always supported the concept in the pending proposals of promoting improved dispute resolution mechanisms. On the basis of our experience in this area, we have some recommendations and comments which we believe will further improve any of the bills under consideration regardless of which bill is ultimately adopted. Although improvements are warranted before a bill is enacted, our support for the proposed legislation is not conditioned on adoption of our suggested amendments.

Without question individuals need and deserve aid in resolving minor disputes, especially those disputes between a business and its customers. Although we agree with the concept of promoting efficient, fair, expeditious and inexpensive resolution of all types of minor disputes, our comments will be limited to H.R. 2863, H.R.. 3719 and S. 423 as they would impact on the resolution of disputes between buyers and sellers of goods and services. Disputes between neighbors, relatives, and landlord and tenants, etc., are serious and deserve the same consideration afforded consumer disputes. However, we hope that non-economic disputes would not dominate the activities of funded mechanisms.

Sears aims to satisfy its customers. Our goal is to provide quality merchandise at reasonable prices, as we constantly strive to provide improved products and services. As products are improved to become easier, more convenient and efficient to use, they become more technically complex. Thus, the need for repair, maintenance, replacement or refund by the seller may increase. Unresolved product problems breed consumer frustration and dissatisfied customers.

It is not always easy to satisfy each customer because product problems may arise from circumstances beyond a retailer's control. The seller has little or no control over problems arising from product neglect or abuse, prompt delivery of repair or replacement parts from suppliers and new problems developing in products within hours of previous repair.

Thus, Sears views these three bills as a good starting point to provide the federal government an opportunity to encourage the establishment of workable systems of dispute resolving mechanisms which would help alleviate the feelings of frustration and alienation consumers have toward business.

In voicing Sears support for the concept embodied in the current proopsals, of improving dispute settlement mechanisms, several aspects of the proposals warrant particular consideration.

Any legislation enacted should include provisions which encourage the development of internal dispute resolution mechanisms akin to our "Satisfaction Guaranteed or Your Money Back". This could be done by a provision requiring consumers to initially utilize any informal dispute resolution mechanism established or co-sponsored by business to which consumer complaints are referred.

There are obvious benefits to be derived from settling disputes at the source of the problem. First, it helps to establish and maintain goodwill between business and consumers. Second, it encourages the parties themselves to work out their own problems. Third, in the context of these specific proposals, it would make them more cost effective.

Suggested amendments

To implement this suggestion we recommend that Section 4 of HR 2863, HR 3719 and S. 423 be amended as follows (underlining indicates changes or additions to the language presently in S. 423, but all such changes can be easily adapted to HR 2863 and HR 3719):

SEC. 4. CRITERIA FOR DISPUTE RESOLUTION MECHANISMS

(a) CRITERIA.—In order to achieve the purpose of this Act, a dispute resolution * * * shall provide for—

* * * * * * *

(5) reasonable and fair rules and procedures, such as those which would—

* * * * * * *

(C) encourage the *early* resolution of disputes by, in addition to adjudication, such informal means as conciliation, mediation, or arbitration, *and require disputants to initially utilize those informal means established by those who are a party to the dispute.*

(b) STATE SYSTEM.—Each State is encouraged to developed a State system which is responsive to the criteria established in subsection (a) of the section by providing—

(1) sufficient numbers and types of readily available dispute resolution mechanisms which meet the requirements for such mechanisms set forth in subsection (a) of this section, *including informal dispute settlement mechanisms; and*

* * * * * * *

Whatever scheme for promoting and funding dispute resolution mechanisms that is adopted should include three basic levels of redress mechanisms for consumers. These levels consist of:

(1) internal mechanisms established by the business disputant;

(2) voluntary arbitration and mediation programs established by private organizations, such as business sponsored groups or consumer-business cooperative efforts, or state or local government agencies; and

(3) small claims courts and/or arbitration programs administered by the courts.

I. INTERNAL BUSINESS SPONSORED MECHANISMS

The first level for resolving consumer dissatisfaction should be the responsibility of the business itself, through self-regulation. Only when the business cannot resolve the dispute, should there be resort to governmental or private mechanisms outside the business.

Since 1886 Sears has had its own self-regulation dispute resolving mechanism embodied in the company of "Satisfaction Guaranteed or Your Money Back." In part this policy states:

A. The purchaser of any product or service sold by Sears, who, within a reasonable time after purchase, advises Sears of dissatisfaction with a purchase for any reason, will obtain prompt and courteous action in accordance with his/her wishes on the part of the Sears unit contacted. It is company policy that Sears accept the customer's judgment of what it takes to satisfy the customer, including refunding the full purchase price, and/or the service charges paid.

B. Where merchandise or a service has been used and retained by the customer beyond a reasonable period, the complaint will be handled on a basis that is acceptable to the customer as an equitable adjustment and confirms to the customer the integrity and business principles of the Company.

Note: In any advertising, or on the selling floor, this statement of basic policy is not to be paraphrased in any way or referred to as a "trial period" of use. It must always be stated "Satisfaction Guaranteed or Your Money Back".

Our suggested amendments would encourage sellers to establish internal programs and provide that consumers must first resort to redress mechanisms offered by a business or a consumer sponsored or co-sponsored organization. We believe this would encourage both individual and business groups to develop fair consumer redress mechanisms.

To the extent that business and business sponsored mechanisms are utilized first to successfully resolve disputes, the scarce financial resources of non-business mechanisms can be more efficiently utilized. Thus, for each dispute resolved at the buyer-seller level, the capacity of the federal government funded mechanisms proposed by these bills would be more efficiently utilized.

II. VOLUNTARY ARBITRATION AND MEDIATION PROGRAMS ESTABLISHED BY PRIVATE ORGANIZATIONS OR STATE OR LOCAL GOVERNMENTAL AGENCIES

Sears has what we believe to be a very fair, inexpensive, efficient, and effective controversy settlement procedure; however, there are occasions when Sears can't satisfy a customer and agrees to resort to external controversy settlement procedures such as mediation or arbitration.

A number of organizations have provided mediation and/or arbitration programs for consumers in various areas throughout the country. The most prominent of these have been the local Better Business Bureaus which have offered mediation services to consumers for years, and more recently have offered arbitration programs in a variety of areas. Today, many local Better Business Bureaus offer consumer arbitration programs, and Sears has been a supporter and participant in such programs in many areas.

In order to fund dispute settlement mechanisms which would best achieve the purposes of the Act, and to encourage each state to develop a state system which would be most responsive to the criteria established for funding dispute settlement mechanisms, we suggest the following.

First, a dispute resolution mechanism should be inexpensive to utilize by consumers as stated in the Act's purpose. This would require that either no charge or a minimal charge be the rule in using the services provided by dispute settlement mechanisms.

Second, in order to provide convenient access to dispute resolution mechanisms, it is equally important that the mechanism be conveniently located as well as be held during hours and on days that are convenient. Arbitrations have been held at the mutual convenience of the parties involved, in the consumer's home, where the work was performed, and at the seller's place of business.

Finally, where information is provided concerning redress mechanisms, it should include, in addition to the availability of the mechanism, its location and how one can avail himself of the benefits of the mechanism.

Suggest amendments

In order to implement the above suggestions Section 4 should be amended to read as follows (underlining indicates changes or additions to the language presently in S. 423):

SEC. 4. CRITERIA FOR DISPUTE RESOLUTION MECHANISMS

(a) CRITERIA.—In order to achieve the purpose of this Act, a dispute resolution mechanism * * * shall provide for

(1) *inexpensive utilization by disputants, and* forms, rules, and procedures which are so far as practicable, easy for potential users to understand and free from technicalities;

* * * * * * *

(3) the adjudication or resolution of disputes *at convenient locations* during hours and on days that are convenient, including evenings and weekends, *where feasible;*

* * * * * * *

(5) reasonable and fair rules and procedures, such as those which would—

* * * * * * *

(G) provide information about the availability, *location and use* of other redress mechanisms in the event that dispute settlement efforts fail or the dispute does not come within the jurisdiction of the mechanism.

III. SMALL CLAIMS COURTS AND ARBITRATION PROGRAMS ESTABLISHED AS PART OF A COURT SYSTEM

On April 17, 1974, Mr. Charles McKenney of Sears Law Department in the Pacific Coast Territory testified on S. 2928—the Consumer Controversies Resolution Act—at Senate Field Hearings in Los Angeles. Mr. McKenney's testimony was limited to the small claims court aspects of the bill. He explained Sears experience with the Small Claims Court System in California and made a number of recommendations for reform of small claims courts in general.

On behalf of Sears, Roebuck and Co., Mr. McKenney recommended the following reforms to the small claims court system:

(1) Improve accessibility by making change of venue simple, or when business sues an individual consumer, requiring the filing of suit at the defendant's residence;

(2) Make court hours more convenient, by adding evening and Saturday sessions;

(3) Improve the understanding of the system itself, its purpose, its rules and procedures by making information readily available in brochures;

(4) Provide translators and/or manuals in Spanish or any other language prominently spoken in the vicinity of the court;

(5) Provide paralegal assistance for consumer defendants and plaintiffs;

(6) Discourage the use of attorneys as representatives of either party;

(7) Require the showing of a prima facie case when a defendant does not appear for a hearing;

(8) Establish the jurisdictional limit of small claims courts at a level below which it is uneconomical for an attorney to handle the case, such as $1,000;

(9) Make it easier for consumer plaintiffs to collect judgments;

(10) Allow complaints to be filed through the mail, such as registered mail, return receipt requested.

Many of Mr. McKenney's recommended reforms are presently addressed in the current legislative proposals. We believe, as Mr. McKenney testified in Los Angeles, that if these reforms are implemented in small claims courts, these courts will become fair, accessible, understandable, and effective judicial forums in which consumers could seek redress. These reforms to improve the atmosphere of small claims courts from the individual consumer's standpoint should encourage the wider use of such courts by consumers, both plaintiffs and defendants.

In addition to reformed small claims courts, arbitration programs offered as a part of court systems should be eligible for funding as a part of a state system when necessary to relieve court congestion.

To the extent states develop or maintain small claims court systems, funding criteria should include provisions concerning jurisdictional limits, methods for assuring process served is actually received, and tightening procedures with respect to entry of default judgments.

SUGGESTED AMENDMENTS

To implement the above, Section 4 should be amended as follows (*underlining* indicates changes or additions to the language presently in S. 423):

SEC. 4. CRITERIA FOR DISPUTE RESOLUTION MECTANISMS

(a) CRITERIA.—In order to achieve the purpose of this Act, a dispute resolution mechanism * * * shall provide for—

* * * * * * *

(5) *the establishment of jurisdictional limits which are designed to provide for the effective resolution of minor disputes;*

(6) reasonable and fair rules and procedures, such as those which would—

* * * * * * *

(H) *permit service of notice of complaint by registered mail, return receipt requested;*

(I) *discourage default judgments by requiring a finding in open court that adequate motive was given the defendant and a prima facie case was established by the plaintiff.*

Note that although these comments address concerns particularly cast in a business context, the amendments suggested above apply equally well to non-economic disputes.

All of the above suggestions concern amendments to the criteria section of the current bills. There are other sections of the immediate proposals that deserve brief comment.

In HR 2863, Section 8(h)(2), a $200,000 annual funding limitation would be placed on any approved project. Although the actual dollar figure limitation is debatable, limiting the funding that any one project can receive is a good idea, and should be included in any final proposal.

Under HR 2863, Section 8(g), priority funding for existing dispute resolution mechanisms substantially supported by State or local public funds and located in the same area and performing similar functions as would a new dispute resolution mechanism, appears to be a desirable feature which is not contained in either S. 423 or HR 3719.

CONCLUSION

With the amendments suggested in this statement, Sears believes the Dispute Resolution Act would be extremely important legislation effectively designed to reform, improve and establish systems of dispute resolution mechanisms of various kinds and at various levels. Providing consumers with alternative mechanisms in which to seek redress of their problems, and adequately informing consumers of the existence and use of such mechanisms, should greatly improve business-consumer relations. The frustrations consumers feel in the increasingly complex world of consumer products and services should be reduced. This legislation would also provide consumers with increased and improved access to judicial forums which will help restore citizens' faith in their governmental institutions.

Sears support of legislation to encourage the establishment of effective systems of dispute resolution mechanism is offered with the firm belief that consumers who have complaints are most satisfied when their problems are resolved quickly and fairly by the person from whom they brought the product or service. For that reason, as well as our concern for wise use of taxpayer dollars, we have suggested amendments to encourage sellers to establish and offer fair and efficient internal procedures for resolving consumer complaints. We believe such procedures should be utilized by consumers first before resorting to other mechanisms. This is the major deficient aspect of the legislative proposals, as they are now written, and we believe our suggestions in this regard would greatly improve and further the objectives of whatever proposal is adopted.

Sears appreciates the opportunity to express its views on HR 2863, HR 3719 and S. 423—the Dispute Resolution Act.

Sincerely,

PHILIP M. KNOX, Jr.,
Vice President, Governmental Affairs.

APPENDIXES

APPENDIX 1—BILLS

96TH CONGRESS
1ST SESSION

H. R. 2863

To provide financial assistance for the development and maintenance of effective, fair, inexpensive, and expeditious mechanisms for the resolution of minor disputes.

IN THE HOUSE OF REPRESENTATIVES

MARCH 13, 1979

Mr. KASTENMEIER (for himself, Mr. RODINO, Mr. EDWARDS of California, Mr. CONYERS, Mr. SEIBERLING, Mr. DANIELSON, Mr. DRINAN, Ms. HOLTZMAN, Mr. MAZZOLI, Mr. HARRIS, Mr. MATSUI, Mr. MIKVA, Mr. FAZIO, Mr. RAILSBACK, and Mr. SAWYER) introduced the following bill; which was referred to the Committee on the Judiciary

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A BILL

To provide financial assistance for the development and maintenance of effective, fair, inexpensive, and expeditious mechanisms for the resolution of minor disputes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SHORT TITLE

SECTION 1. This Act may be cited as the "Dispute Resolution Act".

FINDINGS AND PURPOSE

SEC. 2 (a) The Congress finds and declares that—

(1) for the majority of Americans, mechanisms for the resolution of minor disputes are largely unavailable, inaccessible, ineffective, expensive, or unfair;

(2) the inadequacies of dispute resolution mechanisms in the United States have resulted in dissatisfaction and many types of inadequately resolved grievances and disputes;

(3) each individual dispute, such as that between neighbors, a consumer and seller, and a landlord and tenant. for which adequate resolution mechanisms do not exist may be of relatively small social or economic magnitude, but taken collectively such disputes are of enormous social and economic consequence;

(4) there is a lack of necessary resources or expertise in many areas of the Nation to develop new or improved consumer dispute resolution mechanisms, neighborhood dispute resolution mechanisms, and other necessary dispute resolution mechanisms;

(5) the inadequacy of dispute resolution mechanisms throughout the United States is contrary to the general welfare of the people; and

(6) neighborhood, local, or community based dispute resolution mechanisms can provide and promote

expeditious, inexpensive, equitable, and voluntary resolution of disputes, as well as serve as models for other dispute resolution mechanisms.

(b) It is the purpose of this Act to assist the States and other interested parties in providing to all persons convenient access to dispute resolution mechanisms which are effective, fair, inexpensive, and expeditious.

DEFINITIONS

SEC. 3. For purposes of this Act—

(1) the term "Advisory Board" means the Dispute Resolution Advisory Board established under section 7(a);

(2) the term "Attorney General" means the Attorney General of the United States;

(3) the term "Center" means the Dispute Resolution Resource Center established under section 6(a);

(4) the term "dispute resolution mechanism" means any court with jurisdiction over minor disputes, and any forum which provides for arbitration, mediation, conciliation, or similar procedure, which is available to resolve any minor dispute;

(5) the term "grant recipient" means any State or local government, any State or local governmental agency, and any nonprofit organization which receives a grant under section 8;

(6) the term "local" means of or pertaining to any political subdivision of a State; and

(7) the term "State" means the several States, the District of Columbia, the Commonwealth of Puerto Rico, or any of the territories and possessions of the United States.

CRITERIA FOR DISPUTE RESOLUTION MECHANISMS

SEC. 4. Any grant recipient which desires to use any financial assistance received under this Act in connection with establishing or maintaining a dispute resolution mechanism shall provide satisfactory assurances to the Attorney General that the dispute resolution mechanism will provide for—

(1) assistance to persons using the dispute resolution mechanism;

(2) the resolution of disputes at times and locations which are convenient to persons the dispute resolution mechanism is intended to serve;

(3) adequate arrangements for participation by persons who are limited by language barriers or other disabilities;

(4) reasonable, fair, and readily understandable forms, rules, and procedures, which, to the extent feasible, would—

(A) ensure that all parties to a dispute are directly involved in the resolution of the dispute, and that the resolution is adequately implemented;

(B) promote the voluntary resolution of disputes;

(C) promote the use of nonlawyers in the resolution of the dispute;

(D) provide an easy way for any person to determine the proper name in which, and the proper procedure by which, any person may be made a party to a dispute resolution proceeding; and

(E) permit the use of dispute resolution mechanisms by the business community;

(5) the dissemination of information relating to the availability, location, and use of other redress mechanisms in the event that dispute resolution efforts fail or the dispute involved does not come within the jurisdiction of the dispute resolution mechanism;

(6) consultation and cooperation with the community and with governmental agencies; and

(7) a public information program which effectively and economically communicates to potential users the availability and location of the dispute resolution mechanism.

DEVELOPMENT OF DISPUTE RESOLUTION MECHANISMS BY STATES

SEC. 5. Each State is hereby encouraged to develop—

(1) sufficient numbers and types of readily available dispute resolution mechanisms which meet the criteria established in section 4; and

(2) a public information program which effectively communicates to potential users the availability and location of such dispute resolution mechanisms.

ESTABLISHMENT OF PROGRAM; DISPUTE RESOLUTION RESOURCE CENTER

SEC. 6. (a) The Attorney General shall establish a Dispute Resolution Program in the Department of Justice to carry out the provisions of this Act. Such program shall include establishment of the Dispute Resolution Resource Center and the Dispute Resolution Advisory Board, and the provision of financial assistance under section 8.

(b) The Center—

(1) shall serve as a national clearinghouse for the exchange of information concerning the improvement of existing dispute resolution mechanisms and the establishment of new dispute resolution mechanisms;

(2) shall provide technical assistance to State and local governments and to grant recipients to improve

existing dispute resolution mechanisms and to establish new dispute resolution mechanisms;

(3) shall conduct research relating to the improvement of existing dispute resolution mechanisms and to the establishment of new dispute resolution mechanisms, and shall encourage the development of new dispute resolution mechanisms;

(4) shall undertake comprehensive surveys of the various State and local governmental dispute resolution mechanisms and major privately operated dispute resolution mechanisms in the States, which shall determine—

(A) the nature, number, and location of dispute resolution mechanisms in each State;

(B) the annual expenditure and operating authority for each such mechanism;

(C) the existence of any program for informing the potential users of the availability of each such mechanism;

(D) an assessment of the present use of, and projected demand for, the services offered by each such mechanism; and

(E) other relevant data relating to the types of disputes addressed by each such mechanism, in-

cluding the average cost and time expended in resolving various types of disputes;

(5) shall identify, after consultation with the Advisory Board, those dispute resolution mechanisms or aspects thereof which—

(A) are most fair, expeditious, and inexpensive to all parties in the resolution of disputes; and

(B) are suitable for general adoption;

(6) shall make recommendations, after consultation with the Advisory Board, regarding the need for new or improved dispute resolution mechanisms and similar mechanisms;

(7) shall identify, after consultation with the Advisory Board, the types of minor disputes which are most amenable to resolution through mediation and other informal methods, in order to assist the Attorney General in determining the types of projects which shall receive financial assistance under section 8;

(8) shall, as soon as practicable after the date of the enactment of this Act, undertake an information program to advise potential grant recipients, and the chief executive officer, attorney general, and chief judicial officer of each State, of the availability of funds, and eligibility requirements, under this Act; and

(9) may make grants to, or enter into contracts with, to the extent provided in appropriation Acts, public agencies, institutions of higher education, and qualified persons to conduct research, demonstrations, or special projects designed to carry out the provisions of paragraphs (1) through (7).

DISPUTE RESOLUTION ADVISORY BOARD

SEC. 7. (a) The Attorney General shall establish a Dispute Resolution Advisory Board in the Department of Justice.

(b) The advisory Board shall—

(1) advise the Attorney General with respect to the administration of the Center under section 6 and the administration of the financial assistance program under section 8;

(2) consult with the Center in accordance with the provisions of section 6(b)(5), section 6(b)(6), and section 6(b)(7); and

(3) consult with the Attorney General in accordance with the provisions of section 8(b)(4) and 9(d).

(c)(1) The Advisory Board shall consist of nine members appointed by the Attorney General, and shall be composed of persons from State governments, local governments, business organizations, the academic or research community, neigh-

borhood organizations, community organizations, consumer organizations, the legal profession, and State courts.

(2) A vacancy in the Advisory Board shall be filled in the same manner as the original appointment.

(3)(A) Except as provided in subparagraph (B), members of the Advisory Board shall be appointed for terms which expire at the end of September 30, 1984.

(B) Any member appointed to fill a vacancy occurring before the expiration of the term for which the predecessor of such member was appointed shall be appointed only for the remainder of the term.

(d) While away from their homes or regular places of business in the performance of services for the Advisory Board, members of the Advisory Board shall be allowed travel expenses, including per diem in lieu of subsistence, in the same manner as persons employed intermittently in the Federal Government service are allowed expenses under section 5703 of title 5, United States Code. The members of the Advisory Board shall receive no compensation for their services except as provided in this subsection.

FINANCIAL ASSISTANCE

SEC. 8. (a) The Attorney General may provide financial assistance in the form of grants to applicants who have submitted, in accordance with subsection (c), applications for the

purpose of improving existing dispute resolution mechanisms or establishing new dispute resolution mechanisms.

(b) As soon as practicable after the date of the enactment of this Act, the Attorney General shall prescribe—

(1) the form and content of applications for financial assistance to be submitted in accordance with subsection (c);

(2) the time schedule for submission of such applications;

(3) the procedures for approval of such applications, and for notification to each State of financial assistance awarded to applicants in the State for any fiscal year;

(4) after consultation with the Advisory Board, the specific criteria, terms, and conditions for awarding grants to applicants under this section, which shall—

(A) be consistent with the criteria established in section 4; and

(B) take into account—

(i) the population and population density of the States in which applicants for financial assistance available under this section are located;

(ii) the financial need of States and localities in which such applicants are located;

52-434 O - 80 - 18

(iii) the need in the State or locality involved for the type of dispute resolution mechanism proposed;

(iv) the national need for experience with the type of dispute resolution mechanism proposed; and

(v) the need for obtaining experience throughout the Nation with dispute resolution mechanisms in a diversity of situations, including rural, suburban, and urban situations;

(5)(A) the form and content of such reports to be filed under this section as may be reasonably necessary to monitor compliance with the requirements of this Act and to evaluate the effectiveness of projects funded under this Act; and

(B) the procedures to be followed by the Attorney General in reviewing such reports;

(6) the manner in which financial assistance received under this section may be used, consistent with the purposes specified in subsection (f); and

(7) procedures for publishing in the Federal Register a notice and summary of approved applications.

(c) Any State or local government, State or local governmental agency, or nonprofit organization shall be eligible

to receive a grant for financial assistance under this section. Any such entity which desires to receive a grant under this section may submit an application to the Attorney General in accordance with criteria, terms, and conditions established by the Attorney General under subsection (b)(4). Such application shall—

(1) set forth a proposed plan demonstrating the manner in which the financial assistance will be used—

(A) to establish a new dispute resolution mechanism which satisfies the criteria specified in section 4; or

(B) to improve an existing dispute resolution mechanism in order to bring such mechanism into compliance with such criteria;

(2) set forth the types of disputes to be resolved by the dispute resolution mechanism;

(3) identify the person responsible for administering the the project set forth in the application;

(4) include an estimate of the cost of the proposed project;

(5) provide for the establishment of fiscal controls and fund accounting of Federal financial assistance received under this Act;

(6) provide for the submission of reports in such form and containing such information as the Attorney General may require under subsection (b)(5)(A);

(7) set forth the nature and extent of participation of interested parties in the development of the application; and

(8) provide for the qualifications, period of service, and duties of persons, other than judicial officers, who will be charged with resolving or assisting in the resolution of disputes.

(d) The Attorney General, in determining whether to approve any application for financial assistance to carry out a project under this section, shall give special consideration to projects which are likely to continue in operation after expiration of the grant made by the Attorney General.

(e)(1) Financial assistance available under this section may be used only for the following purposes—

(A) compensation of personnel engaged in the administration, adjudication, conciliation, or settlement of minor disputes, including personnel whose function is to assist in the preparation and resolution of claims and the collection of judgments;

(B) recruiting, organizing, training, and educating personnel described in subparagraph (A);

(C) improvement or leasing of buildings, rooms, and other facilities and equipment and leasing or purchase of vehicles needed to improve the settlement of minor disputes;

(D) continuing monitoring and study of the mechanisms and settlement procedures employed in the resolution of minor disputes in a State;

(E) research and development of effective, fair, inexpensive, and expeditious mechanisms and procedures for the resolution of minor disputes;

(F) sponsoring programs of nonprofit organizations to carry out any of the provisions of this paragraph; and

(G) other necessary expenditures directly related to the operation of new or improved dispute resolution mechanisms.

(2) Financial assistance available under this section may not be used for the compensation of attorneys for the representation of disputants or claimants or for otherwise providing assistance in any adversary capacity.

(f) In the case of an application for financial assistance under this section submitted by a local government or governmental agency, or a nonprofit organization, the Attorney General shall furnish notice of such application to the chief executive officer, attorney general, and chief judicial officer

of the State in which such applicant is located at least 30 days before the approval of such application. The chief executive officer, attorney general, and chief judicial officer of the State shall be given an opportunity to submit written comments to the Attorney General regarding such application and the Attorney General shall take such comments into consideration in determining whether to approve such application.

(g) Whenever an application for financial assistance under this section is submitted for an existing dispute resolution mechanism which is supported substantially by State or local public funds and such an application is also submitted for a new dispute resolution mechanism which is located in the same area and which performs similar functions as such existing mechanism, priority consideration for funding shall ordinarily be given to such existing mechanism if it complies with the criteria established in section 4.

(h)(1) Upon the approval of an application by the Attorney General under this section, the Attorney General shall disburse to the grant recipient involved such portion of the estimated cost of the approved project as the Attorney General considers appropriate, except that the amount of such disbursements shall be subject to the provisions of paragraph (2).

(2) The amount of Federal financial assistance for any project approved under this section shall not exceed $200,000 in any fiscal year. In addition, the Federal share of the estimated cost of any such approved project shall not exceed—

(A) 100 per centum of the estimated cost of the project, for the first and second fiscal years for which funds are available for grants under this section;

(B) 75 per centum of the estimated cost of the project, for the third fiscal year for which funds are available for such grants; and

(C) 60 per centum of the estimated cost of the project, for the fourth fiscal year for which funds are available for such grants.

(3) Payments made under this subsection may be made in installments, in advance, or by way of reimbursement, with necessary adjustments on account of underpayment or overpayment. Such payments shall not be used to compensate for any administrative expense incurred in submitting an application for a grant under this section.

(4) In the case of any State or local government, or State or local governmental agency, which desires to receive financial assistance under this section, such government or agency may not receive any such financial assistance for any fiscal year if its expenditure of non-Federal funds for other

than nonrecurrent expenditures for the establishment and administration of dispute resolution mechanisms will be less than its expenditure for such purposes in the preceding fiscal year, unless the Attorney General determines that a reduction in expenditures is attributable to a nonselective reduction in expenditures in the programs administered by the State or local government or by the State or local governmental agency involved.

(i) Whenever the Attorney General, after giving reasonable notice and opportunity for hearing to any grant recipient, finds that the project for which such grant was received no longer complies with the provisions of this Act, or with the relevant application as approved by the Attorney General, the Attorney General shall notify such grant recipient of such findings and no further payments may be made to such grant recipient by the Attorney General until the Attorney General is satisfied that such noncompliance has been, or promptly will be, corrected. The Attorney General may authorize the continuance of payments with respect to any program pursuant to this Act which is being carried out by such grant recipient and which is not involved in the noncompliance.

(j) The Attorney General shall, to the extent provided in appropriation Acts, contract for an independent investigation of the Dispute Resolution Resource Center's overall performance and effectiveness in implementing this Act, including a detailed analysis of the extent to which the purpose of this Act has been achieved, together with recommendations with respect to whether and when the Center should be terminated and any recommendations for additional legislation or other action. The Attorney General shall, not later than April 1, 1984, make public and submit to each House of the Congress a report of the results of such investigation.

(k) No funds for assistance available under this section shall be expended until one year after the date of the enactment of this Act.

RECORDS; AUDIT; ANNUAL REPORT

SEC. 9. (a) Each grant recipient shall keep such records as the Attorney General shall require, including records which fully disclose the amount and disposition by such grant recipient of the proceeds of such assistance, the total cost of the project or undertaking in connection with which such assistance is given or used, the amount of that portion of the project or undertaking supplied by other sources, and such other records as will assist in effective financial and performance audits.

(b) The Attorney General shall have access for purposes of audit and examination to any relevant books, documents, papers, and records of grant recipients.

(c) The Comptroller General of the United States, or any duly authorized representatives of the Comptroller General, shall have access to any relevant books, documents, papers, and records of grant recipients until the expiration of three years after the final year of the receipt of any financial assistance under this Act, for the purpose of financial and performance audits and examination.

(d) The Attorney General, in consultation with the Advisory Board, shall submit to the President and the Congress not later than one year after the date of the enactment of this Act, and on or before February 1 of each succeeding year, a report relating to the administration of this Act during the preceding fiscal year. Such report shall include—

(1) a list of all grants awarded;

(2) a summary of any actions undertaken in accordance with section 8(i);

(3) a listing of the projects undertaken during such fiscal year and the types of other dispute resolution mechanisms which are being created, and, to the extent feasible, a statement as to the success of all mechanisms in achieving the purpose of this Act;

(4) the results of financial and performance audits conducted under this section; and

(5) an evaluation of the effectiveness of the Center in implementing this Act, including a detailed

analysis of the extent to which the purpose of this Act has been achieved, together with recommendations with respect to whether and when the program should be terminated and any recommendations for additional legislation or other action.

AUTHORIZATION OF APPROPRIATIONS

SEC. 10. (a) To carry out the provisions of section 6 and section 7, there is authorized to be appropriated to the Attorney General $2,000,000 for each of the fiscal years 1980, 1981, 1982, 1983, and 1984.

(b) To carry out the provisions of section 8, there is authorized to be appropriated to the Attorney General $10,000,000 for each of the fiscal years 1981, 1982, 1983, and 1984.

(c) Sums appropriated under this section are authorized to remain available until expended.

96TH CONGRESS
1ST SESSION

H. R. 3719

To provide financial assistance for the development and maintenance of effective, fair, inexpensive, and expeditious mechanisms for the resolution of minor civil disputes, and for other purposes.

IN THE HOUSE OF REPRESENTATIVES

APRIL 25, 1979

Mr. ECKHARDT (for himself, Mr. BROYHILL, Mr. CORRADA, Mr. FORSYTHE, Mr. LAFALCE, Mr. LAGOMARSINO, Mr. MINETA, Mr. MURPHY of Pennsylvania, Mr. NOLAN, Mr. OTTINGER, Mr. PEPPER, Mr. VENTO, Mr. WAXMAN, Mr. WHITLEY, and Mr. WOLPE) introduced the following bill; which was referred jointly to the Committees on the Judiciary and Interstate and Foreign Commerce

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A BILL

To provide financial assistance for the development and maintenance of effective, fair, inexpensive, and expeditious mechanisms for the resolution of minor civil disputes, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SHORT TITLE

SECTION 1. This Act may be cited as the "Dispute Resolution Act".

FINDINGS AND PURPOSE

SEC. 2. (a) The Congress finds and declares that—

(1) for the majority of Americans, mechanisms for the resolution of disputes involving consumer goods and services, as well as numerous other types of minor civil disputes, are largely unavailable, inaccessible, ineffective, expensive, or unfair;

(2) the inadequacies of dispute resolution mechanisms in the United States have resulted in dissatisfaction and many types of inadequately resolved grievances and disputes;

(3) each individual dispute, such as that between neighbors, a consumer and seller, and a landlord and tenant, for which adequate resolution mechanisms do not exist may be of relatively small social or economic magnitude, but taken collectively such disputes are of enormous social and economic consequence;

(4) there is a lack of necessary resources or expertise in many areas of the United States to develop new or improved consumer dispute resolution mechanisms, neighborhood dispute resolution centers, and other necessary dispute resolution mechanisms;

(5) the inadequacy of dispute resolution mechanisms throughout the United States is contrary to the general welfare of the people; and

CONTINUED

3 OF 8

(6) neighborhood, local, or community based dispute resolution mechanisms can provide and promote expeditious, inexpensive, equitable, and voluntary resolution of disputes, as well as serve as models for other dispute resolution mechanisms.

(b) It is the purpose of this Act to assist the States and other interested parties in providing to all persons convenient access to dispute resolution mechanisms which are effective, fair, inexpensive, and expeditious.

DEFINITIONS

SEC. 3. For purposes of this Act—

(1) the term "Advisory Board" means the Dispute Resolution Advisory board established under section 7(a);

(2) the term "Attorney General" means the Attorney General of the United States;

(3) the term "Center" means the Dispute Resolution Resource Center established under section 6(a);

(4) the term "dispute resolution mechanism" means any court with jurisdiction over minor consumer disputes and other minor civil disputes, and any forum which provides for arbitration, mediation, conciliation, or any similar procedure, which is available to adjudicate, settle, or otherwise resolve any minor consumer disputes and any other minor civil disputes;

(5) the term "grant recipient" means any State or local government, any State or local governmental agency, and any nonprofit organization which receives a grant under section 8;

(6) the term "local" means of or pertaining to any political subdivision of a State; and

(7) the term "State" means the several States, the District of Columbia, the Commonwealth of Puerto Rico, Guam, American Samoa, the Virgin Islands, the Northern Mariana Islands, the Trust Territory of the Pacific Islands, and any other territory or possession of the United States.

CRITERIA FOR DISPUTE RESOLUTION MECHANISMS

SEC. 4. Any grant recipient which desires to use any financial assistance received under this Act in connection with establishing or maintaining a dispute resolution mechanism shall provide satisfactory assurances to the Attorney General that the dispute resolution mechanism will provide for—

(1) assistance to persons using the dispute resolution mechanism;

(2) the adjudication or resolution of disputes at times and locations which are convenient to persons the dispute resolution mechanism is intended to serve;

(3) adequate arrangements to facilitate use by persons who have difficulties communicating in English or who have physical disabilities;

(4) reasonable, fair, and readily understandable forms, rules, and procedures, which shall include those which—

(A) ensure that all parties to a dispute are directly involved in the resolution of the dispute, and that the resolution is adequately implemented;

(B) provide an easy way for any person to determine the proper name in which, and the proper procedure by which, any person may be made a party to a dispute resolution proceeding; and

(C) permit the use of dispute resolution mechanisms by the business community;

(5) the dissemination of information relating to the availability, location, and use of other redress mechanisms in the event that dispute resolution efforts fail or the dispute involved does not come within the jurisdiction of the dispute resolution mechanism;

(6) consultation and cooperation with the community and with governmental agencies; and

(7) a public information program which effectively and economically communicates to potential users the

availability and location of the dispute resolution mechanism.

DEVELOPMENT OF DISPUTE RESOLUTION MECHANISMS BY STATES

SEC. 5. Each State is hereby encouraged to develop—

(1) sufficient numbers and types of readily available dispute resolution mechanisms which meet the criteria established in section 4; and

(2) a public information program which effectively communicates to potential users the availability and location of such dispute resolution mechanisms.

ESTABLISHMENT OF PROGRAM; DISPUTE RESOLUTION RESOURCE CENTER

SEC. 6. (a) The Attorney General shall establish a program in the Department of Justice, to be known as the "Dispute Resolution Program", to carry out the provisions of this Act. Such program shall include establishment of the Dispute Resolution Resource Center and the Dispute Resolution Advisory Board, and the provision of financial assistance under section 8.

(b) The Center—

(1) shall serve as a national clearinghouse for the exchange of information concerning the improvement of existing dispute resolution mechanisms and the establishment of new dispute resolution mechanisms;

52-434 O - 80 - 19

(2) shall provide technical assistance to State and local governments and to grant recipients to improve existing dispute resolution mechanisms and to establish new dispute resolution mechanisms;

(3) shall conduct research relating to the improvement of existing dispute resolution mechanisms and to the establishment of new dispute resolution mechanisms, and shall encourage the development of new dispute resolution mechanisms;

(4) shall undertake comprehensive surveys of various State and local governmental dispute resolution mechanisms and major privately operated dispute resolution mechanisms in the States, which shall determine—

(A) the nature, number, and location of dispute resolution mechanims in each State;

(B) the annual expenditure and operating authority for each such mechanism;

(C) the existence of any program for informing the potential users of the availability of each such mechanism;

(D) an assessment of the present use of, and projected demand for, the services offered by each such mechanism; and

(E) other relevant data relating to the types of disputes addressed by each such mechanism;

(5) shall identify, after consultation with the Advisory Board, those dispute resolution mechanisms or aspects thereof which—

(A) are most effective and fair to all parties in the resolution of disputes; and

(B) are suitable for general adoption;

(6) shall make recommendations, after consultation with the Advisory Board, regarding the need for new or improved dispute resolution mechanisms and similar mechanisms;

(7) shall identify, after consultation with the Advisory Board, the types of minor civil disputes which are most amenable to resolution through mediation and other informal methods, in order to assist the Attorney General in determining the types of projects which should receive financial assistance under section 8;

(8) shall, as soon as practicable after the date of the enactment of this Act, undertake an information program to advise potential grant recipients, and the chief executive officer, attorney general, and chief judicial officer of each State, of the availability of funds and eligibility requirements, under this Act; and

(9) may make grants to, or enter into contracts with, to the extent provided in appropriation Acts, public agencies, institutions of higher education, and qualified persons to conduct research, demonstrations, or special projects designed to carry out the provisions of paragraph (1) through paragraph (7).

DISPUTE RESOLUTION ADVISORY BOARD

SEC. 7. (a) The Attorney General shall establish a Dispute Resolution Advisory Board in the Department of Justice.

(b) The Advisory Board shall—

(1) advise the Attorney General with respect to the administration of the Center under section 6 and the administration of the financial assistance program under section 8;

(2) consult with the Center in accordance with the provisions of section 6(b)(5), section 6(b)(6), and section 6(b)(7); and

(3) consult with the Attorney General in accordance with the provisions of section 8(b)(4) and section 9(d).

(c)(1) The Advisory Board shall consist of 9 members appointed by the Attorney General and shall be composed of persons from State and local governments, business organizations, the academic and research community, neighborhood

organizations, community organizations, consumer organizations, the legal profession, and State courts.

(2) A vacancy in the Advisory Board shall be filled in the same manner as the original appointment.

(3)(A) Except as provided in subparagraph (B), members of the Advisory Board shall be appointed for terms which expire at the end of September 30, 1984.

(B) Any member appointed to fill a vacancy occurring before the expiration of the term for which the predecessor of such member was appointed shall be appointed only for the remainder of the term.

(b) While away from their homes or regular places of business in the performance of services for the Advisory Board, members of the Advisory Board shall be allowed travel expenses, including per diem in lieu of subsistence, in the same manner as persons employed intermittently in the Federal Government service are allowed expenses under section 5703 of title 5, United States Code. The members of the Advisory Board shall receive no compensation for their services except as provided in this subsection.

(e) The Chairman of the Federal Trade Commission shall have authority to advise and consult with the Attorney General, and consult with the Center, in the same manner as the Advisory Board under subsection (b). The responsibilities of the Attorney General and the Center with respect to con-

sultations with the Chairman of the Federal Trade Commission shall be the same as the responsibilities of the Attorney General and the Center with respect to consultations with the Advisory Board.

FINANCIAL ASSISTANCE

SEC. 8. (a) The Attorney General may provide financial assistance in the form of grants to applicants who have submitted, in accordance with subsection (c), applications for the purpose of improving existing dispute resolution mechanisms or establishing new dispute resolution mechanisms.

(b) As soon as practicable after the date of the enactment of this Act, the Attorney General shall prescribe—

(1) the form and content of applications for financial assistance to be submitted in accordance with subsection (c);

(2) the time schedule for submission of such applications;

(3) the procedures for approval of such applications, and for notification to each State of financial assistance awarded to applicants in the State for any fiscal year;

(4) after consultation with the Advisory Board, the specific criteria, terms, and conditions for awarding grants to applicants under this section, which shall—

(A) be consistent with the criteria established in section 4; and

(B) take into account—

(i) the population and population density of the States in which applicants for financial assistance available under this section are located;

(ii) the financial need of States and localities in which such applicants are located;

(iii) the need in the State or locality involved for the type of dispute resolution mechanism proposed;

(iv) the national need for experience with the type of dispute resolution mechanism proposed; and

(v) the need for obtaining experience throughout the United States with dispute resolution mechanisms in a diversity of situations, including rural, and urban situations;

(5)(A) the form and content of such reports to be filed under this section as may be reasonably necessary to monitor compliance with the requirements of this Act and to evaluate the effectiveness of projects funded under this Act; and

(B) the procedures to be followed by the Attorney General in reviewing such reports;

(6) the manner in which financial assistance received under this section may be used, consistent with the purposes specified in subsection (f); and

(7) procedures for publishing in the Federal Register a notice and summary of approved applications.

(c) Any State or local government, State or local governmental agency, or nonprofit organization shall be eligible to receive a grant for financial assistance under this section. Any such entity which desires to receive a grant under this section may submit an application to the Attorney General in accordance with criteria, terms, and conditions established by the Attorney General under subsection (b)(4). Such application shall—

(1) set forth a proposed plan demonstrating the manner in which the financial assistance will be used—

(A) to establish a new dispute resolution mechanism which satisfies the criteria specified in section 4; or

(B) to improve an existing dispute resolution mechanism in order to bring such mechanism into compliance with such criteria;

(2) set forth the type of disputes to be resolved by the dispute resolution mechanism;

(3) identify the person responsible for administering the project set forth in the application;

(4) include an estimate of the cost of the proposed project;

(5) provide for the establishment of fiscal controls and fund accounting of Federal financial assistance received under this Act;

(6) provide for the submission of reports in such form and containing such information as the Attorney General may require under subsection (b)(5)(A);

(7) set forth the nature and extent of participation of interested parties, including consumers, in the development of the application; and

(8) provide for the qualifications, tenure, and duties of persons, other than judicial officers, who will be charged with resolving or assisting in the resolution of disputes.

(d) The Attorney General, in determining whether to approve any application for financial assistance to carry out a project under this section, shall give special consideration to projects which are likely to continue in operation after expiration of the grant made by the Attorney General.

(e)(1) Financial assistance available under this section may be used only for the following purposes—

(A) compensation of personnel engaged in the administration, adjudication, conciliation, or settlement of minor disputes, including personnel whose function is to assist in the preparation and resolution of claims and the collection of judgments;

(B) recruiting, organizing, training, and educating personnel described in subparagraph (A);

(C) improvement or leasing of buildings, rooms, and other facilities and equipment and leasing or purchase of vehicles needed to improve the settlement of minor disputes;

(D) continuing monitoring and study of the mechanisms and settlement procedures employed in the resolution of minor disputes in a State;

(E) research and development of effective, fair, inexpensive, and expeditious mechanisms and procedures for the resolution of minor disputes;

(F) sponsoring programs of nonprofit organizations to carry out any of the provisions of this paragraph; and

(G) other necessary expenditures directly related to the operation of new or improved dispute resolution mechanisms.

(2) Financial assistance available under this section may not be used for the compensation of attorneys for the representation of di putants or claimants or for otherwise providing assistance in any adversary capacity.

(f) In the case of an application for financial assistance under this section submitted by a local government or governmental agency, or a nonprofit organization, the Attorney General shall furnish notice of such application to the chief executive officer, attorney general, and chief judicial officer of the State in which such applicant is located at least 30 days before the approval of such application. The chief executive officer, attorney general, and chief judicial officer of the State shall be given an opportunity to submit written comments to the Attorney General regarding such application and the Attorney General shall take such comments into consideration in determining whether to approve such application.

(g)(1) Upon the approval of an application by the Attorney General under this section, the Attorney General shall disburse to the grant recipient involved such portion of the estimated cost of the approved project as the Attorney General considers appropriate, except that the amount of such disbursements shall be subject to the provisions of paragraph (2).

(2) The Federal share of an approved project may not exceed—

17

(A) 100 percent of the estimated cost of the project, for the first and second fiscal years for which funds are available for grants under this section;

(B) 75 percent of the estimated cost of the project, for the third fiscal year for which funds are available for such grants; and

(C) 60 percent of the estimated cost of the project, for the fourth fiscal year for which funds are available for such grants.

(3) Payments made under this subsection may be made in installments, in advance, or by way of reimbursement, with necessary adjustments on account of under payment or overpayment. Such payments shall not be used to compensate for any administrative expense incurred in submitting an application for a grant under this section.

(4) In the case of any State or local government, or State or local governmental agency, which desires to receive financial assistance under this section, such government or agency may not receive any such financial assistance for any fiscal year if its expenditure of non-Federal funds for other than nonrecurrent expenditures for the establishment and administration of dispute resolution mechanisms will be less than its expenditure for such purposes in the preceding fiscal year, unless the Attorney General determines that a reduction in expenditures is attributable to a nonselective reduction

18

in expenditures in the programs administered by the State or local government or by the State or local government agency involved.

(h) Whenever the Attorney General, after giving reasonable notice and opportunity for hearing to any grant recipient, finds that the project for which such grant was received no longer complies with the provisions of this Act, or with the relevant application as approved by the Attorney General, the Attorney General shall notify such grant recipient of such findings and no further payments may be made to such grant recipient by the Attorney General until the Attorney General is satisfied that such noncompliance has been, or promptly will be, corrected. The Attorney General may authorize the continuance of payments with respect to any program pursuant to this Act which is being carried out by such grant recipient and which is not involved in the noncompliance.

(i) The Attorney General, to the extent provided in appropriation Acts, shall enter into a contract for an independent study of the Dispute Resolution Program. The study shall evaluate the performance of such program and determine its effectiveness in carrying out the purpose of this Act. The study shall contain such recommendations for additional legislation a may be appropriate, and shall include recommendations concerning the continuation or termination of the

Dispute Resolution Program. Not later than April 1, 1984, the Attorney General shall make public and submit to each House of the Congress a report of the results of the study.

(j) No funds for assistance available under this section shall be expended until 1 year after the date of the enactment of this Act.

RECORDS; AUDIT; ANNUAL REPORT

SEC. 9. (a) Each grant recipient shall keep such records as the Attorney General shall require, including records which fully disclose the amount and disposition by such grant recipient of the proceeds of such assistance, the total cost of the project or undertaking in connection with which such assistance is given or used, the amount of that portion of the project or undertaking supplied by other sources, and such other records as will assist in effective financial and performance audits.

(b) The Attorney General shall have access for purposes of audit and examination to any relevant books, documents, papers, and records of grant recipients.

(c) The Comptroller General of the United States, or any duly authorized representatives of the Comptroller General, shall have access to any relevant books, documents, papers, and records of grant recipients until the expiration of 3 years after the final year of the receipt of any financial

assistance under this Act, for the purpose of financial and performance audits and examination.

(d) The Attorney General, in consultation with the Advisory Board, shall submit to the President and the Congress not later than 1 year after the date of the enactment of this Act, and on or before February 1 of each succeeding year, a report relating to the administration of this Act during the preceding fiscal year. Such report shall include—

(1) a list of all grants awarded;

(2) a summary of any actions undertaken in accordance with section 8(h);

(3) a listing of the projects undertaken during such fiscal year and the types of other dispute resolution mechanisms which are being created, and, to the extent possible, a statement as to the success of all mechanisms in achieving the purpose of this Act;

(4) the results of financial and performance audits conducted under this section; and

(5) an evaluation of the effectiveness of the Dispute Resolution Program in implementing this Act, including a detailed analysis of the extent to which the purpose of this Act has been achieved, together with any recommendations for additional legislative or other action, including recommendations concerning the con-

tinuation or termination of the Dispute Resolution Program.

AUTHORIZATION OF APPROPRIATIONS

SEC. 10. (a) To carry out the provisions of section 6 and section 7, there is authorized to be appropriated to the Attorney General $3,000,000 for each of the fiscal years 1980, 1981, 1982, 1983, and 1984.

(b) To carry out the provisions of section 8, there is authorized to be appropriated to the Attorney General $15,000,000 for each of the fiscal years 1981, 1982, 1983, and 1984.

(c) Sums appropriated under this section shall remain available until expended.

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96TH CONGRESS
1ST SESSION

S. 423

IN THE HOUSE OF REPRESENTATIVES

APRIL 9, 1979

Referred jointly to the Committees on the Judiciary and Interstate and Foreign Commerce

AN ACT

To promote commerce by establishing a national goal for the development and maintenance of effective, fair, inexpensive, and expeditious mechanisms for the resolution of consumer controversies, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That this Act may be cited as the "Dispute Resolution Act".

SEC. 2. FINDINGS AND PURPOSE.

(a) FINDINGS.—The Congress finds and declares that—

(1) for the majority of Americans, mechanisms for the resolution of disputes involving consumer goods and services, as well as numerous other types of disputes involving small amounts of money, are largely

52-434 O - 80 - 20

unavailable, inaccessible, ineffective, expensive, or unfair;

(2) the inadequacies of dispute resolution mechanisms in the United States have resulted in dissatisfaction and many types of inadequately resolved grievances and disputes;

(3) each individual dispute, such as that between a consumer and seller, and landlord and tenant, for which adequate resolution mechanisms do not exist may be of relatively small social or economic magnitude, but taken collectively such disputes are of enormous social and economic consequence;

(4) there is a lack of necessary resources or expertise in many areas of the country to develop new or improved consumer and other necessary dispute resolution mechanisms;

(5) the inadequacy of dispute resolution mechanisms throughout the United States is contrary to the general welfare of the people;

(6) a major portion of the goods and services which form the underlying subject matter of consumer disputes and disputes involving small amounts of money flows through commerce, and the unavailability of effective, fair, inexpensive, and expeditious means

for the resolution of such disputes constitutes an undue burden on commerce; and

(7) while the States and the private sector have made substantial efforts to resolve disputes, and while such efforts should be encouraged and expanded, effective redress will be promoted through a cooperative functioning of both public and private mechanisms with the support and assistance of the Congress.

(b) PURPOSE.—It is the purpose of the Congress in this Act to assist the States and other interested parties in providing to all persons convenient access to dispute resolution mechanisms that are effective, fair, inexpensive, and expeditious.

SEC. 3. DEFINITIONS.

As used in this Act, the term—

(a) "Attorney General" means the Attorney General of the United States, or his designee;

(b) "commerce" means trade, traffic, commerce, or transportation—

(1) between a place in a State and any place outside thereof, or

(2) which affects trade, traffic, commerce, or transportation described in paragraph (1);

(c) "Commission" means the Federal Trade Commission;

(d) "dispute resolution mechanism" means courts of limited jurisdiction and arbitration, mediation, conciliation, and similar procedures, and referral services, which are available to adjudicate, settle, and resolve disputes involving small amounts of money or otherwise arising in the courses of daily life;

(e) "local" means of or pertaining to any political subdivision within a State;

(f) "State" means any State of the United States, and the District of Columbia; and

(g) "State system" means all of the State-sponsored mechanisms and procedures available within a State for the resolution of consumer disputes and other civil disputes not involving large amounts of money, including, but not limited to, small claims courts, arbitration, mediation, and other similar mechanisms and procedures.

SEC. 4. CRITERIA FOR DISPUTE RESOLUTIONS MECHANISMS.

(a) CRITERIA.—In order to achieve the purpose of this Act, a dispute resolution mechanism funded in whole or in part under this Act shall provide for—

(1) forms, rules, and procedures which are, so far as practicable, easy for potential users to understand and free from technicalities;

(2) assistance, including paralegal assistance where appropriate, to persons seeking the resolution of disputes;

(3) the adjudication or resolution of disputes during hours and on days that are convenient, including evenings and weekends;

(4) adequate arrangements for translation in areas with substantial non-English-speaking populations; and

(5) reasonable and fair rules and procedures, such as those which would—

(A) insure that all sides to a dispute are directly involved in the resolution of such dispute, and that such resolution is adequately implemented (including promoting effective means for insuring that a monetary award or agreement is promptly paid, and a nonmonetary award or agreement is effectively carried out);

(B) provide an easy way for an individual to determine the proper name in which, and the proper procedure by which, any person may be made a party to a dispute resolution proceeding;

(C) encourage the resolution of disputes by, in addition to adjudication, such informal means as conciliation, mediation, or arbitration;

(D) permit the use of dispute resolution mechanisms by the business community, including, but not limited to, small businesses, corporations, partnerships, and assignees;

(E) provide for the qualifications, tenure, and duties of persons, other than judicial officers, charged with resolving or assisting in the resolution of disputes;

(F) encourage the finality of the resolution of consumer and other minor disputes; and

(G) provide information about the availability of other redress mechanisms in the event that dispute settlement efforts fail or the dispute does not come within the jurisdiction of the mechanism.

(b) STATE SYSTEM.—Each State is encouraged to develop a State system which is responsive to the criteria established in subsection (a) of this section by providing—

(1) sufficient numbers and types of readily available dispute resolution mechanisms which meet the requirements for such mechanisms set forth in subsection (a) of this section; and

(2) a public information program which effectively communicates to potential users the availability and location of such mechanisms and consumer complaint offices in such State.

SEC. 5. DISPUTE RESOLUTION PROGRAM.

Within 60 days after the date of enactment of this Act, there shall be established within the United States Department of Justice a dispute resolution program, to be administered at the direction of the Attorney General. Such program shall consist of the Dispute Resolution Resource Center established pursuant to section 6 of this Act and of the financial assistance authorized under section 7 of this Act.

SEC. 6. DISPUTE RESOLUTION RESOURCE CENTER.

(a) ESTABLISHMENT.—There shall be established within the United States Department of Justice, as part of the dispute resolution program established pursuant to section 5 of this Act, a Dispute Resolution Resource Center (hereinafter referred to as the "Center"). As soon as practicable after the creation of such dispute resolution program, the Attorney General shall provide for the creation of the Center and prescribe basic criteria for its operation consistent with the purposes described in subsection (b) of this section.

(b) PURPOSES.—The Center shall—

(1) serve as a national clearinghouse for the exchange of information concerning the improvement of existing and the creation of new dispute resolution mechanisms;

(2) provide technical assistance to State and local governments to improve existent and to create new mechanisms for dispute resolution;

(3) conduct research and development for the improvement of existent and creation of new dispute resolution mechanisms;

(4) undertake comprehensive surveys of the various State systems and, to the extent possible, major private dispute resolution mechanisms within the States, and each such survey shall, to the extent possible, disclose (A) the nature, number, and location of dispute resolution mechanisms within each State; (B) the annual expenditure and operating authority for each such mechanism; (C) the existence of any program for informing the potential users of the availability of each such mechanism; (D) an assessment of the present use of and projected demand for the services offered by each such mechanism; and (E) other relevant data on the types of disputes handled by each such mechanism, such as disputes between consumers and sellers, landlords and tenants, and any other relevant categories of cases;

(5) identify, after consultation with the Commission, those dispute resolution mechanisms or aspects thereof that—

(i) are consistent with the provisions of section 4;

(ii) are most effective and fair to all parties in the resolution of disputes; and

(iii) are suitable for general replication.

Consideration shall also be given to the need for the program to provide new or improved mechanisms for the resolution of all types of minor disputes. Mechanisms or aspects thereof so identified shall be certified as "national priority projects"; and

(6) make grants to, or enter into contracts with, to the extent provided in appropriation Acts, public agencies, institutions of higher education, or private organizations to conduct research, demonstrations, or special projects to implement paragraphs (1) through (5).

SEC. 7. FINANCIAL ASSISTANCE.

(a) AUTHORITY.—As part of the dispute resolution program established under section 5 of this Act, the Attorney General is authorized to provide financial assistance in the form of grants to applicants who have filed, pursuant to subsection (c) of this section, applications for the purpose of improving existent or creating new dispute resolution mechanisms.

(b) DUTIES OF THE ATTORNEY GENERAL.—As soon as practicable after the date of enactment of this Act, the Attorney General shall prescribe—

10

(1) the form and content of the applications for assistance to be submitted as set forth in subsection (c) of this section;

(2) the time schedule for submission of applications for assistance available under this section;

(3) the procedures for approval of applications submitted under this section, and for notification to each State of all funds awarded to applicants within such State;

(4) the specific criteria for the distribution of funds received by applicants under this section, consistent with the limitations contained in section 4 and subsection (e) of this section and after consultation with the Commission;

(5) the form and content of the reports to be filed under this section as may be reasonably necessary to monitor compliance with the requirements of this Act and to evaluate the effectiveness of projects funded under this Act and the procedures to be followed by the Department of Justice in reviewing such reports;

(6) the uses to which funds received under this section may be put consistent with those set forth under subsection (d) of this section; and

(7) procedures for publishing in the Federal Register a notice and summary of approved applications.

11

(c) ELIGIBILITY REQUIREMENTS.—Nonprofit organizations, agencies of State governments, and units of local governments are eligible to receive assistance under this section. Any such entity desiring to receive grant funds under this section shall submit to the Attorney General an application consistent with the criteria set forth in section 4 of this Act and such specific criteria as the Attorney General may establish under paragraph (4) of subsection (b) of this section. Such application shall—

(1) set forth a proposed plan for improving or creating dispute resolution mechanisms for which financial assistance is sought;

(2) identify the person responsible for the administration of the project set forth in the application;

(3) provide for the establishment of fiscal controls and fund accounting of Federal funds paid pursuant to this Act;

(4) provide for the submission of reports in such form and containing such information as the Attorney General may require under subsection (b) of this section;

(5)(A) meet the criteria of the national priority projects program of the Center, or (B) identify the project proposed therein as not meeting the criteria of the national priority projects program and request

funding as an exception thereto in such manner, on such forms, and pursuant to such specific criteria as the Attorney General may prescribe pursuant to paragraph (2) of subsection (e) of this section; and

(6) set forth the nature and extent of participation of interested parties, including consumers, in the development of the application.

(d) USE OF FUNDS.—(1) Funds available under this section may be used only for the following purposes:

(A) compensation of personnel engaged in the administration, adjudication, conciliation, or settlement of disputes, including personnel whose function it is to assist in the preparation and resolution of claims and the collection of judgments;

(B) recruiting, organizing, training, and educating personnel described in subparagraph (A) of this subsection;

(C) improvement or lease of buildings, rooms, and other facilities and equipment and lease or purchase of vehicles needed to improve the settlement of disputes;

(D) continuing monitoring and study of the mechanisms and settlement procedures employed in the resolution of disputes within a State;

(E) research and development of effective, fair, inexpensive, and expeditious mechanisms and procedures for the resolution of disputes;

(F) sponsoring programs of nonprofit organizations to accomplish any of the provisions of this subsection; and

(G) other necessary expenditures directly related to the operation of new or improved dispute resolution mechanisms.

(2) Funds available under this section may not be used for the compensation of attorneys for the representation of disputants or claimants or for attorneys otherwise providing assistance in any adversary capacity.

(e) DISTRIBUTION OF FUNDS.—(1) One-half of the funds available for the purpose of making grants under this section shall be reserved for equal distribution among the States from which applications have been received for projects which are identified as national priority projects and which are approved by the Attorney General. The sum of all grants awarded in any State under this subsection shall be (A) an amount equal to the entitlement of such State; or (B) an amount up to the entitlement of such State, if approved applications for funds under this paragraph are, in total, in an amount less than such State's entitlement. Funds available

under this paragraph shall be awarded to applicants in such amounts as the Attorney General may decide.

(2) One-half of the funds available for the purpose of making grants under this section shall be reserved for the awarding of discretionary grants by the Attorney General. Such grants may be made to fund applications that were not funded under paragraph (1) of this subsection, to applications for projects that do not meet the criteria of the national priority projects program, or to research and demonstration projects or other activities that will encourage innovation in order to effectuate the purpose of this Act. The Attorney General shall, in consultation with the Commission, establish specific criteria, terms, and conditions for awarding grants under this paragraph. Such criteria, terms, and conditions shall include consideration of: (A) population and population density; (B) the financial need of States and localities in which applicants for funds available under this section are located; (C) the need in the State and locality for the type of dispute resolution mechanism proposed; and (D) the national need for experience with the type of mechanism proposed, including the need to further the goal that for all types of disputes there be dispute resolution mechanisms available.

(f) PAYMENTS TO GRANTEES.—When the Attorney General has approved an application submitted under subsection (e)(1), he shall pay to the applicant the Federal share of

the estimated cost of the approved project. The Federal share of the estimated cost of projects funded pursuant to applications submitted under subsection (e)(1) shall be 100 percent for the first fiscal year in which funds are appropriated for grants under this section; 90 percent for the second fiscal year in which funds are appropriated for grants under this section; 75 percent for the third fiscal year in which funds are appropriated for grants under this section; and 60 percent for the fourth fiscal year in which funds are appropriated for grants under this section. When the Attorney General has approved an application under subsection (e)(2), he shall pay to the applicant the amount which he in his discretion determines appropriate. The aggregate expenditure of funds of the State and political subdivisions thereof, exclusive of Federal funds, for such purposes shall be maintained at a level which does not fall below the average level of such expenditures for the last 2 fiscal years preceding the date of application for funding. Payments made pursuant to this subsection may be made in installments, in advance, or by way of reimbursement, with necessary adjustments on account of underpayment or overpayment, but shall not be used to compensate, directly or indirectly, for any administrative expense incurred in applying for funds under this Act.

(g) SUSPENSION OF PAYMENTS.—Whenever the Attorney General, after giving reasonable notice and opportunity

for hearing to any recipient of a grant under this subsection, finds that the project for which such grant was received no longer complies with the provisions of this Act, or with the relevant application as approved by the Attorney General, the Attorney General shall notify such recipient of his findings and no further payments may be made to such recipient by the Attorney General until he is satisfied that such noncompliance has been, or promptly will be, corrected. However, the Attorney General may authorize the continuance of payments with respect to any program pursuant to this Act which is being carried out by such recipient and which is not involved in the noncompliance.

(h) No funds for assistance available under this section shall be expended until one year after the date of enactment of this Act.

SEC. 8. RECORDS, AUDIT, AND ANNUAL REPORT.

(a) GENERAL.—Each recipient of assistance under this Act shall keep such records as the Attorney General or his designee shall prescribe, including records which fully disclose the amount and disposition by such recipient of the proceeds of such assistance, the total cost of the project or undertaking in connection with which such assistance is given or used, the amount of that portion of the project or undertaking supplied by other sources, and such other records as will assist in effective financial and performance audits. This

provision shall apply to all recipients of assistance under this Act.

(b) AUDIT.—The Attorney General or his designee shall have access for purposes of audit and examination to any relevant books, documents, papers, and records of the recipients of financial assistance under this Act.

(c) COMPTROLLER GENERAL.—The Comptroller General of the United States, or any of his duly authorized representatives, shall, until the expiration of 3 years after the final year of the receipt of any financial assistance under this Act, for the purpose of financial and performance audits and examination, have access to any relevant books, documents, papers, and records of recipients of such assistance under this Act.

(d) ANNUAL REPORT.—The Attorney General, in consultation with the Commission, shall submit to the President and Congress on or before the 365th day following the enactment of this Act, and on or before February 1 of each succeeding year, a report on the administration of this Act during the preceding fiscal year. Such report shall include but not be limited to—

(1) a list of all grants awarded;

(2) a summary of any actions undertaken in accordance with section 7(g) of this Act;

52-434 O - 80 - 21

(3) a listing of the projects designated as national priority projects for that year and the types of other dispute resolution mechanisms which are being created, and, to the extent possible, a statement as to the success of all mechanisms in achieving the purpose of this Act;

(4) the results of financial and performance audits conducted pursuant to this section; and

(5) an evaluation of the effectiveness of the Center in implementing this Act, including a detailed analysis of the extent to which the purpose and goal of this Act have been achieved, together with any recommendation for additional legislative or other action.

SEC. 9. AUTHORIZATION FOR APPROPRIATIONS.

(a) To carry out the purposes of section 6 of this Act, there are authorized to be appropriated to the Attorney General not to exceed $3,000,000 for the fiscal year ending September 30, 1980; not to exceed $3,000,000 for the fiscal year ending September 30, 1981; not to exceed $3,000,000 for the fiscal year ending September 30, 1982; not to exceed $3,000,000 for the fiscal year ending September 30, 1983; and not to exceed $3,000,000 for the fiscal year ending September 30, 1984.

(b) To carry out the purposes of section 7 of this Act, there are authorized to be appropriated not to exceed

$15,000,000 for the fiscal year ending September 30, 1981; not to exceed $15,000,000 for the fiscal year ending September 30, 1982; not to exceed $15,000,000 for the fiscal year ending September 30, 1983; and not to exceed $15,000,000 for the fiscal year ending September 30, 1984. Such sums shall remain available until expended.

SEC. 10. THE FEDERAL TRADE COMMISSION.

The Federal Trade Commission shall hire and assign applicants for employment and shall promote, train, discipline, demote and dismiss employees on the basis of individual merit, without regard to race, color, sex, religion, or national origin, and without engaging in any act or practice which has the purpose or the effect of illegal discrimination against any individual because of his or her race, color, sex, religion, or national origin.

Passed the Senate April 5 (legislative day, February 22), 1979.

Attest: J. S. KIMMITT,

Secretary.

Appendix 2—Additional Materials Submitted by Witnesses

(a) By the American Bar Association

Alternative Methods of Dispute Settlement

A selected bibliography

Compiled by Frank E. A. Sander and Frederick E. Snyder, Harvard Law School for the American Bar Association Special Committee on Resolution of Minor Disputes

September, 1979

Preface

The genesis of this bibliography was a feeling on the part of the compilers that in a field such as dispute resolution, which has had vast amounts of writing over the years but has undergone a significant recent flowering, an attempt at classification and compilation would be a useful aid to scholars currently working in the field. As soon as we began to undertake the task, however, we understood better why others have hesitated where we have dared to tread. The domain is vast and it is at times difficult to delimit the subject appropriately. For example, although our focus is primarily on civil litigation and we therefore felt free to avoid many of the detailed issues of criminal adjudication, the disposition of lower level criminal cases by civil alternatives such as neighborhood justice centers does lie at the core of our concern. Where a subtopic had substantial amounts of writing but was not centrally related to our concern, we have on occasion resorted to the device of listing one or two basic pieces that contain references to most of the remaining literature. In general, we have tried to err on the side of inclusion in the hope that we will not be held too strictly accountable for that judgment in particular cases.

Similar questions of judgment have attended the subdivisions. These should not be viewed as watertight, but simply as helpful guides. Whenever appropriate, we have felt free to list items under various headings where that might be helpful.

It should not need to be said that this bibliography does not pretend to be complete or comprehensive. Rather than refining or elaborating it further in the hope of getting a better product, we have thought it desirable to disseminate this tentative first draft now in the hope that it will lead others to suggest additions or subtractions which can then be reflected in future editions.

Many individuals have contributed ideas and suggestions to the bibliography. There are too many to list here. We would simply like to acknowledge the helpful research assistance of Charlotte Salomon who laboriously checked all the items here listed and helped us to put them into some coherent form.

F.E.A.S.
F.F.S.

Abbreviations Used

ABA—American Bar Association.
BNA—Bureau of National Affairs, Wash., D.C.
GPO—Government Printing Office.
IJA—N.Y.U. Institute of Judicial Administration.
LEAA—Law Enforcement Assistance Administration, U.S. Department of Justice.
NCSC—National Center of State Courts.

Alternative Methods of Dispute Resolution

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52-434 O - 80 - 22

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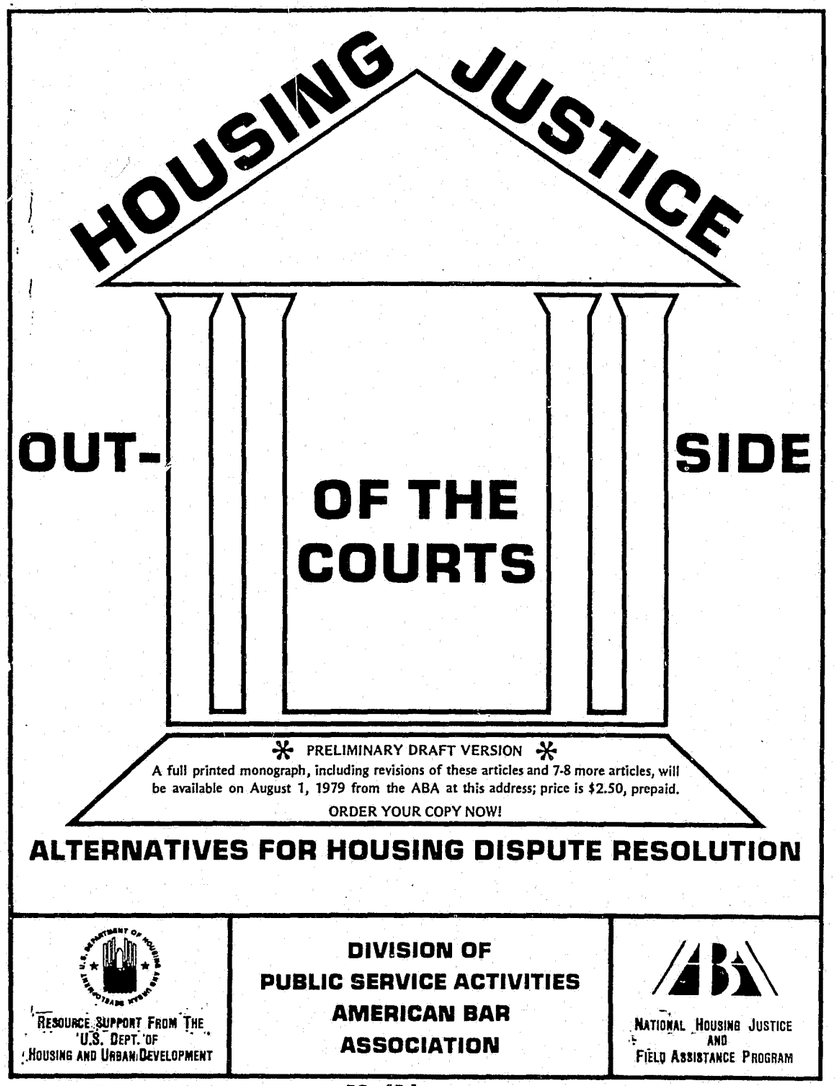

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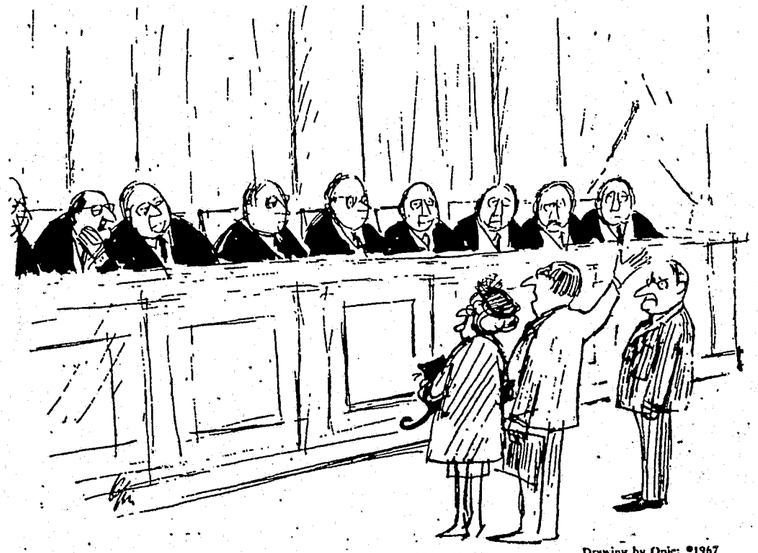

"Her landlord kicked her cat! How did this thing ever get out of Small Claims Court?"

Randall W. Scott, editor

ALTERNATIVE DISPUTE RESOLUTION MECHANISMS AND HOUSING DISPUTES: A Survey

Fred M. Dellapa*

The Pound Conference on the Causes of the Popular Dissatisfaction with the Administration of Justice (St. Paul, Minnesota, April 1976) focused attention on alternative dispute resolution mechanisms—ADRM—that have developed around the country since the early 1970's. These projects utilize nonadversarial modes such as negotiation, mediation, or arbitration, which seem to be expeditious, efficient, inexpensive, and most importantly, effective in resolving certain classes of disputes.

Established ADRMs found that they were resolving disputes in the ninety percentiles; although closer evaluation dropped these success percentiles to the seventy percentile range, the results were nonetheless encouraging. This concept of "alternatives" to conventional adjudication has ignited, fueled to a large extent by the sponsoring of three Neighborhood Justice Center (NJC) demonstration programs by the Justice Department and the National Institute for Law Enforcement and Criminal Justice. The three demonstration centers drew from the experiences of six selected, existing programs and are endeavoring to prove the merit of such nonlitigious modes of dispute resolution by means of intensive, external evaluations.

At its last tally—December 1978—the ABA's Special Committee on Resolution of Minor Disputes has identified no less than one hundred seventy operational ADRM programs nationwide; certainly a healthy growth pattern when such projects numbered less than sixty as recently as late 1976.

Background. Any society needs some procedure, however ill-defined, by which a disagreement between its members, once it begins to constitute a threat to the harmony and cohesion of the society, may be contained and, if possible, resolved. It was not too long ago that certain legal thinkers began to seriously ponder the effectiveness of the formal adversary system of justice in resolving certain classes of interpersonal dispute that often manifest themselves in misdemeanor or small claim courtrooms. These disputes between persons with an ongoing relationship, such as spouses, lovers, neighbors, friends, landlord/tenant, merchant-customer, and the like, are primarily the result of such occurrences as noisy animals and stereos, faulty plumbing, shoddy merchandise, simple assaults, unreturned security deposits, damaged property, and similar types.

Typically these disputes would go before the bench, where the judge would try to apply procedures, evidentiary rules, and case precedents to the particular situation. On surface, once a judgment had been reached, it appeared that the matter was resolved; but was it really? As often as not (there exists no hard data to confirm this statement, but the popular dissatisfaction with the administration of justice bears it witness), the disputants are returned to essentially the same position they were in before: except that now, one is officially declared the "winner" and the other the "loser".

Professor Sander devised a chart of . . . "available alternative dispute resolution processes arranged on a scale of decreasing external involvement". They are: (A) Adjudication; (B) Less formal adjudication: 1) specialized courts such as small claims, traffic, housing and family-conciliation courts, 2) arbitration, and 3) screening; (C) Fact finding; (D) Diversion; (E) Mediation; and, (F) Information and referral.

The first two modes are generally referred to as the formal judicial process. Adjudication and less formal adjudication are well known to most laymen and lawyers, with the possible exception of arbitration and screening. It is difficult for the American legal profession to find much fault with the adjudicatory-adversary process, as it has been the life blood of the profession for years. However, the community's dependence on and the expectations of the courts may well exceed the judiciary's capacity to solve the problems of individuals or society.

Our formal adjudicatory process and to a large extent our less formal one too, has moved in the direction of greater complexity and professionalization. Laws are written in technical, often obtuse language, procedural refinements multiply almost geometrically, and specialization is becoming more common. As a result, the legal system often is intelligible only to lawyers and accessible only to those who can obtain the services of legal counsel.

A more subtle, but equally as harmful result, is the greatly diminished role of the disputants in the resolution of their dispute. Aside from their presenting their version of the matter, the majority of decisions going to an adjudicated resolution are made by counsel and the court. Perhaps this lace of "participatory justice" is at the root of people's dissatisfaction with the administration of justice. Focusing now on the last four elements of Professor Sander's chart, we shall briefly review those methods of dispute resolution used by the various ADRM.

Fact finding, or the investigative approach, has not generally been a component of our judicial system, except to the very limited degree that bodies like grand juries and boards of inquest are related to the courts. Essentially the fact finder is active; he uses the informational sources himself. If selected by the consent of the parties, the likelihood that his/her findings will be carefully weighed by both sides is increased. Fact finding, as a dispute resolution technique, relies heavily on the fact finder reconstructing the elements of the dispute by investigation and then issuing a finding based upon such investigation. The parties may then resolve the dispute based on this finding. The fact finder has no coercive power or sanctions, operates without rules, procedures, or precedents, and is motivated solely by his/her own internal motivation to find all relevant proofs. It could be said, by reaching just a bit, that in some dispute resolution centers (particularly the NJC), intake personnel use fact finding techniques to aid in resolving a dispute before mediation. This is accomplished by the intake worker gathering information on the dispute from both parties and then suggesting a possible solution to the disputants. However, by and large, the majority of ADRM do not utilize fact finding techniques, at least to the extent meant by Professor Sander.

Diversion, to this writer at least, is not really a dispute resolution methodology. Essentially, diversion programs take a person charged with a crime and, upon a withholding of prosecution by the state, places that person in a program of treatment, counseling, job training, or the like. Assuming the person successfully completes the particular diversion program's requirements, the prosecutor will then *nolle prosequi* the matter and the individual is returned to his community as a better person.

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The last two components are the general tools of most ADRM: mediation and information and referral. As Professor Lon Fuller put it: "The central quality of mediation . . . [is] its capacity to reorient the parties toward each other, not by imposing rules on them, but by helping them to achieve a new and shared perception of their relationship, a perception that will direct their attitudes and dispositions toward one another." This is achieved by disputants voluntarily submitting their dispute to a neutral third party who has no active or coercive power over the parties: for a negotiation, conciliation, or mediation of the problem. Such a procedure relies heavily on the participation of the disputants in the resolution of the dispute. The basic character of mediation is that the parties do not refer the dispute to an independent, third person in order to obtain a decision. Rather, the good offices of another person are used to bring about communication between the parties and facilitate the negotiation of an agreement.

Early ADRM evaluations and the more authoritative NJC Interim Evaluation indicate that this form of resolving dispute is viable and bears considerable study and development. The emphasis is upon conciliation; this will be achieved only where the whole history of the relationship of the parties to the dispute is brought to light and discussed, and not where investigation is confined to the particular issue which has finally induced the parties to seek a settlement. Unfortunately, our judicial system does not presently afford a luxury of delving into the causes of a dispute; it merely permits the processing of the results.

It is the various modes of mediation that best utilize the active participation of the disputants in the resolution of their dispute and hence yields what I refer to as participatory justice. It appears that if given the opportunity to be heard as to their perspective of the dispute, most persons will, with patience and understanding, eventually set forth the parameters of a resolution. A mediator can then utilize these conceptualized terms of an agreement and aid to shape them into a lasting resolution. The burden of "living up to" that resolution rests squarely on the parties. In a mutually agreed upon resolution, everyone ought to come out satisfied (neither winner or loser), as they themselves resolved the dispute to their mutual satisfaction. If anything, the experiences of the ADRM have prompted a certain amount of discussion over the administration of justice and its attendant philosophies.

This information and referral aspect of Sander's chart is characterized by Cratsley as being ". . . just another intervenor, although at a very preliminary level." Essentially this component of an ADRM is utilized to: (a) provide a party with information on all the options available to assist in resolving a dispute; and, (b) refer persons to agencies that can better assist in a resolution than the ADRM or as a tool for helping the parties understand themselves, their agreement, and living up to that agreement.

National Survey. In the fall of 1978, the Department of Housing and Urban Development contracted with the American Bar Association's Special Committee on Housing and Urban Development Law to conduct a "National Housing Justice and Field Assistance Program". The principal purpose of this study is to determine the state of the administration of justice in the courts vis-a-vis housing disputes, and to examine the experience of certain "housing courts" around the country. In turn, the ABA Special Committee on Resolution of Minor Disputes was asked to conduct a brief and modest national survey of the nation's ongoing ADRM to determine to what extent they were involved in housing disputes. The survey results were only recently completed, but were surprising in that far more ADRM were involved in the attempted resolution of housing dispute than imagined. This suggests that ADRM projects are being well received by the public and, if the survey data are valid, that the application of ADRM techniques to housing dispute merits research and development.

To conduct the survey, forms were sent to 140 ADRM projects and persons involved in ADRM activities listed by the project office of the ABA Special Committee on Resolution of Minor Disputes. Of the survey group, 32% responded, yielding an ample number from which to approximate the involvement of ADRM in the area of housing dispute. Of the ADRM responding, a full 63% service or attempt to service disputes involving housing. The ADRM were asked to define housing dispute in two categories: (1) *Typical:* being the more traditional type such as eviction, security deposit returns, code violations, property damage; and (2) *Atypical:* being more interpersonal in nature, such as an altercation between a landlord and tenant, or apartment or condominium neighbors that resulted in assault, battery, or other misdemeanor or tort behavior.

(1) The ADRM processing housing disputes indicated that, on average, approximately 60% of the disputes could be classified typical, 34% classified atypical, and 6% received no classification. Certain respondents claimed that they did not adequately document the cause of the disputes, but felt that a portion of the assault, battery, property damage, and trespass matters also could be indirectly related to housing difficulties. (2) The survey discovered that the ADRM reporting with sufficient data, processed a total of 10,951 housing disputes on average per annum. (3) ADRM reported their average resolution rate on housing disputes to be 75%. ADRM operated by official entities averaged a 76% resolution rate, while the independent ADRM averaged 71% successful resolution.

(4) The survey determined that approximately 62% of the ADRM are operated by an official entity (with 38% being independent). This broke out as follows: (a) Court or court related ADRM = 15%; (b) City, county, district, or legal service attorney operated = 23%; and, (c) Unit of local government operated = 24%. (5) The individual resolution rate of each of the above was: (a) 73%; (b) 78%; and, (c) 78%; the independent ADRM averaged 71% resolution.

(6) A further survey result was the determination of the approximate percentage of the total caseload that is housing disputes. It was found that: (a) 53% of the ADRM serviced 1 - 25% housing disputes; (b) 25% of the ADRM serviced 26 - 50% housing disputes; (c) 11% of the ADRM serviced 51 - 75% housing disputes; and, (d) 11% of the ADRM serviced 76 - 100% housing disputes.

The survey results illustrate that ADRM have, at least, *potential* for assisting in the resolution of housing disputes. An example, let us project the housing dispute caseload figure into the current known operating ADRM. Assuming that 107 equals 63% of the existing ADRM and each ADRM averages 278 housing disputes a year; hence the now existing ADRM have the potential of processing 29,778 housing disputes per year. Personally, I do not feel that numbers are impressive; rather, it is the potential for development indicated here that intrigues me. It is quite clear that ADRM, at least in terms of this modest survey, are active in the housing dispute area and suggest that further development of ADRM use is in order.

A Proposal. "The causes of housing deterioration (and attendant disputes) to the extent that they have been identified, are diverse - poverty, racism, high property taxes, outmoded building codes, strict and insensitive zoning laws, incompetence and excessive profit taking by landlords, rigid rent control and an aging housing stock." The present system does not have the flexibility to handle the tremendous variety of disputes that come before it, nor does it have enough appropriate remedies. Landlords presently have only the sanction of eviction to deal with irresponsible tenants, and tenants have only injunctive relief or tort damages for code violations involving dangerous or inhabitable conditions. Something must be done. Perhaps the United States Court of Appeals for the

District of Columbia said it best: ". . . Courts have a duty to reappraise old doctrines in light of the facts and values of contemporary life - particularly old common law doctrines which the courts themselves created and developed."

From the outset it must be understood that no single law, program, or policy can in one triumphant sweep remedy all the ills of administering housing justice. The problems range from difficulties in properly identifying the true owner of property in violation of minimum housing code violations to an effective process for timely remedial action. In those areas that have specialized housing courts, the problems themselves have not abated.

A landlord-tenant dispute, like any other lawsuit, cannot be resolved without due process of law unless both parties have had a fair opportunity to present their cases. Our courts were never intended to serve as rubber stamps for landlords seeking to evict their tenants, but rather to see that justice is done before a person is evicted from his or her home. What must be attempted then is a complete reordering of the processes for administering housing: a reordering that contemplates change or revision of laws, ordinances, codes, rules of procedures, and the integration of mechanisms involved in housing dispute resolution. The settlement mechanism should remain within the judicial system. Despite the disadvantages inherent in a judicial proceeding, the courts remain the most appropriate forum for the settlement of legal disputes. The court system (but not necessarily the adversarial system) is best able to bring to the decision making process a sense of justice with the concommittant understanding that precedents are not dictates, and statutes do not require stagnation.

A new mechanism for the settlement of housing disputes needed: a mechanism motivated by legal and equitable concerns which gives all parties an equal opportunity to seek justice. To begin formulating such a housing dispute mechanism, two critical areas must be re-evaluated and, ideally, redesigned; these are the law and the process. Too often we look at only improving the process, leaving the procedural and substantive law alone. This, I feel, is a mistake as improved process or mechanism are not really worth much if the rules concerning entry and use are not concurrently modified. Proposed changes in the organization and procedures of a judicial dispute settlement mechanism must allow for implementation of the substantive law. The court must not continue to be the vehicle for inhibiting application of precedent deemed undesirable by litigants or judges.

Legislation ought to be promulgated that grants exclusive jurisdiction over all disputes arising out of residential - rental relationships, and all actions to enforce or penalize violations of minimum housing codes. This housing jurisdiction would operate in close cooperation with the various executive branch agencies involved, such as housing authorities and administrators, prosecutors, and county or city attorneys. It ought to have jurisdiction over possessory actions, injunctive actions, code prosecutions and, with proper resources, the authority to appoint receivers for properties in extreme disrepair and violation or abandoned by the owner.

Judges sitting in the housing jurisdiction should remain for a substantial time period to ensure continuity and expertise. Hearing examiners could be appointed to assist the judge and would have the authority to refer consenting parties to a mediation/arbitration service. In addition, a property inspection staff should be available to inspect and report to the housing court, and a social service branch to refer indigent tenants to financial and employment resources.

The housing jurisdiction would be two tiered. A preliminary review after the filing of a complaint and answer, if any, would be made by a hearing examiner. If the dispute encompasses nonpayment of rent or habitability conditions, the matter may be referred to mediation. Disputes should be sent to mediation in 4 categories: (1) tenant has withheld rent because of the condition of the premises; (2) tenant has fallen behind but is willing to make up lost rents; (3) tenant is unable to pay and referral to social service assistance agency is necessitated; and, (4) disputes over security deposits.

Since the landlord's objective in most nonpayment cases is collection rather than eviction, referral to mediation services would provide both parties the opportunity and assistance in resolving the dispute with a minimum of delay. (Please note that data indicates that less than 4% of eviction actions culminate in dispossession.) The mediation part, backed by the knowledge that quick and certain action will occur if the parties are obstructionist or deal in bad faith, could utilize some innovative resolution techniques. For example, when the premises are in substandard condition, the amount of payment provided could be reduced accordingly, restorable if the landlord agrees to repair. If the landlord will not accept such condition, the case would proceed to judicial determination: complete with inspection by housing court inspectors.

If none of the preceding steps could be taken, the matter would then proceed to the second tier, trial court. The trial court ought to have the proper rules, procedures, and laws to take the following actions, if warranted and proven: (a) *Punitive:* code enforcement methods narrowly conceived to impose absolute responsibility on an owner of record, or his agent, for violations. This could be inflexibly applied without regard for the profitability of the building as an economic unit; (b) *Economic:* code enforcement through rent control. As an example, a rent reduction ordered is code violations exist and, by same token, restorable if corrections are made; and, (c) *Direct repair remedies:* local government can place building in receivership and repair or renovate, then collect rents, etc., until reimbursed.

The suggestions made above are not at all new or innovative, as they have all been made at various times in the past. What is needed is an area that needs and wants to restructure its housing jurisdiction from top to bottom, encompassing law and procedural changes. This survey (for the ABA's National Housing Justice and Field Assistance Program) indicates that alternative methodologies are workable. A concentrated effort ought to be made to locate at least one cooperative jurisdiction to implement a new housing court and ADRM experiment.

THE SAN JOSE HOUSING SERVICE CENTER: A "Comprehensive" Non-Judicial Model for Housing Disputes

Anthony J. "Bud" Carney*

The Housing Service Center is a non-profit community-based organization located in San Jose, California. The Center provides low-moderate income tenants, landlords, and homeowners a solution to many of their housing disputes in a non-judicial setting and without the costs and often lengthy process that the legal system offers. Since the Center opened in August 1975, about 35,000 residents have used the free services.

Located on the southern tip of the San Francisco Bay, the city of San Jose was once considered a sleepy little town of 95,000 people. However, in just the last 30 years the population exploded and rapid urbanization awoke the residents of the "Valley of the Heart's Delight." Today San Jose is the major city of Santa Clara County, with a population that is half of the County's 1.2 million residents. This "boom" has resulted in providing many job opportunities but it also has created a shortage of affordable housing, a low vacancy rate, and a greater economic gulf between those who can and cannot afford housing.

In 1970, the median cost of a new house in San Jose was $23,800. Since then the cost of housing has tripled and the vacancy rate has dipped to around 1%. The average family income is about $20,000 a year; however, the average selling price of an older house is $90,195 (April 1979). Increasing rents are not providing an acceptable alternative to buying. Seniors and other persons on fixed incomes are facing a housing crisis that has no light at the end of the tunnel. There is currently a move by tenants to have rents regulated: an issue that is being addressed by a task force made up of tenant and landlord representatives who will present recommendations to the city council in June. Perhaps their solution will aid the fixed-income families, if not, the "Citizens for Rent Relief" will take the issue to the ballot.

Tensions between tenants and landlords in the past generally have been "solved" by the landlord giving the tenant a 30 day notice to vacate. In the State of California, the scales of justice are still unevenly tipped in favor of the owner (e.g., a landlord can evict a tenant for no just cause by merely giving a 30 day notice if the tenant is on a month to month agreement; leases in California are almost unheard of). However, and particularly in light of the housing situation, many of those tensions in San Jose that arise between tenants and landlords can be solved through the Housing Service Center.

The Center provides comprehensive housing counseling for low-moderate income tenants, landlords, and homeowners. Trained counselors can help with: evictions, lockouts, habitability, utility shutoffs, retaliatory evictions, housing discrimination, illegal landlord entry, abandonment, deposits/fees and other matters. The Center's philosophy has been to emphasize the merits of self-help; the counselors do not solve problems for clients, but rather show the clients how to solve their own problems.

Initial Client Contact. Contact with the Center generally begins over the phone. A counselor determines the extent of the caller's complaint or problem. (1) Most complaints or questions are clarified or answered over the phone. (2) When requested or where needed, a [specially-prepared, problem-area] brochure will be mailed to the caller. (3) Often the counselor will conciliate the matter without having to set up an appointment in the office.

(4) There are, however, circumstances where an appointment with a counselor is necessary. At that time the counselor inquires as to the magnitude of the complaint or problem before a course of action is determined. (If there is a legal issue involved, the counselor consults with the Center's attorney who may sit in on the appointment.) The client will be provided with an analysis of his or her situation, and a possible course of action, with emphasis placed on the client's participation in the solution.

(5) The next step is the implementation phase, which could be mediation (for example, setting up a meeting with the owner of a complex where most of the tenants have complained about a manager's unlawful conduct).

In one case, a manager answered the door pointing a gun at the tenants. The same manager slammed the door in the face of a 74 year old woman which resulted in her being hospitalized. In this example, the owner lived in Hawaii and had no knowledge of any questionable activities by the manager. After reviewing documentation and hearing testimony from the tenants, the owner dismissed the manager. Since then there have been no complaints from tenants at this apartment complex.

(6) Where mediation is not applicable nor is self help workable, the case is either terminated or it becomes a legal issue. A determination is made: (a) to assign the case to the Center's attorney, or (b) refer it to a volunteer legal panel.

Tenant Landlord Hearing Committee. Toward the end of 1976, the Center began to staff the city's Tenant Landlord Hearing Committee. An examiner was added to the staff in order to assist the committee (comprised of five tenants, five landlords, and one "neutral" member; all members are appointed by the city council). The examiner initially conciliates with the tenant and the landlord. If this is not successful, the case is heard by the committee, which makes a final recommendation. Although the committee's decision is not binding on either party, almost everyone who participated has complied. In the last two years less than 1% of the 230 cases have gone to court.

Homeowner Counseling. Homeowners who are faced with foreclosure can find assistance at the Center. The staff is certified by HUD to provide default counseling. The Center has found the mortgage lenders extremely cooperative with regard to saving a family's home and investment. In addition, the counselors will make available a "Homebuyer's Kit" and "Energy Conservation" information to the public.

*Mr. Carney, a City Planner, was one of the founders of the Housing Service Center and the Executive Director from its inception. He is currently a private Planning Consultant specializing in housing matters.

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Discrimination Counseling. Eliminating discrimination in housing is an area where the Center places major emphasis. Over a thousand complaints have come to the attention of the Center's Fair Housing Specialist. In addition to counseling clients who allege that they have been discriminated against, the Center recently conducted a major housing discrimination audit. (The results of this audit showed that of the 112 rental units contacted, at least 50% discriminated against racial minorities. Following the release of the audit results, individuals and community groups formed a coalition to further combat racial discrimination in housing.)

Tenant Landlord Law Classes. The Center's attorneys hold tenant-landlord law classes in community centers and churches. Most classes are held in the lowest income neighborhoods and are usually attended by about half tenants and half landlords or apartment managers. More than 3,000 persons have taken advantage of the free classes.

Legal Services. Although the Center attempts to "de-mystify" the legal aspects facing many clients and places emphasis on self-help or mediation, some cases can only be solved in a judicial setting. A unique aspect of the Center is the way in which legal services are provided. The Center's two attorneys (who are on retainer) handle the legal counseling and some court cases.

Examples of cases that the attorneys have handled are assisting tenants of a HUD Section 236 apartment complex to purchase it as a co-operative, or defending a tenant in a habitability issue involving the renting of a converted chicken coop. Another example was a case where a woman was given an eviction notice from an "adults-only" apartment complex because the manager suspected that she was pregnant. The tenant won this one (but upon arrival of the stork, the manager may have a message for the new born: thirty days to vacate!).

When the case is one that the Center does not normally handle or the Center's attorneys are over-extended, the client is referred to a 25-member volunteer attorney panel. Attorneys on the panel have agreed to take cases for a fee scaled to income. The fees range from $10 to $40 per hour after an initial half hour consultation fee of $10. The panel was instituted three years ago by the Santa Clara County Bar Association, at the request of the Housing Service Center; since then it has been highly praised.

Community Housing Projects. In addition to the counseling activities, the Center has been involved with community groups who want to increase their housing options or better their housing conditions.

One such project was the formation of a housing constituency made up of interested individuals and community organizations. This effort was orchestrated in conjunction with the Department of Social Work at San Jose State University, the Council of Churches, and the Catholic Social Services; the organization is called "Housing Action." One of its major projects has been the formation of a housing development corporation, but it also has been responsible for the County increasing the expenditure of its Community Development Block Grant program toward the housing needs of the low income community. Another project of the Center was an analysis of the availability of rental housing for families with children. The Center's staff discovered that in this "International Year of the Child", 70% of the rental units did not allow children. A County ordinance recently adopted which would have prohibited this practice was overturned in the courts; it is now being appealed.

Training. Training for the staff is mainly conducted by the Center's attorneys who are known for their expertise in housing matters. HUD as well as counseling organizations, such as the Pacific South West Association of Housing Counselors (PSWAHC), provide additional classes and workshops in housing counseling.

Funding and Staffing. The main source of funding for the Housing Service Center is from San Jose's share of HUD Community Development Block Grant (CDBG) funds. As a HUD certified counseling agency, the Center also receives an additional grant ($45,000 for fiscal year 78-79) from HUD to augment the services.

The Center also has employees who were hired and trained under Title IV of the Comprehensive Employment and Training Act, which is administered by the Department of Labor. (The total staff of the Center includes 15 full-time and 1 part-time professional as well as 2 full-time support staff; there are 14-40 volunteers as outlined above and a board of 11 persons. The annual budget is approximately $330,000.)

Conclusion. The Center (as a concept) was presented in 1974 to the city's CDBG Steering Committee for inclusion (as a project to be operated by a community organization) in their recommendations to the city council.

At that time, the San Jose Community Tenants Union was the sponsor of the project. When the recommendation reached the city council along with requests from other groups who wanted to operate the Center, the council asked for new proposals. The Tenants Union submitted a new proposal and reduced the amount requested to $160,000. Even though the city's own Property and Code Enforcement Department competed for the funds to operate the Center, the city council had enough faith in the track record of the Tenants Union to vote for the contract.

The Center now is an independent non-profit corporation. It submits a new proposal each year to the CDBG Steering Committee. Thus far it has received a favorable recommendation and (most importantly) a contract with the city to provide free housing counseling services to the low-moderate income residents of San Jose, California.

One of the most important aspects of the Housing Service Center is that a resident can utilize the services of the Center with confidence that the staff have been trained to provide *comprehensive* housing counseling. The *specialization* in various housing matters which the counselors have developed further the Center's capability as well as its credibility in the community. A system that lacks the expertise that the Center provides may not be received as well, mainly because a client may fear that "they" would not thoroughly understand his/her problem.

A client who alleges housing discrimination can get expert assistance from the Center's Fair Housing Specialist or even free legal advice from the Center's Attorney. If the same client were to enter a system where many different kinds of disputes were dealt with, the client may or may not receive the expertise that s/he deserves. For instance, the Center has trained volunteer checkers who can immediately respond to a discrimination complaint. A system that involves itself in many issues may not have the energy nor the resources to adequately address a discrimination complaint. Moreover, housing complaints are bound to increase because of the rising cost of housing. Coupled with the complexities of many HUD programs, such as Section 8, Section 213, Section 221(d)3, Section 235, etc., it will become even more important to have trained "experts" who can proscribe "cures" for the illness.

The Center is capable of meeting the needs of the future and is further gearing up to do so. The Center receives about a thousand complaints a month; most of these are handled over the phone, many are solved through conciliation, some by mediation, and only a few are processed through our legal services. In order to facilitate the

potential problems which may result from the emerging housing crisis, the Center has agreed to tie into the county's Multi-Service Center system.

The Center plans to provide outreach offices in four of the new multi-service centers which are mostly located in low income neighborhoods. The multi-service centers combine social services, vocational services, children's protective services, mental health services, a medical clinic, alcohol outpatient services, public health nursing services, community services (private non-profit), and senior citizen services. Becoming a part of this kind of system allows the Center to remain autonomous and yet address the housing problems facing many low income persons who would use the services of the multi-service center but who may not be aware of our Center's central office.

The Center's specialization (solving housing disputes) and its autonomy and community orientation place it in a unique position to provide its services in the least amount of time, a minimum amount of funding, and a maximum use of resources.

HOUSING SERVICE CENTER HANDOUTS

The following "publications" are available from the Center:

(1) Section 8 Facts; (2) Subsidized Housing List; (3) Section 235 Summary; (4) Sample Rental Agreement and Checklist; (5) CHEC (Spanish & English); (6) "Insulate Save Energy"; (7) "Be an Energy Miser"; (8) "From HUD Energy"; (9) Housing Service Center (pamphlet); (10) El Centro De Servicio De Casas; (11) Deposit; (12) Depositos; (13) Repair and Deduct; (14) Reparar y Descontar; (15) Eviction Notices; (16) Noticias de Terminacion; (17) "Housing Discrimination is Illegal" (flyer); (18) "Know Your Rights About Renting" (flyer); (19) "How to Buy a House; (20) "Homebuyers Checklist"; (21) "The Homebuyers Estimator of Monthly Housing Cost"; (22) "Home Mortgage Insurance"; (23) "How to Apply for FHA-Insured Mortgage on your Home"; (24) "Simple Home Repairs"; (25) "Direcciones Para Tareas Domesticas"; (26) "Racial Discrimination in Housing - Audit and Recommendations"; (27) "Let's Consider Cooperatives"; (28) "Consideremos Las Cooperativas"; (29) "Fair Housing"; (30) "Disciminacion"; (31) "Legal Rent Withholding"; (32) "Retencion Legal De Renta"; (33) "Abandonment"; (34) "Abandono"; (35) "Tenant Landlord Hearing Committee"; and, (36) "El Comite de Audiencias del Inquilino-Dueno".

SERVICES PROVIDED BY THE CENTER: AUGUST 1975 THRU APRIL 1979

TENANT (26,904) & LANDLORD (2,949) COMPLAINTS			29,853
DISCRIMINATION	1,153	LOCKOUT	266
3 DAY NOTICE	2,831	REPAIR & DEDUCT	2,012
30 DAY NOTICE	3,289	RETALIATORY EVICTION	210
UNLAWFUL DETAINER	2,011	HABITABILITY	1,410
RENT RAISE	2,295	DEPOSIT/FEES	5,801
SMALL CLAIMS COURT INFO	621	ABANDONMENT/	
UTILITY SHUTOFF	164	SURRENDER	300
MOBILE HOME	431	GENERAL INFORMATION	2,770
LANDLORD ENTRY	138	OTHER	4,151
HOUSING REFERRALS			2,918
HUD (Section 235/245 Home Purchase - Mortgage Default)			1,243
TENANT LANDLORD HEARING COMMITTEE			230
TENANT LANDLORD LAW CLASSES			68**
LEGAL REFERRALS			542
TOTAL PROGRAM			34,854

*Clients served are at the following approximate categories: Elderly 10%; Minority 38%; and Female Head of Household 19%. These percentages are not mutually exclusive, but nonetheless account for more than 50% of all clients served by the Center.
**More than 3,000 persons have attended the free law classes

LANDLORD-TENANT MEDIATION: Project In Colorado

David M. Ebel*

Almost every urban area in our country faces a rapidly increasing number of landlord-tenant disputes. Traditional judicial procedures appear incapable of efficiently resolving these disputes. Although there have been many efforts to make the judicial process more responsive to the growing flood of landlord-tenant disputes, there is an increasing feeling that perhaps a part of the solution lies entirely outside of the traditional court structure. The Colorado Bar Association and the Commission on Community Relations for the City and County of Denver have jointly undertaken a new nine-month experimental project in Denver, Colorado, which seeks to resolve landlord-tenant disputes through mediation.

Particular credit for the conception and implementation of this pilot project should be given to Mr. Minoru Yasui, the Executive Director of the Commission on Community Relations, Ms. Lynn Smith, the project coordinator, Ms. Annette Finesilver and Ms. Wendie Downie, all with the Denver Commission on Community Relations; to Mr. Carlos Lucero, the past President of the Colorado Bar Association, and Professor Jonathon Chase, for their work on behalf of the Colorado Bar Association; and to Ms. Karen Olson, state program officer of ACTION, for her guidance and counseling throughout. This project is funded by a $34,800 grant from ACTION; it is reasonably expected that a further grant will extend the project for an additional year. (This was awarded on September 30, 1978, to the Commission on Community Relations to establish Landlord-Tenant Mediation Project for a period of eight months. Since the project did not get underway until December 15 and the program funds have been carefully utilized since that time, the project will now operate through October 31 of 1979.)

The Structure. The Colorado Landlord-Tenant Mediation Project is governed by a five-person governing board with representatives from the Commission on Community Relations, the Colorado Bar Association, the judiciary, a landlords' association, and a tenants' association.

To assist the governing board and to provide broad community support, there is a much larger advisory board, consisting of representatives of other organizations interested in landlord and tenant concerns. In addition, a paid, full-time project coordinator, accountable to the governing board, supervises all intake and screening, assignment of mediators, and the general operation of the program.

The actual mediators are all volunteers. To date, twenty volunteers have been recruited. Each person has agreed to mediate at least one dispute a month. Twenty additional volunteers will be recruited within the next four to six months. The mediators come from many different walks of life, although they tend to be professional people with skills particularly applicable to landlord-tenant controversies. All prospective mediators are carefully screened in order to exclude those with preconceived biases. In addition, there are plans to enlist retired people to serve as mediators: it is believed that they could bring a special perspective, dedication, and availability to the project. This proposal would also tap one of society's greatest underutilized resources—its senior citizens.

Once the mediators are selected, they undergo several intensive training sessions. These sessions include instruction from representatives of the Colorado Bar Association on landlord-tenant law in Colorado, as well as instruction from psychologists and experienced mediators on the art and skill of mediating disputes. The training sessions also include several mock mediation demonstrations. Additionally, the Colorado Bar Association is preparing a manual for use by the mediators which will outline the basic provisions of landlord-tenant law in Colorado. The Colorado Bar Association also supplies back-up lawyers who can be consulted at any time.

Intake. The mediation services are available without charge to any landlord or tenant in the Metropolitan Denver area with a dispute relating to the rental of residential property. There are several possible intake routes. First, an individual landlord or tenant may directly contact the project coordinator; the coordinator can then obtain the required information to commence resolution of the dispute. Second, a cooperative procedure is now being established with the Denver Small Claims Court.

Under this procedure, when a landlord-tenant dispute is filed in the small claims court, the parties will be advised of the mediation services offered by the panel and encouraged to use these services. Pending mediation, the case will be kept active on the small claims court docket. If the mediation is unsuccessful, the parties will be able to proceed to trial in the small claims court without any loss of time.

Efforts are also underway to establish a working relationship with various landlord and tenant organizations whereby they will refer complaints by their members directly to the mediation panel. Referrals will also be encouraged from the Legal Aid Society, the Metropolitan Denver District Attorney's Consumer Office, and other agencies who come in contact with landlord-tenant problems. Ultimately, it is hoped that landlords in the area can be persuaded to insert a provision in their leases stating that both parties agree to submit any disputes that arise under the contract to the voluntary mediation panel before proceeding to court.

The Mediation Process. The coordinator assigns a mediator within two days after a party has requested mediation. Although mediators generally are assigned at random, some consideration is given to special skills that may be useful in particular kinds of disputes (such as assigning an engineer to handle a case involving claims of structural deficiencies or uninhabitability). An effort is also made to elect a mediator whose location is convenient to the parties. Within two days the mediator contacts the opposing party to determine if he will attend a voluntary

*Mr. David Ebel is an attorney in Denver.

mediation session. (In some cases, the matter can be resolved very quickly over the telephone. Of course, a meeting will not be required in those cases.)

If both parties agree to try mediation, the mediator sets up a meeting as soon as possible—hopefully within the next several days. Neutral sites such as a church or community center near the location of the property will be sought. The mediator should be flexible enough to hold the session during the evening hours or on weekends, if desired by the parties, to avoid interfering with the parties' employment situations and to obtain a prompt scheduling of the mediation session.

The mediation process itself will be informal. There will be no record and no formal taking of testimony. Either side may advance whatever arguments and evidence desired; in addition, the mediator may actually visit the premises to make an on-site inspection. Depending upon the circumstances, a mediator may determine that the process will work better if he meets separately with each side, rather than having both parties together at a single meeting. However, the typical procedure will involve a single meeting with all participants present.

The mediator's role in the dispute resolution process will depend upon the circumstances of each individual case. There may be times when the mediator should simply facilitate a meeting of the disputants. Other times, the mediator may serve most effectively as an intermediary or mutual confidant. Still other times the mediator may serve as an adviser or non-binding arbitrator making specific suggestions and recommendations to the parties.

The mediator will try to bring as much flexibility and creativity to the process as possible. For example, if there is a dispute over the tenant's right to remain in possession, the mediator could determine that the tenant's main objection to vacating the premises is his concern about finding suitable alternative housing. The mediator may then be able to assist the tenant in locating alternative housing in exchange for the tenant's willingness to accept some definite future date to vacate the premises. The landlord may be persuaded to give the tenant enough additional time to locate such alternative housing on the basis that it will be cheaper and faster than instituting an eviction action. In the area of damage deposits, a mediator might be able to identify precisely what damage was done to the apartment. In addition, the mediator might be able to obtain an agreement between the parties for repair without resort to a damages judgment. In a case where the tenant is withholding rent until certain repairs are made, the mediator may assist the parties by identifying the work to be done and by arranging for suitable escrow of the withheld rent so that both parties are protected.

If the mediator is successful, the mediator will assist the parties in drafting a brief and simple agreement. If the mediation is unsuccessful, the mediator will advise both parties of the availability of remaining courses of action. If one or both parties desire to carry the matter to the small claims court, the mediator may help both parties narrow and frame the issues and prepare a stipulation of undisputed facts so that the case can be expeditiously presented. In return for this assistance it is hoped that the court will give the parties priority on the docket so that the parties will not have lost any time by initially trying mediation.

If the matter does proceed to trial, the mediator will not be available to testify on behalf of either party. This will preserve the mediator's neutrality and will encourage both parties to participate in a frank exchange during the mediation process.

At this time, 24 volunteers have completed training. The materials that the mediators use contain extensive information on landlord-tenant law and mediation techniques, which are updated occasionally to keep them informed of any changes which may be of use in dispute resolution.

Publicity. Publicity about the project was initiated on February 15 through press releases to the newspapers and television stations in the Denver area.

Moreover, a presentation of the services available was made before the Denver City Council, as a result, the police and fire departments as well as various social services organizations refer clients directly to the Landlord-Tenant Mediation Project. Public service announcements proved to be so effective that the project no longer utilizes them.

An Advisory Committee of 26 persons involved in landlord-tenant issues was set up to familiarize these people with the services offered so that they may "spread the word" throughout the community. In addition, the project issues a series of newsletters called "Rental Rap" which appears in ten local publications regularly.

Evaluation. In order to determine the effectiveness of the project and to supervise the work of the mediators, there will be monitors who periodically observe the mediation sessions.

Furthermore, the participants will be asked to evaluate the process after it has been completed. The ultimate objective of this program is to develop credible statistical data on the cost effectiveness of mediation. A further objective of the program is to define the parameters and techniques that are important in achieving successful mediation.

Other Benefits. In addition to the immediate benefit of resolving specific landlord-tenant disputes, it is hoped that this pilot program will generate additional long-term benefits for the community.

First, there is an educational benefit. There will be a fairly extensive program of public education on the rights and obligations of tenants and landlords and the procedures to be followed in enforcing these rights. Brochures are being prepared for distribution and presentations before local high schools are planned. Additionally, the Colorado Bar Association may recommend both modifications in the standard local residential leases as well as legislative changes based on its participation and experience with the mediation project.

Summary. Lawyers are traditionally taught that disputes can only be resolved successfully if there is a third party, such as a court, with power to impose a settlement. However, the price paid for vesting such authority in a third party is that the disputants themselves are subjected to a great deal of delay, expense, and formality that has developed to protect the parties against abuse of this decision-making power. Although voluntary mediation does not have the finality of a judicial decree, at the same time it does not carry all the burdens that have evolved in judicial proceedings and which now threaten to choke them. For those that say the mediation process will not work, it should be pointed out that mediation has rarely been given the chance to work. Further, in those limited situations where mediation has been tried in a landlord-tenant context, it has worked out well. (*See*, e.g., the Weld County Information Referral Service program in Greeley, Colorado, which applies a very informal mediation approach to these and other kinds of problems.)

It is the hope of this project to remedy, or at least to minimize, the problems attending use of the courts to resolve

landlord-tenant disputes. First, the mediation process, if successful, should be much faster than any conventional court proceeding. If the process is unsuccessful, efforts should be made to enable the parties to return to court without any loss of time on the docket resulting from their mediation efforts. In this way, mediation will be integrated into the court structure.

In addition, the mediation process should be much less expensive than a court suit: no fee is charged and attorneys will generally be discouraged from participating in mediation.

If the project proves to be cost effective in terms of saved judicial time or in terms of saved legal costs and other trial expenses for the disputants, it is hoped that the project can eventually be funded in a more permanent way through one or more of the following sources: (1) nominal filing fees required of the participants themselves; (2) contributions from the major landlord and tenant organizations in the Metropolitan Denver area; (3) support from the state and local governmental entities that would otherwise have to resolve these same disputes through the more expensive judicial process.

The process should also be more convenient to the parties, particularly since the mediation session generally will be located near the parties, rather than in the traditional downtown judicial complexes. The scheduling of the mediation session will be more flexible: it should not be necessary for the parties to take time off from work in order to participate. Further, mediation should be less intimidating for both parties. It is strictly voluntary in nature, and the proceedings will be informally conducted in neutral, comfortable surroundings. People who traditionally have been unwilling to submit their dispute to a court should be more willing to try the mediation process.

Finally, and perhaps most importantly, it is hoped that the flexibility of the mediator both in marshaling the resources of the community and in suggesting creative solutions to these intensely human problems will manifest more acceptable solutions for both parties. It is, of course, always the risk of a demonstration program that it may demonstrate the unworkability of the idea. However, it is still hoped that the information obtained will be of use to others around the country who are similarly coping with the difficult problems of finding an economical, efficient, and fair way to resolve landlord-tenant disputes.

CITY AND COUNTY OF DENVER

COMMISSION ON COMMUNITY RELATIONS
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RESOLUTION OF HOUSING DISPUTES OUTSIDE THE COURTS: A Glimpse Of 5 Projects

Ann Barthelmes Drew and Lynne Anita Williams*

Introduction

By now it is a truism that housing problems are increasingly straining the judicial system and its responsiveness is inadequate in many respects. The increase in tenants' rights groups, housing shortages in many cities, and an increase in housing-related court filings have all contributed to this strain.

Although there has been an increasing interest in experimentation with innovative programs inside and outside the courts and although research in the housing dispute resolution area has been accumulating, much of what we know about it remains sprawled in a diffuse heap of newspaper articles and disconnected studies. The HUD-funded study being conducted by the American Bar Association's Special Committee on Housing and Urban Development Law is responding to this gap with its evaluation of the experience of cities where Landlord-Tenant or Housing Courts exist.

This committee has given the ABA Special Committee on Minor Disputes two modest subprojects to look at government and private sector sponsored dispute resolution mechanisms designed to *avoid* the litigation of housing-related disputes by utilizing informal techniques such as arbitration, mediation and special hearing panels.

First, a broad survey of more than 170 such mechanisms throughout the country has been carried out (see paper by F. Dellapa) in the course of this research. While the identifying and descriptive information being gathered in the broad survey clearly adds to the overall national profile being generated, a deeper cut is also needed. Thus secondly, this paper presents a more detailed, descriptive analysis of the role that a few of these programs play in housing-related dispute resolution. Except for the Office of the Rentalsman (Vancouver), these programs were chosen because they are among the oldest and most experienced minor dispute resolution programs in the country.

The goals of this [second] research paper have been:

(1) to provide a picture of the history, structure, process, and substance of the programs selected for study; (2) to examine the strengths and possible pitfalls of these programs; (3) to provide a more educated foundation for planning additional indepth research on *nonjudicial* housing dispute resolution; (4) to identify what types of housing disputes these projects currently handle and in what ways they can expand their role in this area; and, (5) to obtain some perceptions of various groups toward these mechanisms (i.e., courts, organized bar, tenants, landlords, community groups).

Our initial contacts were with the Directors of each program to be studied.

The interviewer explained the purpose of our research, stressing the housing aspect, and its goals and sponsorship and asked for his/her cooperation. We also described the types of people we wanted to interview about various aspects of the programs and requested some names. The Director's Information Request was then mailed to each Director and completed by him/her.

We began each telephone discussion with key contacts by explaining the purpose and goals of the research, again emphasizing the housing aspect. We asked for their cooperation and when they agreed we conducted the discussion immediately. None of the contacts whom we were able to reach by telephone refused to be interviewed.

Columbus, Ohio: Night Prosecutor's Program

Project History. The Night Prosecutor's Program began in March, 1973 with funding from LEAA.

Since 1975, the program has been totally funded through City Council - local funding.

When the project began, there existed a need for an alternative way of dealing with interpersonal disputes, rather than filing a complaint or ignoring the problem. The original project goals were: (1) to provide an opportunity for interpersonal disputes, principally family quarrels and neighborhood altercations, to be handled through conciliation and mediation; (2) to avoid unnecessary arrest records for parties; (3) to provide a convenient forum during evening and weekend hours to resolve these disputes; and, (4) to ease community tensions.

Initially the program sought to handle family and neighborhood disputes. At present, family and friend disputes, as well as bad check complaints, predominate. Most (82%) of the referrals come from the police, the court, or are self-referrals.

Organization and Structure. The Night Prosecutor's Program operates under the direction of the City Attorney's office.

It employs 35 law students and 2 clerical personnel. The law students act as mediators and are paid per hour. There are also 8 volunteer students. The law students receive 12 hours of training in crisis intervention and are then observed and the best are chosen to be mediators. The training is done by a professional social service consultant who utilizes the program staff. There are also assessments made by training coordinators as well as ongoing training which zeroes in on specific problem areas. Each 6 month period, the program conducts a landlord/tenant seminar in conjunction with the Tenants Union and legal aid.

Process. In order to resolve housing-related disputes, the program uses telephone interviewing and fact-finding, telephone negotiations and mediation, in-person mediation, and fact-finding. All disputants must be residents of Franklin County and their complaint should be of a criminal nature or have that potential, were there no intervention.

The program screens all criminal complaints coming into the City Attorney's Office. If the situation is an emergency, such as a lockout, they attempt to resolve it immediately by calling the landlord. If there are additional issues to be resolved a mediation hearing is scheduled within 7 days.

If the complainant comes in person to file the complaint, a hearing is scheduled and a notice sent to the respondent. In 65% of the hearings scheduled the parties show up, and 93% of those hearings resolve the problems. The form of resolution is a parties' agreement, and infrequently a recommendation. The program attempts to enforce agreements by a system of call-backs and rehearings

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Housing-Related Dispute Caseload. In 1978, the Night Prosecutor's Program received 20,280 inquiries and opened and closed 17,950 files. 7½% of the inquiries were housing-related, as were 6% of the files closed. The housing-related caseload has increased in proportion to the general caseload increase. The major increases have been in general landlord-tenant complaints, health-sanitation code violation, noise and utilities complaints. (See Table 1.)

Many of the complaints coming to the Night Prosecutor's Program are minor and would probably have to escalate before they received attention from any other agency. Besides helping to resolve these minor disputes the program attracts many disputants because the hearing is held almost immediately and the parties are able to avoid the delays and frustrations of the formal court.

The Night Prosecutor's Program has frequent contact, in terms of referrals both to and from the program, with various Tenant Organizations, mental health centers, counseling centers, and community organizations. However, it could handle a larger housing caseload and more publicity in the community at large might achieve this. Another possibility would be to create a landlord-tenant program component similar to their bad check component.

Impressions. Opinions of the Night Prosecutor's Program were elicited from five people.

These included the Director of the Columbus Tenant's Union, a Municipal Court Judge, a member of the County Committee on Criminal Justice, and two City Council members. These interviewees listed as the primary goals of the project: (1) relieve the burden on the court and prosecutor's office; (2) provide a working experience for law students; and, (3) screen and handle cases which appear to be minor but need to be resolved. Regarding the last goal, the court's relationship with the project is that of an overseer, and one respondent (Criminal Justice Committee member) observed that the court does not want to handle these cases and so gives them to the project; yet, it wants to keep the power to make final any settlement coming out of the project.

The interviewees were aware of all of the project's referral sources: the court administrator, the city attorney, landlord/tenant organizations, sheriff and police, self-referrals and social service organizations. The explanations for client usage of the project consisted of the following: informality, "the court told them to", low cost, speed and lack of fear of the project as opposed to the court.

All of the interviewees felt that the project was a proper forum for housing-related disputes except the director of the tenant's union. (She felt that the project was not appropriate for two reasons: the staff and mediators lacked expertise in housing law; and, the serious nature of landlord-tenant problems lent themselves to adjudication in court.) There was agreement that *in-person* mediation, if any, was the best way to resolve housing-related disputes. The respondents felt that the project could improve its ability to handle housing disputes by producing greater community awareness, increasing accessibility, instructing the staff and mediators about state housing law, increasing the staff and doing more advertising.

The project's strengths were thought to be its decrease of the court's caseload, its simplicity and the fact that it is free. Its weaknesses are its limited resources, space problems, community ignorance, lack of housing expertise and inaccessibility. Aside from a few negative comments by the tenant organizer regarding the role of the Night Prosecutor's Program in the resolution of housing disputes, all of the interviewees presented a highly positive picture of the interviewees presented a highly positive picture of the program in general and regarding housing disputes. It appears that with some relatively simple publicity and staff training in housing law, the Night Prosecutor's Program could play an increasingly larger role in the resolution of housing-related disputes.

Miami - Dade County's Citizen Dispute Settlement Center

Project History. Established in March, 1975, the project was originally funded by LEAA.

The Dade County's CDS Center was designed to provide a system which would effectively and quickly divert complaints of a civil or minor criminal nature from the court calendar, thereby decreasing court caseload. The majority of complaints are domestic, neighborhood, landlord/tenant and consumer altercations, with neighborhood disputes dominating.

Organization and Structure. The CDS program has been a part of Dade County's Circuit Court since January 1, 1979.

It presently employs 7 staff-members and 13 mediators. The Director of the CDS is an attorney, all of the mediators are college graduates and 75% have a background in either the law or the social sciences. Potential mediators go through a screening process of interviews and role-playing and are trained by observing actual hearings.

In order to use the services of the CDS a client must be a resident of Dade County. In 1978 the CDS closed 3,083 files must of which were referrals from the police and the D.A. or self-referrals.

The CDS has a close working relationship with Legal Aid, Legal Services, Citizen Information, Animal Control Safe Streets (a division of the Police) and Small Claims Court. It gets referrals from these agencies as well as referring clients to them. The CDS does not deal closely with any landlord organizations but it does make referrals to various tenant organizations in Dade County.

Process. The CDS uses in-person mediation and fact-finding to resolve housing disputes. Ninety percent of the housing complaints received by the CDS are mediated and approximately 80% of these are resolved at mediation. Resolution results in a written agreement between the parties; however, the CDS does not attempt to enforce these agreements, or to conduct a follow-up of the disputants.

The easiest housing cases for the CDS to handle are those which revolve around needed repairs. Once the landlord is notified by the CDS that these repairs need to be done, he usually complies. Those that are most difficult are collecting back rent and helping tenants involved in condominium conversions, due to the fact that the CDS does not have the power to force a tenant to pay back rent or a landlord not to convert his building.

If the CDS did not exist or if a disputant preferred not to use its services, there are other agencies to which he could take his housing-related disputes, such as Small Claims Court, the State Attorney's office, Tenant Education Association of Dade County or a private attorney. However, all of these remedies require either time and/or money and it is probably because the CDS is fast and free that so many disputants use it.

Our interviewee (an intake officer of the CDS) believes that the CDS could handle a larger caseload of housing-related disputes, and that as more people become aware of the program, through public service announcements and the like, the number of cases will increase somewhat. However, there will still be a problem with disputants' reluctance to do anything about their disputes and with the CDS' lack of power to order compliance. The interviewee also feels that the CDS could and should become more aware of the various agencies that can help resolve housing-related disputes when the CDS is unsuccessful, but she does not perceive a need for a more formal referral relationship with the judicial system in Dade county.

Housing-Related Dispute Caseload. The number of housing disputes has remained fairly constant from the start of the program. Approximately 13% of the total caseload is housing-related. The major types of tenant complaints

in this category involve landlords' refusal to return security deposits and to make repairs. Landlords commonly complain that a tenant has vacated their apartment taking landlord-owned items with him, or leaving the apartment a mess. A breakdown of housing-related caseload, typical referral sources and resolution rates appears in Table 2.

Impressions. The interviewees for the Miami CDS were a judge, the Chairperson of the Tenant's Organization, and an informed community member.

Only the tenant organizer had any opinion on what the original goals of the project were and he though that it was designed to establish better landlord-tenant relations and to provide a more convenient forum for resolving disputes. The judge commented that he thought the CDS was a good "dumping ground" for the State Attorney's office. He said that they refer many cases to the project which don't belong there.

There was agreement about why clients go to the project—because it's more efficient, cheaper, faster and less formal than the court. One interviewee felt that many clients go to the project because the State Attorney will not allow many of the cases to go to Court.

These interviewees had a complaint common to those we interviewed about other community mediation programs—that they don't publicize themselves enough. They believed that many community members are not aware of the project and that publicity and outreach should be increased. One respondent felt that there should be more centers in other areas of Dade County, so that people who could not get to the current one, such as the elderly, would be able to use the CDS project's services.

The project makes no special effort to get clients with housing-related disputes, however, all of the interviewees feel that it's a proper forum for housing disputes. Some types are those involving security deposits, living conditions and needed repairs. All felt it was unsuited to eviction cases and that those should go to court which can force compliance with its decision.

Although all respondents were positive about the CDS project, one interviewee suggested that it should make more of an attempt to reach and help two groups of people—those who are renting apartments which are being converted to condominiums and the elderly. These groups comprise a large segment of the Miami tenant population and are presently experiencing a lot of problems and this interviewee sees the project as one potential source of aid for them.

Rochester, New York—AAA CDS Project

Project History. The Rochester Community Dispute Services Project began in July 1973 with LEAA funding and is operated by the American Arbitration Association.

Prior to the establishment of this project, the American Arbitration Association National Center for Dispute Settlement conducted some successful mediation in Rochester to resolve community disputes. Many community members felt that a local dispute settlement center would be helpful in resolving many types of disputes between community members as well as providing them an alternative process to court resolution.

Almost 75% of the CDS project's cases are either harassment, assault, or property disputes. The distribution of cases has not changed over time. Most of the cases are referred from the Court Clerk in Rochester, with some from the clerks of other Monroe County towns, as well as self-referrals.

Organization and Structure. The staff includes the following persons.

There is a Project Director responsible for the overall operation of the project, a coordinator responsible for training, a Tribunal Administrator responsible for scheduling dispute hearings, an Administrative Assistant responsible for clerical duties and maintenance of fiscal records, and an Intake Worker responsible for intake screening of cases at the clerk's and court's office. There are 88 mediators available and they are community members. The project provides extensive mediator training (40 hours) which includes role playing and case studies.
(extra typed copy as an insert is found on the last page of this article)

Impressions. There were 3 people interviewed regarding the Rochester CDS Program.

These included the Complaint Clerk, the Director of the Housing Authority, and an informed community member. One of these interviewees felt that the CDS was originally established as an advisory agency to help those who could not afford to go through the traditional dispute resolution process, and had then evolved into an independent third-party, designed to handle disputes. The others knew the historical facts described in the last section. The common consensus was that the project needs to get out into the community and make potential clients more aware that the CDS exists and is a viable means of resolving certain types of disputes.

All agreed that the CDS was a proper forum for handling certain types of housing disputes. These are the disputes, as one interviewee put it, "in the grey area, with no right or wrong. Usually there is some culpability on both sides, and the court cannot handle this type of problem well." The types of disputes that the CDS is well suited for were thought to be a broad range of landlord-tenant disputes including eviction, pet problems, problems about children, security deposit and code violations. Those problems not suited to be resolved through mediation were described as disputes with high evidentiary standards, discrimination cases, and contractual disputes.

Besides the problem of not publicizing itself in an attempt to get more cases, the lack of training in housing law was thought to be a problem, and one interviewee suggested increasing both legal and housing-related training for mediators. The interviews concluded with more suggestions that the project publicize itself and its methods as well as supply the mediators with more information about how to deal with public assistance and welfare tenants.

Dorchester, Massachusetts: The Urban Court Program

Project History. The Dorchester Urban Court Program was initially funded by LEAA in the Spring of 1975.

The original objectives of the program included resolving potential criminal disputes in a manner which would help prevent future criminal recurrences. Emphasis was to be placed on resolutions being affected as early as possible in the criminal justice process by providing for intake capacity at the Station House, the Prosecutor's office, and the Clerk's office so that the burden on the court would be decreased.

These objectives have not been fully realized. No intake capacity was ever developing at the Station House or Prosecutor's Office and most of the Court referrals come from the judge and not the clerk. The present objective of the program appears to be simply the processing of disputes between non-strangers in such a way that they are able to explore arrangements that might eliminate future conflict between them as well as mitigate the negative effects of past conflict.

Organization and Structure. The Urban Court has strong community ties, although it has been incorporated into the Dorchester Court.

There is a board composed of community members who deal with policy decisions concerning the Urban Court and since the courts in Massachusetts are decentralized the Dorchester District Court, it is, in a way, a community-based Court. However, the Urban Court has not had a history of referrals from community organizations or agencies and it is not clear if publicity alone could change this.

The project currently employs 3 staff members and approximately 50 volunteer mediators. The staff and most of the mediators have a background in social service or community work. There are no specific prerequisites for becoming a mediator and the trainees are chosen on the basis of a personal interview. The training is quite extensive, consisting of approximately 70 hours of lecture, observation and role playing, conducted by IMCR, who has also trained mediators from other community mediation programs. The training of mediators does not cover housing-related issues, nor does the program employ either a legal or housing expert.

Process. The project uses in-person mediation to resolve disputes. There is an initial complainant intake, then a respondent intake and a mediation session is scheduled, usually within a week.

If an agreement between parties is reached at mediation, it is in the form of a written agreement and both parties receive a copy. The Urban Court does a follow-up 30 days and 90 days after the mediation session, and if the 90 day follow-up is positive, the charges (if any had been filed) against the respondent are dropped at that time.

The prerequisites for becoming a client of the project are simply an ongoing relationship with the other disputant (in actuality there have been some cases where the parties were strangers or barely knew each other) and an agreement by both parties to have the dispute mediated.

Housing-Related Dispute Caseload. The project handles approximately 300 cases a year. The majority of the cases (71%) involve either assault, threats or property damage, and 60% of the cases are referred by the Judge. 61% of the disputants are either married, romantically involved, or neighbors. The frequency of housing related disputes has remained fairly constant over time. About 10% of the caseload can be considered landlord/tenant problems.

The Urban Court could handle a larger caseload of housing-related disputes and in fact their caseload of all types of disputes is less than they would be able to handle. Part of the problem lies in the low frequency of self-referrals, likely due to inertia on the disputants' part combined with lack of knowledge about the whole process of mediation. There is also a reluctance on the part of the clerk to refer cases and almost a refusal by the police to make referrals. More cooperation by these referral sources would likely increase general caseload and consequently housing-related caseload.

Impressions. Interviews were conducted with five people who were knowledgeable about the Dorchester Urban Court.

These included the Dorchester District Court Administrator, the Executive Director of the Criminal Justice Foundation (who originally conceived the idea of the Urban Court), manager of the Dorchester Little City Hall, and two mediators (one of whom is presently a U.C. staff member). The respondents see the U.C. as having had two original goals: to relieve the court of the burden of minor criminal offenses and to give the community a chance to participate in the criminal justice system. The U.C. is presently a part of the Dorchester District Court and most of its referrals are criminal or potentially criminal cases which come from the judge. Most of these interviewees felt that the court should expand the scope of the project and handle both criminal and civil cases as well as encourage referrals from sources such as the police, social service organizations, schools, YMCA and special interest organizations (e.g., landlord/tenant groups).

All agreed that the primary reason disputants went to the program was because the court directed them. Other reasons were the program's informal structure, its impartiality, its responsiveness to the needs of the disputants, and the fact that it is free. The Court Administrator pointed out that the mediators and disputants were not required to comply with the standard rules of evidence and no criminal records resulted from mediation. All respondents assured the interviewer that a good rappart existed between the community and the program, that a majority of the users were well satisfied with their experience, and that most community members supported the program's continued existence.

These interviewees seemed unsure about the role of the U.C. in the resolution of housing disputes. They felt that the major source of housing-related disputes at present is the Court, the major source of all their cases, with only a very small number of referrals from social service agencies or self-referrals. All agreed that in-person mediation, as conducted by the U.C., was a proper forum for most housing disputes, although the respondents thought that cases involving large sums of money or major housing code violations were not amenable to mediation. The respondents suggested that if the project wanted to handle more housing disputes it would have to make more of a conscious effort to get referrals of civil cases, which most housing disputes are.

Other suggestions included conducting more follow-up after mediation, having more involvement with the community, instituting some means of enforcing settlements, tying into the Housing Court the way it now is with the Dorchester District Court, improving accessibility, and increasing outreach. Only one respondent (the original creator) had a suggestion about future housing-related goals or directions for the U.C. He suggested that one way of getting involved with housing disputes would be for the U.C. mediators to go directly to housing projects and tenant associations and conduct mediation for them.

The interviewees were aware that the police have a very negative attitude towards the U.C. They feel that police officers view it as a more liberal extension of what they consider a too liberal court. They stated, however, that all other groups they could think about were positive and that the U.C. has made the community closer and more aware of itself. Its major strength was thought to be this benefit to community and its lessening of both direct and indirect cost to litigants. Its weakness appeared to be primarily a lack of funds, overstaffing, and being forced to keep within court guidelines and directives. (These were five highly positive respondents; however, it must be remembered that they are all presently, and have been for years, involved with the Urban Court in either a direct or indirect capacity.)

Vancouver, B.C.: The Office of the Rentalsman

Project History. This provincial government agency was established in July, 1974 and has exclusive jurisdiction to rule on all landlord-tenant cases in British Columbia.

It evolved out of a timeliness of developing a mechanism to resolve landlord-tenant disputes (because of an extreme housing shortage) as well as the government's desire to extend security of tenure to tenants. An administrative "tribunal" appeared to be a more viable forum than the Courts. The Office of the Rentalsman is unique among programs studied in that it is devoted exclusively to housing-related problems. Its client population represents a cross-section of tenants (low, middle, high income) and landlords (large, middle-sized, "Mom and Pop"). There are no prerequisites for being a Rentalsman client other than being a party to a tenancy agreement in British Columbia.

The Rentalsman's goals continue to be:

(1) to provide a fast, easily usable alternative to the courts in the area of landlord and tenant law; (2) to provide adjudication, mediation, public counseling, on-site investigation (a unique feature of this office), and research; and, (3) to increase the self-governing of tenancies. Goals have been changing their drift in the sense of emphasizing "service" rather than "regulations."

Organization/Structure. The Office reports to the Provincial Government's Minister of Consumer and Corporate Affairs.

It is also responsible to the judicial system in the sense that judicial appeal is available on all Rentalsman orders on a point of law or jurisdiction. It has no Advisory Committee and it has no specific relationship to the local Bar.

The Office maintains liaison with landlord organizations, tenant organizations, management corporations, the Housing Ministry, the Human Relations Ministry and the Law Society. Most landlord organizations (except some of the large ones) and management corporations like it. Tenant organizations—whose thrust was hugely diluted by the advent of the office—tend to dislike the Rentalsman.

The Rentalsman's office employs 44 fulltime professionals and 25 fulltime clerical people. Legal expertise is provided by local practicing attorney consultants. Legal consultants are used mainly for judicial reviews, drafting legislative amendments and interpreting legislation on related common law when "new" issues arise. A housing expert is used to (1) estimate annual increases in operating costs; (2) formulate and assess methods of removing rent controls; (3) analyze rental housing trends and new construction; and, (4) analyze trends in rent increases and need for subsidies.

The majority of mediators have completed at least a University education. Twenty-five percent of them have graduate degrees. Only 10% are lawyers. Although most of the mediators are lay people, they all receive inhouse legal and counseling training which consists of 30 days of paralegal, legislative and communication training as well as workshops and counseling. Senior management staff and specialized lawyers provide the training, which is totally housing-related. Mediators are retrained continuously through workshops, file reviews, policy reviews, and staff meetings.

Housing-Related Dispute Caseload. In 1978, 15,490 files were opened, 14,896 files were closed. 225,264 inquiries were received. All of these were, by definition, housing-related.

Most cases come to the Office by self-referral and walk-in. Landlord organizations and tenant organizations follow as the most significant referral sources. Moreover, each mediator (Rentalsman Officer) handles about 800 cases per year. (Prerequisites for becoming a mediator/Officer are paralegal, communication and counseling skills and the mediators are selected through public (civil) service competitions.)

The Rentalsman's office seeks out a comprehensive range of housing-related cases, including evictions, security deposit claims, repairs, covenants of a tenancy agreement, abandonment. Security deposit disputes have increased both in number and in their percentage of total caseload.

There has been a tripling in security deposit cases in the past four years and a modest increase in the other types of housing-related cases. The form of resolution for housing disputes ranges from pure information giving, through mediation to binding orders. (See Tables 3, 4 and 5.)

Process. The Office utilizes a wide range of special procedures in resolving disputes including telephone interviewing, fact finding, telephone negotiation/mediation, on-site investigation, telephone investigation, in-person mediation, and arbitration/"adjudication."

More specifically, the process works like this: most initial contact is by telephone, where an attempt is made to obtain sufficient information to resolve the issue. Most disputes are resolved initially. Otherwise, a file is opened and an attempt is made to resolve the issue by talking to or writing to each party. If explaining rights and obligations, or mediation does not resolve the matter, a hearing is held and a decision made by a presiding officer. There are no follow-up procedures.

The Rentalsman staff thinks that its most important function in teaching disputants how to resolve their future disputes without third party intervention lies in providing education on rights and obligations to avoid future disputes.

The project has been very successful in its efforts to encourage the public to bring it housing disputes for resolution.

Advertising, brochures, public meetings, mass mailings, media coverage of certain cases are a few of its public relations strategies. In a nutshell, the average person on the street knows where to go with a housing-related conflict. Still, there may be some landlords and tenants who are not aware of the legislative and the Office continues to broaden its outreach. With additional manpower, it could handle even more cases than it does.

The Rentalsman can most easily resolve rent arrears or troublesome tenant problems, since eviction can be accomplished in a relatively short time and rent arrears are easy to establish. The most difficult cases to handle are security deposit claims. Although individual disputes may not be difficult, the high volume, subjective nature, and often trivial amounts in dispute create a substantial drain on the tribunal's resources.

Under new leadership, the Office is currently engaged in trying to improve its operations.

A large number of changes are in the making, including: implementation of a relatively "flat" modified matrix organization; decentralization; installation of a video word processing system; upgrading officers; installation of an on-line computer system; reduction of certain procedural requirements of the legislation (removing unnecessary regulations for landlords, closing several loopholes); increasing the jurisdiction of security deposit claims to that of the Small Claims Court; and, implementing a filing fee to discourage trivial disputes.

The Rentalsman staff see no reason for a more formalized relationship with the judicial system. The Office has more cases than it can handle efficiently. And, since officers are both mediators and adjudicators, if mediation doesn't work, a dispute is adjudicated with the same effect of a court decision.

Impressions. Interviewers spoke with an attorney, a judge, a landlord organization director and a tenant's organization director about the research.

Although there are many criticisms voiced about the Rentalsman's Office by virtually all publics (policy makers, attorneys, judges, landlord organizations and tenant organizations), on balance it is considered an excellent concept albeit needing improved administration and services. Improvements are expected under the new leadership.

The Office's major strengths, according to our interviewees, are accessibility, the provision of legal advice and "rights", availability to educate and back-up "Mom and Pop" landlords, and investigative power. Weaknesses mentioned were that it is too slow, requiring too much paper-shuffling, and being understaffed. Not surprisingly, landlord and tenant organizations each think that the Office is biased toward the "other side", although other research indicates that individual tenant users think it is fair, while at least some landlord users think it is tenant biased. There is also a worry that the legal expertise of the Rentalsman staff is inadequate

Overview

In general, tenant organizations are less positively disposed towards these projects because of housing shortages which reduce landlords' motivation to have cases mediated. Experience has shown that it is extremely difficult to convince landlords to agree to mediation even if it is explained that it can reduce costs to have the dispute settled quickly and outside of court.

Data returned to us indicate that, on the average, 11% of the projects' caseloads consist of housing-related disputes. Landlord-tenant, security deposit, and property damage cases and neighbor assault/harassment cases are the common kinds of housing disputes handled by these projects, although there are also varying opinions as to whether these are, in fact, "housing" cases. There was, however, consensus that eviction and discrimination cases are too difficult to mediate and should be handled by the appropriate judicial or administrative forums.

Although we were told that these projects are a proper forum for handling many types of housing-related disputes, we were also told (ironically, by a lawyer-run operation as well as others) that more legal expertise and training (especially in housing codes) is needed. There was also general agreement that the projects would be strengthened if there was some kind of enforceability mechanism.

Across the board, it was agreed that these projects' major strengths are their informality and speed; their major weaknesses are lack of funds and lack of cases as a result of inadequate community awareness of their existence and functioning.

After discussing their collective data-gathering from all of the projects, our interviewers felt that public education through TV, radio, newspapers and outright advertising would dramatically increase the housing dispute (and other types, for that matter) caseload. They also thought that, given a prevailing push for preventative law, it might be useful to have a clause in any tenancy lease stating that any dispute arising between landlord and tenant within the life of the lease must go to mediation or arbitration. (This is common in many types of contracts but would have to be made to appear beneficial to both landlord and tenant.)

The data collected and analyzed so far indicate that these projects are able and, with a few changes, willing to handle housing-related disputes . . . although there is some difference of opinion as to which kinds of disputes, aside from evictions, they should not handle. It also seems that only a small portion of their caseloads is related to housing (except in Vancouver: a special case). It appears that poor public awareness of projects' specific capabilities to handle housing disputes is at least at the root of their small caseloads. Individuals with whom we spoke indicated that if the projects acquired more expertise in housing problems and legislation as well as promoted themselves more, they would find themselves playing an increasingly important role in the resolution of housing-related disputes.

TABLE 1

COLUMBUS NIGHT PROSECUTOR'S PROGRAM
HOUSING-RELATED DISPUTES

Type	Estimated % of Total Monthly Filings	Typical Referral Source	Usual Procedure	% Resolved By Program
Code Violations: building, health, sanitation, etc.	4%	City Department	Mediation	78%
Tenant v. Tenant, Neighbor v. Neighbor	Frequent	*	Mediation	*
Repair bills by Tenant	Some	*	Mediation	*
Tenant initiated complaints	Some	Tenant's Union	50% Phone 50% Mediation	93%
Owner v. Builder/ Developer	Some	*	Mediation	*

*No information available.

MIAMI CITIZEN DISPUTE SETTLEMENT CENTER
HOUSING RELATED DISPUTES

Type	Estimated % of Total Monthly Filings	Typical Referral Source	% Resolved by CDS	Alternate Resolution Mechanism
Tenant: Suit for Rent Deposit	4.5%	State Attorney	60%	Small Claims Cour
Landlord: Suit for Back Rent	2.5%	Police	40%	Small Claims Court
Tenant: Repair Bills by Tenant	1.5%	State Attorney	75%	Small Claims Court
Tenant (defense in eviction)	1.5%	Police	50%	Municipal Court
Neighbor against Owner/Tenant	1%	Police	50%	Municipal Court
Neighbor vs. Neighbor	1%	Police	80%	Small Claims or Municipal Court
Condominium Conversion	.5%	Word-of-Mouth	10%	Would not be handled formally
Tenant initiated Complaints	.5%	Police	80%	Small Claims or Municipal Court
	13%			

TABLE 3

OFFICE OF THE RENTALSMAN
HOUSING-RELATED DISPUTES

Type of Dispute	Estimated % of Total Monthly Filings	Referral Source	How Dispute Is Usually Handled by Project	Special Problems
Eviction-nonpayment of rent	1%	Landlord	Adjudication	Tenant has either paid or not
Eviction-to recover possession	10%	Landlord	Mediation/adjudication	
Eviction-early violation offense (early termination)	9.5%	Landlord	Mediation/adjudication	
Landlord: suit for back rent	N/A	Landlord	Send to Small Claims Court except security deposit disputes	
Tenant: suit for rent deposit	36%	Tenant	Mediation/adjudication	Attitude of protagonist—"Principle, not money."
Tenant-related; repair bills by tenant	9%	Tenant	Onus on landlord to repair	Procrastination by landlord
Rent control actions/decisions	23%		Reference to Act	
Tenant initiated complaints	4%	Tenant	Landlord directed pursuant to Act	Landlord reluctance to comply
Tenant (defense in eviction)	13%	Tenant		
Tenant vs. Tenant (e.g., noise)	.64%	Tenant		
Tenant housekeeping violations (damage)	.13%	Tenant		
Subjects: building, health, sanitation, noise, etc. (misc. and general information)	11%	Landlord/Tenant	Telephone Intake Person	
Other subjects: a) essential services	3%	Tenant	Landlord *ordered* to restore or rent redirected	Oral tenancy agreements can make it hard to establish liability
b) abandonment	3%	Landlord	Landlord directed pursuant to the Act	Storage and disposal of chattels

TABLE 4

OFFICE OF THE RENTALSMAN

Type of Dispute	Who Typically Initiates Dispute	Where Dispute Would Typically Have Been Resolved If Not By Rentalsman's Office
Eviction: nonpayment of rent	Individual landlord	Small Claims Court
Eviction: to recover possession	Individual landlord	Small Claims Court
Eviction: violation of lease	Individual landlord	Smalls Claims Court
Landlord: suit for back rent	Individual landlord	Small Claims Court
Tenant: suit for rent deposit	Individual tenant	Small Claims Court
Related: repair bills by tenant	N/A	Small Claims Court
Rent withholding and reduction	Individual landlord or tenant	Small Claims Court
Rent control actions/decisions	Individual landlord or tenant	Housing Court; Municipal Court
Condominium conversion	Individual landlord	Housing Court; Municipal Court
Condemnation and demolition	Individual landlord	Municipal Court
City agency-initiated complaints	N/A	
Tenant-initiated complaints	Individual tenant	Housing Court
Tenant (defense in eviction)	Individual tenant	Small Claims Court
Neighbor against owner/tenant	N/A	Small Claims Court
Tenant vs. tenant (as noise)	Individual tenant	Municipal Court
Tenant housekeeping violations	Individual landlord	Housing Court; Municipal Court
Subjects: building, health, sanitation, noise, zoning, some environmental cases, etc.	Individual tenant	Housing Court; Municipal Court
Co-tenancy suits and counterclaims	Individual tenant	Small Claims Court
Neighbor vs. neighbor	N/A	Small Claims Court
Owner vs. owner (condo & HOAs)	N/A	Small Claims Court
Owner vs. condo management	N/A	Small Claims Court
Owner vs. builder/developer	N/A	Small Claims Court
Contract purchaser vs. realtor	N/A	Small Claims Court
Applicant vs. financial agency	N/A	Small Claims Court
Other subjects: amenities, aesthetics, security, upkeep, assault & battery, harrassment	N/A	Small Claims Court

TABLE 5

OFFICE OF THE RENTALSMAN

NATURE & NUMBER OF RESIDENTIAL TENANCY FILES OPENED

Type Case	DECEMBER, 1978	YEAR TO DATE
Security Deposit	597	5,612
Rent Increases	2	35
Service of Facility	30	458
Tenant Damage	3	20
Repairs	113	1,326
Privacy	7	136
Noise & Disturbance	10	99
Abandonment	30	433
Illegal Eviction	2	78
Distraint	13	245
Subletting & Assigning	—	15
Locks and Access Restrictions	9	97
Attornment	—	1
Disputed Termination 24(2)	142	2,040
Application for Order for Possession 14(2)	112	1,535
Miscellaneous	130	1,570
General Information	6	160
Rent Arrears	13	155
Application to order Early Termination	138	1,475
TOTAL	1,357	15,490

Footnotes

1. For the purposes of this research "housing problems" encompass the relationship a person has to his dwelling unit, neighbors, owners and managers, beyond the purely landlord-tenant relationship.

2. Fred M. Dellapa, *Alternative Dispute Resolution Mechanisms (ADRM) and Housing Disputes*, March 1979, submitted to the American Bar Association Special Committee on Housing and Urban Development Law.

3. The programs chosen for study were: The Columbus, Ohio, *Night Prosecutor's Program*, the Miami *Citizen Dispute Settlement Program*, The Rochester, New York, *American Arbitration Association Community Dispute Services Project*, the Dorchester, Massachusetts, *Urban Court Program*, the New York *Institute for Mediation and Conflict Resolution Dispute Center*, the San Francisco *Community Board Program* and the Vancouver, British Columbia, *Office of the Rentalsman*. Information regarding the New York and San Francisco program was not received in time for this paper but will be incorporated into the final draft.

4. William L. F. Felstiner and Lynne A. Williams, *Preliminary and partial report on mediation as an alternative to criminal prosecution: a case study of the Dorchester project*, Report to NILECJ, LEAA (1979).

5. If one includes neighbor v. neighbor another 23% is added. However, at present we have no statistical breakdown of what proportion of the neighbor cases involve housing issues, since many of them involve non-housing (e.g. racial) issues.

6. Office of the Rentalsman, Monthly Statistical Report.

7. Ann Barthelmes Drew, *Draft report on the Office of the Rentalsman*, Report to NILECJ, LEAA (1979).

ROCHESTER, NEW YORK -- INSERT ABOVE PARAGRAPH TITLED "IMPRESSIONS"

Of the 85 mediators, 20 are

A specifically trained in housing-related dispute resolution. The project does have access to a housing expert who advises the staff and mediators on such matters as housing technicalities, appraisals and repair estimates. These services are now rendered voluntarily but future plans involve retaining them on a contractual basis.

Process

The Rochester CDS considers on-site investigation as standard procedure where a housing-related dipute is involved. Very little telephone interviewing is done unless it is for follow-up purposes. The CDS focuses primarily on in-person mediation, fact-finding, and arbitration, if needed. If a resolution is reached it is in written, notarized form and it reflects either a consent between the parties (mediation) or an award issued to one party (arbitration). The project attempts to enforce these agreements/awards through follow-up procedures.

Follow-ups are conducted for a total of 20 weeks (first at a 4 week interval after the hearing, then 2 weeks later, then 10 weeks later). There is a telephone interview or personal visit with the complainant and the respondent; if the agreement is not working, the complainant is advised to refer the case to court.

Housing-Related Dispute Caseload

The CDS has handled housing disputes from the beginning, but the number of these disputes has increased over the years. There have been large increases in cases which involve general landlord/tenant or management/tenant matters, faulty warranties, overdue rent and eviction. Eviction more often than not escalates to harassment or assault before it reaches the CDS. The project claims a 78% resolution rate for housing-related disputes. The other 22% are referred to court for judicial resolution.

Mediation is the most commonly used method for the resolution of housing disputes, however the CDS will arbitrate if requested to do so. The majority of referrals come from the court (Judge and District Attorney) with the remaining . mostly walk-ins ;. most complainants are landlords.

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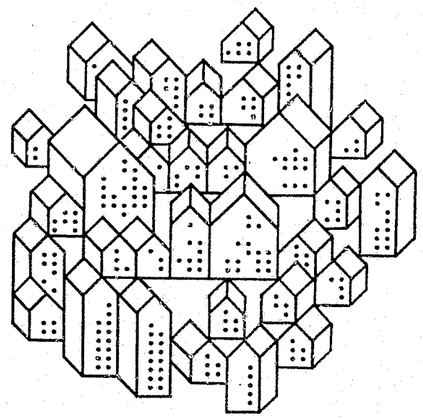
PROGRAM MODELS

Neighborhood Justice Centers

An Analysis of Potential Models



Office of Development, Testing and Dissemination
National Institute of Law Enforcement and Criminal Justice
Law Enforcement Assistance Administration
U.S. Department of Justice

Neighborhood Justice Centers

An Analysis of Potential Models

by

Daniel McGillis

Joan Mullen

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CHAPTER 2
NEIGHBORHOOD JUSTICE CENTERS: AN ANALYSIS OF MAJOR OPTIONS

Neighborhood Justice Centers can clearly vary on a wide range of dimensions, from where they are located to how they acquire cases, to how they process appeals, etc. For the purposes of this study, twelve major dimensions on which Neighborhood Justice Centers can vary will be discussed. These dimensions comprise the most obvious, and probably the most significant variables for characterizing specific Neighborhood Justice Centers. The dimensions are:

1. the nature of the community served
2. the type of sponsoring agency
3. project office location
4. project case criteria
5. referral sources
6. intake procedures
7. resolution techniques
8. project staff
9. hearing staff training
10. case follow-up procedures
11. project costs
12. evaluation

Table 2.1 presents a summary of the six sampled dispute processing projects in terms of these twelve dimensions. In addition, information is provided regarding the staff organizations, the models used in developing project structures and additional services provided by the projects.

Table 2.1
Major Characteristics of the Six Sampled Dispute Processing Projects

FEATURES \ CITIES	Boston	Columbus	Miami	New York City	Rochester	San Francisco
Project Name	Boston Urban Court Project	Columbus Night Prosecutor Program	Miami Citizen Dispute Settlement Program	Institute for Mediation & Conflict Resolution Dispute Center	Rochester Community Dispute Services Project	Community Board Program
Start-up Date	9/75	11/71	5/75	6/75	7/73	In planning stages
Community Served						
Name	Dorchester District, Boston, Massachusetts	Franklin County, Ohio	Dade County, Florida	Manhattan and Bronx, New York	Monroe County, New York	Selected Sections of San Francisco
Population	Dorchester: 225,000	County: 833,249 Columbus: 540,025	County: 1,267,792 Miami: 334,859	Manhattan: 1,539,233 Bronx: 1,471,701 Total: 3,010,934	County: 711,917 City of Rochester: 296,233	San Francisco: 715,674
Sponsoring Agency						
Name	Justice Resource Institute (non-profit)	City Attorney's Office, Columbus, Ohio (Contractor: Capital University Law School)	Administrative Office of the Courts	Institute for Mediation & Conflict Resolution (non-profit)	Rochester Regional Office of the American Arbitration Association (non-profit)	Community Board Program (non-profit)
Source of Funds	Law Enforcement Assistance Administration	Originally Law Enforcement Assistance Administration. Now city funded	Law Enforcement Assistance Administration	Law Enforcement Assistance Administration	Law Enforcement Assistance Administration	Foundation Funds
Location	Private storefront near the court	Prosecutor's office	Government building which also houses court & district attorney	Office building in Harlem, not near court	Downtown office building near the court	Likely to have offices in the neighborhoods
Case Criteria						
General Rationale	Generally ongoing relationships among disputants	Generally ongoing relationships among disputants and bad checks	Generally ongoing relationships among disputants	Generally ongoing relationships among disputants	Generally ongoing relationships among disputants	Generally ongoing relationships among disputants

Table 2.1 (continued)
Major Characteristics of the Six Sampled Dispute Processing Projects

FEATURES \ CITIES	Boston	Columbus	Miami	New York City	Rochester	San Francisco
Case Criteria (continued)						
Types of Cases	36% family disputes; 20% neighbor; 17% friends; 10% landlord/tenant; 17% miscellaneous	39% interpersonal disputes, 61% bad checks	Statistical data are not currently available. Many assaults, harassments, neighborhood problems, domestic problems	Statistical data are not currently available. Cases include both misdemeanors and felonies	Approximately 2/3 are interpersonal criminal matters, 14% city regulations, 5% bad checks & miscellaneous. May begin to process family court cases	Not Applicable
Referral Sources						
Walk-ins	See Other	(to prosecutor)	20% approximately	6%	1975 14% 1976 18%	(likely to be high)
Police	2.2%		20% approximately	42%	– 1%	(likely to be high)
Prosecutor	See Bench	Most cases received through this office	60% approximately		6% 11%	
Clerk	33.4%			52%	66% 70%	
Bench	57.4% (including district attorney)	10-15% approx.			11%	
Community Organizations	See Other				– –	"Third party" referrals will be encouraged
Other	7%				2% 0%	
Screening/Intake Procedures	Staff member attends morning arraignment sessions; staff also answer calls from bench. Interviews conducted at court or project office	Staff members of district attorney's office & intake staff of project refer disputants to project. Respondents are requested to appear at hearing or face possible charges	Intake staff are located at the project office & interview clients referred to the project from other criminal justice agencies	Cases are received from intake workers at summons court, criminal court, & police desk of district attorney's office	The project intake worker screens and refers cases at the clerk's office. Walk-in cases are screened at the project's office	Currently being developed

Table 2.1 (continued)
Major Characteristics of the Six Sampled Dispute Processing Projects

FEATURES \ CITIES	Boston	Columbus	Miami	New York City	Rochester	San Francisco
Resolution Techniques						
Type	Mediation	Mediation	Mediation	Mediation followed by imposed arbitration if mediation is unsuccessful. Only 5% of cases have required imposed arbitration	Mediation followed by imposed arbitration if necessary. In 1976 40% of cases heard required an imposed arbitration award	Mediation
Enforceability of Resolutions	Court cases continued pending follow-up after mediation	Disputants are informed that case charges will be filed if case is not satisfactorily resolved. Respondents are occasionally placed on prosecutorial probation	Disputants are informed that case charges may be filed if case is not satisfactorily resolved	Arbitration agreements are prepared at the end of all hearings & are enforceable in the civil court	Arbitration agreements are prepared at the end of all hearings & are enforceable in the civil court	Peer pressure
Time Per Hearing	2 hours	30 minutes	30 minutes	2 hours	One hour and 45 minutes	Not Applicable
Availability of Repeat Hearings	Rarely more than two	Rarely used	Very rare	Most cases are completed in 1 session. Small number require two	Rarely used	Not Applicable
Use of Written Resolutions	Yes	Rarely used	Yes	Yes. Resolutions are binding	Yes. Resolutions are binding	Yes (unsigned ones are planned)
Hearing Staff Qualifications and Training						
Type	Diverse group of community members	Law students	Professional mediators	Diverse group of community members	Diverse group of community members	Diverse group of community members
Form of Recruitment	Widespread advertising, group contact	Contacted by staff at Capital University Law School	Through community contacts	Contacts with community groups and agencies	Contacts with organizations	Widespread effort to contact. Community meetings
Number Used Per Session	2-3	1	1	1-3	1	5
Rate of Payment	$7.50 per night	$3.75 per hour	$8-10 per hour	$10 per session	$25 per case	Not determined yet (may be same as jurors)

Table 2.1 (continued)
Major Characteristics of the Six Sampled Dispute Processing Projects

FEATURES \ CITIES	Boston	Columbus	Miami	New York City	Rochester	San Francisco
Hearing Staff Qualifications and Training (continued)						
Training	40 hour training cycles originally conducted by IMCR, and now by local staff	12 hours of training conducted by the Educational and Psychological Development Corporation	Discussions and co-mediation with experienced mediators	50 hours of training conducted by IMCR	40 hours of training conducted by AAA	2 day training cycles are planned
Follow-up Techniques						
Appeal/Rehearing Availability	Yes, but rare	Rarely used. Disputants can return on new charges	Yes, but rare	Only if both parties agree. Parties can appeal under state law if they feel award was arrived at fraudulently	Yes, if both parties agree	Probably appeal to new board
Follow-up Contacts	Disputants are contacted two weeks after hearing and again three months later	Disputants are contacted 30 days after hearing to see if resolution is being maintained	No. Project plans follow-up in summer of 1977	Yes. 30-60 days post hearing to see if resolution is being maintained	Assist in maintaining resolution if contacted. No systematic re-contact	Some follow-up planned
Case Preparation for District Attorney/Court	No	Yes. Charging material is prepared and filed if necessary	Court is contacted regarding outcomes	No	No	No
Overall Costs and Unit Costs						
Annual Operating Budget	$105,268****	$43,000	$150,000	$270,000	$65,000*	$167,500
Total Annual Referrals	350	6,429** (1976)	4,149 (1976)	3,433***	663 (1976)	Not Applicable
Cost/Referral	$300	$6.69 plus in kind costs	$36.15	$78.65	$98.03	Not Applicable
Total Annual Hearings	283	3,478 (1976)	2,166 (1976)	649***	457 (1976)	Not Applicable
Cost/Hearing	$372	$12.36 plus in kind costs, approximately $20	$69.25	$416 (recently $270)	$142	Not Applicable

Table 2.1 (continued)
Major Characteristics of the Six Sampled Dispute Processing Projects

FEATURES \ CITIES	Boston	Columbus	Miami	New York City	Rochester	San Francisco
Goal Achievement						
Total Annual Referrals	350	6,429 interpersonal disputes in 1976; 10,146 bad checks; total = 16,575	4,149 (1976)	3,433 extrapolated from 15-18 months through November, 1976	663 (in 1976)	Not Applicable
Percentage Having Hearing	71%	54% of interpersonal disputes	54%	46% hearing scheduled, 19% held due to clients resolving disputes	69% (in 1976)	Not Applicable
Percentage of Hearings Resulting in Resolutions	89% (i.e., written agreement)	Not Applicable	Project reports 97%	100%: 95% mediated, 5% arbitrated	100% due to arbitration provision. 60% mediated agreement; 40% arbitrated agreement	Not Applicable
Percentage of Failures to Uphold Resolutions	15%	10% (survey of 892 1976 cases)	Not Available	9% according to a follow-up	Unknown	Not Applicable
Percentage of "Resolved" Cases Returning to Court	Unknown	2.2%	Not available	Less than 1%	5% seek enforced agreement	Not Applicable
Project Organization						
Total Number of Project Staff	4	Approximately 5 full-time equivalents	8	10	6	5½
Administrative	Supervisor	Coordinator, Director	Program Director, Administrative Officer	Executive Director, Center Director, Summons Court Supervisor, fiscal officer	Project Director, Coordinator, Tribunal Administrator	Project Director Program Manager
Intake	2 case coordinators	6 senior clerks, 6 clerks	3 intake counselors	Intake Coordinator, Intake Worker, Police Liaison	Intake Worker (partly by Tribunal Administrator)	2½ organizers
Social Service	Case coordinators provide referrals	8 social work graduate students	Social worker	Social worker		

Table 2.1 (continued)
Major Characteristics of the Six Sampled Dispute Processing Projects

FEATURES \ CITIES	Boston	Columbus	Miami	New York City	Rochester	San Francisco
Project Organization (continued) Mediation	Approximately 50	Approximately 30	Approximately 20	Approximately 50	Approximately 70	Will train approximately 50
Clerical	Administrative Assistant	None	1 secretary, 1 receptionist	Receptionist, Administrative Assistant	Administrative Assistant, Receptionist	Evaluator
Project Models	IMCR Dispute Center		Columbus Project Rochester Project	Rochester Project, Columbus Project, Jewish Conciliation Boards, Bronx Youth Project	Philadelphia Arbitration As An Alternative Project	Danzig's model of Community moots
Additional Services Provided	Disposition program/victim service component	Problem drinker's group, battered wives' group			Community Group Dispute Resolution, training programs	Community Group Dispute Resolution

NOTES:

* Total budget is $126,723, including additional components (community group dispute resolution and community organizational training).
** Interpersonal disputes only — bad check cases add an additional 10,186 referrals but involve very little project case processing time.
*** Extrapolated from aggregated data on initial 18 months of referrals through November 30, 1976.
**** Based on portion of larger Urban Court Budget attributed to the mediation component; case figures are estimates for the corresponding years (6/77 - 6/78).

In the sections that follow, each of the major dimensions is discussed in turn, and an attempt is made to identify the advantages and disadvantages of the various options that are available on each dimension. In some areas, specific options seem to be clearly preferable due to empirical findings or logical analysis. In many other cases, however, the selection of a given option is more difficult because data regarding the relative merits of comparable options are not available, or the selection of an option is heavily determined by one's vision of the aims of Neighborhood Justice Centers as well as by the available data. Various value judgments which can influence the choice of Neighborhood Justice Center components are discussed along with a review of available empirical data.

2.1 The Nature of the Community Served

Neighborhood Justice Centers can clearly be developed in many types of communities. The need for Neighborhood Justice Centers is not likely to be constant in all areas, however. Both rural areas and small towns are likely to have many of the older dispute resolution mechanisms still intact. Churches, extended families, neighborhood police officers, and community organizations have traditionally served the function of assisting those associated with them in resolving minor disputes. Both rural areas and small towns are likely to have these institutions at least partially in place. Research on the degree to which this is true would be valuable, however, since the stereotype of the quality of support institutions in rural areas and small towns may be lagging behind the realities in those areas. The citizen dispute processing projects which have been developed have tended to be in urban areas and have been justified in part because of the atomistic life styles common in the cities, and the consequent lack of ties with traditional dispute resolving institutions. Barring research to the contrary, urban communities and their associated lower courts would seem to be in the greatest need of dispute processing projects.

Within urban areas, dispute centers have been developed in a variety of communities. The demographic makeup, governmental structure, and other characteristics differ widely between the cities studied, with New York's project having a potential target

population of over three million, while Rochester's primary target population is 296,000.

A number of strategies are available for selecting a target population within a given urban area. In Rochester, Miami and Columbus, the local projects accept cases from throughout the counties in which they are located. Referrals from within the specific cities tend to dominate the case loads and project offices are located in or near the downtown areas of the cities in each case. The Miami project has made a concerted effort to encourage referrals from throughout the county and has established three branch offices in outlying government buildings.

The Boston, New York City, and San Francisco projects have all adopted a different strategy and have been structured to receive referrals from just a portion of the city's population. In New York, two boroughs--Manhattan and the Bronx--are served. However, the vast populations in these boroughs make their combined population of over three million far larger than those of the counties served by other projects. Thus, while New York is serving a portion of the city population, its target clientele can hardly be characterized as a small intimate group. In fact, the relatively small percentage of referred cases which go on to hearings in the New York project may imply that the area served is too large and disparate to benefit from the community spirit present in smaller areas. The Boston project only provides services to the Dorchester district of the city, an area with a population of approximately 225,000. This area is quite large but is still considered to evoke a "sense of community" from its residents. The San Francisco project is working to localize its target areas within limited and highly circumscribed areas of San Francisco. The project is currently establishing its first community board and has chosen an area of the city referred to as Visitacion Valley. This area has a total population of approximately 22,000 and is considered to be composed of five subcommunities. The project presently plans to develop two community panels, one in the Geneva Towers area which is a predominantly black community, and one in the upper and lower valley area which is made up primarily of whites and Samoans.

An alternative is to define a target community by demographic characteristics rather than geographic areas. Available census data would enable researchers to define these non-geographically

based communities. In some sense, for example, subcultural groups form a "community" regardless of the location of their residences. However, substantial logistical difficulties are likely to occur in defining a project's target community solely in terms of demographic characteristics, due to the need to publicize the program to a widely dispersed "community" and to educate referral sources to supply only clients with specific characteristics. In addition to logistical difficulties, limiting the target community in this way can eliminate one of the strengths of a project. Numerous projects have found that they serve as a meeting ground for people with different ethnic, racial and socioeconomic characteristics. The Rochester project, for example, was founded by an interracial advisory board after the city experienced racial conflict during a major school reorganization. The Boston project has served a similar function of bringing together a community with a rapidly changing demographic makeup.

The experience of these latter two projects confirms the desirability of locating Neighborhood Justice Centers in communities whose residents have shown an interest in group problem solving. At one extreme, Rochester and Boston were communities experiencing fairly severe conflict as a result of changing racial balances. However, this issue served to organize the communities, raising a spirit of activism extremely conducive to program development efforts. As the founder of Boston's project noted, "The voices were often negative, but at least there were voices." Similarly, communities with active citizen groups--be they strong tenants' associations or neighborhood improvement groups--may be expected to yield a receptive climate for neighborhood justice.

Another factor critical to project success is the receptivity of the community's criminal justice system. All of the operating projects studied rely heavily upon criminal justice agencies for referrals. It is doubtful that a project would receive sufficient referrals if it relied only on the community and social service agencies, unless perhaps it were intra-institutional, serving only a housing project, school, or other contained group. The San Francisco project does plan to rely heavily on walk-ins and referrals from community sources, on the assumption that citizens need a real neighborhood alternative to official contact. Nevertheless, in the absence of any experience with this model, the support of official criminal justice agencies can be considered crucial. Clearly, the presence of other police or court reform projects is a reasonable indicator of the reception a project is

likely to receive. Once key officials have accepted a program, the efforts of the project staff are likely to be primary determinants of the ongoing cooperation and referral policies of criminal justice agencies. In general, planners of the projects studied were able to gain the initial support of most of the relevant police, prosecutorial and judicial officials; any remaining skeptics have been won over by observing project staff and operations.

2.2 Type of Sponsoring Agency

The choice of a specific form of organizational sponsorship is likely to be influenced by a number of factors including the types of cases desired, the specific stage of criminal justice processing seen as most appropriate for diversion into mediation, the availability of organizations willing and able to sponsor the project and the degree of coercive authority desired by the project. The most basic decision to be made is whether the project is to be attached to a governmental agency or to be under private sponsorship.

2.2.1 Private Organizational Sponsorship

Four of the projects which were studied intensively are sponsored by private agencies. A central advantage of private sponsorship is the ability of the program to project an image of total neutrality. Any project which is attached to criminal justice system agencies has the automatic problem of being viewed by some as presumptively biased in favor of the complainant. This assumption is particularly common in the case of projects attached to the police or the prosecutor. A second related advantage is the reduced stigmatization to the parties in having their dispute processed by a private organization. Even in the case of complaints which are dismissed at early stages of criminal justice system processing, defendants typically suffer some loss of face to their peers merely due to the contact with the system. In the case of reciprocally hostile relationships in which both parties have consistently antagonized one another, this stigmatization of the party which "lost the race to the courthouse" is likely to be particularly galling and may serve to harden the resentment of the defendant against the complainant independent of other aspects

of their dispute. A third advantage of private sponsorship is the ability of the project to develop a broad base of support among community members, and to use the services of community members in all phases of project development. Private projects such as the San Francisco Community Board and the Rochester Community Dispute Services Project have governing boards made up of a diverse range of community members. In many cases these governing boards have developed the basic structure of the project from the grassroots up (e.g., see the San Francisco and Rochester case studies). These projects can claim to be community-based in the most fundamental sense of the word, and this attribute may enhance the likelihood of the project's receiving certain types of cases which would not voluntarily enter a system developed from the top down. Government sponsored projects can presumably also develop advisory boards of community members. These boards could not have the governing authority of boards operating private organizations, but could provide significant input into the policy decisions and structure of governmental projects.

Private agency sponsorship has disadvantages as well as advantages. If a project is interested in receiving referrals from criminal justice agencies rather than just from the community, close ties must be maintained with those agencies. Decisions within the agencies can have a profound impact on the vitality of the project. For example, the development of the pre-warrant hearing procedure by the Clerk's Office in Rochester, and the revised practices in case docketing in the Summons Court in New York City have had significant impacts upon the referrals received by the Rochester and New York projects. Similarly, the Boston project's dependence upon the court for referrals makes the project vulnerable to any policy or personnel changes in the court. The sections on "referral sources" in the respective case studies provide examples of the ways in which referral agency policies can dramatically influence project operations.

Attempts to develop privately sponsored dispute processing projects should include careful attention to the development of close working relationships with criminal justice referral sources. Project designers should keep the possibility in mind that total dependence on a single agency can conceivably result in control of internal project policies by that agency by the selective provision of referrals contingent on project compliance with agency desires. The above cited advantages of private sponsorship would be likely to rapidly disappear in situations in which the

"private" project is a de facto branch of a specific governmental agency.

An additional consideration in deciding between private or public sponsorship of a dispute processing project is the availability of professional assistance in operating the project. Two of the four privately sponsored projects reviewed in this study were sponsored by agencies with a great deal of sophistication in dispute resolution. The American Arbitration Association has sponsored numerous Arbitration As An Alternative Projects for the settlement of citizen disputes including the Rochester project studied here. The Institute for Mediation and Conflict Resolution has similar extensive experience in dispute resolution and sponsors the New York project. The availability of organizations such as these as a resource provides considerable advantages to some privately sponsored projects.

The question of long-term funding is also relevant to the choice of public versus private sponsorship. Public agencies have ongoing budgets and have the capacity to "institutionalize" projects. Private agencies often experience great difficulties in continuing program operations after the federal demonstration funds run out. To the extent that a private project's achievements can rub off on relevant public agencies, projects are likely to acquire public agency support which can be translated into funding support from the city or county budget. One possible mechanism for this generalization of a private project's successes to public agencies is partial collaborative operation under some contractual arrangements with the referral agencies. These arrangements would enable the typically politically sensitive agencies to receive some credit for project achievements, and yet this shared credit would be unlikely to diminish the projects significantly. Total dependence on public agencies for contractual support would be less desirable because when cutbacks were forced upon the agency, the project contract would be a likely early target.

2.2.2 Public Agency Sponsorship

Two of the sampled projects are sponsored by governmental agencies. The Columbus Night Prosecutor Program has been institutionalized as part of the Columbus City Attorney's Office, and the

Miami Citizen Dispute Settlement Project is operated by the Administrative Office of the Courts in Florida's 11th Judicial Circuit. The Columbus project has an additional interesting feature, in that the actual day-to-day operations of the project are carried out by Capital University law students under contract to the City Attorney's Office, thus combining agency sponsorship with the use of personnel from a private institution.

Government agency sponsorship has a number of advantages. First, the problems in case referrals experienced by some privately sponsored dispute processing projects are less likely to occur. Particularly when the project is attached to the Prosecutor's Office or the Clerk of Court's Office, referrals are under the control of the sponsoring agency and can be varied appropriately to enable the project to have sufficient referrals. Agency sponsorship can also be used to compel the appearance of respondents. The fact that the agency controls arrests (in the case of the police) or charges (in the case of the prosecutor) can make a "request" to appear on agency stationery very persuasive. The privately sponsored Rochester project, for example, initially used project stationery in letters to respondents, but later changed to Court Complaint Clerk stationery to further encourage the appearance of respondents.

The disadvantages of government agencies are the mirror image of the advantages cited for the privately sponsored projects: (1) a presumption of bias in favor of the complainant may occur in the case of agency sponsorship, (2) stigmatization of clients may occur simply due to the association with the criminal justice system, and (3) difficulties are likely to occur in fully integrating community members into the development and operation of the project.

The choice of a specific governmental agency will depend upon the project developers' interest in intervening at a specific stage of case processing and also on the willingness of agency officials to support the development of a dispute processing project. The police, the prosecutor's office, and the courts are three major possibilities for project sponsorship.[1]

52-434 O - 80 - 25

• *Police Sponsorship*

A dispute processing project affiliated with the police would have the advantage of intervening at the earliest possible stage in case development. The San Francisco Board Project has decided to use the police as the primary source of referral, and has received the support of the police in their plans. The primary advantage of police sponsorship is the ability to receive cases close to the time of the incident and before the system has expended considerable resources and perhaps stigmatized the defendant as well. Pre-arrest diversion of cases into the dispute project would avoid the need for the elaborate and expensive booking procedures commonly practiced by the police at arrest. Photographs, fingerprinting and their transfer to Washington and state police files, record checks, etc. are all costly. These procedures are needed in the case of serious crimes but are often superfluous in the case of interpersonal misdemeanor cases among acquaintances. The expense is particularly unjustified when such a high percentage of these cases are dismissed due to the lack of interest on the part of the complainant in pursuing the case. When dismissals occur fingerprint records must be retrieved from Washington and the state police, photographs destroyed, etc. Many police departments have revised their operating procedures to avoid arrests where possible and use summonses in their place for the less serious crimes. This procedure saves many of the expenses associated with arrests, but substantial costs are still incurred in presenting the summons to the defendant and in processing the many relevant forms in multiple copies. A dispute processing project could simply receive referrals from police officers prior to the initiation of normal police procedures. Complainants could visit the project's office and have the project contact the respondent to schedule a hearing. The use of police stationery and the threat of arrest would be likely to insure the presence of a high percentage of respondents.

The major advantage which the police would receive from the development of a dispute processing project would be the ability to maintain some control over the case. Under current procedures, the police lose control of a case once a charge is brought. Police dissatisfaction with prosecutor or court processing of cases has often led the police to desire greater control over the case processing mechanisms. In pre-arrest referrals to the dispute processing project, the police can still hold the threat of arrest over the defendant, and thereby retain an option for action with regard to the defendant. While this aspect of project

sponsorship is an advantage to the police, problems with due process and the protection of defendants' rights quickly arise. Recent literature on diversion projects has begun to grapple with the complexities of constitutional rights as they relate to diversion programs.

Presumably, a police sponsored project would result in the department's structuring incentives for officers to refer complainants to the project. Currently, police referrals to projects which are sponsored privately or by non-police governmental agencies have not been vigorous. For example, in New York City, the IMCR Dispute Center originally intended to receive most of its referrals from the police in specified New York City police districts. The project learned, however, that many officers were hesitant to refer clients to the project when they could "make a bust" instead. Officers making arrests receive "collar credit" from the department and their peers which provides prestige and presumably possibilities for eventual promotion or raises. A similar experience has occurred in the other cities studied. The Public Safety Department in Dade County has been the only police department in our sample which appears to very actively make referrals to its local dispute processing project. The source of these referrals is the crisis intervention unit in the department called the Safe Streets Unit. This unit has a "sociological" orientation to the disputes it deals with and officers receive the equivalent of "collar credit" for referrals to the Citizen Dispute Settlement Project in lieu of arrest.[2]

• *Prosecutor Sponsorship*

The Columbus Night Prosecutor Program and its successors in other communities (see case study for listing) have favored sponsorship by the prosecutor's office. The prosecutor's control over charging places him in an advantageous position for diverting cases to dispute processing projects while maintaining the option to still bring charges. The cases reaching the prosecutor have incurred system expenses already if the police have made an arrest or have otherwise devoted considerable energy to the case. Supporters of police referral oppose waiting until a case reaches a prosecutor because of these expenses. Supporters of prosecutor referral feel that it may be superior to wait until cases reach the prosecutor, because presumably many cases which do not belong in the system or the dispute processing project will be eliminated by the time they reach the prosecutor. Others feel that virtually no disputes are

too minor to warrant project processing if they are perceived to be important by the disputants, and these individuals would strongly oppose the notion of waiting until the system discourages certain disputants from pursuing their case before making referrals to the dispute processing project.

Specific aspects of prosecutor sponsorship need little discussion here since the Columbus project and its close relatives have demonstrated that the procedure is workable, at least for the cases reaching the prosecutor. The issues of presumed bias toward the complainant, stigmatization, etc. are of course still viable. Even though the projects work in the sense of processing large caseloads with relatively low cost and apparent low rates of return to the system, these projects may still not be optimal when compared to other mechanisms.

- *Court Sponsorship*

The Miami Citizen Dispute Settlement Project is sponsored by the Administrative Office of the Courts. The primary advantage of court sponsorship is the close structural ties possible with criminal justice agencies. The Prosecutor's Office is likely to cooperate with the project in referrals simply due to the reciprocal power held by both the courts and the prosecutor. The problem of presumption of bias in favor of the complainant is also likely to be reduced somewhat, due to the court's traditional image as a neutral forum. On the other hand, the problem of possible stigmatization of the defendant is likely to increase if the court serves not only as the sponsor but also the primary referral source since the defendant will typically already have been processed by both the prosecutor and the police before reaching the state of referral from the clerk or the bench. In the case of the Miami project, the primary source of referrals is the prosecutor's office, and thus sponsorship by the courts does not result in most referrals being from the court. In Boston, on the other hand, the project is sponsored by a private organization and yet receives the majority of its referrals from the court.

- *Summary Comments*

In the final analysis, a great many factors will inevitably determine the choice of an organizational sponsor for a dispute processing project. The discussion above highlights some of the

issues which should be considered by program planners in their choice of an institutional home for new projects.

2.3 Project Location

To a large extent, the physical location of the project is closely related to the nature of its sponsoring agency. Columbus is both physically and administratively tied to the prosecutor's office, Miami to the court. The remaining projects are operated by independent agencies and are located in independent facilities--Boston in a storefront near the court, Rochester in an office building near the court, and New York in an office building in Harlem, some distance from the court. San Francisco, which expects to deal predominantly with police and community referrals, plans to locate its community Boards in informal settings within the neighborhood.

An independent location reinforces an image of neutrality, conveys a more relaxed informal atmosphere which may be more conducive to dispute resolution, and, if the court or prosecutor is overburdened or understaffed, avoids pressures to become involved in routine case handling tasks.

The advantages of an official location are also compelling: ease of access to referrals, immediate communications with court personnel, an atmosphere which reinforces the serious nature of the mediator's task, and greater opportunity to institutionalize project procedures into daily court routine.

Obviously, any project should be readily accessible to its clientele, and, ideally, can be located in close proximity to its major source of referrals. However, given proper access (and assuming adequate official space is available), the issue of independent vs. official location presently appears to be an open question.

2.4 Case Criteria

A number of factors need to be taken into account in devising case criteria for a dispute settlement project. These factors

include (1) the nature of the relationship among the clients, (2) the level of seriousness of the offense, (3) the role of civil vs. criminal matters, (4) the inclusion of domestic matters, and (5) the inclusion of matters which are essentially not amenable to mediation but are useful to the system, such as bad check cases. Each of these factors will be discussed in turn.

2.4.1 The Nature of the Relationship Among Clients

All of the projects reviewed in this study have tended to place primary focus upon disputes occurring among individuals with an ongoing relationship of some sort, whether as relatives, landlord-tenant, employer-employee, neighbors, etc. Sander points out in his Pound Conference paper that in the case of ongoing relationships there is "potential for having the parties, at least initially, seek to work out their own solution," and that this approach "facilitates a probing of conflicts in the underlying relationship, rather than simply dealing with each surface symptom as an isolated event".[3] Mediation among strangers is clearly more difficult because the victim, if he has a valid complaint, has little more to compromise with the respondent than he has already. Victim restitution projects have been established to deal with these situations but generally rely on an adjudicated verdict of guilt prior to bringing the two parties together. Thus, a guideline of some form of ongoing relationship seems advisable. Johnson et al. (1977) in their monograph Outside the Courts have stressed the values of ongoing relationships as a critical feature for successful arbitration. They point out that "one study [by Sarat (1976)] determined that when a party has the choice of arbitration or adjudication, the most relevant factor in the decision is the relationship of the disputing parties. Where there has been a significant past relationship or anticipation of a continuing future relationship, arbitration is more likely to be selected. Responses by former disputants indicated that in four times as many arbitrated cases as adjudicated cases it was easier for the parties to get along with each other in the future."[4]

2.4.2 The Level of Seriousness of the Offense

Citizen dispute processing projects can clearly deal with a wide range of offenses from minor grievances which would normally have

never surfaced to the attention of the criminal justice system to serious felonies. The various projects have differed significantly in the types of disputes they feel are appropriate. The New York project has begun to take referrals on felony cases from the New York Criminal Court and is establishing a branch office in Brooklyn which will process only Criminal Court referrals from that borough. On the other hand, the San Francisco project intends to process cases which might otherwise not have been referred to the criminal justice system due to hesitancy on the part of the complainant to involve the respondent in the criminal justice system.

The experience of the various projects seems to be that mediation is effective for a very broad range of offenses as long as the disputants have an ongoing relationship and a stake in coming to some resolution. This finding makes sense when one considers that the difference between a minor assault and a very serious felonious assault often involves the accuracy of the assailant's aim in striking the victim rather than the degree of animosity in the relationship. Further research is needed to determine the limits in the seriousness of offenses which are amenable to mediation. The Institute for Mediation and Conflict Resolution has had success in mediating cases as serious as rape, robbery, burglary, kidnapping, grand larceny, and a second degree assault. To the degree that complainants were deeply involved with the defendant and wished to reconcile with him, the process seems to have been successful. One can clearly envision many serious crimes among people with ongoing relationships for which mediation would seem extremely unsatisfactory to the complainant. As Danzig points out in his work on community moots, "Due process considerations, danger, the need for professional training and dispassionate commitment all make community handling of 'true crime'--crime with victims, crime which provokes a passion for retribution and a need for extended incarceration of the 'criminal'--a poor subject for community controlled decentralization."[5]

In any event, most projects will no doubt want to perfect their skills in the processing of relatively minor disputes before moving on to felonies. Time would be required to develop mediators with sufficient skill to handle the extreme emotional complexities likely to arise in many felony cases. Thus, minor disputes involving violations of ordinances, misdemeanors, and some matters which would have never reached the criminal justice system seem appropriate for beginning Neighborhood Justice Centers.

2.4.3 The Role of Civil Vs. Criminal Matters

All of the projects which were studied process civil matters as well as criminal matters. The Miami project categorizes approximately 25 percent of its caseload as being civil rather than criminal in nature. The Boston Urban Court Project is currently soliciting Small Claims Court matters, and the Columbus project has developed a working relationship with the local Small Claims Court. In Columbus normal procedures for Small Claims Court cases involve an initial interview at the court, then a mediation session, and finally the hearing of the case by a referee. If disputants have the Night Prosecutor Program mediate their case and are unsuccessful in resolving the matter, the Small Claims Court will waive the requirement for the initial interview and the mediation session at the Small Claims Court and proceed directly to place the case on the docket of one of the referees for a hearing.

The question of what limits to place on the size of civil matters referred for mediation is a difficult one. Sander has discussed the issue of using the amount in dispute as a guidepost for selecting a dispute resolution forum, and points out that "when one considers the lack of rational connection between amount in controversy and appropriate process" one can appreciate the problems that have occurred in trying to allocate cases by this rubric.[6] Sander notes that, "quite obviously a small case may be complex, just as a large case may be simple."

A common thread tying together the various civil matters processed by the projects is the existence of an ongoing relationship between the disputants discussed earlier. The projects have been willing to process cases in which a person has a complaint against his corner store owner. In these cases the two disputants may have known each other for years and will continue to have contact. A similar dispute regarding merchandise or services arising out of a complainant's contact with a large department store would not be acceptable because the respondent for the complaint would, of necessity, be an institution rather than an individual. Many civil matters among relatives, neighbors, and acquaintances, such as failures to pay back debts or deliver on promised services, can quickly become criminal matters. The confrontation with the acquantance on the "civil" matter can often culminate in relatively uncivil behavior categorized by the police as criminal.

A project's choice of whether to accept civil cases, and if so, what proportion of the caseload to devote to such cases, will be determined in part by the project's funding source, its sponsoring agency, etc. It should be noted that both of the projects sponsored by criminal justice agencies, i.e., Miami and Columbus, have still been willing to process civil cases when the cases seemed amenable to mediation.

2.4.4 The Inclusion of Domestic Matters

The degree to which projects process cases involving divorce issues such as custody, visitation rights, support payments, etc. is dependent upon the project's relationship with the local court. In New York City, for example, the IMCR project will agree to mediate various divorce-related matters, but is not allowed to arbitrate these matters because of the Family Court's desire to retain control over these cases. The Family Court in Rochester is very interested in the possibility of the project arbitrating divorce-related issues, and negotiations are currently being conducted between the project and the Family Court which may lead to the project extending into this area. Many assault cases received by the various projects involve married couples in the process of divorcing. The Miami newspapers have provided extensive coverage of the Miami project's efforts in mediating assaults between spouses, and the Family Court has expressed interest in working closely with the project.

In short, the inclusion of domestic matters, such as the terms of divorce actions, differs somewhat among the projects. If appropriate authority can be delegated to dispute processing projects, domestic legal matters seem to be quite well suited for their form of case processing. Sander points out the need for experimentation in this area and states, "Where there is a breakdown of the family as a result of death or divorce, the courts have customarily become involved and it is here that alternative dispute resolution devices, particularly mediation, need to be further explored."[7]

2.4.5 The Inclusion of Matters Not Essentially Amenable to Mediation

Citizen dispute settlement projects at times provide a useful forum for the processing of non-mediational cases. For example, the Columbus project processes over 10,000 bad check cases per year, and these cases comprise 61 percent of the project's caseload. The cases are not "mediated" in the strict sense of the word. Merchants will arrive on bad check case evenings (Monday and Wednesday) with a list of individuals who have provided them with bad checks. The individuals are assembled in hearing rooms and are called to the front to meet the merchants and explain the absence of money in their account. The complainant in these cases is often simply a representative of a large chain store, and has never had any form of relationship with the respondent, except perhaps by mail. The issues at hand tend to be factual, e.g., "You bought the hibachi, didn't you?", "Where's the money?", etc., and very little give and take of the type characteristic of true mediation sessions is likely to occur. The reason for the inclusion of this type of case in an otherwise "interpersonal" dispute processing program is straightforward. The service is useful and efficient for the prosecutor's office, and the prosecutor is the sponsor of the project. Whether this type of case processing influences the public's view of the project adversely is difficult to determine. It is possible that especially poverty-stricken individuals would view the project as an arm of the wealthy and would be hesitant to bring their own disputes to the project after they or a friend had their bills collected by the project. Intake cases observed during the site visit did not support this negative image, however, and many very poor individuals were observed bringing in highly personal minor disputes to the program for mediation. A sample of opinions of others in the city would, of course, be needed before this anecdotal evidence should be accepted as of value.

Projects will need to consider the likely impact on their image resulting from processing cases such as the bad check cases in Columbus. Cases in which institutions serve as the complainant against citizens may well adversely affect a project's reputation, particularly among the underprivileged. Empirical work is needed to test if this is really the case. Adding a component which enables the individual citizen to reciprocally bring complaints against institutions may at least even the score, although the role of "mediation" in either type of case where institutions are one party and a citizen is another seems questionable. In fact,

unequal power relationships of any sort can be troublesome in mediational programs. Johnson et al. (1977) in their monograph Outside the Courts point out that other forums such as newspaper consumer complaint columns, media hot lines, ombudsmen, etc. may be particularly useful in the case of unequal power relationships among disputants.[8] They note that "it is feasible, and possibly useful, to conceive of these institutions not as mechanisms which actually resolve disputes but as ones which facilitate the negotiation process by equalizing the bargaining power of the contending parties." For example, in regard to media complaint centers Johnson et al. note, "Their ability to publicize arrogant behavior on the part of commercial enterprises tends to neutralize the bargaining advantage such enterprises traditionally enjoy in their relations with individual consumers."

2.4.6 Summary Regarding Case Criteria Issues

The preceding discussion simply provides some guideposts regarding the development of case criteria. Each project will need to thoughtfully consider the types of cases it wants to process in light of its vision of the possible services it can render to local citizens, and in light of the constraints placed upon it by its institutional affiliations and referral sources.

2.5 Referral Sources

Section 2.2 on "sponsoring agencies" has also provided considerable discussion on the advantages and disadvantages of various referral sources. As that discussion indicated, a continuum of referral sources is represented among the programs reviewed, beginning with San Francisco which is the strongest preventive model and will primarily accept its referrals from the community and the police, the continuum includes primary referrals from the prosecutor's office in Columbus, the Clerk's Office in Rochester and finally the entire spectrum of court-based referral sources in Boston.

Earlier intervention clearly implies lower immediate costs to the system to the extent that cases diverted would have proceeded on to the next stage in the criminal justice process. Even if the

case might not proceed on the basis of the instant offense, if it is believed that the behavior left unchecked is likely to escalate and motivate future criminal incidents, cost savings may still be involved--if not calculable--in the long term.

It should be noted, however, that in some communities cases referred by the police may involve a large percentage that would not be likely to result in arrest, cases referred from the prosecutor may be those least subject to prosecution, and so forth. In Boston, for instance, the project has not been able to negotiate a referral arrangement with the police due to union concerns of reduced overtime benefits from attending court sessions. Should access be gained to this source of referrals, it is likely that the cases will be those which might present officers with difficult situations that would only at some future point result in arrest.

Research is needed on the trade-offs involved in processing cases which never would have received substantial criminal justice system attention, versus devoting resources primarily to cases firmly caught up in the system. Sander discusses issues relating to the surfacing of cases which normally are not processed by the criminal justice system, and states "whether that will be good (in terms of supplying a constructive outlet for suppressed anger and frustration) or whether it will simply waste scarce societal resources (by validating grievances that might otherwise have remained dormant) we do not know." Sander notes that "the price of an improved scheme of dispute processing may well be a vast increase in the number of disputes being processed."[9]

Given the multiplicity of goals inherent in the concept of neighborhood justice, the choice of referral strategy will be a reflection of a project's particular objectives, as well as the access routes permitted that project by official criminal justice agencies. However, a model which intervened at all stages in the pre-trial process from informal citizen complaints through arraignment may well represent a strategy that allows for the maximization of both citizen needs for a dispute resolution forum and system needs to divert cases which are inappropriately consuming criminal justice system time, facilities, and personnel.

2.6 Intake Procedures

A number of issues are relevant to the construction of intake procedures including (1) the degree to which the project actively pursues the complainants and encourages their participation in the project, (2) the use of threats to respondents for failure to appear versus the use of voluntary agreements to appear at hearings, (3) the use of cooling off periods prior to the conduct of a hearing, and (4) the use of signed agreement to participate in a hearing prior to the conduct of the hearing. Each issue will be discussed in turn.

2.6.1 The Degree of Active Pursuit of Complainants

Once clients have been referred to the project from whatever referral source, the project has the choice to actively pursue complainants or to rely on the complainant to appear and participate in the project. Many projects experience striking attrition between referral and the conduct of a hearing. For example, the IMCR project in New York received 1,657 referrals during the first ten months of operation. In 662 cases the referred complainants decided not to take further action and appear at the Dispute Center following the referral. Furthermore, 146 additional complainants agreed to have a hearing scheduled and then decided not to appear. These data can be interpreted in a number of ways. Failures on the part of complainants to pursue a case can simply indicate that they have been able to resolve the dispute, with the pressure from the project on the respondent perhaps facilitating that resolution. The IMCR project has conducted an informal study which indicates that this type of resolution can occur in many cases. The lack of complainant follow-through on a case may also indicate that complainants are wary of institutional attempts to solve their problems and have decided to avoid becoming too entangled in projects which intrude on their life. Rigorous data are needed to determine the causes for case attrition at the various stages of case processing. If cases are actually being solved outside of the project, active pursuit of referred complainants would be an invasion of their right to solve their problems privately. If, on the other hand, case attrition is caused in large part by disaffection with institutions in general, conscientious efforts to encourage complainants to participate in the project such as phone contacts or personal contacts may be in order.

2.6.2 The Use of Threats for Failure to Appear Vs. Voluntary Requests of Respondents

A second issue involving project intake procedures is the choice to threaten respondents for non-appearance and participation in the project versus requests for voluntary participation by the respondent. Projects using binding arbitration as their means for resolving disputes such as those in Rochester and New York must rely upon the voluntary agreement of respondents to participate. No citizen dispute projects which deal with criminal matters have compulsory arbitration. Some courts, such as those in Pennsylvania, have adopted compulsory arbitration as the means for settling relatively small civil claims. An arbitration project can conceivably use threats of further action in the criminal courts by the complainant to persuade the respondent to appear at the project and learn about the arbitration program, but cannot force the respondent to agree to arbitration.

The Miami and Columbus projects and the Rochester pre-warrant hearing project of the clerk's office all use very threatening letters to compel respondents to appear for mediation with the complainant. The typical closing line in the letters is, "Failure to appear may result in the filing of criminal charges based on the above complaint." Official stationery is used and the district attorney or a similar official signs the letter.

The Boston project and the newly forming San Francisco project are mediational projects, which stress the importance of the voluntary participation of the respondent. The Boston project strongly urges respondent participation, but requires the respondent's signature agreeing to participate in a hearing.

The value of the various approaches needs to be researched. Preliminary examination of the available data from the projects indicates that voluntary compliance can at times produce low cooperation from respondents.

2.6.3 The Use of Cooling Off Periods Prior to Hearings

None of the six citizen dispute settlement projects employed cooling off periods prior to the conduct of hearings. Projects typically hold hearings seven to ten days after the complaint is received. The Rochester pre-warrant screening project operated by the clerk's office in Rochester (described in the "referral source" section of the Rochester case study) does employ a cooling off period. Misdemeanor complainants presenting complaints at the clerk's office are informed that a pre-warrant hearing will be scheduled to be held three weeks after the date of the complaint. Complainants are informed that the clerk's office will attempt to arrive at a resolution between the complainant and the respondent at that time. The pre-warrant hearing project cooling off period has resulted in a high rate of withdrawal of complaints by complainants during the three week period while they are awaiting the hearing. Many other complainants simply do not appear at the hearing, and thereby cease prosecution of the complaint. The hearing officer for the project estimates that 60-65 percent of all complainants fail to pursue the complaint to the time of the pre-warrant hearing. This amounts to a sizeable number of complainants since in one six-month period in 1976 the project processed over 1,600 complaints.

The question arises with a cooling off period policy whether the disputes are successfully resolved outside of the project or the complainant is simply disgusted with institutional treatment, and sees the long delay prior to the hearing as evidence that the clerk's office has little to offer in the way of thoughtful and timely assistance for their problem. Research is needed to determine which of these interpretations of complaint attrition is the more accurate one.

2.6.4 The Use of Signed Agreements to Participate in Hearings

As was noted above, arbitration projects by definition must obtain signed agreements from their participants to join in hearings. Mediation projects do not have this requirement, and yet the Boston project has chosen to request signed agreements as symbols of the disputants' willingness to seriously deal with the issues of their dispute. Newly developed projects should consider the merits of

this type of procedure as a way of enhancing the participants' perception that they are voluntarily entering into a serious attempt to resolve their differences with the opposing party.

2.7 Resolution Technique

A wide variety of issues arise in the selection of resolution techniques and many combinations and sequences of techniques are possible. This section will discuss the merits of mediation versus approaches using a combination of mediation and arbitration. The use of social service assistance will also be discussed, and characteristics of hearings such as the number of hearing officers used, the use of written agreements, and time allotted per hearing will be explored.

2.7.1 Mediation Vs. Combined Mediation and Arbitration

Four of the projects which were studied employed mediation as the technique for the resolution of disputes while the remaining two (Rochester and New York) employed combined mediation and arbitration. Most practitioners and theoreticians seem to be in agreement that disputes should be first dealt with by mediation, even within a session that may terminate in an arbitrated decision. As part of the mediation attempt, an opportunity is typically provided for both parties to simply air their grievances, usually with the complainant speaking first. This phase of the mediational session closely approaches conciliation in which parties are simply given the opportunity to state their problems and possibly negotiate a solution on their own without third party assistance.

If the conciliatory effort does not result in an agreement among the parties (as it often does not because the parties typically use the opportunity to vent pent-up emotions), then the mediator takes the role of a third party neutral and may ask questions to help clarify issues. A mediator will typically try to identify the areas of agreement between parties and isolate the specific issues under contention. Suggestions may be made regarding possible solutions and individual caucuses may be held with the complainant and the respondent to better determine the parties'

"bottom line" position on a settlement. Disputants often find it easier to indicate possible concessions directly to a mediator without the other disputant present because no loss of face is involved. Compromises directly in the presence of the other disputant may be perceived by both disputants as a sign of weakness. An insightful mediator can work these "bottom line" settlements into the conversation in a fashion which makes them appear to be trade-offs to concessions made by the other party rather than outright concessions.

A number of the projects which solely employ mediation attempt to work toward written agreements regarding the dispute. Miami and Boston both employ written non-binding agreements as a way to affirm the existence of an agreement, and the parties sign the agreement in cases where an agreement is reached. The San Francisco project anticipates that it will use a similar approach but with unsigned agreements. The Columbus project uses mediation but does not use written agreements as the culmination of resolutions unless the parties request them. The project feels that the non-enforceability of the written agreements makes their use somewhat deceptive, because the project is providing an illusory contract which cannot be enforced if violated. If parties request written agreements, the hearing officer will write up the agreements but the project will not keep a copy on file.

Projects using mediation employ different methods to increase the probability that the agreements will be maintained. The Miami and Columbus projects make it clear to the disputants that criminal charges can still be filed if the dispute continues. The Columbus project generally keeps a filled out charging instrument in cases in which the offense was clearly criminal and prosecutable. The respondent is made aware of the fact that the charge can be easily activated. The Columbus project had a policy in the past of informing respondents who were not prepared to come to a reconciliation with the complainant or who were unlikely to maintain an agreement that they were on "prosecutor's probation" for the coming sixty days. If the agreement was broken, charges might be brought against them. This policy is less common now in the Columbus project because of the project's interest in avoiding the sham of an unenforceable threat. In actuality "prosecutor's probation" had no independent legal force, and the threat of filing a criminal complaint "stands more on the merit of the repeated offense than on the violation of the probation agreement".

52-434 O - 80 - 26

The Boston project uses a combination of threats of criminal justice system action, as is embodied in the return to the court in bench referral cases after ninety days to indicate whether the agreement is still in force, and peer pressure. The mediation panels are made up of community members who presumably might be able to pressure the parties to maintain the agreement. The Rochester and New York projects also use community mediators, but the use of only a single mediator in Rochester, and the vast size of the jurisdiction in New York mitigate against any meaningful community pressure in most cases. This limitation is likely to apply to Boston to a large degree also. The San Francisco project plans to employ peer pressure as its primary mechanism for encouraging the maintenance of agreements. The case study presented in Chapter 3 of this report discusses the project's views on peer pressure as a social control mechanism.

Arbitration projects typically engage in the same steps at hearings as the mediation projects, moving from conciliation to mediation. These projects go the additional step of imposing arbitration agreements upon disputants who fail to arrive at agreements during the mediation phase of the hearing. Furthermore, mediated agreements which are arrived at are converted into arbitrator's awards for the sake of their future enforcement. In these cases the agreement only includes those points arrived at in the disputants' own resolution.

Arbitrator's awards are enforceable in the civil courts, and the majority of states have "modern arbitration legislation" which provides the legal structure for the enforcement of arbitrated agreements. The typical procedure for enforcing an arbitrator's award involves making a motion to the civil branch of the court to confirm the award. If confirmed, this motion is followed by a motion for a specific judgment (in the case of monetary awards) or a contempt of court action in the case of behavioral agreements. Typically the staff of projects using arbitration as a resolution technique will assist a disputant in confirming an arbitrator's agreement by filling out the proper forms. In New York City the court has agreed to waive the normal fees for persons enforcing arbitration agreements arising out of the Institute for Mediation and Conflict Resolution Dispute Center's cases.

Sander has noted an interesting problem in the combined conduct of mediation followed by arbitration, and states, "There is an obvious

difficulty if the mediator-arbitrator is unsuccessful in his mediational role and then seeks to assume the role of impartial judge. For effective mediation may require gaining confidential information from the parties which they may be reluctant to give if they know that it may be used against them in the adjudicatory phase. And even if they do give it, it may then jeopardize the arbitrator's sense of objectivity. In addition, it will be difficult for him to take a disinterested view of the case - and even more so to appear to do so - after he has once expressed his views concerning a reasonable settlement."[10] Sander argues that a better procedure is to use a mediational phase followed by an arbitration phase conducted by a different person or persons in cases which need to go to arbitration. Sander notes that "the use of separate personnel, though perhaps more expensive and time-consuming, makes possible the use of individuals with different backgrounds and orientations in the two processes."

The problem of conflicts in the mediator's and arbitrator's role may be blunted in cases in which very few cases go to arbitration. For example, in the IMCR project in New York 95 percent of the cases involve mediated settlements with only the remaining 5 percent going on to an imposed arbitration agreement by the hearing officer. The Rochester project, on the other hand, has similar project procedures and yet 40 percent of the cases require imposed arbitration. The issue of the potential counterproductive aspects of using the same personnel for both mediation and arbitration needs to be explored empirically.

An additional interesting question is the degree to which the threats by some projects to file charges if resolutions are broken amount to <u>de facto</u> arbitration, but with criminal rather than civil remedies as the enforcement device. If in fact the disputants perceive the agreements which are reached in these projects to be "criminally" rather than "civilly" binding then the question arises of which type of enforcement mechanism is superior. Many supporters of civilly-enforced arbitration argue that even if mediation with threats of criminal prosecution results in "perceptual arbitration", criminal enforcement of the agreements has many drawbacks. The criminal courts do not provide restitution to the complainant but simply punish the defendant in the name of the state. The criminal courts stigmatize the defendant in ways that civil enforcement does not. And civilly enforced arbitration awards remove cases from the heavily overburdened criminal justice system through the waiver of prosecution by complainants agreeing to have their dispute processed through arbitration.

In summary, a great many provocative issues are involved in the choice of dispute resolution mechanisms. Numerous additional mechanisms are also available and appropriate for certain types of disputes, e.g., ombudsmen, fact-finders, and, of course, adjudicators. Research is needed to help with the decision of which technique or combination of techniques is most useful for the types of disputes likely to be processed by Neighborhood Justice Centers. A sequential application of mediation and arbitration seems to have promise, and the Rochester case study illustrates how one jurisdiction has combined these two approaches in a pre-warrant hearing project under the sponsorship of the clerk of court and a privately sponsored arbitration project.

2.7.2 Social Service Assistance as an Adjunct to Hearings

Many of the projects have employed social workers to assist disputants in receiving social services. The New York and Miami projects have full-time social workers on their staffs while the Columbus project uses the services of graduate school students in social work from nearby Ohio State University. In each project a certain proportion of cases never reach the hearing stage because the social work staff is able to refer the disputant to a social service agency which is able to resolve the disputant's problem. In other cases the social work staff provide follow-up services after hearings. These referral processes will be discussed in Section 2.10.

2.7.3 Characteristics of Hearings

Project hearings vary on a number of dimensions. Some projects use panels of mediators (e.g., Boston, New York and San Francisco) while others use single mediators (e.g., Rochester, Miami and Columbus). These mediators may also vary greatly in training, and the following section discusses these characteristics. Similarly, the use of written agreements varies across the projects. The time allotted for hearings also varies, with the Miami and Columbus projects generally holding hearings for approximately thirty minutes and the remaining projects holding hearings for approximately two hours each. Details of these variations are presented in Chapter 3 of this report in the individual project case studies.

2.7.4 Due Process Considerations

None of the current dispute processing projects studied have experienced due process challenges. The directors of the projects feel that the voluntary nature of the projects limits the likelihood of complaints regarding the lack of due process safeguards in project case proceedings. All disputants are free to have their disputes processed by formal judicial mechanisms and are not required to use the services of the projects. Nevertheless, the degree of coercion of project participants does differ considerably among the projects studied, and some disputants may perceive project participation to be virtually mandatory. These cases may result in future legal attempts to clarify the degree of "perceived coercion" allowable for projects of this sort before due process protections are required. A related issue involves the possible impact upon prosecutorial and judicial personnel of failures to arrive at satisfactory dispute settlements. Consideration should be given to the possibilities for prejudice against respondents resulting from unsuccessful hearings. Most of the current projects provide criminal justice agencies with very limited information regarding the content and outcomes of hearings, and would absolutely resist any attempt to have hearing officers serve as witnesses at judicial proceedings. Projects would consider such attempts to be a violation of the privileged relationships of hearing officers and disputants.

2.8 Project Staff

Table 2.1 presents an overview of the staff organizations of the six projects studied, including the total number of full-time staff, the number of mediation staff, and the titles of other staff categories such as administrative, intake, social work, and clerical. Each case study includes a detailed section titled "project organization" which provides descriptions for the various staff positions and comments on staff turnover. As can be seen from Table 2.1, staff configurations vary widely among projects, with the Boston project having only four full-time staff, while the New York project has ten full-time staff members.

2.8.1 Administrative, Intake and Social Service Staff

Major reasons for staff size variation include (1) the varying needs to supply paralegal intake staff workers at referral sources to process clients. For example, the Rochester project requires only one intake officer at the clerk's office, while the New York project requires three intake workers and a summons court supervisor to process referrals at various agencies. (2) The use of social work staff; for example, the Columbus project uses six social work graduate students for social services, while the Rochester project intake worker also processes social work referrals. (3) The size of administrative and clerical staff varies as a function of the size of the intake, social work and mediation staff.

The importance of selecting highly committed, energetic, and politically sensitive individuals for project administration is difficult to overestimate. Virtually all of the Project Directors have noted that this type of resourceful and industrious person is crucial to project success. An insensitive Project Director, regardless of the type of sponsoring agency, could easily alienate otherwise positively predisposed criminal justice officials, and a highly effective Project Director could potentially win over initially hostile officials. The recruitment of project staff should clearly be conducted with great care, and efforts should be made to locate indigenous leaders with the background and skills appropriate for the operation of the dispute processing project.

The absolute minimum staff configuration for a centrally located Neighborhood Justice Center would seem to require an administrator, intake staff worker and pool of mediators. The San Francisco plan for having three-person outreach office staffs comprised of an office manager, community liaison and organizer, in addition to mediators, provides a model for a community-based project. Projects differ in their perception of the need for legal staff at the Neighborhood Justice Center. Columbus has recently added a full-time lawyer to the staff because other staff felt that legal issues were often raised in hearings requiring the consultation of a lawyer. The New York project, on the other hand, relies on the neighborhood legal aid staff office for legal consultation, and feels that this approach is in keeping with the image of Neighborhood Justice Centers as alternatives to formal legal case processing. The sections in the report on hearing staff qualifications,

intake, referral, follow-up, etc., provide additional details on the type, characteristics, and duties of current dispute processing project staff.

2.8.2 Type of Hearing Staff

The programs discussed in Chapter 3 represent a range of hearing staff models, including lay citizens (San Francisco, Boston, New York and Rochester), law students (Columbus) and professional mediators (Miami). Two additional models not described by these programs but available for consideration include the use of nonlaw-trained graduate students or trained lawyers. Each of these types is discussed briefly below with reference to other factors which relate to the decision regarding the qualifications of hearing staff.

- *Lay Citizens*

Clearly, the use of trained members of the community as mediators is consistent and even requisite in a model of neighborhood justice which seeks to involve citizens in the remediation of community problems often inappropriately brought before the court. The use of lay citizens provides a project with mediation staff who have a vested interest in the welfare of the community and the satisfactory reconciliation of disputing parties. Moreover, the opportunity to educate participating citizens regarding the functions and problems of the court may also serve an important function in altering community perceptions of official justice.

Depending on the nature of the case and the mediator's ability and experience, Boston and New York typically use two or three trained laymen per session. Rochester uses only one per session, while San Francisco plans on a panel of five. Both Boston and New York report that they have found their sessions more balanced and more comfortable for the mediators when more than one participates. The San Francisco model, which will call on panels of five citizens in order to exert stronger peer or neighborhood pressure on the resolution process, may begin to pose questions regarding the sessions' balance of power and clients' concern of privacy. This latter model, however, has yet to be tested.

The primary disadvantages of the use of lay citizens are the monetary costs and process time associated with the management of citizen mediators. Substantial time may be required to develop community support and involve the community in program planning and administration in order to sustain that support and to engender a sense of responsibility and ownership towards the program. An additional commitment of time and resources is required to mount careful recruitment, selection and training efforts that must then be institutionalized to accommodate a turnover rate that may exceed that of a professional staff. Finally, the pool of people to be managed on an ongoing basis is likely to be larger and more difficult to schedule given the part-time availability of most community volunteers. Although lay citizens will not involve substantial salary expense, all four programs reviewed here provided or planned to provide participating citizens with stipends or fees and advocated this policy as an incentive, a token of appreciation, and a means of providing volunteers with expense reimbursement.

The credibility of lay citizens may also be a factor to consider --credibility with the project's major sources of referrals as well as its clients. In Boston, the Presiding Justice of the project's host court expressed initial concern about the potential danger of involving lay citizens in a situation of implicit power. Though these concerns proved groundless (and the project's actions are subject to numerous checks and balances through its affiliation with the court), projects further removed from official scrutiny may need to remain sensitive to this issue. The experiences of the Community Boards in San Francisco will provide an interesting test of this concern.

- *Law or Other Graduate Students*

The use of law students or graduate students of any discipline offers a number of practical advantages. First, a student model offers a contained source of applicants whose availability can be fairly accurately predicted and controlled (particularly if mediation work is offered in conjunction with regular course work as a clinical practice option). Second, mediators can be employed at a wage rate that only need be consistent with other part-time student employment opportunities (and could be offered as a course credit alternative without financial remuneration). Finally, although the training requirements are comparable to those for lay citizens, some, if not all, initial and ongoing training activity might be absorbed by the graduate curriculum.

In Columbus, the single site reviewed here that uses law student mediators, not all of these hypothetical advantages prevail. Law students are involved in the program as mediators, and social work students are available to provide counseling and referral services. All students are paid at fairly modest rates, but course credit and associated classroom training is typically not offered.

A potential disadvantage of drawing upon student populations--specifically to fill mediation roles--is the age of the group involved and their consequent lack of maturity and perhaps sympathy for the community orientation of project efforts. With particular reference to law students, a number of observers have expressed concern that training which emphasizes the development of adversarial skills for the courtroom is inconsistent with the mediational skills required in an informal hearing environment. The result may be an inappropriate reliance on facts and an authoritarian demeanor that may discourage self-initiated agreements among disputants. Recognizing this tendency, the training program in Columbus has begun to place emphasis on the development of human relations skills.

- *Professional Mediators*

In Miami, professionals with backgrounds in a variety of disciplines (including law, psychology, social work) and specialized training in mediation technique, are paid up to $10.00 per hour to hear the project's cases. The primary advantage here is clearly the availability of highly skilled mediation staff from whom the project can demand a level of professionalism and sensitivity not immediately available under a student or citizen model. Potential disadvantages include the costs of retaining professionals (without necessarily benefiting from reduced training costs); the availability of a sufficient pool to cover project needs given their competing professional demands; and the foregone opportunity to establish a strong sense of community justice.

- *Lawyers*

With the exception of those law-trained professionals who participate in the Miami project, the exclusive use of lawyers is not seen in the group of projects reviewed here. The Orlando, Florida project has used this model with some apparent success. Again, the advantages are similar to those that result from the use of

professional mediators. The disadvantages are also similar, with the additional and very serious reservation regarding the inherent adversarial rather than mediational orientation of law-trained persons.

In summary, a number of factors bear on the issue of hearing staff qualifications including the project's objectives, caseload, budget, and the availability of staff support services.. While the lay citizen model is not without liabilities, it appears to be a particularly appropriate and timely model viewed in the context of the broad goal of citizen participation in the resolution of community disputes.

2.9 Hearing Staff Training

With the exceptions of New York and Rochester (where the IMCR and the AAA respectively provide training to their own projects), projects viewed have relied--at least initially--on the use of specialized consultants to develop and assist in delivering pre-service training to mediators. Boston's Urban Court Program retained IMCR for two training cycles and now is sufficiently confident of internal staff capabilities that IMCR was asked only to introduce the third major session. In Columbus, an educational consulting organization developed the training program and instructional materials, which are now administered by project staff. In Miami, a mediator with training in psychology has recently begun to develop a formal training manual.

Boston and Rochester offer a full forty hours of formal training for new mediation staff. New York exceeds this period at fifty hours, and Columbus offers twelve hours of initial training. In addition to theoretical and practical discussions of mediation and arbitration techniques, training typically includes sessions to orient participants to the criminal justice system as well as project policies and procedures. Role playing and case studies are common methods advocated by projects as is the opportunity to observe and co-mediate sessions with more experienced staff. Students and lay mediators can be expected to require the most extensive training and ongoing supervision. The project case studies in Chapter 3 of this report include subsections on "training" and illustrate the various training methods used by the projects.

2.10 Follow-up Techniques

The Boston, Columbus and New York projects re-contact disputants to determine if the agreement has remained in force following the hearing. Boston re-contacts the parties twice (two weeks and three months after the resolution), while other projects rely on a single contact thirty to sixty days after the hearing. Rochester has not been able to allocate the resources required for follow-up efforts; Miami plans to hire an intern who will initiate a follow-up procedure during the summer.

During the follow-up contact, Boston staff emphasize the desirability of restricting the inquiry to the general satisfaction of the disputants. Rather than determine whether a party has adhered to each specific letter of the resolution agreement (and thereby perhaps cause the client to dwell unnecessarily on a part of the agreement which may have been overlooked), the parties are asked whether their overall relationship with one another has improved and whether they were satisfied with the resolution process.

Typically, if a former complainant is dissatisfied with the progress of the resolution, the respondent is called and encouraged to adhere to the terms of the agreement. In some cases, the project may intervene and offer additional mediation or social referral assistance. The use of the courts to enforce agreements or resolve breakdowns varies by project. In Columbus, by virtue of the project's affiliation with the prosecutor, charging material is prepared prior to the hearing. Should the agreement dissolve, the prosecutor may consider filing the case. In Boston, where the majority of the referrals come from the bench, cases are continued for ninety days. If the agreement breaks down during this period, the court may take official action when the case is reviewed for dismissal. In Miami, no record of the case has typically been held by the prosecutor; however, procedures may be instituted to maintain cases on file in order to facilitate later action.

In both Rochester and New York, agreements may be enforced by making a motion to the civil branch of the court to confirm the arbitrators's award. If confirmed, this motion is followed by a motion for a specific judgment in monetary awards or a contempt action for behavioral agreements. Project staff in both Rochester

and New York will assist disputants in filling out the required affidavit and in New York court fees are waived for project cases.

The use of either civil or criminal court sanctions has been rare across all projects; problems arising from apparent breakdowns in agreements are normally resolved through renewed project contact and, where appropriate, the threat of court action.

Clearly, follow-up contact is an important function of a dispute processing project--both to monitor project achievements in terms of continuing client satisfaction, and to identify needs for further mediation or social service assistance. Ideally, a project's role in enforcing non-binding agreements which may deteriorate following a hearing would be restricted to attempts to resolve the problem informally. Preparing charging documents or using information from mediation sessions to support official criminal court action is inconsistent with the neutrality associated with the neighborhood justice concept and may raise due process concerns. Referrals to appropriate agencies (including small claims and criminal courts or social service agencies) are, of course, called for when project resources alone cannot resolve the problem.

2.11 Costs

The projects reviewed differ substantially on the volume and costs of referrals and hearings. Table 2.2 on the following page arrays projects in approximate order of costs and summarizes those elements presented in the larger matrix (Table 2.1) which appear to relate to higher or lower case expenditures. Although the number of projects is clearly too small to draw any firm conclusions, the following relationships are suggested by these data.

- The sponsorship of a private organization (which also typically involves a physical location independent from the court) describes the administrative arrangement in the three higher cost projects. To some extent, this may be an artifact of accounting procedures, as it is likely that the indirect costs of an official sponsor may not be fully attributed to a project's budget. In view of the opportunities to share facilities, materials, and personnel, these

Table 2.2
Referral and Hearing Costs and Related Attributes

Site (No. Referrals/ No. Hearings)	Cost Per Referral	Cost Per Hearing	Sponsor	Primary Source of Referrals	Resolution Technique	Hearing Staff	Number Per Session	% Repeat Hearings	Hours Per Session	Follow-up Contacts	Hours Mediation Training
Boston (350/283)	$300.00	$372.00	Private	Bench	Mediation	Citizen	2-3	16%	2.0	2	40
New York City (3433/649)	79.00	416.00*	Private	Summons Ct.	Arbitration	Citizen	1-3	2%	2.0	1	50
Rochester (663/457)	98.00	142.00	Private	Clerk	Arbitration	Citizen	1		1.75	0	40
Miami (4149/2166)	36.00	69.00	Court	Prosecutor	Mediation	Profes-sionals	1		.5	0	
Columbus** (6429/3478)	6.69	12.36 (20. incl in-kind costs)	Prosecutor	Prosecutor	Mediation	Student	1		.5	1	12

* Based on recent caseload increases, the project projects a reduction in hearing costs to $270.

** Figures presented are for interpersonal disputes only. The Columbus project also processes many bad check cases, but procedures for these cases are non-mediational.

indirect costs are likely to be substantial, decreasing the apparent economies of an official location.

- Obviously, the volume of referrals and cases heard is an important influence on case costs. These measures, in turn, are affected by a number of variables, including court caseload, point of intervention, project location, nature of cases referred, and the amount of official authority attached to the referral.

- Although Table 2.2 suggests that the deeper cases penetrate the system prior to referral, the more costly the diversion, this variable may be only a proxy for sponsor, and in turn, the staff required to secure project referrals. Both officially sponsored projects have no need to allocate substantial staff time to the screening/intake function as referral mechanisms are fully integrated with the normal duties of the prosecutor's staff. Conceivably, however, later referrals might result in fewer cases available to project staff and therefore higher costs. In Boston, for example, both referrals and cases heard are significantly lower than other projects serving comparable populations--a situation which suggests that the project's access to cases is restricted by its reliance on bench referrals. Moreover, since cases referred from the bench must reappear at the end of a continuance period, so also must project staff, thereby increasing the project's responsibility to a given case.

- Projects which use the arbitration technique are among the higher cost programs. However, these are also among the projects which employ citizen mediators and offer more extensive pre-service training. The key element here, then, may be the type of mediation staff and associated administrative expense.

- The high cost projects also devote a greater amount of time to the hearing, re-hearing and follow-up process, and frequently use panels rather than a single mediator. Boston's highly sophisticated management information system is also likely to add some additional costs to that project.

Unfortunately, it is difficult to relate these differences to project outcomes in order to derive measures of cost-effectiveness. Although rates of resolution breakdowns are available, since these data are not uniform across sites, any differences presently observed can partially be attributed to variations in the definitions of outcomes and the type of follow-up effort. The development of uniform reporting categories and procedures would do much to provide projects with useful management information and would facilitate future comparative analyses.

Serious consideration should be given to the possibilities for future institutionalization in the city or county budgets when initial project budgets are planned. The only dispute processing project studied which has been fully institutionalized by its local government is the Columbus Night Prosecutor Program. As can be seen from Table 2.1, this project has the lowest overall budget and yet the highest caseload of all of the projects reviewed. Given the serious current problems with city and county government finances, every effort should be made to develop projects which are as inexpensive as possible. Possible mechanisms for cost savings include the use of volunteers, efficient coordination with criminal justice system screening staff to limit the need for project supported staff at referral sources, the use of graduate students on field placements to perform some office functions, the use of free public or private facilities for hearings, etc. Highly expensive projects are likely to face great difficulties in receiving continuation funding from local sources, and if such funding is available it is likely to be a fraction of the project's original budget necessitating the economical modifications suggested.

2.12 Evaluation

A number of issues need to be considered in developing evaluations of Neighborhood Justice Centers, including means of collecting data on project development, processes, and impact, and also the potential contribution of project evaluations to the resolution of the many significant general research questions relevant to Neighborhood Justice Centers. Each of these issues will be discussed in turn.

2.12.1 Data Relating to Project Development

Neighborhood Justice Centers exist in very complex institutional environments and, of necessity, have many constituencies. Community agencies, city government, the police, prosecutor, court, and general community members all have a vested interest in aspects of Neighborhood Justice Center functioning. The history of the dispute processing projects studied for this report tends to be complex and involve intricate interactions among the various public agencies and community members. Section 1 of each case study contains a discussion of program development, including the project planning phase, grant processing, and early implementation. Data for these reports were reconstructed from the memories of individuals who participated in project development and from limited written records.

The systematic collection of data on the development of new Neighborhood Justice Centers would be useful to aid potential replicators in understanding the types of obstacles likely to hinder project development and ways to overcome these obstacles. The data would also provide insights into how public agencies and community members interact in project development and might provide guidance for strategies for community involvement in other jurisdictions.

If sufficient funds were available, it would be useful to conduct a participant observation study in which a researcher was given the opportunity to observe the major aspects of the project as it developed. This would include initial project planning contacts with governmental agencies and funding sources, planning meetings in which the project's design and policies are developed, and attempts of the project to recruit staff and mediators, advertise the project's availability to referral sources, and begin to process cases. The value of these data to other communities would of course have to be weighed against the potential intrusiveness of the evaluative process. To the degree that the evaluator could provide the project with timely reports of its accomplishments and problems, the evaluation might provide useful feedback to the project on its current policies and strategies and might help to guide constructive changes in the project's formation.

2.12.2 Data Relating to Project Processes

Every project should collect ongoing data on project caseflow, case characteristics, personnel allocation, etc. to enable the project to monitor its achievements and problems. As an example, the Boston Urban Court Project has developed a relatively comprehensive management information system. The system enables the project to develop comprehensive monthly reports which tabulate referrals by source, source by type of dispute, type of dispute by disposition, outcomes of mediation, recommended social services and the number of sessions held. The collection and tabulation of this information requires roughly two hours per week for each line staff member, four hours per week of supervisory time, one day per week for the overall project director in charge of the project's three components and one day per week for a staff member of the sponsoring organization, the Justice Resource Institute. Data on the demographic characteristics of clients are not routinely collected by the Boston project. The project does solicit information regarding client attitudes toward the project during its routine follow-up calls. Data are also maintained on social service referral activities and reported monthly.

A system similar to that established by the Boston Urban Court Project would enable a project to have timely feedback on its activities and would guide policy adjustments as caseflow, social service referrals, etc. varied. The data provided from such a system would also be invaluable to an outside evaluator seeking to develop a longitudinal analysis of the projects' activities. The other projects studied for this report also had management information systems in use, although the comprehensiveness of the systems varied widely.

2.12.3 Data Relating to Project Impact

In addition to data on project caseflow activities, information would also be valuable regarding the project's impact upon clients, the local criminal justice system and social service agencies. Data on client impact can be obtained in part through the follow-up phone contacts with disputants. Clients can be asked questions regarding their satisfaction with the dispute's resolution, their contacts with social service agencies, the courts, etc. Estimates of project impact on the criminal justice system require that the

52-434 O - 80 - 27

project determine the likelihood that project cases would be prosecuted through the various stages of the criminal justice system. This type of prediction is, of course, extremely difficult. In cases where projects receive a large proportion of referrals from the prosecutor or the clerk of court, it may be possible for the staff of these agencies to note the likelihood that the case is technically prosecutable and the likelihood that the agency would pursue the prosecution of the case in the absence of the Neighborhood Justice Center project. The validity of these judgements would, of course, be suspect in the absence of any validating study with a control group of cases which were then not actually sent to the project, but rather allowed to travel their spontaneous course through the system without any special interventions.

Project staff and criminal justice agency personnel may be strongly opposed to the conduct of a random assignment experiment, if they feel that the Neighborhood Justice Center project is critically needed to assist needy citizens and relieve the criminal justice system of its chronic overload. The implementation of such a study in at least a few jurisdictions, however, would be very useful in providing estimates of the savings likely to accrue from dispute processing projects and the quality of the outcomes likely to be received by project and control group individuals. Data on the impact of the project upon social service agencies may be gathered by determining the number of clients referred to specific agencies, the approximate degree of contact of the clients with the agencies, and the proportion of the agencies' caseload contributed by Neighborhood Justice Center referrals.

2.12.4 Central Research Questions Requiring Attention

Numerous examples of research issues requiring attention have been cited in this report. Neighborhood Justice Centers could provide a dramatic improvement in the way "justice" is delivered in America. Answers to some of the important research questions would indicate what procedures are most effective, under what conditions, with what type of staff, in what type of locality, etc. Some of these questions might be addressed by the comparative evaluation of pilot projects now being planned by Institute and OIAJ staff; others might be addressed by the establishment of a national resource center with a capacity to set data collection standards and perform "state-of-the-art" analyses; while still others might be examined

by individual research efforts. The latter studies might focus on rather narrowly defined issues such as resolution techniques or on broader theoretical issues relating to the optimal roles of administrative versus adjudicative procedures in handling a range of minor civil and criminal matters.

Some of the interesting research questions discussed earlier are closely tied to Neighborhood Justice Center operation and might fruitfully be explored in comparative evaluative research and "state-of-the-art" assessments. These questions include:

1. the influence of public versus private sponsorship upon perceptions of neutrality of the dispute processing project, degree of stigmatization of clients, and differential willingness of community members to participate in project development and functioning.

2. the influence of case criteria policies upon the public's perception of the Center, particularly in regard to the processing of non-mediational cases, such as bad check cases, which often involve an institutional complainant and an individual respondent.

3. mechanisms for structuring incentives to encourage police officers to make referrals to the Neighborhood Justice Center, such as the provision of the equivalent of "collar credit" for Center referrals.

4. the causes of case attrition from initial referral to appearance at hearings focusing upon the possible disenchantment of citizens with institutional solutions to their problems.

5. the impact of pre-hearing cooling off periods upon case attrition, and possible causes for this attrition.

6. the influence of the use of public agency stationery and threats of prosecution upon the rates of appearance of respondents.

7. the degree to which strong threats of possible criminal court action result in disputants perceiving their mediated case resolutions to be as enforceable as arbitrated resolutions with civil remedies.

8. the relative merits of conciliation, mediation, arbitration, and combinations of these techniques in resolving disputes.

9. the relative merits of different hearing procedures such as the use of written versus oral resolutions, single versus multiple mediators, long versus short hearings, etc. upon dispute resolution.

10. the possibility of using a two-stage process of mediation and arbitration, when necessary, with different hearing officers in the two stages to avoid constraints occurring when an officer must serve as both a mediator and an arbitrator.

11. the relative merits of variations in types of mediation staff including trained citizens, law students, lawyers, and professional mediators in resolving cases brought before the Neighborhood Justice Center. In addition, data on citizen perceptions of the adequacy of each type of mediator would be valuable.

Larger scale, more basic research questions which might be usefully explored with substantial research programs include:

1. the current availability of dispute resolution mechanisms in communities, and differences in their availability as a function of community size, demographic characteristics, etc.

2. an analysis of trends in the development of non-adjudicatory remedies to problems and the apparent causes for these trends.

3. the appropriate role of lawyers in the resolution of disputes in present day America, particularly given the current reward structure existing in the legal profession favoring large scale litigation. As part of this study, possibilities should be explored for modifications in the training of lawyers and paralegal staff to accommodate the recent move in the United States away from reliance on adjudicatory forums.

4. additional cross-cultural research on the varieties of dispute processing mechanisms of the type being conducted by Johnson, Felstiner, et al.

5. variations in individual definitions of "communities" and the degree to which individuals are interested in having their problems solved within the context of these "perceived communities".

6. the causes for individual differences in readiness to complain about problems and the sociological and psychological consequences of dispute avoidance.

7. institutional and organizational barriers to the development of alternative dispute processing mechanisms, the reasons for these barriers, and possible resolutions of the problem.

8. differences in the public's perception of the civil and criminal justice systems and the impact of these perceptions upon readiness to employ specific forms of alternative mechanisms for dispute resolution.

Many additional research questions have been raised in this paper, and it is clear that the newly forming Neighborhood Justice Centers raise provocative and fundamental issues regarding the relationships of individuals to one another and to their society.

Summary Comments Regarding Neighborhood Justice Center Options

As we have noted in the preface, an attempt to recommend a single unitary model for Neighborhood Justice Centers would be inappropriate due to dissimilarities in the needs and characteristics of host jurisdictions, and the widely differing visions of the purposes Neighborhood Justice Centers should serve. In addition, in reviewing the discussions of the various options for Neighborhood Justice Centers, the lack of reliable empirical data is apparent.

As has been shown, it is possible, however, to identify twelve major dimensions which should be carefully considered in making conscious choices regarding program structure and operation. In

some areas, available findings may suggest the choice of a specific option, while in many others, the trade-offs between advantages and disadvantages will be difficult to calculate. In these latter, more difficult decisions, serious consideration of the complex issues presented here in light of local jurisdictional conditions and goals should provide the basis for a systematic and thoughtful choice of Neighborhood Justice Center components.

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(C) BY LINDA R. SINGER, ESQ.

The Growth of Nonjudicial Dispute Resolution: Speculations on the Effects on Justice for the Poor and on the Role of Legal Services

(By Linda R. Singer*)

INTRODUCTION

Non-judicial methods of resolving disputes have come into their own. Endorsed by the Chief Justice of the United States Supreme Court and by the Attorney General of the United States, discussed at national bar-sponsored conferences and supported with federal, local and private funds, non-judicial forums have begun to proliferate throughout the country. Legislation to foster the development of non-judicial remedies, or occasionally, to require them as a precondition of litigation, has been introduced in Congress and a few state legislatures.[1]

In this context, this paper has two purposes: to provide a basic level of information and analysis concerning the relevance of alternative methods of handling disputes to the achievement of justice for the poor; and to stimulate debate concerning the benefits and drawbacks of non-judicial dispute resolution among members of the legal services community. Such a debate is extremely important: the fate of different forms of dispute resolution could have a significant effect on the allocation of resources within legal services as well as on the activities of individual lawyers.

The author approaches this discussion from the perspective of an active participant in the development of non-judicial remedies in community and institutional settings. At the same time, she is a practicing attorney who is involved in the enforcement of constitutional and statutory rights on behalf of individual, often poor, clients. The questions raised and tentative conclusions offered are based on that experience, as well as on the observations of the few legal scholars who have written about the subject. Empirical data are scarce and incomplete; one early and obvious conclusion is that much more study is needed.

II. EMERGING MODELS FOR PROCESSING DISPUTES

Several approaches to resolving disputes short of litigation are in the process of evolving in the United States and other countries.[2] These approaches, virtually all of them less than ten years old, vary in the types of disputes handled (whether they are traditionally dubbed "civil" or "criminal;" whether they involve property or interpersonal relationships), the identity of the parties (whether they are individuals or organizations; strangers, neighbors or relatives), the techniques employed and the enforceability of the results. Common to all the models, however, is the use of processes that are more flexible and less formal than those associated with litigation and a greater emphasis on accommodation between the parties than on a definitive adjudication of their rights and liabilities.

A. Techniques of resolution

The two principal techniques employed in the various models are mediation, in which an impartial third party, who has no power to dictate a solution, attempts to assist the parties to a dispute in arriving at a mutually satisfactory resolution; and arbitration, in which the third party is given the power to impose a binding resolution. Variations include conciliation, a term used to describe the efforts of

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[1] E.g., S.423, H.2863, H.3719 (96th Cong. 1st Sess., 1979); S.957 (95th Cong. 2nd Sess., 1978); Assem. Bill No. 2763 (introduced by Assemblyman Fazio, California Legislature, 1977–78 regular session); S.4012 (introduced by Senator Ornstein, New York Legislature, 1979); see Dispute Resolution Act, Hearings Before the House Judiciary Subcommittee on courts, Civil Liberties, and the Administration of Justice (95th Cong. 2d Sess., July 27, Aug. 2, 1978).

[2] See generally E. J. Johnson, V. Kantor and E. Schwartz, Outside the Courts: A Survey of Diversion Alternatives in Civil Cases (1977); Ford Foundation, Mediating Social Conflict (1978). For a broader historical and cultural perspective, see L. Nader (ed.), Law in Culture and Society (1969); R. Danzig, "Toward the Creation of a Complementary Decentralized System of Criminal Justice," 26 Stanford Law Review 1 (1973).

an intermediary to facilitate communication between disputing parties without becoming actively involved in settlement efforts; fact-finding, a non-binding determination of the facts underlying a controversy; and mediation/arbitration, a newly coined term that denotes the activities of a third party who first attempts to mediate, then, if unsuccessful, proceeds to decide the merits of a dispute.[3] A few of these definitions overlap; in addition, some of the techniques can be combined or used sequentially in the same model or even in the same dispute.

B. Applications of nonjudicial techniques

1. Community disputes.—Mediation of disputes involving large numbers of people and broad social issues was first tried in the 1960's, in response to increasingly divisive community conflicts. A growing group of "community mediators" has augmented efforts of federal mediators employed by the Community Relations Service of the Justice Department, which has been active in this regard since 1964. Both public and private mediators have had dramatic success in resolving multi-party conflicts over diverse subjects including access to a limited number of publicly funded housing units by members of competing ethnic groups; Indian claims to land and fishing rights; and developers' plans to build dams or highways over the objections of environmental groups. The techniques of peaceful conflict resolution honed in such highly visible arenas soon appeared useful in other contexts.

2. Dispute centers.—Building on the techniques of peaceful conflict resolution that were developed in community disputes, tribunals known as "community dispute centers" or, more recently, "neighborhood justice centers" have been organized to resolve conflicts between individuals. This model recently has received a great deal of official encouragement and has proliferated rapidly.

Major characteristics of individual community dispute centers may vary substantially. Centers may be sponsored by state or local courts, prosecutors' offices or independent government agencies; by established private organizations, such as bar associations; or by ad hoc neighborhood groups. They may be operated by lawyers and social workers or by community residents of all occupations. They may be located in a courthouse, a bank building or a store front. Criteria for accepting disputes also vary. Virtually all centers handle cases involving minor "criminal" conduct, whether or not a charge actually has been filed. Most also accept "civil" cases involving no such conduct; often, in instances of ongoing relationships between the parties, these distinctions are blurred.

3. Institutional grievance procedures.—Already accustomed to participating in grievance procedures negotiated with their unionized employees, large governmental and private organizations have begun to provide procedures based on some of the same principles for their non-unionized employees and, most significantly, for their clients. A small but growing number of prisons, high schools, universities and hospitals have adopted procedures for responding to clients' complaints. Some of these procedures have done little more than formalize the processes used by various agency officials to respond to complaints unilaterally; others involve the clients themselves and/or outside neutrals in significant roles as fact-finders, mediators or joint decision-makers.

4. Consumer conciliation.—Consumer complaint offices, media action lines, state and local government ombudsmen and private trade associations deal with a large volume of complaints regarding the quality of goods and services, credit terms and various forms of bureaucratic red tape. The complaint-handling organizations may simply facilitate communication between the parties in cases in which complainants have been unable to get a response. Or they may actively investigate complaints and, if they consider them justified, attempt to persuade the respondents to settle. Some of these organizations keep records of companies frequently complained about or found to be at fault; some publicize what they consider egregious cases.

Consumer complaint organizations generally do not conduct any sort of hearing; indeed, the disputants rarely meet face-to-face. These agencies are attractive to many consumers because they are simple to use and because they sometimes are willing to represent the interests of complainants to large organizations. However, they have been criticized as ineffectual and incapable of compensating for the ineffective bargaining position of the individual who confronts large corporations or government bureaucracies.[4]

[3] See D. McGillis and J. Mullen, Neighborhood Justice Centers: An Analysis of Potential Model 10–25 (1977).

[4] See L. Nader, "Disputing Without the Force of Law," 88 Yale Law Journal 998 (1979).

5. Government-sponsored mediation.—Federal and local government agencies have been assigned increasing responsibilities for enforcing individual civil rights against private employers or recipients of federal funds. In response to growing backlogs of unresolved complaints, a few agencies are experimenting with mediation as an initial method of resolving complaints without formal fact-finding and enforcement. The parties' participation in mediation efforts is sometimes voluntary, sometimes mandatory. In some agencies, the mediation is carried out by employees who have enforcement powers; in others, mediation is separated from enforcement and conducted by outside mediators.

6. Consumer arbitration.—Commercial contracts long have contained clauses committing both sides to binding arbitration in case of a claimed breach. Following this model, some trade associations, such as Better Business Bureaus, and professional groups, such as bar associations, have begun to require their members to precommit themselves to binding arbitration of disputes with consumers. Consumers' use of arbitration is voluntary; occasionally, however, contracts for the purchase of goods and services may specify arbitration as the only remedy for a beach claimed by either party.

7. Court-annexed arbitration.—Beyond such private arrangements, a growing number of courts require that certain civil cases, generally those involving claims for damages between the ceiling for small claims court and a higher amount of up to $10,000, be submitted to arbitration by court-sponsored panels of attorneys. Decisions of such panels are binding unless either party exercises the right to appeal. Trials de novo are permitted but not encouraged; monetary penalties sometimes are imposed if the party who appeals does not improve on the arbitrators' award by a specified amount or percentage.

This is the only model that diverts all of its cases from court after complaints have been filed. It is also the only model that requires all parties to submit to arbitration as a precondition of obtaining access to court.

III. DIVERGENT OBJECTIVES OF ALTERNATIVE FORUMS

Reformers of the legal system do not necessarily share the same objectives. Even those who seek the same goal may differ concerning appropriate legal strategies for achieving that goal. Consequently, it becomes necessary to articulate the frame of reference within which legal policies or institutions are to be evaluated. In discussing the consumer movement, for example, Eric Steele distinguishes among the functions of regulation, criminal law enforcement and dispute settlement and demonstrates that the approach chosen to solve substantive legal problems will depend on the conceptual frame of reference adopted:

> An emphasis on regulatory or preventive law may lead one to perceive the problem as originating in widespread business practices and to advocate rule-making and administrative supervision. . . . An emphasis on law enforcement may lead one to perceive the problem as deviance and advocate the prosecution of criminals and enforcement of civil laws against fraud, deceptive advertising, and unfair business practices. An emphasis on dispute settlement would lead one to perceive the problem as lack of bargaining power and lack of access to legal forums and to advocate improvements in the delivery of lawyers' services, paralegal personnel, community advocates and advisers, the creation of forums for arbitration and mediation, and the reform of small claims court. . . .[5]

The supporters of non-judicial forums also have different, sometimes unstated objectives. Judicial endorsement of informal dispute resolution, for example, frequently proceeds from the desire to make the courts more efficient by reducing caseloads, costs and delays. Government sponsorship of community dispute centers generally is based on the hypothesis that the centers are faster and less expensive to operate than courts and that the courts themselves can be made to operate more efficiently if congestion is reduced by diverting minor disputes to other forums.

A different (and possibly conflicting) objective is to augment the access of citizens to a variety of tribunals that can resolve their complaints. Achievement of this objective would bring a large number of disputes into some forum, whether judicial or non-judicial, and thus, presumably, increase the total resources devoted to dispute resolution.

A third objective of alternative forums is to reduce conflict by settling individual disputes that, if unresolved, might fester, recur or escalate into violent

[5] E. H. Steele, "Two Approaches to Contemporary Disputes Behavior and Consumer Problems," Law and Society Review 667, 669 (1977).

confrontations. In this regard, supporters of mediation frequently cite its superiority to formal adjudication in addressing the "root causes," as opposed to the most recent symptoms, of ongoing conflicts.

On the other hand, the achievement of a fourth objective, the use of the legal system to further social, economic and political conceptions of equal justice, sometimes may result in the escalation of conflict. For the past generation, legal efforts to achieve equal justice have concentrated on litigation, frequently by means of class actions. Recently, some scholars and practitioners have begun to question such heavy reliance on the courts to enforce rights and deter unfair practices; they advocate a variety of forums and procedures to redress the grievances of members of underrepresented constituencies, ranging from prisoners to consumers. Such advocates are sometimes vocal supporters of non-judicial forums.

Many advocates of non-judicial dispute resolution are motivated by still other objectives, whether explicitly or implicitly: increased fairness of both legal processes and their results; increased satisfaction with the legal system on the part of participants; and increased ability of various segments of society to govern their own affairs, without having to resort regularly to judicial intervention. The last objective has been expressed quite differently in different contexts. In institutional contexts, the objective is expressed as one of self-governance or avoidance of the imposition of rules by outsiders. In neighborhoods or, occasionally, tightly knit ethnic communities, it may be expressed as community empowerment or neighborhood justice. Finally, on an individual level, the objective is one of increased self-sufficiency or the capacity to manage one's own affairs without heavy reliance on representatives of the legal system.

In examining the potential effects of alternative methods of processing disputes on the achievement of justice for the poor, it is useful to separate these varied and sometimes conflicting objectives. Naturally, all of the objectives do not have equal relevance to low and moderate-income disputants, furthermore, the relevance of a particular objective may vary with the circumstances. For example, the reduction of conflict may be less important than their compensation or deterrence if a low-income consumer is cheated by a local merchant; yet conflict resolution may well be paramount when the dispute is between the same consumer and her husband. Judicial efficiency generally is of little concern to poor litigants who find themselves involved with the courts far more often as defendants than as plaintiffs. Yet efficiency suddenly becomes crucial when a tenant sues for the return of a security deposit wrongfully withheld by a landlord.

The conclusions reached by each individual concerning the desirability and importance of creating and expanding non-judicial forums will depend both on the priorities one places on various objectives as methods of achieving justice and on the degree to which the forums actually meet each of the objectives. Thus, members of the legal services community, although committed to the same goals and the same client constituencies, may well differ concerning the utility of different types of dispute resolution.

In order to facilitate critical analysis, various hypotheses concerning the potential effects of alternative forums will be discussed in terms of the different objectives that have been identified.

IV. POTENTIAL EFFECTS OF NON-JUDICIAL DISPUTE RESOLUTION ON JUSTICE FOR THE POOR

A. Efficiency

According to many of the supporters of alternative forums, the greatest inresolution: shortening the delay between registration of a complaint and final resolution; and reducing the costs of resolution to the disputants and the public.

According to many of the supporters of alternative forums, the greatest increase in efficiency will come from the diversion of minor, inappropriate or simply "junk" cases from the courts, thus reducing court backlogs and making litigation more efficient for the cases than remain. At the same time, the cases diverted are expected to be resolved more quickly, less expensively and more effectively than they would be in court.

Because of these expectations, it is relevant to consider whether the disputes submitted to alternative forums actually are diverted from judicial processing or represent additional cases that would not have been taken to court in the absence of alternative forums. This is a difficult question to answer definitively, since there have been so few attempts to develop the necessary data. It appears at present, however, that only a small minority of the disputes handled non-judicially would otherwise have gone to court.

Court-annexed mediation or arbitration projects clearly handle cases diverted from judicial processing (although, even here, processes that are viewed as particularly efficient or effective may have the effect of attracting a larger number of filings). Other types of mechanisms, such as dispute centers and institutional grievance procedures, handle some disputes that would have ended up in court But operators of alternative forums seem to agree that only a minority of the disputes they handled ever could have been litigated; most of these involve criminal charges (many of which would have been dismissed by the prosecutor or the judge). Even in the case of prisoners, generally considered unusually litigious, a recent study revealed that fewer than half of the grievances filed with a New York prison grievance mechanism involved claims that conceivably could have been taken to court; far fewer actually would have been filed.[6]

For those cases that are diverted, sufficient empirical data do not yet exist to permit precise comparison of the delays and costs involved in resolution of similar cases through the courts with resolution through other means. It does seem clear that the alternative mechanisms are faster than either judicial or formal administrative processing. The time between filing and resolution generally is measured in days, as opposed to years. Although there are exceptions (some institutional grievance mechanisms can take months to run their course), the average time to some sort of resolution is greatly reduced.

Assessment of alternative costs is more difficult. Courts do not record their operating costs on a per-case basis (and never on the basis of different types of cases), and rarely consider capital costs at all. Furthermore, comparisons of costs generally focus on those that can be measured easily in dollars and attributed to the system itself, such as salaries, while ignoring hidden costs, such as the time spent by litigants and volunteers. For example, compulsory arbitration of certain categories of court cases by panels of volunteer lawyers clearly saves the time of a limited number of judges. Yet it is difficult to term the process more efficient (unless, of course, it takes much less time) if cases that formerly were heard by one judge now are heard by panels of three lawyers. (The equation changes in cases that would have involved jury trials.)

Perhaps the most difficult question associated with determining efficiency involves the degree to which disputes are, in fact, resolved. An ongoing dispute between neighbors, for example, can involve many calls for police, as well as the possibility of personal injury, destruction of property and criminal proceedings. The most efficient mechanism for resolving such a dispute is the mechanism that has the best possibility of resolving it once and for all. Similarly, various disputes involving similar questions of law or policy may be resolved most efficiently by a clarification or change in the relevant law or policy.

B. Access

Despite frequent references to a "litigation explosion" and a documented increase in filings in both federal and state courts,[7] it is quite probable that most disputes that could be litigated are not brought to court and that many of these disputes are not settled in any other way.[8] Individuals, particularly low income individuals, do not generally take their complaints to lawyers or courts. Yet there are preliminary indications that some poor people are using alternative forums and that increased access to some form of remedy may be a result of the growth of such forums.

Civil courts are used overwhelmingly by organizations (both business and government) against other organizations or individuals.[9] (Domestic relations cases may be the one large category of exceptions.) This disproportionately low use of the courts by individual plaintiffs may occur because individuals do not perceive many of their problems as "legal."[10] because many categories of disputes have not been defined in constitutional or statutory terms, or because "legal" remedies require the services of lawyers. For those who can afford to pay some-

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[6] J. R. Hepburn, J. H. Laue, and M. L. Becker, To Do Justice: An Analysis of the Development of Inmate Grievance Resolution Procedures and a Final Report to the Center for Community Justice 237–43 (1978).

[7] See J. Barton, "Behind the Legal Explosion," 24 Stanford Law Review 567 (1975).

[8] See W. L. F. Felstiner, "The Influence of Social Organization on Dispute Processing," 9 Law and Society Review 63 (1975). R. Danzig and M. Lowy, "Everyday Disputes and Mediation in the United States: A Reply to Professor Felstiner," 9 Law and Society Review 675 (1975).

[9] M. Galanter, "Delivery Legality: Some Proposals for the Direction of Research," 11 Law and Society Review 225, 244 (1977).

[10] See L. M. Mayhew, "Institutions of Representation: Civil Justice and the Public," 9 Law and Society Review 401, 411–12 (1975).

thing for legal services, disputes may involve less money than the price of the lawyer, or may have no monetary value at all. For poor people, there remains an acute shortage of civil attorneys in some parts of the country and for many types of cases.

Except for the studies of the costs and availability of legal services to people of low and middle income, few efforts have been made to examine the use of traditional mechanisms for resolving disputes in terms of the income of the disputants. The Center for the Study of Responsive Law recently conducted a ground-breaking study of consumer behavior. Its findings support the hypothesis that poor people make less use of civil remedies (both judicial and non-judicial) than members of other income groups. The study revealed that a significantly smaller proportion of households of low socioeconomic status perceive problems with purchases of typical consumer products and services that those of higher status (and a smaller proportion of blacks than whites even within income groups). Furthermore, consumers of higher socioeconomic status (and whites) complain to sellers and third parties about a greater proportion of the problems they perceive:

Whites complain more than blacks within each SES (socioeconomic status) category; and within the white population, complaints vary directly with SES . . . If we combine the effects of socioeconomic status on perception and voicing, then for every 1,000 purchases, households in the highest status category voice complaints concerning 98.9 purchases, while households in the lowest status category voice complaints concerning 60.7 purchases.

Finally, of all omplaints about purchases, complaints to third parties (as opposed to complaints directly to sellers) are made disproportionately by members of the better educated, better informed and politically more active households.[11] These findings are consistent with impressions of the socioeconomic status of consumers who invoke complaint-handling mechanisms, such as consumer arbitration, and with analyses of access to dispute mechanisms as a function of the capability of the disputants.[12]

In contrast to the observation that the poor use civil remedies disproportionately less than other segments of the population is the observation that they use criminal remedies disproportionately more. Whether because of the state's provision of police and prosecuting attorneys and acceptance of full responsibility for criminal prosecutions, or because prosecution, like divorce, is a remedy whose possibilities are widely understood, poor people seem to file criminal complaints far more readily than civil. Hard data do not exist to support or refute this proposition; however, a recent study of a Boston slum by an anthropologist revealed that the filing of criminal complaints is used as a weapon by poor people (frequently females) who are too old or too weak to fight.[13]

In this regard, perhaps the most interesting finding of the interim evaluation of the three LEAA-funded Neighborhood Justice Centers is the predominance of low income disputants: typical participants during the first six months were blacks earning less than $6,000 per year in Atlanta; roughly equal proportions of blacks and whites earning less than $6,000 in Kansas City; and whites earning between $6,000 and $12,000 in Los Angeles.[14] This apparent success in attracting low income disputants may simply be a function of the fact that many cases are referred to the centers by police, prosecutors and criminal court judges. (No horrelation is given for income level and type of case or source of referral.) But the participation of the poor also may indicate that the centers are proving successful in attracting poor people with non-criminal disputes and thus are expanding access to a civil remedy.

The small number of studies of alternative forums indicates tentatively that use of such forums is increased by the presence of the following features: simplicity and ease of access (the newspaper ombudsman, for example); the presence of intake people with whom potential users can identify (minority "neighborhood aides" in a city ombudsman's office, inmate grievance clerks in

[11] A. Best and A. R. Andreasen, "Consumer Response to Unsatisfactory Purchases: A Survey of Perceiving Defects, Voicing Complaints, and Obtaining Redress," 11 Law and Society Review 701, 707, 722–23, (1977).

[12] See M. Galanter, "Why the "Haves" Come out Ahead: Speculation on the Limits of Legal Change," 9 Law and Society Review 95 (1974).

[13] S. Merry, Going to Court: Strategies of Dispute Management in an American Urban Neighborhood (unpublished manuscript, 1978).

[14] D. I. Sheppard, J. A. Roehl and R. F. Cook, National Evaluation of the Neighborhood Justice Centers Field Test—Interim Report 47–48 (1979).

prisons); the speed of the process; and the perceived impartiality of the decision-makers.[15] These features are present in many alternative forums, particularly those that rely heavily on lay mediators and neighborhood intake and referral personnel. If these forums can avoid problems of professionalization and bureaucratization (one dispute center already has had a strike by its "volunteer" mediators, who demanded higher pay and greater opportunities to find careers at the centers), they should continue to attract people who do not use the civil courts.

Although it is too early and the data are too sparse to make definite conclusions concerning increased access to the legal system as a result of the growth of alternative forums, the indications are that at least some of these forums are providing access to low income disputants who otherwise would not have taken their complaints to the courts. Unless one believes that the only meaningful access to justice involves access to a court, this is a potentially significant finding. It also may mean that, in evaluating the procedures and results of some alternative forums, the relevant comparison is not to civil courts but to no forum at all.

C. Conflict resolution

The proliferation of forums that rely heavily on mediational techniques has been both praised and criticized as a means of reducing conflict. In the case of individuals with ongoing relationships, such as family members and neighbors, there generally is no other forum to deal with their disputes. (Family counseling, while applicable to some of the same conflicts, emphasizes the reordering of complex relationships rather than the settlement of more immediate, concrete disputes.) The spread of informal dispute resolution coincides with an increased public interest in and recognition of the seriousness of domestic violence (particularly wife beating and child abuse), for which no satisfactory legal remedies exist. In the case of broad community or intra-institutional disputes that can be taken to court if they involve recognized legal rights, adversarial procedures may exacerbate the conflict, further polarizing the parties.

Again, there are no satisfactory data regarding the extent to which disputes are resolved permanently by different forums. It is clear that most dispute centers and arbitration programs spend significantly more time on each case than a small claims or misdemeanor court ever could; much of this time is devoted to increasing communication between the parties and discussing ways of avoiding the escalation of disputes in the future. There is a conscious effort to resolve all relevant aspects of ongoing conflicts, not just those involving single crimes or clearly defined legal rights. Evaluations of dispute centers indicate a high degree of success in actually settling interpersonal disputes.[16]

These observations apply to disputes between individuals with ongoing relationships. Preliminary results indicate that dispute centers have a significantly higher degree of success in resolving such cases than those involving disputes between strangers or disputes between individuals and organizations.[17] This reservation is not intended to detract from the potential of dispute centers for resolving such disputes and the likely result of preventing violent crimes by and against the poor, particularly within families and neighborhoods.

D. Social and economic justice

This objective, clearly of crucial importance to the poor (and to those who represent them), involves the use of the legal system to decrease inequities in the distribution of benefits through society. Due to the increasing concentration of power in governmental and corporate bureaucracies, efforts to increase social and economic justice necessarily focus on the relationship between individuals and large organizations, such as manufacturers, landlords, schools and welfare departments.

1. Individuals versus organiations.—In addition to the obvious differences in power and resources, there is a significant disparity between large organizations, such as those mentioned above, and their clients—particularly poor clients—in their capacity to use legal institutions of all kinds:

[15] See J. M. Keating, Jr., V. A. McArthur, M. K. Lewis, K. G. Sebelius, and L. R. Singer, Grievance Mechanisms in Correctional Institutions 13–26 (1975); L. Tibbles and J. H. Hollands, Buffalo Citizens Administrative Service: An Ombudsman Demonstration Project 61 (1970); J. A. Hannigan, "The Newspaper Ombudsman and Consumer Complaints: An Empirical Assessment," 11 Law and Society Review 679 (1977).

[16] W. F. Moriarty, Jr., T. L. Norris and L. Salas, Evaluation, Dade County Citizen 61 (1970); J. A. Hannigan, "The Newpaper Ombudsman and Consumer Complaints: An

[17] D. I. Sheppard et al., supra, n. 14, at 33.

Legal contests (or noncontests) do not ordinarily take place between rich guys and poor guys. They take place, for the most part, between individuals and large organizations. The contract, grant, license, or other transaction—even the accident—is routine for the organization, which designs the transaction. If trouble develops, the occasion is typically one of a kind for the individual—it is an emergency or at the least a disruption of routine propelling him into an area of hazard and uncertainty. For the organization (usually a business or government unit), on the other hand making (or defending against) such claims is typically a routine and recurrent activity.[18]

Provisions for resolving disputes between individuals and organizations must take into account the disparities in power and in the familiarity with legal problems and procedures.

Community dispute centers have been receiving the lion's share of attention as mechanisms for resolving disputes out of court. Yet it is important to recognize that most of the centers never were intended to deal with disputes between individuals and institutions. The design for the LEAA-funded Neighborhood Justice Centers specifically limits the centers to handling disputes "between individuals with an ongoing relationship . . . Consumer complaints (should) be confined to those involving individuals or an individual and a small local merchant rather than a large institution." [19] This limitation prevents community dispute centers from being a solution to many of the most acute problems of dispute resolution. However, the limitation also puts into perspective a common criticism that the centers serve to deflect needed reforms, by "buying off" individual complainants. Such criticism is misplaced if neighborhood justice centers do not resolve disputes between individuals and institutions.

Although many types of institutions have a continuing relationship with individuals as clients, customers or employees, few have attempted to develop effective mechanisms for responding to individuals' complaints. Government agencies, spurred by judicial requirements of due process, have developed procedures for taking adverse action against individual clients or employees; but they have failed to develop similar procedures for responding to action initiated by individuals. Indeed, the low priority placed by agencies on responding to individual complaints is implicit in the language agencies use to describe them; complaints against organizations generally do not rise to the level of "disputes;" they are merely "grievances."

Yet even in this context, there are relationships worth preserving through means less divisive than litigation or formal agency procedures. Employees or students, for example, may wish to have their complaints resolved without polarizing or severing their relationships with their employers or schools; present adversarial procedures make such a result extremely difficult to achieve.

It is generally agreed that mediation between parties of significantly unequal power is inappropriate. For example, even where disputes are between individuals, no responsible mediator would attempt to mediate between a child abuser and the victim of the abuse. Where institutions are concerned, the question is whether sufficient leverage can be developed to equalize the power of disputants to the point where mediation becomes a realistic alternative. A recent report by the Ford Foundation concludes that, over the past ten years, such a shift in the distribution of power has started:

"The growing use of mediation to resolve social conflicts signals a changing attitude towards compromise among social activists, community representatives, and institutional officials. Compromise or to use the gentler term, "accommodation," is no longer reflexively regarded as ethically unsavory. Among the reasons that compromise is now more feasible is that power is better distributed, which in turn is the result of the work of civil-rights organizations, public interest law firms, and consumer and environmental groups." [20]

2. Sources of power for individual disputants.—Several methods of equalizing power between disputants exist or are in the process of being developed. Following the example of labor unions, individuals with similar interests have organized into groups whose power more nearly approximates that of the institutions with which they must deal. Organizations that can afford to ignore the complaints of individuals cannot afford to ignore those of entire groups. Media-

[18] M. Galanter, "Delivering Legality: Some Proposals for the Direction of Research," 11 Law and Society Review 225, 231–32 (1977).

[19] Proposed National Institute of Law Enforcement and Criminal Justice Design for Neighborhood Justice Centers, reprinted as Appendix B to D. McGillis and J. Mullen, supra, n. 3.

[20] Ford Foundation, Mediating Social Conflict 6–7 (1978).

tion between tenant organizations and landlords, between consumers' cooperatives and suppliers, and between environmentalists and industrialists has been possible only where individuals with similar but diffuse interests have been able to achieve some degree of organization.

Another development involves the precommitment of institutions to handle individual complaints in a specific fashion. The potential expense and uncertainties associated with litigation or intervention by enforcement agencies, even where the actual incidence of individual law suits or enforcement action is rare, can provide the impetus for a business or, more rarely, a government agency, to agree to submit future disputes to an alternative forum under conditions specified in advance. Such precommitments can be of great importance to the individual complainant; they constitute an agreement on the part of the institutional pary to participate in a non-judicial forum without regard to the strength of the individual case. (Without such precommitment, the sophisticated institutional party might reserve participation for those cases in which it beileved it would be taken to court and risk losing.) Recent examples of such precommitment include programs in the marketplace and in prisons and jails: some members of the Council of Better Business Bureaus (including some large automobile manufacturers) have agreed to submit certain types of disputes to binding arbitration at the option of consumers; a small but growing number of correctional administrators have agreed to submit complaints by inmates to advisory arbitration.

If institutional parties insist that the individuals with whom they deal also commit themselves in advance to non-judicial dispute resolution, a question of fairness will arise. If, for example, contracts for purchasing automobiles limited purchasers to arbitration as the exclusive remedy for a claimed breach, they might well be invalidated as taking unconscionable advantage of the disparity in bargaining power and sophistication between purchasers and sellers. The requirement that both parties attempt mediation or arbitration before invoking adjudicatory remedies is less drastic. Judgments concerning the fairness of such a requirement may depend on its onerousness; for example, the requirement that each party to a complaint of age discrimination participate in mediation efforts for a period not to exceed sixty days prior to seeking administrative or judicial remedies is far less onerous than the mandatory, court-annexed schemes that impose financial penalties for unsuccessful appeals.

Statutes or administrative regulations requiring institutions to participate in non-judicial procedures can serve a function similar to precommitment. There must be sufficient incentive in the procedure itself or in the availability of more onerous enforcement procedures, however, to induce genuine efforts to resolve the dispute.

In some cases, the forum itself may have a source of power sufficient to induce participation by the more powerful disputant. The prestige of some ombudsmen and the ability of media action lines to publicize gross or repeated refuals by organizations to respond to complaints probably explain whatever success they have as conciliators. Furthermore, their occasional function as advocates for complaints also can help redress the parties' imbalance of resources and sophistication.

Once inside a forum (whether judicial or non-judicial), individual parties, particularly low income parties, may suffer significant disparities in knowledge of the subject matter in dispute and in their ability to argue persuasively to the other party or (in the case of arbitration) the decision-maker. These disparities may be reduced by technical legal requirements applied to institutional disputants, such as the Truth-in-Lending Law, or exacerbated by other requirements, such as the Statute of Frauds. Similarly, procedural protections can protect less sophisticated parties or trap them in technicalities.

Two obvious ways of compensating for these disparities are the provision of advocates and the provision of experts. The need for legal assistance to thread through technical procedures may be greatly reduced in alternative forums. Furthermore, some mediators are trained to obviate the need for advocacy by attempting to elicit facts or arguments from less articulate parties. Yet the need for advocacy may persist where parties are not equally sophisticated or articulate. Advocates may be lawyers, paralegals or friends; their specific roles will be discussed below.

Technical experts clearly are unnecessary in some types of disputes; they are crucial in others. The furnishing by the Council of Better Business Bureaus of free, independent automotive experts to consumers with complaints involving car warranties may prove a significant innovation, although it does not reach the complaints of low income consumers regarding less expensive purchases.

3. Systemic reform.—One measure of the usefulness of alternative forums in resolving disputes involving large organizations is the degree to which alternatives can achieve solutions to systemic social or economic problems. The class action suit seeking injunctive as well as compensatory relief against fraudulent business practices or illegal discrimination is the classic example of a legal process designed to achieve such solutions. Yet it is important to remember that the class action is not the typical law suit; most litigation proceeds on a case by case basis, resolving only a single factual situation.[21]

Significant criticisms of alternative forums have been made on the basis that such forums, unlike courts, cannot contribute to the solution of systemic problems. According to Mark Budnitz, former Director of the National Consumer Law Center, "The private, settlement-oriented approach of arbitration and mediation will not deter the future unfair practices . . . These forums can at best provide only limited relief in individual cases brought before them. They cannot provide the deterrence and broad remedial relief which is often needed when industry-wide practices are exploiting consumers or certain merchants are engaging in exceptionally abusive practices." [22] Richard Hofrichter has criticized informal dispute resolution as being divorced from the type of political action needed to effect basic economic change:

> The need for a collective response or policy transformation cannot be achieved through individualized dispute resolution.
>
> The prevention of repeated fraudulent activities, for example, housing code violations or excessive rates charged by finance companies, requires a substantive reordering of property rights. The political dimension of these injustices is excluded when translated into a misunderstanding resolvable by negotiation and the avoidance of conflict . . .
>
> Such informal systems provide the sense of having had one's day in court without challenging the wrong committed at a more general level of confronting the problem in another arena.[23]

In addresssing these criticisms, one must ask, "compared to what?" If alternative forums are diverting potentially significant test cases from the courts or masking patterns of abuse from the scrutiny of regulatory and enforcement agencies, their acknowledged virtues will be outweighed by considerable shortcomings. If, on the other hand, the great majority of the cases resolved in such forums never would have been brought to an existing mechanism, the criticisms miss the point. It is impossible to answer this question definitively; as has been discussed, however, alternative forums appear to be attracting new cases, not diverting cases from traditional processing. If this is so, particularly in light of the small proportion of complaints that are brought to any remedial forum, the existence of alternatives actually may serve to increase the number of cases brought to public attention.

Even in cases where informal dispute settlement does serve to resolve disputes that otherwise would have been decided formally, complainants themselves should have the right to make a voluntary, informed choice between faster, often partial relief and enforcement of substantive standards through litigation. Some claims (for example, those based on proof of a pattern and practice of discrimination) can be enforced most effectively through class actions. Yet as every lawyer knows, many clients do not wish to become involved in test cases. As one study of legal services for the poor observed, " 'serving the clients' interests' as clients (quite properly) perceive them ordinarily implies compromise, settlement with minimum delay and expense, and taking what one can get." [24]

The desire of low income clients for speedy relief, particularly where monetary compensation is involved, may be particularly acute.[25] At present, only about fifteen percent of the cases handled by programs funded by the Legal Services Corporation are resolved through litigation.[26]

The ability of different types of forums to facilitate general solutions to classes of problems has received little attention. Clearly, the courts themselves are constrained from focusing on aggregate patterns of complaints by accepted doctrines of what constitutes a "case;" thus they have serious shortcomings in this regard. Enforcement agencies, which should be aggregating complaints and seeking

[21] See T. Ehrlich and J. L. Frank, Planning for Justice, 4–9 (1977).
[22] "Consumer Dispute Resolution Forums," Trial, Dec., 1977 45, 47, 49.
[23] Justice Centers Raise Basic Questions," 2 New Directions in Legal Services 168, 170 (1977).
[24] L. H. Mayhew, supra, n. 10, at 415.
[25] But see G. Bellow, "Turning Solutions into Problems: The Legal Aid Experience," 34 NLADA Briefcase 106, 108–09 (1977).
[26] Legal Services Corporation and the Activities of Its Grantees: A Fact Book 23 (1979).

systemic solutions to regulatory problems, frequently become "passive recipients of privately initiated complaints . . . the focus is more on settling disputes than on affirmative action aimed at realizing public goals." [27] The proliferation of methods of informal resolution could have the effect of freeing enforcers to concentrate on their law enforcement function.

Furthermore, alternative forums themselves may be able to generate information concerning individual complaints that can be used to facilitate systemic solutions. For example, the former director of a state corrections agency reported that the information generated by a formal grievance mechanism concerning the complaints of inmates, the investigation of those complaints and their disposition was extremely useful in detecting previously hidden, recurrent problems and in highlighting the failure of agency staff to implement agency policies.[28] Such information could be helpful to outside monitors as well. Some media action programs have succeeded both in exposing patterns of abuse and in putting information concerning recurring complaints on computers for the use of enforcement agencies concerned with consumer fraud.[29]

Specialized mechanisms that respond to contain categories of complaints seem better situated than general dispute centers for facilitating solutions to systemic problems. Specialized tribunals can accumulate a body of information concerning patterns of violations of particular laws to be referred to appropriate regulatory agencies. They also may acquire sufficient experience and expertise to enable them to inform the parties of relevant legal requirements, such as the disclosure of consumer finance charges.[30] Of course, other considerations, such as ease of access, may mitigate against such specialization.

The role of confidentiality in alternative tribunals also is relevant to the tribunals' potential usefulness in detecting patterns of abuses. Many businesses may agree to submit to mediation or arbitration with consumers only if the process is kept confidential. Programs administered by the Council of Better Business Bureaus respect this desire for privacy. Other forums, such as ombudsmen and media action lines, clearly are public. Some prison grievance mechanisms publish decisions without complainants' names. The role of confidentiality in community dispute centers has yet to be clearly defined, although some proposed legislation would establish a mediator's privilege. Among traditional mediators, the general rule is that anything said in a mediation session is confidential; however, the fact of submission to mediation and the results of mediation (a particular settlement or the failure to reach a settlement) is not.

E. Fairness and acceptability of results

Few empirical data exist concerning the actual results of dispute resolution in different types of forums or the subjective perceptions of parties to the disputes regarding the process or the outcome. Without such data, no firm conclusions can be drawn about either the procedures or the results of non-judicial tribunals.

In the field of institutional grievance resolution, a recent evaluation of prison grievance mechanisms revealed that most prisoners believe their complaints are handled fairly and are satisfied with the results where procedures adhere to three principles: inmates themselves participate in grievance resolution; decisions may be appealed to neutral outsiders; and the written procedures are adhered to in practice. Conversely, the great majority of prisoners consider procedures that leave the resolution in the hands of institutional staff unfair and unacceptable. The actual results of the different types of procedures are consistent with the users' perceptions; participatory procedures produce far more institutional change than do the traditional, chain-of-command responses.[31] Furthermore, earlier research indicated the importance to complainants of some sort of face-to-face hearings, even where the results are not what the complainant seeks.[32]

Comparisons among three community dispute centers, and between such centers and traditional court processing, should result from the current evaluation of

[27] P. Selznick, Law, Society, and Industrial Justice, 225 (1969).
[28] A. Breed, "Administering Justice: Implementation of the California Youth Authority Grievance Procedure for Wards," 10 Loyola Law Review 113 (1976).
[29] See D. P. Rothschild and Bruce C. Throne," Criminal Consumer Fraud: A Victim Oriented Analysis," 74 Michigan Law Review 661 (1976).
[30] C. Rubenstein, "Procedural Due Process and the Limits of the Adversary System," II Harvard Civil Rights-Civil Liberties Law Review 49, 81 (1976).
[31] Center for Community Justice, Evaluation of Inmate Grievance Mechanisms in Correctional Facilities (preliminary draft, 1979).
[32] D. Dillingham and A. Klaus, Final Evaluation of Ward Grievance Procedure at Karl Holton School 46 (1974).

neighborhood justice centers. Before an informed judgment concerning the fairness of alternative procedures can be made, several questions should be answered:

What is the relationship of various procedural protections to achieving just outcome? What is the importance of active participation by the parties in reaching an acceptable and equitable result and in increasing perceptions of fairness? Does participation exacerbate disparities between parties' capabilities or does it mitigate some of the differences in resources? One recent study of the voluntary arbitration of small claims in New York concluded that "the advantages of experience appear to be diluted in the informal, compromise-oriented atmosphere of arbitration and highlighted in processes of adjudication." [33]

What is the effect of the amount of time spent on each dispute? Do characteristics (such as social class or race) shared by disputants and decision-makers contribute to a more just result? There is some evidence that the existence of common characteristics, such as a similar handicap where discrimination against the handicapped is at issue, contribute to a complainant's sense of both the fairness of the decision-maker and the effectiveness of the advocate.[34]

The need for consistency to ensure fairness should also be explored.[35] Where means other than formal adjudication are used, it may be important to determine the effect of precedent and the existence of alternative means, if any, of achieving some predictability of results if the use of some decisions as precedents for others is rejected. Settlements achieved through negotiation or mediation between the parties cannot serve as precedents for settlements between other parties cannot serve as precedents for settlements between other parties (although they can serve as models of creative solutions to similar problems). The results of arbitrations, on the other hand, can serve as precedents, although they need not be given precedential effect. In the field of commercial arbitration, for example, precedents are not considered binding; the custom of the trade, based on the parties' shared experiences and goals, serves to provide the predictability needed in the business world.

The appropriate role of coercion in alternative forums must also be explored. The amount of official coercion or community pressure that ought to be applied to induce unsophisticated respondents to participate in community dispute centers has been hotly debated. Supporters cite the importance of getting disputants into some forum where they can address their problems, together with the coerciveness of the alternatives theoretically available (often criminal prosecution) if respondents do not cooperate.[36] Critics argue that the court system is available only in theory and that coercing participation in alternative methods of dispute resolution, whether explicitly or implicitly, ensnares a larger number of citizens in some form of social control.[37] Particularly where diversion to community dispute centers occurs in the early stages of the criminal process, without a trial to determine whether the defendant has violated the law, there is at least the potential for applying sanctions without proper concern for due process protections.[38] Such concern becomes even more acute with regard to those programs in which disputants are asked to sign agreements to submit to binding arbitration in the event that efforts to mediate their dispute should fail. The interim evaluation of the LEAA-funded Neighborhood Justice Centers observed that all three are using some degree of "implicit" coercion:

> In the development of the three NJC projects, all of them avoided the use of overt coercion. However, there are some subtle and not so subtle pressures placed on the disputants when deciding if they should participate in the "voluntary" program. In all three centers, the parties can refuse to participate in a hearing, but in many instances, the parties understand that such a refusal may result in court action . . . If either party decides not to be involved in a mediated settlement, then his wishes are accepted. However, the fact that the other party can still pursue his case through traditional channels may be passed on to the reluctant disputant . . .
>
> The concerns about coercion . . . are certainly justifiable. . . . It does appear, however, that subtle forms of coercive pressure are very important elements in

[33] A. Sarat, "Alternatives in Dispute Processing: Litigation in a Small Claims Court," 10 Law and Society Review 334, 336 (1976).
[34] Center for Community Justice, Grievance Procedures Under Section 504 of the Rehabilitation Act 27–31, 38–43 (unpublished report, 1978).
[35] See L. Fuller, The Morality of Law 39 (rev. ed. 1969).
[36] *E.g.*, E. Fisher, "Community Courts: An Alternative to Conventional Criminal Adjudication," 24 American University Law Review 1253 (1975).
[37] R. Hofrichter, "Justice Centers Raise Basic Questions," 2 new directions in Legal Services 168, 170–71 (1977).
[38] Cf. P. Nejelski, "Diversion: the Promise and the Danger," 22 Crime and Delinquency 393, 410 (1976).

> the building of sizeable caseloads. Unless a dispute center wishes to exclude the established criminal justice system and concentrate on small numbers of community self-referrals, it will probably have to engage in some coercion.[39]

Present methods of obtaining the consent of both parties to participate in mediation sessions at community dispute centers raise troubling questions of parties' understanding of the process and of their right to choose whether to participate. Some of the centers send letters to parties who have criminal charges pending against them "inviting" them to participate in mediation and explaining that if they do so and reach a resolution the criminal charge will be dropped. In a few of the centers, these letters request that the recipient sign a form consenting to binding arbitration. It is doubtful that all of the people who sign such forms understand what they are signing. Some centers refuse to employ binding arbitration for this reason. Some of them also talk to all parties on the telephone or in person and carefully explain the process before seeking their consent to participate in informal resolution.

Any pretense of voluntary participation is dropped under mandatory arbitration schemes, which require parties in civil actions for damages below a certain amount to submit their disputes to "binding" arbitration. The arbitration awards may be appealed to a trial de novo, but generally there are significant financial deterrents to an appeal. Such schemes, first implemented in Philadelphia in 1966, have been praised for reducing court backlogs and providing speedy relief.[40] Yet they raise troubling questions. For one thing, the jurisdictional amount involved in a law suit may have no relationship to the complexity of the issues involved or their importance to the parties or the public and hence to their suitability for arbitration. For another, diverting only so-called "minor" disputes over relatively small amounts of money may have a disproportionate impact on poor people, implying that their disputes are less important than others' and that they are not equally entitled to judicial attention. Finally, there has been no attempt to determine whether the relatively low rate of appeal from arbitrators' awards is due to disputants' satisfaction with the results of arbitration or to the burdens imposed by new hearings and additional court costs and fees for lawyers.

Finally, the enforceability of the results of informal dispute resolution and the forum in which they are enforced is relevant to their usefulness. Logically, it would seem that solutions jointly arrived at would be more easily implemented than judicial decrees imposed on losing parties. Indeed, there is some empirical evidence to support this logical assumption.[41]

Some forums make no pretense of enforceability in cases where one of the parties fails to comply; others produce formal agreements, decisions or "awards." In states with developed arbitration statutes, such awards appear to be enforceable civilly, at least where they involve traditional civil remedies, such as the payment of money. On the other hand, where interpersonal disputes are resolved by agreements of the parties to stay away from each other, or by one party's promising not to harass the other, it is difficult to determine how they could be enforced through civil suits brought for breach of contract.

In some programs that involve referrals from the criminal justice system, parties are told that the criminal process may be invoked if mediated agreements are breached. The use of criminal prosecution to enforce individual agreements appears to violate not only traditional notions of due process but also the spirit behind mediated settlements. Without some method of enforcement, on the other hand, many of the agreements could turn out to be useless.

To date, most centers report that the failure to abide by agreements, at least in interpersonal disputes, is not a serious problem. Ongoing evaluations should provide more information in this regard. One evaluation criticized the concern of one dispute center's staff over the lack of enforcement "teeth" in agreements produced through the program. In the opinion of the evaluators, coercive enforcement would run counter to the program's expressed goals of providing an informal, non-coercive forum for the settlement of disputes.[42]

F. Avoidance of outside imposition of rules

Institutions implementing grievance mechanisms have as at least one of their objectives the retention—or the wresting back from courts or outside adminis-

[39] D. I. Sheppard, et al., supra, n. 14, at 56.
[40] E.g., "Compulsory Judicial Arbitration in California: Reducing the Delay and Expense of Resolving Uncomplicated Civil Disputes," 29 Hastings Law Journal 475 (1978).
[41] M. Cappelletti and B. Garth, eds., Access to Justice: A World Survey, v. 1, p. 61 (1978); Kaplan, Support from Absent Fathers of Children Receiving A D C, 1955 (U.S. Bureau of Public Assistance, Report No. 41, 1960).
[42] W. F. Moriarty, Jr. et al., supra, n. 16, at 88.

trative agencies—of their autonomy. Private businesses, private and state universities, and state and local prisons and jails are all confronted by increasing intrusions of government into what were previously considered internal affairs. In some cases, the institutions are beginning to respond with more or less effective procedures for responding to clients' complaints internally. Some entities, such as factories or trade associations, adhere to well-developed systems of self-governance. The most widespread example involves collectively bargained agreements between labor and management to submit disputes to arbitration; similar provisions exist in commercial contracts between buyers and sellers with continuing, interdependent relationships. Other types of organizations, such as schools or prisons, feel a similar need to avoid the outside imposition of rules or standards; yet their alternatives are much less developed and their power much less well distributed.

It is clear that such procedures have handled grievances that, if left unresolved, could have ripened into lawsuits; but there is as yet no conclusive evidence that the implementation of even the most responsive procedures actually has reduced the incidence of litigation. Indeed, the legitimation of complaining through recognized channels could serve to increase the number of complaints that are voiced. In commenting on the growth of administrative grievance mechanisms in prisons, for example, a recent study of litigation by prisoners noted, "It is possible that the introduction of a grievance mechanism could increase the number of suits by educating prisoners to make formal complaints, guiding them to articulate inchoate grievances and insist on their adjudication." [43]

The development of responsive, institutional grievance mechanisms has many potential benefits for low income clients, offering at least the possibility of speedy responses through accessible channels. A recent survey of consumers revealed a far greater incidence of complaints to sellers than to third parties and thus placed the highest priority on the improvement of sellers' complaint procedures.[44] During the past five years, it has become clear that grievance mechansims in correctional institutions can handle large numbers of intra-institutional complaints effectively. Where inmates and outsiders are involved in resolving grievances, significant policy changes have been achieved at far less cost in time and resources than would have been required for litigation.[45]

From the clients' perspective, however, there is a danger that a general requirement of exhaution of administrative remedies could be instituted as a jurisdictional prerequisite to litigation. Such a requirement might make the resolution of some types of grievances even more expensive and time consuming. Where trade-offs seem necessary as the price of more resources for either administrative or judicial remedies, the choice may be close. William Turner, an experienced litigator on behalf of prisoners, supports open access by prisoners to both administrative grievance mechanisms and federal litigation and opposes the imposition of a jurisdictional requirement that a prisoner plead and prove exhaustion of administrative remedies. Yet Turner has concluded that it would be useful to permit brief, court-imposed stays to enable the processing of grievances underlying lawsuits through administrative channels. Turner supports stays of litigation only so long as administrative procedures meet recognized standards and resort to them would be likely to yield meaningful results.[46]

G. Community empowerment

Some organizers of community dispute centers have attempteed to decentralize the administration of justice and place tribunals under the control of neighborhood residents. This objective is best exemplified by the publication of the Grassroots Citizen Dispute Resolution Clearinghouse and the operation of the Community Boards program in San Francisco.[47]

In order to be a true neighborhood justice center, run by local residents and separate from the official, governmentally controlled system of justice, a dispute center must be operated strictly by local volunteers or have a source of funding that does not make the center dependent on close ties to the official system for referrals and enforcement. Supporters of this type of tribunal stress that all parties must come to them voluntarily; as was discussed above, this avoidance

[43] W. G. Turner, "When Prisoners Sue: A Study of Prisoner Section 1983 Suits in the Federal Courts," 92 Harvard Law Review 610, 634–35 (1979).
[44] A. Best and A. R. Andreasen, supra, n. 11.
[45] See, e.g., D. McGillis, J. Mullen and L. Studen, Controlled Confrontation (1976); J. R. Hepburn, J. H. Laue and M. L. Becker, supra, n. 6, at 398–408.
[46] W. B. Turner, supra, n. 43, at 642–46.
[47] E.g., The Mooter (published quarterly); Citizen Dispute Resolution Organizer's Handbook (undated); Community Boards, Annual Report (1978).

of express or implied coercion, at least to date, probably limits these centers to a relatively small number of cases.

Where neighborhoods have some degree of cohesiveness, and for disputes within the power of the neighborhood itself to resolve, community dispute centers have the potential for administering justice in a way that is responsive to local needs, thereby returning some degree of autonomy to local communities and enriching community life. In communities based on ties other than those of residence, such as those comprised of tightly knit religious or ethnic groups, this form of justice has been traditional and contributes to the community's cohesion.

The only danger in adhering to this objective (other than those connected with the demands of funding agencies) is that its fulfillment probably is restricted at best to a limited category of disputes among community members themselves. It is unrealistic to presume that large institutional disputants will submit to community justice or that most modern disputes can be dealt with in such tribunals. Furthermore, the extent to which sufficiently cohesive communities continue to exist in this country is open to question.[48] Richard Hofrichter has warned of the dangers of imposing a community model where no real community exists:

> The pretension of informal neighborly justice disregards the political nature of conflict and the danger of indirect elite control. Thus, what on the surface appears as a movement toward a more personalized, decentralized and community controlled justice, may actually represent a new form of State bureaucracy, extending the purview of State authority well beyond that of conventional courts.[49]

Writing about the subject in the mid-1960's, Jean and Edgar Cahn stated simply that "some conflicts and grievances are primarily *internal* and can be handled quite well as intra-neighborhood disputes, while other grievances are *external* and require that consumers be equipped with the means necessary to battle interests and groups outside the neighborhood." [50]

H. Self-sufficiency

Cutting across all models of informal dispute resolution is the objective of giving parties a greater role in resolving their own disputes; this will in turn, enhance their capability to use similar mechanisms in the future and to solve their own problems without the need for intervention by outsiders, such as lawyers or police. A tribunal in which the parties themselves play a central role presents the opposite picture from that of the English court, in which the defendant stands at the back of the courtroom while his lawyer argues his case; although disputants may be advised and aided by advocates, the bulk of the responsibility for articulating their views is their own. Thus both procedures and substance need to be kept simple and free from legal mystique.

It is too early to tell whether informal procedures can remain simple and informal over time; there is a constant danger of bureaucratization and the accretion of rules and ceremones. The cost of simplicity, on the other hand, may be non-application of substantive legal reforms which were intended to reorder the relative rights of landlords and tenants or merchants and consumers. If such laws are unknown (or considered overly legalistic), they cannot (or will not) be applied. It also is unclear whether informality and participation by disputants reduces parties' disparity in capability or sophistication or accentuates it because of their enlarged role. In some cases, intervention by active decision-makers may serve to assist weaker parties and to give inarticulate participants the confidence to tell their own stories.[51]

It is clear that, if access to justice is to become more than a slogan, people must be given the resources and the confidence to pursue at least some of their rights on their own. If the lack of capability is the most fundamental barrier to access to existing legal mechanisms, minimization of the need for special expertise, together with the possibility of acquiring whatever skills and self-confidence are necessary for using the system, is crucial.

V. THE SIGNIFICANCE TO LEGAL SERVICES OF NONJUDICIAL FORUMS

A. The role of legal services in alternative forums

As has been discussed, the role of professional advocacy in nonjudicial forums is less significant and less pre-emptive of the parties' own participation than it is

[48] See W. L. Felstiner, "Avoidance as Dispute Processing," 9 Law and Society Review 695, 704 (1975).
[49] R. Hofrichter, supra, n. 23, at 171–72.
[50] E. Cahn and J. Cahn, "What Price Justice: The Civilian Perspective Revisited," 41 Notre Dame Lawyer 927, 943 (1966).
[51] See M. Cappelletti and B. Garth, supra, n. 41, at v. 1, p. 75.

in court. The reduced importance of legal advocacy does not obviate the need for representation in all cases, however, particularly where there are significant disparities between parties. Because of the reduced complexity of the proceedings, representation frequently can be provided by paralegals. Paralegals can be recruited or trained to deal with particular types of problems, such as intrafamily violence, or particular types of disputants, such as people with physical or mental handicaps.

Most alternative tribunals permit the parties to be represented by attorneys. Some discourage the presence of lawyers, fearing they will cause the process to become excessively adversarial or, with considerable justification, believing it unfair to have one party represented while the other is not. Where attorneys are present, they generally are encouraged to play a less active role than is customary, providing advice but allowing their clients to speak for themselves. Both organizers of non-judicial forums, and lawyers and paralegals who have participated in their proceedings, report success with such a role, at least with advocates who are able to restrain themselves.

Participation of lawyers in collaborative conflict resolution also may have the potential for educating lawyers in the usefulness of non-adversarial methods in resolving some types of disputes. In the area of family law, for example, some non-lawyers have criticized the misapplication of attorneys' traditional adversarial training.

Most attorneys retained by a party to a divorce perceive their role as that of an adversary, advocating the client's statutory rights. The client is often led to concentrate on specific legal goals and to abandon any attempt at assessing the total family situation or individual responsibilities. This procedure does not encourage collaborative conflict resolution. In fact skillful constructive problem solving may be discouraged.[52]

In many cases, professional representation may not be necessary, but access to legal advice may be. A flexible arrangement through which lawyers could be on call for disputants (or mediators) who have legal questions, without actually being present throughout frequently hours-long mediation sessions, would be an efficient way of meeting this need. For example, a community dispute center might be located next to a neighborhood legal services office, thus facilitating collaboration between the two. It does not seem appropriate for a legal services organization to operate its own dispute center; questions of conflicting interests between representing clients and resolving disputes would be inevitable.

The use of lawyers as mediators raises novel ethical questions. The most troubling is whether, and to what extent, a mediator should advise the parties of the substantive law that would be applied to their dispute in court. Such advice may help to resolve the dispute; it also may preclude any settlement. Suppose, for example, that two neighbors disputing a boundary line are ignorant of the fact that the common-law period necessary to establish adverse possession has expired? Or that the Statute of Frauds requires all agreements for the transfer of real property to be in writing? At present, there is disagreement beween those who believe that lawyer-mediators are obligated to inform the parties of the law and those who consider that the injection of such legalisms would subvert the very purpose of non-adversarial dispute resolution. The problem is exacerbated where the parties are unequal in power or sophistication and the substantive law in question, such as a tenants' rights law, is one that was designed to protect the less powerful.

In addition to providing representation or advice, lawyers can help their clients make informed choices among alternative forums by explaining the benefits and drawbacks of each and helping clients to relate them to their own needs and objectives:

The consumer should be assisted in deciding what reasonable primarily objectives are. These may vary from maintaining a decent relationship with the other party to the dispute, to settling as quickly as possible, to exposing the dispute to a public forum, to taking advantage of a new consumer protection law.[53]

B. Potential for redirecting the energies of legal services

Some of the most articulate participants in the legal services movement have acknowledged and encouraged the need for directing some energies away from the processing of individual cases by lawyers who represent the poor. In the course of an informal study of the operations of local legal services offices, for example, Gary Bellow observed several troubling patterns: the domination of

[52] M. S. Herman, P. C. McKenry, and R. E. Weber, "Mediation and Arbitration Applied to Family Conflict Resolution: The Divorce Settlement," 34 Arbitration Journal 17, 18 (1979).
[53] A. Budnitz, supra, n. 22, at 47.

lawyer-client relationships by the lawyers; a narrow definition of clients' grievances; and a failure to group clients with similar problems in order to make a concerted challenge and to expose patterns of problems. Bellow concluded:

There is too much mechanical communication with clients, too few motions and other aggressive legal actions, too much routine processing of cases, too little enthusiasm and awareness of missed opportunities among legal aid lawyers for anyone concerned with the problem to be sanguine any longer about the character and quality of representation and advice in legal services work. When one learns, from the limited empirical work available on legal aid practice, that legal services attorneys are regularly handling caseloads of one hundred fifty to two hundred ongoing cases, generally seeing their clients only once in the course of an entire representation, and spending an average of twenty minutes per interview on the client's substantive legal problems, it seems a certainty that the cases are being superficially and minimally handled.[54]

Although others have criticized Bellow for overstating the problem, it is clear that the pressure to handle large numbers of clients does serve to limit the quality of legal services that can be provided. Among Bellow's recommended solutions are to restrict caseloads and to adopt a "focused case strategy," geared to affecting institutional practices and conditions.[55]

In a recent article discussing future directions for the legal services movement, Alan Houseman, Director of the Research Institute of the Legal Services Corporation and a long-time legal services attorney, charted several courses through which legal services programs could become more effective in securing equal justice for the poor. All of these courses involve a reordering of priorities away from individual case handling in order to achieve greater leverage on the problems of the poor.

Houseman advocates the adoption of "broad strategies for addressing traditional poverty problems." These would include giving a greater priority to implementing and monitoring change in public institutions—a strategy that will require continued use of class action litigation (the need for which no institutional grievance mechanism ever can obviate completely) and much greater attention to effective remedies. Houseman also recommends that legal services offices work to strengthen the capacity of groups of poor people to effect change, by educating members of the community concerning their legal rights and the available means of enforcing those rights and by training lay persons in advocacy skills, negotiation and, one might add, mediation.[56]

Alternative methods of settling disputes have the potential for significantly transforming the role of legal services in the directions advocated by Bellow and Houseman, although realization of this potential will most probably require years. Enormous unmet need for traditional legal services continues to exist. Alternative forums do not appear to be reducing this need; rather they appear to be attracting disputes that may never otherwise have reached a lawyer. Yet there is a real possibility that the growth of alternatives will release legal services lawyers, and even paralegals, from their preoccupation with individual complaints and enable them to concentrate a greater portion of their energies and resources on solutions to systemic problems.

As an example, intrafamily disputes have occupied the time of legal services programs since their inception. The largest category of cases handled by field programs funded by the Legal Services Corporation continues to be family/domestic: these cases comprise 35 percent of the national average caseload; in some programs, as much as 60 percent of the cases are domestic. (Admittedly, domestic disputes probably do not occupy as large a proportion of attorneys' time as these figures would indicate.) At the same time, a significant proportion of the caseload of virtually every community dispute center, as well as the entire caseload of a few specialized family conciliation programs, is devoted to intrafamily disputes. In addition to providing a nonadversarial forum for dividing jointly held property and arranging for child custody and visits, mediation programs have supplied a new approach to the often intractable problem of spousal abuse—a problem for which there is a dearth of successful solutions. The growth of alternative forums for resolving domestic disputes, coupled with access to legal advice concerning the rights of various parties, could relieve legal services programs of much of the burden of active representation in contested domestic cases.

[54] G. Bellow, "Turning Solutions into Problems: The Legal Aid Experience," 34 NLADA Briefcase 106, 108, 109 (1977).
[55] Id. at 121–22.
[56] A. W. Houseman, "Legal Services and Equal Justice for the Poor: Some Thoughts on our Future," 35 NLADA Briefcase 44, 49, 56–57 (1978).

C. Participation of legal services in developing alternative forums

Many of the alternative forums discussed in this paper (neighborhood justice centers and prison grievance procedures are obvious examples) are being used primarily by poor people. Others, including most of the consumer complaint mechanisms, should be reaching out to include the complaints of the poor but have not done so. Yet the only organized source of lawyers for the poor, the legal services movement, has been uncharacteristically silent about the growth of nonjudicial remedies and the role of the poor in their design and operation.

To date, alternative forums have been organized and operated by a variety of groups: local bar associations, law schools, private businesses and private nonprofit corporations. With few exceptions, legal services programs have not participated in organizing such programs or in opposing them; by and large, they have simply ignored them. This lack of attention to a world-wide movement that has the potential for drastically expanding and, in some cases, modifying the remedies available to a large number of people for a wide range of problems, may be attributable to the coincidental proliferation of nonjudicial forums with the reorganization and expansion of federally funded legal services programs. Whatever the explanation, a continuation of the laissez-faire position on the part of the legal services community can serve only to exclude poor people and their representatives from vital processes of decision-making concerning the design of programs, their accountability and the allocation of resources.

Members of the legal services community should be taking active positions concerning the development of alternative methods of dispute resolution in their communities. First, both attorneys and paralegals need to inform themselves about the issues involved and to develop their own positions concerning the relative importance of the various objectives discussed in this paper. Second, local offices should raise questions about the range of alternatives available for the resolution of disputes in their communities, as well as about the performance of any experimental programs. It is important that empirical data be collected that will permit evaluation of the extent to which various remedies meet their objectives. At a minimum, legal services offices should follow up on the clients referred by them to alternative mechanisms, in order to determine their satisfaction with the process and its results, and to make their own assessment of the quality of justice being provided.

Third, the legal services movement should press for the establishment of effective grievance mechanisms in institutions such as prisons, schools and hospitals, where none exist or where existing mechanisms are not responsive to clients' complaints. Finally, legal services attorneys must insist on the participation of the client community (and themselves, where their advocacy is needed) in both the design and the operation of local programs and on adherence to those objectives most likely to achieve justice for the poor.

It seems likely that increased federal funding soon will be available to support local experimentation with alternative forms of dispute resolution. It is important that legal services play a role in developing and implementing these experiments. Specifically, legal services attorneys, paralegals and clients should serve as members of boards of directors, or oversight committees, as mediators and case screeners, and as evaluators—in other words, in every capacity in which they can influence policy or practice.

In order to be effetive, this sort of participation will require the education of clients concerning the use of alternative remedies and their training in specific skills of negotiation, advocacy and mediation. These activities may result in a functional reorganization of some legal services offices. They will take time and may require skills as yet incompletely developed. Yet they comprise the only way to ensure that the proliferation of remedies is responsive to the concerns of the poor and that the growth of alternatives will hasten the achievement of equal justice.

(d) By LARRY E. RAY, Esq.

INTAKE AND THE NIGHT PROSECUTOR'S PROGRAM—THE YEAR IN REVIEW: 1978

(Larry Ray, Assistant City Attorney, Coordinator)

95159

INTRODUCTION

The Night Prosecutor's Program has completed its sixth year of operation. It is considered one of the most successful and flexible mediation programs in the

nation. Each innovative idea in the criminal justice system which is introduced as a program such as the Night Prosecutor's Program must progress through several stages: Planning, implementation, institutionalization, and re-examination. The year of 1978 was a time to re-examine the goals of the Night Prosecutor's Program and its means of achieving these goals.

Various aspects of the Night Prosecutor's Program was procedurally reorganized as a result of this re-examination. Some functions were redefined. For example to achieve the goal of screening all civilian-filed criminal complaints, the Intake Division was created.

(*I*) *Intake Division*

The intake division is in charge of the initial screening of all civilan complaints. Nine law students have been designated as "intake counselors" who are supervised by a coordinator-attorney. The intake division is assisted in this screening process by "a duty prosecutor", a rotating position among the trial prosecutors for one week periods.

(*A*) *Intake procedure*

The intake counselors interview the complaints in an attempt to identify (1) the problem and (2) the most appropriate action to be taken. Frequently, the complainant needs information and/or direction; thus, a phone call, interview, or referral is all that is necessary.

From the total number of screening interviews, approximately sixty per cent (60 percent) of the complainants are initially scheduled for a mediation hearing.

If a formal charge is necessary, the intake counselor will assist the complaint in completing a questionnaire. This questionnaire will then be reviewed by "the duty prosecutor." The duty prosecutor will evaluate the complaint and inform the intake counselor whether a charge should be filed. The intake counselor will then contact the complainant and advise him/her of the recommendation.

In crisis situations, the intake counselor may evaluate the complaint and if necessary assist the complainant in filing the charge.

(*B*) *Counselors:*

Frequently, the student human relations counselors will assist in the screening process. They will provide short term counseling and referrals to community agencies.

(*C*) *Intake statistics:*

Statistics were recorded from the intake cards on a random basis resulting in the following:

TYPE OF COMPLAINTS

[Random sampling]

Categories	Percentage	Number
Animals	1.2	15
Assaults	31.0	378
Criminal damaging	5.3	65
Disorderly conduct	1.2	15
Harassment	11.5	140
Interference with custody	3.0	37
Landlord/tenant	1.1	13
Menacing threats	16.6	202
Non-support	.3	4
Passing bad checks	3.7	45
Failure to deliver title	1.2	15
Telephone harassment	1.2	15
Theft	10.2	124
Trespassing	7.3	89
Unauthorized use of motor vehicle and property	1.5	18
Felony charges	.4	5
Other	3.3	39
Total	100	1,218

DISPOSITION OF COMPLAINTS

Categories	Number	Percentage
Night prosecutors hearings	743	61
Criminal complaints:		
Summons	195	
Warrants	97	
Total	292	24
Dog letters	0	0
Referred	73	
Detective bureau	12	
Attorney	17	
Small claims	5	
FCCS	5	
Clerk of courts	10	
Other	24	6
Other (cancel hearing, drop charges, information, etc.)	110	9
Total	1,218	100

(II) Night prosecutor's program components

(A) Columbus Health Department

The Columbus Health Department has been an integral component of "the Night Prosecutor's Program" for the past two years. One evening each week a representative from the health department scheduled hearings. The department exhausts their own particular resources to obtain compliance with a health ordinance such as cutting weeds or removing trash. Then, before filing the criminal charge of "failing to comply," a hearing is scheduled.

The results have been impressive: Approximately sixty-five percent (65%) compliance after the hearing is scheduled. Frequently, the respondent does not realize the seriousness of the complaint. This is explained to them during the hearing.

(B) Bureau of Motor Vehicles

The Bureau of Motor Vehicles' (State Department of Highway Safety) participation in the Night Prosecutor's Program begin in March, 1978. After the Bureau exhausts its resources in attempting to obtain compliance in returning the driver's license, license plates, and/or auto registration, the bureau representative schedules a night prosecutor hearing. These hearings involve drivers who have accumulated twelve (12) or more points against their record in a two year period or who have an unsatisfied judgment arising out of an auto accident.

Approximately seventy percent (70 percent) of the hearings result in compliance without the filing of a criminal complaint. Frequently, the respondent needs additional information or does an explanation of the situation during the hearing.

(C) Counseling

Records indicate that the majority of the cases referred to the Night Prosecutor's Program involve domestic strife, or other forms of human relations dysfunctionality. Recognizing that many "crimes" result from the inability of citizens to resolve their interpersonal disputes by themselves, it is evident that continued counseling would be an effective means to prevent new interpersonal crises. The Human Relations Counseling Program as an integral adjunct to the Night Prosecutor's Program helps meet a critical need; personalization of human needs in the criminal justice system. In order to fill this need, graduate students from the Ohio State University School of Social Work and graduate students from the Lutheran Theological Seminary at Capital University are available in the Prosecutor's Office to provide further counseling. Undergrate students from Otterbein College and Ohio Wesleyan also participate.

Objectives:

(1) To alleviate the immediate crisis situation;

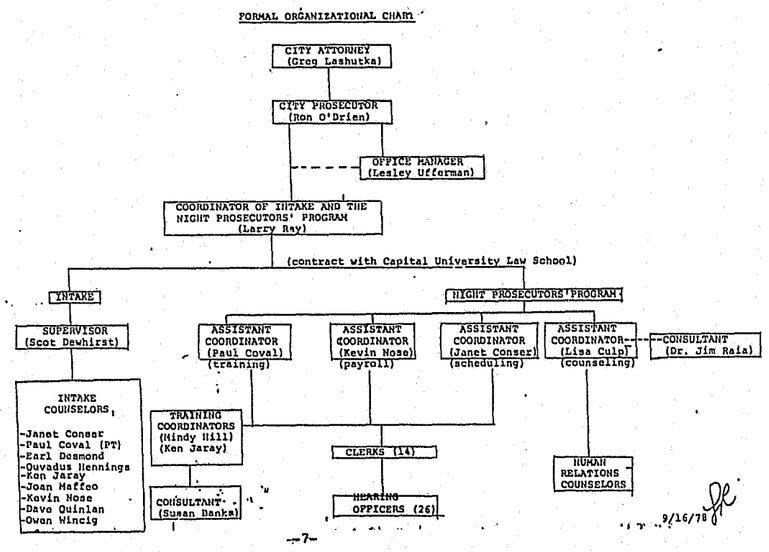
(2) To determine the precipitating factors leading to the crisis situation;

(3) To foster an understanding of the interpersonal relationships bearing upon the case; and

(4) To discover additional sources of help within the community in terms of social agencies.

Prior to the beginning of each hearing session, a Human Relations Counselor should review each case that is scheduled for that particular evening to determine beforehand (if possible) which cases obviously entail purely legal problems; for example, writing of bad checks, and which other cases involve problems which appear to indicate domestic disharmony or other human relations difficulties which probably would be assigned to the Human Relations Counselor later.

All cases which are handled internally by the Night Prosecutor's Program must have a follow-up: that is, calling each party to inquire into the status of the situation posthearing. This follow-up is done either by the hearing officer or the Human Relations Counselor.



(D) Bad check program

"The Bad Check Program" is an integral component of Night Prosecutor's Program. More than 9,000 bad check hearings were scheduled during 1978. In most cases, scheduling the hearing should be the first step in processing a bad check complaint. The purpose of the hearing is twofold:

(1) To settle the dispute which usually means restitution to the complainant, and

(2) To educate the respondent as to the possible ramifications of writing a check which subsequently "bounces." The hearing officer should inquire;

Why the incident occurred,

How it could have been avoided, and

If there are additional outstanding checks.

The Prosecutor's Office is not a collection agency, but rather the last step before the filing of formal charges. The Bad Check Program provides an opportunity for the complainant to notify the respondent that he/she intends to pursue the complaint through formal channels if necessary.

Hearing time and place: All bad check hearings for merchants or individuals having (3) or more respondents and/or planning to use the program on a regular basis are to be held on Monday and Wednesday evenings from 6:00 P.M. to 8:00 P.M. in Courtroom No. 12 on the first floor of the City Hall Annex, 67 North Front Street.

(III) Program operations

The Columbus Night Prosecutor Program is one of the most successful diversionary programs in terms of its effectiveness in existence. Designated as an Exemplary Project by the National Institute of Law Enforcement and Criminal Justice of L.E.A.A., the goals of this program are: (1) to develop a procedure

which would be able to rapidly and fairly dispense justice to citizens of Franklin County who become involved with minor criminal conduct; (2) to eliminate one of the burdens on the criminal justice system by reducing the number of criminal cases which cause a backlog in the courts; (3) to ease community and interpersonal tensions by helping the parties involved find equitable solutions to their problems without resorting to a criminal remedy; (4) to provide a public agency forum for the working population during hours which would not interfere with their employment; and (5) to remove the stigma of a criminal arrest record arising from minor personal disputes.

(*A*) *Scheduling mediation hearings*

In operation, the intake counselor (described previously) will schedule the mediation hearing. It is possible that a night prosecutor may schedule the hearing. The hearing is scheduled for a date that does not interfere with employment, approximately one week later. The complainant is informed that he/she may bring "a witness" to the hearing. Notice is mailed to the respondent stating the date of the hearing and captioning the complaint (assault, harassment, dog running at large, landlord-tenant problem, etc). Hearings are scheduled on a docket sheet at one half hour intervals:

6:00–10:00 P.M. during weekdays, 10:00–3:00 P.M. Saturdays, and 2:00–10:00 P.M. Sundays

In a crisis situation, the hearing may be scheduled within twenty-four (24) hours. Notification may be made to the respondent by phone call or the police department may deliver the notices.

(*B*) *Hearing procedure*

Hearings are conducted in a private room in the office of the prosecutor. Present at the hearing are the hearing officer, the complainant, the respondent, a human relations counselor, attorneys (which is rarely the case) and witnesses (if necessary). The hearing officer conducts the hearing informally, in such a way that each party has an opportunity to tell his/her side of the story without interruption. The hearing officer asks questions and the parties may talk with each other in an attempt to work out a resolution to the underlying problem.

The hearing officer, acting in the role of a mediator and conciliator, pays special attention to what the parties are saying in an effort to discover and reveal the basic issues which may in fact have precipitated the dispute which brought the parties into the prosecutor's office.

The most successful resolutions have proved to be those in which the parties themselves suggest a solution and agree about what should be done. Often, the most effective solution is suggested by a witness, who in many cases, is a friend of both parties. If, however, the parties are not capable of or willing to do this, the hearing officer will suggest a solution which is palatable to the parties. An additional responsibility of the hearing officer is to inform the parties of the law and criminal sanctions which may apply. This may include criminal statutes or city ordinances which carry criminal penalties.

Occasionally, the problem involves many parties or even an entire neighborhood. In such cases, the hearing moves to a court room. These hearings usually last one hour or more.

Hearings are free flowing without regard to rules of evidence burdens of proof or other legalities. Emotional outbursts are common with the responsibility of the hearing officer being to insure that they do not get out of control. Experience has shown that without the opportunity for the controlled display of emotionalism, shouting and other forms of confrontation, the basic truth often does not come to the surface.

Hearings are scheduled for thirty minutes; in many cases, however, additional time was needed to try and sort out the basic problems underlying the legal problem.

(*C*) *Field hearing officer*

The Field Hearing Officer is a position designed primarily to serve the needs of those individuals who have a need for the Night Prosecutor's Program, but are unable to use the services due to lack of transportation, age or disability. This hearing officer also handles those cases where a "view of the site" is critical to the decison-making process (that is, decision making by the parties involved with the aid of a third party mediator—the hearing officer).

Usually, the hearings are held in one party's home. Although this situation creates a more personal relationship with the hearing officer, it may be viewed as a violation of neutrality by the other party. In that case, negotiations must be conducted in separate locations, with possibly the hearing officer traveling to and fro.

The hearings for the Field Hearing Officer are scheduled for the convenience of the patries; therefore, the hearings are not necessarily held at night.

(*IV*) *Crisis intervention training*

A Crisis Intervention Conflict Management Training Program has been tailored for use with the Night Prosecutor Program. This is a twelve (12) hour training program for clerks, hearing officers, and intake counselors, on how to handle conflict situations, how to run a hearing, and how to take a mediational approach rather than an adversarial one to the hearing process. The ability of hearing officers to effectively handle their hearing dockets is a direct result of the training they receive in this program. The Crisis Intervention Training Program not only helps to alleviate the time burden on hearing officers but also offers them guidelines on how to effectively structure the informal hearing in a fair, impartial way that will result in a fair and just hearing.

In addition to these twelve hours, all the law students are required to attend four to six hours of "in-house" training which focuses on procedure of intake and mediation.

This training is facilitated by a counselor/psychologist from the local mental health center. The facilitator works with program student administrators in the planning and the implementation stage. This facilitator has proven invaluable to the program, not only in facilitating the crisis training using his/her particular expertise, but as a consultant. The facilitator is not integrally involved in the daily operations of the program and usually provides an objective view of program concerns.

After the weekend of crisis training, the facilitator returns to the program and does twenty (20) hours of follow-up training. The facilitator observes and evaluates the trainees' mediation skills and leads group process at the evening's end.

(*V*) *Program statistics*

Statistics for the year 1978 are as follows:

	Total scheduled	Total held	Total settled	Summons issued	Warrants issued
Interpersonal hearings	7,422	4,548	4,213	318	93
Bad check hearings	8,342	4,197	5,654	1,184	219
Columbus health department	547	313	406	81	0
Bureau of Motor Vehicles [1]	920	644	644	152	0
Total	17,231	9,702	10,917	1,753	302

[1] The Bureau of Motor Vehicles hearing component began March of 1978.

Note: A total of 17,231 hearings were scheduled. Hearings were held in 56 percent of the cases. Of the interpersonal hearings held, 93 percent were settled. Of the total bad check hearings scheduled, 68 percent were resolved.

(*VI*) *Future considerations*

The new facilities for the *Night Prosecutor* Program in the Municipal Court Building should greatly enhance the effectiveness of the program, as separate facilities on a permanent basis should increase the level of public acceptance. In addition the expanded centralized quarters will provide for a smoother operation of business in both keeping of records and the screening of complaints.

The Domestic Violence Bill (amend. Subst. H.B. 835) recently passed by the State Legislature presents many new factors to consider in the intake procedure, as well as in the Night Prosecutor hearings. Since domestic violence problems are quite numerous, the evaluation of new procedures, which the Bill allows, should contribute to a more effective resolution of domestic violence situations.

(*A*) *Intake-refining intake procedure*

The first contact an individual has with the Prosecutors office is when he/she speaks with an intake counselor. Continued examination of all facets of solving an individual's problem is made with emphasis on finding an effective out-of-

court solution. A more complete utilization of community resources which can provide alternative remedies is contemplated.

Availability of record checks would increase the intake counselors effectiveness in determining what course of action to follow. Since the emphasis is on solving problems outside the formal court process, the individual's previous contact with the legal system could indicate whether an out-of-court settlement is possible or even desirable.

Closer and more direct contact with police officers involved in an incident would contribute to the intake counselor's analysis of the complaint. Since police have first hand knowledge of the incident, then input into the intake process could prove to be invaluable.

Increased use of human relations counselors (HRC) in the intake procedure is of extreme importance. Many of the problems seen in the office are ones in which an HRC can assist and provide important counseling and/or necessary referrals. The addition of HRC's between the hours of 8:30 a.m.–6:00 p.m. is desirable and necessary for the continued growth of the program.

(B) Night prosecutor program

The refinement of the process of notifying parties of a Night Prosecutor's hearing is contemplated. Many complaints demand immediate attention and resolution. Police cruiser delivery of notices of emergency hearings can be done rapidly and is being done now on a limited basis. Plans for expansion and refinement of cruiser delivery of notices is being studied. In addition, telephone notice of hearings would increase the program's acceptability to the public. A phone call to a respondent would be less threatening than a notice received in the mail, and it would allow the party to ask questions about the complaint and the process in which he will be participating.

Increased follow-up of hearings to ensure that agreements made by the parties are being fulfilled. Extreme time pressures and heavy work loads of hearing officers have prevented effective and structured follow-up in the past. Procedures are being developed that will contribute to a quicker and more intensive follow-up.

The goal of the Night Prosecutor Program is to have human relations counselors present in 60% of all hearings. Their skills are of extreme importance in handling the numerous non-legal problems that are encountered in the hearing process.

Continual training of hearing officers and human relation counselors is a necessary component. New procedures and services are always arising. Training is a vital component of the program that will insure a coordinated and informed staff prepared to handle the public in an intelligent and effective way.

(e) By EARLE C. BROWN

An Evaluation of the Akron 4–A Project

(Roderick Smith/Terrence Smith, Summit County Criminal Justice Commission, June, 1977)

Chapter I

Introduction

The purpose of this research paper is to perform an evaluation of the Akron 4–A project (Arbitration As An Alternative to minor criminal complaints) to determine if the project is effectively and efficiently achieving its goals and objectives.

This evaluation can be very useful to administrators in the criminal justice system who make funding decisions. Of equal importance, this evaluation should be a useful planning tool in guiding the project to more fully attain its goals and objectives.

This evaluation will be limited to the operation of the project in fiscal year 1976 (July 1, 1975 to June 30, 1976).

Following this introduction, Chapter I will discuss the economic aspects of arbitration as a public good. Accountability for public programs will be introduced and followed by a section on the essentials of evaluation research in the public sector.

Chapter two introduces the project's background, history, and operations.

Chapter three is an evaluation of the project from a "process" evaluative approach.

Chapter four is an evaluation of the project from an "impact" evaluative approach.

Chapter five lists the conclusions and recommendations of this study.

A. Arbitration as a public good

A substantial amount of literature has been written about the concepts of public goods, externalities, and collective action (Musgrave, 1939; Dahl, 1953; Samuelson, 1964; Downs, 1957; Buchanan, 1962; Tullock, 1965).[1]

The basic theory surrounding the concepts of public goods and services as that they are provided because of certain characteristics: joint consumption and non-exclusion. Joint consumption of public goods is possible because the consumption by any one individual in no way diminishes the amount of public goods that can be consumed by other individuals. The costs of excluding any one individual from enjoying a "pure" public good without excluding all other individuals are infinite.

However, there are only a few exceptional goods that can be categorized as "pure" public goods. Most goods and services that are provided by a government and other organizations have public characteristics. Some examples of these "quasipublic" goods include mosquito abatement, air and water depolution, fire and police protection, and law enforcement.

Another reason why goods and services are provided by governments and other organizations is because of the "merit principle". Some goods are considered merit goods and are not priced according to the workings of the market system. "Merit goods involve interdependence in utility functions such that citizens receive pleasure or other benefits from knowing that some of their fellows are able to consume more of certain services that they would not be able to consume if the market place alone determined their distribution."[2]

External effects also result from the production of public goods because costs and benefits occur to persons not accounted for in the transactions.

Increasingly, governments have produced quasi-public goods and services and have financed its production through taxation of its clientele. Federal dollars have been allocated to many public programs like education, housing, transportation, and law enforcement. These programs are established to accomplish a prescribed set of objectives through the conduct of specified activities. Programs may include specific projects at the implementation level. This is, the level where resources are used to produce and end product that directly contributes to the objective of the program.

The Court Arbitration project in Akron can be viewed in the broad context as a quasi-public good that is provided through the law enforcement program.

B. Accountability for public programs

The 4–A project in Akron is funded by the Summit County Criminal Justice Commission (SCCJC) through the Law Enforcement Assistance Administration (LEAA), U.S. Department of Justice. Like other projects which utilize public funds, the 4-A project has to have some accountability to the public.

"Accountability comprises a series of elements ranging from problem identification to goal formulation, and it raises the central questions of efficiency and effectiveness in reducing social problems. To be accountable means addressing a real problem that can be remedied. It means that professional work can be provided if society makes the resources available. That this work will be provided in the manner promised, and that the problem may be effectively minimized at the least possible cost".[3]

Accountability, at minimum, is utilized to assure the criterion of honesty. However, honesty is necessary but insufficient for a fully accountable system. A sound system of accountability goes beyond honesty and is based on results.

The input, output, and outcome of the arbitration project has to be measured to assess whether the project is achieving its goals and objectives (effectiveness) and economically utilizing its resources (efficiency).

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[1] Richard A. Musgrave, "The Voluntary Exchange Theory of Public Economy". Quarterly Journal of Economics, LIII (February, 1939); Robert A. Dahl and Charles E. Lindblom, Politics, Economics and Welfare (New York: Harper and Row, 1953); Paul A. Samuelson, "The Pure Theory of Public Expenditure", Review of Economics and Statistics, XXXVI (November, 1955); Anthony Downs, An Economic Theory of Democracy (New York: Harper and Row, 1957); James M. Buchanan and Gordon Tullock, The Calculus of Consent (Ann Arbor: University of Michigan Press, 1962); Gordon Tullock, The Politics of Bureaucracy (Washington, D.C.: Public Affairs Press, 1965).

[2] Werner Hirsch, "Economics of State and Local Government" (New York: McGraw Hill, 1970), p. 12.

[3] Edward Newman and Jerry Turem, "The Crises of Accountability", Social Work, January 1974, pp. 5–16.

C. Why Evaluation Research is Necessary

Evaluation is a necessary foundation for effective implementation and judicious modification of existing programs. Evaluation can provide the information required to strengthen weak programs, fully support effective programs, and drop those which simply are not fulfilling the intended goals and objectives.

The importance of evaluation of law enforcement programs was reflected in the 1977 budget of the United States. As stated by the budget document, "law enforcement assistance grants will decline by 8 percent in 1977, reflecting a more cautious and selective approach in this area. Emphasis will be placed on evaluation to determine the impact of these grant programs on the level of crime in the United States." [4]

Evaluation research will measure the effects of 4-A against the goals and objectives it sets out to accomplish as a means of contributing to subsequent decision making and improving future programming.

The methods employed in evaluating 4-A are process and impact measures.

"Process" evaluation will answer the question of how well is the project operating. "Impact" evaluation will assess the overall effectiveness of the project in meeting its goals and objectives. Cost analysis will be included in the impact evaluation to provide information on the cost efficiency of providing services through the project as compared to other projects.

CHAPTER II

THE AKRON 4-A PROJECT

A. Project background

In Akron, as in virtually every urban center in the United States, the stresses of the urban environment lead to a large number of conflicts between residents. A significant number of conflicts rise to levels of activity prescribed by the language of penal laws.

One of the aggrieved resident's recourse is to begin criminal prosecution by means of a private criminal complaint in the prosecutor's office of the Akron Municipal Court. Many of these complaints are for minor criminal offenses such as harassment, simple assault, threatening, domestic quarrels, and the like. These offenses usually occur between relatives, friends, or neighbors.

The Community Dispute Service (CDS)[5] of the American Arbitration Association (AAA) felt that the traditional court process was not the proper forum for settlement of these common urban living disputes, albeit, technically criminal in nature.

In the words of the CDS, community conflicts find their roots deep in our society and in human nature. Too often we only see the symptoms, the surface evidence, of a more pervasive problem. Much like the visible tip of an iceberg, the private criminal complaint or private warrant frequently deals with relatively minor charges growing out of deeper human conflict, frustration, and alienation. In such cases, more often than not, neither the complainant nor the defendant is entirely blameless; yet, the criminal law with its focus on the defendant alone is ill equipped to deal with this basic fact. The judge or prosecutor, faced with an overcrowded court calendar, beyond-a-reasonable-doubt criteria for conviction, conflicting stories, and "minor" offenses, typically dismisses the case and lectures the defendant, threatening possible punishment for future offenses. This is not conflict resolution; it is not problem solving; nor is it intended to be. The tip of the iceberg has been viewed briefly, but the underlying problem remains unseen and potentially as obstructive as ever. Neighborhood tensions have not been reduced. Relationships have not been improved. At best a shaky truce may have been ordered.

If all such cases were prosecuted, the courts would be backlogged everywhere as many as now. Even if the courts could process all such cases, they could not resolve the real problem, i.e., the causes of the technically criminal behavior; the courts are restricted to finding the defendants before them either innocent or guilty of the alleged offense.

So what has been done? First, it was felt by the CDS that the criminal process was not the proper forum for the settlement of these common urban living disputes. This is because the warrant and ensuing criminal prosecution may be used by one of the parties as another weapon in the underlying dispute rather than as

[4] U.S. Budget in Brief, 1975.
[5] CDS was formerly known as the National Center for Dispute Settlement.

a means of resolving the dispute. Nor was it felt that the dispute would be any better resolved by seeking a resolution by way of the civil courts. What was needed was a procedure independent of the court which would be, quite simply, fast, cheap, and easy. The 4–A project does this with the added benefits of greatly reducing the underlying cause of the criminal conduct and avoiding criminal conviction and arrest records.[6]

B. Project history

The Community Dispute Services of the American Arbitration Association established the West Philadelphia Center for Community Disputes in early 1969 as an experiment in application of labor-management techniques to community disputes. Later that year, the CDS and Philadelphia District Attorney reached an agreement establishing a pilot program for arbitration of criminal cases begun by private complaints. The "4–A Project", as it became known started accepting cases at the beginning of 1970. Due to the success of 4–A in Philadelphia, arbitration projects have been established in approximately twenty-five other U.S. cities including Akron.

The Akron 4–A Project began operating in 1973. In the first year of operation, the project worked out of available space in the Akron prosecutor's office. In 1974, the project moved to a new location in the John D. Morley Health Center.

Presently, the project is staffed with a director, tribunal clerk, referral clerk, and a professional arbitrator. The project also utilizes about twenty-five community volunteers who serve as trained arbitrators and community workers.

The budget of 4–A in fiscal year 1976 was $29,222.00. This fund was provided as follows:

ADJ	$20,000
State buy-in	1,111
Local cash	1,111
Additional local cash	7,000
Total budget	29,222

The budget was broken down into the following category:

Budget category	$29,222
Personnel	
Consultants	
Travel	
Equipment	
Supplies	
Other services	
Construction	
Indirect costs	
Total project cost	29,222

Additional costs to the project are fixed in that they are borne by the American Arbitration Association.

C. The project

The 4–A project in Akron operates under the principle that the dispute will voluntarily be submitted to final and binding arbitration by both parties.

The project begins to function when a person in the community feels wronged by another person's acts. The wronged party (complainant) seeks criminal prosecution against the other party (respondent) by choosing to file a complaint at the office of the city prosecutor.

The complainant meets with an assistant prosecutor who screens the case and decides if the case should be sent to 4–A, prosecutor's hearing, juvenile court, or elsewhere.

Cases are only initially referred to 4–A with the consent of the complainant. The respondent is immediately notified and has to consent to arbitration. The parties are advised that while it is not necessary for them to contract the services of an attorney for the hearing, they are entitled to be represented by counsel if they desire.

The "Submission to Arbitration" form is forwarded by the prosecutor's office to the 4–A project which then schedules the hearing. A "Notice of Hearing" is

[6] National Center for Dispute Settlement, The Four-A-Program (Arbitration As An Alternative to the Private Criminal Warrant and other Criminal Processes), Washington, D.C., MCDS (unpublished, revised December, 1972).

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sent to the parties advising them of the hearing date and procedures to follow if they desire to use attorneys or witnesses. The Arbitrator is appointed to the case by a "Notice of Appointment". Arbitrators are selected from the Arbitrator Panel consisting of citizens from the Akron Community and CDS staff. At the hearing, the arbitrator hears the facts of the dispute from each of the parties allowing each side to tell his story and ask questions of the other party. The arbitrator may also ask questions to clarify facts and issues. After each side has had a full opportunity to relate his story, the arbitrator uses his mediation skills seeking to find a basis for the parties to reach a voluntary agreement as to the resolution of their problem. If these mediation efforts fail, then the arbitrator exercises his authority to render an award in the case as to a remedy which is final and binding on the parties.

In the event either or both parties are represented by legal counsel, the correspondence is sent directly to the attorneys, who in turn are responsible for notifying their clients. On the day of the hearing, a clerk from the CDS staff administers an oath of office to the arbitrator and swears in the parties and any witness they elect to call. The hearings are held in accord with the CDS rules and the laws of the State of Ohio.

Following the hearing, the arbitrator forwards his award to the CDS office for transmittal to the parties and the prosecutor's office, thereby closing out the case. In the event charges are withdrawn during the course of the administrative proceedings, the prosecutor's office is likewise notified. Should either party fail to appear for the hearing, an effort to reschedule the hearing is made at the discretion of the CDS.

A summary of the problem 4–A is addressing is that the traditional court process is not the best forum for resolution of minor conflicts resulting from human interaction in the urban environment. Arbitration is a viable alternative to the criminal court for resolution of these minor criminal complaints.

The goals of the project are to:

1. Provide system support activities geared to improve the ability of criminal justice and related agencies to deliver services;
2. Provide a meaningful alternative to prosecution of minor criminal complaints, independent of the Akron Municipal Court;
3. Streamline the workload with direct impact upon the municipal prosecutor's time and having indirect impact upon the court's time and manpower requirements of the police department.

The objectives of the project are:

1. Diversion of minor criminal complaints to reduce the case load of the criminal justice system by diverting 33.33 percent of the complaints filed through the prosecutor's office;
2. 90 percent of the cases referred to 4–A will have a private hearing scheduled within seven (7) days aiding in the speedy resolution of problems;
3. Provide a more lasting resolution of private criminal complaints through a means which are less costly and more swift than traditional court processing;
4. Increase the probability of resolving problems by removal of rules of evidence applicable in the court room.

Chapter III

Project "Process" Evaluation

"Process" evaluation answers the question of how well is the Project operating. Information for the "process" evaluation was gleaned through observations of the Project in operation and interviews with the Project's staff and municipal court personnel. In addition, an examination of the Project's office procedures, record system, and management information system was made.

Observations were made at the prosecutor's office when private complaints were launched. The evaluator followed some complaints to the final disposition by sitting in on arbitration hearings. The city prosecutor and clerk of court were interviewed. The evaluator also interviewed the Project's director, a professional arbitrator, community volunteer, tribunal clerk, and referral clerk.

The case volume figures given are from the Project's records. Since the record keeping system includes periodic monitoring, these figures are believed accurate.

A. Diversion

This project can best be put in perspective by first presenting the private criminal complaint process. A person seeking to begin criminal proceeding must file a complaint at the prosecutor's office of the Akron Municipal Court.

In fiscal year 1976, 4,223 private criminal complaints were filed in the prosecutor's office. After interviewing the complainants, the prosecutor scheduled 1,075 cases (25 percent) for prosecutor's hearings; 1,219 cases (29 percent) were referred to 4–A; 1,929 (46 percent) were dropped by the prosecutor's interview, or referred elsewhere. (See table 1–A).

One of the objectives of 4–A is to divert minor criminal complaints to reduce the caseload of the criminal justice system diverting 33.33 percent of the complaints filed through the prosecutor's office.

As gathered from the 4–A quarterly reports, the project diverted 29 percent of all complaints filed in the prosecutor's office. Although, this is below the stated 33.33 percent diversion level, this is very significant in that the prosecutor's office handled less cases than 4–A (25 percent). Many of the cases (46 percent) were initially dropped by the prosecutor in the first interview, or referred elsewhere (legal aid, small claims court, etc.).

However, this 46 percent is beyond the control of the project in that these cases are not within the realms of criminal complaints that could have been referred to 4–A. They mainly consisted of civil matters and the like which are outside the specialization of 4–A.

In actuality, the city prosecutor would have handled 2,294 complaints had 4–A not existed. The project had a direct impact upon the workload of the municipal prosecutor's time by reducing the caseload through diverting 1,219 (53 percent) of these 2,294 complaints.

According to Mr. Peter Oldham, Chief Prosecutor for the City of Akron, "The 4–A project bypasses criminal proceedings. It does lighten caseload considerably and helps iron out the situations." [7]

It can be concluded that je jure, 4–A has not reached the 33⅓ percent diversion level. De facto, 4–A surpassed the diversion level by diverting 53 percent of private criminal complaints that would have to be processed through the Akron Municipal Court Prosecutor's office.

TABLE 1–A.—CASE REFERRAL

Case referral	July to September 1975	October to December 1975	January to March 1976	April to June 1976	Total	Percent
Total complaints filed with the prosecutor[1]	1,250	985	917	1,071	4,223	100
Prosecutor's notice sent for prosecutor's hearings	315	243	239	278	1,075	25
Total cases referred to 4–A by prosecutor	453	243	218	305	1,219	29

[1] Actual complaints taken in prosecutor's office. Includes (1) cases upon which affidavits were issued, (2) cases that were disposed of at the time the complaint was made, (3) cases which were referred elsewhere (Legal Aid, Small Claims Court, etc.), (4) cases which were referred to 4–A, (5) cases which were referred to prosecutor's hearings.

Note: Compiled data is for fiscal year 1976 (July 1, 1975 to June 30, 1976)

Source: Court arbitration quarterly report.

B. Problem resolution

The project has another objective of increasing the probability of resolving problems by removal of rules of evidence applicable in the court room.

The cases arbitrated are of "petty" variety. Out of 1,219 cases referred to 4–A, the criminal charge was simple assault (22 percent), fraud/larceny (6 percent), trespassing (3 percent), conversion (5 percent), threats (12 percent), malicious destruction (8 percent), harassment (14 percent), domestic/neighborhood (19 percent), and miscellaneous (11 percent.) (See Table 1–B.)

[7] Interview with Oldham, March 1977.

It is the experience of the arbitrators that these criminal charges are infrequently the result of isolated incidents. Rather, the incidents are symptoms of long smouldering disputes. The case type data presented in Table 1–B appear to support this evaluator's observations and the arbitrator's opinions on this point. The acts alleged could well be viewed as the type of action one might take in expressing anger or hostility or exacting revenge.

During the arbitration hearing, an attempt is made to penetrate the incident and probe the underlying problem. The issue in a criminal trial, on the other hand, is whether or not one of the parties is guilty of violating a specific criminal statute.

The informality of the arbitration hearing proceeding is a key element to the arbitration project. The arbitrator introduces himself to the parties in the reception area, escorts them to the room and urges them to make themselves comfortable. He explains that he has the powers of a judge, and that if the parties fail to reach an agreement, his arbitration order is final and enforceable in court. After noting that strict rules of evidence do not apply, he permits each side to tell his story in turn, without interruption. The arbitrator asks questions at the end of each story to firm up details and ambiguities.

Few of the arbitrators dwell at any length on the criminal charge. Rather, they inquire about any underlying relationship which might have been brought to a head by the alleged criminal act. The parties are asked about any contact they have had since the complaint was filed.

Witnesses accompany the parties in a minority of cases. Because formal rules of evidence are not followed, they are not needed to establish a chain of evidence or to circumvent hearsay problems. But they do lend background information. Most frequently, the witnesses are family members or friends who have come to give moral and evidentiary support to a disputant.

The informality of the proceedings and the apparent willingness of the arbitrator to allow each side to give a full and fair explanation of his side of the story encourages the participants to give vent to their feelings. An arbitrator may vary in the amount of heated discussion they will permit, but usually interruptions or insulting comments are not allowed.

Not infrequently, this mutual exchange of views, with a little guidance from the arbitrator, is enough for the parties to see some ground of mutual concern. One party, for example, may finally state that all he wants is for his neighbor to leave him alone. The other party is usually too willing to do this, provided that he doesn't have to admit that he had been harassing his neighbor. Nobody is found to be "guilty" or "innocent" of a crime.

Arbitration is not to establish that either or both of the parties are at fault, but to fashion a method for the parties to avoid future conflict. The ability of the arbitrators to fashion unique remedies enhances their ability to resolve long-standing disputes.

It can be concluded that the nature of the problems have enhanced the ability of the Project to increasingly resolve disputes with the absence of rules of evidence used in the court process.

The arbitrator and consent award generally state that if eihter party violates, the conditions of the case will be referred back to court. Much to the Project's credit, it has informally developed techniques of enforcing its awards short of court referral. Complaining parties generally phone the project and discuss the problem. The staff then phones the violating party to inform him that if he persists the case would go back to court. Frequently, this is sufficient to dissuade him from further non-compliance. If more appears needed, the arbitrator discusses the matter with the violator. If this is unsuccessful, a second arbitration hearing is sometimes advisable.

In fiscal 1976, the Project settled 82 percent of all cases referred by the prosecutor's office. Ten percent of the cases were referred back to the prosecutor and 8 percent were cancelled by the complainant after an arbitration hearing was scheduled.

This evaluator further concludes that 4–A has been successful in settling a significant percentage of cases referred to the project. In some instances, cases included in the 10 percent referred back to the prosecutor should not have been initially referred to 4–A. Although they fall in the general category of minor complaints, the underlying problem is extremely intense and beyond the reach of 4–A for a suitable resolution.

TABLE 1–B.—CASES REFERRED TO 4–A

	July to September 1975	October to December 1975	January to March 1976	April to June 1976	Total	Percent
Case disposition:						
Cases settled	364	191	179	261	995	82
Cases pending	0	0	0	0	0	0
Cases referred back to prosecutor	43	35	21	21	120	10
Cancellations	46	17	18	23	104	8
Total	453	243	218	305	1,219	100
Case breakdown:						
Assault	105	49	49	60	263	22
Fraud/larceny	20	16	17	21	74	6
Trespassing	23	9	4	6	42	3
Conversion	7	15	9	23	54	5
Threats	49	38	25	36	148	12
Malicious destruction	23	17	31	26	97	8
Harassment	57	49	28	59	173	14
Domestic/neighborhood	100	43	39	54	236	19
Miscellaneous	69	27	16	20	132	11
Total	453	243	218	305	1,219	100

Note: Compiled data is for fiscal year 1976 (June 30, 1975 to July 1, 1976).

Source: Court arbitration quarterly report.

C. Speedy Resolution

A third objective of 4–A is that 90 percent of the cases referred to the project will have a private hearing scheduled within seven days aiding to the speedy resolution of problems.

The evaluator took a random sample of 50 cases within the evaluation period and discovered that 99 percent of the cases were scheduled within seven days.

Although this sample is relatively small to be statistically accurate, it does indicate a trend to conclude that 4–A is successfully fulfilling this objective.

D. Management System

Supervision

The project is well supervised by a director, tribunal clerk, referral clerk, and a professional arbitrator. All appear to be working at or near capacity.

The involvement of trained volunteers has proven to be successful and has allowed 4–A to expand its services to the community. The volunteers serve as arbitrators and community workers. Community workers go into the neighborhood for subsequent follow-up that is needed for some cases. As more individuals are becoming involved in this program office space has become a problem. However, the success with community volunteers is a plus in favor of the project. This has also expanded the operations of the project in order to achieve its goals and objectives.

Records

Since inception this project has maintained excellent records. There is a quarterly monitoring and daily logs. It should be pointed out that this experience is not necessarily typical of "small" projects with very few full-time staff.

This project's record system has grown with the caseload and serves as a quite adequate management information system. All cases are entered in a log as soon as received. From this log, a staff prepares a quarterly summary indicating the number of cases received, remanded, withdrawn, and arbitrated.

The high quality of supervision and accurate record system indicate that the project is well managed. The project staff is very responsive to problems and dynamic to incorporating new ideas for the betterment of the project.

Chapter IV

Project Impact Evaluation

Impact evaluation will answer the question of whether the project offers a viable alternative to criminal justice processing of minor criminal complaints.

The project's effectiveness and efficiency in meeting its goals and objectives will be assessed. Information for impact evaluation was obtained through:

(1) collecting a random sample of fifty minor criminal cases that were resolved by the city prosecutor's hearing and arbitration hearing during the same time period (August, 1976) to determine if any cases re-entered the criminal justice system by March 30, 1977. This recidivism measurement will also determine if the project achieved its goals of having an impact on the prosecutor's time, court load, and police manpower requirements,

(2) presenting the results of an interview of twenty-nine persons that had cases arbitrated during fiscal 1976. This outcome measurement will determine if the project met its objective of providing a more lasting resolution to their disputes as opposed to the court process, and

(3) determining the cost per case to process 4–A cases as compared to other alternatives. This cost measurement will determine if the project is cost efficient.

A. Recidivism

Recidivism as defined in this study is a tendency of repeated relapse into criminal or delinquent habits by the same parties over the same problems.

A distinction should be made between recidivism and cases remanded. Remanded cases are those which the arbitrator sends back to the prosecutor for many reasons. The reasons could include: the parties did not abide by the arbitrator's award; the aribtartor did not reach a resolution satisfying to both parties; the parties prefer to prosecute after being referred to 4–A, among many. Recidivism, on the other hand, only measures the rate of repeators after cases have been arbitrated or heard by the prosecutor and determined closed.

The results of a random sample of fifty "minor" cases a arbitrated vis-a-vis those that went to prosecutor's hearing shows the following: the recidivism rate of 4–A cases was 2 percent in fiscal 1976 as compared to 12 percent for cases heard by the prosecutor. This means that the prosecutor had a higher percentage of repeators after they had closed a case as compared to 4–A. (See Table 2.)

Although the type of cases in this sample are unevenly distributed, it should be mentioned that the only recidivist case for 4–A fell within the category of malicious destruction. This evaluator followed the case to its final disposition and found that the case never passed the pre-trial stage. The complainant, who was the husband of the respondent, did not show up for the hearing and the case was dropped.

The evaluator realizes the limitations of such a sample. However, the results do indicate that the project has been successful in keeping cases out of court and reducing the time that municipal prosecutors and police officers have to spend on these cases is they re-entered the criminal justice system.

TABLE 2

	Number cases	Recidivism	(Percent)
Cases arbitrated	50	1	2
Prosecutor's hearing	50	6	12

	4–A (percent)	Prosecutor's hearing (percent)
Type of Cases:		
Assault	20	38
Trespassing	4	6
Conversion	10	8
Threats	10	16
Malicious destruction	10	10
Harrassment	32	16
Domestic/neighborhood	14	6
Total	100	100

B. More lasting resolution

A total of twenty-nine arbitrated cases were randomly selected in fiscal 1976 to determine the effectiveness of the services provided by the Akron 4–A project.[8]

[8] This survey was conducted by the College of Business Administration, University of Akron, August, 1975.

The conclusion from this survey is presented in Table 3.

The highlights of this survey is that: 65 percent of the respondents felt that 4–A resolved their problem; 10 percent felt that their conflict could best be solved in court; 79 percent favored the continuation of arbitration service; and 0 percent ended up in court in spite of the 4–A hearing.

There is good reason to believe that the arbitration process is very effective in solving minor criminal complaints vis-a-vis the tradional court process. This 4–A objective has been achieved to a very acceptable level by the project's clientele.

TABLE 3.—COMPOSITE SAMPLING; AKRON COMMUNITY DISPUTE SERVICES

Question	Number of responses	Percent		
		Yes	No	No response
1. My problem was resolved	29	65.5	17.25	17.25
2. My problem was not solved	29	10.3	27.5	62.2
3. My problem was partly solved	29	27.5	20.7	51.8
4. My conflict could best be solved in court	29	10.3	31.0	58.7
5. No court could have solved my problem	29	24.1	20.7	55.2
6. The arbitration service should continue	29	79.3	3.4	17.25
7. I was given a fair complete hearing before the arbitrator	29	82.7	3.4	13.9
8. I was the complainant	29	44.8	20.7	34.5
9. I ended up in court in spite of the arbitration conference	29	0	51.8	48.2

Note: This evaluation was conducted by the University of Akron, College of Business Administration.

C. 4–A cost

1. Compared with other "hearing projects".—In fiscal 1976, the 4–A project had an annual budget of $29,222.00 in public funds (other costs borne by the project are fixed costs and do not vary considerably if the project did not exist). Thus, the cost per case is $23.97 since the project met a projected caseload of 1,219 cases in fiscal 1976.

Estimates of the cost per case for some "hearing projects" [9] in other cities are:

Philadelphia 4–A project	$126
Columbus night prosecutor	20
Civilian complaint center (D.C.)	13

These cost estimates must be viewed with a great deal of caution. A direct comparison would simply be inaccurate and misleading. One problem is that the projects vary greatly in the amount of services offered. Some only offer the briefest of hearings and attempt at mediation, while others issue final and binding awards in addition to referring clients for service. Further, the cost of providing basic public services varies from locale to locale depending on many factors including salaries and size of the community.

Also, cost varies because of the relationship of a project to the criminal justice system. Projects may be "in-house" projects, run as part of a prosecutor's office or "outside" projects which are independent of the traditional court process.

Thus, the Akron 4–A is far less expensive than the Philadelphia 4–A Project. But it is more expensive than the Columbus Night Prosecutor Project and the Civilian Complaint Center, D.C., which are "in-house" projects.

2. Compared with the Akron prosecutor's office.—In order to compare the project cost with how much it would cost the prosecutor's office had 4–A not existed, cost for case processing would be limited to salaries [10] for personnel handling these minor criminal complaints.

The clerk in the prosecutor's office took approximately five minutes to make a record of each of the 4,223 complaints filed with the prosecutor's office in fiscal 1976. At $4.28 per hour, it cost $1,478.00 to make a record of all complaints.

The prosecutor took approximately fifteen minutes to screen and refer these complaints for proper disposition. At $10.16 per hour, it cost $10,726.00.

Out of the 4,223 complaints filed in fiscal 1976, the prosecutor drafted 2,294 cases to be referred to 4–A or prosecutor's hearings.

[9] See Interim Evaluation Report, Philadelphia 4–A Project, Blackstone Associates, 1975.

[10] Salaries for Municipal Court Personnel was obtained by the Summit County Criminal Justice Commission from the Akron Municipal Court Executive Officer.

It would take another ten minutes for the clerk to schedule and send out notices for each prosecutor's hearing. Had the clerk sent notices for 2,294 cases. it would cost $2,956.00.

The prosecutor takes approximately thirty minutes during each hearing. It would cost $21,452.00 for hearing 2,294 cases.

The total cost in salaries for the prosecutor's office to handle all complaints had 4–A not existed is $36,612.00 ($1,478+$10,726+$2,956+$21,452).

This does not include other fixed costs (equipment, furniture, record-keeping system) of the prosecutor's office.

The evaluator does not attempt to state that 4–A saves the prosecutor's office x number of dollars since the prosecutor's office would have to spend $36,612 only in salaries had 4–A not existed (considering the entire 4–A project cost the public $29,222.00). No accurate cost comparison is possible because no data is available to assure that cases processed by each method are in relevant respects comparable.

However, it is the conclusion of the evaluator that the public benefits from such a project in that it is cost efficient and cost to the public has been minimized

Chapter 5

Conclusions and Recommendations

1. Conclusion

It is the conclusion of the evaluator that the Akron 4–A project successfully achieved its goals and objectives in fiscal 1976.

The project is well-run, effective, efficient, and has benefited the public in providing system support services to the criminal justice system in the delivery of services.

However, arbitration is better viewed as a forum of diversion from the criminal justice system rather than an alternative criminal forum. The legality and propriety of 4–A referral is the same as that of other diversion projects; apparently, well within the discretion of the court and prosecutor. However, the Akron 4–A project has demonstrated the viability of a process diverting a large number of cases at a relatively low cost.

2. Recommendation

The evaluator offers the following recommendations:

(1) The project should consistently document their goals and objectives not limiting them to the concept of what they strive to achieve but to the actual wordings of those concepts.

(2) The Municipal Prosecutor should establish a more clear cut criteria for referral of cases to 4–A to eliminate the probability of the remanded and recidivism cases steming from the fact that they can't be solved through 4–A conflict resolution process. Also, descriptive brochures of the project should be issued in the prosecutor's office instead of only on verbal explanation of the project.

(3) Consideration should be given to expanding the scope of this project to include non-compulsory referrals to social service agencies as part of the arbitration process.

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(2) American Arbitration Association, Cleveland Center for Dispute Resolution.

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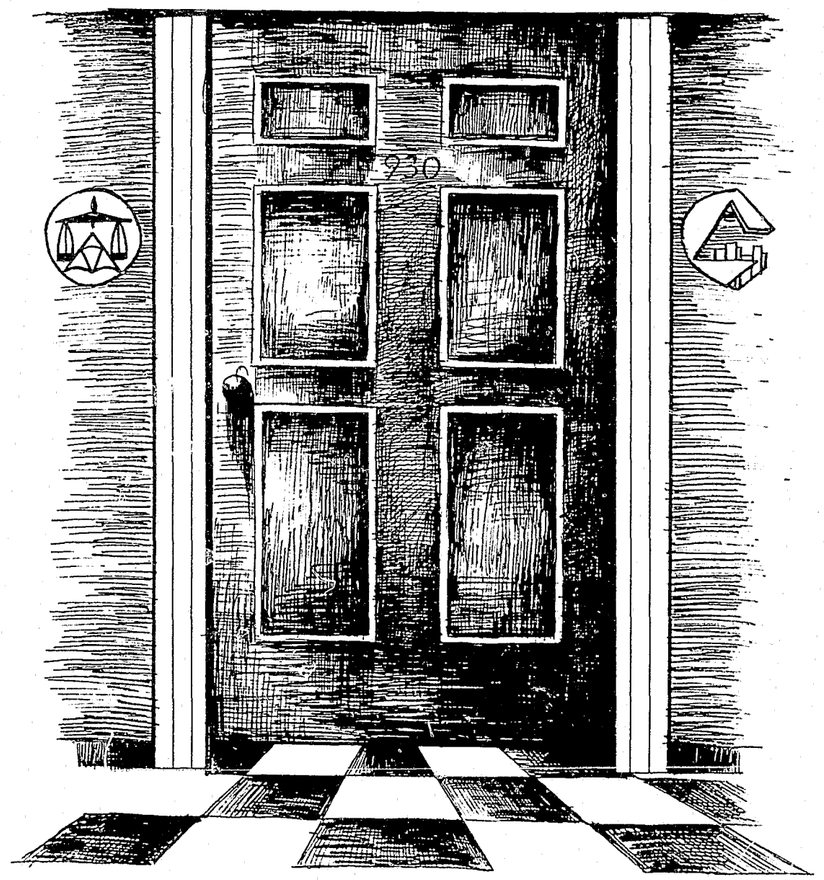
CLEVELAND CENTER FOR DISPUTE SETTLEMENT



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". . . arbitration must be set free to serve mankind,
that it must have a home of its own,
and from that home taken to
the doorsteps and housetops of the common people . . . ."

Frances Kellor
American Arbitration
Its History, Functions and Achievements
Harper & Brothers Publishers, 1948

Above: Tribunal Supervisor Manola R. Jordan (middle) talks with temporary employees Cam Nguyen (left) and Oksana Semerak.

Middle: From right, Ms. Jordan with Tribunal Administrators Richard J. P. Rinaldo, Deborah A. Gorman, and Derrelle E. Pounds (seated).

Below: Clerical staff from right: Darryl E. Smaw, Aurea Vasquez, Evelyn Camacho, Bernice Begay, and Barbara Elie (seated).

2

Since its founding in 1926, the American Arbitration Association has been a leader in developing techniques to solve a wide range of disputes. In maintaining that tradition, the Cleveland Regional Office administered 514 accident claims cases, 459 labor and 81 commercial arbitrations in 1978. Another service developed by the Association has been the administration of elections, and the Cleveland office conducted twelve of these in that same year.

From left: staffers Becky Bulina, Barbara Crooks, and Carol Marquardt take a moment to pose during a recent election.

3

Education is a big part of AAA activity—nowhere more evident than during the annual Labor Seminar. In the picture above, AAA General Counsel Gerald Aksen greets the Seminar's main speaker Chief Justice C. William O'Neill (also pictured above right as he made his address), while Judge James DeVinne and Earle C. Brown look on. Below, James Trusso of Teamsters Union dramatizes a point during a mock arbitration while arbitrators Paul Wells and Charles Ipavec look on. Arbitrator Peter Dileone (at right) concentrates on the proceedings.

4

During the Seminar, held on October 31, 1977, in the Bond Court Hotel, Chief Counsel Gerald Aksen (above) spoke on the merits of arbitration in settling labor disputes. Over two hundred people from both the business and labor sectors were on hand to hear the address.

Arbitrator Jonathon Dworkin (above) listens intently as Leon Plevin, also an arbitrator, made a few comments before Justice O'Néill was introduced.

THE CLEVELAND CENTER FOR DISPUTE SETTLEMENT

Arbitration As An Alternative (4-A)

PROJECT NARRATIVE

BACKGROUND

The American Arbitration Association (AAA), a private non-profit organization of which the National Center for Dispute Settlement (NCDS) is a part, has provided arbitration services to business, labor and government since 1926. It has been and continues to be one of the primary organizations in this country to develop such procedures and to educate the public in their use. It has also assumed responsibility for exploring new techniques of dispute settlement, as well as for studying the adaptability of proven dispute settlement techniques in new fields. No other organization has comparable experience in assisting parties to develop conflict resolution machinery or in administering private, voluntary dispute settlement procedures, and no other organization has accepted image of neutrality with facilities available on a nationwide basis.

In June 1968, the AAA received a grant from the Ford Foundation to establish the National Center for Dispute Settlement. The Center was set up to explore and develop methods and mechanisms for settling disputes in the new arenas of conflict, particularly those arising in the community between individuals, consumers and buisnessmen, landlords and tenants, community groups, and government agencies and their clients.

The key to its operation was to modify, adapt and apply the techniques of negotiation, mediation, conciliation, fact-finding and arbitration to the resolution of specific conflict situations and in the creation of new dispute settlement systems. At that time, the unanswered question was: Would those involved in these highly volatile, often violent conflicts be receptive to skilled third-party intervention and would they submit to such dispute settlement processes?

It soon became clear that the NCDS as an operational unit had to develop its own philosophy, define more precisely its own commitment and decide how to articulate both in a manner acceptable to the irrepressible forces for change on the one hand and to the holders and custodians of institutional power on the other.

It also became clear that the modification and the application of dispute settlement techniques on an ad hoc basis in the relatively new and explosive areas of community, campus and public employment conflict dealt with only part of the problem and constituted less than half the challenge. A deeper need could be met and a more lasting contribution made through new systems development within existing institutions creating greater participatory designs and providing both the opportunity to entertain conflict and the mechanism and skills to accomodate and resolve it—extending where necessary beyond the institutional orbit. Furthermore, the NCDS could independently urge the adoption of such new systems without the immediate coercive force of conflict.

PROGRAM DESIGN

The 4-A Project provides Arbitration As An Alternative to arrest, the criminal warrant and other criminal processes.

Community conflicts find their roots deep in our society and in human nature. Too often we only see the symptoms—the surface evidence—of a more pervasive problem. Much like the visible tip of an iceberg, the private criminal complaint or private warrant frequently deals with relatively minor charges growing out of deeper human conflict, frustration and alienation. In such cases, more often than not, neither the complainant nor the defendant is entirely blameless; yet the criminal law with its focus on the defendant alone is ill equipped to deal

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with this basic fact. The judge or prosecutor, faced with an overcrowded court calendar, beyond-a-reasonable-doubt criteria for conviction, conflicting stories, and "minor" offenses, typically dismisses the case and lectures the defendant—threatening possible punishment for future offenses. This is not conflict resolution; it is not problem solving in the community; nor is it intended to be. The tip of the iceberg has been viewed briefly, but the underlying problem remains unseen and potentially as obstructive as ever. Neighborhood tensions have not been reduced. Relationships have not been improved. At best a shaky truce may have been ordered.

The National Center for Dispute Settlement of the American Arbitration Association believed that there was a better way and as a result a new approach evolved where, in appropriate cases, and when agreed to by the citizens involved, an alternative course of action is followed—the voluntary submission of the dispute to final and binding arbitration under the auspices and administration of the National Center.

These procedures provide a greater opportunity to deal meaningfully and sensitively with human beings in conflict, to engage in meaningful dialogue, to probe for the underlying causes and to address them, and to reach an accomodation. It also provides finality through the Arbitrator's award. However, the process itself makes the award rendered far more acceptable. The conflict which arises in the community is settled in the community under conditions of maximum involvement and participation of the parties to the dispute.

The program begins to function when a person in the community feels wronged by another person's acts. The wronged party (Complainant) seeks criminal prosecution against the other party (Respondent) by calling the police or by filing a complaint at the office of the district attorney or city prosecutor. This complaint from a private citizen often results in an arrest or the issuance of a warrant for the arrest of the respondent. Many of these complaints are for relatively minor criminal offenses such as harassment, destruction of property, simple assault, disorderly conduct and the like. Such offenses as these often arise out of arguments between friends or neighbors which resulted in one party's slapping the other, a minor scuffle, a broken window or other activity not uncommon to urban living, albeit, technically criminal in nature.

If all such cases were prosecuted, the courts would be backlogged everywhere, as many now are. Even if the courts could process all such cases, they could not resolve the real problems, i.e., the causes of the technically criminal behavior; the courts are restricted to finding the defendants before them either innocent or guilty of the alleged offense.

So what has been done? First, it was not felt by NCDS that the criminal process was the proper forum for the settlement of these common urban living disputes. This is because the warrant and ensuing criminal prosecution are often used by one of the parties as just another weapon in the underlying dispute, rather than as a means of resolving the dispute. Nor was it felt that the dispute would be any better resolved by seeking a solution by way of the civil courts. What was needed was a procedure independent of the court which would be, quite simply, fast, cheap and easy. The 4-A Program does this with the added benefits of greatly reducing police manpower time requirements, court case loads and, most importantly, resolving the underlying cause of the criminal conduct while avoiding criminal convictions, arrest records and, hopefully, future anti-social activity.

The 4-A program is quite flexible in its procedures, making it readily adaptable to any court system or community referral procedure.

DESCRIPTION OF 4-A PROCEDURES

Once the prosecutor makes the determination that a particular dispute is appropriate for arbitration as an effective means of settlement, the complainant and the respondent are offered the opportunity to appear before an Arbitrator, whose decision is to be final and binding. The service is offered to the parties without charge. They are advised that while it is not necessary for them to contract the services of an attorney for the hearing, they are entitled to be represented by counsel if they desire. Parties who wish to use the 4-A Project to administer the hearing as well as a formal commitment by them to be bound by the Arbitrator's award.

The "Submission to Arbitration" form is forwarded by the municipal court to the 4-A project which then schedules the hearing. A "Notice of Hearing" is sent to the parties advising them of the hearing date and procedures to follow if they desire to use attorneys or witnesses. The Arbitrator is appointed to the case by a "Notice of Appointment." Arbitrators are selected from the Arbitrator Panel consisting of citizens from the Akron community and the NCDS staff. At the hearing, the Arbitrator hears the facts of the dispute from each of the parties allowing each side to tell his story and ask questions of the other party. The Arbitrator may also ask questions to clarify facts and issues. After each side has had a full opportunity to relate his story, the Arbitrator exercises his authority to render and award in the case as to a remedy which is final and binding on the parties.

In the event either or both parties are represented by legal counsel, the correspondence is sent directly to the attorneys, who in turn are responsible for notifying their clients. On the day of the hearing a clerk from the NCDS staff will administer an oath of office to the Arbitrator and swear in the parties and any witnesses they elect to call. The hearings are held in accord with the Community Dispute Settlement Rules of NCDS and the laws of the State of Ohio.

Following the hearing, the Arbitrator forwards his award to the NCDS office for transmittal to the parties and the prosecutor's office, thereby closing out the case. In the event charges are withdrawn during the course of the administrative proceedings, the Prosecutor is likewise notified. Should either party fail to appear for the hearing, an effort to reschedule the hearing will be made at the discretion of the NCDS.

Dispute center keeps cases out of court

By BOB WILLIAMS

You may figure there are just two ways to settle disputes — punch somebody or go to court.

But now there is a third way, offered here by an office known as the Center for Dispute Settlement, 215 Euclid Ave.

It is one of 10 branches of the National Center for Dispute Settlement of the American Arbitration Assn.

Chief settler of disputes at the center is Earle C. Brown, onetime basketball star with the Harlem Globetrotters.

NCDS here has assisted in disputes ranging from complaints by County Jail prisoners to reclaiming a $500 deposit a couple had paid to an East Cleveland realty firm towards buying a home.

Consumer complaints are a big source of its work, and it has an agreement with the Better Business Bureau for arbitration of disputes between buyer and seller.

Those with complaints may be referred or go directly to NCDS with their troubles.

But its primary business is handling disputes referred by the East Cleveland Municipal Court, presided over by Judge James DeVinne.

East Cleveland was selected as a trial area before expanding the project to other municipalities, including Cleveland.

Brown has handled about five cases weekly since last November and reports less than one out of 10 has been appealed or returned for additional evidence.

The center here receives funds from a two-year, $105,000 grant by the Cleveland Foundation. It is funded nationally by the Ford Foundation.

"The chief difference between the dispute center and a court," says Brown, "is that the center isn't out to find a guilty party.

"What we do is try to come up with a solution satisfactory to both parties."

Once a dispute is settled, violation of the terms of arbitration could restore the case to the East Cleveland court for prosecution, Brown emphasized.

East Cleveland was chosen, he said "because Judge James DeVinne is noted for his innovative ideas which, with the cooperation of the prosecutor's office, provided immediate possibilities for success."

Judge DeVinne praised Brown and the dispute settlement program, and said the system should be expanded throughout Cuyahoga County.

"It is an excellent idea in theory, but it needs further implementation," the judge said.

In disputes, the arbitrator hears both sides and attempts to bring an agreement acceptable to both. Both parties must sign, ending the dispute.

"We're not anybody's advocate; anybody is free to use our services; and there is no fee involved, except where money is involved; and even then the quite nominal sum may be waived," said Brown.

Attorneys, while not necessary, are welcome if either party prefers. Most cases avoid courts, prosecutors and attorneys.

Earle C. Brown

Judge James A. DeVinne

Statistical Report, 1977

Types of Cases Referred by Prosecutor	Total
Assault & Battery	735
Fraud/Larceny	26
Trespass	40
Conversion	219
Threats	400
Malicious Destruction	200
Neighborhood Situations	185
Harrassment	759
Resolved during hearing	2171
Resolved prior to hearing	233
Referred back to prosecutor	106

Pictured below during a break in the day's busy activities in the Cleveland 4-A office are (from left) Secretaries Terri Crowell and Barbara Elie with Assistant Director Frank Thomas and Prosecutor Almeta Johnson.

Elyria 'arbitrators'

By TOM CHERNITSKY

An Elyria man feels he is being harassed by the sound of his neighbor's "hot rod" car late at night.

Another man knocks down part of his neighbor's fence.

An Elyria woman is slapped by her husband during an argument.

EARLE C. BROWN offered arbitration services for 50 years.

THE POLICE ARE CALLED and their advice to all these persons is "see a prosecutor."

Until a year ago, Elyria prosecutors had to study the merits of each complaint for criminal charges, but since November last year there has been an alternative called arbitration.

Besides saving time and money for the Elyria prosecutor's office and Elyria Municipal Court, the program also solves problems a court doesn't have the responsibility to hear, according to Earle C. Brown, regional director of the National Center for Dispute Settlement of the American Arbitration Association, which has

THE ARBITRATION SERVICES have expanded to municipalities in the past few years.

A court determines guilt or innocence, but arbitration establishes a resolution which both parties can live with, Brown said.

Statistics on the program in Elyria from its beginning through September indicated 183 cases were referred to arbitration out of 810 complaints filed at the prosecutor's office in city hall.

OF THE CASES WHICH went into arbitration, all but 10 were resolved and those cases went back to prosecutors to be studied for possible criminal charges.

Most of the cases were assault and battery, but included theft, trespassing, threats, malicious destruction of property, and other violations which technically are classified as criminal charges.

Unlike criminal complaints made by citizens at the cost of $14, arbitration is free and representation by an attorney is unnecessary, Brown said.

THE ASSOCIATION HAS BEEN trading its services to the city for use of office space the past year, but the $30,000 cost for the program next year will be funded with a Law Enforcement Assistance Administration grant with the city and state each contributing about $1,600 for the program.

The procedure begins when a citizen visits the prosecutor with a complaint. A prosecutor can quickly determine if the complaint can be settled in arbitration.

Notice is given to the person the complaint is against, but that person, called the respondent, won't know who filed the complaint until he gets to the arbitration session.

Tribunal Administrator Rita Delvecchio (standing) with Assistant Director Audrey Mendenhall

CONTINUED

5 OF 8

save courts time, $$

"THE REASON WE DON'T TELL them is we don't want someone to take it out on a guy for going to the halls of justice," Brown said.

If the respondent refuses to appear for arbitration, the complaint is referred back to the prosecutor, Brown said, but they usually do appear.

"The charges are never formal if they are resolved at this level," he said.

WITH THE ARBITRATOR present, the complainant and the respondent "sit across the table from each other talking

'A court determines guilt or innocence, but arbitration establishes a resolution both parties can live with.'

about their differences. In courts, they would not be permitted to do so," Brown said.

"The charging party is given an opportunity to make a statement and the respondent is given an opportunity to respond. Then we try to determine the cause," Brown said.

Witnesses may also be called.

In about 70 per cent of the cases, the arbitrator does not have to make a decision because the complainant and respondent come to a mutual agreement, according to Brown.

IF RESOLUTION cannot be reached, "We'll send it back to the prosecutor and will make recommendations," Brown said.

Mrs. Audrey Mendenhall is the arbitrator in Elyria and is in the city hall office during regular business hours.

Elyria solicitor George H. Ferguson and prosecutor Michael E. Szekely both say they believe the program is beneficial for the city.

"HOPEFULLY, IT EVEN solves the very basis of the problem," Ferguson said. "We can only press a criminal charge and someone is then found guilty or innocent.

"A lot of people come up here and say they don't want a criminal charge. They want help with their problem," Ferguson said.

Szekely called the program "fantastic."

"MOST OF THE TIME it works out real well. It saves a lot of time for us and it prevents the filing and dismissing of charges," Szekely said, explaining that in many family disturbances prosecution becomes impossible when the person who filed the complaint in the first place won't cooperate with prosecutors.

Brown hopes the services in the Elyria office will expand in the coming year to include arbitration for more non-criminal matters.

Similar arbitration programs operated by Brown's organization are set up in the Cleveland area and Akron, but the one in Elyria is the only one in Lorain County.

BROWN SAID MANY CASES SETTLED by arbitrators are misunderstandings which boiled over. Settling them without going to court means no police record, no publicity, and no fine, jail sentence, or court costs.

But most important, Brown said, arbitration may settle differences which could end with more tragic results than a slap in the face or a fight.

Statistical Report, 1977

Types of cases referred by prosecutor	Total
Assault & Battery	62
Fraud/Larceny	2
Trespass	15
Conversion	6
Threats	9
Malicious Destruction	7
Miscellaneous/Other	52
Housing Code	0
Walk-in (not referred)	1
Harrassment	47
Domestic/Neighborhood	31
Total cases referred	233
Cases settled	211
Cases referred back to prosecutor	8

Figures shown here do not include those cases which were settled prior to the time of hearing.

Elyria Mayor, Marguerite Bowman

Judge James P. Horn

Judge Stephen R. Nagy

City Solicitor George H. Ferguson

OFFICE OF SOLICITOR
SOLICITOR
GEORGE H. FERGUSON

THE CITY OF ELYRIA, OHIO
CITY HALL
ELYRIA, OHIO 44035
323-5647 & 323-5648

ASST. SOLICITORS
& PROSECUTORS
ELMER A. BESSICK
LARRY E. COEY
QUENTIN J. NOLAN
DAVID M. NEIL
MICHAEL E. SZEKELY

August 22, 1978

Mr. Earle C. Brown
Regional Director
American Arbitration Association
930 Williamson Building
215 Euclid Avenue
Cleveland, Ohio 44114

Re: Court Arbitration

Dear Mr. Brown:

This letter will explain the structure of the Elyria Solicitor's Office and the function and effect of the Arbitration Program presently in existance in Elyria.

The Solicitor's Office has provided space for the Arbitration Program since November, 1975. Although the Mayor of the City of Elyria is the subgrantee, the Arbitration is more closely allied with the Solicitor's Office, both physically and workwise. All of the City's Prosecutors are employed by and work under the supervision of the Solicitor. Whenever a citizen files a written complaint with the Prosecutor's Office, a member of our office interviews the complainant, and if it appears as though the case could be resolved through the Arbitration Program, the complainant is referred to the Arbitration. Any citizen who desires to go directly to Arbitration can do so without going through the personnel in the Prosecutor's Office. In addition, both of the Municipal Judges have referred cases to Arbitration.

During the three years that the Arbitration Program has been in effect in the City of Elyria, it has been of great assistance to the Prosecutor's Office, to the citizens, and to the Court. The Prosecutor's Office has been relieved of the burden of handling many criminal cases which Arbitration was able to resolve without criminal charges or court action. Numerous citizens have had their problems resolved by Arbitration, which problems, if not resolved, could easily have lead to criminal action. Finally, the Municipal Court, at various stages of criminal proceedings, has referred cases to Arbitration pending further prosecution if not resolved.

As the Elyria City Solicitor, it is my opinion that the Arbitration Program has been an invaluable service to the community in general, and to our office particularly.

Very truly yours,

George H. Ferguson/jag
George H. Ferguson
City Solicitor

GHF/jag

Peacemakers . . .

By KATHY GOFORTH
Beacon Journal Staff Writer

"If charges are brought against you again, it'll be a far more serious matter," arbitrator Earle Brown told the 14-year-old boy across the conference table.

"The next time it won't be just a session down here, it'll be in front of a judge and could result in a record that'll follow you the rest of your life."

A neighbor, Jerry Kinsey, 21, had complained to the Summit County Juvenile Court that 14-year-old Scott Olson had harassed him by banging several times on his front door, throwing snowballs at his windows and trying to set his front door on fire.

Special report

Those are not their real names, but the case is typical of those referred to Community Dispute Services (formerly the National Center for Dispute Settlement), an arbitration service offered through the Akron prosecutor's office, which last year also began hearing juvenile cases.

Kinsey, Scott and Scott's mother sat face to face in the conference room while each told Brown his version of the story.

Kinsey had been told by witnesses that Scott was responsible for the trouble. Scott admitted he had thrown snowballs but denied banging on the door or trying to set it on fire.

"Were you ever friends?" Brown asked. That is a question he often poses to disputing neighbors.

Scott said he and a group of his friends used to go to Kinsey's apartment to play cards and listen to the radio. Scott's mother said the trouble began when Kinsey's 13-year-old niece began harassing Scott with phone calls and using foul language when he refused to talk to her.

"I didn't know about that," said Kinsey. "I'll put a stop to it."

MANY TIMES the purpose of arbitration is reconciliation, Brown told them. "I'm not going to recommend that in this case," he said. "The age difference between you leaves some question in my mind as to what commonalities you share."

Instead he ordered Scott to stay away from Kinsey and his niece. "It doesn't mean I find you guilty or innocent of anything," he told Scott. "But a recurrence of the problem could result in a court action, and you don't need that kind of trouble."

The point is one Brown and the center's other arbitrator, William E. Fowler Sr., emphasize, especially to juveniles.

"A court record can keep you from going to certain schools; it can keep you out of certain professions," Brown told another group of teenage boys involved in a neighborhood dispute. "You're at the stage where the decision is all yours."

BROWN'S candid remarks and practical problem-solving techniques are typical of the method of handling disputes that range from neighborhood squabbles to criminal charges.

An important part of arbitration, they say, is offering people an alternative to solving their problems on the street, taking the law into their own hands or using the courts as weapons against their neighbors.

A division of the American Arbitration Association, the center was established in 1973 through a Ford Foundation grant and has been extended through yearly $40,000 grants from the Law Enforcement Assistance Administration of the Justice Department and supplemented by city and state funds.

The purpose is to make the program part of the city's legal system, said Brown, regional director for the centers in Akron, Cleveland, Elyria and Shaker Heights. Brown is also a former (1968-72) adminis-

Cooling sore spots for city neighbors

trative assistant to the Akron Metropolitan Housing Authority and a onetime member of basketball's Harlem Globetrotters.

With a growing number of cases referred from the prosecutor, juvenile court, area police departments, the housing division of the Akron Health Department and Metropolitan Housing Authority, the program is building a reputation for its effectiveness.

OF THE 1,227 cases referred to the center in 1975, 939 were settled, 133 were dropped by complainants before they came up for a hearing, and 155 were referred back to the prosecutor.

The program not only offers an alternative to the courts, it has an advantage over them, said Brown.

"The courts can only determine the innocence or guilt in a case," he said. "They have no way of dealing with cases where solving the problem means going deeper than simply deciding whether a crime was committed. As a result, people go out with the same animosity that created the conflict to begin with. And because the prosecutor is bound by law to act on every citizen's complaint, individuals end up retaliating through the courts."

Cases can also be heard and resolved sooner than in the courts, and the courts reap the benefit of lighter case loads, he said.

MOST IMPORTANT, a solution to underlying problems causing the conflict is often found, said Brown.

When a supermarket brings charges against an individual for writing bad checks, he cites as an example, prosecution might result in a jail term for the check writer, leaving the store with the bad check and the publicity of a trial.

"In arbitration we've had guys readily admit they wrote a bad check but say they did it to feed their families," said Brown.

"We've been able to work out agreements between the guy and the store to have the check paid off over a period of time. In a couple of instances where the man was unemployed, we've been able to put him to work for the store."

In one case an elderly landlady had charged a tenant with taking her furniture when he moved out.

"When someone is on a fixed income, it doesn't help much if they get a judgment from the court but no money," said Brown. "If we can recover the furniture, the case will be dismissed. If it's been disposed of, we'll try to work out a settlement for reimbursement."

DISPUTANTS who agree to arbitration also must agree to abide by the arbitrator's decision. If the problem cannot be worked out or the parties violate the agreement, the case is immediately referred to the prosecutor or juvenile court for prosecution, said Brown.

The arbitrator begins each session by saying that pointing the finger of guilt is not the goal. The discussion continues, prompted by questions aimed at uncovering problems that may be adding to the conflict.

In one session two sets of parents squared off, each blaming the other's children for continued fighting among their four boys (ages 7 to 12) that resulted in the three older boys tying up the smaller one.

The angry mothers had difficulty following Brown's instructions to let each tell her side of the story without interruption.

FURTHER questioning by Brown revealed the mothers had played cards together often before having a falling out.

"If you two were friends, do you think your children would be fighting?" he asked them.

"Listen to how you're getting along in this room right now — how do you expect your children to behave?"

Brown then told the fathers that they, not their wives, should handle any future fights between the children.

"Can you two communicate without threats?" he asked.

"He and I can get along," said one father while the other nodded. Brown then dismissed the parents from the room.

"Are you going to get along in spite of the fact that your parents may not?" Brown asked the boys.

The boys agreed they would and were laughing and talking when they joined their parents.

JUVENILE Court Staff Development Coordinator John Saros said he would like to see the arbitration program expanded to handle even more juvenile cases.

The court currently refers about a dozen cases a month to the center. They are usually cases where there is "a little bit of wrong, a little bit of right, and parent involvement aggravating the situation," said Saros.

He estimated about 10 percent of all the court's cases (between 500 and 600 a month) could go to arbitration if the program were expanded.

"Its advantage is, there is no official record that can be held against the child," said Saros.

Housing Disputes To Be Mediated

By **WILLIAM CANTERBURY**
Beacon Journal Staff Writer

Disputed Akron housing code violations will go to Federal arbitrators beginning April 1 in a program designed to keep the disputes between property owners and the City out of the courts.

The National Center for Dispute Settlement of the National Arbitration Association will receive about 10 housing cases a week, according to Fred Rossi, director of the Health Department's housing division.

ARBITRATORS Earle Brown and Frank Thomas

Fred Rossi

will hear the cases in the City-County Safety Building.

When the program begins, Akron will be the first of 22 cities in the country to have arbitrators take over housing disputes.

The arbitrators last Summer took over adjudication of disputes between citizens in another program designed to reduce court caseloads. About 150 complaints a month, mostly domestic, have been handled by the Center for Dispute Settlement.

Rossi said typical housing disputes to be handled by arbitration include:

An out-of-town absentee landlord ignoring Health Department notices to vacate his four-unit building in the central city because it is "unfit for human habitation."

A resident complaining about lack of rat control and also wanting his apartment painted.

"These are exactly the kind of cases that are at the stage where we'd like to send them to a third party," Rossi said. "We hope we can resolve them satisfactorily, but we're not going into arbitration to compromise on code violations.

"Sanitarians and supervisors will decide what points we should give in on in strategy sessions prior to the hearings, and we'll set that forth at the very beginning of the hearing."

Rossi said Health Department sanitarians inspected 2,190 buildings in 1973 and found about 65 pct. in code violation.

About 3,500 complaints were classified as "nuisances," having to do with such items as garbage and animals.

Most of the complaints were brought against landlords by tenants, Rossi said.

HEALTH officials heard the complaints before the new program was set up, with 18 being sent to court because the complaints could not be resolved.

"Although we've been able to settle most of the cases without a court fight, they have left a lot of resentment simmering after the hearings, usually on the part of the landlord," Rossi said.

One of the main reasons for turning the disputes over to arbitrators, Rossi said, is to give landlords a "voice" in the proceedings and bring about a more peaceful settlement.

"You have to be relatively willing to make some concessions as long as you aren't jeopardizing the health and safety of the people," Rossi said.

Form 191P

CITY OF AKRON, OHIO

MEMORANDUM FOR INTER-DEPARTMENTAL USE

Date March 10, 1975

To William C. Grimm - 10th Ward Councilman

FROM: Frank Slaton - Administrator of Food & Sanitation

Re: Complaint at 1178 Triplett Blvd.

A second arbitration hearing was conducted this date (March 7, 1975), by Mr. Earle Brown of National Center for Dispute Settlement of the American Arbitration Association regarding the disputes or complaint you forwarded to this department from Violet Wendell against Tredco, Inc. and Mr. Piscitelli.

Arbitration was suggested as an alternative to Civil court action, which in the past had not resolved this dispute. Both parties in this matter agreed to binding arbitration.

Agreement was reached this date (March 7, 1975) between both parties that will resolve further problems or disputes. That agreement was: Mr. Piscitelli agreed to purchase the Wendell property at 1186 Triplett Blvd. and the Wendells agreed to sell. A price, time for vacating, closing costs, etc. were agreed upon.

Sincerely,

Frank Slaton

Frank J. Slaton, Administrator
of Food & Sanitation

/siw
cc: Noble Sherrard
Fred Rossi

Signed _____

KARL HAY
CHAIRMAN

SUMMIT COUNTY CRIMINAL JUSTICE COMMISSION
234 OHIO BUILDING B
191 SOUTH MAIN STREET
AKRON, OHIO 44308
PHONE: (216) 253-4547

February 10, 1975

ANTHONY J. LA SALVIA
EXECUTIVE DIRECTOR

Mr. Earle C. Brown, Director
National Center for Dispute Settlement
c/o Morley Health Center
177 South Broadway Street
Akron, Ohio 44308

Dear Earle:

This letter is to inform you that the Akron 4-A, Court Arbitration Program has been cited by the Administration of Justice Division as a "Notable Project" in the 1975 Ohio Comprehensive Criminal Justice Plan.

Your organization is certainly to be commended for this outstanding achievement.

Best wishes for continued success!

Sincerely,

Anthony J. La Salvia

Anthony J. La Salvia
Executive Director

AJL/RB/cs

"It is the conclusion of the evaluator that the Akron 4-A project successfully achieved its goals and objectives in the fiscal year of 1976.
The project is well-run, effective, efficient, and has benefited the public in providing system support services to the criminal justice system in the delivery of services.
However, arbitration is better viewed as a forum of diversion from the criminal justice system rather than an alternative criminal forum. The legality and propriety of 4-A referral is the same as that of other diversion projects; apparently well within the discretion of the court and prosecutor. However, the Akron 4-A project has demonstrated the viability of a process diverting a large number of cases at relatively low cost."
From "An Evaluation of the Akron 4-A Project" June, 1977, by Roderick Smith and Terrence Smith

Above, the Akron 4-A staff from left: Elizabeth DeBruin, Barbara Crooks, Carol Marquardt and Arbitrator William Fowler (seated). Below, Earle C. Brown and Frank Slayton (left) with Fred Rossi.

Statistical Report, 1977

Types of cases referred by prosecutor	Total
Assault & Battery	211
Fraud/Larceny	81
Trespass	27
Conversion	46
Threats	132
Malicious Destruction	62
Miscellaneous/Other	81
Housing Code	0
Harassment	151
Domestic/Neighborhood	128
Cases Settled	804
Cases settled before hearing	81
Cases referred back to prosecutor	44

Arbitrators to get role in juvenile court cases

Binding arbitration, which has been used to solve labor disputes, will be employed to solve disputes involving children under a plan approved today by Summit County Commissioners.

The county's juvenile court will add $9,000 to an $11,000 grant from the Junior League of Akron to establish a panel of arbitrators at the detention center.

League members will be trained by American Arbitration Association members to hear cases that have been resolved in juvenile court.

"Some complaints relating to children are referred to us," said Juvenile Court William Kannel, "and then end up as nothing more than neighborhood disputes.

"But rather than I find the child delinquent, I believe we can get the cases resolved more effectively through arbitration."

SOME JUVENILE cases have already been submitted to arbitrators, but the caseload has increased to the point that more persons are needed to hear the cases, Kannel said.

As part of the grant, the league will provide the money for training of arbitrators.

The agreement calls for the program to last until April 1977. Kannel said his staff will evaluate the program at the end of six months.

4-A staffers pause during training sessions for volunteers. From left: Earle C. Brown, Liz DeBruin, Harry Payne, III Detroit Regional Director, Midge Cowap, and Joseph Stulberg, Vice President, AAA.

650 Dan Street, Akron, Ohio 44310
379-5760

CHARLES T. SIMONSON
Director of Juvenile Court Center

MYRON W. TARBIS
Assistant Director of Juvenile Court Center

JAMES R. CANNATA
Director of Detention Services

JAMES E. PHILLIPS
Director, Psychological Services

WILLIAM P. KANNEL
Judge

ROBERT HIGHAM
Referee

BERNARD M. SCHWARTZ
Referee

January 28, 1975

Earle Brown, Director
American Arbitration Association
630 Williamson Building
215 Euclid Avenue
Cleveland, Ohio 44114

Dear Mr. Brown:

We understand that you, as authorized representative of the National Center for Dispute Settlement, will offer arbitration services to the Summit County Juvenile Court for a trial period. These services will be at no cost to the court, the county, or to the client.

We propose the following terms for referrals from the court to you:

1. The juvenile court intake department shall provide clients with your telephone number to initiate the referral in cases of neighborhood disputes, to include harassment, property damage, andminor injury claims.

2. Copies of the court's walk-in reports shall be provided to you upon request.

3. Meetings for your arbitration shall be in your Akron offices or at space provided for you in the Juvenile Court Center on Tuesday and/or Thursday, weekly, as needed.

4. It is expected that the dispute center will provide the court with a report of the outcome of each matter referred to you.

Sincerely

William P. Kannel

William P. Kannel - Judge
Summit County Juvenile Court Center

WPK:if
cc: F. Hernandez
C. Simonson

Volunteers mend fences, relationships

By KATHY GOFORTH
Beacon Journal Staff Writer

Volunteer Barbara Hellwig helps patch up neighborhood feuds.

Once she rebuilt an old wooden fence to ease the tension between two warring families. The fence's owner had accused his 17-year-old neighbor of damaging the fence during several summer vacations and demanded that the Summit County Juvenile Court put the boy on probation.

The case was referred to the Akron Community Dispute Services division of the American Arbitration Association. During the hearing an arbitrator suggested the resolution might be for the boy to help repair the fence, but the boy's mother refused to allow him to work on the man's property.

Ms. Hellwig and volunteer Barbara Crooks did the patch job themselves.

THE WOMEN are two of 25 volunteers recently trained in arbitration skills as part of an Arbitration Association program designed to offer young offenders an alternative to the juvenile court.

The program, funded through April of 1977 by the Junior League ($11,000) and the Summit County Juvenile Court ($9,000), was piloted a year ago by the Akron Community Dispute Services office under Earle C. Brown, association regional director. It is the first of its kind in the nation.

Juvenile first offenders involved in minor infractions of the law, neighborhood disputes or status offenses (such as truancy) are channeled into the program by the juvenile court, currently at a rate of about 30 cases a month.

The juveniles escape the stigma of a formal court record, the "victim" often gets some retribution, and the load of the overburdened court is lightened, said Liz deBruin, Akron Junior League program coordinator.

Arbitration also offers a chance to explore deeper conflicts that may be causing the problem, she said. "The goal is to resolve rather than suppress conflicts."

Volunteers attend two weekend seminars for training in communication and listening skills, questioning techniques, handling evidence, preventing and resolving disputes, negotiating strategies and other arbitration techniques.

SOME OF the volunteers work in the association office handling phone calls from those who are about to go through arbitration or have complaints or questions. Others work in the field doing follow-up work in the home or taking a first hand look at the alleged damage to property. Some, the ones with special talents, even become arbitrators.

The training and application of so many skills put the job into the category of a new kind of volunteerism, said Ms. deBruin.

"More training, involvement and commitment is needed. It's going with the trend of what volunteers are asking for. The traditional role of the volunteer is in areas where you can volunteer half a day a week and no intense training is needed. This job is for someone looking for a more total experience in the volunteer field," she said.

The results have been rewarding, said Ms. deBruin. Many times a case is resolved with a single hearing. Others, where conflicts are deeper and older, require follow-up by a volunteer.

TRYING to uncover the real point of contention in a dispute is the first step in solving the problem, said Ms. Hellwig, also executive director of Mobile Meals. "A lot of neighborhood conflicts occur, for example, because of people's different lifestyles," she said.

The man with the fence problem expressed a hatred toward the 17-year-old boy disproportionate to the amount of visible damage done, said Ms. Hellwig

During an arbitration hearing questioning brought out the fact that the complainant was a religious man who had attempted to evangelize the neighbor boy without success.

Parents often unwittingly become bad examples for their children in dispute resolution, said Ms. Hellwig.

In one recent case involving a fight between two neighbor boys in an upper middle class suburb, Ms. Hellwig made a follow-up visit to find out why the agreed-upon sum of money for medical expenses had

52-434 O - 80 - 31

not been paid by one family to the other.

A 13-YEAR-OLD we'll call Tommy Smith had severely beaten an 11-year-old we'll call Bobby Jones for calling him a name. At an arbitration hearing it was decided that the Smith's should pay the $100 difference between Bobby's medical expenses and the amount covered by the Jones' insurance.

The agreed-upon due date for payment of the sum had passed, and when a volunteer contacted the Smiths to find out why they hadn't paid Mrs. Smith indicated her husband believed the medical bills had been padded with charges for treatment not related to injuries received in the fight.

On her follow-up visit, Ms. Hellwig had the information Mrs. Smith wanted: "The case was thoroughly investigated — we called each doctor. We can be reasonably sure that every expense is connected to the incident."

In the discussion that followed Ms. Hellwig explored the hostility that existed between the families. She also repeated some of what had been said at the hearing.

"Under no circumstances do we suggest that you bring a child up to be weak, but you don't want him to over-react to a verbal attack. It isn't necessary to respond with physical violence. A child should learn that he can always walk away from words."

LOOKING for a resolution, she countered a fresh string of complaints with gentle counseling.

Mrs. Smith said she could not punish her boy for doing what she would have done in the same situation. The money would be paid but it would be "a burr under my saddle for a long time." If she had been smart, Mrs. Smith said, she would have taken her son to the hospital that time the Jones boy tripped him getting off the school bus.

Statistical Report, 1977

Types of cases referred by prosecutor	Total
Assault & Battery	71
Larceny	5
Trespassing	5
Threatening	5
Criminal Damaging	86
Neighborhood	15
Harassment	48
Sexual Imposition	2
Total referred	235
Total hearings	102
Total Awards	102

Below, volunteer Barbara Hellwig listens attentively during the first training sessions for volunteers.

—THE PLAIN DEALER, WEDNESDAY, JUNE 25, 1975 9—E

Sylvia Porter

Businesses turn to the arbitrator

NEW YORK — Businesses of all kinds, from small, family-owned independent operations to international conglomerates, are increasingly turning to arbitration, rather than the courts, to

will make sure that nothing will be overlooked.

• Study your case from the other side's point of view in order to be prepared to answer the opposition's evi-

New service provides mediators

Mad at mate? Arbitrate

By Michael Ward

Since 1936, the American Arbitration Association has handled disputes in labor, commerce, consumerism ...ilities in Cleveland.

areas where people are having to negotiate contracts is in the family dispute field.

"When a couple decides to break up, one of the first things they have to do is make arrangements for how they will live after they separate, and ...that involves negotiating ...separation

irrevocably dead, then the impartial party can be a mediator and can help them agree on a separation agreement.

"Then if they feel they can't agree as to one or more of the issues between them, it is possible for them to ask the mediator or some other person to serve as a referee, and they will agree that they will accept his

...the abritra-

JULY 24, 1977

Elyria bill payer is bill evader in sea of

By V. David Sartin

Thomas M. Radican, Elyria's auditor, long ago wished he had no telephones in his City Hall office.

And he admitted that Elyria Telephone Co. would be justified in removing the devices from his and surrounding desks.

The city owes the utility at least $35,000 in back bills that have piled up for at least six months, he estimated.

"I'm half afraid to add it all up," said Radican.

The telephone company, other utilities and most creditors have not been paid in an effort to give city officials time to heal a sick treasury. One of the bills are for car parts, other products, mops and other gear bought and used last year.

Radican is normally the city's chief payer, but he said he has become city's chief bill ...

There is also no buying now when a supplier will not extend credit to the city.

Radican declined to say who will no longer sell on credit, but conceded that some businessmen have cut the city off.

Radican also declined to say when the debts could be paid.

"We still don't know about the cash flow," he said.

For example, the city just received the July income tax payment forwarded from the collectors. That $304,000 was paid out for a twice monthly paycheck to 340 workers.

Another 108 employes are paid from federal funds under a program designed to hire workers furloughed for several weeks. Some officials have admitted that workers have been laid off just to shift the pay... check hund...

note being offered to investors. It would provide cash to run the city and pay debts, said Radican. It would replace cash used in December when investors refused to extend a loan that had been made for the City Hall. The city then paid that debt with cash.

However, the note is not being offered on the national market where brokers require a detailed disclosure of the city's debt history and future revenue prospects.

In the past, paper securities issued by the city have been offered through

"I don't like it one bit. But, we are doing everything we can to catch up. "The City Council has passed legislation to raise more money, the voters approved an income tax hike and we are conserving ...

Arbitrator replaces judge in settling police cases

ued from Page 25
d the program is doing an excel-
ıere.
'ery satisfied, just delighted with
ıtions here," he said. "It's done
ut job of keeping petty offenses
natters out of the court."
tion lets the defendant avoid a
lice record, fines and court
'so eliminates the need for a
hearing is informal. It
ies resolve

the contendants reach a solution among themselves. He may ask:

"What do you think should be done?"

Sitting face to face, listening to one another, might be something the contendants have not done for years.

In a recent case, a middle-aged
pulled a .38-caliber revol
off shotgun
uab

after lengthy discussion and explanat the parties simply agreed to disassoc so they could live side by side in peac

This arrangement saved the court time and money it would have taken h he case.

rle Brown, an arbitrator, said a cases they hear are simple m ndings, easily resolved without tle.

ut-of-court settlement serves a ell, saving the courts time an saving the parties the often ex convenience of court appear

on as an Alternative is funde and federal governments o nts. Brown said the Ameri n Association has sometimes a new program.

Talk Things Out

E. Cleveland Goal: Settle Out of Court

By B. Vivian Aplin

Within the next two
months an anticipated 5
of nontraffic cases in E
Cleveland Municipal C
will be settled through
lot program to resolve
munity conflicts
court.

An office of the N
Center for Dispute
ment (NCDS), an
the American Ar
Association, is ex
open in East Cle
the end of Octol
be the first in Oh
with a court.

Four-A (Arb
An Alternative
ist across th
Philadelphia,
co, Hartford
Miss.

THE EAST CLEVELAND
office will share a $300,000
budget provided by the
Cleveland and Ford founda-
tions with the Cleveland dis-
pute center, which opened
this summer. The Cleveland
office does not work exclu-
sively with any court.

Operating expenses for
Cleveland's dispute center
also come out of the budget.

East Cleveland's center is
the brainchild of local
NCDS director Earle C.
Brown and Municipal Judge
James M. DeVinne. Both
are flying to Philadelphia

volve consumer and tenant-landlord disputes, he ex-
plained.

vinne antici-
in the

Teachers of retarded ask arbitration group's help

Instructors of mentally retarded children asked the American Arbitration Association yesterday to assist them in ironing out differences with the Cuyahoga County Board of
cases only. Civil disputes will also be settled.

JUDGE DeVINNE will advise those persons whose cases might be settled through arbitration that the center is available to them. Arbitration sessions will be scheduled within 10 days, with a decision reached in another 10 days.

If an agreeable settlement is reached through the center, DeVinne will dismiss the case. The case will go back to court if arbitration is unsuccessful.

Brown said the pilot program will be re-evaluated in two years to determine its success and future. All
will be provided

Retardation that have brought about their dismissals.

Earle Brown, regional director of the arbitration as-
re, reported at for his office at he had not oly to the tele-
made to board teth F. Semi-
tore was to r the board ılation act having the

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s, 2905

Meanwhile, teachers have announced classes for 50 of the 1,200 retarded children currently deprived of training will be held at two churches beginning this morning.

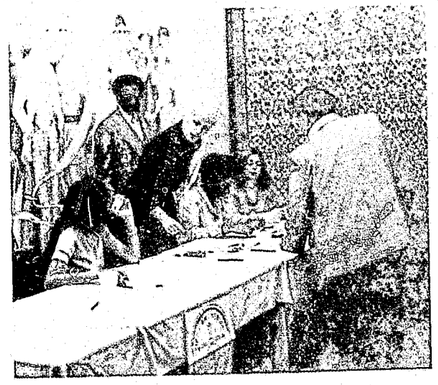
The Cuyahoga County Teachers of the Trainable Retarded said striking teachers will donate services in space provided by Holy Rosary Catholic Church, 12021 Mayfield Rd. SE, and Faith Lutheran Church at 16511 Hilliard Rd., Lakewood. Students are being accepted on an emergency basis, representatives said.

The teachers went on
strike Sept. 10 fo

Earle C. Brown, at left, pauses a moment with the Cleveland Indian Center's Board of Directors Chairperson, Ruby Hooper, Assistant Director Robert Roche, and Director Jerome Warcloud.

Right: Professor Nels E. Nelson makes a few comments during a seminar.

Below: The whole staff pitches in to bring education and training to the public.



In its fifty years of existence, the American Arbitration Association has been a leader in the cause of dispute settlement. And, each year, its members and staff strive to ever-broaden the scope of AAA activities—to train, to educate, mediate, conciliate, negotiate—and arbitrate. At left, Robert Coulson, President of AAA, addresses an audience pertaining to the use of arbitration in labor relations disputes.

Below, regional directors meet with Vice President Michael Hoellering (far right.)

AMERICAN ARBITRATION ASSOCIATION

930 WILLIAMSON BUILDING • 215 EUCLID AVENUE
CLEVELAND, OHIO 44114 (216) 241-4741

EARLE C. BROWN
Regional Director

Ladies and Gentlemen:

In summing up our report, I would like to express our gratitude to the many area organizations and individuals who have demonstrated their support either financially or through the donation of their time. The commercial and accident claims arbitrators who serve one day a year without pay are too numerous to mention, but, without them, arbitration would be out of the financial reach of many who seek those services.

Equally important are those members of the Junior League who serve as arbitrators/investigators in our current Juvenile Court Program.

In the past seven years, we have expanded the services of the Cleveland Office to embrace a wide range of disputes, but the job has only begun.

Plans are under way to interest several of our Region's larger cities in services similar to those of the 4-A programs discussed in these pages, and the uses of arbitration in the traditional realm of labor and commercial dispute expands each year. Consumer advocates, protection agencies, and individual contractors are all finding increased benefits from our services; and employee/employer relations problems are increasing with each new interpretation of the laws.

We look forward, then, to a productive and challenging year.

If you are interested in AAA/CDS, please give my office a call. We'll be looking forward to hearing from you.

Sincerely,

Earle C. Brown

Earle C. Brown
Regional Director

Earle C. Brown, with the Association for over seven years, is Regional Director of the American Arbitration Association and its Community Dispute Services.

A graduate of San Francisco Teachers College and a former Harlem Globe Trotter, Mr. Brown brings twenty years of experience in the field of dispute resolution to the position of Regional Director.

He was Deputy Director of the Akron Metropolitan Housing Authority and also Director of the Akron Fair Housing Center. Currently, he is a member of the Society for the Professionals in Dispute Resolution and the Industrial Relations Association as well as serving on the Attorney General's Office's Steering Committee for the planning of the National Justice Centers. He has been associated with the Cleveland AIM Jobs Center and the Greater Cleveland Neighborhood Center, and is also on the panel for several international conflicts.

APPLICATION FOR MEMBERSHIP

AMERICAN ARBITRATION ASSOCIATION

140 West 51st Street, New York, N.Y. 10020 (212) 977-2000

We accept your invitation to membership and enclose our check, made payable to the American Arbitration Association, in the amount of $_____

Name of organization _____

Address _____

City _____ State _____ Zip code _____

Type of business _____

Organization contact and title _____

Number of employees _____ Date _____

In order that we may send you our literature that is of particular interest to you, will you kindly check your major interest

LABOR ☐ LEGAL ☐

COMMERCIAL ☐ INTERNATIONAL ☐

COMMUNITY DISPUTES ☐

Membership dues and contributions to the American Arbitration Association are tax-deductible.

The following pages (474-488) contain material protected by the Copyright Act of 1976 (17 U.S.C.) DISPUTING WITHOUT THE FORCE OF LAW, The Yale Law Journal, 1979.

Working Papers

disputes processing research program

WORKING PAPER 1979-1

LAWYERS AND CONSUMER PROTECTION LAWS: AN EMPIRICAL STUDY

Stewart Macaulay
Professor of Law
University of Wisconsin Law School

disputes processing research program

University of Wisconsin-Madison
Law School
Madison, Wisconsin 53706
(608) 263-2545

LAWYERS AND CONSUMER PROTECTION LAWS: AN EMPIRICAL STUDY*

Stewart Macaulay
Professor of Law
University of Wisconsin Law School

*This study is part of a larger project dealing with consumer protection and the automobile industry, the Magnuson-Moss Warranty Act, and the consumer protection policies of the Federal Trade Commission, which was funded by the National Science Foundation Law and Social Science Division, SOC 76-22234. Dr. Kenneth McNeil and Professor Gerald Thain are carrying out other parts of the project; some of Dr. McNeil's findings which are related to this study are reported in Appendix II, infra.

As always, a study is a collaborative effort, and I owe thanks to many people. Dr. Jacqueline Macaulay edited all of the many drafts of the manuscript and was a challenging and helpful critic. Kathryn Winz spent a summer interviewing lawyers, and her own experience in the Office of Consumer Protection of the Wisconsin Department of Justice was most valuable. Marc Galanter, Robert Gordon, Stuart Gullickson, Joel Grossman, Kenneth McNeil, Richard Miller, Ted Schneyer, Gerald Thain, David Trubek, Louise Trubek and William Whitford all read a draft of the manuscript and made very helpful comments. Able research assistance was provided by Jill Anderson, Jane Limprecht and Daniel Wright. At the invitation of Professor John Schlegel, I presented my ideas at a seminar of the Faculty of Law and Jurisprudence at SUNY Buffalo, and I took away important ideas. Yet after all this help, of course, I am still responsible for all errors.

PRECIS

A traditional model of the practice of law, found both in the bar's public relations efforts and in drama and fiction, paints the attorney as one primarily concerned with the application of the law and as a relatively passive reflection of the client's wishes. This picture is an oversimplification, and accepting it as accurate has a number of costs. It distorts our view of what lawyers do. Apparently, it has misled those who draft reform legislation so that they rely on attorneys to assert individual rights in situations when they are not likely to be willing or able to do so. A case study of the response of Wisconsin lawyers to consumer protection laws is reported which calls attention to how often lawyers act with little or no knowledge of the applicable laws, how they play conciliatory rather than adversary roles, and how their self interest importantly influences their decisions about whether to take cases and what tactics to pursue to resolve those they do take. Theories explaining lawyers' behavior in terms of factors of personality or ethics are questioned on the basis that they omit important structural constraints on behavior.

LAWYERS AND CONSUMER PROTECTION LAWS: AN EMPIRICAL STUDY

In Western culture the lawyer has been regarded with both admiration and suspicion for centuries. Both evaluations seem to rest on a widely held image of what it is that lawyers do or ought to do. The basic elements of the stereotype of the practice of law probably are nearly the same now as they were in the seventeenth century. Lawyers have long held out a picture of their usefulness to justify their position. (See, e.g., Bloomfield, 1976; Nash, 1965). Novels, plays, motion pictures and television programs convey images of lawyers as important and powerful people. On the other hand, a debunking tradition--recently reinforced by the Watergate episode--shows lawyers as those who profit from the misfortunes of others, as manipulators who produce results for a price without regard to justice, and as word magicians who mislead people into seeing what is wrong as acceptable. Yet even much of this writing accepts the traditional picture of lawyering if only as a yardstick against which actual practice falls short. While this stereotypic picture may serve the profession's claims for legitimacy, the dramatist's need for conflicts of principle, and even the muckraker's need for a villain, we are coming to see that it is an oversimplification which may cost us understanding.

In the classical model of practice, lawyers apply the law. They try cases and argue appeals guided by legal norms. They negotiate settlements and advise clients largely in light of what they believe would happen if matters were brought before legal agencies. Lawyers represent clients. They take stock of a client's situation and desires and then

seek to further the client's interests as far as is legally possible. Sometimes the boundaries of this role are indicated by saying that a lawyer is a "hired gun" who does not judge his or her client but vigorously asserts all of the client's claims of right. The lawyer cannot go too far and interfere with the interests of others, however, because of the operation of the adversary system. These competitive claims of right will be decided by legal agencies or through settlements based on predictions of the likely outcome if the case were processed formally. Moreover, lawyers will place their clients' interest ahead of their own because of the demands of legal ethics and professional custom.

Perhaps only the most innocent could think that this classical model describes professional practice. While the model reflects something of what goes on, it is at best a distorted picture of much of what most lawyers do. Both Wall Street and Main Street lawyers often operate in situations where they know little about the precise content of the relevant legal norms or where those norms play only an insignificant part in influencing what is done. Lawyers regularly engage in the politics of bargaining, seeking to work out solutions to problems, which reflect some balance of all of the interests important in the situation. Rather than playing "hired gun," lawyers often serve as mediators who stand between the client and others who are not represented by lawyers, seeking to educate, persuade and coerce both sides to adopt the best available compromise rather than to engage in legal warfare. Many lawyers find themselves acting as therapists and counsellors, helping clients deal with problems by coming to understand them differently. I will call these activities non-legal or non-adversarial

roles to distinguish them from the familiar picture of the lawyer who argues in court and does research in a law library. Of course, these more conciliatory roles are not completely non-legal and non-adversarial. Lawyers by their very position never act without at least some tacit threat that they could cause trouble by learning some law or going to a legal agency if either or both were called for. Also most American lawyers are socialized into a legal culture so that their expectations will reflect legal norms, many of the assumptions of an adversary system and styles of legal reasoning. Nonetheless, I call these conciliatory roles non-legal and non-adversarial to emphasize that the chance of directly invoking legal norms and procedures is slight.

While lawyers sometimes do act as a "hired gun", it seems likely that they do this only in certain kinds of cases for certain kinds of clients. Usually lawyers have great freedom to choose whether or not to take a case and how far to pursue those they do take. In playing all of their roles, ranging from arguing a case before the Supreme Court of the United States to listening to an angry client in their offices, lawyers are influenced by their own values and their own self interest. It is hard to see how it could be otherwise. Lawyers earn their living by selling services. Their values and interests are, of course, influenced by the overlapping and interlocking relationships involved in the practice of law. In short, legal ethics and the assumptions of the classical model are important but so are the need to pay the rent and do things the lawyer finds satisfying and not distasteful.

Finally, when attorneys reject potential clients and when they act for those they do accept, their professional efforts involve attempts

to transform or convert views and characterizations of the situations in ways which profit them and, usually, their clients. We are familiar with the complicated process whereby a lawyer tries to convert only some of the factors involved in an automobile accident into a winning cause of action for negligence. There is another equally important kind of transformation that is less familiar. Lawyers often must try to convert a client's desire for vindication and revenge into a willingness to accept what the lawyer sees as the only reasonable settlement that can be obtained with the effort the lawyer is willing to invest in the case. As we will see, this kind of alchemy may prompt much of the negative view of the profession held by clients and by the public at large. The rhetoric and manipulation that must be used to gain settlements and sell them to clients may be tolerated as a necessary evil, but it also often is seen as hypocritical misrepresentation. To some it seems that truth and justice are put to one side so that a deal can be made.

The emphasis placed on the lawyer's business as being in the courtroom or in the law library has a number of costs. People tend to expect action from lawyers which they cannot or should not get, and when these expectations are defeated, they are likely to be angry and suspicious. At least some people expect lawyers to apply the law in their behalf at trial or in counselling only to discover that things will be worked out through personal contacts and informal arrangements. Some people may expect lawyers to be available and willing to fight for a client's rights only to discover that they cannot afford to pay for competent legal advice or, at best, they can afford to make only a

deal instead of doing battle for justice. This tends to make the practice of law appear, in Blumberg's (1967) phrase, as a "confidence game." Yet from some points of view, conciliatory solutions which make the best of a bad situation may be far preferable to spending one or more expensive days in court from which one party will emerge as the loser.

The classical emphasis on the lawyer as an adversary applying legal norms may have blocked serious thought about the ethics of counselling, mediation and negotiation. Some people may be disappointed when they discover that their lawyer will not bribe officials or use some magical form of influence to make all their troubles go away. (But see Fair and Moskowitz, 1975). Simon (1978) has brilliantly set out the many difficulties with a system of professional ethics based on the assumptions underlying the view that the lawyer is a "hired gun" in the adversary system--what he calls the positivist theory of practice. He points out that most of the writing on the role of lawyers in our legal system rests on variations on this positivist theme. However, insofar as the theory is based on an incomplete or distorted picture of what lawyers commonly do, it is irrelevant to large areas of practice. At present we have little normative basis for judging how the non-legal and non-adversarial roles of lawyers are played. (See Brown and Brown, 1978).

Another cost of our oversimplified picture of practice is faulty legal engineering. We must recognize that lawyers often play an important part in making reform laws more or less effective. Particularly during the past twenty years, reformers have sought to right what they saw as wrong by advocacy before legal agencies. When reformers win in areas such as civil rights, sex and racial discrimination, and consumer

protection, their victories often come in the form of cases, statutes or regulations which, along with other things, grant rights to individuals. (See, e.g., Case Western Law Review, 1978; Cohen, 1975; Field, 1978; Frenzel, 1977; Scheingold, 1974). However, for the most part, individual rights remain words on paper unless people can get a court or agency to enforce them or can make a credible threat to do so. Here is where lawyers enter the picture, serving as gatekeepers to the legal process. On one hand, some lawyers, representing those the reforms seek to regulate, work hard to make it difficult to vindicate these new rights. On the other hand, the lawyers approached by those who want to assert their new rights are free to reject these cases or if they do accept the client, they are free to decide how aggressively to pursue what tactics. Lawyers have barred many people from using the rights reform laws created on paper. (See Friedman, 1967).

In short, barriers to using legal rights in litigation or negotiation serve to make many reforms largely symbolic. While symbolic laws may be important steps toward challenging accepted views of what constitutes common sense and justice, both reformers and some of those who were supposed to benefit from the new laws have been dissatisfied with symbolism. This has prompted various proposals for further reform--some want to change the system for delivering legal services and others want to remove problems from the domain of lawyers. (See, e.g., Abel, 1979; Danzig, 1973; Felstiner, 1974; 1975; Danzig and Lowy, 1975; Johnson, 1974; Johnson and Schwartz, 1978; McGillis and Muller, 1977). Whatever solutions to the problems of implementing individual rights are advocated, a clear picture of the structure of the practice of law is an essential starting

52-434 O - 80 - 33

point for argument and planning. Without it, we risk missing the mark again or, worse, prompting unintended and harmful consequences.

This article will develop these ideas about an expanded picture of the practice of law through a case study. I will consider the roles played by lawyers in connection with a number of consumer protection laws which create individual rights. While these laws have some of their own peculiar characteristics, they also reflect an important trait of most reforms of the 1960s and 1970s: their basic approach is to create a cause of action for an aggrieved individual. This will not be a complete study of the impact of these laws since that would require me to move away from lawyers and look at such things as the effect of the activity of government agencies, the threat of more drastic laws which might be passed in the future, and public relations considerations involved in the publicity gained by the consumer movement. In short, the subject of the study is lawyers and the focus on consumer laws serves as a way of looking at the behavior of several kinds of attorneys.

The research on which this article is based began as a study of the impact on the practice of law in Wisconsin of the Magnuson-Moss Warranty Act , 15 U.S.C. §§ 2301-12 (Supp.V 1975). This statute, which became effective on July 4, 1975, was supposed to be an important victory for the consumer protection movement, and it did prompt national news coverage (See, e.g., Business Week, 1975; Consumer Reports, 1975; Fendell, 1975; Ladies Home Journal, 1976; Rugaber, 1974; Time, 1976.) and an outpouring in the law reviews. (See, e.g., Brickey, 1978; Cornell Law Review, 1977; Eddy, 1977; Fahlgren, 1976; Fayne and Smith, 1977; Indiana Law Journal, 1976; Roberts, 1978; Rothschild, 1976; Saxe and Blejwas, 1976; Schroeder, 1978).

However, it quickly became apparent that the focus of the study was too narrow. Most lawyers in Wisconsin knew next to nothing about the Magnuson-Moss Warranty Act--many had never heard of it--and when asked about it, they tended to respond with comments on consumer protection laws generally. Moreover, it was extremely difficult to find lawyers who knew much about any specific consumer protection law other than the Wisconsin Consumer Act , Wis. Stat. §§ 421-427(1975)--a law largely concerned with procedures for financing consumer transactions and collecting debts. And while a few lawyers were extremely well informed about the WCA, what others knew about it consisted of some "atrocity stories", (See Dingwall, 1977), about debtors who had used it to evade honest debts.

In spite of this ignorance of the specific contours of consumer protection regulation, most lawyers had techniques for dealing with complaints voiced by clients, or potential clients, who were dissatisfied with the quality of products or service or could not pay for what they had bought. And these techniques will be a major focus of this article.

What follows is based on in person and telephone interviews conducted by a research assistant and by me during the summer of 1977. (See Appendix I for a more detailed discussion of the research.) We talked with about 100 lawyers in five Wisconsin counties and a representative of each of the state's ten largest law firms, of the legal services program in Milwaukee and Madison, of Wisconsin Judicare--a program for paying private lawyers to handle cases for the poor in the northern and western parts of the state (See Brakel, 1973; 1974)--and of all the group legal service plans registered with the State Bar of Wisconsin.

(See Alpander and Kobritz, 1978; Case, 1977; Colvin and Kramer, 1975; Conway, 1975; Freedman, 1977; Harris, 1977). In addition, a questionnaire concerning experiences with the Magnuson-Moss Warranty Act was sent to all lawyers attending an Advanced Training Seminar sponsored by the Bar, which dealt with the statute. While in no sense is this study based on a sample representative of all lawyers in Wisconsin, there was an attempt to seek out lawyers whose experiences might differ. Most importantly, there is great consistency in the stories that this very diverse group of lawyers had to tell. This suggests that almost any sample would have served in this study. Even at points where very divergent interpretations were offered by the lawyers interviewed, their description of practice was consistent. Moreover, the information I gathered was consistent with, and indeed helps explain, the findings about lawyers and consumer problems of the American Bar Association-American Bar Foundation study of the legal needs of the public. (See Curran, 1977). The ABA-ABF study was based on a random sample of the adult population of the United States, excluding Alaska and Hawaii.

However, my study has some obvious limitations. I cannot offer percentages of the lawyers who have had certain experiences or who hold particular opinions. Often the lawyers themselves could say no more than they get a particular kind of case "all of the time," or that they "almost never" litigate. Since the lawyers have no reason to compile statistics, usually they offer only general estimates of their caseload. Many of the more informal contacts and telephone calls never appear in the lawyer's own records, the lawyer is unlikely to have a very precise memory of them, and one would have to follow the lawyer around and log

what s/he did all day long as well as at social events on weekends and in the evening. Few lawyers are likely to be that cooperative, and even if they were, the cost of collecting data this way would be very high.

Also my conclusions are based on what informants told my research assistant and me, and so we face all of the problems of hearsay. Many of the lawyers interviewed were former students of mine, and they were extremely helpful. Other lawyers also seemed eager to cooperate with a University of Wisconsin Law Professor. This effort to be helpful, which was very appreciated, may have introduced some distortion. On one hand, these lawyers may have been willing to go along with the interviewer's definition of the situation, which is implicit in the questions, rather than to challenge the entire basis of the inquiry. On the other hand, a few may have modified a fact here and there to present a good story to entertain their old professor or to make themselves look good. While I cannot be sure that this did not happen, again the consistency of the stories over 100 lawyers suggests that this was not a major problem. Finally, this article reports the author's interpretations of what he was told by these lawyers, and not all of them were asked exactly the same questions since the information gained as the study progressed changed its focus from the Magnuson-Moss Warranty Act to consumer protection laws and then finally to the practice of law itself. The study then is much closer in spirit to a law review essay than a report of the practice of the more quantitative variety of social science. All in all, this should be viewed as a preliminary study, offering suggestions the author thinks are true enough to warrant reliance until someone is willing to invest enough to produce better data and lucky enough to find a way to get it.

I. The Impact of Consumer Protection Statutes on the Practice of Law.

A. Lawyers for Consumers.

In this section I will consider the roles played by lawyers who represent or who might be expected to represent individuals attempting to assert rights under various consumer protection laws. First, I will consider how often such people make any contact with lawyers, and, since so few do attempt to see lawyers, why and how any of them manage to bring their problems to members of the bar. Next we will consider how lawyers react when they encounter these cases or how they avoid seeing them in the first place. Finally, I will sketch the reasons why lawyers tend to play no role or only limited roles in consumer dispute processing despite the modern outpouring of consumer protection statutes and regulations.

1. When and How Do Lawyers See Consumer Cases?

Probably lawyers see but a small percentage of all of the situations where someone might assert a claim under one or several of the many consumer protection laws. (See Mayhew and Reiss, 1969). Of course, it is impossible to be sure how many potential cases exist where consumer protection rights might be asserted and what percentage of them come to lawyers. Some claims are never asserted because consumers fail to recognize that the product they received is defective, that the forms used in financing the transaction fail to make the required disclosures or that the debt collection tactics used by a creditor are prohibited. (See Best and Andreasen, 1977). Many other potential claims are recognized but resolved in ways which do not involve lawyers. Some consumers see the

cost of any attempt to resolve such a problem as not worth the effort, and they just "lump it." Others decide not to buy a particular product again or not to patronize again a seller of goods or services who leaves them dissatisfied. (See Best and Andreason, 1977; Haefner and Leckenby, 1975; Mason and Himes, 1973; Warland, Herrmann and Willits, 1975.) Some fix the defective product themselves while other complain to the seller or the creditor and receive an adjustment which satisfies them. It is likely that most potential claims under consumer protection statutes are resolved in one of these ways. (See Curran, 1977: 109-10, 140, 196.)

A few consumers go directly to remedy agents without consulting lawyers. For example, they may turn to the Better Business Bureau in Milwaukee or to one or more of the several state agencies which mediate consumer complaints. (Compare Steele, 1975).[1] A few may go directly to a small claims court. Others contact the local district attorney who, in at least the smaller counties in Wisconsin, often offers a great deal of legal advice or even a rather coercive mediation service to consumers who might vote for him or her in the next election. In short, there is a wide variety of remedy agents available in Wisconsin which do not require one to purchase the services of a lawyer. However, we cannot be sure how many consumers know of all of the options which are available; such knowledge probably is not too widespread.

Many lawyers in private practice reported to us that they never saw a case involving an individual consumer. Those who represent businesses and practice in the larger firms were likely to say this. Other lawyers talked about encountering such cases only now and then. Those few cases that survive the screening process that routes most

potential consumer disputes away from attorneys may have special characteristics which determine that lawyers see them. Some lawyers said that they occasionally represented a consumer seeking to avoid repossession of a car or a mobile home. Very few saw situations where a consumer was complaining about a defective product or poor service where there had been no personal injury. However, cases where personal injuries were caused by a defective product were another matter; they were not seen as consumer protection cases but were called "products liability" problems. Many lawyers dealt with products liability, and there is a specialized group of attorneys who are expert in the techniques of asserting or defending these cases. Most lawyers knew the products liability specialists and sometimes referred cases to them. No similar network of access to specialists in consumer protection matters seems to exist. Several attorneys mentioned one lawyer they thought was an expert in consumer protection, but when I interviewed that lawyer, he said that he now tried to avoid such cases after handling several a few years ago.

Lawyers working for programs providing legal services for the poor or for members of groups entitled to receive them under a benefit plan seem to see more consumer protection cases than attorneys in private practice. However, I have no good data on the frequency of these cases since lawyers for plans and lawyers in private practice keep no statistics and can offer only inexact estimates. Both lawyers dealing with poor clients and those dealing with union members entitled to receive legal services as a fringe benefit said such things as "we see these cases all the time, but there are not as many as you might think." Lawyers in the group legal services plans of school teachers' unions and those of

cooperatives reported that they seldom were called on to provide advice about consumer protection matters.

In summary, we can say that only a small proportion of the problems covered by consumer protection laws come to lawyers in Wisconsin. Since potential clients could be expected to hesitate before taking any but the most dramatic or expensive consumer problems to a lawyer, if we are to understand the impact of consumer protection laws, we need to ask how any of these less dramatic or inexpensive cases do get to attorneys. First, some people will bring cases to lawyers which others might see as trivial but which the clients see as matters of principle. Even if only $300 or $400 is involved, people who feel they have been cheated may be angry and think there is a wrong which ought to be redressed. Second, we found that debtors are often pushed into a lawyer's office by the actions of a creditor. While many debtors surrender gracefully to an action to repossess a car, others want to fight. If an expensive recreational vehicle or mobile home is involved, the debtor is not likely to accept repossession passively. (Compare Landers, 1977.)

A third kind of person who takes consumer problems to lawyers are those who are regular clients of the lawyer. The lawyer may attempt to handle some matters in order to keep a client's good will; one lawyer called this a kind of "loss leader" service. For example, another lawyer in a small county had drafted a wealthy farmer's estate plan and had set up a corporation to handle some of his dealings in land development. The farmer was dissatisfied with a Chevrolet dealer's attempts to make a new car run satisfactorily. The farmer called the lawyer and told him to straighten out matters, the lawyer negotiated with the dealer, and

the lawyer sent the farmer a bill for only a nominal amount which in no way reflected all of the time the lawyer had spent on the case. Sometimes officers of a corporation that has retained a lawyer with a specialized business practice will ask for personal advice when they are dissatisfied with an expensive product. Not surprisingly, they usually get plenty of free advice, and they may even receive substantial help in complaining effectively without being charged a fee.

Another way consumer cases are brought to the attention of lawyers is through informal social channels. Many lawyers responded to questions about consumer matters by pointing out that they had friends, relatives and neighbors as well as clients who asked for their advice. People who would not retain a lawyer to handle a consumer matter, often raise their problems with lawyers they see at church suppers, PTA meetings, and cocktail parties. One lawyer noted that it was hard to have a drink at a bar in Madison on a football weekend without being called on for free legal advice. Few of these problems ever become cases, but occasionally lawyers find one that demands more than a few minutes of free advice.

Decisions about whether or not to see a lawyer hinge on personal factors. One lawyer remarked that many people seem to need reassurance that it is legitimate to complain and make trouble for others by going to a lawyer. (Compare Sniderman and Brody, 1977). Others are hesitant about appearing foolish before an educated professional or, perhaps, admitting to their spouse that they were taken by a retailer or manufacturer when they should have known better. These people will avoid a trip to a lawyer when they fear that it may expose their stupidity. Some people have these concerns about seeing lawyers answered by friends

and associates who encourage them to seek advice. (See Ladinsky, 1976; Locher, 1975). Some lawyers said that most of their clients--both those who come to their office and those who ask for advice during informal contacts--come to them through friendship networks. A former client may talk with a friend at work or at a bar and end up sending him or her to the lawyer. (See Curran, 1977: 202, 203.) There is a "folk culture" that defines, among other things, what kinds of consumer cases one should take to a lawyer, what kinds of situations call for solutions not involving lawyers, and what kinds of complaints should be just forgotten. Those facing aggressive debt collection procedures are likely to be told to see lawyers; those with complaints about the quality of a product are usually told just to forget it.

How do those who decide to see a lawyer choose one? Many pick their lawyer on the basis of a friend's recommendation, but some would-be clients seem to pick their lawyers at random from the yellow pages of the telephone directory. One lawyer whose last name begins with "An" was amused by how often he was called immediately after one of his partners whose name begins with "Ab" had refused to take a case. Alternative systems of delivering legal services attempt to make use of these more casual ways of contacting lawyers. The legal services office in Milwaukee, for example, is located in a low income neighborhood and tries to attract people as clients who walk into the office from the street. Group plans sponsored by unions often offer the right to call the plan's lawyers for advice, and union leaders may try to encourage members to use the service. Legal services and group plan lawyers often talk at community meetings, and people raise individual problems informally after the program is over.

2. What Do Lawyers Do With the Consumer Cases They Encounter?

a. A catalogue of possible responses: Many lawyers seek to ward off potential clients with consumer protection problems. (See Curran, 1977: 204.) Large firms that specialize in representing businesses encourage some potential clients but discourage others by the location, decor, and atmosphere of their offices. Everything about these firms tends to communicate the idea that these are expensive professionals who deal only with important people. Their offices are often in the financial district of a large city and have a magnificent and obviously expensive view, expensive furnishings, and fine art on the walls. One waiting to see a member of the firm may be served coffee or tea in a cup and saucer made of china. While waiting, the potential client can see sophisticated word processors and other costly and impressive office equipment. Secretaries, paralegal workers, and lawyers dress as if they were accustomed to dealing with wealthy people. One who is not to the manner born would hesitate to waste the time of this highly professional establishment with a mere personal matter.

Even lawyers who are more accessible to individuals have techniques to avoid cases they do not want to take. Some lawyers' receptionists try to screen cases so that minor personal matters will not waste their boss' time. Some lawyers try to brush off individuals by talking briefly to them on the telephone in order to keep them from coming to the office with a consumer or other individual problem.[2] Some listen to people who come to the office for only a few minutes and then interrupt to spell out the cost of legal services. These attorneys see their role as that of educating would-be clients so that they will see that they cannot

afford to pursue the matter. Some lawyers are subtle and skilled at getting rid of unwanted clients without losing their good will; others are blunt and accept that the person will leave unhappy. Even legal services lawyers feel the need to reject some potential clients or to deal with them quickly so that they can apply their efforts to what they see as more worthy cases.

If the potential client with a consumer matter is not rejected out of hand, lawyers may still limit their response to playing non-adversary parts in the drama. One role played fairly often might be called that of the therapist or the knowledgeable friend. The client is allowed to blow off steam and vent his or her anger to a competent-seeming professional sitting in an office surrounded by law books and the other stage props of the profession. By body language and discussion, the lawyer can lead the client to redefine the situation so that s/he can accept it. What looks to the client to be a clear case of fraud or bad faith, on close examination comes to be seen as no more than a misunderstanding not worth a great deal of emotion. The lawyer may try to focus the client's general annoyance and help the client consider the practical options open in the situation. Of course, attempts to deescalate anger and redefine situations may not be welcomed by clients. Also, in those few cases where it seems practical, the lawyer may encourage the client to fight a consumer matter. Indeed, on occasion, it may be necessary to encourage clients to be more assertive about their rights and openly angry.

Often the lawyer will take a further step and combine the therapist role with that of a broker of information or a coach. It may be easier

to hear the complaint and then refer clients elsewhere for a remedy than to attempt to ward them off. This gets the would-be client out of the office less unhappy than had the lawyer just rejected the case and offered nothing. These people can be sent to state agencies which mediate consumer claims or to private organizations such as the Better Business Bureau. Some lawyers go a little further and try to coach clients on how to complain most effectively to a seller or creditor or how to handle a case in a small claims court without a lawyer. They may offer a few suggestions or attempt to write a script for a would-be client. Sometimes consumers need to be reassured that they have a legitimate complaint, to be given the courage to complain, to learn where to go and whom to see, and to be given a few good rhetorical ploys to use in the dispute resolution process. This information and coaching may be of more help in some cases than formal legal advice. Sometimes, however, it does not help much, and the process of being sent elsewhere only serves to prompt the client to give up and drop the matter. Most lawyers have little idea whether referring a particular case to a state agency or sending a client alone to complain to the seller actually helps because the client rarely will return to tell the attorney what happened. Of course, this may not be the case if the potential client was a friend or neighbor, and perhaps lawyers in small towns hear about outcomes indirectly. Nonetheless, it is not a system with reliable feedback.

Attorneys who become more involved in a case may find themselves playing the role of go-between or informal mediator. They may telephone or write the seller or creditor to state the consumer's complaint. The very restatement of that complaint by a professional is likely to make

it a complex communication. On one level, the attorney is reporting a version of the facts which may be unknown to the seller or creditor even in cases where consumers have complained to them on their own. Lawyers can organize facts so that the basis of the complaint is more understandable. On another level, the fact that the report comes from a lawyer is likely to give the complaint at least some minimal legitimacy. The lawyer is saying that s/he has reviewed the buyer or debtor's story, that the assertions of fact are at least plausible, and that the buyer or debtor has reason to complain if these are the facts. The lawyer is more likely than the consumer to get to talk to someone who has authority to do something, rather than someone at the bottom of the chain of command. For example, the consumer may have talked with the sales person while the lawyer will deal with the manager or the owner of the business. Also the lawyer is likely to speak as at least the social equal of the representative of the seller or debtor, which may not be the case for the consumer. This may be an important factor. Many retailers, for example, may not care too much about the opinions of factory workers, but they probably do not want professionals to think ill of them. Finally, the attorney's professional identification conveys at least some tacit threat that an unsatisfactory response could be followed by something the seller or creditor might find unpleasant. Indeed, the vague threat of unpleasantness may be more powerful than precise knowledge of what an attorney could do if s/he were not satisfied with the creditor or seller's response--in light of the cost barriers to litigation, the attorney is a paper tiger in many consumer matters, but sellers and creditors cannot be sure that this is the case.

Thus sellers and creditors are more likely to make conciliatory responses to lawyers than to buyers or debtors, as long as the lawyers do not ask for too much. And it is part of a lawyer's stock in trade to know how much is too much. (Compare Ross, 1970). If the seller or creditor does not offer some sort of conciliatory response, the lawyer may suggest it. One lawyer told us:

> I enjoy negotiation. Of course, what happens is not determined by the merits . . . One has a discussion about what is best for everyone. You do not make an adversary matter out of it. It is a game, and it is funny or sad, depending on how you look at it. You call the other side and tell him that you understand that he has a problem satisfying customers but that you have a client who is really hot and wants to sue for the principle of the thing. Then you say, "Maybe I can help you and talk my client into accepting something that is reasonable." The other side knows what you are doing. It is a game. You never want to get to the merits of the case.

A seller or creditor's representative may try to persuade the consumer's lawyer that it has behaved reasonably and that the client has little cause for complaint. The representative may assert that the client has just misunderstood the situation or has told the lawyer only part of the story. Two lawyers with wide experience in handling consumer matters reported that at this stage an attorney often discovers that the client's case is far less clear cut than the attorney assumed after hearing only one side of the story. There are almost always facts that the client neglected to tell the lawyer, and often the facts have been slanted to make the client's story look good.

The seller or creditor is likely to make some kind of gesture to show good faith so that the lawyer will not have to return to client empty handed. The simplest gesture is a letter of apology, explaining how the problem occured and accepting some or all of the blame. A

superior may attempt to blame an employee with whom the consumer dealt, perhaps remarking that it is difficult to find good sales people or mechanics. Manufacturers often blame dealers, and dealers, in turn, seem eager to pass the blame to manufacturers. In addition to an apology, the merchant may also offer something which will make the apology easier to accept. For example, a seller might offer to make minor repairs; a manufacturer may send the consumer free samples of its products.

In a few situations, a lawyer may be able to persuade a seller or manufacturer to offer the consumer a refund or a replacement for a defective product. Sometimes the lawyer can gain this remedy for a client even where the flaw in the item originally delivered was not so material as to warrant "revocation of acceptance" under the Uniform Commercial Code. U.C.C § 2-608. Lawyers are not likely to gain refund or replacement remedies from new car dealers or fly-by-night merchants who operate on the borders of fraud. New car dealers are tightly controlled by manufacturers, who seem to value cost control more than consumer good will, (See Whitford, 1968.) while fly-by-night operators seldom worry about repeat business. Sears, Wards, J. C. Penney and many large department stores have an announced policy of consumer satisfaction. One can get his or her money back without having to establish that there is something wrong with the product. (See Ross and Littlefield, 1978). Other retailers and manufacturers do not announce this as their policy but will grant refunds or replacements selectively when their officials think the customer has reason to complain or if repeat business is valued. One lawyer suggested that many consumers think that they have a right to return any product to any store for a refund or replacement

as a result of the practices and advertising of stores such as Sears. Some disputes may arise because other businesses will not or cannot match the customer satisfaction policies of the large retailers. However, if a manufacturer or retailer offers refunds or replacements in some cases but not others, a telephone call from a lawyer may be enough to swing the balance in favor of the complainant--it probably seems easier to make a refund than to argue with a lawyer.

The lawyer's view of the acceptability and adequacy of the gesture or remedy offered by the merchant will turn importantly on the lawyer's reappraisal of the client's case in light of the other side's story. For example, a used car dealer might offer to contribute $100 toward the cost of repairing a car; this might look very generous if the client had misrepresented the condition of a car traded in as part of the deal. The lawyer's appraisal also will turn on the ease or difficulty of taking any further action against the merchant and on the consumer's likely reaction to what has been offered.

At this point, the lawyer has to persuade the client to see the situation as now defined by the lawyer in light of the seller or creditor's response. Part of the task is to get clients to see the problem as one where there is something to say on both sides rather than as something justifying fighting for principle, and part of the task is to get clients to accept the gesture as the best one could expect given the amount of legal work they can afford. At all levels of law practice, this is a difficult task. The client tends to want vindication while the lawyer is talking about costs balanced against benefits. It is even a more difficult task when the client is very angry but has what the lawyer sees

as a questionable case that involves too little money to warrant even drafting a complaint let alone litigation. This is often the situation when consumer protection laws are involved.

Only in rare instances will lawyers go further than conciliatory negotiation in a consumer matter and play the classic adversary bargainer-litigator role. In this classic role, the lawyer makes more explicit threats of unpleasant consequences if the antagonist fails to offer a satisfactory settlement. Some lawyers report that once overt threats are made, one is likely to have to draft and file a complaint before any offer of settlement will be received. One reason is that serious threats from a lawyer are likely to prompt sellers or creditors to send the matter to their lawyers. But even at this point, the lawyers for both sides have every reason to settle rather than litigate. Some consumer cases do go to trial--we can even find appellate opinions to put in law school casebooks[3]--but I suspect that they are likely to be unusual and atypical of the mass of consumer complaints.

b. Explanations for the responses: There are a number of reasons why lawyers either refuse to take consumer protection cases or tend to play only nonadversary roles when they try to help a client with such a complaint. The most obvious explanation is that the costs of handling these cases in a more adversarial style would be more than most clients would be willing to pay. Few consumers can afford many hours of lawyers' time billed at from $35 to $50 an hour just to argue about a $400 repair to their car or even a repossession of a $5,000 used car. Such items as toasters, hairdryers and cameras cost enough to concern many consumers but do not involve enough to warrant the investment of any professional

time. And few lawyers can afford to spend time on cases that will not pay. One lawyer in northern Wisconsin emphasized that "after all, I am self employed." Another lawyer from one of Wisconsin's more important firms commented,

> A lawyer in private practice has to earn money. He has to take a very hard look at the cases that are brought to him, and he must reject those which will not pay. It is very hard to have to tell a potential client that she or he has a meritorious case and would likely win but that there is not enough involved to make it worth taking. As you get older, you have to carry your part in covering your share of the overhead. When I was younger, I could take just about any case. The firm could always chalk it off to training a young lawyer. Now I am an experienced lawyer, and I must invest my time where there is enough money involved to help the firm.

Consumer product quality cases are very similar to products liability litigation absent the factor of personal injury. But the factor of personal injury is what yields the chance of very large damages, and this chance is what prompts lawyers to work for contingent fees.

Not only are consumer protection cases unlikely to warrant substantial fees, (See Curran, 1977: 208), but many, if not most, lawyers would have to make a major investment of professional time to litigate one or to negotiate in light of a serious threat to litigate. Those lawyers most expert about consumer laws are the attorneys who counsel businesses and draft documents for them in view of the requirements of these laws. Yet these are the lawyers least likely to see an individual consumer's case--except, perhaps, as a favor to a friend. As I noted at the outset of this article, most lawyers in Wisconsin know very little about any of the many consumer protection laws, perhaps with the exception of the Wisconsin Consumer Act, and detailed knowledge about even this statute is not common. Moreover, it would be very difficult for most lawyers to

master all of the relevant statutes, regulations and cases in this area. Most of them did not study consumer law in law school. Either they graduated before most of it was passed or they did not take elective courses in the area when they were in law school. These statutes, regulations and cases do not come up often enough in practice so that a lawyer is likely to know someone to call on for help who is an expert.

An even more important part of the explanation for avoiding an adversarial approach is that most lawyers in Wisconsin lack easy access to the text of consumer protection law. Most are unlikely to own the necessary law books themselves. It is part of the folk wisdom of private practice that one must avoid going bankrupt by buying law books that are not used often. The books must pay for themselves. Typically, lawyers have access to the Wisconsin statutes and the opinions of the state's supreme court. Some, but not all, own or can borrow copies of the state administrative regulations without difficulty. Fewer have access to federal materials that deal with statutes such as Truth in Lending (15 U.S.C. § 1601, et seq. (1970)) or the Magnuson-Moss Warranty Act. The great majority of the bar does not have ready access to loose leaf services dealing with trade regulation. County law libraries outside of the largest cities seldom fill the gap, although they are likely to have at least a set of the Wisconsin administrative regulations. Many lawyers rely primarily on practice manuals and continuing legal education handbooks for most of their legal research. However, there are not many of these in the area of consumer protection, and many lawyers do not think that it is worth buying those that have been published.

Of course, lawyers in Milwaukee and Madison have access to

relatively complete law libraries, and there may be reasonably good law libraries in other cities as well. Any lawyer in the state can travel to one of the large cities and do research or can hire a lawyer who practices there to do the work. But often this is not practical, particularly if the potential recovery in a case is not high. Lawyers in Milwaukee or Madison also would have to leave their offices--or send an associate--to use the collections in their own cities, and the time invested would be too much for a client who can pay only a modest fee.

Even a lawyer who was expert in consumer protection law and had easy access to a good law library would face difficulties because of the qualitative nature of these laws, their complexity and problems in their application. Consumer protection laws often rest on uncertain concepts and involve piecing together a number of laws and regulations. For example, suppose a consumer were dissatisfied with a newly purchased car and wanted to return it for a refund. Approached legally, one would probably have to overturn the warranty disclaimers and limitations of remedy found in the form contracts under which the car was sold. To do this, a lawyer would have to apply the Uniform Commercial Code and the Magnuson-Moss Warranty Act, arguing such things as whether "circumstances [had] cause[d] a . . . limited remedy to fail of its essential purpose . . ." This concept is not well defined in the Code or in the cases interpreting it. (See Eddy, 1977b). A lawyer might also have to argue about whether the remedy limitations were "unconscionable," or whether the regulations governing remedy limitations issued by the Federal Trade Commission under the Magnuson-Moss Warranty Act applied in a breach of warranty action brought in a state court by an individual or whether they were

limited to enforcement by the FTC in federal court. (See Schroeder, 1978). One might seek to cast the cause of action as one for innocent misrepresentation but couple that action to all of the UCC's remedies for breach of warranty under the little known section 2-721. These are all matters of debate, and any decision won before a trial court would be vulnerable to an appeal. Many other consumer protection laws present similar problems.

Apart from the nature of the law itself, consumers often face difficult burdens of proof under these laws. The buyer in our example who wants to return the car would have to establish that it was defective when it was delivered or that the seller or manufacturer was in some way responsible for a defect that appeared later. This kind of evidentiary problem often is faced in products liability litigation where personal injuries put several hundred thousand dollars at issue, and there the matter usually is established by expert testimony. (See Rheingold, 1977). Indeed, a recent issue of the Trial Lawyers Quarterly (Winter, 1978) carried an advertisement for a consulting service which claimed " a quarter century's experience" in testifying in cases where a client had been "maimed by a lawn mower." Products liability supports a high degree of specialization. But experts are expensive, and one cannot afford to use them in the typical action arising under a consumer protection statute or regulation. One office offering legal service to the poor was able to use expert testimony in cases involving complaints about automobiles because it could call on a program which trained poor people to be automobile mechanics, but this kind of access to experts is rare.

We were told about a case where all of these difficulties were

surmounted which will serve as an example of how rarely one might expect this to happen. A wealthy doctor ordered a $500,000 custom-made yacht from a boat yard. He refused to accept delivery, asserting that the boat was defective in many respects. He sued to recover his downpayment, and he also asked for a large sum as damages. His complaint reflected the highest degree of creativity in marshaling a blend of traditional and newly developing contract and consumer protection theories. Only the wealthy can afford to pay for this kind of expert lawyering and for the necessary testimony about the condition of the boat. Here private rights can be invoked without compromising the quality of the lawyer's work, but the example suggests that consumer protection laws may be limited in application to the wealthy who can afford to pursue their individual rights in dealings with sellers of yachts and other luxury goods. Perhaps this is an overstatement, but it does suggest that to some extent the reformers may have aimed an inadequate weapon at the wrong target.

Problems of cost and difficulty in litigation have not gone unnoticed by those who draft consumer protection legislation. Some of these statutes seem based on the assumption that individual rights will be enforced by plans that provide lawyers at low or no cost to various beneficiaries. Other statutes award attorneys fees to consumers who win, and many of these rights could be the basis of a class action. Magnuson-Moss even makes a bow toward encouraging suppliers of consumer goods to set up informal arbitration schemes. All of these techniques may have had some effect, but none of them singly nor all of them together offer a complete solution. We will briefly consider why this is so.

Low cost or free legal service plans employ lawyers who will deal with consumer problems. Legal Action for Wisconsin (LAW), a program to supply legal services to people with low incomes in Milwaukee and Madison, probably sees as many consumers as any group of non-governmental lawyers in the state. However, LAW's services are limited, and they must be rationed carefully. LAW's attorneys may make a telephone call or write a letter seeking relief if either strategy looks appropriate, but most often its lawyers refer the client to the consumer mediation service of the Department of Justice or to the Concerned Consumers' League, a private organization which trains low income consumers to complain effectively or to use the Small Claims Court. However, the LAW lawyers sometimes will attempt to work out complicated consumer financing problems which loom large in the life of a poor person, and they frequently attempt to use the federal Truth in Lending law or the Wisconsin Consumer Act to strike down some or all of a transaction. Sometimes, they assert a highly technical defense based on these statutes as a surrogate for bankruptcy or for fighting a breach of warranty claim. For example, often it is easier to find a clause in a form contract which violates statutory requirements than it would be to prove that the goods were defective and the seller had some responsibility to the buyer for defects. (See Cerra, 1977; Landers, 1977). Occasionally, LAW lawyers will make an appearance in the Small Claims Court on a consumer matter, but they try to avoid this.

Wisconsin Judicare pays private lawyers to take cases for the poor in northern and western Wisconsin. However, poor people rarely bring cases involving consumer protection laws to these lawyers. Lawyers who

take Judicare cases said that they have referred consumer complaints to officials of the state Department of Agriculture, Trade and Consumer Protection who ride circuit around the state to mediate complaints. Occasionally, these lawyers have written letters for poor people to retailers or businesses which repair cars, snowmobiles or mobile homes. These lawyers explain that Judicare fees for consumer matters rarely are high enough to make taking such a case attractive, and they often do not bother submitting a bill to Judicare for giving advice over the telephone or dictating a short letter.

Members of a number of labor unions, condominiums, cooperatives and student organizations are entitled to the benefit of legal services under various plans. However, under almost all plans the amount of service is limited and carefully defined. Usually, a member is entitled to a specified number of telephone calls or office visits. If a legal problem warranting more service is discovered, the member can retain a plan lawyer at a reduced rate.

The use of these plans by members with a consumer dispute varies. Members of cooperatives almost never bring consumer matters to the lawyers who serve their plans, and members of elementary and high school teachers' unions also make almost no use of their plans for these kinds of problems. Lawyers employed by these plans believe that members take care of their problems themselves and face few consumer disputes which they cannot resolve by complaining to sellers. One lawyer reported that members of the plan he served tend to read Consumer Reports, to shop carefully both for price and the cost of financing, to be able to borrow from a credit union rather than paying high rates to a loan company or

an automobile dealer, and to buy goods that need servicing only from businesses likely to be able to provide it. In short, model consumers need little legal advice. On the other hand, another lawyer suggested that many members of cooperatives and school teachers were the type of people who are unwilling to admit that they had made a bad purchase or had been fooled or cheated. Those who deny they have problems also have little need for legal advice.

The members of the few condominium group plans also brought few consumer problems directly to their lawyers. However, these lawyers attended condominium association meetings and often made presentations about how to avoid common consumer frauds and what to look for in consumer contracts. Before or after these meetings, individual members often asked for informal advice about consumer matters.

When we turn to student plans we see a very different picture. Students at several campuses of the University of Wisconsin are entitled to legal service, and many of them use these benefits. Typically, plan employees train the students to handle their own case before a small claims court or tell them how to invoke the complaint procedure of the state agency that mediates consumer complaints in the area in question. Often, they prefer to sue rather than to compromise. Some students seem to delight in battling local landlords and merchants in whatever forum they can find. When a pattern of unfair practice by a particular retailer or landlord is discovered, the plan's lawyers attempt to find a general remedy for the students to prevent future abuses.

Members of plans that benefit industrial unions fall somewhere in between cooperative members and the students in terms of using their

services in the consumer area. Industrial union plans usually are framed so that the lawyers cannot get rich off them, and these plans tend to face problems of overload. As a result, their services are strictly rationed. One firm which provides legal services to many union locals' plans, will write letters to merchants or refer members with consumer complaints to a small claims court or the mediation service of a state agency, but the firm will do little more. One of their attorneys said that he only writes letters, and he would never telephone the seller. If one telephones, s/he has to listen to the seller's side of story, and there is never time to do this. This lawyer sees consumer matters as less important than the many other kinds of cases that plan members regularly bring to him. On the other hand, members of another law firm that represents union plans sometimes pour much time and effort into consumer protection matters. The lawyer who handles most of these cases negotiates directly with manufacturers, retailers, sellers of services, record and book clubs, health and dance studios and the like. If he cannot get a good settlement, he takes the case himself to a small claims court. He does not think that clients can handle cases by themselves in a small claims court. This lawyer has a good working knowledge of consumer protection law and ready access to the firm's large law library which has the materials needed for this work. However, this firm is not typical. Group legal services are viewed as a cause by its partners, and while there may be long run benefits to the firm, in the short run they are not being paid fully for all of the services they provide. One can wonder how long the firm will be able to devote this much energy to individual cases and whether we can expect other firms to

follow their pattern. Moreover, it is not clear how popular group legal service plans generally are with union leaders and members. Even if a law firm can offer a high level of service, union locals may not continue to bargain for legal services as a fringe benefit. If the plans fail to grow to cover more members, they will not serve to deliver very much consumer protection law to individuals.

Some consumer protection statutes have followed the pattern set by civil rights acts and allowed successful consumers to recover reasonable attorneys' fees. One might expect this to be an incentive for lawyers to handle these matters. However, there are major problems. Few lawyers know about the attorneys' fee provisions in consumer protection statutes. Moreover, those who do know about them point out that these really are contingent fees because one must win the case in order to benefit from these statutory provisions. As a result, the statutes are unlikely to be very attractive in close cases since they do not give lawyers the opportunity to win large fees in some cases to offset the cases they lose where they gain nothing for their effort. Finally, such statutes almost always leave the amount of recovery in the discretion of the trial judge. Many trial judges do not like awarding bounties to lawyers who bring certain types of cases. As a result, these judges will often award fees at a rate far below that usually paid in the community for lawyers' services. In one recent Wisconsin civil rights case won by the complainant, the size of the lawyers' fees request was the subject of critical newspaper comment. (See Kendrick, 1978). A large award of fees acts as a penalty, and many judges do not see the conduct regulated by consumer statutes as warranting punishment. Moreover, elected judges

may worry about the reaction of the voters to awards of large sums as attorneys' fees.

The economic barriers to claims made under consumer protection statutes might be overcome to some extent if many small claims could be aggregated into a class action. For example, all those buyers of Oldsmobiles who discovered that they had received cars equipped with Chevrolet engines could be a powerful class. While there are some examples such as this one, it is not a technique suited for most consumer problems. Many turn on the facts of individual cases and present no common problem to aggregate. Moreover, class actions are hard to manage successfully. A lawyer must discover that the problem is common to many consumers and then find them so that the constitutionally required notice can be given to each one. This costs money which lawyers are hesitant to invest on the chance of winning a large judgment. Several attorneys reported that most Wisconsin lawyers think that those lacking experience in handling class actions should not attempt to run one.

All of these problems are thrown into sharper focus by looking at one statute that solves them in many situations. The Wisconsin Consumer Act deals with procedures for extending credit and collecting debts. (See Crandall, 1973). However, as I have noted, it can serve as a surrogate for the complex laws dealing with product quality if a seller has failed to follow the procedures required by the WCA for extending credit--instead of arguing about warranty, the buyer can base a claim on the failure of the contract to meet statutory requirements. The WCA often is easy to use because it establishes many relatively clear-cut

per se violations, thus avoiding the problems of qualitative complexity so often found in other consumer statutes. The WCA also provides bounties to the consumer for bringing certain kinds of cases. A . . . consumer who establishes certain WCA violations may keep the goods and recover all that s/he has paid. Wis. Stat. §425.305. Other violations call forth a penalty of twice the amount of the finance charge up to $1,000. Wis. Stat. §425.304. Moreover, the statute provides for reasonable lawyers' fees for winning consumers. Wis. Stat. §425.308. It was easier to use the WCA in its early days before lenders and those who sell on credit learned to avoid problems with the statute. Nonetheless, one still finds large stores and banks that make important mistakes in their procedures, and out-of-state creditors who try to collect debts from Wisconsin consumers very frequently run afoul of the WCA.

The WCA's provisions that overcome many of the usual cost barriers to legal action may seem to be a model of how to solve some of the economic problems inherent in so much of the consumer law which creates individual rights. However, the unusual circumstances that allowed it to pass and its unpopularity among many Wisconsin bankers, business people and lawyers suggest that it is a model of limited utility. The WCA was passed after the J. C. Penney case , 48 Wis. 2d 125, 179 N.W. 2d 64 (1970), had labelled revolving charge accounts as usurious. This could have subjected many retailers to large penalties. The Governor and organized labor traded their support for a statute reversing this decision and retroactively suspending the penalties in exchange for the support of the business and banking communities for the WCA. (See Davis, 1973). One who wanted to extend this approach of per se

violations, penalties and attorneys fees to problems of defective products, deceptive trade practices, or the like would have to find another case that affected important sectors of the business community as drastically as did the J. C. Penney case. Today even another J. C. Penney case might not be enough in view of the hostility of many business people and lawyers to the WCA in particular and to consumer protection law in general.

There are other important elements besides the economic ones we have discussed that make Wisconsin lawyers reluctant to take consumer cases and that affect the way they handle the ones they do take. The catalogue of disincentives which follows is more speculative than the cost-benefit story told up to here. It should be read as applying to some but not all lawyers and as applying in varying degree since it rests on piecing together bits of information gained in interviews rather than on any uniform pattern of answers. Nonetheless, it is important to describe these possible disincentives because the evidence suggests that there are problems with an individual rights strategy which would not be solved completely if these cases were made only a little more economically attractive.

Many attorneys represent such clients as banks, lenders, the local Ford dealer or even General Motors when it is sued in a local court. These lawyers would face a pure conflict of interest if they were to take a consumer protection case against one of the clients, and, as a result, they are not part of the market for legal services for consumers with such problems.[4] Most lawyers have some less direct ties to their local business community or even to a regional or national one. An

overly aggressive pursuit of a consumer claim might require a lawyer to risk losing the good will of existing and potential clients or endangering his or her network of contacts. At the same time, these very ties to a segment of the business community may enable a lawyer to be more effective in working out reasonable settlements or at least gaining a gesture.

Lawyers who would face no direct conflict of interest think it important to avoid offending business people unnecessarily. (Compare Brakel, 1974). One lawyer in northern Wisconsin stressed that, "you can always get a merchant's name in the newspaper just by filing a complaint. However, this will make him bitter, and you will pay for it in the future." Even lawyers who realistically would not expect to gain the local Ford dealer or the General Motors Corporation as clients, may want to retain their good will. Lawyers' contacts are part of their stock in trade. They know, for example, where to get financing or who might want to invest in a business deal their client is interested in. Lawyers also often get clients through referrals and recommendations, and bankers and retailers frequently serve as experts who can tell you where to find a good lawyer. In short, most lawyers in private practice work hard to become and stay members in good standing of the local business and political community. Perhaps this is a more common concern in smaller communities than in larger ones, but many lawyers in Milwaukee and Madison carefully guard their contacts with those who count in these cities.

We cannot expect lawyers concerned with the reaction of business people to take a tough approach to solving consumer problems. It is safer to refuse these cases or to refer them to a governmental agency

52-434 O - 80 - 35

which mediates consumer complaints against business. It is also reasonably safe to call an influential business person to try to work out matters in a low key conciliatory manner. Not only is this course often the most economically feasible approach for the consumer, but if the lawyer handles the situation skillfully, such an approach can even gain the appreciation of the business person against whom the consumer is complaining. The lawyer can explain the view of the business to the client, giving it some legitimacy just by stating it as something to be considered seriously and not to be rejected out of hand. Clients who begin by feeling defrauded and wronged may change their mind and come to see the situation as a simple misunderstanding which has now been cleared up. The client not only feels better but the reputation of the business will not be attacked constantly by the client. Whether or not the consumer is cooled out successfully, the lawyer serves at least the short run interest of the business complained against if the client is persuaded to drop the matter and go away.

The local legal community recognizes legitimate and not so legitimate ways of resolving various types of problems. For example, most lawyers feel strongly that one does not escalate a simple dispute into full scale warfare which will benefit neither the parties nor the lawyers. With this in mind, lawyers interested in the good opinion of other members of the bar and bench will follow accepted, routine, and simple ways of dealing with consumer problems. Many lawyers see an adversary stance in this area as wholly inappropriate unless one is doing a public service by going after a fly-by-night company or a firm that employs overly aggressive door-to-door sales people. Some lawyers

who take this view are hostile to consumer protection laws and to those who assert their rights under them. They view business people--at least local business people--as honest and reasonable. While misunderstandings are always possible, these lawyers doubt that serious wrongs are ever committed by the local bank, Chevrolet dealer, or appliance store. Consumers who complain often are seen as deadbeats trying to escape honest debts or as cranks who are unwilling to accept a business' honest efforts to make things right. For example, one lawyer who practices in a large city said,

> Most of the fraud now is against the lenders. Debtors, especially the young kids, are wise to the tricks. They know that it costs money and takes time to get the wheels in motion, and it isn't worth the trouble if there isn't too much money involved. Recently a young woman bought a brand new car and financed it through a bank. She got a job delivering photographic film and put over 100,000 miles on that car within a year. Then when she was tired of making payments she just left the car in the bank's parking lot and put the keys and all the papers into the night deposit slot with a note saying, "Here's your car back." What can the bank do realistically? They may be entitled to a deficiency judgment, but it is not worth the trouble to get it under the new laws. . . .
>
> The hallways outside small claims courts are crowded with little old people, crying because of the way young kids have screwed them out of several month's rent. . . . A judgment is just a piece of paper and the Wisconsin Consumer Act has made collection procedures so difficult that a judgment is almost worthless.

Two other lawyers who practice in a small town were interviewed together, and they expressed similar views:

> There has to be some way of handling the deadbeats, who are the only ones who benefit from all the consumer laws anyway. The administrative costs of consumer protection laws are a major cost of business to firms out here in smaller communities because they are always operating on a shoestring.
>
> . . . We feel sort of grimy representing consumer clients. In

> one recent case, a young man was being sued for a legitimate $700 debt. We negotiated in light of consumer protection laws and got the guy a settlement for $500. It was really a $200 robbery, just as if the guy had gone into the store with a gun.

Undoubtedly these are accurate descriptions of some consumers who lawyers encounter. The views expressed are not held by all members of the bar. Another lawyer in the same small town said that "local people are being ripped off by local merchants every day. . . .Attorneys in town can't believe that these guys whose fathers went to the country club with their fathers could be dishonest. They consider these ripoffs just 'tough dealing.' But the local merchants have absolute power--people have to deal with them, and merchants just can't resist the temptation to use this power for all they're worth." Nonetheless, as Abel (1979: 27) puts it, "Lawyers inevitably identify with those they serve; law practice would be intolerable otherwise, whatever we may say about the importance of objectivity . . ."

Many lawyers also have personal reasons for hostility to consumers and consumer protection laws. Lawyers are engaged in small businesses themselves. They may face problems when they try to collect fees from clients. (See Granelli, 1979). They see and read about dissatisfied clients who have been bringing enough malpractice suits to drive up the malpractice insurance rates for all lawyers. Moreover, most lawyers have little reason to see consumer problems as something serious which they or their friends or family might face. Attorneys tend to be affluent enough and sufficiently well connected so that businesses make efforts to keep them happy. Some lawyers make many major purchases from or through clients. Lawyers generally understand the

consumer contracts that they sign. While they may not read a particular contract, the provisions of, say, a conditional sales contract will involve variations on a well-known theme. Lawyers pay their debts or know how to negotiate with their creditors to avoid collection procedures and trouble. And if there is a problem, lawyers tend to be assertive people who complain directly to the seller and get their defective stereo or camera fixed or replaced. Lawyers are likely to experience what might be called consumer problems that flow from computer and data processing errors, and even those lawyers who represent the largest corporations have their "war stories" about trying to straighten out their credit card accounts or bills from the telephone company. Yet these tend to be viewed as frustrating annoyances and not as major problems. Most lawyers see no reason why nonlawyers should encounter consumer problems either. One attorney reflected a common position when he said,

> I am not sympathetic to consumer complaints. I refer them to the Department of Agriculture Consumer Protection Office, and I have no desire to hear how they come out. People should find a reputable place to trade instead of bargain hunting. They ought to know better than to trust fly-by-nights.

As I have suggested, a lawyer who holds such a negative view of consumer laws and consumers who complain is likely to find wholly inappropriate an aggressive pursuit of the remedies granted by these laws. A number of attorneys suggested that a lawyer has an obligation to judge the true merit of a client's case and to use only reasonable means to resolve problems. Indeed, these lawyers seemed to be saying that an attorney should not aggressively assert good cases under ill-

advised or unjust statutes, but no one went so far as to say this explicitly. A reasonable approach in the consumer area was usually seen as a compromise. For example, several attorneys were very critical of other members of the bar who had used the Wisconsin Consumer Act so that a lender who had violated what they saw as a "technical" requirement of the statute would not be paid for a car which the consumer would keep. While this might be the letter of the law, apparently a responsible lawyer would negotiate a settlement whereby the consumer would pay for the car but would pay less as a result of the lender's error. Also several lawyers indicated that if a lawyer for a consumer offered an honest complaint about the quality of a product or service, it would be resolved in a manner that ought to satisfy anyone who was reasonable. A lawyer who sued in such a matter would be only trying to help a client illegitimately wiggle out of a contract after s/he had a change of heart about a purchase or to gain money by pushing a case a manufacturer or retailer could not afford to defend on the merits. A lawyer who represents Ford in actions in parts of Wisconsin commented, "The economics are not only a problem for consumers. How many $200 transmission cases can Ford defend in Small Claims Court? Lots of suits are bought out only because it is easier to buy them off than defend them. A lot of people forget that there are cost barriers to defending cases too. Ford cannot bring an expert from Detroit and pay me to defend product quality cases, and a lot of lawyers for plaintiffs know this and count on it when they file a complaint."

Those attorneys who often press consumer rights were called such things as members of the "rag-tag bar" who had no rating in Martindale-

Hubbel and who ignored the economic realities of practice. An older lawyer commented that many younger lawyers are very consumer minded and seem to be "involved emotionally with clients when the word consumer comes up." One attorney, who characterized himself as an "establishment lawyer," explained that in Madison and Milwaukee there now are many lawyers who do not depend on practice for their total income or who live life styles in which they need far less than most people. He was particularly concerned about women lawyers who live off their husband's income and thus are freed to play games and crusade without recognizing the economic realities of practice. Still another attorney pointed out that consumer cases were often brought by young lawyers just beginning practice. Since they had few cases and wanted to gain experience, these beginners often refused to accept reasonable settlements and filed complaints. Similar objections were made to some legal services program lawyers who failed to go along with the customs of the bar about the range of reasonable settlements, and who were seen as far too aggressive in asserting questionable claims against established businesses. Some older "establishment" lawyers were annoyed by the mavericks while others viewed the younger lawyers with amusement, predicting that they would learn what to do with such cases as they grew up. One lawyer explained that the local judges were all experienced lawyers, and so he could end consumer cases without much difficulty by simple motions; the judges just were not going to let these cases go to juries or even to trial.

A number of other lawyers also report--but more critically--that many Wisconsin judges and their clerks are not sympathetic to an adversary handling of consumer protection laws. These judges and clerks

are said to do all they can to see that their time is not wasted by cases which they think never should have been brought to them. Many judges will help consumers handling their own cases in a small claims court reach some kind of settlement, but if a consumer wants to try the case, some judges respond by applying the rules of procedure and evidence very technically so that they will not have to reach the merits. These lawyers tell stories about trial judges who refuse to enforce individual claims based on Wisconsin administrative regulations designed to protect consumers. The judges seem to view these regulations as something illegitimate enacted by liberal reformers in Madison who are out of touch with conditions in the rest of the state. The judges also are unfamiliar with these regulations and with federal materials. Most judges did not master these laws when they were lawyers in practice, and they seldom see them in cases brought before them. Also they may lack ready access to copies of these laws or to articles explaining their various provisions. A lawyer for a local retailer, it was reported, successfully defended a consumer case on the ground that the Wisconsin Administrative Code lacked a good index. Another lawyer remarked that he would not use the Magnuson-Moss Warranty Act in a case brought in a state court because "as soon as you throw federal law at a state judge, they freak out since they have no familiarity with federal law. You would have to spend an hour and a half convincing them that they had jurisdiction." Still another attorney commented "judges hate consumer cases because they simply do not understand the law. The courts are just now getting used to the Uniform Commercial Code. If you try to use consumer laws, you are letting yourself in for a lot of briefing to educate the judges."

One trial judge gained some measure of local fame among the bar by threatening to declare the Uniform Commercial Code void for vagueness. Other trial judges or their clerks flatly tell lawyers that consumer cases just will not be tried in their courts. Of course, a lawyer who wanted the formal state or federal law to penetrate into a county in which such a judge sat would always be free to appeal, but the cost barriers before this route assure trial judges a large degree of freedom to do justice as they see it in the teeth of consumer protection laws which displease them.

Perhaps these lawyers' "atrocity stories" (See Dingwall, 1977) about judges are not entirely accurate, but insofar as they are repeated among lawyers, they are likely to affect the strategy any attorney will pursue. For example, few lawyers would look forward to arguing that a contract was "unconscionable" under Section 2-302 of the Uniform Commercial Code before the trial judge who was so unhappy with the open texture of much of the UCC. Young lawyers who have mastered the administrative regulations designed to protect consumers will learn to hesitate to display their wisdom before a trial judge who has never heard of such laws and who is unlikely to sympathize with their goals. Reformers and law professors often assume that laws published in the state capital automatically go into effect in all the county courthouses in the state. Experienced lawyers know better.

Lawyers who are not so tied to the local business and legal establishments also face disincentives to using consumer laws beyond the obvious economic ones. These lawyers also recognize the difficulties of trying to litigate newly created individual rights before unsympathetic

judges. Those involved with various causes face this problem all the time. These lawyers too must select carefully the cases they take which may turn out to be charity work. They are not free to treat every potential client who walks in from the street as the bearer of a major cause. They must balance their good works with enough paying clients so that they can meet payrolls and pay the rent and utility bills. Many who call themselves "movement" lawyers and who are engaged in representing various causes do not honor consumerism any more than do establishment lawyers. Consumer protection is viewed by many of these "progressive" lawyers as a middle class concern. It just us not as important as criminal defense of unpopular clients or battling local governmental authorities in behalf of migrant laborers. This attitude is reflected in the following comments of a person who regards himself as a progressive lawyer and who has represented a number of unpopular clients:

> You want to avoid filing complaints and trying consumer law suits. Partly this is economic, but we cannot overlook another important reason. What have you done when you win one of these cases? You have saved a guy a couple of bucks in a minor rip-off. It just isn't fun. It would be a boring hassle. If you win, the client gets only a marginal benefit, and he won't be grateful. So this kind of case will fall to the bottom of the pile of things to do. There are many cases that are far more satisfying. We take these cases sometimes, but they are not the things we really enjoy.
>
> You may feel funny about even negotiating consumer cases. A lawyer often can get his client something he is not really entitled to. For example, one client had a contract with a health club. There was nothing really wrong with it. The client was just tired of the club. We wrote a letter on our letterhead, and the club folded and let him out of the deal. This isn't the way the case should have come out, but it is the way it works. You do not get a great deal of satisfaction out of such a case, and you will try to avoid doing this sort of thing when you can.

Even "movement" lawyers report that they must distrust consumer

clients who complain. They say that many are "nuts" or "freaks" who simply do not understand the situation or who will omit or make up "facts" and get the lawyer out on a limb. These clients often are a little "flakey." Many of them have mistaken ideas about their legal rights and will not accept the lawyer's attempt to tell them that they are wrong. It is not worth the time it takes to argue with them about what the statutes say. Many are seen as people projecting their anger onto a single dispute in an attempt to get even. They will not accept a compromise since the case involves a matter of principle, but they cannot afford to wage a real vendetta. "You just have to try to ward off those potential clients who are overreacting or are crazy."

B. Lawyers for Business.

In contrast to lawyers for individuals, attorneys for business play fairly traditional lawyer's roles when they deal with consumer law: they lobby, draft documents and plan procedures, and respond to particular disputes by negotiating and litigating. Indeed, our idea of what is a traditional lawyer's job may flow largely from what this part of the bar does for clients who can afford to pay for these services. As Hazard (1978:152) puts it, "One of the chief reasons why competent lawyers go into corporate work is precisely that business clients are willing to invest enough in their lawyers to permit them to develop the highest possible levels of professional skill. Indeed, it is not far wrong to say that lawyers for big corporations are the only practitioners regularly afforded latitude to give their technical best to the problems they work on." But even when we turn to business practice, the classical model of lawyering is only a rough approximation of what happens. This suggests that the amount of the potential fee is not the only factor prompting problems with the classical view. I will consider each of these traditional kinds of lawyer's work in the business setting, looking at what is done for clients, which lawyers do what kinds of work, and the degree of independent control exercised by lawyers in each instance.

Lawyers working for manufacturers, distributors, retailers and financial institutions are likely to be present at the creation of any law that purports to aid the consumer. For example, the decision of the Supreme Court of Wisconsin that found the revolving charge account plan of the J. C. Penney Company to run afoul of the state's usury statute was a major chapter in the story of consumer protection in Wisconsin.

Lawyers from several of the state's largest and most prestigeous law firms were involved in defending revolving charge accounts in the challenge before the courts and in the complex negotiations which led to legislation reversing the Supreme Court's decision in exchange for support of what became the Wisconsin Consumer Act. (Davis, 1973).

Perhaps less dramatically, lawyers representing both state and national businesses have been involved in the process of administrative rule-making that has produced such consumer protection regulations as those that govern warranties on mobile homes, the procedures for authorizing repairs on automobiles, and door to door sales. During recent sessions of the Wisconsin legislature all kinds of measures purporting to protect the consumer have been introduced, and business lawyers have been there attempting to block passage or to modify these proposals.

Not surprisingly, the role of lobbyist for business is a specialized one, usually played by a small number of lawyers from the larger firms in Milwaukee or Madison, or by lawyers employed by industry trade associations. Lawyers who are former state officials or former legislators also lobby as do many non-lawyers. Smaller businesses seldom hire a lobbyist. They rely on being represented by larger businesses or trade associations, or officials of these businesses directly contact their representatives in the Legislature. Indeed, legislators who are lawyers may find themselves representing home town businesses before state agencies as a matter of constituent service. The lobbying role is a familiar one. (See Horsky, 1952). Lawyer-lobbyists alert their business clients to what consumer advocates are proposing in the legislature and before various administrative agencies. These lawyers then

attempt to influence the shape of the statutes and regulations so that their clients can live with them. This can involve drafting and advocacy, but it is also likely to involve bargaining and mediation. In an era when consumer protection is generally popular, business lawyers usually take a cooperative stance. Their key argument involves painting their clients as honest people who want to do the right thing and who should not be burdened by regulations aimed at a few bad actors. They also play on traditional anti-regulation arguments about red tape and the cost of meaningless procedures and forms.

Many of these lawyer-lobbyists are more than mere advocates. In order to gain concessions from those pushing consumer protection, business has to give something. These lawyers make judgments about which regulations are reasonable, acceptable or inevitable, and then they sell their view to their clients. Undoubtedly, there is an interchange of ideas at this point. Only a few lawyer-lobbyists have the power to make final decisions without consulting their clients, and some clients will not accept their lawyers' opinions about what is reasonable and what is not. Nonetheless, the lawyers generally have great influence on the decisions about which laws must be accepted and which ones can be fought. One reason for this is that they control much of the information necessary for making such judgments. (Compare Prottas, 1978; Ross, 1970). For example, to a great extent they are the experts both about the political situation facing the agencies and legislators and about the intensity of the commitment to a particular proposal of those who speak for consumers. Of course, some manufacturers, financial institutions and trade associations use non-lawyers as lobbyists and some use

both lawyers and non-lawyers working together. When non-lawyers are on the scene, the lawyer-lobbyist may have less control over the flow of information and thus less power over the client.

After consumer laws and regulations are passed, business lawyers help their clients cope with them. Much of the work involves drafting documents and setting up procedures for using these forms. For example, both the federal Truth in Lending Law and the Wisconsin Consumer Act required a complete reworking of most of the form contracts used to lend money and sell things on credit. The Magnuson-Moss Warranty Act demanded that almost every manufacturer, distributor and retailer selling consumer products rewrite any warranty given with the product and create new procedures to make information about these warranties available to consumers. (See Fayne and Smith, 1977, for a description of how national manufacturers' lawyers have coped with this statute). The Wisconsin administrative regulations governing automobile repairs required a form be drafted on which consumers could authorize repairs and demand or waive an estimate before the work was done. This is very traditional lawyers' work, demanding a command of the needs of the business, a detailed understanding of the law, and drafting skills. Moreover, the uncertainties and complexities of many consumer protection laws calls for talented lawyering if the job is to be done right.

While the average Wisconsin lawyer does not often counsel business clients about consumer protection laws and attempt to draft the required forms, this is the stock-in-trade of the largest firms in the state and of a group of other lawyers with a predominantly business practice. Some large corporations that have dealings with consumers have their own

legal staff which does the necessary document drafting and reviewing of procedures. (See McConnell and Lillis, 1976). Some of this work can be mass produced, and lawyers for trade associations have worked on standard forms to be used by all of their members. Lenders, retailers and suppliers of services in smaller cities tend to rely on forms supplied by these trade associations which retain specialists to produce them. Smaller manufacturers of consumer products and smaller financial institutions often send problems concerning consumer protection laws to lawyers in Milwaukee or Madison. They may do this difectly or their local attorney may refer the problem to a larger law firm. However, there may be a "trickle down" effect: lawyers who do little business counselling and are not expert in consumer law often produce variations on forms written by more expert lawyers. Sometimes these forms are just copied and no independent legal research is attempted. The less expert lawyers collect copies of the work product of the more expert in a number of ways. Some receive them from clients who get them from trade association; some can call on friends who work for the larger law firms for help in unfamiliar areas.

Of course, the size of the firm alone does not determine whether lawyers will offer drafting and counselling services to business nor whether a lawyer will be skilled in dealing with consumer laws. Some individual lawyers, with perhaps an associate or two, do counsel business clients and draft contracts, and some individuals do it very well. But several lawyers commented that the flood of regulation of the past ten years has made it hard for a smaller firm to keep up with all the new law and to maintain the resources needed to advise business. Lawyers

who specialize in representing business must be primed to alert their clients to changes in the law which require review of practices. These lawyers usually have their own libraries with copies of both federal and state administrative regulations as well as the expensive loose-leaf services necessary to keep them up to date. The large law firms and corporations with house counsel can afford to send their lawyers to continuing legal education programs put on at the state or national level. The large firms can afford to have someone in their office specialize in the various consumer laws. Indeed, many of these law firms face the problem of coordinating their large staff so that all of their lawyers will recognize a problem of, say, the Truth in Lending Act and then call on the resident expert in the area. The consumer law specialists in these firms often can call on people working for the various administrative agencies for informal advice about how the agency is likely to respond to particular procedures or provisions in form contracts; of course, any lawyer can call on the agency, but often these expert lawyers and administrative officials will know each other from their continuing contacts or from participation in continuing legal education programs.

Some of the attorneys who have been involved in this redrafting of forms and fashioning of new procedures saw the task as one of making the least real change possible in traditional practices while complying with the new laws or regulations. They tried to design new forms which would ward off both what they saw as the unreasonable governmental official and the unreasonable consumer in the unlikely event that matters ever came close to going to formal proceedings before agencies

52-434 O - 80 - 36

or courts. Other business lawyers, however, used the redrafting exercise as a means to press their clients to review procedures and teach their employees about dispute avoidance and its importance. In some cases the lawyer's views significantly influenced the client's response to a new law. For example, many business people are proud of their product and service and want to give broad warranties, but their lawyer is likely to convince them that this is too risky. The Magnuson-Moss Warranty Act attempts to induce manufacturers of consumer products to create informal private processes for mediating disputes. At least some business people have expressed interest in taking such steps to avoid litigation and in experimenting with new procedures for dealing with complaints by consumers. However, lawyers in at least two of the largest firms in Wisconsin strongly advise their clients to avoid creating private dispute resolution processes. These lawyers see the benefits as unlikely to be worth the risks, and they are in the position to have the final word with many clients about mediational institutions. While their advice may be sound, it is not based on experience with consumer mediation and arbitration. Whatever its soundness or basis, however, this advice is likely to decide the matter for most clients.

Finally, some consumer protection laws call on business lawyers to become directly involved in the process of settling particular complaints when other methods fail. For example, lawyers throughout the state, in both large and small firms, represent banks and other creditors in collections work. At one time this was a routine procedure that yielded a default judgment and made clear the creditor's right to any property involved. However, many of the traditional tactics of debt collection

have been ruled out of bounds or are closely regulated by state and federal laws passed in the past few years. Lawyers who do collections describe what seems to be a new legal ritual to be followed whenever a debtor who is armed with legal advice resists a collection effort. The lender first attempts to collect by its own efforts, and then it files suit, often in a small claims court. The debtor responds, asserting that something was wrong with the credit transaction under the Truth in Lending Act, the Wisconsin Consumer Act, or both or asserting that the creditor engaged in "conduct which can reasonably be expected to threaten or harass the customer . . ." or used "threatening language in communication with the customer . . ." as is prohibited and sanctioned by the Wisconsin Consumer Act. Wis. Stat. §§ 427.104 (g), (h) (1975). The lender then has to respond, either by offering to settle or by claiming to be ready to litigate the legal issues. Then the lawyers on both sides play an important role in deciding whether to settle or fight. However, at the same time, many bankers and managers of lending institutions are themselves becoming expert in at least the more common applications of these statutes. While immediately after the Wisconsin Consumer Act was passed many bankers could not believe that what had always been accepted practice was now prohibited, today many bankers and lenders are more expert about many consumer protection laws than lawyers who are not specialists.

Large retailers who sell relatively expensive products or services face a regular flow of consumer complaints. Almost all of them are resolved without the participation of lawyers, but a lawyer sometimes must enter the picture to deal with the small number of these disputes that

cannot be resolved by officials of the retailer. This may not happen until the consumer files a complaint in court. Often the manufacturer's or retailer's lawyer will be facing an unrepresented consumer in a small claims court. Several of these business lawyers commented that the consumer was only formally unrepresented since the judge often seemed to serve both as judge and attorney for the plaintiff, particularly in pre-trial settlement negotiations. These are expensive cases for a retailer or manufacturer to defend if the consumer gets a chance to present the merits of his or her claim to the court. One law firm in Madison represents one of the largest automobile manufacturers in such matters, but it sees only three or four such cases a year. Interestingly, these cases almost never involve an application of any of the many consumer protection laws or even the Uniform Commercial Code; the real issue is almost always one of fact concerning whether the product or service was defective. The law firm's recommendation about whether to settle is almost always final. Their recommendation will be rejected only where the manufacturer wants to defend a particular model of its automobiles against a series of charges that it has a particular defect.

Another situation that brings out lawyers involves consumer complaints which prompt a state regulatory agency to start an enforcement action against a business. Typically, this situation calls for the business lawyer to work out a settlement rather than litigate, but, of course, the possibility of formal action affects the bargaining position of both sides. Here, too, the lawyer has great influence on the client's decision about whether to settle. The lawyer's advice is likely to involve a mixture of his or her predictions about the practical

consequences of the proposed settlement order of the agency, the outcome of a formal enforcement proceeding, and the risks of adverse publicity if the matter went to a public forum.

It should be stressed that most of these lawyers for business who deal with consumer laws do not see themselves as hired guns doing only their clients' bidding. In playing these traditional roles and exercising high professional skill, there is room for a good deal of influence on what are thought of, usually, as the client's choices. Some business lawyers concede that occasionally they must persuade their clients to change practices or to respond to a particular dispute in what the lawyers see as a reasonable manner. For example, these lawyers may tell their clients that they must appear to be fair when they are before an agency in order to have any chance of winning in this era of consumer protection. In this way, they may be able to legitimate sitting in judgment on the behavior of their clients and occasionally manipulating the situation to influence the choices which the clients think they are making.

While business lawyers do try to influence their clients' behavior, most of our sample stressed that their clients are responsible people, trying to do the right thing. Members of the elite of the bar seldom see any but the most reasonable people in business, at least when it comes to consumer problems. Of course, it is not surprising that these lawyers tend to see their clients as reasonable for business attorneys are likely to share their clients' values. Business lawyers tend not to be sympathetic toward most consumer protection legislation. They concede that these laws make more work for them, and thus increase their

billings, (See Beal, 1978; Dickinson, 1976; Galluccio, 1978), but they also see their clients as being swamped by governmental regulation and paper work which serve little purpose. (Compare Bugge, 1976). They are unhappy because they cannot explain these laws to their clients in common sense terms. Some business lawyers are concerned about common easy credit practices and how easy it is for some consumers to evade their debts when they become burdensome. They worry that the importance of keeping promises and paying one's debts is being undermined by reforms directed at problems which politicians invented. Several remarked that when they left law school, they were strongly in favor of consumer protection, but after a few years in practice they saw matters differently. Advocacy of a business point of view is thought to be legitimate by those whose opinion matters most to these lawyers, and these clients pay well. In short, as we might expect, Wisconsin business lawyers are not radicals and are comfortable representing business.

A few of the lawyers we interviewed reported having to act to protect their own self interest when dealing with a business client. One prominent lawyer, for example, described a case where he represented an out-of-state book club in a proceeding before one of the state regulatory agencies; he took the case as a favor to a friend who had some indirect connection with the club. As the case unfolded, the lawyer discovered that the book club had failed to send books to many people who had paid for them. It was not clear whether the situation involved fraud or merely bad business practice. The lawyer insisted that the book club immediately get books or refunds to all of its Wisconsin customers and sign a settlement agreement with the agency which bound

the club to strict requirements for future behavior. The attorney explained that the business had been trading on his reputation as a lawyer when it got him to enter the case on its behalf. Once it became clear that the administrative agency had a good case against the client, the lawyer felt that the client was obligated to help him maintain his reputation as an attorney who represented only the most ethical businesses.

In conclusion, even though Wisconsin business lawyers seldom objected to the stance taken by their clients in consumer matters and seldom found their self interest infringed by their clients, there is evidence of the continuing truth of Willard Hurst's (1950: 344-5) observations about the historical role of the bar:

> The lawyer's office served in all periods as what amounted to a magistrate's court; what was done in lawyers' offices in effect finally disposed of countless trouble cases, whether preventively, or by discouraging wasteful lawsuits, or by settling claims over the bargaining table. After the 1870's, as the lawyer assumed a broader responsibility in his client's business decisions, a corollary result was to extend the occasions and degree to which the lawyer was called on to judge the rights and duties of his client, with a decisive effect on future action. . . Elihu Root remarked. . . "About half the practice of a decent lawyer consists in telling would-be clients that they are damned fools and should stop."

About the only amendment of Root's statement needed to bring it up to date is that it is not necessary for a business lawyer to tell a client anything in order to bring damned fool behavior to an end. The lawyer often has the power to channel the behavior of clients without their awareness of what is being done.

II. Of Gaps Between Normative and Empirical Pictures: The Consumer Statutes, Classical Views of Lawyering and This Study.

This story of lawyers' responses to consumer protection laws differs from what an innocent student of the text of these statutes and regulations might have anticipated if s/he knew about the practice of law only from literature or television. Probably it also differs from what those who wrote these laws expected as well. Impact studies almost always discover a significant gap between normative and empirical pictures; it is not news that the law on the books differs from the law in action. Indeed, there is no reason to assume without further thought that such gaps should be closed. Nonetheless, often we can learn something important about the legal system by explaining why the is differs from the ought. Also, we may gain some understanding of how to make reforms more effective, or we may come to see why they are impossible.

The law of consumer disputes has several not totally consistent goals. Much of this law seems aimed at producing an informed consumer who will avoid problems by making rational choices. Many laws and regulations seek to prompt sellers to offer more and better information about just what is being sold, how far it is guaranteed to do what, and for how long, and at what total price--including financing charges. Consumers with this information, it is assumed, can avoid bad deals and take good ones, and this will prompt more competition which then will make more good deals available. (But see McNeil, Nevin, Trubek and Miller, 1979). Still another goal of these laws is dispute avoidance through improved quality control and prompt repair of defects.

Automobiles that run properly produce few disputes, when there are defects; satisfactory repairs at acceptable prices are preferable to causes of action. The last goal is more complicated. On one level, most consumer protection statutes offer individual rights so that those who do not receive what they bargained for can gain a remedy in a court. But, perhaps more importantly, causes of action are created to provide support for attaining the goals of adequate disclosure and better product quality and repair. If the possibility of costly litigation prompted all manufacturers to improve both their products and their contracts so that there were no disputes, these laws would be magnificent successes although not one case ever came to a lawyer's office, a court or an administrative agency. Of course, a lack of complaints in these channels does not necessarily indicate that these laws have been this successful.

It is hard to measure with any precision how close the consumer product quality dispute laws have come to meeting any of these goals. For one thing, too many factors besides the laws are also at work. But lawyers for manufacturers and sellers of consumer goods, prompted by federal and state statutes and regulations, do work hard to help their clients comply with the disclosure requirements. For example, most manufacturers and sellers of any substantial size have revised their warranties to meet the demands of the Magnuson-Moss Warranty Act. Of course, there is reason to doubt whether disclosure regulation of this type actually benefits consumers--we can wonder, for example, how far consumer behavior is influenced by the now common disclosure, mandated by the statute, that the seller offers a "limited warranty."

(See Whitford, 1973). But that is the disclosure the drafters of the Magnuson-Moss Warranty Act demanded, and business lawyers have seen to it that their clients have made it.

I cannot say much about the goal of improved quality control or better service. This study was not designed to determine whether manufacturers of consumer goods have improved their products and service in response to these laws. A number of business lawyers interviewed said that their clients were very concerned about quality, but many thought that their clients were just as concerned before all of the laws were passed. Moreover, consumer protection laws may only reflect a general dissatisfaction with modern consumer goods and services, and this dissatisfaction itself may be what has prompted the efforts of many manufacturers to increase quality and avoid complaints. Also, laws that require recalls of consumer products for safety-related defects (See, e.g., Apcar, 1978; Grabowski and Vernon, 1978; Stuart, 1977; 1978.) and multimillion dollar products liability judgments in cases involving personal injuries (Perham, 1977), may have far more impact on corporate decisions than laws that merely create new causes of action for individuals who have not suffered personal injury. Nonetheless, other studies suggest that laws such as the Magnuson-Moss Warranty Act did play some part in placing the issues of product and service quality on the agenda of top management of the corporations that manufacture consumer goods. If nothing else, these corporations have been challenged to do something before a legislature or administrative agency drafts still more law; if it looks as if

business is putting its own house in order, more law may not be seen as needed.

Whatever the situation concerning these first two goals, we do find a gap when we turn to the third. Those with complaints about the quality of consumer products or services and those who are unhappy with the terms of a conditional sales contract or the debt collection tactics used by a vendor are likely to be treated very differently than the text of consumer protection laws suggest. The major differences can be highlighted by summarizing the conclusions I drew from interviewing attorneys and comparing them with the characteristics of many consumer protection statutes.

First, as I have emphasized, not many consumers with a complaint will have effective access to the legal system. To a large extent, lawyers act as gatekeepers, turning away many potential clients, encouraging a very few others to fight for their rights, and offering some but not too much hope to still others. Consumers can seek self help before small claims courts or one of the several state agencies that mediate consumer complaints, but many do not know of these possibilities and others are unsure about using them. Those who take these routes probably would do better with some advice.

Second, those consumers who get to see a lawyer are likely to have their situation judged by different norms than are found in the formal law. At the outset, they will be judged by the lawyer to see that they are not "flakey" or people projecting their anger onto a single dispute in an attempt to get even. Then the lawyer probably will appraise the case quickly in terms of some common sense notion of

reasonableness as well as the likelihood that the business complained against will want to please this particular customer and avoid wasting time in negotiations. Both the consumer's lawyer and the person who speaks for the manufacturer, seller or creditor are likely to have only a vague idea about the specific contours of the relevant area of consumer protection law. Instead, they will operate on the basis of generally accepted norms about a seller's responsibilities, perhaps influenced by a general idea that some consumer law might be available if it were worth anyone's time to look for it. Equally important, a very different law of evidence is likely to apply. The question of whether the product or service was defective is likely to be answered, not by expert judgment, but by the consumer's ability to tell a plausible story which the lawyer is willing and able to sell to the business person.

Third, I have described the remedies likely to be gained, if any, and it is clear that they differ from those called for in the text of these laws. Some consumers get little more than the chance to discover that nothing can be done. At best, they are reassured that they are not foolish to drop their claim because it is weak legally or because it is not worth the cost of pursuing it. Others may gain apologies and token gestures. A few receive repairs, replacements or refunds. Almost no one gets more.

These remedies are unlike those offered by most consumer protection laws. (Compare Ross and Littlefield, 1978). On one hand, consumers may recover something even when they cannot prove there was a defect for which the business would be legally responsible. For example, we have

noted that sometimes a lawyer can gain a refund or replacement for a client even where the flaw in the item originally delivered was not so material as to warrant this remedy under the Uniform Commercial Code. On the other hand, consumers are likely to recover less than the remedies created by these statutes. We have also seen that the Wisconsin Consumer Act in some cases offers penalties and the right to keep goods without paying for them, a much greater remedy than anyone is likely to gain through negotiation. The Uniform Commercial Code coupled with the Magnuson-Moss Warranty Act says that in an appropriate case one can recover consequential and incidental damages for breach of warranty (U.C.C. §§ 2-715) or, perhaps, even for innocent misrepresentation. (U.C.C. §§ 2-721). However, these remedies are blocked in most cases by the terms of the form contract used in the transaction; if a consumer is able to get around the disclaimers and limitations, difficult problems of proof probably will deny recovery. Lawyers negotiating for consumers seldom gain anything like these remedies. Consumers who have to wait a month or two for a manufacturer to ship a part needed to repair their stereo receiver will receive nothing for the loss of use and enjoyment; drivers whose cars break down on vacation trips will not have the expense of awaiting repairs paid by the manufacturer. Indeed, while the UCC's basic remedy is "cover" (See U.C.C. §§ 2-711)--buying or renting a replacement and suing the seller for any amount more than the contract price which this costs--lawyers for consumers seldom can persuade a dealer to pay the cost of renting a car while the customer awaits a repair, and few dealers will loan customers cars because of insurance problems.

Appliance stores do not pay the cost of the coin operated laundry which a customer is forced to use while awaiting repairs to a defective washing machine. Whatever the merit of common law and UCC remedy system in commercial cases, in consumer disputes they are such ill fitting garments that they are seldom worn.

Turning from consumer laws to lawyers, we encounter another gap. What I have called the classic model is a picture of the practice of law which has both normative and descriptive elements. In telling us that this is the way things should be, it seems to imply that this is the way things are. On one hand, this model of practice emphasizes the lawyer as advocate, both standing before the courts and seated in the law library doing research. And in both places, the lawyer is primarily concerned with the law. On the other hand, the classical model paints a picture of the lawyer as largely subordinate to the client's ends as long as those goals and the means for achieving them are within the rules of the game. The lawyer, for example, owes fiduciary obligations to the client and attorneys must be careful to avoid a conflict of interest in trying to serve several clients. It is questionable whether a lawyer should ever try to represent both parties involved in a dispute. (But see Hagy, 1977; Paul, 1976). Whatever the precise boundaries of these obligations, the lawyer's own self interest is muted in this classical picture, and it might not be noticed at the first viewing. This study suggests that model does not match much of the day-to-day practice of many, if not most, lawyers.

As I have noted, most lawyers are unlikely ever to be found in a courtroom arguing a consumer protection case, and only those who specialize in counselling businesses are likely to be found in a law library doing research on these laws. Most lawyers deal with any consumer complaints they encounter without much real knowledge of the statutes, regulations and cases in this area. Perhaps as time passes, lawyers will become more and more aware of these laws. It may take a generation or two for new areas to penetrate into the knowledge held by most members of the bar. Perhaps as new forms of delivering legal services develop and old areas of practice are reformed out of existence, lawyers will turn to consumer protection law as an unmined resource and find ways to make its exploitation economically feasible. (See Falk, 1978; Ross, 1976). Nonetheless, today in handling these cases, attorneys are much more likely to play roles other than that of advocate. Their posture is much more likely to be conciliatory than adversary--their role is likely to be closer to that of a mediator than that of a "mouth piece."

In attempting to resolve disputes through conciliatory strategies, lawyers engage in techniques of conversion or transformation of attitudes. At the outset, lawyers could simply reject a potential client whose case they did not wish to take, but too blunt a rejection risks creating ill will and damage to their reputation. In trying to avoid annoying would-be clients whom they turn away, lawyers can plead that they are overloaded with work or they could refer the case to a specialist if they know of one. Many will try to transform the potential client's

view of the situation, using some mixture of at least three types of arguments. The client may be told that s/he has no legal case; the problem may be the doctrine, the evidence or some mixture of the two. Of course, this argument may be more persuasive if a lawyer knows what s/he is talking about. The client may be told that it is against his or her interest to pursue the matter; legal action may cost more than it is worth, either directly or in terms of the client's long run interests. The client may be told, often very indirectly, that whatever the legal situation, s/he is being unreasonable to complain as judged by some standard other than the law. These arguments may anger the potential client, make him or her feel foolish for being upset and bothering the lawyer or serve as a kind of therapy in those instances when the would-be client accepts the situation and views it differently.

These same kinds of arguments are used by lawyers when they contact the seller or lender on behalf of the consumer and attempt to work out some kind of settlement which is acceptable to all concerned. Yet, as I have suggested, the legal style of argument tends to fade into the background. Either the attorney is not too sure of the precise legal situation or s/he hesitates to appear to coerce the other party. An attorney is likely to appeal to some mixture of the interest of the seller or lender and standards of reasonableness apart from claims of legal right. Then, if there is a settlement offer, the lawyer must sell it to the client. Once again appeals are likely to be made primarily in terms of reasonableness or interest rather than legal right.

Lawyers have a great deal of independence from clients--far more than we might assume from the classic model. (Compare Reed, 1969;

Rosenthal, 1974). They usualy have a choice whether to take a case. Of course, marginal lawyers and beginners may have to accept almost anything that comes through the door and established lawyers may feel obligations to regular clients and friends. Nonetheless, more often than not lawyers can and do judge the potential client, the case, and what they might have to do in order to resolve the matter before they agree to represent an individual or an organization. For all practical purposes the lawyer makes the decisions about how to handle the case. Sometimes lawyers will act as experts, telling the client authoritatively what must be done. If they must persuade their client to accept the approach they recommend, their standing as expert professionals and their skill as advocates usually make them very effective sales people. The major differences between lawyer and client seem to arise at the point when the lawyer tries to sell a specific agreement to the client. Clients often find it hard to believe that they cannot do better than the lawyer says they can. The study reported here also suggests that clients are unlikely to be able to prompt a change in tactics when lawyers feel they cannot afford to invest more time in the solution of a problem. Curran (1977:214) reports that "persons consulting lawyers on . . . consumer difficulties . . . are more likely to be negative about the lawyer-client exchange." The client may leave the lawyer unsatisfied, but the client leaves.

At each stage of a case, lawyers judge both clients and their claims in terms of such things as the economics of practice, the likely impact on their professional reputation, professional satisfaction coming from dealing with the case, and identification with the client. Lawyers are

52-434 O - 80 - 37

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6 OF 8

likely to be happy to represent large organizations in multimillion dollar transactions, and such clients will have important influence on their lawyer's judgments about tactics. When individuals or relatively weak political action organizations bring lawyers consumer, discrimination or environmental cases, usually the attorneys are doing the clients favors if any help at all is offered. As a result, in these situations lawyers are more likely to be in command and tactical choices will reflect their judgments colored by their values and interests. Wealthy and high status individuals bringing lawyers cases involving significant amounts of money are likely to fall in between these extremes, particularly if the nature of their claim is more economic than political. (See Galanter, 1974).

The self interest of lawyers is particularly important when we consider lawyers playing other-than-adversary roles. P. H. Gulliver, (1977:34) the anthropologist, notes that a mediator "inevitably brings with him certain ideas, knowledge and assumptions, as well as certain interests and concerns, his own and those of the people who he represents." Gulliver goes on to point out that when a mediator acts as a go-between with the parties physically separated and not in direct communication, the mediator's ideas and interests are given scope to operate. Mediators can control information. They convey messages, but they also can change the content, emphasis and implication. They can add interpretations or include additional messages because neither party is able to monitor the mediator's activities. Mediators are likely to evaluate each party's position if, for their own reasons, they want to affect the settlement reached.

To a great extent, lawyers drafting a new warranty clause in light of various statutes and regulations act as mediators between the legal system and their clients. In the guise of telling the clients what they must do, lawyers have power to tell them what the lawyers think they ought to do. A lawyer telephoning a seller about a consumer complaint plays Gulliver's go-between role with all of the opportunities to manipulate the result which Gulliver describes. And, importantly, lawyers are repeat players likely to have some concern that what they do in this case will affect their relationships in the business and legal communities in the future.

Lawyers value being "professional." If a case cannot be handled by "real lawyers' skills," it is unlikely to be taken or given much time and attention. (Compare Katz, 1978; Laumann and Heinz, 1977. See also Heinz, Laumann, Cappell, Halliday and Schaalman, 1976.) Lawyers also believe in the legitimacy of business and the related values of self reliance and anti-paternalism. Lawyers tend to understand the problems of manufacturers and sellers. They believe that if one signs a contract, one ought to perform; they think that debts ought to be paid. As a result, consumerism is not seen as a major cause, and consumer protection legislation frequently is indifferently or hostilely received by many lawyers. These views are reinforced by the reactions of many judges who do not want to have their time wasted by lawyers bringing consumer protection cases before them.

Redmount (1961), a psychologist and a lawyer, suggests that some lawyers, as a matter of personality, are likely to be assertive while others are more conciliatory. While this study did not attempt to assess

personality variables, it does seem likely that a conciliatory lawyer who knows almost no consumer law, has only minimal sympathy for consumer problems, associates regularly with business people and recognizes that a consumer's case will justify only a minimal fee at best will do little more than attempt to work something out in a five-minute telephone call to the seller. Even a lawyer who likes to fight will prefer other kinds of cases that offer bigger and better pay offs.

All in all, this study adds another instance to our growing catalogue of other-than-adversary roles played by lawyers. (See Shaffer, 1969). For example, recently legal literature has paid some attention to the problems lawyers face in proceedings for involuntary commitment of a client to a mental institution when the lawyers themselves believe that their client needs treatment. (See, e.g., Cyr, 1978; Dawidoff, 1975; Galie, 1978; Zander, 1976. But see Yale Law Journal, 1975, arguing for an adversary role.) Other articles have considered the problems of lawyers who learn that their clients are violating the regulations of the Securities and Exchange Commission now that the SEC is trying to impose a duty on these lawyers to blow the whistle. (See Lorne, 1978; Miller, 1978; Williams, 1978.) Still other articles look at the problems of lawyers assigned to represent young children in child custody disputes--one cannot just ask a four year old whether s/he wants to live with mommy or daddy and seek to carry out that preference using all of the skills involved in evidence gathering and cross examination. (See, e.g., Church, 1975; Deutsch, 1973; Elkins, 1977; Spencer and Zammit, 1976; Yale Law Journal 1976; 1978).

In the consumer product quality situation, as in these other instances, lawyers are often pushed into a role Justice Brandeis called the "counsel for the situation." Geoffrey Hazard (1978:64) notes that such lawyers must be advocate, mediator, entrepreneur, and judge all rolled into one. They are called on to be experts in problem solving, asked to produce a solution which will be acceptable over time rather than to produce immediate victories for their own clients. To do this, they often must persuade or coerce both the client and the other party to reach what the lawyer sees as the proper solution, often "translating inarticulate or exaggerated claims . . . into temperate and mutually intelligible terms of communication."

III. Evaluation.

How should we evaluate what Wisconsin lawyers do to fashion solutions to consumer problems? Our story tells us something about both the impact of a body of reform laws and about the practice of law. We can sketch both a positive and a negative evaluation; the choice between them rests largely on one's values and one's assumptions about facts beyond the scope of this study.

On the positive side, one might view the practices of the lawyers I studied as yielding a kind of rough justice. Lawyers guard an expensive social institution--the legal system--from overload by relatively minor complaints. Consumers who are dissatisfied with such things as warped phonograph records, defective hair dryers, or inoperative instant cameras can return them to the seller. Usually, the seller will replace them or offer a refund if they cannot be fixed. If the seller refuses, the buyer

can shop elsewhere next time, and the buyer has an "atrocity story" with which to entertain friends which, in turn, may affect the seller's reputation. In short, many problems can be left to the market. (See Diener and Greyser, 1978; Ramsay, 1978; Ross and Littlefield (1978); Wilkes and Wilcox, 1976). At the other extreme, consumers who have suffered serious personal injuries as the result of defective products have relatively little difficulty in finding lawyers who will aggressively pursue their cases, and the growing law of products liability offers what some see as exceedingly generous remedies if not too much protection. Moreover, products liability and government ordered product recalls together give manufacturers a great incentive to pay attention to quality control so problems will be avoided.

The problem is to sort out claims falling between these poles. Defects in automobiles and mobile homes, for example, probably warrant buying at least a little of a lawyer's time, especially when manufacturers and sellers fail to remedy the problem after a customer makes a complaint. But a full scale war using elaborate legal research and expert testimony would be a waste of resources--it would parallel sending a brain surgeon to stitch up a minor cut. A telephone call or a letter or two shaped by rough notions of fairness is all the claim is worth. Only if all those clients who have cases which will support substantial fees were forced to subsidize the consumer cases involving only small sums of money, could lawyers buy all of the necessary law books and learn all the details of consumer law. Alternatively, lawyers could be subsidized by governments to master consumer law and litigate, but there are probably better uses for tax revenues.

Moreover, those lawyers who are willing to do anything at all for clients with a consumer case often are deliberately or unknowingly defending the values of social integration and harmony. In Laura Nader's (1969) phrase, they are seeking "to make the balance" by restoring personal relations to equilibrium through compromise. They do this by clearing up misunderstandings and promoting reasonableness on both sides rather chan fighting for total victories and aiding consumers wage vendettas. They can offer their clients their status and contacts which allow them to reach the person who has power to apologize, offer a token gesture or make a real offer of settlement. In some situations, the fact that a manager or owner accepts the blame and apologizes may be as effective in placating the client as a recovery of money. The real grievance may rest on a sense of being taken, insulted, or treated impersonally. Lawyers can help their clients accept the situation and see themselves not as victims but as people with minor complaints; they can help them get on with the business of living rather than allowing a $200 to $300 problem to become the focus of their lives.

One can emphasize this point by stressing what these lawyers are not doing. Lawyers often are portrayed as promoting disputes in order to make work for themselves. A partner in a consulting firm that aids corporations, in its words, "manage change" recently charged that,

> It is probably not coincidental that the United States the country with the highest proportion of lawyers in its population, is the most litigious country in the world. All those lawyers are looking for work, and they are sure to find it among a self-centered, demanding, dissatisfied

population which has grudges--real or imagined against institutions or individuals.

(9 Behavior Today 3, 4 (No. 4, Oct. 16, 1979)

Rather than pour gasoline on the fire of indignation in members of a "self-centered, demanding, dissatisfied population which has grudges," almost all of the lawyers interviewed in this study seem far more likely to use some type of fire extinguisher. Even lawyers who see themselves progressives and those who work for group legal services plans try to push aside potential clients who they judge to be "crazy," to want something for nothing, or to be acting in bad faith.

It would be difficult to deliberately plan and create a system such as the one I have described. Perhaps it could only have arisen in response to laws that created a number of individual rights which could not be fully exercised. By relying on lawyers as gatekeepers, we get enough threat of trouble to prompt apologies, gestures and settlements which are acceptable but not enough litigation to burden legal or commercial institutions. We avoid having to reach complete agreement on the precise boundaries of the appropriate norms governing a manufacturer's and seller's responsibility for quality defects and for misleading buyers short of absolute fraud. And such agreement would be difficult to attain. We avoid having to live with inappropriate norms about these matters which might result from the confrontation of interest groups in the legislative and administrative processes. We avoid having to resolve difficult questions of fact concerning the seller's responsibility for the buyer's expectations and for the condition of the goods. Finally, we offer some deterrence to consumers who want to defraud sellers or to those eager to get something

for nothing. (See Wilkes, 1978).

On the negative side, one could highlight the fact that many consumers with problems lack effective access to the system because of the barriers of cost and the structure of the legal profession. As I point out, people hesitate to bring problems to lawyers for reasons often not related to the merits of their case. They may think they cannot afford high legal fees, and they may not know that some lawyers often write letters or make telephone calls for little or no fee. (See Curran, 1977:208). Of course, lawyers may be able to offer such services only because they are not asked to do it too often; if more people knew about the practice, lawyers might have to reject even more people with consumer claims in order to guard their time for more profitable legal work. Middle class and rich consumers are likely to be able to get more of the various kinds of services offered by lawyers than are the poor. The more affluent are likely to purchase products where unresolved disputes will be serious enough to warrant seeking professional help; lawyers are likely to want to please these clients and offer "loss leader" services; attorneys are more likely to be successful in persuading a merchant that a middle class or rich person's good will is worth some substantial gesture.

Much of the case favorable to present practices rests on a judgment that most consumer claims are trivial. But should we be satisfied with the judgments of individual lawyers--typically white, middle class males who are nicely integrated into their communities--about whether an individual who wants to assert his or her legal rights is reasonable and responsible? In an era of inflation, perhaps, the $400 many consumers spent to replace four defective Firestone 500 steel-belted radial tires may seem trivial to

a successful lawyer, but it was not trivial to the many car owners faced with this problem. Many buyers of such defective products do not have "the balance" restored; they feel taken or cheated, and they are upset by a sense of "near miss" since defective tires might have killed or injured them or their families. They will have suffered an injury to their expectation interest which will not be redressed. (Compare Bernacchi, 1978). They may be seeking some measure of retribution, and they are not going to be satisfied to be turned away from a lawyer's office after the person at the counter at the Firestone store had denied any responsibility for the problem. In the case of the buyers of Firestone tires, they were likely to have been even more unhappy with lawyers and their lack of remedy when they watched the General Counsel of Firestone testify before a congressional committee that the problems were entirely the consumer's fault. Somehow, it does not seem enough just to avoid ever again buying Firestone products or to enjoy seeing Firestone steadily losing ground in the stock market despite the efforts of an aging actor to prop up its reputation in television commercials. Of course, Congress and an administrative agency ultimately induced Firestone to offer a remedy to some of the buyers of the 500 steel-belted radial, but that does not serve to legitimate the system described in this study because this happy outcome for some consumers was not prompted by lawyers handling individual claims.

While a sense of being taken and the loss of a few hundred dollars may be viewed as too trivial to be of concern, the Firestone case illustrates the possibility that even more important interests are at stake. Even if a lawyer had obtained some gesture from Firestone before

the wave of bad publicity forced it to recall the 500 steel-belted radial tire, it is likely that Firestone would still have been rewarded for its incompetent engineering and production techniques unless the settlement had been for significantly more than Firestone was offering when the defects in the tire were first discovered. Conciliatory settlements which a consumer accepts as the best that can be gained still may be subverting the purposes of consumer protection law if we take these statutes at face value and not as exercises in symbolism. Such a lawyer simultaneously convinces clients that they are getting all they can hope for reasonably while shielding socially harmful practices from effective scrutiny by the public or some legal agency. While the Firestone affair eventually did come to light, it took time while many passengers in cars equipped with these tires were at risk, and we can wonder whether there are other serious problems still being suppressed and shielded from scrutiny because of our system of warding off consumer problems where large sums of money are not involved. Conciliatory tactics may block the degree of market correction called for by consumer protection legislation and deny the public of awareness that markets are not being corrected.

While some individuals find a lawyer to act as an effective go-between when they encounter a consumer problem, others may find lawyers who, in large measure, act in their own self-interest. Clients may find themselves manipulated and fooled. Many clients probably do not come to lawyers seeking to have their situations redefined through therapy or their problems solved by apologies and token gestures. At least some consumers do not want a "counsel for the situation" but are looking for a lawyer to

take their side. The settlement worked out after a five-minute telephone call may be the best possible in light of the lawyer's and the business' interest, and an objective observer might be able to defend it as serving some social interest. But do clients know how their interests are regularly offset by all of the others involved?

Conciliatory strategies require little investment of professional time as compared to more adversarial ones. Mediation does not require much knowledge of consumer law, and a lawyer can negotiate a settlement after filing a complaint based on generalities rather than hard legal research. However, lawyers get an exclusive license to practice because they are supposed to be expert in the law. Many who have never seen the inside of a law school might be better conciliators than lawyers since legal education does little to train students for this part of practice, but non-lawyers are not given the privilege of representing clients. In theory, lawyers are qualified to negotiate and mediate because they can assess the legal position and work from it as a baseline. Lawyers who know almost nothing about consumer law are operating from a different baseline. Earlier I quoted Geoffrey Hazard's (1978:152) comment that people go into corporate law because they have the opportunity to "give their technical best to the problems they work on." Hazard continues by saying that the "rest of the bar ordinarily has to slop through with quickie work or, as one lawyer put it, make good guesses as to the level of malpractice at which they should operate in any given situation." Indeed, an official of the Federal Trade Commission who was concerned about the success of the Magnuson-Moss Warranty Act, condemned Wisconsin lawyers who were not fully acquainted with that statute two

years after it had become effective as being guilty of serious malpractice. He thought that perhaps a malpractice action or two might wake up the Wisconsin bar, but he conceded that he thought lawyers in other states were no more aware of the law. Several lawyers interviewed in this study commented that many lawyers do not know enough consumer law to recognize that it offers a good legal theory and that if they did see this, it might change the course of their negotiations.

On the other hand, it is hard to blame lawyers who almost never see a consumer case involving more than a few hundred dollars for not mastering a complicated and extensive body of law and for not purchasing expensive loose-leaf services to keep up to date. There is no way that any lawyer can know much about all branches of the law; lawyers naturally become far more expert in the areas they see regularly. Furthermore, lawyers are involved in complicated networks of relationships which both grant them opportunities for using conciliatory strategies and curb their freedom to be too aggressive and litigate or threaten to do so. Legal services are delivered by a market system, and while perhaps we can ask lawyers to do some charity work, they cannot provide free services for every case that comes in the door. (Compare Schneyer, 1978).

The lawyers studied seem to be responding predictably to the social and economic structures in which the practice of law is embedded. Liberal reforms, such as the consumer protection laws, often create individual rights without succeeding in efforts to provide the means to carry out those rights. Grand declarations of rights can be personally rewarding to those who struggle for legislative and appellate victories. But justice is rationed by cost barriers and even lawyers working for

lower income clients must pick and choose where to invest their time and how much of their stock of good will to risk investing in a particular case.

We could see most individual rights created by consumer protection laws as primarily an exercise in symbolism. The reformers gained the pretty words in the text of the statute books and some indirect impact while business practice is affected only marginally because the new rights often cannot be implemented. And since there are so many new consumer protection statutes and so much time has passed since the consumer movement became news, the issue becomes less and less fashionable. As a result, we may be left with little more than the public relations gestures that some manufacturers of consumer products have found useful for their purposes. (See Stuart, 1979).

There is probably some truth in all of my interpretations. One's judgment about the situation will turn importantly on his or her view about whether the quality of consumer products, repairs and bargains is an important social problem, and that is a judgment resting on facts which this study was not designed to gather. But one could rephrase the problem to bring it closer to this study: We could ask whether consumer product, service and bargain quality is an important problem which could be solved to any significant extent at an acceptable cost by having lawyers attempt to enforce the individual rights created by these laws. At least some might see the solution to any problem that exists as resting outside the laws discussed here. On one hand, manufacturers could be required or given incentives to improve product, service and bargain quality so that problems just would not arise. To some extent

this has been done with regard to products such as automobiles, tires and drugs. But there is a limit on how far we can go in this direction. Quality control costs money and pushes up prices. On the other hand, others might advocate wealth redistribution so that more people would find more problems concerning consumer products to be less important to them or so that more people would be sufficiently important customers so that business would be more attentive to their satisfaction. Or we could provide more subsidized lawyers for more of the population so that rights created by these statutes could be tested in litigation more often. Or we might conclude that the present solution, with perhaps some marginal adjustments, is the best that could be attained without investing resources which would be better spent elsewhere. Whatever judgment one may make about these alternatives, it seems clear that anyone interested in reform cannot continue to press for statutes granting individual rights in situations where there are unlikely to be large amounts of money as damages unless such a person is satisfied with the kind of conciliatory counsel-for-the-situation approach described here.

Whatever we conclude about consumer laws, it is still worth looking at the non-legal, non-adversary or only semi-adversary roles played by lawyers which I have described. The response of the bar to consumer laws is but one example of what goes on all the time in the practice of law. Indeed, the "hired gun" going full speed ahead to fight for whatever clients want when they walk into the lawyer's office probably is uncommon except in a few routine situations. Few clients are powerful enough to snap their fingers and have their lawyer jump. However, if

non-legal, non-adversary or semi-adversary roles are common, we are right to be concerned about how they are played.

Often lawyers in such roles are forced to decide how the problem they face should be resolved and then to sell their solution to all affected parties, including their own client. But many of the affected parties may not be represented by lawyers; some may be represented by lawyers who do not understand the law, the situation, or both. Many of those affected may not be able to see all of the likely consequences of the lawyer's proposed solution, and they may have to rely on the lawyer to fashion a solution which is the best for them, for the group or for society. While lawyers usually can persuade themselves and argue to others that they are only seeking their client's long run best interest or the right solution to the problem, their judgments about appropriate solutions necessarily reflect their own values and perceptions of fact. For example, lawyers who respect university faculty members, honor a university, enjoy teaching part time in the law school, and doubt the reality of discrimination against women are not likely to be willing to take a case against the university for a woman denied tenure. If such a lawyer does take the case, s/he is likely to handle it very differently than a lawyer who is also a feminist. For example, the non-feminist lawyer is unlikely to press very hard for language in a settlement agreement that might help the women's movement in addition to seeking a payment of money to end the proceedings.

Lawyers who play "counsel for the situation" may leave the rest of us a little uneasy. (See Frank: 702). What qualifies these lawyers as experts in problem solving? Certainly, this was not the approach of

their law school training, and we can only wonder if their professional experiences have produced wisdom in finding good solutions. And why should the views of a particular lawyer about consumer protection, sex discrimination or any other area play such an important part in influencing what is done in so many situations? Is a lawyer really selecting the best solution or does s/he just dislike negotiating aggressively? Do clients a lawyer likes and identifies with get more than other people? Of course, all of this raises the problem of legitimacy. As is true in the case of so many empirical studies, once again we have stumbled on the problem of discretion and the expert whose skill rests on experience rather than on training and science. (See Macaulay and Macaulay, 1978). And, apart from the chance of a malpractice action, a counsel for the situation has little accountability to much beyond his or her own conscience.

Several writers have criticized the relationship between lawyers and their clients as being impersonal and technical. Lawyers, they say, are quick to turn matters of emotion into causes of action. (See, e.g. Allen, 1964; Appel and Van Atta (1969); Fey and Goldberg, 1978; Greening and Zielonka 1972; Saxe and Kuvin, 1974. Compare Redmount, 1959.) They thus often solve the legal problem and leave the real problem untouched. They keep professional distance and avoid such things as anger, rage, guilt, a sense of injustice, or self deception. It has been charged that law schools train students to avoid emotion and broad solutions to problems by transforming human situations into legal categories. (See, e.g., Himmelstein, 1978). Perhaps there is truth in this charge, but it does not seem to fit the way many of the lawyers

52-434 O - 80 - 38

interviewed in this study try to practice law. And it is likely that the realities of practice exert a far more powerful influence than what happens in, say, a first year course in contracts. Counselling and therapy are very time-consuming, and professional time costs money. This study has emphasized that perceptions, values, personality, and indoctrination all operate within the framework of the structure by which this society provides legal services. When faced with a problem, lawyers will be rewarded only for some responses and not others; we should not be surprised when they offer those responses that produce rewards. As we have seen, a consumer case involving only a few hundred dollars in damages is likely to prompt an impersonal, but not very technical, quick solution from a lawyer. It is an open question whether clients end up satisfied and see their situation in a new light. However, it is hard to see how much more could be offered within the present system.

One response to all this is to call for a return to the adversary model of the practice of law. (See, e.g., Yale Law Journal, 1975.) A lawyer who aggressively asserts only his or her client's interests rather than looking for the right solution would seem to avoid many of the difficulties I have sketched. But adversary ethics may be incomplete and ultimately unsatisfactory. For example, lawyers would have to give up many of the roles sketched in this article and turn would-be clients away. Many would see the conciliatory stance of these lawyers as socially useful. (See Griffiths, 1977. Compare Abel, 1978; Crowe, 1978). Most non-lawyers likely would question the desirability of attorneys acting as hired guns rather than as problem solvers.

President Carter, for example, said, "Mahatma Gandhi, who was himself a very successful lawyer, said of his profession that 'lawyers will as a rule advance quarrels rather than repress them.' We do not serve justice when we encourage disputes in our society rather than resolving them." (Carter, 1978). If anything, we may be witnessing pressure to move even further from adversariness with current demands for lawyers and other professionals to assume responsibility for their clients' compliance with the law. The counsel for the situation role, as troublesome as it is, is unlikely to fade away. Therefore, it makes sense to think seriously about how the values, personality traits and structural constraints of the bar influence the choices that are made. Perhaps as a very small first step it might be worth considering whether non-lawyers could be made more aware of what is going on and whether this would influence the choices that are made. It might help if all clients recognized that they were hiring a counsel for the situation to fashion as good a solution as was possible within the time the lawyer could give to the case. It might help if all clients recognized that lawyers must be influenced by their own values, personality and self-interest. Over-inflated pictures of lawyers acting without self-interest in pursuit of a result dictated by the pure reason embodied in the law can only add fuel to the cynicism about the bar which goes so far back in our history.

Appendix I

A Description of the Research

Between us, Kathryn Winz and I interviewed 106 practicing lawyers, four district attorneys, six paralegal workers and an official of the Office of Consumer Protection of the Department of Justice of the State of Wisconsin. Interviews ranged from one which took an entire morning with four lawyers meeting together in their office to telephone conversations of only a few minutes. At the outset of the study, discussions with friends who practice law and colleagues on the University of Wisconsin Law Faculty made it seem likely that while some lawyers in the state might often encounter consumer protection laws, many or most would never see them. As a result, we thought that a random sample of all lawyers in the state of a size feasible to interview with our limited resources was likely to miss too many lawyers with experience in this area and thus be misleading. However, we could not think of an easy to use principle of selecting a stratified sample. We tried several strategies to try to discover lawyers with the experience we sought with little success. What the lawyers we interviewed told us caused us to conclude that few lawyers in the state spend a great deal of their time dealing with consumer protection matters, and that the sample we had been seeking did not exist.

We began by interviewing lawyers in Door, Douglas, Iowa, Richland and Rock Counties. We hoped to learn enough in these smaller counties so that we could deal with much larger ones. Door County is in the northwest part of the state and it relies on agriculture, ship and boat building and tourists for its income. At the time of the study, its

population was about 20,000. Douglas is in the far northwest corner of the state, Superior is its largest city, and the population was 43,400. Iowa and Richland are contiguous relatively prosperous agricultural counties in the southwestern part of the state with populations of 18,650 and 16,900. Rock County is both agricultural and urban with important manufacturing. It is in the south central part of the state and borders on Illinois; Janesville and Beloit are its two largest cities; its population is 137,200.

We attempted to interview one member of each law firm and all the solo practitioners in each county. Within each firm we tried to contact someone we hoped would talk with us and had experience with consumer protection laws or who would refer us to an appropriate partner or associate. After two unsuccessful attempts to contact a solo practitioner or a representative of a firm, we abandoned our effort to interview them. Generally, Wisconsin lawyers were very cooperative and many gave us a great deal of their time. We understood that the practice of law can involve working under time pressure, and many lawyers had more important things to do than answering our questions. We found it easier to interview lawyers in the smaller counties than lawyers in Rock County where they were busier. Lawyers who had no experience with consumer laws and little if any contact with consumers sometimes did not see any value in wasting their time to tell us that and explain why it was the case; sometimes we got only a sentence or two from a lawyer before s/he cut off the conversation. A few lawyers thought that our study was an invasion of their privacy, and they told us so in no uncertain terms.

Our interview schedule was simple: we asked the lawyers we were

able to interview if they or their partners and associates encountered consumers with problems, if so, what they did with these cases, and whether they were familiar with the Magnuson-Moss Warranty Act, the Wisconsin Consumer Act or the various administrative regulations which are designed to protect consumers. The following table indicates what we found. It should be stressed that in this table we credited both lawyers who were real experts and those who had but slight knowledge as being familiar with these laws because we saw no way to test and grade the level of skill held by our respondents.

Table I About Here

At this point in the study, I tried to find attorneys with more experience in using consumer laws; we had learned a good deal about why cases seldom came to lawyers and how they quickly handled most they encountered in a conciliatory fashion, but we had come across few lawyers who knew much about the rules and used them in their practice. I thought that lawyers who worked for legal services programs of various kinds might make more use of consumer protection laws; they offer legal services at no extra cost to those who are the beneficiaries of these plans, and so cost barriers seemed likely to be less of a factor. I interviewed one or more lawyers from each of the 66 group legal services plans registered with the State Bar of Wisconsin. These plans are benefits for members of groups such as unions, cooperatives, condominiums and university student associations. 39 of the 66 plans are represented by just five different law firms, and one of these firms represents 21 different plans and another performs services for six. These lawyers did see more

consumer problems and were somewhat more familiar with consumer protection laws as is shown by Table 2.

Table 2 About Here

I also talked with representatives of Legal Action for Wisconsin (LAW), a federally funded program with staffed offices in Milwaukee and Madison that deals with problems of low-income clients, and a representative of Wisconsin Judicare, a federally funded program which pays private attorneys in the northern and western parts of the state for legal services to clients with low incomes. The representative from the Milwaukee office of LAW saw many cases where consumer protection laws were relevant, and he was an expert on many of these laws. The Madison office does not see as many of these cases, and its representative was not as expert as the lawyer in the Milwaukee office. Wisconsin Judicare seldom handles consumer cases.

Next I continued to try to find lawyers who might be knowledgeable about consumer protection laws by asking my colleagues on the Law Faculty and friends in practice for suggestions. I was referred to several lawyers who had taken a consumer protection seminar in law school and had also worked for the Office of Consumer Protection of the Wisconsin Department of Justice. After I interviewed these lawyers, I asked them for the names of other attorneys who might be expert in consumer laws, talked with these lawyers to whom I had been referred, and then asked them for more names, and so on. In this way, I "covered" Dane County, the home of the state capital, Madison, which has a population of about 300,000 and about 1,400 lawyers. This referal network sent me to 18 lawyers in

Madison, one in Columbus, Wisconsin and two in Milwaukee. By the time I had talked with everyone in this group I was being referred back to people I had already seen, and so I concluded that I had found nearly all the experts there were to be found in this manner. Nine of the twenty one lawyers knew a great deal about consumer law because they represented businesses or trade associations rather than individuals. The other twelve represented both individuals and businesses--and three of these lawyers were truly expert in these laws. However, two of the three had become expert while working for the Office of Consumer Protection of the Wisconsin Department of Justice and seldom used their knowledge in their practice.

I next turned to the ten largest law firms in the state to learn more about the legal advice given to the larger manufacturers, financial institutions and trade associations. I had been told that these firms did most of the drafting of contracts and other business forms which reflected the influence of consumer protection laws. I talked with twelve lawyers from these firms, nine in Milwaukee and three in Madison. All but one firm had a great deal of experience in helping business cope with consumer protection, and the one firm without this experience specialized in labor relations law. Lawyers in these firms were very generous with their time and help; many were my former students and some, possibly because they were former editors of a law review were very interested in the research project.

In June of 1977, Wisconsin Advanced Training Seminars, a continuing legal education program of the State Bar of Wisconsin, sponsored a two day meeting in Milwaukee on the Uniform Commercial Code. The first

morning session involved a discussion of consumer product warranties under the UCC and the Magnuson-Moss Warranty Act by Professor James White of the University of Michigan Law School. I hoped that the lawyers who had attended this program had some interest in this branch of consumer protection law since they took the time away from their practice to attend; however, the program also dealt with other matters unrelated to consumer problems, and some lawyers attended largely just to get their continuing legal education credit. Whatever the case, I hoped to test what I had been finding against the experience of a large group of lawyers practicing in Milwaukee since I assumed that most of those attending the ATS program would come from there. At this point, I had talked only to lawyers who represented group legal service plans in Milwaukee about both their group and non-group practice, and they had told me just the same story I had heard from lawyers practicing elsewhere.

Thus, in the fall of 1977, I sent a one-page questionnaire with a stamped self-addressed envelope to the 173 attorneys who had attended the Uniform Commercial Code-Magnuson-Moss seminar. The mailing list was kindly provided by David B. Mills, the Program Attorney for ATS-CLE. 110 (63%) responded. 86 of the questionnaires were sent to addresses in Milwaukee or its suburban communities; 49 replies came in envelopes postmarked from Milwaukee or these suburbs. 14 questionnaires were sent to addresses in Madison; 8 replies came from there. The rest of the questionnaires were scattered all over the state, somewhat to my surprise. Of course, a lawyer who practiced in one community might mail his or her response from anywhere s/he happened to be near a mailbox, but is seems reasonable to assume that most lawyers would fill out the questionnaire

at their desk and send it back with the rest of their professional correspondence for the day. Fourteen respondents were house counsel for corporations; 24 were in general business practice primarily representing financial institutions, manufacturers and retailers; 60 were in general practice, which included substantial representation of both business and individuals. Twelve described their practice as "other," since they worked for such organizations as trade associations, units of government or corporations in non-legal capacities.

These lawyers were asked whether they had drafted warranties "and considered the Magnuson-Moss Warranty Act." They were asked if they had considered that statute in connection with a claim by a consumer while representing the business against which the claim was made or while representing the consumer making, or considering making, the claim. The useable responses are described in Tables 3 and 4.

Tables 3 and 4 About Here

None of these lawyers knew of any litigation in the courts in their area in which the Magnuson-Moss Warranty Act was involved.

Appendix II

[This appendix was prepared by Richard E. Miller, Department of Sociology, University of Wisconsin-Madison]

Survey Data on Lawyer Contacts by New Car Buyers with Problems

The interviews with attorneys which are reported in this paper were part of a larger project on the impact of consumer protection laws, particularly the Magnuson-Moss Warranty Act, on the automobile industry. As part of a survey of new car buyers, dealers and manufacturers under the direction of Dr. Kenneth McNeil, questions were asked buyers about contacts with lawyers. The information gained by this study reinforces the conclusions drawn from the interviews with attorneys.

The survey of new car buyers involved a sample of purchasers of 1977 model domestic cars purchased in Dane (Madison) and Milwaukee Counties. These people were interviewed by telephone, once shortly after their purchase and again a year later. A total of 1,537 complete interviews were obtained, which represents 77 percent of all buyers sampled. In the second interview, buyers were asked about experiences with their new cars; those who reported both "troublesome experiences" and "some problem or delay" in resolving these difficulties were asked further questions about their most serious problem and what they did to resolve it. 26.7 percent of all buyers had both some repair problem and some delay in resolving it or did not get the problem resolved at all. The data reported here are from this subgroup.

Table 5 gives the percentages of those in this group who complained to or contacted the dealer, the factory, a public remedy agent, or an attorney and the percentages who ultimately had their problem resolved.

Table 5 About Here

Complaint rates were somewhat higher for those with problems which they considered major. For example, 56.0 percent of those with major problems complained beyond the service manager, while 46.2 percent of those with what they saw as a minor problem did so. Over half of those with a problem registered their complaint with the dealership, and almost a quarter went further and contacted the factory. Relatively few buyers contacted attorneys or public remedy agents. The low usage of public remedy agents is particularly striking because about half the sample live in Dane County where the three state agencies that handle new car complaints are located--these are the Consumer Protection Division of the Wisconsin Department of Agriculture, Trade and Consumer Protection; the Motor Vehicles Division of the Department of Transportation; and the Office of Consumer Protection of the Wisconsin Department of Justice.

Many of those who complained contacted several people or organizations. All of those who contacted the manufacturer, lawyers or public remedy agents had already complained to the dealer. Of those contacting an attorney, 37.2 percent also contacted a state agency or a private consumer complaint organization such as the Better Business Bureau or a local television station. Conversely, 26.6 percent of those who contacted a public remedy agent also discussed their problem with an attorney.

Table 6 indicates the sources of legal advice.

Table 6 About Here

Of those who were not themselves lawyers, about half the buyers who

experienced problems and a delay in resolving them and who talked with a lawyer saw a lawyer as a client, while the other half talked with friends or relatives who were attorneys or with an attorney employed by one of the state's consumer protection agencies.

Table 7 shows the rates that members of different income groups used attorneys.

Table 7 About Here

While 33.9 percent of all the new car buyers who had problems had incomes below $15,000, only 19 percent of those contacting a lawyer were in this lower income group. Those in the $15,000 to $20,000 group contacted lawyers at a somewhat higher rate while those in the $20,000 to $25,000 group saw attorneys at a much higher rate. This pattern probably reflects both economic resources and the availability of lawyers through social networks. The low rate of contacting lawyers for the highest income group is difficult to explain. It may represent chance variation or lower felt needs for assistance. Table 8 shows the rate of attorney use by education. A pattern similar to that for income emerges, with high usage only among those with some college education.

Table 8 About Here

Table 9 shows the rates of usage of lawyers by age.

Table 9 About Here

High usage rates are found only for the 25 to 29 year old group. These

people were in high school and college during the height of the consumer movement, the early 1970s. They may, then, be the only age group well educated in asserting consumer rights. They may also have naive expectations about the efficacy of attorney aid.

Because of time constraints, detailed information about what lawyers told the respondents was not obtained. However, respondents whose problems were not resolved at all and who had consulted a lawyer were asked if the attorney had encouraged them to continue complaining, suggested that they give up, or something else. From these responses and from marginal notes on the interview form, it was possible to determine the nature of the advice offered by the lawyer to most respondents. Table 10 reports these results.

Table 10 About Here

Those buyers who saw a lawyer and whose problem was resolved were asked if the attorney helped in obtaining a solution. One third replied affirmatively. Of the nine respondents who contacted lawyers as clients, four had their problems resolved and two of these credited their lawyer with helping them. One of these two merely sent the client to a state agency and the client found the agency to be "worthless"; thus, the basis for the client's judgment that the lawyer had been helpful is unclear. The other 'helpful' attorney coached the client in writing complaint letters and in dealing with the manufacturer and also suggested contacting the Motor Vehicles Division of the Wisconsin Department of Transportation.

While no lawyer actually contacted an automobile dealer on behalf of a respondent, 9.9 percent of those buyers who had a problem reported

using the threat of hiring an attorney when they complained at the dealership. Forty-five percent of those threatening to see a lawyer had their problems resolved (of course, we cannot be sure of the impact of the threat), which is about the same rate of success as achieved by those who actually did talk to a lawyer. A minority followed up their threat; 35 percent of those who threatened to see a lawyer actually did so. Fully 86 percent of those who did discuss their problem with a lawyer had threatened to do so when they complained to the dealer or the factory.

FOOTNOTES

1. In Wisconsin many state agencies attempt to mediate disputes between consumers and businesses. For example, the Department of Agriculture, Trade and Consumer Protection issues regulations to control unfair trade practices. (See Wis. Stat. § 100.20 (1975).) In order to gain information about business practices which might indicate the need for new or amended regulations, the Department is eager to receive consumer complaints. After a written complaint form is filed, the agency sends a standard form letter to the complained-against business. Often the business responds with an offer to settle. If it does not, the agency must drop the matter unless its investigators determine that an unfair trade practice has been committed. One agency investigator is very active in mediating consumer disputes in the northern and central parts of the state, but the agency is much less active in Milwaukee.

The Office of Consumer Protection of the Department of Justice also mediates consumer complaints by sending out a series of standard letters on the Attorney General's letterhead. Usually, this will prompt an offer by a business to make some adjustment. (See, generally, Jeffries, 1974.) There has been some conflict between Agriculture and Justice about which agency has jurisdiction to deal with consumer complaints. At times officials of Justice have viewed people at Agriculture as insufficiently aggressive in championing the consumer; those at Agriculture have not been pleased by Justice's invasion of what they view as their territory.

The Motor Vehicle Department also mediates consumer complaints, particularly those involving used cars. It is given authority to enforce

the requirements that used car dealers disclose on a standard sticker placed on the window of cars on their lot all defects they know about. It has 14 field investigators, most of whom are former members of the state highway patrol. These investigators mediate consumer complaints, dispensing justice based on their view of the condition of the car and the degree of compliance with the sticker law. (See [Madison] Wisconsin State Journal (Feb. 11, 1979), sec. 3, 4.)

The Commissioner of Insurance also processes complaints by consumers (see Whitford and Kimball, 1974) as does the Public Utilities Commission.

2. One lawyer told us the "I am in an office with three lawyers, and we opened last November, breaking away from a larger firm. We have three secretaries and a half time book-keeper, and they keep good records of every activity of the office. We take over 50 telephone calls every morning up to 1:00. Seven out of ten of these calls will involve a client who wants to shoot the breeze on some off-beat problem or idea. We do not bill in these cases, and I do not think that most lawyers would. A lot of free advice is available to anyone who will call. There is no real crisis in the delivery of legal services. The middle class can afford them, but it just doesn't want to pay."

3. White (1977: 1272) found that the warranty and warranty disclaimer sections of the Uniform Commercial Code were heavily cited in reported cases from California, New York and Ohio published in the late 1950s and early 1960s, and these sections comprised a substantial plurality of all the citations to the Uniform Commercial Code from each of the three states studied. He explained this result by noting that "many of these warranty

52-434 O - 80 - 39

cases are brought by an allegedly injured consumer-buyer against the seller, with whom he has no continuing relationship. Unlike the businessperson, the consumer-buyer pays no added litigation cost in the form of injured or severed business relationships." (Compare Macaulay, 1963.) However, White does not indicate how many of the warranty cases he found involve consumer-buyers and how many involve business buyers. Moreover, he does not indicate how many of the cases involving consumer-buyers reflected situations where the consumer-buyer alleged that a personal injury had been caused by a defective product. It would seem that while a consumer's litigation costs might be lower in terms of severed or injured relationships, the potential benefits of litigation to a consumer-buyer also would be less in cases where there was no personal injury to prompt a large claim for damages. For example, recovery of the purchase price is likely to yield much less in a case involving a defective automobile than in one involving a defective machine tool or needed raw materials.

Jane Limprecht, my research assistant, collected all of the reported cases in 1977 which involved a breach of warranty theory from the Modern Federal Digest, the U.C.C. Reporter, and West's General Digest. Of the 147 cases she discovered, 82 involved business purchasers and 65 involved consumer-buyers. 30 of the consumer cases had personal injuries prompting substantial damage claims; 35 did not involve personal injuries. Included within these 35, were 9 involving a new car, 3 concerning a new pick-up truck and 4 relating to used cars. In 9 of these automotive cases the damages sought were reported. The lowest claim was for $1050 and the greatest was for $9000. Six more of the 35 consumer-buyer cases

where there was no personal injury involved mobile homes where the lowest claim was for $5,400 and the highest was for $14,395. Four more involved boats and yachts; the lowest claim here was $950 and the highest was $37,000. The other consumer-buyer but no personal injury cases involved such things as an inflatable mammary prosthesis, a vault for a child's casket, a home sewage treatment system and a stove which exploded and destroyed a house. Of course, as White recognizes, reported cases can be but a distorted reflection of what goes on at trial, in pre-trial negotiations, in lawyers' offices and in attempts by consumers to exercise self-help. Nonetheless, these reported decisions suggest that consumer product quality cases which involve no personal injury are likily to be prompted by only certain kinds of products--particularly yachts, cars and mobile homes--and we might guess that they are likely to involve consumers who can both afford these products and lawyers.

4. A conflict of interest problem does not always stop a lawyer from acting as a mediator. One lawyer told us that "in one case a customer came to the office and he had a complaint against a store we represent. Clearly, the store should have made good on the matter, and so I called the store and told them to fix things up. They did without question, and the man left my office happy."

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52-434 O - 80 - 40

TABLE 1

INTERVIEWS WITH LAWYERS IN FIVE COUNTIES

County	No. of lawyers and firms:												
	In County *			Interviewed			Frequency of consumer clients				Familiarity with:		
	Total Lawyers	Firms	Solos	Total Lawyers	Firm reps.	Solo	None	Few	Some	Many	Mag.-Moss	WCA	Wis. Regs.
Door	24	5	8	6	4	2	1	5	0	0	1 **	3	3
Douglas	30	6	12	9	6	3	1	8	0	0	0	8	2
Iowa	20	4	12	9	2	7	1	7	1	0	0	3	2
Richland	12	4	5	5	3	2	3	2	0	0	0	2	1
Rock	164	27	55	22	11	11	5	12	5	0	0	13	3
Totals				51			11	34	6	0	1	29	11

* Source: Wisconsin Legal Directory 1976-1977.

** The lawyer who was familiar with Magnuson-Moss taught consumer education classes in a local adult education program.

TABLE 2

INTERVIEWS WITH REPRESENTATIVES OF GROUP LEGAL SERVICE PLANS

No. of lawyers interviewed	Frequency of consumer clients				Familiarity with		
	None	Few	Some	Many	Mag.-Moss	WCA	Wis. Regs.
19	1	9	2	7	3	4	3

TABLE 3

DRAFTED WARRANTIES CONSIDERING MAGNUSON-MOSS

	House counsel	Lawyers for Business	General Practitioners	Total
Never	4 (29%)	12 (50%)	36 (60%)	52 (53%)
Once	0	2 (8%)	10 (16%)	12 (12%)
Several times	7 (50%)	9 (38%)	14 (23%)	30 (31%)
Frequently	3 (21%)	1 (4%)	0	4 (4%)
Totals	14	24	60	98

TABLE 4

CONSUMER COMPLAINT CONSIDERING MAGNUSON-MOSS

	For business				For consumers			
	H.C.	Business	G.P.	Total	H.C.	Business	G.P.	Total
Never	10 (71%)	19 (79%)	46 (82%)	75 (80%)	13 (100%)	21 (88%)	43 (77%)	77 (83%)
Once	0	0	3 (5%)	3 (3%)	0	1 (4%)	4 (7%)	5 (5%)
Several times	4 (28%)	5 (21%)	6 (11%)	15 (16%)	0	2 (8%)	9 (16%)	11 (12%)
Frequently	0	0	1 (2%)	1 (1%)	0	0	0	0
Totals	14	24	56	94	13	24	56	93

Table 5

Complaint and Success Rates Among New Car Buyers with Problems

	Percent Complaining	(N)[1.]	Percent of Problems Resolved[2.]
Complained beyond service manager (eg. to general manager or dealer)	53.1%	(183)	51.8%
Complained to manufacturer	23.4	(70)	56.4
Contacted state or private remedy agent	6.5	(29)	45.6
Discussed problem with lawyer	4.6	(17)	46.0
Buyer was a lawyer	1.0	(4)	0.0
Did not complain beyond service manager	46.9	(193)	42.6

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1. The number of buyers in each category is given in parentheses. Percentages total more than 100% because some buyers did more than one thing. The percentages cannot be directly derived from the numbers in each category because a weighted sampling design was used.

2. The resolution rate does not necessarily reflect the effectiveness of a particular complaint avenue; those who consulted a lawyer, for example, may have resolved matters themselves apart from any help offered by the lawyer.

Table 6

Channels to Contact With a Lawyer

	Percent	N
Lawyer was the spouse or other relative of buyer	9.5%	2
Lawyer was friend, neighbor or coworker of buyer	23.8	5
Lawyer was employee of state agency contacted by buyer	9.5	2 [1.]
Lawyer was private attorney contacted by buyer as client	42.8	9
Buyer was a lawyer	19.0	4
		22 [2.]

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1. This figure represents those who identified their attorney as a state employee. It is probably an undercount, since some others who contacted state agencies may have talked to lawyers without knowing it.

2. One respondent both talked to lawyer friends and consulted an attorney as a client. The percentages are calculated using 21 as a base and do not reflect sampling weights.

TABLE 7

Contact with Lawyers by Income Group (N = 17)

Income	Percent in income category	Percent of those contacting attorney	Percent of income group contacting attorney
Less than $10,000	13.4%	8.3%	2.7%
$10,000 - $15,000	20.5	10.6	2.3
$15,000 - $20,000	35.2	34.3	4.3
$20,000 - $25,000	12.6	36.4	12.7
Over $25,000	18.4	10.3	2.5
	100%	100%	

Table 8

Lawyer Contact By Education (N = 17)

Education	Percent of those with delay in solving problem	Percent of those contacting attorney	Percent of educational group contacting attorney
Less than 11 years	10.9%	2.1%	0.8%
High school graduate	39.7	21.7	2.2
Some college	23.5	65.2	11.2
College graduate	14.8	8.7	2.2
Some post-graduate	11.1	2.9	1.1
	100.0	100.0	

TABLE 9

Lawyer Contact By Age (N = 17)

Age	Percent of those with delay in solving problem	Percent of those contacting attorney	Percent of age group contacting attorney
18-24	13.4%	1.6%	0.5%
25-29	16.8	63.1	15.2
30-39	25.1	17.8	2.9
40-49	15.2	7.8	2.1
50-59	17.2	7.6	1.8
Over 60	12.3	2.1	0.7

TABLE 10

Advice or action	Number of attorneys offering
Urged to continue complaining to dealer or manufacturer	6
Referred to state agency	2
Told to return if no resolution	2 [1.]
Coached in complaining	1
Wrote or telephoned seller	1 [2.]
Could not help	2 [3.]
Advice could not be determined	5/19 [4.]

1. One client was going back to see his attorney again the day after the interview.

2. The attorney wrote the factory but was "too slow."

3. One attorney was a coworker in a state consumer protection agency who had the same problem and also could not get it resolved. The other attorney refused the case because he represented a former owner of the dealership. This respondent, following his dealer's advice to "sue me," was preparing to represent himself in a small claims court and was the only buyer interviewed who reported using or planning to use that remedy.

4. Two respondents were given two sorts of advice each. Actually, 17 had contacted an attorney, and 9 did so as clients.

DPRP WORKING PAPERS—TITLES IN PRINT

1979–1 *Lawyers and Consumer Protection Laws: An Empirical Study*, by Stewart Macaulay, 124 pages.
1979–2 *Toward an Economic Theory of Conflict Choice*, by Neil S. Komesar, 39 pages.
1979–3 *The Milwaukee Dispute Mapping Project: A Preliminary Report*, by Jack Ladinsky Stewart Macaulay, and Jill Anderson, 73 pages.
1979–4 *Justice in Many Rooms*, by Marc Galanter, 59 pages.
1979–5 *Thinking About Courts: Traditional Expectations and Contemporary Challenges or The Crisis of the Courts as a Social and Political Crisis*, by Austin Sarat and Ralph Cavanagh, 97 pages.

CURRENT DEVELOPMENTS IN JUDICIAL ADMINISTRATION: PAPERS PRESENTED AT THE PLENARY SESSION of the AMERICAN ASSOCIATION OF LAW SCHOOLS, DECEMBER, 1977

Held at Atlanta, Georgia
December 28, 1977

PANEL II: LET THE TRIBUNAL FIT THE CASE—ESTABLISHING CRITERIA FOR CHANNELING MATTERS INTO DISPUTE RESOLUTION MECHANISMS

Introductory Remarks of Maurice Rosenberg[7] as Moderator[8]

In the program, the title of this panel discussion is couched in more dignified terms, but the theme is actually "Let the Forum Fit the Fuss."

In any event, my function is to serve as moderator, which, given the traffic on this platform, means I will have to imitate the control tower at O'Hare Airport.

We are concerned here with how we Americans can civilize our systems of civil justice so that we can resolve legal disputes with less wear and tear and with better results than by litigating to the hilt. As you know, going to court is the U.S.A.'s fastest growing indoor diversion. It is now in second place just behind . . . basketball . . . but it demands far more of the participants than basketball does of the spectators. Earl Johnson has estimated, based on the experience in California, that state courts throughout the country handle up to 10 million cases a year. I am not sure how safe it is to generalize from California to the rest of the country. If we did take our cues from that state, based on the last five days rainfall out there we ought not to be sitting here with our diving helmets off.

The estimate of 10 million state court cases a year contrasts sharply with the figure of about 130,000 civil cases filed annually in the federal courts. Those figures make a point about the relative impact on the lives of common citizens of the state courts compared to the much more visible and exalted federal courts.

The pains of the rapidly growing volume of cases in our courts are well known. They breed delay, require mass production methods, produce de-humanized "processing" and badly strain the machinery of justice.

It is essential to find alternatives to courts for some sizeable part of the deluge of disputes if we are to avoid a continuing deterioration in the system of justice. Earl Johnson will lay out the main alternatives:

7. Harold R. Medina, Professor of Procedural Jurisprudence, Columbia University. Special Assistant to Attorney General of U. S. (1976–77); Chairman, Advisory Committee to National Center for State Courts (1975–77); Chairman, Advisory Council for Appellate Justice (1971–76); American Law Institute. Author: JUSTICE ON APPEAL (with Carrington & Meador 1976); CIVIL PROCEDURE (with Weinstein, Scott & Korn 1976); CONFLICT OF LAWS (with Reese 1971).

8. May bear only slight resemblance to what actually was said.

detouring cases away from the courts; eliminating many occasions for controversy by changing the substantive law; reducing decision points; and providing alternative modes of handling many disputes. Well enough. Then: what sorts of cases shall we say belong in the courts and what sorts do not? That question asks us to examine the characteristics or criteria of the traditional judicial process to learn what it is about the courts that makes them very appropriate for some types of disputes and not for others.

Stating them hastily, some of the attributes of courts that might be enumerated in any inventory of special characteristics are these:

(1) Courts give a disagreement a very sharp focus. The controversy is molded into an adversarial confrontation and the disputed issues are made to come to a head before the court.

(2) The participation of the parties is made effective by giving each a professional advocate as champion. Each advocate is dedicated to the proposition that first loyalty belongs to the client's interests.

(3) The adversaries confront each other in the presentation of evidence of the facts and in arguments about the law. It is thought to be of great importance that they are entitled to cross-examine each other's witnesses.

(4) The end of the process is an authoritative decision—usually a reasoned decision, supposedly based upon the evidence and the law; except when a jury sits and delivers an opaque general verdict.

(5) Characteristically, courts deal in zero-sum outcomes: at the end of the process, the plaintiff's hand is raised as winner, or the defendant's. *Judgments* decreeing compromise are uncommon.

(6) The decision reached is ordinarily reviewable by a multi-judge appellate tribunal.

(7) Law-trained people make the rules and conduct the proceedings from beginning to end.

I am not at all sure what those characteristics lead us to conclude in answer to the question we started with—what sorts of disputes should rationally be assigned to courts instead of to other agencies of dispute resolution. But I have a strong belief it would be useful to try to channel to the courts work that is particularly suited to the special attributes courts possess.

Now for the cast of characters who will speak to you . . .

Remarks of Earl Johnson, Jr.[9] as Presentor

It is somewhat revealing that when the Judicial Administration Division of the Association of American Law Schools finally has the opportu-

9. Professor of Law and Director of the Program for the Study of Dispute Resolution Policy at the University of Southern California Law Center. Deputy Director, Neighborhood Legal Services Program, Washington, D.C. 1964–65; Dir., OEO Le-

nity to take center stage at the plenary session of the annual meetings, a dominant topic is not the better design of the judicial system, but rather the need for, and proper role of, non-judicial mechanisms for resolving disputes. A cynic might say that all the innovations in judicial administration during the last couple of decades have failed so badly that the reformers are now casting about for someone or someplace else that can bail out the courts. A less cynical observer might counter that the courts have succeeded too well. As a result, too many people are knocking on the courthouse door seeking relief for their grievances and resolution of their disputes.

In any event, recent years have given us an abundance of colorful images to describe the plight of the American judicial system. Analogizing to the field of ecology, Tom Ehrlich, President of the Legal Services Corp. and formerly Dean of Stanford Law School, diagnosed the problem as "legal pollution." Borrowing his terminology from the health field, Bayless Manning, another former Stanford Dean, labeled the affliction as "hyperlexis" and, any number of people have adopted an image from the munitions field, and called it the "law explosion." Meanwhile, this past May, at the ABA Conference on the Resolution of Minor Disputes, Chief Justice Burger warned of the hordes of lawyers descending like locusts on American Society.

Though there are some differences in analysis and emphasis in these various articles and speeches, they share a common theme: we have become too dependent upon an over-legalized, over-formalized method of resolving disputes in the U.S. We have passed too many laws creating too many legal rights that can only be implemented through the courts.

There is less consensus about the cures. Nonetheless, one does often hear about the four de's: de-legalize, de-lawyer, de-formalize and de-judicialize. In other words, let's reduce the number of laws. Let's make them simple enough so that it isn't necessary for a citizen to hire a lawyer before he takes any major step or every time he attempts to resolve any dispute. Let's take some of the time-consuming, confounding formalities out of the judicial process itself. And finally, let's take as many disputes as possible completely out of the judicial framework and resolve them through other means.

We've also begun to hear about wholesale as opposed to retail approaches to dispute resolution. For instance, legislation that would prescribe certain levels of child support payments for different levels of income, rather than leaving it to the discretion of some judge in each individual case. And the suggestion that more disputes and problems be aggregated through class actions and otherwise. Others have advocated the deliberate deployment of economic incentives to encourage settlements between disputants. Some have mentioned the possibility of

gal Services Program, Washington, D.C. 1966–69. Author: TOWARD EQUAL JUSTICE (with Cappelletti and Gordley 1975); OUTSIDE THE COURTS (with Kantor and Schwartz 1977) and JUSTICE AND REFORM (2d ed. 1978). Board of Directors, California Rural Legal Assistance; Chairman of the Board, Western Center on Law and Poverty 1971–73, and Board member since 1976; Member, ABA Special Committee on Resolution of Minor Disputes since 1977.

automatic relief which in certain circumstances might award the citizen money he seeks without a prior hearing of any kind before any forum.

I mention all of this to suggest that many people perceive a crisis in our system. More importantly, that many astute observers feel that both the crises and the solutions, if there are any, transcend what we have traditionally thought of as the judicial system. Likewise, I wanted to underscore that what I am discussing today is only a part—an important part, to be sure—but only part of the fundamental system-wide changes that are currently under study by the new generation of judicial reformers—a group that might be called the justice system reformers.

The term "*justice* system reform" appears appropriate because the focus widens to embrace many elements beyond the courtroom and the clerk's office. Thus, justice system reformers are concerned with legal services, how they are rendered and financed, the impact of economic disparities between disputants on the dispute resolution process, the substantive law, both its content and its expression, and how that substantive law structures the disputes and determines the mode of their resolution.

These and a half dozen other fundamental topics comprise an approach to improving the administration of justice. It certainly is not entirely new. Professor Alfred Conard was talking about it five years ago when he urged us to address problems of justice system policy in "*macro-justice*" terms and people like Professor Maurice Rosenberg, our panel chairman, have been examining judicial administration problems in that broadened context for several years.

That systems approach has, among other things, opened our thinking to optional forms of resolving disputes. It is that part of the total spectrum of justice system reform to which this paper is addressed. In the course of this discussion I may touch on related issues such as simplification of the substantive law, the place of government-subsidized legal representation, and the like. But, the central theme is the possible design of non-judicial forums and their potential role in a revised comprehensive justice system.

The present regular courts tend to adhere to one model of dispute resolution. The nearly universal characteristics are (1) *adjudication* by a (2) *professional* law-trained *judge* (occasionally assisted by a jury) (3) on the basis of *adversarial* presentations by (4) the contending *disputants* who *bear* full *responsibility* for investigation of the facts of the dispute, the research of the applicable law, etc. Under ordinary circumstances these latter tasks require the expertise and skills of expensive well-educated, professional lawyers.

Alternative Models of Dispute Resolution

It is possible to find or devise variations of nearly every one of the elements of the present judicial model. To begin, there are several alternatives to outright adjudication: *conciliation* which attempts to facilitate two party negotiation, *mediation* which may go a step further

to recommend possible settlement terms, *arbitration* in which the disputants consent to be bound by a neutral's decision, and *persuasive justice* in which the third party's recommendation is backed up by publicity or other sanctions short of judicial enforcement. (An ombudsman office traditionally fits this definition.) Sometimes these dispute resolution techniques can be combined. So-called *Med-Arb* is an example: The dispute resolver first attempts to arrive at a voluntary settlement between the disputants, but, if that fails, issues a binding decision.

It is equally easy to conjure *dispute resolvers* other than professional judges. The most obvious are *lawyers* who possess the same knowledge and general orientation as a judge but who often have been enlisted as part-time arbitrators, mediators, etc., and even adjudicators. But for various disputes and different forums other community members lacking legal training may be appropriate and even superior substitutes. *Psychologists* and others with special training in human relations may bring extraordinarily useful skills to many disputes and many processes of dispute resolution, especially conciliation and mediation. Other disputes may cry out for *subject matter experts,* that is, people who know nothing about the law or human relations but a great deal about widgets or engineering or longshoring. In fact, one of the reasons private arbitration has become so common in labor and commercial disputes is the subject matter expertise offered by the arbitration panels available to disputants.

Some of the recent experiments with community mediation have ventured beyond these specialists, assigning the dispute-resolving role to *common citizens.* In some instances, these people have been chosen because they are perceived to be *community leaders* whose decisions or recommendations would carry special respect with disputants. Elsewhere, however, the choice is from volunteers who are peers of the disputants. And it is entirely possible to conceive of random drafting of citizens for these purposes in a manner analogous to jury service.

Some of the most interesting possibilities, however, have to do with subtle factors such as the difficulty and distribution of responsibilities within the process. As highlighted above, our present court system is based on a pure adversarial model. The litigants are expected to research the applicable law, investigate the underlying facts of the transaction in dispute, and present their versions to the judge. As a practical matter, for most disputes in the courts, that means hiring a lawyer who is familiar with the law (or at least with how to find it), experienced at discovering the relevant facts, and possessed of the knowledge and skills to make an effective presentation consistent with the formalities of a traditional courtroom.

In many of the alternative forums which have grown up outside the Anglo-American courtroom, these tasks are simplified. Common notions of fairness and equity may displace complex, precise legal rules as the basis for decisions/recommendations. Thus, parties are relieved of the necessity of searching the statute books and libraries for the law which will control the solution of their problems. Alternatively, lawyers may be

banned entirely from a forum or reduced to a subsidiary role in which they can only advise the disputants but not speak out themselves.

Some other interesting developments have involved the redistribution of responsibilities for discovering the facts. In several alternative forums, the dispute-resolver has assumed these duties himself. This is observed in its simplest form when a small claims judge interrogates the parties and witnesses before him. But more sophisticated versions do exist. The British Columbia "Rentalsman" and the Swedish "Public Complaint Board" described later in this paper both employ full-time investigative staffs.

Once we depart from the rather narrow professionalized adversarial model on which our present judicial system is based, we open up the possibilities for greater community involvement in the decision-making process itself. Laymen are fairly comfortable with common notions of justice and equity and find less need for the guidance of judges and lawyers so essential to solve the mysteries of technical legal rules and judicial precedents. Similarly, if lawyers are barred from the hearings or reduced to a subordinate advisory role, the common man may feel more at ease either as disputant or decision-maker. Conciliation, mediation, persuasive justice and even arbitration may also be less intimidating forms of dispute resolution for the laymen.

Whatever the reasons, it already is possible to detect a trend toward alternatives to the professionalized 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, and several citizens usually possessing some subject matter expertise or representative of an interest group relevant to that class of dispute. There now are 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 non-criminal 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 telephone or 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, i. e., dry-cleaning, auto repair, etc. 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 PCBs 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—non-lawyers employed on a full-time basis to resolve disputes. In this instance, the disputes are between landlord 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's Office attempts to mediate informally. If unsuccessful, an investigator often 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 the 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 1960's 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—two or three 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.

Other eastern European nations have institutions similar to the Polish Community Conciliation Committees. But it should not be assumed that this basic model is unique to the communist countries. Within the last two decades, several very diverse societies have created similar forums. For instance, Iran has "houses of equity"—community based, unpaid, lay tribunals empowered to decide most minor civil and criminal cases. Sri Lanka's version is the "Compulsory Conciliation Board."

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 underlay 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 in the mouth that brought the neighbors to court.

Different programs use different types of mediators. Some depend on lawyers, others on psychologists or other professionals in human relations. A few approach the true community model, drawing their mediators from the general population, people who possess no extensive formal training in either law or psychology.

The existing community mediation efforts have supplied the chief inspiration for an ambitious new experiment—the "Neighborhood Justice Center," which eventually could become an important element in our total justice system. Initially the U.S. Department of Justice is sponsoring three centers scheduled to open this spring in representative neighborhoods in Atlanta, Kansas City, and Los Angeles. Unlike their predecessors, the community mediation programs, these Neighborhood Justice Centers are open to civil as well as criminal cases. Also unlike their ancestors here in the United States, they may begin to offer arbitration services, as well as mediation. Moreover, they are organized to refer people to the courts, social services agencies or lawyers when the problems are not suitable either for mediation or arbitration.

But the potential of Neighborhood Justice Centers does not stop with community mediation, arbitration and referral. Some planners also expect these Centers to evolve into decentralized "one-stop" intake points for the entire justice system. They could become a place where court actions are filed when less formal resolution techniques are inappropriate, thus saving a long trip to the downtown courthouse. Small claims and housing court judges might hold night sessions at a given center once or twice a month to hear cases between residents of the area. Other methods of resolving disputes—fact-finding, ombudsman, some variation of the British Columbia rentalsman or Swedish Public Complaint Board, and other approaches not yet designed or labelled—may be folded in as Neighborhood Justice Centers gain a firm footing.

Three Rationales for Alternative Forums

But why consider using any of these alternative forums. What is wrong with our tried and tested centuries old Anglo-American judicial model? That is an important threshold question that is related intimately to the issue of which criteria one might employ in allocating different categories of disputes to different kinds of forums.

Nor is there a single answer to this question. I suspect that different reformers would provide this audience with different answers. It is, however, possible to detect at least three independent rationales for diverting civil cases away from the traditional judicial forum. For some, the primary goal is to relieve the court workload. For a second, the primary purpose is to improve access for disputes and disputants that cannot economically reach the judicial forum. A third group of reformers feels that the judicial mode is at best an inferior way of resolving at least some kinds of disputes and furthermore that it is a socially and psychologically disruptive approach to such controversies. For convenience, I will label the first motive for channelling disputes to alternative forums as the "judicial overload" rationale, the second as the "access to justice" rationale, and the third as the "superior process" rationale.

This is not to say that a given forum must be supported by only one of these rationales. Some alternative forums are seen as contributing to two or more of these purposes. Nonetheless they are very distinct

rationales. Deciding which one is the predominant motive will largely determine which kinds of disputes should be allocated to the non-judicial forum and the criteria which should be applied in judging the performance of that alternative forum.

The Judicial Overload Rationale

Possibly the weakest of the three rationales, yet also probably the most powerful political motive for the current trend to use non-judicial forums is the "judicial overload rationale." With caseloads mounting daily in the regular courts and backlog and delay far beyond tolerable levels, it is easy to understand the motivation to channel some of the overwhelming demand to other forums. The Los Angeles Superior Court probably was merely harbinging the future throughout the country when it recently announced that by summer 1978, its courts will no longer be able to conduct any civil trials.

To be effective for this purpose, of course, the non-judicial forum must be dealing with the precise same cases that would be heard in the courts. Otherwise it won't diminish the demand on court resources but merely be an add-on, handling disputes that wouldn't have reached the courts anyway. Furthermore, the alternative forum won't make much sense as a conserver of judicial resources unless it can resolve cases cheaper than the courts. Otherwise it is merely eating up government funds that could have been used to hire more judges.

There are a number of non-judicial forums whose clear primary function is to relieve the judicial caseload. They bear different names and use different kinds of dispute-resolvers and different processes of dispute resolution. But most do share a common trait. They usually perform a pre-processing role for the courts in private disputes similar to what administrative agency hearing officers and tribunals do for disputes arising out of the operation of administrative bodies. A pair of examples—one domestic and one foreign—should illustrate.

In Pennsylvania, Ohio and New York, some jurisdictions require all civil cases under a specified level to be submitted to compulsory arbitration. In Philadelphia, where the jurisdiction extends to $10,000 disputes over 12,000 cases a year—that's about 80% of the civil caseload—are referred to arbitration panels chosen at random from a list of over 3,000 lawyer volunteers. These three lawyer panels hear the cases usually in the office of one of the panel members. Awards are binding unless one of the litigants asks for a *trial de novo* within 20 days. There is a price for that appeal—reimbursement of the $110 the state paid the arbitrators. Requests for *trial de novo* hover around 10% with most of these settled without an actual trial. All the evidence is not in since the jurisdictional limit was raised from $2,000 to $10,000 a few years ago. But delay in the courts was cut in half, and apparently fewer cases end up in trial. Thus a final resolution occurs much earlier on the average either through arbitration award or settlement. The pre-processing of the *arbitration system* apparently weeds out all but the toughest, closest cases.

The country of Sri Lanka offers a slightly different pre-processing format. It has a compulsory community mediation system. Composed of local citizens serving on an unpaid basis, these tribunals possess no adjudicatory power. On the other hand, no civil case can be filed with the regular courts until it has been heard by one of these boards. If the conciliation board's mediative efforts are successful, of course, litigation becomes unnecessary. If unsuccessful, a certificate is issued permitting the disputants to take their case to the courts. Thus, only when the common citizens fail to bring about a negotiated settlement does the professionalized adversary process take over.

All of these pre-processing alternatives are terribly sensitive to appeal rates and their own cost. Unless they result in final resolution of a very high percentage of the cases assigned and at significantly less cost than the courts, such forums can merely become a superfluous step that delays the litigation process. They also can just waste money that could have been used to hire more judges or lawyers.

This suggests some selectivity in assigning cases to non-judicial forums in furtherance of the "judicial overload" rationale. Subject matter will seldom be a useful criterion. The most relevant consideration is whether the parties are likely to be satisfied with the outcome in the alternative forum. That probably is more likely to turn on factors like the amount in dispute, the credibility of the non-judicial forum and the persuasiveness of any disincentives to appeal.

The Access to Justice Rationale

The "access to justice" rationale is a more recent phenomenon, and to me a more important reason for diversion to non-judicial forums. Here the pressure is not coming from judges and those concerned about caseload, backlog and delay. Rather it is originating with litigants and potential litigants, consumer organizations, and the like. Litigation has simply become too expensive for most people. The high cost of litigation through the courts irritates many litigants, but for some it constitutes a total bar to the judicial process. No matter how meritorious the claim or how worthy the defense, the average person is unable to afford to litigate most cases. Even the affluent find the courts uneconomic unless the amounts in dispute exceed their investments in legal fees and other court expenses by a substantial margin. Otherwise, they can win in the courtroom yet lose in the pocketbook.

Many lawyers have told me they advise clients it doesn't pay to litigate a $2,000 or even a $5,000 dispute. But meantime, institutional litigants—credit companies, landlords, and the like—can afford to haul individuals into the courts over even a few hundred dollars because of economies of scale, risk distribution and like factors. Do the individual defendants thrust into the judicial arena in such a case enjoy true access to the courts? Pretty clearly not. Sociologist David Caplovitz found, in a 1971 study of debtors, that most capitulated despite good defenses when they found it would cost them more to hire a lawyer and win the case than to just pay the dubious claim.

I have to pause a moment before discussing the use of non-judicial forums in the context of the "access to justice" rationale. There is another distinct approach to this problem which merits consideration. That is subsidized access to the regular courts. Rather than affording litigants a less costly means of asserting their rights, government could merely absorb the expense for those unable to pay their own way in the regular courts. Cost would then no longer constitute a barrier for the assisted parties.

Of course, I'm not talking merely about legal aid for the poor. The underlying principle would have to be extended far beyond these present manifestations if it were to respond to the dilemma of the well-to-do person implicated in a dispute over a sum insufficient to warrant recourse to costly forums like the courts. Government subsidies would have to be available irrespective of means to any individual desiring to prosecute or defend most claims. It seems doubtful that many legislatures would choose this course of action over the alternative of somehow curtailing the cost of litigating such matters.

Thus, it is not surprising to see forums beginning to emerge not only in the United States but elsewhere in which the primary effect is to lower the cost to the disputants. Not necessarily the cost to the government, but to the people using the forum. Moreover, for the most part, these are not disputes that are taking the time of the courts at present. Almost by definition, they are cases that disputants couldn't afford to bring to court.

One of the more revealing examples is found in British Columbia, Canada. Called the Rentalsman, this is a forum set up in 1974 which has exclusive jurisdiction over most landlord-tenant disputes in the province. It is revealing especially to note the extent to which the Rentalsman's Office has gone to lower the transaction costs for disputants seeking an official resolution of their grievances. A complaint can be lodged by telephone or a simple letter, as opposed to traveling to some distant courthouse to file a formal document. The Rentalsman's staff will contact the other party, often by telephone and attempt an informal mediation. If that proves impossible, the office has its own investigative staff to look into the facts of the dispute. Thus, the parties don't have to hire a lawyer and conduct their own expensive investigation. When a hearing does take place, it is at a convenient time and place. It is informal and non-adversary. The deputy Rentalsman first seeks once again to mediate the dispute and only if unsuccessful does he adjudicate.

As a consequence of all these measures, the Rentalsman is processing about eight times as many landlord-tenant cases as the courts did when they had jurisdiction. Moreover, it is reported that in only 1% of these cases does either disputant use a lawyer. It seems fairly apparent that tenants and landlords can now afford to take many disputes to the Rentalsman they couldn't have litigated in the courts.

It also should be noted that the Rentalsman appears to cost the government more. That is, the Rentalsman's budget seems larger than the portion of the judicial budget which formerly had been allocated to landlord-tenant cases. At the same time, recognize it is handling many

more cases and it apparently is saving the disputants significant legal fees and other transaction costs.

You will recognize the basic process used by the Rentalsman as very similar to some American consumer protection agencies, television hotlines, etc. The Swedish Public Complaint Boards which handle a wide variety of consumer disputes in that country follow a similar path. The main difference is that the Rentalsman possesses ultimate adjudicative power if mediation and persuasion fail. The American and Swedish analogs do not.

The Beverly Hills Bar Association is about to inaugurate a different sort of forum predicated on the "access to justice" rationale. Members of the Association finally have become fed up with having to tell clients who come in with a $2000 or $3000 or $5000 case, "Sorry, we can't help you. It would cost more to litigate that case in the courts than you would stand to gain." So they are starting a free, voluntary arbitration program for disputes between $750 (the small claims court limit) and $5000. Association lawyers will serve as unpaid arbitrators. But the parties cannot be represented by lawyers. That would defeat the purpose. The Association hopes to sign up landlords and merchants who will be willing to submit all customer controversies to the program.

There are other examples in the "Harlem Neighborhood Court," Los Angeles "night small claims settlement officer," and the like. But the most frequent elements are easy complaint filing by telephone or letter, lawyers unnecessary or banned, hearings informal and at convenient times and places, and an inquisitional process often with the forum responsible for most of the investigation.

Under the "access to justice" rationale, we are not very concerned about the subject matter of the dispute allocated to an alternative forum. The most significant criterion is whether a person of reasonable means could afford to prosecute or defend this kind of dispute in the regular courts. If not, it may be a legitimate category for assignment to a process that lowers the litigants' transaction costs.

It is here that the notion of "second class" forums is most apparent and the danger of "second class justice" most acute. By definition, these are disputes which usually cannot as a practical matter be taken to the courts if litigants are dissatisfied with the process in the alternative forum. This is in stark contrast to compulsory arbitration and like procedures discussed under the "judicial overload" rationale. Time is too short to offer even tentative answers to the many questions: Is rough justice better than no justice to a disputant involved in a case that can't be litigated economically in the regular courts? Or need an alternative forum that lowers the costs to disputants necessarily offer a rougher cut of justice? Is the Rentalsman's staff of non-lawyer housing law experts really offering second class justice compared to landlord-tenant judges? In another context could even an amateur panel of common citizens come up with a better solution to a minor dispute in an hour or two of deliberation than a professional judge could in the five or ten minutes he's likely to devote to the same matter?

On the other hand, would a system of non-judicial forums akin to the Rentalsman actually be less expensive for government than providing fully subsidized access to the regular court system? Might not the disputant's government-paid lawyers settle rather inexpensively most disputes which in an essentially lawyer-free alternative forum would require a full-scale hearing? If so, which would be the better way of dealing with the "access to justice" problem?

The definitive answer to this last question probably would require a massive social experiment in which two analogous communities tried out the competing policy options.

And there are many other issues in this field—some of them suggested above—which cry out for more modest research efforts, too, and for experimentation.

The Superior Process Rationale

But let me move on to the "superior process" rationale. This provides most of the motivation for the community mediation programs which have sprouted with LEAA funding in a number of cities and underlies the rhetoric of the Neighborhood Justice Centers and several other recent initiatives. This rationale rests on the contention that the professionalized adjudicatory model presently used by the courts is ineffective and even counterproductive in certain categories of disputes.

Courts are faulted first, for their inability to get at the underlying causes of disputes, second for their tendency to aggravate tensions between disputants, and third for the limited range of remedies they have available. If a man is charged with hitting his neighbor because the neighbor won't do something to quiet his barking dog, the judicial inquiry will be quite limited. Did "A" hit "B"? The two will meet in an adversary atmosphere. After a short hearing, the judge will sentence "A" to 30 days or impose a $200 fine. Even if he hears about the barking dog, the judge will only use that information to mitigate the jail term or fine.

Forums implementing the "superior process" rationale seek to substitute conciliation, mediation, and what might be characterized as short-term therapy for the adjudicatory process. The Dade County Dispute Settlement Center, in fact, uses psychologists as dispute-resolvers. Others use lawyers or common citizens who have received training in conciliation-mediation techniques. The aim is to reach and resolve the underlying causes of the incident which provoked the official intervention—the barking dog or its equivalent.

The process is informal, leisurely, frequently non-directive. The disputants are encouraged to tell their full stories, the irrelevant as well as the relevant, their feelings as much as the objective facts. A case that typically would have been heard in five minutes by a professional judge may take two or three hours. The dispute-resolvers will seek to work out an agreement that addresses the underlying causes. The dog owner will keep his dog penned after nine p. m. but the other man will prevent his children from teasing the dog.

It will be rare that these forums serve the "judicial overload" rationale. Most cases they undertake would have occupied limited court resources: many would have settled without a hearing and the majority would take only a few minutes to try. Moreover, these forums often are more costly than the courts on a per case basis. Hence, if relief of court workload were the goal, it would make more sense to use the money to hire more judges. Likewise, increased access, though sometimes realized, is not a significant goal of these forums.

A superior result is the goal and the test. Thus, it becomes important to allocate to these forums only such cases as they can be expected to resolve better than the courts could. Common sense or research might suggest that litigation in the courts is counter-productive for disputes between people with a continuing emotional relationship—members of the same family, neighbors, and the like, simply because a negotiated settlement is likely to be preferable to an adversary proceeding and an imposed solution. Similarly, research may establish that litigation is less effective than some other approaches in disputes between parties involved in a continuing *economic* relationship—landlord-tenant, supplier-merchant, seller-consumer, etc. 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 easier for a customer to shift patronage to another store than to disown a son or even to ignore a next-door neighbor. In addition, it may be preferable to offer disputants voluntary government-sponsored forums where they can seek to work out their problems short of litigation, despite the fact the "failures" will end up in the professionalized adjudicatory setting anyway.

Toward a New Justice System

Whichever rationale is under consideration, it is apparent we do not yet have all the answers as to what forums work or which disputes should be channeled to which tribunals. In fact we are just beginning to ask the right questions.

The next decade is apt to see an enormous amount of activity in this field. New forums will be devised, experiments will be undertaken, evaluations will be conducted, debates will rage. In one way or another, through careful planning or confused groping I submit American society will move toward a new justice system: one in which the courts as we know them will still occupy an important position but alongside a variety of alternative forums offering disputants other methods of resolving disputes, other types of dispute resolvers and even other aspirations. It is also a justice system where non-lawyers will have a prominent role.

The entire enterprise offers both challenge and opportunity to the law schools. The chances for creative scholarship and particularly for empirical research are exciting. Meanwhile, there will be need to be flexible in our educational programs to adjust them to the needs of a rapidly evolving and probably dramatically restructured justice system. Who is

to train the lay arbitrators, the mediators and other dispute resolvers, both professional and amateur? And how do we equip law students to function effectively in a multi-faceted justice system where they may be called upon to be neutral mediators as often as they are expected to be partisan advocates?

I'm sure there are many in this audience who are skeptical that anything nearly so dramatic as I have suggested will happen ever, to say nothing of within the next decade. But I submit that the three rationales I discussed today are each supported by different but very powerful constituencies. These constituencies range from right to left across the political spectrum, and are found within and without legal profession. Pushing from different directions and for different reasons I suggest they will thrust what might be viewed as revolutionary change upon the judiciary and the legal profession. It may be the historic role of the law schools not only to respond to that change but to help shape it.

Remarks of Paul D. Carrington [10] as Commentator

This is a happy occasion. For those of us who labor in the boiler room of the law that is judicial administration, an opportunity to address a general audience is an uplift. And to speak of our concerns to legal scholars is heady stuff. Rarely do you captains of the law lend your ear to us who are concerned with such matters as whether your ship's engines will drive its propellers.

Professor Johnson's presentation proceeds from two premises. They are old ones. One is that it is a good policy to make justice available to all. Virtually every step in the long history of judicial reform was justified by reference to that same premise.

Perhaps the most eloquent appeal ever made in English for the cause of access to justice was voiced by the great nineteenth century reformer, Lord Brougham. His speech in favor of the Hilary Rules reform was, indeed, one of the most powerful ever made in Parliament. His peroration is worth recalling; he said:

> "it was the boast of Augustus that he found Rome of brick and left it of marble. But how much nobler will be the sovereign's boast when he shall have it to say that he found law dear, and left it cheap; found it a sealed book, left it a living letter; found it the patrimony of the rich, left it the inheritance of the poor; found it the two-edged sword of craft and oppression, left it the staff of honesty and the shield of innocence."

Elegant words these, but Brougham's experience, like many others, teaches that the purpose is more easily stated than served. Brougham's words were uttered in support of a reform which proved to be a fiasco. The Hilary Rules proved to be tools of delay and obfuscation. The system was a greater source of injustice than the common law pleading which it

10. Professor, University of Michigan. Director, AALS Curriculum Study Project; American Law Institute. Author: JUSTICE ON APPEAL (with Rosenberg & Meador 1976); CIVIL PROCEDURE (with Babcock 2d ed. 1977).

displaced. Within a decade, the Hilary Rules were repealed. Thus, the idealism in Professor Johnson's presentation is an old idealism. But like many ideals, this is one to be approached with a cautious recognition that its pursuit can be self-defeating.

The second premise of the movement for alternatives to judicial procedure is that the courts cannot bear the load. That, too, is an old idea. Nothing is more ubiquitous and endemic than the congestion of courts. Was there ever a system that was not overloaded? Well, the federal courts in their first decade were underutilized. And we also have had state court systems underutilized, usually in underpopulated areas. But overloading, and cries of concern about open floodgates have been a normal feature of judicial institutions for millenia.

The fact that congestion is old stuff does not diminish the force of the observation that we are at a moment of crisis. Our judicial institutions truly cannot bear the weight that is now being imposed upon them. If you take nothing else away from this session, please believe at least, that the wolf we decry here is real. Current demands are now being met by mass production methods which are making our courts less distinguishable from our least revered bureaucracies. This erosion is occurring even at the highest levels. Our courts are trying to make decisions faster, with less investment of effort. But fairness and justice are already threatened by haste. Alternatively, our legislatures could increase the number of decision-makers, or reduce perhaps the number of decisions to be made. Those are the three dimensions of the problem. There are no others. Unpleasant choices must be made or they will be made for us by the march of events. In guiding our thinking about these matters, Professor Johnson performs very useful work.

Nevertheless, my presence here will foretell that I have some doubts about a complex system of alternative procedures for dispute resolution. My doubts are of two kinds. First, I find the task of measuring the supposed benefits and the apparent risks of the proposal to be very troubling. And, secondly, I am not clear to whom the benefits would flow.

I.

The economics of judicial administration is an extremely primitive science. The costs of the complexity proposed will not be easily assessed. We know that just as there is no free lunch, so there is no free justice. Every official procedure, whether we call it a legal procedure or not, inflicts costs. Some of these costs are quite indirect and difficult to detect. Others are passed on by the litigants in ways which may have quite unintended social consequences.

A simple example of the difficulty of cost-benefit assessment is offered by the proposal to use official mediators whose services are imposed on disputants. How does one know whether official mediators are earning their keep? It is clear that the mediation is itself a new cost. Whether there is a net saving yielded by their efforts is a sizeable question. Experience and the kinds of data generally available are subject to

multiple interpretations and explanations. Our experience with pretrial and pre-appeal conferences, for examples, is not reassuring.

Similarly, the use of lay decision-makers is a dubious economy. We are able to say with little doubt that the traditional means of employing lay decision-makers, the jury trial, is not an economy in final terms, at least. Perhaps some moderately drastic changes in jury trial procedure, such as the elimination of voir dire, would make jury trials more economic; perhaps jury trials could be made to be as cheap as non-jury trials, although this would require quite a lot of surgery, major surgery on our accustomed procedures. Perhaps lay decision-making would be still more economic if we eliminate the professional judges and lawyers who make the jury trial so expensive. But it is no more than possible that this is so; it is neither self-evident nor demonstrable. The costs of such a proceeding would still be substantial; the side effects would be consequential; and the benefits elusive.

Cost-benefit analysis is more complex when the calculus includes the psychic costs and benefits of different kinds of proceedings. Lawyers generally indulge in the convenient assumption that a good adversary fight is the best way to take out one's aggressions and exhaust hostility. But this assumption is highly questionable; Charles Dickens may have been much closer to the truth when he said that no man's nature is made better by legal bickering. Hence, some of the more conciliatory alternatives proposed by Professor Johnson may be superior to other legal proceedings of a more conventional sort. Especially, I am sorry to say, to the extent that lawyers and judges are removed from the process. But in this area of social psychology nothing is clear. We are in a very poor position to give guidance to the officer who would match disputes with procedures according to the degree of adversariness appropriate to particular occasions. We have a very long way to go to surmount this problem.

This concern for the inadequacy of our understanding grows where Professor Johnson's alternatives would increase the separation between the costs and benefits of litigation. Parenthetically, this is also a puzzling question in regard to systems for prepaid or public financing of legal services. What happens when users of the system have reduced concern or even no concern about the ineffable costs associated with the users' benefit?

We have now accumulated a mass of experience in the fields of medical and hospital services which suggest that there is a large risk that potential beneficiaries will in such a situation overuse the system provided for them. In the field of health, this has resulted in grave economic effects. To the extent that some of Professor Johnson's alternatives make courthouses more like hospitals in the degree to which costs are borne by the public or groups other than the immediate users, it seems quite possible that they will replicate the experience of overuse by persons asserting claims of diminishing merit and significance.

The social consequence of overuse of legal institutions is more adverse than the consequence of overuse of hospitals. For, after all, in almost every dispute, one of the parties is involuntary; even if he wins, he loses in some sense.

For this reason, we might well want to add to Professor Johnson's list of alternative means of dispute resolution the alternative of forbearance. There are some grievances which society has no appropriate means to correct because the irreducible minimum cost of correction is simply excessive. In regard to such matters, the public is too wise to promote forbearance, and to impose on its institutions the duty to discourage grievants. We need not replicate the advice of Charles Dickens to suitors in equity: suffer any wrong, he advised, before you go to Chancery. But a system which gives too little reinforcement to the virtue of forbearance can be a menace and even a cause of injustice to those who are beset by unjust claims. There is a danger that this will happen where costs and benefits are dissociated.

II.

Let me now proceed to a brief discussion of my second level of concern. My question here is not whether there is a cost or benefit to be measured, but who receives it. This question is more political and less economic. But it appears that Professor Johnson and I share a common premise that judicial reform should serve the interests of those who are generally least advantaged by the legal system.

There is a lesson to be learned from our relatively recent experience in creating small claims courts to serve as forums for the poor. That reform is about 50 years old. What happened to the small claims courts is that they were quickly captured by institutional litigants. Institutions have employees who quickly gain the experience needed to make effective lay presentations; such experience lay persons can usually be expected to roll over the beleaguered poor who appear to contest their claims as tenants or consumers. It is a rare tenant or consumer who leaves the small claims court with the warm feeling that he has secured justice at a low price. The lesson to be learned from this experience is this: Do not underestimate the ability of those who seem to exploit the present system to exploit its substitute or alternative even more effectively.

More particularly, I admit to special apprehensions about the proposed alternatives making greater use of lay judges. An effort has been made over the last century to professionalize our judges. Just as the last justice of the peaceships are being retired, we are now hearing anew of the virtues of lay judges. How are these lay decision-makers to be selected? Is there to be a procedure for disqualification for bias? Will they be expected to obey the law? What kind of supervision is contemplated?

Some of the proposals advanced seem to rest on the assumption that social pressure will be brought to bear on lay decision-makers to assure the integrity of such procedures. This is most explicit in the proposal of neighborhood tribunals. There may be a few neighborhoods in America in which there remains a sense of community and obligation among neighbors. But surely they are few. Transiency of the population has all but eliminated that admirable fellow-feeling of the past. Especially in those neighborhoods populated by the less resourceful citizens who are the intended beneficiaries of these procedures. For these reasons, I am skeptical about the integrity and trustworthiness of lay tribunals.

Similarly, we might ask: who benefits from the complexity of a system of alternatives? Rarely, I suspect, will it be those citizens who are disadvantaged by the flaws in the present system of justice. The one group that is generally advantaged by complexity is the professional class who learn to manipulate the complexity and turn it to their own profit. Again, we have experience to draw on. Perhaps the most notable contribution of Roscoe Pound was his leadership in the unification movement. For decades, efforts proceeded under his guidance to simplify the judicial hierarchy and to consolidate courts and jurisdictions. This movement was intended to serve those who might be disadvantaged by the complexity of the law, who would be burdened by the costs of jurisdictional squabbling. Let us not draw more costly jurisdictional lines without a good purpose clearly in mind. As we populate our courthouses with various levels of para-judges, including such figures as magistrates, referees, court-appointed arbitrators, and other retainers, we are likely to be increasing the value of the professional lawyer's skill. We may well be making justice more of a game to be won by the side who has the best champion. And so it is by no means clear that the beneficiaries of alternative dispute-resolving processes will be those who are intended to benefit.

Conclusion

The plan for a complex system of dispute-resolving alternatives needs more thought. There is a serious risk that it would disserve the public and the poor.

Remarks of Robert B. Kent [11] as Commentator

I think that it is well pointed out that the attractiveness of a search for alternative methods of dispute resolution stems from two related but very different concerns. The first is the overcrowded condition of courts of general jurisdiction and, most importantly, the impact of that condition on the quality of the administration of criminal justice. The second is the lack of access to the system, the inability of courts as we know them to deal effectively with substantial categories of matters for reasons apart from the crowded conditions.

With all respect to Paul Carrington, the "twas ever thus" approach to court congestion simply will not wash in the face of the difficulty we are having in disposing of serious criminal cases. Indeed the persistence of courts in their elaboration of the pretrial conference and the institution of the preliminary conference on appeal reflect a continuing stress regarding their ability to do their work.

11. Professor of Law, Boston University School of Law. Teaching responsibilities include Civil Procedure, Constitutional Law, Federal Courts and Conflict of Laws. Co-editor of Scott and Kent, CASES AND MATERIALS ON CIVIL PROCEDURE. Draftsman of the Rhode Island Rules of Civil Procedure. From 1970–72, was the Dean of the University of Zambia School of Law.

As Earl Johnson has made clear, determining the appropriate forum and devising appropriate tribunals involve many questions, and the questions encompass more than those matters which may be lumped into the category of "minor disputes."

I recently became rather intrigued by a state supreme court disposition ordering a new trial. A do-it-yourself type wanted to panel his basement and took a wrench to a capped gas line, long unused, which protruded into the basement. A bluish vapor, accompanied by hissing, moved his wife to get him, the kids, and herself out of the house before it blew up. Their suit against the gas company for loss of their dwelling resulted in a verdict for the defendant. It was set aside upon appeal because the trial judge had excluded testimony based on a strict reading of the pleadings and on his unwillingness to permit their amendment in the late stages of the trial. My enthusiasm for the appellate court's action diminished markedly upon my being reminded of the nearly obvious: neither husband and wife on the one hand nor the gas company on the other had any interest in the matter; the dispute was between their respective insurers. Whatever else, that action did not belong in a civil session with jury, not once, let alone twice. And yet arguably this was not a minor dispute. It did not belong there for at least two reasons. It contributed to the congestion which haunts the administration of justice in courts already beleaguered by serious criminal cases, matters which clearly do belong there. Second, the cost of judicial processing of such matters under our current system has an impact on the cost of insurance which is making restless many segments of the community. This case was before the court with a jury essentially because it had about it the look of an action of trespass on the case. Earl Johnson appropriately has focused our attention on criteria for channeling matters into a variety of dispute resolution mechanisms. One criterion which bedevils the process is: Does the claim have about it the look of an action of trespass on the case?

It seems to me that serious consideration of the entire topic of dispute resolution inevitably involves another look at the place of trial by jury in civil cases. We are in need of another round, another serious discussion of the constitutional right to trial by jury in civil cases. I do not propose abolition of that form of trial in all cases which may be labeled civil. I do suggest that the nature of the tribunal appropriate for particular types of disputes ought to be a matter for the legislative process and that courts should have a role in determining what civil cases within their jurisdiction should be tried to juries. Questions of appropriateness should be faced as problems of present day judicial administration; they should not be answered solely in terms of the assignment of matters to courts of common law or equity in bygone times.

One may be reluctant to fan the flames which break out within our profession when this subject comes up. Recent proposals for expansion of no-fault insurance into the realms of medical malpractice and products liability, together with approaches advocated here today, have stirred anxiety. I have recently received an invitation to join an association of lawyers; the invitation was cast in the form of a memorandum on "The

Very Real Threat to Human Rights." The memorandum began with the assertion that "the American system of civil justice is under serious attack," and it concluded with the statement that "the interest groups are aiming to abolish the adversary system." To say that both the system of civil justice and the adversary system need careful, deliberate study with a view to possible change is not, in my view, to make threats against human rights.

I realize that there are ways around the requirement of trial by jury in civil cases, but they trouble me. Changes in substantive law ought to stand on their own merits and not as the bases for assigning matters to administrative agencies simply to get away from juries. Chipping away at the incidents of jury trial has the danger of fallout for the criminal field, wherein I confess to a rather fierce bias in favor of the constitutional right to trial by jury, and not a watered down version thereof. And making access to the civil jury depend on ability to pay a substantial admission fee seems to me an affront to the notion of equal access that we ought not to accept.

I think it fair to say that the one serious obstacle to total incorporation of the Bill of Rights into the Fourteenth Amendment is a justified reluctance to impose upon the states the terms of the Seventh Amendment.

At the state level we should be considering seriously elimination of the constitutional requirement of trial by jury in civil cases in order that we may proceed with the process of fitting the forum to the nature of the dispute and to the needs of the disputants and the community at large.

At a recent conference sponsored by the Massachusetts Bar Association a number of practicing lawyers made or endorsed the suggestion that as a profession we are too adversarial, too combative in our approach. It is not the observation but its source that is of interest. The lawyers further suggested that we in the law schools do something about that, and I know that Frank Sander will address that topic. Meanwhile my colleagues in the field of civil procedure need not fear. The adversarial system will be around for some time, and the present discussion simply broadens our horizons.

Remarks of Frank E. A. Sander[12] as Commentator

Paul Carrington's skeptical comments, though well-merited in a number of respects I will touch on later, remind me of the story of the Maine farmer who, when asked whether he believed in infant baptism, replied "Believe in it? Hell, I've seen it done." The movement towards alternatives is a reality. It seems to me the present posture for us law teachers is not, as Paul Carrington might have us believe, whether alternatives are

12. Professor of Law, Harvard University. Labor arbitrator. Member, ABA Special Committee on Resolution of Minor Dispute; Special Consultant to ABA in connection with Conference on Minor Dispute Resolution held at Columbia Law School, May 1977. Consultant to Alaska Judicial Council in connection with establishment of Anchorage Citizen Dispute Center. Author: "Varieties of Dispute Processing", 70 F.R.D. 111 (1976).

a guaranteed success, or whether we already know the answers to all the relevant questions, but rather whether this is a subject worth engaging our interest. My answer is a resounding yes. Indeed, I find it puzzling how we could have been teaching courses like procedure for so long with such a single-minded focus on the litigative judicial process, and with so little emphasis on possible alternative dispute-resolution processes.

Professor Johnson has usefully described three prongs of the movement towards alternatives. I would like to add three others. First, it seems to me that up to now we have had far too single-minded a preoccupation on the adversary system as the paradigm dispute resolution process. While the adversary method may be ideally suited to the resolution of sharp conflict over factual issues, there are many other problems for which it is not so well-suited. Take, for example, a dispute between two neighbors over some tools that have been lent back and forth, or about a dog of one that keeps trespassing on the land of the other. Perhaps this festering situation will ultimately degenerate into some kind of physical assault and wind up in the criminal courts. This kind of problem is not likely to be effectively resolved by the criminal adversary process, for the ultimate issue is not who hit whom, but rather how this degenerating relationship can be constructively restructured. For that type of dispute between interdependent individuals, a mediative process seems far more apt than a coercive process. Or consider some of the issues arising in school disciplinary disputes. Professor Paul Verkuil has written an evocative piece contrasting an ombudsman approach to these problems with the due process model that seems to be evolving as a result of recent Supreme Court decisions.[13] One could cite many other examples.

I also sense a perceptible public disenchantment with the increasing complexity and remoteness of the traditional dispute resolution process. Sometimes that process appears to be so cumbersome that it develops a life of its own and loses sight of the underlying problems it was designed to resolve. Disputants appear to yearn increasingly for a simple and accessible procedure that permits them to tell their story and get prompt and constructive assistance towards the resolution of the underlying controversy. Often a court is not the best way to assure this objective.

Professor Carrington rightly reminds us of the happily fading era of the justice of the peace. But not all lay judges are alike. What is envisioned here, in the neighborhood context for example, is a lay individual drawn from the community, who, after training, and perhaps working together with two others, will try to conciliate the kind of dispute between neighbors that I have just described. That is a very different role from the one performed by the justice of the peace who, as I understand it, sought to perform coercive, quasi-judicial functions, but often did so without appropriate controls and restraints. In our case what is contemplated is an attempt to help the disputing individuals to reach a consensual agreement.

13. Verkuil, *The Ombudsman and the Limits of The Adversary System*, 75 Colum.L. Rev. 845 (1975).

That brings me to the third point—the increasing loss of a sense of community to which Paul Carrington rightly alludes. The intriguing question is whether the kind of process I have just described might not be able to help restore some of that sense of community, as individuals in the neighborhood become involved not only in helping to solve their neighbor's problems, but also in learning more about their common concerns. At least this seems to me an avenue worth exploring.[14]

Qualifications and Questions

While my perspective is decidedly more optimistic than that of Professor Carrington, I fully agree with his attempt to inject a note of necessary caution. He is quite right in suggesting forbearance as a possible alternative for many problems that are simply too trivial to deal with in any formal way. Indeed, we must be seriously concerned whether, by making additional dispute resolution processes increasingly available, we are not thereby encouraging the needless processing of some disputes that ought to be handled by avoidance. This is indeed a difficult question which needs further scholarly illumination. One aspect of that question concerns the costs and benefits of avoidance. Obviously it is cheaper in the short run to provide no means of redress for some disputes. But what is the ultimate psychic cost to the individuals who are thus left with festering concerns, and what is the potential social cost if that concern ultimately erupts into violence or destruction? These are important questions that need to be further researched.

There are also important due process concerns where the alternative procedures contemplated are not entered into consensually. Thus it is one thing if two neighbors voluntarily come into a Neighborhood Justice Center to resolve their squabbles about a boundary line or a trespassing dog. It is quite another thing if one neighbor attempts to bring the other to court and they are compelled instead to take up the case through neighborhood mediation. Obviously the latter situation raises important questions such as the fairness of the procedures, as well as possible denial of the right to jury trial and the right to legal representation. These, too, are issues that need to be further considered.

I also agree with Paul Carrington that there is a serious information gap on a number of critical questions. First, we need to know more about the relative effectiveness of different types of dispute resolution processes. How, for example, does arbitration compare with the traditional court process? As an occasional labor arbitrator, I have the distinct impression that arbitration is far more efficient than the judicial process, at least in that setting. But we need to find out whether that surmise can be scientifically verified, and if so, what are the limitations of

14. There is some evidence that such an approach has been helpful with respect to juvenile problems. See, e. g., Bruce and Spencer, FACE TO FACE WITH FAMILIES (1976), a report on the Scottish Children's Panels.

extrapolating those conclusions to other settings. We also need to know much more about the role of lawyers. Do they play a useful role in nonadversary, nonjudicial processes? Or does their predisposition to adversariness and conflict retard their effectiveness in those settings? What is the potential role for lawyers as dispute-resolvers in these settings? Finally, as indicated above, we need to know much more about the role of lay individuals in nonjudicial contexts.

A final concern I have is the increasing evidence of a kind of Gresham's law with respect to nonjudicial processes. Just as we are beginning to become more aware of the unique characteristics of various dispute resolution processes and to begin to develop some possible typology for matching particular types of disputes to appropriate processes, an increasing judicialization and formalization is becoming apparent. In arbitration, for example, which was once seen as an informal substitute for the judicial adjudicatory process, we are increasingly beginning to see the presence of lawyers, transcripts, discovery proceedings, and all the other familiar trappings of the judicial process. This is something we need to guard against if we are to preserve the unique characteristics of these different processes.

Implications for Law Schools

It is almost a truism by now that we in the law schools are still far too preoccupied with the case method, typically focusing on the appellate process in the context of adversary litigation. We need to broaden our perspective to take in the entire justice system.[15] From a systemic perspective, this means looking at how disputes arise and how they might be prevented, through the introduction of such measures as no-fault statutes or simplified processes (e. g., in divorce or probate). Then, with respect to those disputes that cannot be prevented, we need to consider what alternative dispute resolution mechanisms are available and how particular disputes might best be matched to relevant characteristics of particular dispute resolution processes.[16] To be sure, as Professor Carrington reminds us, this endeavor is still in a very primitive stage. But should we not at least begin by asking ourselves what are the unique characteristics of courts, so that those beleaguered institutions might be reserved primarily for the disputes that demand their unique services? Finally, with respect to those disputes that are best handled by the judicial system, we need to deal not only with the traditional questions of how to try the case in court, but also how the judicial process could be made more effective by such measures as requiring the parties at an earlier stage to disclose their case and by using cost mechanisms (particu-

15. See, e. g., Ehrlich and Frank, PLANNING FOR JUSTICE (Aspen Inst. for Humanistic Studies 1977).

16. See, e. g., Sander, *Varieties of Dispute Processing*, 70 F.R.D. 111 (1976) for a suggestive analysis.

52-434 O - 80 - 42

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7 OF 8

larly encompassing also attorney's fees) in such a way as to discourage dilatory litigation and to encourage reasonable settlement.

From the perspective of the client, we need to focus on diverse ways of solving his problem, entailing the full range of services from counseling and planning to litigation,[17] as well as the vast variety of possible dispute settlement mechanisms.

It seems to me that the systemic issues I have just alluded to belong very appropriately into a course in procedure or the legal process. Alternatively, special courses or seminars in alternative methods of dispute resolution, such as I have offered at Harvard, can be developed.

The client-oriented concerns could be met by more courses in drafting, counseling and negotiating. We have begun to see a few of those in the law schools, but all too few. Since there is an increasing demand for lawyers as neutrals (either arbitrators or mediators) we might well do more along these directions. Of course there have been some efforts of this kind in labor courses, but the need as I see it, far transcends that particular field.

One advantage of greater academic involvement in the realm of alternative dispute resolution is that it fits well with the current emphasis on clinical education. For example, a student might work at the Boston Housing Court and attempt to compare that mechanism with the rentalsman that Professor Johnson has described. Or a student might be assigned to a Neighborhood Justice Center of the kind that are springing up all over the country with a view to attempting to address some of the questions suggested above, such as the role of lawyers, if any, in that process or the need for particularized due process guarantees. Or a law student could help to design a grievance system for prison complaints. All these efforts, and others, would help the student to gain a better understanding of the diverse range of nonlitigious processes and institutions.

Finally, one would hope that law teachers will become engaged in research that will help to answer some of the questions that have been noted above. Such research might provide an excellent opportunity for interdisciplinary collaboration with a legal sociologist or a political scientist.

In sum, I hope that we will be stimulated rather than deterred by the quandaries and uncertainties that beset this field. It is evident that the world at large is proceeding apace to experiment in various ways with alternatives. I trust that we will see this movement as an exciting opportunity for law teachers and students and that we will not be left behind because we are not yet certain of all—or even most of—the answers.

17. See, e. g., Brown and Dauer, PLANNING BY LAWYERS (Foundation 1978); Bellow and Moulton, THE LAWYERING PROCESS (Foundation 1978).

APPENDIX 4—ADDITIONAL CORRESPONDENCE

(a)

OFFICE OF THE ATTORNEY GENERAL,
Washington, D.C., July 18, 1979.

Hon. ROBERT W. KASTENMEIER,
Hon. RICHARDSON PREYER,
U.S. House of Representatives,
Washington, D.C.

DEAR CONGRESSMEN KASTENMEIER AND PREYER: I want to thank you for the thorough hearings which your two Subcommittees jointly held on the Dispute Resolution Act (H.R. 2863, H.R. 3719, and S. 423). We hope very much that this measure can be enacted into law during this session of the Congress.

There are two questions concerning the dispute resolution program on which I should like to comment. One relates to where and how the program should be set up in the Department of Justice; the other relates to the implications of financing it through LEAA funds.

My strong preference is that the legislation creating the program should adhere to sound principles of administration by according the Attorney General the widest freedom and flexibility as to where in the Department he establishes the program and how he organizes its day-to-day administration. In urging that course I fully recognize the desire among some of your Subcommittee members that the program be lodged with the Office for Improvements in the Administration of Justice. Given the strong and active interest of the Office in developing new modes of resolving disputes—as you know, it developed the plans for the Neighborhood Justice Centers, set them up and is monitoring their performance—and its work with the Congress from the start in developing the present legislative proposal, I share the view that the Office should be closely involved in the dispute resolution program. You may be sure that it is my intention that OIAJ will have a substantial part in setting the policies, directions and standards of the program. I would not want to weight down OIAJ with heavy, detailed, day-to-day administrative duties in any way that might compromise its ability to fulfill its essential goals of developing new ideas for improving the justice system, and working up these ideas by research, consultation and drafting to the point where they can be enacted as legislation or adopted as rules.

Thus, I hope the Congress will see fit to leave the Attorney General a free hand in deciding how to bring OIAJ's interest in the new dispute resolution program to most effective realization. The question whether OIAJ should be established statutorily can be taken up at another time and considered on its merits. In the meantime, you can be certain of my firm intention that OIAJ will have a commanding role in the dispute resolution program.

As to funding, the Administration's position continues to be that we do not seek or support new funding for this program. We have testified that if the bill is enacted without new funding, we would plan to finance it from already-appropriated LEAA funds. That plan should not be understood as an indication that LEAA would be involved in any way in administering the program, for we have no such intention. Of course, if the funds for the program are separately appropriated, then LEAA money would not be used and there would not even be a financial connection between the program and LEAA.

I very much hope that this bill may be moved along without delay. If we can be helpful in any way, please let me know.

Sincerely,

GRIFFIN B. BELL,
Attorney General.

(b)

U.S. DEPARTMENT OF JUSTICE,
OFFICE FOR IMPROVEMENTS IN THE ADMINISTRATION OF JUSTICE,
Washington, D.C., August 3, 1979.

Hon. ROBERT W. KASTENMEIER,
U.S. House of Representatives,
Washington, D.C.

DEAR CONGRESSMAN KASTENMEIER: I appreciate the opportunity to respond to your inquiry as to whether the proposed Dispute Resolution Act (H.R. 2863, H.R. 3719 and S. 423) would authorize activities that would duplicate existing federal programs. It would not do so because the federal government's involvement in promoting the non-judicial resolution of minor disputes is presently very limited and the efforts that do exist need the focus and coordination that would be supplied by the Dispute Resolution Program.

Some federal organizations do employ mediation and conciliation, but primarily to defined areas that are not the principal focus of the Dispute Resolution Program. For instance, the Federal Mediation and Conciliation Service employs mediation techniques, but only in the resolution of labor-management problems. The Community Relations Service of the Department of Justice also practices mediation and conciliation, but under Title X of the 1964 Civil Rights Act, it can only "provide assistance to communities . . . in resolving disputes, disagreements, and difficulties relating to discrimination based on race, color, or national origin . . ." In addition, CRS does not mediate minor disputes between individuals, but enters situations that generally involve groups of people. Its activities have focused on school desegregation, police-community disputes, prison problems and other controversies involving classes of disputants. Though we anticipate that the expertise of CRS will prove helpful in implementing the Dispute Resolution Act, there is very little overlap between its present activities and those that wil be conducted under the Act.

The federal agencies devoting special attention to consumer affairs do not offer programs comparable to those contemplated by the Dispute Resolution Act. The Office for Consumer Affairs receives consumer complaints, but it does not mediate or arbitrate disputes and it does not offer funds to local governments or non-profit organizations to conduct their own programs. The FTC has a small program to study existing alternative mechanisms in the business and consumer fields. It is attempting to develop an information base that may prove helpful when the Dispute Resolution Program is implemented, but the subject matter being examined is limited and no grant funds are available to initiate new programs.

The Department of Housing and Urban Development has awarded money to the American Bar Association to study court handling of housing matters. As part of the project, the ABA is also exploring alternatives to court resolution of housing disputes. It is also looking at small claims courts, but its principal focus is on special housing courts as they compare with courts of general jurisdiction that handle housing matters. The area of overlap with the proposed Dispute Resolution Program, therefore, is small.

The federal activity that most clearly resembles the contemplated Dispute Resolution Program is planned jointly by Action and the Law Enforcement Assistance Administration. The agencies plan to spend $5.5 million in FY 1980 on a total of twelve grants to non-profit organizations to fund four models of community activity, which include arson prevention, property protection, victim-witness programs and dispute resolution.

As is evident from the limited amount of money being made available and the broad objectives of the program, very little money will go to dispute resolution activities. Additionally, the money that is eventually used for dispute resolution projects will have to be spent according to fairly rigid criteria and will not be available for the type of local experimentation encouraged by the Dispute Resolution Act. Furthermore, the specific focus of the Action/LEAA program is crime prevention and not increasing access to justice through the use of speedier, less costly and more effective alternatives to court ajudication of civil as well as criminal disputes. Finally, the Action/LEAA program does not contemplate the establishment of anything resembling the Resource Center in the Dispute Resolution Act. The Action/LEAA program is, therefore, distinct from the Dispute Resolution Program in its purpose, its approach and the amount of money that will be spent on dispute resolution. Certainly, however, when the Dispute Resolution Program is established, it will be necessary to coordinate these two programs.

Action also provides limited funding and volunteer assistance to the San Francisco Community Board Program which promotes the use of alternative methods of dispute prevention and resolution in San Francisco. Action supplies only a small percentage of the resources required by this program.

As the above survey indicates, the present involvement of the federal government in minor disputes resolution is extremely limited. Rather than duplicating present federal activities the Dispute Resolution Program would fill an obvious gap in Federal activity and help to focus and coordinate Federal efforts in this area where they already exist.

If this Office can provide any further assistance, please do not hesitate to contact us. I remain convinced that the Dispute Resolution Act would make a significant contribution to the improvement of the quality of justice in America.

Sincerely,

DANIEL J. MEADOR,
Assistant Attorney General.

(c)

COMPREHENSIVE PLANNING ORGANIZATION,
San Diego, Calif., April 24, 1979.

Hon. ROBERT W. KASTENMEIER,
U.S. House of Representatives, Judiciary Committee, Rayburn Building, Washington, D.C.

DEAR CONGRESSMAN KASTENMEIER: Enclosed is a copy of the executive summary of a report we have prepared regarding a court improvement experiment taking place in San Diego County. I provide this to you as an informational item due to your position on the Courts, Civil Liberties, and the Administration of Justice committee.

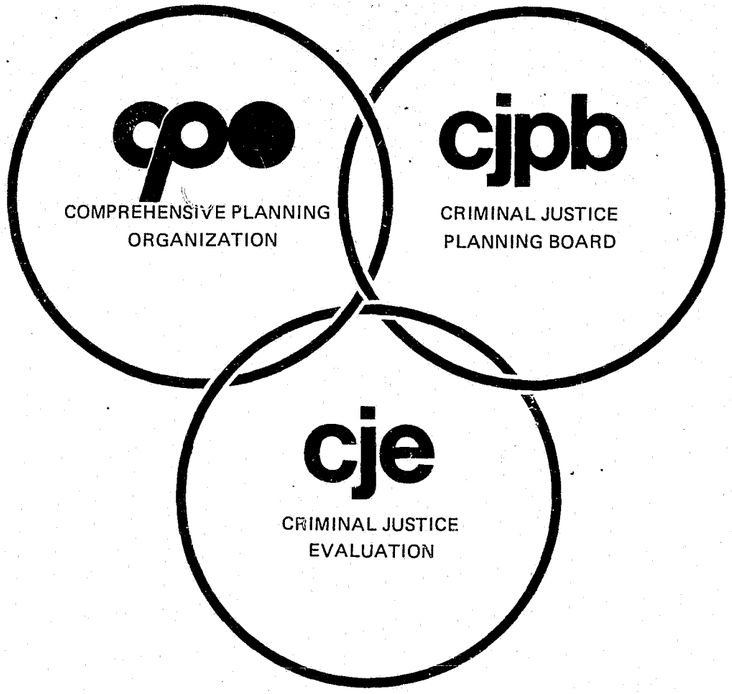
This experiment has attracted attention throughout California with several other jurisdictions considering replication. It is a politically controversial experiment as it does broach the question of court consolidation of lower court and trial court responsibilities. Should you wish a copy of the full report, please advise.

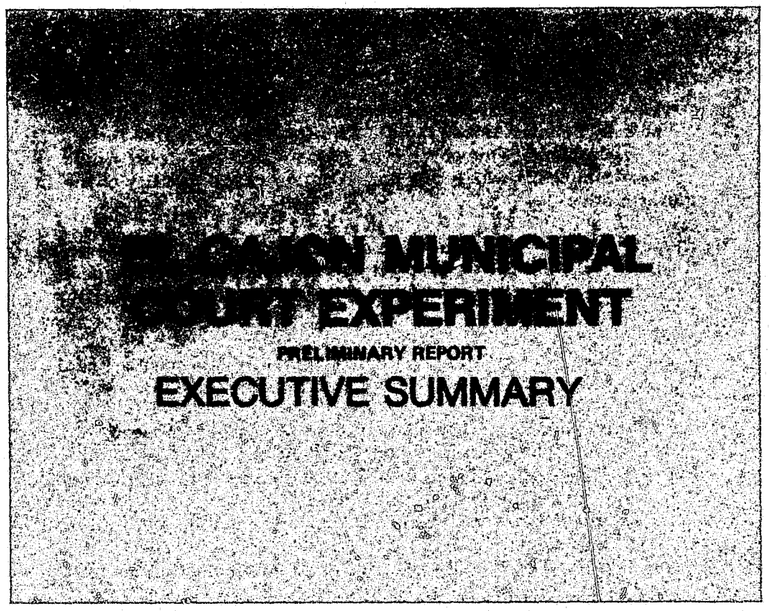
Respectfully,

SCOTT H. GREEN,
Sr. Criminal Justice Evaluator.

Enclosure.

San Diego Region





APRIL, 1979

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This report was financed with funds from the Law Enforcement Assistance Administration.

Executive Summary

NARRATIVE

On April 25, 1977, Senate Bill 1134 was introduced in the California State Senate by Senator Bob Wilson. This legislation called for a five year experiment, whereby the El Cajon Municipal Court would perform judicial tasks which are normally the responsibility of the superior court.

The purpose of the experiment is to test the feasibility and potential benefit of giving Municipal Court judges the authority to hear specified superior court matters. The highlighted elements of the bill included:

1) El Cajon Municipal Court judges who meet the necessary qualifications of a Superior Court judge can hear, upon consent by all parties:
   a. civil matters when the value of demand or property is more than $5,000 and less than $30,000.
   b. felony cases with a specified sentence of three time periods of imprisonment in state prison.[6]
   c. domestic cases in which both parties reside within the court's jurisdiction.
2) The judge will serve without additional compensation as do the clerks who are designated as assistant county clerks.[7]

There were opposing issues raised as to the constitutionality of Senate Bill 1134 concerning, what might be construed as, the establishment of a second Superior Court in San Diego County. The implications of this issue were avoided when the Chief Justice of the California Supreme Court, at the request of the Presiding Judge of the San Diego Superior Court, assigned the El Cajon Municipal Court judges to sit as Superior Court judges under authority of Article VI, Section 6 of the State Constitution. In this capacity, the El Cajon Municipal Court judges could hear all superior court matters. (Although working by assignment of the Chief Justice, the El Cajon judges have followed in concept, Senate Bill 1134).[8]

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[6]Sentences are specified in Penal Code Section 1170 (determinate sentencing). This excludes capital cases from the El Cajon Municipal Court's jurisdiction.

[7]Government Code, Sections 73650-73658.

[8]S. B. 1134 was enacted on January 1, 1978.

The results, after the first year of the El Cajon Municipal Court experiment, indicate that many of the success measures established are being achieved. Products of the experiment, to date, have been a reduction in the downtown Superior Court workload and a quicker process for disposing criminal cases without complaints of due process violations. Additionally, preliminary data indicate that the experiment has not caused increased workload overall for interface agencies. Some agencies have experienced a decrease in workload while others have had to transfer personnel to respond to shifts in workload. The District Attorney's Office indicates that an additional clerical position was necessary to handle the displacement of work from downtown to the branch office.

With the support of the San Diego Superior Court, two other San Diego County Municipal Courts (San Diego and South Bay) began hearing felony criminal cases in May, 1978 under assignment of the Chief Justice. At the time of this report, North County Municipal Court was also preparing to take on this additional work task. During 1978 the three Municipal Courts authorized to hear superior court matters processed 843 felony matters thereby reducing the downtown superior court criminal filings by 19%.

The criminal workload for the superior court during 1979 should be further reduced if the active participation of all the Municipal Courts continues. The Municipal Courts absorbing this additional felony work should provide some flexibility to the Superior Court in directing additional efforts towards reducing its backlog of civil matters.

The preliminary findings concerning this court experiment are positive. There are, however, factors which must be further scrutinized before definitive statements of effectiveness can be made. These factors include:

1) The limited impact the experiment has had on civil litigation.
2) The long range impact this experiment will have on lower court case processing, especially when considering the increase in superior court workload compared to a reduction in preliminary hearings.
3) The advantages, either in workload or cost reductions that have prompted the full cooperation of both defense and prosecuting attorneys.
4) The overall cost implications of this experiment for both the court and interface agencies.

Additionally, eighty-one percent (81%) of those Superior Court judges responding to a survey question stated they were opposed to the consolidation of superior and municipal courts into one court of general jurisdictional responsibility. Therefore, the political ramifications of the expansion of this experiment (which entails the consolidation of superior and municipal court judicial responsibilities) should seriously be considered in context with the potential benefits.

During the next six months the evaluator will be collecting data in an effort to address those issues noted above. In addition to the El Cajon Municipal Court, the assessment will be expanded to include the other Municipal Courts in San Diego County that are also hearing superior court casework. Reviewing the activities of these other Municipal Courts will be useful in considering whether the El Cajon Municipal Court experiment is transferable to other jurisdictions which vary in many ways from the milieu of the El Cajon Municipal Court.

ISSUES, FINDINGS AND CONCLUSIONS

The El Cajon Municipal Court judges, assigned by the Chief Justice of the Supreme Court of California and working within the parameters of Senate Bill 1134, have been hearing superior court cases in the El Cajon Municipal Court since September, 1977. The purpose of this court experiment is to test the feasibility and potential benefit of giving municipal court judges jurisdictional authority to hear matters formerly the exclusive responsibility of the Superior Court.

ISSUE I: WORKLOAD IMPACT - The El Cajon Municipal Court experiment will reduce the San Diego Superior Court criminal and civil workload, and do so without jeopardizing the processing of lower court work. Additionally, interface agencies will not have to assume an increased workload as a result of the experiment.

A. SUPERIOR COURT

Conclusion

During calendar year 1978, the El Cajon Municipal Court judges saved the San Diego Superior Court approximately one judge-year of work, with the greatest workload impact being in the criminal field. The El Cajon Municipal Court was able to process 381 superior court criminal cases, (9% of the total superior court case filings, and 8% of the disposition of cases reported for the San Diego Superior Court during 1978)[1] that previously would have been the responsibility of the Superior Court. Survey data collected from El Cajon Municipal Court judges, Superior Court judges, Deputy District Attorneys and defense attorneys in El Cajon indicate agreement that there has been a positive reduction in San Diego Superior Court workload as a result of the experiment.

The El Cajon experiment had a minimal affect on the civil superior court caseload during 1978 (123 cases or less than 1% of the total civil filings in the Superior Court).

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[1]This data excludes filings and dispositions for the North County Branch Court, since the El Cajon experiment has no impact on their workload.

Findings

1. The workload impact of the El Cajon Municipal Court judges carrying out superior court case work represents a time saving of 91.3% of one superior court judge-year.[2]
2. The judicial time-saving was primarily in the criminal workload, with 71% of one judge-year saved.
3. In the superior court civil workload, 3.5% of one judge-year was saved, in addition to 16.8% of one judge-year in domestic work that would have been processed in San Diego Superior Court without the experiment.
4. El Cajon representatives of Defenders, Incorporated (5) and the District Attorney's Office (6 out of 10), as well as El Cajon judges (5), agree that one advantage of the experiment is a reduction in the downtown Superior Court workload.
5. One hundred percent (100%) of the nineteen (19) Superior Court judges responding to the questionnaire indicated that one of the advantages of municipal courts carrying out superior court responsibilities is the reduction in workload for the Superior Court.

B. MUNICIPAL COURT

Conclusion

During the first year of the experiment, the El Cajon Municipal Court experienced no detrimental effects in processing lower court casework. However, additional data, representing a longer time period, must be reviewed. Changes in lower court procedures and the addition of a new judge in El Cajon during this period preclude definitive statements as to the affect of the experiment on the municipal court casework processing.

Findings

1. The criminal disposition to filing ratio for the El Cajon lower court casework decreased from 80% in 1977 to 79% in 1978, which is not a significant change.

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[2]This is based on the current Judicial Council measure of one judge-year equalling 74,000 minutes of case related work for a Superior Court with 21 judges or more. Time study results show that the El Cajon Municipal Court saved Superior Court 67,590 minutes.

2. Changes in drunk driving arraignment procedures, leading to guilty pleas earlier in the process, and a greater emphasis on settlement of misdemeanor cases at the readiness conference are intervening factors which could explain why the lower court workload was not affected.
3. As a result of the experiment, felony pleas prior to the preliminary hearing increased by 126% from 1977 to 1978 (106 to 240).
4. Fewer preliminary hearings took place in 1978 (330) compared to 1977 (411), a 20% reduction, resulting in a savings of judicial time previously spent for this proceeding.[3]

C. INTERFACE AGENCIES (District Attorney, Defenders, Incorporated, County Clerk, Marshal's Office, Sheriff's Department and Probation Department)

Conclusion

When reviewed systematically, interface agencies that work with the El Cajon Municipal Court, except for the District Attorney's Office, indicate they have not experienced additional workload because of the experiment. The District Attorney did hire an additional secretary due to the transfer of workload to El Cajon Branch Office.

A product of the experiment is the displacement of cases from one court to another. This required workload shifts by the interface agencies, but should not result in additional work departmentwide.

Findings

1. District Attorney - The experiment has required the assignment of one attorney, one investigator and one clerical position to the El Cajon District Attorney's Branch Office. The clerical position was additional, while the attorney and investigator were transferred from other divisions in the District Attorney's Office. Although the increased workload in El Cajon would appear to be counter balanced by the reduction in casework downtown, data should be reviewed over a longer period. The expansion of this process to the other Municipal Courts could create detrimental workload shifts for this agency in trying to cover all the additional courts hearing felony cases with attorneys experienced in felony work.

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[3]Judicial Council Reports, 1977 & 1978 (This includes cases disposed of as misdemeanors at the preliminary hearing as well as felony dispositions)

2. Indigent Defense - The El Cajon Municipal Court has contracted with Defenders, Incorporated to represent approximately 95% of indigent felony defendants since July, 1978. This agency has increased staff to handle this additional workload. However, this increase was primarily due to additional case work resulting from new contract arrangements with the court unrelated to the experiment.
3. County Clerk - There has been no additional workload other than the initial training of the Municipal Court clerks to carry out superior court clerical procedures and having to develop and maintain a system for assigning case numbers in sequence with the downtown Superior Court filing system. There could be workload reductions to the downtown Superior Court Clerk's Office as a result of the El Cajon Municipal Court clerks taking on some of the Superior Court clerk's responsibilities. This will be examined further in the final report.
4. Marshal and Sheriff - There has been no additional workload for the Marshal's Office or Sheriff's Department in transferring prisoners to court or in providing bailiffs. By agreement with the Sheriff, the Marshal is transporting felony defendants to El Cajon Court and staff has not been increased to carry out this responsibility.
5. Probation Department - The Probation Department has had to make periodic shifts in personnel to handle the additional presentence reports being requested by El Cajon Municipal Court judges. This has not resulted in additional work overall for the agency, but simply a displacement of requested reports from the San Diego Superior Court to the El Cajon Municipal Court.

ISSUE II: CASE PROCESSING TIME - The El Cajon Municipal Court experiment will reduce the time to process superior court felony cases without causing delays in the processing of their lower court casework.

Conclusion

The median time for the El Cajon Municipal Court to process similar felony cases from the date of lower court filing to superior court sentencing, or not guilty finding, is substantially less than the traditional process. This has been accomplished without causing delays in the processing of the El Cajon lower court work. An analysis of this data over an extended period of time will validate this conclusion.

Findings

1. The superior court felony cases adjudicated in the El Cajon Municipal Court were resolved 28 days faster than similar

cases processed under the traditional system. The median number of days for the traditional system was 104 days versus 76 days for cases handled by the El Cajon Municipal Court.[4]
2. A greater proportion of cases with multiple defendants were sent to the downtown Superior Court during the experiment, and this had a slight impact on case processing time. However, the felony cases adjudicated in El Cajon were not significantly different in regard to the type of offense (categorized as crimes against persons, property crimes, narcotics and other offenses), or the number of multiple offense cases than those sent to the downtown Superior Court.
3. Attorneys responsible for defense of indigent clients and Deputy District Attorneys in El Cajon agree that superior court cases are resolved more expediently in the El Cajon court. Seventy-four percent (74%) of the Superior Court judges responding to a questionnaire (14) also cited the reduction in case processing time as a positive result of municipal courts handling superior court cases.
4. During the study period, the median time to process El Cajon lower court cases decreased from 40 to 33 days, indicating that the experiment did not detrimentally affect lower court casework. The reasons for the decrease are suspected to be the addition of a new judge, changes in lower court procedures and elements of the experiment itself, which will be examined in the final report.

ISSUE III: COST ANALYSIS - The El Cajon Municipal Court experiment will demonstrate an adjudication process that is more cost-effective than the standard model.

Statement A cost analysis of this experiment will be presented in the final report. Preliminary workload impact and case processing data explained earlier in the report indicate that there are expected cost advantages to the El Cajon Municipal Court experiment.

Findings

1. The average cost per case for indigent defense services was reduced by $72.00 when samples of similar cases processed under both the traditional system and El Cajon Municipal Court experiment were compared.

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[4]The median was used, rather than the average case processing time since it is not influenced by the small number of cases that are extended over time.

2. The reduction in preliminary hearings in El Cajon Municipal Court due to earlier negotiations of pleas produces a cost savings for witnesses (specifically law enforcement officers), and time savings for lower court judicial and non-judicial personnel.
3. The reduction in total days to process felony cases under the experiment should produce a savings when analyzed on a cost per case basis.

ISSUE IV: DUE PROCESS - The El Cajon Municipal Court experiment will not jeopardize the due process rights of defendants or litigants.

Conclusion

Although having the prerogative to request that a case be adjudicated in the San Diego Superior Court, attorneys in 69% of the felony cases originating in El Cajon agreed to have their cases remain there. This would indicate acceptance of the changes in procedures.

Qualitative data shows that representatives of El Cajon Defenders, Incorporated and the District Attorney's office, as well as the San Diego Superior Court judges agree that due process rights are not being jeopardized by the procedures of this court experiment. Additional survey data from private attorneys relating to possible due process infractions in the El Cajon Municipal Court is needed before any final conclusions can be reached on that issue.

Findings

1. One hundred percent (100%) of the defense and prosecuting attorneys surveyed in El Cajon (15) agree that due process rights are not jeopardized by the El Cajon experiment.
2. All nineteen superior court judges responding to a questionnaire felt that due process was being protected under the El Cajon Municipal Court experiment.

ISSUE V: ADDITIONAL ISSUES - Case Profile; Attorney Stipulation Criteria Appeal Rates, and Superior Court Judges Survey

A. CASE PROFILE

Conclusion

Disposition and sentence data does not substantiate the assumption that the El Cajon Municipal Court is retaining less serious superior court felony cases and transferring more complex cases to the downtown court.

Findings

1. Review of those felony cases that originated in the El Cajon Municipal Court jurisdiction, shows 11% were reduced to misdemeanors by El Cajon judges as opposed to 16% by the San Diego Superior Court.
2. Preliminary data indicate that jail sentences were similar in the El Cajon Municipal Court (65%) and the San Diego Superior Court (67%) when comparing felony cases originating in the El Cajon Municipal Court district during January through June of 1978.

   Valid conclusions regarding prison and probation sentences cannot be made at this time due to the limited number of cases in these categories.

B. ATTORNEY STIPULATION CRITERIA

Conclusion

Defense attorneys and Deputy District Attorneys agree that the most important reason for requesting that a case be sent to the San Diego Superior Court was whether there are pending charges against a defendant downtown. Other factors of importance noted by the attorneys include the seriousness of the charges against a defendant and the likelihood that a case will go to trial.

The San Diego County Bar Association has voted against the removal of the stipulation requirement, which requires that both defense counsel and District Attorney agree to leave the case in El Cajon, from the experimental process. In addition, of the fifteen El Cajon defense attorneys and Deputy District Attorneys surveyed, 79% do not believe that all types of felony cases should remain in El Cajon.

C. APPEAL RATES

Conclusion

El Cajon Municipal Court did not experience a higher percentage of felony superior court cases appealed when compared to San Diego Superior Court during 1978. Results for civil matters are inconclusive due to the limited number of superior court civil cases heard in El Cajon.

Findings

1. The appeal rate for 1978 Superior Court criminal cases disposed in El Cajon Municipal Court was 2%, compared to 5% in San Diego Superior Court. This implies that the El Cajon Municipal

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Court did not experience a disproportionate number of appeals during the first full year it heard superior court matters.[5]

2. One superior court civil case and one domestic case heard in El Cajon Municipal Court had an appeal filed last year.

D. SUPERIOR COURT JUDGES SURVEY

Conclusion

The majority of the San Diego Superior Court judges surveyed feel that municipal courts are capable of handling all felony and domestic cases to final disposition, and civil cases up to $15,000. However, they indicate that a disadvantage of this type of system is the potential for judicial administration problems. Also, they agree that the other Municipal Courts in San Diego County should provide superior court services similar to those being done in the El Cajon Municipal Court. In contrast, they are opposed to the consolidation of lower courts and superior courts into one court of general jurisdictional responsibility.

Findings

1. The majority of the nineteen Superior Court judges surveyed stated that municipal court judges are capable of hearing all felony cases (84%) and domestic cases (74%) to final disposition and civil cases up to a $15,000 limit (58%).
2. In the Superior Court judges survey, the most frequently mentioned disadvantage of municipal courts carrying out superior court functions was the potential for judicial administration problems (56%) followed by delays in lower court casework completion (42%).
3. Ninety-four percent (94%) of the eighteen judges responding to the question feel that other Municipal Courts in the county should provide similar judicial services such as those currently provided in El Cajon.
4. Eighty-one percent (81%) of the Superior Court judges responding (13 of 16) oppose the consolidation of superior and municipal courts into one court of general jurisdiction. (Three judges declined to answer this question, and one marked a don't know response).

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[5] The higher rate of appeals for the San Diego Superior Court may be attributed to the volume and complexity of cases, originating throughout the county, that are heard by this court.

STEERING COMMITTEE RESPONSE

The steering committee members have reviewed this report and recommend it be released. We are pleased with the preliminary report and acknowledge the effort that went into its preparation.

One committee member has expressed his concerns about the experiment and issues he feels should be reviewed in the final report. The committee believes it appropriate that his comments be made part of this report. We include these remarks for the reader's consideration.

William A. Yale

Judge William A. Yale
Steering Committee Chairman

County of San Diego

OFFICE OF DEFENDER SERVICES

County Courthouse
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San Diego, California 92101
(714) 236-5059

LOUIS S. KATZ
Director

April 17, 1979

Mr. Scott Green
Comprehensive Planning Organization
1200 Third Avenue
San Diego, CA 92101

Re: Evaluation of El Cajon Court Experiment

Dear Mr. Green:

I have reviewed your preliminary report regarding the work of the El Cajon Court to date sitting as a Superior Court. I would like to suggest that in preparing your final report you consider the following items.

1. Your report indicates a higher percentage of felony defendants sentenced in El Cajon to State prison than those sentenced out of San Diego. The reasons should be explored.

2. In your report there is a larger percentage of cases filed as felonies reduced to misdemeanors in the San Diego Court than in El Cajon.

3. Does a Court located in the metropolitan center of the County draw on a broader cross-section of jurors than a branch Court in East County?

4. Will there be a larger or smaller percent of motions granted pursuant to P.C. 995 or P.C. 1538.5 by a Superior Court than by the El Cajon Branch Court sitting as a Superior Court?

5. Should the El Cajon experiment be reviewed by private practitioners who practice in both Courts in addition to the staff of Defenders, Inc. and the District Attorney's office?

6. Would there be an increase or decrease in the percentage of guilty pleas on misdemeanor charges if the counseling attorneys do not try the cases where their office provides counseling?

Since the information contained in the preliminary report is based on a limited sample of Superior Court cases handled in the El Cajon Court, we will be in a better position after the experiment has been in effect for a full year to evaluate any differences between sentencing and plea bargaining practices in the El Cajon Court as compared to the downtown Courts.

At this time, as the public defender, I am not prepared to say the possible pressure in El Cajon to give up a preliminary hearing is beneficial to the entire judicial system. My concern is that an attorney representing a defendant may be in a better position to plea bargain and to evaluate a case after he has had the opportunity to observe witnesses testify at the preliminary hearing and to find out what evidence the prosecutor will present. But, I recognize the advantages to the system of early case disposition where a guilty plea is inevitable.

I do not recommend that a defense attorney give up his client's right to a preliminary hearing unless there are substantial advantages to be gained. At this time, the report does not answer my questions as to the benefit to a defendant of the pre-preliminary hearing plea bargain process used in El Cajon. I am interested in examining the results of a full-year study of the plan before I reach a final conclusion.

Sincerely,

LOUIS S. KATZ, Director
Office of Defender Services

LSK:jmg

cc:

(d)

DISPUTES PROCESSING RESEARCH PROGRAM,
LAW SCHOOL, UNIVERSITY OF WISCONSIN—MADISON,
Madison, Wis., October 4, 1979.

Congressman ROBERT W. KASTENMEIER,
U.S. House of Representatives,
Washington, D.C.

DEAR CONGRESSMAN KASTENMEIER: We are writing to express our unqualified support for the passage of your amendment to S. 423, the Dispute Resolution Bill. The undersigned are faculty members at the University of Wisconsin-Madison who are currently engaged in studies of dispute processing. These include a detailed study of minor disputes in Milwaukee and a nation-wide, Department of Justice-funded study of civil litigation and dispute processing—the Civil Litigation Research Project. Our research has led us to recognize that many citizens have little or no access to mechanisms for the effective, timely, and non-costly resolution of minor disputes. We believe that it is important for all levels of government to work to solve this problem.

We think, however, that the federal government should take the lead in this effort. There is a pressing need for a national body to coordinate, study, and assist in the development of dispute resolution mechanisms. Although most of the problems created by overcrowded court dockets, over-use of judicial resources, and the paucity of effective alternatives must ultimately be dealt with by state and local government, there is a clear necessity for national coordination and for the encouragement, both fiscal and substantive, of local initiatives to develop non-judicial mechanisms to resolve disputes. There is no existing institution to help communities who want to respond to their needs. A national body, such as the Dispute Resolution Resource Center you propose, is needed to serve as both an information clearinghouse and as a source of technical expertise and assistance for communities wishing to improve, expand, or develop their dispute resolution mechanisms. Such leadership is crucial to the orderly development of nationwide dispute resolution mechanisms.

Your amendment to S. 423 meets the needs outlined above. At the same time, it encourages local entities to experiment with those programs best suited to their particular geographic regions, and provides financial aid to those communities and groups who need help to get programs started. In addition, the amendment provides for obtaining needed empirical data on the cost, effectiveness, and extent of use of various dispute resolution mechanisms which can be used by local groups and planners of future reforms in this imporant area. For these reasons, we endorse your amendment to S. 423, and hope its passage through Congress is swift and successful.

Yours very truly,

STEWART MACAULAY,
Professor of Law.
HERBERT KRITZER,
Assistant Professor, Political Science.
DAVID M. TRUBEK,
Professor of Law.
JOEL B. GROSSMAN,
Professor of Political Science.
JACK LADINSKY,
Professor of Sociology.

(e)

UNIVERSITY OF SOUTHERN CALIFORNIA,
SOCIAL SCIENCE RESEARCH INSTITUTE,
Los Angeles, Calif., October 15, 1979.

Congressman ROBERT W. KASTENMEIER,
U.S. House of Representatives,
Washington, D.C.

DEAR CONGRESSMAN KASTENMEIER: I have received a copy of a letter written by Professors Macaulay, Trubek, Kritzer, Grossman, and Ladinsky of the University of Wisconsin supporting passage of your amendment to S. 423, the Dispute Resolution Bill. I have spent the past ten years conducting research and writing about various alternatives to litigation. Like my Wisconsin colleagues, I am convinced that many Americans have no dispute processing institution to which they can practically turn when faced with upsetting conflict. S. 423 appears to be an

intelligent attempt to respond to this need in a careful manner. I endorse its passage.

Sincerely yours,

WILLIAM L. F. FELSTINER,
Research Associate Professor of
Social Science in Law.

(f)

AMERICAN BAR ASSOCIATION,
San Jose, Calif., May 31, 1979.

Hon. ROBERT W. KASTENMEIER,
Chairman, Subcommittee on Courts, Civil Liberties and the Administration of Justice, Committee on the Judiciary, House of Representatives, Washington, D.C.

Re: H.R. 2863—Dispute Resolution Act.

DEAR MR. CHAIRMAN:

1. Request to amend definition of dispute resolution mechanism—section 3(4).

Thank you for your letter in reply to mine in which I proposed that section 3(4) be amended to read as follows:

(4) the term "dispute resolution mechanism" means any court with jurisdiction over minor disputes, *including but not limited to small civil claims*, and any forum which provides for arbitration, mediation, conciliation, or similar procedure, which is available to resolve any minor dispute; [amendment is in italic].

Please accept this letter in lieu of a request to appear personally in support of this bill and the proposed amendment at the joint subcommittee hearings that have been scheduled in June.

2. An explicit reference in the bill to small claims courts is vital to insure receipt of a fair allocation of federal funds under the Act.

You wrote "There is no doubt that a 'court with jurisdiction over minor disputes' would include small claims courts." Few would disagree with that interpretation.

The purpose of the amendment, however, is to evidence the intent of Congress that small claims courts be given an opportunity at least equal to that given criminal courts in securing financial assistance to improve existing dispute resolution mechanisms which satisfy criteria under the Act or to establish new mechanisms.

Judges and lawyers have developed considerable experience within the past few years in various forms of diversion of minor criminal cases. The grave impact of all forms of crime in our society and on the caseloads of the criminal courts makes the concentration on criminal courts understandable. In the absence of express mention of small claims courts by Congress, it will be natural for low level administrators entrusted with implementation of the Act to continue to focus their attention on minor criminal disputes. Numerous criminal courts have already begun using alternative dispute resolution mechanisms outside the courts. Relatively few small claims courts have participated in similar activities.

3. Small claims courts are unsurpassed in high volume quality dispute resolution.

Only recently has it become widely recognized that there is no mechanism for resolving minor civil disputes either inside or outside of the courts that is more capable than small claims courts in resolving minor disputes in large volume. No ways have been found to resolve large numbers of disputes in a manner that is consistently more fair to both sides, faster and less expensive to operate than the techniques used by small claims courts.

Small claims courts generally use simple procedures and investigative techniques in contrast to the adversary methods which are used in other types of courts. Small claims courts give greater protection to the unrepresented and inexperienced litigants than is possible in more formal courts.

A majority of litigants in small claims courts are individuals and up to half of the cases are filed by individuals. On the other hand businesses and public agencies file a significant percentage of all small claims cases and the vast majority of them are against individuals. The former benefit from the absence of delay and low filing fees, the latter from informal and simple procedures.

Approximately 400,000 small claims cases are filed annually in California and comparable numbers are filed in several other states which have large urban populations.

There is no mechanism for resolution of civil disputes that serves a broader spectrum of the population than small claims courts.

Yet existing mechanisms for the resolution of minor disputes, including small claims courts, are inadequate in meeting the needs of our society, as the authors of the proposed Dispute Resolution Act are aware. The relatively recent proliferation of alternative dispute resolution mechanisms outside the courts supports this conclusion.

4. Small claims courts should become more innovative and accessible to the public.

Several small claims courts have used alternative dispute resolution procedures either under court sponsorship or in cooperation with nonjudicial organizations. This has occurred in such widely separated communities as Portland, Maine, New York City, Chicago, Minneapolis, San Jose and Santa Monica, California.

Approximately 100,000 small claims cases have been analyzed in six California judicial districts around the state which tried a variety of innovative procedures. These include: night and Saturday sessions; court employed legal advisors to assist small claims litigants to prepare for trial but who did not appear in court with them; law clerks for small claims court judges; mediation; more interpreters for non-English speaking litigants; and a specially prepared booklet explaining small claims court procedures.

The foregoing marks the recently completed first phase of the Small Claims Court Experimental Project which the California Legislature created in 1976 and expanded in 1978. The statutory Advisory Committee of the project and the Department of Consumer Affairs are to submit an interim report to the Legislature this summer.

The Municipal Court at San Jose and the Santa Clara County Bar Association have been operating the Neighborhood Small Claims Court there for almost two and one-half years. Endorsed by the National Conference of Special Court Judges. this privately financed small pilot project provides night-time mediation and voluntary non-binding arbitration of cases at a community recreational center that is located in a low income predominantly Spanish speaking neighborhood. The deputy clerks and court officer are bilingual. The mediation and arbitration proceedings are conducted by lawyer-volunteers. More than three-fourths of these small claims cases are completed in the neighborhood although either side has the right to a trial de novo in the regular session of the small claims court by making an objection to the award within 5 days.

This is unfortunate because a significant percent of small claims cases involve issues which are less likely to be resolved satisfactorily through use of conventional small claims court procedures than through alternative dispute resolution mechanisms. This is true particularly in cases where the opposing parties normally would have continuing relationships with each other, such as family members, neighbors, landlords and their tenants, businesses and their customers of long standing.

Conventional small claims court procedures do not allow sufficient time for busy courts to probe deeply into what sometimes are complex histories in order to determine the cause of the dispute and help the parties resolve their differences. Moreover the typical judgment or court order identifies one side as the "loser" and this often embitters that party.

There are also numerous cases where the parties have cross claims against each other and the facts and the law would require a court to deny relief to both sides but in an alternative dispute resolution mechanism the parties can reach satisfactory settlement.

Small claims courts should be encouraged by Congress to improve and extend their services to the public under this Act. It also is in the public interest to encourage alternative mechanisms that are outside the courts to become linked to courts in ways which will encourage the courts to systematicly refer appropriate cases to them for resolution. Ideally every small claims court judge would become familiar with every nonjudicial alternative dispute resolution mechanism in his or her community. It would be equally desirable to provide easy access to small claims courts by having alternative mechanisms refer parties to those courts in disputes they have failed to resolve.

The National Conference of Special Court Judges and The National Judicial College are engaged in preliminary planning of a national seminar for small claims court judges which has tentatively been titled the National Seminar on Resolution of Minor Disputes. The seminar will review the latest developments in judging small claims cases and show judges how they may use or establish alternative dispute resolution mechanisms.

The Municipal Court at San Jose also refers a few small claims cases to lay mediators who are volunteers affiliated with the Neighborhood Mediation and Conciliation Service, a unit of Santa Clara County Government.

Small claims have been subject to binding arbitration in the Civil Court of the City of New York for more than two decades whenever the parties agree to accept lawyer-arbitrators selected by the Court. The Hennepin County Municipal Court operates the Conciliation Court at Minneapolis that was organized about 1915. It now processes more than 30,000 small claims annually. For the past six years lawyers as court referees hear these cases. Several Florida courts refer small claims cases to Citizen Dispute Settlement programs that are being established in that state.

Incidentally, "small claims courts" as used in this letter means any court, unit or session of a court in which the jurisdictional ceiling for a civil claim usually isn ot higher than $1,500, informal and simple procedures are followed, and lawyers are not allowed to represent parties or generally do not appear for parties.

5. Congress should encourage small claims courts to use and develop alternative dispute resolution mechanisms.

Pretrial settlement conferences have been long an integral part of American court procedures. Few cases actually go to trial among those that are filed in any court. Many institutions have developed diverse forms of mediation or conciliation practices and procedures. Arbitration has been popular for several decades in the resolution of civil disputes. What is new to courts is the systematic use by small claims courts of mediation or conciliation, and arbitration when the other alternatives have failed to resolve the dispute. Also new are several of the innovations that are listed above in the reference to the Small Claims Court Experimental Project in California.

The list of communities in this letter having innovative small claims courts is not a complete list of them. Nevertheless most small claims courts in this country do not use alternative resolution mechanisms. Undoubtedly many of their judges have never heard of their use in small claims court cases.

Innovations by small claims courts will require funds beyond those required for the usual operations of the courts. Small claims courts in particular have been among the last in the judicial systems to receive financial assistance. The chances of securing local financial support for small claims court innovations in this period of government retrenchment are not very good.

Recent studies show that users of small claims courts generally perceive them in a favorable light. This is a striking contrast to the public's perception of criminal courts and courts which process civil litigation other than small claims. It is ironical therefore that small claims courts are usually treated within a state judicial system as its stepchild.

The authors of this bill, however, recognize that inadequate mechanisms for the resolution of minor disputes are "of enormous social and economic consequence." These inadequacies are important among the factors which thwart efforts in this nation to "insure domestic tranquility", that still is one of the fundamental responsibilities of government.

State and local governments need encouragement from Congress to make changes in their judicial systems so as to improve the services that are available to the most people. Accordingly, the intention of Congress to assist small claims courts should be explicitly stated in section 3(4) of the Act as suggested in the proposed amendment.

Respectfully submitted,

ROBERT BERESFORD,
Chairman, Committee on Small Claims Courts,
National Conference of Special Court Judges.

(g)

HARVARD LAW SCHOOL,
Cambridge, Mass., February 13, 1979.

HON. ROBERT W. KASTENMEIER,
Chairman, Subcommittee on Courts, Civil Liberties and the Administration of Justice, House of Representatives, Washington, D.C.

DEAR REPRESENTATIVE KASTENMEIER, By coincidence, your letter and enclosed Hearings volume arrived on the date that I appeared to testify at a hearing Senator Kennedy was having here in Boston on the dispute resolution act and the general question of facilitating alternative dispute resolution mechanisms. I was much encouraged by Senator Kennedy's statement that he planned to make the

passage of this bill a high priority, both in the Senate and in the House, and I am therefore hoping the bill will become law early this year. The more I think about the subject, the ore I feel that this bill is precisely the right first step for the federal government to undertake as our greatest needs at present are better coordination of the available knowledge that we have, more research to learn more than we presently know, and some modest seed money to facilitate useful experiments. These, precisely, are the things that the dispute resolution act would accomplish.

If there is anything else I can do to work towards the passage of the bill, please let me know.

Sincerely,

FRANK E. A. SANDER,
Professor of Law.

(h)

P.R.E.A.P. (PRISON RESEARCH EDUCATION ACTION PROJECTS),
Westport, Conn., May 7, 1979.

Congressman ROBERT W. KASTENMEIER,
House Office Building,
Washington, D.C.

DEAR CONGRESSMAN KASTENMEIER: I was pleased to read a copy of H.R. 2863 (financial assistance to community resolution of minor disputes), which you and your colleagues have so wisely introduced.

We sorely need community mechanisms to resolve minor disputes at the earliest possible point. In my 24 years of ministry to Federal prisoners, as well as in our research center, I have been struck by the numbers of persons who committed crimes which could have been prevented before they escalated into more serious behaviors, if there were an appropriate process.

Training in dispute management is a needed skill for citizens who wish to take responsibility for making their communities safer. Your bill provides an opportunity for neighborhoods to begin to manage their own conflicts.

I strongly support H.R. 2863 and would appreciate your keeping me informed on its progress.

Sincerely,

FAY HONEY KNOPP,
Coordinator.

(i)

PROJECT FOR SERVICES AND RESEARCH IN DISPUTE RESOLUTION,
Stillwater, Okla., June 12, 1979.

Re: Dispute Resolution Act.

Congressman PETER W. RODINO,
Chairman, Committee on the Judiciary, Rayburn House Office Building, U.S. House of Representatives, Washington, D.C.

DEAR CONGRESSMAN RODINO: I understand that S. 423, the proposed Dispute Resolution Act, has passed the Senate and been referred jointly to your committee and to the Committee on Interstate and Foreign Commerce. The orderly development of procedures for effective, peaceful resolution of interpersonal disputes is made possible by this bill. I urge your support of it.

The bill is timely in that opportunities for interpersonal conflict management are growing and changing. An ever-increasing number of programs now offer to deal with disputes through interventions by social agents (conciliators, mediators, arbitrators) rather than legal agents (police, lawyers, courts). The American Bar Association's recent *Alternatives Update Report* (Winter, 1979) lists 186 such dispute resolution projects in 35 states, Puerto Rico and the District of Columbia.

The programs range from family violence centers and conciliation courts through consumer advisories and tenant services to pre-trial diversion and victim restitution centers as well as programs for the resolution of neighborhood disputes. There is presently great diversity accompanied by a lack of coordination in this vigorous field; no fewer than five organizations compile information on a nationwide scale in attempts to keep up with the growth of data about dispute resolution alternatives.

As coordinator of the Dispute Services team at Oklahoma State University, I'm interested in the development of procedures which will extend social dispute resolution alternatives to clientele not now served. Federal leadership and support at this time can help channel the efforts being made nationwide, and hasten the widespread availability of dispute services.

Thank you for your patient consideration of my request.

Yours very truly,

BOB HELM, Ph.D.,
Project Coordinator and Associate Professor,
Department of Psychology.

(j)

SANTA CLARA COUNTY BAR ASSOCIATION,
San Jose, Calif., July 10, 1979.

Hon. ROBERT W. KASTENMEIER,
2d District of Wisconsin,
Dirksen Building,
Washington, D.C.

DEAR CONGRESSMAN KASTENMEIER: As you are probably aware, the Santa Clara County Bar Association has sponsored the Neighborhood Small Claims Court project, an innovative way of dealing with minor disputes in the neighborhood where they occur rather than in a downtown courthouse. Should you not be fully familiar with the project, we are enclosing a brief description.

Therefore, we were very interested in H.R. 2863, a bill that provides financial assistance for the development and maintenance of effective, fair, inexpensive and expeditious mechanisms for the resolution of minor disputes. On June 28, 1979, the Trustees of the Santa Clara County Bar Association unanimously passed a resolution in support of that bill.

Thank you.

Yours very truly,

NORDIN F. BLACKER,
President-Elect,
Santa Clara County Bar Association.

Enclosure.

(k)

NEIGHBORHOOD SMALL CLAIMS COURT EXPANSION PROPOSAL

A. PRESENT OPERATION

The Neighborhood Court began operations on January 4, 1977 at the Hillview Community Center in East San Jose. It has operated continuously every Tuesday and Thursday from 5:00 p.m. to 9:00 p.m. since that date. The court serves a target population that includes all of East San Jose. Lawyer volunteers who have been nominated by the Bar Association and appointed by the court conduct mediation and arbitration. Two deputy court clerks and a bailiff complete the court staff.

The arbitration awards are nonbinding in that any party is allowed 5 days within which to object to the award; however, in nearly two and one-half years experience with the project, less than 1% of the cases have been returned for trial in the regular session of the Small Claims Court.

Defendants who live outside the target area are given the right to have the hearing transferred to the courthouse if they request a transfer in writing; however, in the experience of the project, only 15% of defendants residing outside East San Jose have requested a transfer.

B. EXPANSION OVERVIEW

The proposed expansion of the project would divert to the Neighborhood Court for mediation and arbitration 25% of all Small Claims Court cases filed at the Municipal Court Building in San Jose, or 3,375 cases. (The present caseload of the Neighborhood Court is approximately 200 cases per year.)

Several basic factors led the committee to recommend the significant expansion of the project that is proposed. First, the municipal court caseload increased 25% in 1978 and the increase in the monetary limit on municipal court civil cases to $15,000 will be effective in July of this year. Second, the project has proved itself successful in terms of satisfaction for the litigants who have actually used it. Third, the project affords an excellent opportunity for attorneys who wish to provide public service, in that their service may be performed during the evening hours. Far more attorneys have requested to participate in the project than can possibly be utilized with the current caseload.

C. LOCATION

To successfully handle the number of cases contemplated will require a larger facility than is presently available to the project at the Hillview Community Center. A public school building in which classes are conducted at night will provide sufficient space for the mediation sessions and contested arbitration hearings.

D. ASSIGNMENT OF CASES

The clerk of the court would assign approximately 25 cases each court day to the Neighborhood Court. The assignments would be based on zip codes, to ensure that the plaintiffs and defendants resided in the project area. Assignments would be limited to individual litigants.

E. HEARING PROCEDURES

Due to the large number of cases which would be set for mediation and arbitration four nights each week, evening sessions would commence with procedures generally followed at the courthouse. A deputy clerk would call the calendar and note each party present, inform the plaintiff if the defendant had not been served and continue the case to permit service, segregate the files of cases in which there is no appearance by defendant or plaintiff, or both, segregate the cases where there are motions by either side, ascertain if an interpreter is needed, et cetera.

At the conclusion of these preliminaries, one of the mediator/arbitrators would direct the clerk to administer an oath to all parties and witnesses in the waiting room. Then the mediator/arbitrator would explain the procedures. Thereafter, mediation and arbitration sessions would proceed in smaller rooms.

F. DURATION OF PROJECT AS EXPANDED

The project as expanded would continue for the period of one year beginning in 1979 with funds received from the Hewlett Foundation grant of $20,000.

Proposed budget

	Budget allocation
Personnel:	
(1) Coordinator ($4 per hour times 10 hours per week times 12 months plus fringe)	$2,392
(2) Court clerks ($4 per hour times 16 hours per week times 12 months plus fringe)	7,656
(3) Court bailiffs—$42 per night times 12 months	8,740
Subtotal	18,788
Nonpersonnel:	
Travel	432
Supplies	300
Subtotal	732
Other costs:	
Administrative overhead, subtotal	480
Total	20,000

EXPLANATION OF PROPOSED BUDGET

1. Coordinator is necessary to assure that the substantial number of attorney volunteers will be present and follow through on their assignments.
2. The number of clerks is increased by one from the present project total in order to make provision for the increased caseload.
3. The costs for court bailiffs has not been increased over present.
4. Nonpersonnel cost of travel has been increased due to the fact that the Center will be in operation four nights each week instead of two.
5. Nonpersonnel cost for supplies has not been increased. Other costs of administrative overhead reflect a requirement by the County for percentage reimbursement based on the number of personnel employed on the project.

SQUIRE, SANDERS & DEMPSEY,
Washington, D. C., June 7, 1979.

Hon. JAMES H. SCHEUER,
U.S. House of Representatives,
Rayburn House Office Building,
Washington, D.C.

Re: Dispute Resolution Legislation.

DEAR CONGRESSMAN: I am writing on behalf of the Consumer Electronics Group of the Electronic Industries Association (EIA/CEG) for which I am Special Counsel. EIA/CEG represents manufacturers of consumer electronic products such as television receivers, radios, phonographs, audio systems and tape equipment. EIA/CEG represents substantially all of the domestic manufacturers of television receivers and also some Japanese affiliated manufacturers which have facilities in the United States.

The Board of Directors of EIA/CEG wishes to go on record as supporting legislation on resolution of consumer controversies.

We agree that it is desirable to encourage inexpensive and expeditious consumer dispute settlement mechanisms at the state and local government level.

We hope that legislation on this subject would make clear that the mechanisms which would be funded do not include consumer advocacy activities in judicial and regulatory activities but are for the purpose only of resolving private disputes. We also hope that such legislation would permit the use of dispute resolution mechanisms by the business community.

Best wishes,
Sincerely,

J. EDWARD DAY.

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(1)

NEIGHBORHOOD JUSTICE CENTER OF VENICE & MAR VISTA,
Venice, Calif., September 21, 1979.

Representative DANIEL LUNGREN,
Longworth House Office Building,
Washington, D.C.

Re: S. 423.

DEAR MR. LUNGREN: Within the next few days S. 423 (The Dispute Resolution Act) will come before the House Judiciary Committee. We strongly urge an Aye vote.

We are pleased to report to you, as a California Representative on the Judiciary Committee, that last week the California Legislature passed a landmark piece of relevant legislation—The Neighborhood Dispute Resolution Act (A.B. 1136, introduced by Assemblyman Mel Levine). Within the next few days we are expecting Governor Brown, whose Legal Affairs Office helped draft and support the bill, to sign AB1186, making California the first state in the United States to pass such legislation. The Act established a program setting a state policy which encourages the use of dispute resolution centers for settling appropriate interpersonal and consumer disputes, setting guidelines for the operation of such centers, providing confidentiality for dispute resolution proceedings, encouraging the use of federal and other funds by state and local government, and providing a mechanism to decide which programs will be supported by the state government with any available funds.

We believe that the passage of AB1186 demonstrates the leadership of California government and the people of California to continue and to expand the availability of experimental informal dispute resolution. We hope that you will follow that lead by voting for S. 423.

The concept of informal dispute resolution through mediation for a wide variety of interpersonal and consumer disputes is being demonstrated on a limited basis throughout the United States as a preferable alternative to court adjudication. There are a few such experimental programs in California, including our Neighborhood Justice Center in Los Angeles and the Community Board Program in San Francisco. These, and several other mediative programs in California, have begun to demonstrate the success of and the need for such informal dispute resolution.

We would be pleased to supply any additional information you may desire. As soon as we receive an emolled copy of AB1186, we will forward it to you.

Sincerely,

JOEL EDELMAN, *Director.*

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END