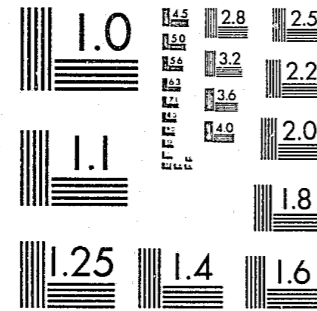


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ALTERNATIVES TO LITIGATION  
AND ADJUDICATION  
CONFERENCE TRANSCRIPT  
December 8, 1979

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ALTERNATIVES TO LITIGATION AND ADJUDICATION  
A Conference held in Madison, Wisconsin

December 8, 1978

CONFERENCE TRANSCRIPT

Office of Court Operations  
Director of State Courts  
November 1, 1982

FOREWORD

The materials in this package constitute the most complete record available of the remarks presented by speakers at the conference on "Alternatives to Litigation and Adjudication" held in Madison, Wisconsin on December 8, 1978.

The opening address by Chief Justice Bruce Beilfuss and the remarks by Paul Nejelski, Paul Wahrhaftig, Fred Dellapa and Ken Palmer were tape recorded and are reproduced here from that tape. Due to technical problems, a transcript could not be prepared from the conference tape recording of Joseph Stulberg's comments; Mr. Stulberg did make available, however, the outline from which he spoke that day and that outline has been included. The speech from Paul Rice is reprinted here in the format provided by him to the organizers of the conference.

A booklet entitled "Alternatives to Litigation and Adjudication: Program Designers Guide" was prepared in conjunction with the conference and it is also available from this office.

ED MC CLAIN  
Deputy Director for Court Operations

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U.S. Department of Justice  
National Institute of Justice

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ALTERNATIVES TO LITIGATION AND ADJUDICATION CONFERENCE

December 8, 1978

Ramada Inn  
3841 E. Washington Avenue  
Madison, Wisconsin 53704

9:00 - 9:30	REGISTRATION	
9:30 - 9:45	OPENING ADDRESS	Chief Justice Bruce Beilfuss
9:45 - 10:30	X [ FEDERAL PERSPECTIVES	Paul Nejelski
10:30 - 10:45	RECESS	
10:45 - 11:30	X [ JUVENILE PROGRAMS	Paul Wahrhaftig
11:30 - 12:15	X [ LEGAL ISSUES AND IMPLICATIONS	Paul Rice
12:15 - 1:30	LUNCH	
1:30 - 2:15	X [ TECHNIQUES OF DISPUTE (RESOLUTION	Joseph Stulberg
2:15 - 3:00	X [ PROGRAM IMPLEMENTATION	Fred Dellapa
3:00 - 3:15	X RECESS	
3:15 - 4:00	[ ADMINISTRATION: THE FLORIDA (EXPERIENCE	Ken Palmer
4:00 - 4:15	CLOSING REMARKS	Karen Knab

"OPENING ADDRESS"

Chief Justice Bruce Beilfuss

I think it is quite appropriate to announce, or to remind us all, that there have been a number of very recent and significant developments in our judicial system in Wisconsin designed to increase the efficiency and accessibility of both trial and appellate courts. The court of appeals, which has broad jurisdiction to hear appeals from all courts, went into operation on August 1 of this year. On that same date a major revision of the trial court structure took effect creating the so-called single level trial court in Wisconsin. In addition there were significant changes made in the authority of the municipal courts, small claims procedures, and the power of court commissioners. While these are significant, forward steps, we need not stop there. We now turn our attention to areas which can have a significant impact upon the administration of justice in Wisconsin. Today's conference is designed to acquaint you with the concept of dispute settlement by means other than formal adjudication by a court, and the legal issues relevant to those alternatives. I might say that many of us in this room I think can recall our efforts in Wisconsin of 20 and 25 years ago to get all of our disputes into the courtroom. We went to great extremes to curtail the jurisdiction of the Justice of the Peace. We insisted that every judge of every court be a trained lawyer. The idea was that regardless of the dispute, and certainly the individuals involved in it, that they were all entitled to have their dispute resolved by a trained professional. I suppose we have gone full cycle. We are now going back to thinking that perhaps efficiency demands that we look to other means to solve these disputes. Certainly I am not here to condemn any efforts we are making

today. There is nothing wrong with going the full cycle. The problems are completely different now than they were then, and I think we would be amiss if we did not devote our attention and consideration to the possibility of utilizing some of these alternatives. This conference, I believe, will give you some practical information concerning the implementation and operation of programs to provide the alternatives. Such programs have not yet been implemented in Wisconsin, but the 1979 Judicial Plan adopted by the Wisconsin Council on Criminal Justice allocates more than \$250,000 to them over the next 2 years. The Supreme Court in this state is constitutionally charged with administrative authority over all the courts in the state to the end that the citizens in Wisconsin have ready access to an efficient and effective system of justice to solve their disputes and preserve and protect and enforce their rights. It is therefore particularly fitting that the Supreme Court, through its Office of Planning and Research, explore the alternatives to litigation and formal adjudication as another method of dispute settlement.

While the system of justice in Wisconsin has been centered around adjudication by a judge in an adversary proceeding, our experience has shown that formal litigation may not always be the most accessible and expeditious method of conflict resolution. I believe the terms "justice system" and "court system" should not be synonymous. The need for alternatives to litigation and adjudication is not merely the state's concern. The federal government, I believe, has the obligation to provide the people of the United States with ready access to a court system for the settlement of disputes whether between individuals, or between individuals

and the government itself. Because the federal courts are courts of limited jurisdiction, there is an inevitable reliance on the courts of the 50 states to provide an efficient and accessible forum for resolution of conflicts. Consequently, in order to make the courts responsive to the needs of the people there should be a federal and state effort to promote accessibility, efficiency, economy, and effectiveness of the state court systems throughout the country. One of the objectives of this effort is to divert from the courts those disputes and controversies which can be settled more expeditiously and effectively by other means. There are circumstances where such methods as arbitration, conciliation and mediation work better than formal process of the courts. The initial task, as I see it, is to identify the kinds of controversies which would be susceptible to settlement by such alternative means. This may be done on the basis of subject matter of the dispute, the identity and relationship of the parties, or the comparative costs of settlement. Whatever the basis, one thing must be kept in mind: as to the categories of disputes which will be sent to the alternative forum, the non-judicial form must offer a more effective process of resolution. Once the categories are established, appropriate means to settle those disputes must be implemented and administered. Through this process of creating alternatives to litigation, the courts will render invaluable assistance through program sponsorship and development, rule-making, case referral, and enforcement where necessary. However, improvement of the justice system is not exclusively the work of the federal and state governments in the courts. Local citizens and neighborhood groups can and should play an important role in the development and implementation of alternatives to litigation. In order for the alternatives to be effective and responsive to local needs, neighborhood and community

groups must take an active part in the development, preparation, and approval of the programs to provide such alternatives. Once operational, these programs envision increased access to community resources such as alcohol and drug counseling, citizen participation on advisory boards and mediation and arbitration centers. As you can appreciate, the creation of effective alternatives to litigation and adjudication requires a combined federal, state and local effort. Today you will have the benefit of the knowledge and experience of some of the country's leading authorities on the subject of alternatives to litigation. We're almost over-awed by reading the description of these persons in the program. We hope it will help us in our efforts to establish programs to provide alternatives to litigation and adjudication, and to assist us in our efforts to improve the justice system in Wisconsin.

Thank You!

91481

"FEDERAL PERSPECTIVES"

Paul Nejelski

It's a pleasure to be here, a transplanted New Englander, to come back and see some snow. In Washington, cross-country skiers have a problem: by the time the snow gets down and you get out there in the trails it's all gone. I gather you don't have that problem here in Wisconsin. Being back in the Department of Justice, people ask how it feels. I'm reminded of the story Judge Bell likes to tell in a similar context of how he likes being Attorney General. It reminded him of a man in rural Georgia who was charged with being drunk and setting fire to his bed. He came before the judge and he pled guilty to being drunk, but his bed was on fire when he got into it. It's been a busy time, and I would like to spend the next few minutes telling you about some of the proposals that we have been working on at the federal level, some of which have to do with the federal court system, some have a decided impact on the states.

I would note particularly the conference document that has been prepared and handed out today. I had a chance to look it over last night and I really commend it to your attention. It is an excellent brief survey of the experience and literature and what has been happening in the field. I would like to touch on a few examples after first telling you a little bit about our office. I think you are probably all familiar with the Law Enforcement Assistance Administration which gives out money to the states and works with the states in justice problems. The Office for Improvements in the Administration of Justice, just started last year by Judge Bell, goes back to a predecessor office started by Robert Kennedy in 1964 in the Department. There was a feeling at that time by Attorney General Kennedy that the prosecution function

would always be represented in the Department with the Criminal Division, Federal Bureau of Investigation and so forth, but that there was no one looking at system-wide problems in the department in the federal system, and so he brought down Jim Hornberg from Harvard to start a very small office of Criminal Justice to worry about such problems as bail reform, right to counsel. Dan Freed, Pat Wald, Harry Suben, who have gone on to careers in justice, research and reform were part of that small office. It's interesting to note that in the next year, 1965, the Office of Law Enforcement Administration got started. That was the predecessor, as you know, to LEAA which came in in 1968. So there has been sort of a parallel development in the Department of Justice--the aids to states through LEAA, but also the concern, particularly in the federal system with the Administration of Justice in a small staff office, which we are, to the Attorney General. Judge Bell not only changed the name of the office, but raised it to the level of Assistant Attorney General, brought Dan Meador, who is a law professor from the University of Virginia who is with us for a two-year leave of absence. Dan is the author, among other things, of the courts volume of the national goals and standards effort that LEAA put out in about 1973. The office, up until last year, had had a very heavy criminal justice orientation. Probably 90% of our projects and efforts were directed to criminal problems. Judge Bell felt that civil justice was equally important and gave us a mandate in that area. We have two deputies in the office: I'm in charge, as Ms. Knab mentioned, of the civil justice court reform side; Ron Gaynor is in charge of the criminal side, and they're working on the federal criminal code and gun control legislation, prison reform and a variety of other topics. I'll be talking mainly about some of the civil

justice court reform projects, which also obviously have an impact on the criminal justice side. Another development last year was our obtaining a \$2,000,000 annual research fund. It is something of an irony that, along the lines of the shoemakers' children going barefoot, the Attorney General last year had no money to spend on research and study of the federal system, or problems of particular interest to the Department of Justice while LEAA, as you know, has been spending several hundred million each year in these areas. We have funded some large studies in sentencing guidelines on which the states have already done a lot of work, but very little has been done at the federal level. We are doing a study on what some people call judicial impact statements--I prefer to call justice system estimates--trying to see what the needs for the courts, for the prosecutor's offices, for other parts of the justice system would be in assessing legislation. We were asked to testify, for example, in our office before the Veteran's Affairs Committee on what would be the impact on the courts of legislation pending in Congress that would make decisions of the Veteran's Administration reviewable in court. They are not now, although as you know, Social Security determinations are reviewable in court and very similar in kind in terms of disability, pensions and so forth. And so we tried to develop that data and information for the Congress. We have a very large project on the cost of civil litigation. We know very little about what the costs are, both in terms of litigation, and in terms of alternatives. And that is one of the important problems that this conference will be addressing, and will be continuing to address together over the next decade. We have a number of smaller research projects studying the impact of diversity--changes in diversity jurisdiction which I think are a joint problem which we in the federal system and you in the state system have together. We have a very small staff--we have 10

lawyers, 5 social scientists. One of the social scientists is Orson Serif who has joined us for a 2 year leave of absence from Yale who, as you read that background document that is prepared for this conference, is frequently cited. He has worked in this area of civil justice alternatives to courts. A lot of our work is done in drafting legislation, testimony on the Hill, but occasionally we have been able to develop other initiatives such as Neighborhood Justice Centers, about which I will speak in just a minute. But I think, all in all, it is an attempt by the executive branch to give aid to the courts to study some of these problems of joint concern on a long-term basis, and we find it an exhilarating time to be working in the courts.

I'm not here to come as a salesman for diversion or alternatives. I think, when properly used, they are very useful. But they are not necessarily a panacea. I think the Chief Justice has remarked already, and I think probably others think there are some of the same problems in alternative courts that we have in the court system in terms of due process, in terms of proper funding.

It is interesting to note, I think, the extent to which some of these mediation alternatives exist within the court. Plea bargaining itself in the courts in almost all jurisdictions, resolving of about 90% of the cases, is a form of negotiation mediation to some extent. I used to be the executive court administrator for a time in the state of Connecticut and I was struck by the fact that 60% of our civil case load was domestic relations cases, and yet they really consumed very little judge time because we had a large staff of over 100 domestic relations

officers who really acted as mediators, arbitrators, whatever you want to call them. They negotiated treaties between the husband and wife about custody, about property settlement, and the judge generally ratified those and rarely got involved in trials of those cases. So I think there is a fair amount of arbitration/mediation going on in the court themselves.

One problem with alternatives to courts that has to be addressed, whether at the federal level or at the state level, is that we are not creating something that is in fact, or is perceived to be, second-class justice; that we give the same degree of care and monitoring and the people in those systems come away at least as happy as they are in the more formal system. There is sort of a schizophrenia, I think, in looking at some of the developments historically of court administration. On the one hand people want inexpensive, fast, quick termination, and on the other hand there is the desire for a certain amount of formalism--a judge in a black robe sitting on a bench. I think the Chief Justice mentioned the experience of Justices of the Peace and the sort of historical evolution we have gone through, and I think that is true. I think it is so useful to look also at the variety of examples of cases that are coming to court or going out of court, such as workman's compensation cases. There is a delightful book that I commend to your attention by Philip Nanette called Administrative Justice which talks about the workman's compensation system in California and how that system was created in the 1920's to be fast and quick and informal, get way from the rules of evidence, quick disposition of these cases, and yet to come back 40 years later and you find a judge, wanting to be called a judge, sitting on a raised bench with a black robe a two-year backlog and binding rules of evidence, and you kind of created the whole system again. I think there are pressures

obviously for due process, but I think part of the challenge is to merge due process with these alternatives being devised. I think Professor Rice and others will be talking about that in much greater detail. There are some pluses, at least from my point of view having been in state court administration and also at the federal level, to these kinds of alternatives. One, it is often possible to use paraprofessionals, people from the community, in new roles, not necessarily on a full-time basis. I think in particular in the juvenile context, which I guess you will be getting to later this afternoon, of the Bronx Neighborhood Diversion Project run now for almost a decade by the VERA Institute of New York. There they have set up mediation panels of people from a community that is 90% black and/or Spanish-speaking where the formal justice system, at least at the time of conception, was 100% white judges, white clerks, white probation officers, which I think had a very hard time relating to and dealing with a population very different. There is an emphasis often in these programs on short-term intervention--crisis intervention--getting into problem-solving and getting out. One problem I think for the courts may be that a case gets into court and it's there two years later with very little satisfaction for the parties or for the state. There is an emphasis, obviously, on mediation, on what I call negotiating treaties, rather than fact-finding and trying to find out who hit who last, which I think can be very helpful in a variety of contexts. Although some of these areas may be moved out of court--informal arbitration, community justice centers, whatever it may be--I would suggest to you that there is a great need for the courts to monitor these alternative systems and that they have a responsibility, especially where the course of power of the state is involved, to see what is going on in those systems.

If I might give you one example, again from the juvenile justice area. In New Jersey they have long had a history of community groups appointed by the Juvenile court judge of maybe from 8 to 10 citizens, often someone from the school system, somebody from the PTA, somebody from the police department who often, on a volunteer basis, sit down with the juvenile and his parents and try to work out some kind of a solution. I think on the whole it has been a very favorable experience. It has been going on since 1945. But I think to some extent the judges lost track of it and there were these autonomous bodies out there making decisions. Someone did a study about 1965, and found a lot of good things but also found at least for me, some troubling things: that these councils in some cases were assessing fines for which they had no authority, they were handling very serious cases such as burglaries and sex offenses for which they really had questionable confidence, ordering psychiatric examination, some of them were even acting like a judge. All of this going on under the auspices of the court but not with any of the controls and guidance I think perhaps should have been happening.

The federal perspective on alternatives to courts I think comes in two parts. One, by example we should get our own act in shape before we tell the states what to do. There is a great need to be improving the federal courts. It's interesting in some of the recent studies of delay in court, which is one of the great bugaboos of judicial administration, that the federal and state court systems often go together. In Massachusetts the federal system is three and one-half years behind and the state court is three and one-half years behind. In other jurisdictions where the state courts are relatively current, the federal courts are relatively



current. So, to the extent that judges and lawyers and others working in the justice system have a created culture and a community for handling these kinds of problems, we are certainly in this together. It is no accident that the one arbitration program that I am about to mention, in federal cases, we are experimenting with in Philadelphia where they have had 25 years of successful experience with arbitration of civil cases at the state level. I think a lot of this goes together and I think the federal role at best can often be giving guidance, setting examples, learning together with the state. Obviously a second role of the federal government is funding of projects, and there are obviously problems of federalism, judicial independence, and others on which I will not dwell but I think we are all aware of those. Here, an example would be the neighborhood justice center which I will describe in some detail. As the conference background paper very correctly states, Judge Griffin Bell was in charge of the follow-up from the Pound Conference held in April of 1976, and when he became the Attorney General a few months later he had an agenda all laid out for him of projects, including alternatives to courts. He had worked very hard to try to implement some of those ideas coming out of this conference in St. Paul in April of 1976 to commemorate the 70-year anniversary of Roscoe Pound's Seminal criticism of the justice system. One of the administration's major problems is access to justice. I emphasize access to justice, not necessarily access to courts. I think we are probably all aware of a lot of the successes that has been made in the environmental area by people trying to mediate disputes rather than go into court and try to litigate very complex, large social problems. I think in particular of the Coal Policy Board;

there are other examples of environmentalists and people from industry trying to sit down and work out their problems, negotiating problems, rather than trying to have a single judge make a decision affecting a whole state or even a whole country, based on an adversarial process.

The arbitration example that I would like to discuss with you in the federal system comes from a belief that you simply cannot be adding more judges to the court system. As you know, in the federal we have just gotten 150 plus judges which is unfortunately, probably what the system needed 5 years ago when all this started, and even though we have this large infusion of federal trial and appellate judges we are always going to be behind. The only solution seems to be adding more judges, adding more prosecutors, adding more clerks, adding more courtrooms. And we feel very strongly that an increased use of magistrates at the federal level who can handle a lot of matters--we have a companion bill to arbitration that would invest much broader civil and criminal jurisdiction in magistrates who are appointed not for life but for a fixed term--would be a great help in relieving some of these problems. The arbitration bill which we have proposed and which passed the Senate in the last Congress builds on the experience from the states. As I mentioned before, Pennsylvania has had the longest court-annexed arbitration system going back to the 1950's--over 25 years of experience. The initial jurisdictional ceiling was \$1,000. That has been raised as inflation and confidence in the system has grown to \$10,000. New York and Ohio have utilized arbitration, often on a local basis, since 1970, Michigan and Arizona since 1971, and California has adopted a compulsory non-binding arbitration that became effective in 1976. These schemes typically involve relatively small amounts, ranging from

\$3,000 to \$10,000 now, and often are an adjunct to the small claims jurisdiction of the state. They hear evidence under relaxed rules of admissibility and render an award, and there is generally a right to a trial in the court of general jurisdiction if the parties want it, but there may be financial disincentives placed on that demand. For example, if the party does not improve his position if he goes to trial then he would be taxed the cost of the arbitration or some other disincentive. These plans have generally held up very well under proper constitutional challenges that they are a burden or denial of the right to jury trial. There is always the right to jury trial, but the issue becomes how much of a burden can be placed on that right. The important fact I think, is that almost uniformly they have had very few cases going up for a trial. Success rate, or at least the disinclination of the parties to appeal, has been very great. Only 5 to 15% of these cases go on to the court, so that in effect you are diverting roughly 90% of the cases that came into the court system. There are obviously problems of taking this analogy from the state and applying it to the federal system. Many of the cases we are talking about are diversity cases, others that start at \$10,000 as a jurisdictional limit. I think one of the interesting things about the experiment that we have been working on and the proposal will be to see how effective arbitration will be at levels of \$50,000 or \$100,000 which are currently being experimented with. We sent up a bill last year with considerable detail for spelling out the arbitration experiment. There would be from 5 to 8 districts around the country that would give this a try, having panels of lawyers selected by the judges to hear these arbitrations, receiving modest remuneration. While we've been working on the legislative project, with permission of Congress, we've

worked out an experiment in three districts, in Connecticut, the Eastern district of Pennsylvania, and the Northern district of California, to see how this would work in a real life setting. I say court-annexed and not compulsory jurisdiction because most of these plans make it possible to petition the judge and say that for one reason or another--because of the precedential value of the case or because of the large number of witnesses, or some other reason--it should not go to arbitration. But that is by far the exception.

For types of cases put into this--and I mention this in some detail because the continuing question is what is suitable for adjudication, what is suitable for some kind of an alternative--we have developed three criteria. One, that the cases would involve claims for money damages only. It was felt that equitable relief, for example, would be inappropriate for a panel of arbitrators to be awarding. We put a limit of \$100,000 on the claims for the cases that would be heard. And there was also a feeling that these should involve primarily factual issues rather than complex legal questions or constitutional claims. What we finally have worked out with the Congress is that in these three trial districts, and in the bill if it is passed, the negotiable instruments or contracts for personal injury or property damage in which the jurisdiction is based on federal question of diversity or admiralty jurisdiction, including cases in which the United States is a party, would automatically be referred to arbitration. There are certain exceptions for that: if there's an allegation of a constitutional tort, a civil rights violation, a case that involves fraud against the government, or if official immunity is raised as a defense. The experience has been quite successful. We are

just really starting on the local experiment roles. One thing that we are finding is that an arbitration is almost as rare as a trial on the civil calendar, on the civil side. Many of the cases, perhaps as many as 80 or 90%, get settled before there is even an arbitration so that the stimulus of forcing the parties to sit down and take a hard look at their case, the knowledge that they are going to have to go through a day or two of arbitration perhaps, and tie up witnesses and resources, has been enough to have settlement in an overwhelming majority of the cases in these early early months. We have only had a few arbitrations in these three districts; none of them have gone on to the district court, and we have had a constitutional challenge to this program in Philadelphia, so we are very much sorting out the issues and seeing where we are.

I would like to turn next to probably an area that is of more immediate concern to you, and that is the Neighborhood Justice Center program. We have been working with the Law Enforcement Assistance Administration in funding three centers around the country, in Atlanta, Kansas City, and Los Angeles. The objective is to develop an inexpensive, expeditious alternative to the formal system. I am not sure--people talk to a large extent that these cases would be diverted from the criminal justice or the justice system--but my feeling is that often these cases, if they get into the system itself, would be quickly washed out or not very satisfactorily, handled. These are often interpersonal disputes--interfamily disputes, neighborhood disputes, disputes between friends--which the courts are often reluctant to get involved in. It is a difficult problem to get the complaining witness or others to come into court and testify against someone they are living next door to or they are living with under the same roof, and I think there is a feeling that this kind of arbitration/mediation

process is a better way of working out some of these problems. It is also being utilized in other more formal relationships such as landlord-tenant, customers, and other situations. These programs are hardly original. There have been a number of prototypes around the country. One of the most celebrated and written about being the Columbus Night Prosecutor Program operating as an adjunct to the Prosecutor's Office in Ohio started in 1971. You'll be hearing from Fred Dellapa who is one of the pioneers in developing a program in Miami. Last year when we came into office we asked that these various experiences be surveyed and studied, and that they be written up. A book has resulted from that. McGillis and Mullen from the APT Associates have written a book cited in your materials describing some of these half-dozen or dozen programs around the country, and we have tried to learn from that experience in setting up the three that we have. The three centers have certain common features. They all are located in an identifiable neighborhood in a particular city; they are not located in the courthouse but alternatively one is in an office building, another is in a former residence which has been reconverted into an office structure, and another is a storefront operation. The neighborhoods range in population from roughly 50,000 to 90,000 and they are basically residential with some commercial activity. There is a mix of income, generally lower and middle incomes being represented. The populations are also racially diverse. In Atlanta, for example, the white population of the neighborhood is 46% while the blacks comprise the remaining 54%. Typically, the centers have a director and 4 or 5 full-time persons, and a panel of approximately 30 members from the community who have been recruited to serve as mediators, who are used on a case by case basis. These people have been trained for

about 40 hours in one instance to a high of 70 hours in another city, often with follow-up training after several weeks so that they have had a chance to learn from their mediation experience and get some more formal training. The persons when they are used as mediators are often paid a fairly nominal amount, \$10 to \$20 for each case that they are called on to arbitrate. The centers have adopted general guidelines as to what kind of cases they view as most appropriate to take, and as I've mentioned those are generally family disputes, disputes between neighbors, landlord-tenant, consumer disputes being the major category. It is recognized that they can't solve all the problems, and often they will be serving a referral function to other agency, and so knowledge of what is available in the city is also needed. To me one of the most interesting things has been the sponsoring agencies and who has been receiving the money and working with these centers. It is quite diverse. In Kansas City it is an agency, the executive branch of government, in Atlanta it is run by a private corporation with a very heavy court influence, judges being represented on the board and in the planning, and the Los Angeles center has been sponsored by the local Los Angeles County Bar Association. Each center has a broad-based policy making board of representatives from the neighborhood being served.

I would just like to give you two quick examples of cases that have been handled in some of these centers in the first months. They just started last March or April so we have only about six to eight months of experience with them. In one case the complaining party and respondent were married but currently in the process of obtaining a divorce. The complainant husband wanted to get back together with his wife and wanted to see his daughter. The wife did not want to get back together, did not

want financial assistance, and did not want to let the husband see the daughter. Both parties were unemployed and living with their respective parents. The mediation session conducted by one mediator lasted more than 3 hours. The result agreed to by the parties was that they would separate, the husband would not bother the wife, and the wife would let the husband see the daughter for several hours each Sunday. In another case a tenant had paid \$800 for repairs for his apartment and was paying a reduced rent until the cost of the repairs was offset. A new landlord took over the building and wanted the tenant to move out in order to allow the landlord to rent the premises to a personal friend. The present tenant did not want to move and wanted reimbursement for the repairs that he had paid for. The new landlord did not want to uphold the agreement made with the previous landlord. In a mediation session conducted by a single mediator, the tenant agreed to vacate the apartment within a specified period of time, and the landlord and tenant also reached a settlement regarding the amount of money to be reimbursed to the tenant for the repairs.

There is a national evaluation being conducted of these three centers and we hope to learn a lot about the programs. They are studying the implementation of the program, the politics of how one goes about setting up a program, how the people are selected for it, how different agencies and parts of government are worked with. That part has been written up largely and should be available early next year, we hope. There is another study of the process of cases through the centers. We are beginning to get a little bit of data from that and I will just share a few things with you from this experience. The centers have had about half of their cases coming in on interpersonal types of problems, this sort of continuing

relationship case between families or neighbors; and about half what one might call civil settlement types of cases, of employe-employer, merchant-customer, and landlord-tenant kinds of situations. So it has been very diverse input into the centers. Contrary to some of the expectations, and perhaps a reflection of the fact that in urban America there are few very coherent neighborhoods, many of the cases are coming from outside of that particular neighborhood in terms of the parties being involved, and that it is drawing cases from outside of the geographical unit. There are variations in case loads between the centers, and I think this gets into a problem for anyone evaluating them: is a high case load a good thing or a bad thing; to the extent that a lot of cases are being put in, what is the quality of service being rendered, and are we creating just another mill that the courts have been accused of being or the small claims courts, maybe, where people don't get the kind of service we would like to have. Just reading bare figures doesn't tell you that, I would suggest. About 50% of the cases that come into the centers result in hearings. In some cases the complaint is withdrawn or the whole case is withdrawn, in other cases the respondent won't show up, won't in a sense submit to the jurisdiction of this group for a variety of reasons. The range of referrals is also very broad. I will give them to you in quick order: the largest number coming from the prosecutor's office, second largest coming from the individuals themselves--walk-ins, self-referrals coming into the centers, the third largest source of referral from judges, fourth from the police, fifth from various government agencies, sixth from legal aid. One fact that struck me was the age group involved in the people coming in for some kind of relief: the median average age was about 34, but the range was from 12 to 88, which suggests a broad interest in these kinds of centers in the population.

I would just like to mention quickly, and Professor Rice I think will discuss this in detail, the number of legal and ethical issues raised by informal dispute centers. One is the enforceability of arbitration. What is the relationship of the center negotiated agreements to state arbitration statutes and procedures, for example? Should they be enforceable in court? What is the role of established law? Should statutes of limitation, statutes on fraud, the uniform commercial code and other laws of the state be enforced in these centers, or to what extent should they be overlooked? What problems of confidentiality of communication and records? Should a prosecutor or civil party be able to subpoena the records of the center or the individual mediator concerning what was said during the course of visits to the center or during negotiations? If a client should confess a crime, is it their duty to report that to authorities? At what point does a mediator possibly become a co-conspirator, an accessory before or after the fact? There are problems, I think, of mediator and center liability. Should they have liability insurance? What happens if a center or mediator is sued, perhaps by a disgruntled complainant? And finally, as I have mentioned earlier, the problems of coercion. Are people in the program under any real or imagined coercion, especially where cases are referred by police or judges? What is the relationship of the center to more formal adjudication agencies such as court? For example, when does the court have any monitoring obligation, about which I have already spoken. And I go back, to some extent, to the dichotomy that I started with--I think there are problems of helping versus adjudication. Some administrative agency and juvenile courts have been already caught in the dilemma of whether their primary function is helping people or adjudicating their

legal status. To what extent will these centers be caught in the potentially inconsistent roles of social worker and doctor on the one hand, of the lawyer and judge on the other hand. Hopefully the mediation will provide a middle ground, but I would suggest that these are some areas to be concerned about.

Finally I would just like to take the minute that remains to tell you about a larger project that we are working on in our office. I think this is a time, as some of these programs that I have mentioned to you suggest, of changing roles and changing institutions, in the courts and in larger society. We have established a group of about 25 individuals from around the country who have a variety of perspectives to try and see if we can come together about some kind of consensus about what is the role of a court in our society. Professor Abe Chase, in an article in the Harvard Law Review a year or two ago, pointed out the growing public law nature of the courts, particularly the federal courts, but I think also in the state courts, where the judge is no longer hearing a case between a single plaintiff and a single defendant in the traditional mode of the tort or contract case that we have generally been concerned about in law school and historically. But rather, the courts are increasingly involved in much broader social issues of anti-trust cases, school desegregation, conditions in prisons. The whole controversy about the ability of a particular individual to have standing to sue, to bring a claim, I think is very symptomatic of these kinds of problems. Who has the right to raise certain rights and questions, certain actions of the government. I think these kinds of cases call for continuous monitoring, that I have already suggested. Certainly the state courts have an obligation of monitoring what is going on in these alternatives. I think also of the housing court experiments in places like Massachusetts

and New York where one wonders whether it is a court or an administrative agency. It is called a housing court, and there is a judge, but he or she has an investigating staff permanently assigned to the judge, and ongoing sort of enforcement obligation which looks very much like an administrative agency to some people. So we are, in the course of this work, funding some studies to look at areas of the law such as tort law or decedent's estates and try to say what aspects of that area are best handled in court, what areas are best handled outside of court. The whole argument about no-fault automobile insurance is one example in the tort area. Another area is in trade regulation where at the federal level we have the Federal Trade Commission, an administrative agency set up to work in this area, but also the anti-trust division of the Department of Justice. What have we learned, if anything, from this experience is what is best handled in court, what is best handled by the administrative agency. We are also probably going to be doing a study of family law versus commercial law. It seems, on the one hand, that family law cases are more and more coming into court, with children suing that they don't want to go to this school or what they have a right to a college education. All sorts of family matters that perhaps 50 or 100 years ago would never have gotten into the courthouse door are now being wrestled with by judges and lawyers in the court context. Whereas commercial cases seem to be coming out of the court either through arbitration or insurance or whatever. These are some of the hypotheses we would just like to check out factually to the extent that commercial cases are less in court now than they were 50 years ago.

We are preparing a list of strengths and weaknesses of courts and I would suggest that you probably will be either consciously or unconsciously. I would just like to close with some things that this group, in its preliminary deliberations, seems to see as strengths in court, as well as some of the weaknesses. I think this is an ongoing examination we are all going to be making at the state or federal level. It seems that some of the strengths of courts are their adherence to precedent, the ability to sharply focus a dispute, the advantage of finality--a judgment is entered and it is very difficult to set that aside, its relative speed at least in terms of the legislature and in terms of resolving certain kinds of social disputes and problems, the attempt at least at a reasoned judgment, the appellate review because you do have an adherence to precedent and you are attempting to make a reasoned judgment, the concern about reviewing and the ability to even review that decision which is really almost impossible in an arbitration setting or in some other kinds of diversion areas. It is important not to forget the psychic satisfaction of being in court, that the judge told somebody to do something. I think that is an important aspect not to be forgotten and goes to some extent to the point that I was trying to make earlier about not having second class justice. Obviously almost any of these strengths can be turned around as weaknesses for the court. The adherence to precedent and law can get away from a sense of equity. The courts are given to zero-sum decision--you win, I lose--whereas what we may need is an ability to compromise, to work out that kind of solution. It is often hard to get at all of the evidence in the court,

epitomized perhaps by rules keeping evidence out. There is a formalism, a vocabulary, phrases that the common person doesn't understand and often resents. And, I think, perhaps most important, is the cost of litigation, the cost of being in court. I think you can go on, and I hope that you will, in making your own list of the strengths and weaknesses of court and weighing them against the particular problem that you are confronted with, whether it be in juvenile justice or in neighborhoods justice centers, or whatever the area may be.

Thank you very much.

"JUVENILE PROGRAMS"

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Paul Wahrhaftig

I was worried how I was going to keep people awake around 4:00 this afternoon and I am quite glad that task is going to devolve onto somebody else. I am listed on the program as being the juvenile expert, which I am not, but I will talk about some juvenile programs. A little background on the outfit that I work for, the Grassroots Citizen Dispute Resolution Clearinghouse of the American Friends' Service Committee (short title): The American Friends' Service Committee is a Quaker-based social action organization which has been active in peace education, race relations, and in all of these activities in finding non-violent ways, reconciling ways, to solve these kinds of problems.

There is a very technical term for dispute resolution or court alternative, but we're really talking about settling out of court. We may call it a fancy program, but we are really talking about settling out of court, and one nice thing about settling out of court is that we generally don't get hung up on legal categories. It doesn't matter that much whether it's criminal, or it's civil, and I would argue it doesn't matter that much whether we are dealing with adults or kids. Most of the community-based dispute resolution programs deal with adults and kids, and so they are sort of overlapping as an alternative to everything. I will go through three projects that deal mainly with kids, so we call them juvenile ones, but I want to put them in a context. First, I was sort of assuming that I would be farther down on the agenda and you would have gone through a while bunch of speakers who would have really gotten you acquainted with what mediation and dispute resolution is all about. I am going to



assume that anyway or is that a fair assumption? Basically we are talking about mediating things outside of court, in some cases arbitrating depending on the program, finding ways that, primarily, lay people can get involved in the system, and having disputes heard in a way that focuses less on, as Paul Negelski said, who hit whom first or last but how can we live together in peace in the future. I would argue that if we are going to be moving into court alternative programs that we think very seriously about them being very community based, and real court alternatives. In other words, outside the court: we are settling out of court, we don't settle so much with a court person sitting, in either court salaried or responsible to the court. I would like to run down at least four reasons for that which may apply to all of these, even with different value system. Number one is what has brought a lot of you here, I assume--court overload. I don't have to go into great detail on it. The court is full of all sorts of cases that don't seem to belong there. I would put one caution in there though, and that is that as we look at the response of court systems which, at least their top level administration, say that they are overloaded, and we come up with program designed to deal with court overload, somehow those cases that we want to pull out of the system stay in the system and something else goes into the overload system. It may be that we are challenging some attitudes of prestige, some attitudes of importance, patronage, I don't know what else. Sometimes people in that overloaded system are reluctant to give up that overload. Incidentally, going back to the Chief Justice's remarks, he was saying if we are going to develop alternatives, these alternatives must be better than our existing system. I think that our mediation programs probably are, but I think that may be

a heavier burden than we need. To me, if it works as well as the existing system, and these arguments make sense then we have a case for an alternative even though there is no net improvement.

The Proposition 13 argument can be expressed two ways. One way is that the government costs a lot of money and we have got to find different ways to do it. The other side of the argument is that as citizens, we have opted out of a whole mess of our responsibilities, responsibilities to handle our own problems, and we have dumped them on the court system. A lot of the earlier presentations talked about the increasing thing with public law and family disputes and all that type of thing. That may be because professional institutions aren't handling their responsibility and it is time now to push the responsibility back on to some of the neighborhoods, back on the community groups, back on the individual, to be at least the first line of problem-solvers in this area. Number three, I heard a bit in here about the need for court monitoring. Coming from a community perspective there is an argument that monitoring equals surveillance, and that is something to look out for. That might be said in another way--some people think that one of the main differences between those who are classified as convicts and those who are not classified as convicts is that somebody was looking. If we look at the persons out on parole and the kinds of conditions and some of the grounds that a person on parole gets their parole revoked, these are things that for anybody else would be legal behavior. And so there is a lot of resistance, particularly in minority communities, to

systems that would allow an increase in the web of court monitoring. That is the way diversion programs have gone. As Norval Morris, Dean of the University of Chicago Criminology Department says, "The guilty we convict. The innocent we divert and supervise."

Fourth, community empowerment. Just as children learn to handle their own problems better if a mother lets them sort them out themselves rather than step in and unilaterally decide the rights and wrongs--so communities can grow from handling their own disputes. It gives them a chance through problem-solving to analyze its own problems, and based on that knowledge move ahead. And I'll get into that a little more, I hope. Those I think are the rationales for where we are going.

I am going to go through three juvenile projects and then go back to the general, community oriented thing. The Bronx Youth Diversion Program is the first juvenile program I looked at. I want to give you a commercial--I have these here as freebies--just a description of my program. If you are interested in a more detailed analysis of the community-based approach to dispute resolution, I have a couple of copies of this article, or you can write in for it. "Citizen Dispute Resolution: A Blue Chip Investment in Community Growth". Sort of the idealogue on that. (I think the price on that is \$.50.) The Bronx Youth Diversion Program has been written up by various people. I visited it in 1973. It is in the Tremont area of the Bronx, which I guess could be best characterized, if you read the New York Times Magazine and they have an article about areas of the city where all the housing is getting torn down--whatever horrendous urban problem it is that they are exposing, it is usually the Tremont area in that article somewhere. There they

have a formalized mediation program and it is involved with a lot of traditional pre-trial diversion counseling and recreation. It is run by an independent corporation made up of people from the community, people from the VERA Institute for Justice, and from Fordham University (at least it was in 1973; it may have shifted since then). They get kids into the program primarily by referrals from the probation officer. Incidentally, if you want readings on this, my bibliography is not in your bibliography. The Pretrial Justice Quarterly is a publication that used to come out my office. Volume II, No. 3 has an article on this, but please specify that you are interested in the Bronx project, because I misnumbered an issue and I have two Volume II, No. 3's. If you looked at the original proposal, (they get their referrals mainly from probation officers, they weren't able to get many from police--these are the probation officers at the intake level of the court) it was for a mediation center, at least the mediation part of the program which they call a forum, where you would get together the kid and the victim and you would go through what is the problem and come up with some kind of resolution. It never worked out that way and I think that is something serious to look at. What has happened is they mainly get status offender cases--they call them PIN, people in need of supervision--and some juvenile delinquency cases, but their juvenile delinquency cases were where somebody has spotted a family disruption in the background of the kids' behavior. So, they are mainly dealing with problems within families, that's what their focus is. A kid comes into the program, referred by a probation officer, he is assigned an advocate--a streetwise person who has been hired for the job--who investigates the case, talks to the kid, finds out what the

problems are, and sort of steers this thing through the process. They may resolve it in sort of a social work way, steering the kid into some kind of social referral program, or it may go to the forum. At the forum the kinds of things that are heard are problems within the family. The parents are brought in, the kids are brought in, the advocate kind of speaks for the kid, and they'll end up (I thought I had some typical resolutions) putting the kid into counseling, a temporary shelter, or coming to some resolutions) putting the kid into counseling, a temporary shelter, or coming to some resolutions about behavior within the family and the kid just goes back to the family. I think there are some real problems with the program, and one of the questions I have been interested in is, why they don't deal with victims and with straight juvenile delinquency kinds of cases, and disputes between kids and victims who have some sort of relationship. One real problem with the program is they had a misconception, from the beginning I think. They told me the reason they don't do much juvenile delinquency stuff is they have a problem when the kid doesn't admit guilt, they have got a fact-finding problem and a community forum of lay volunteers is not equipped to do fact-finding. I think they are absolutely right--if the focus of the hearing is going to be on fact-finding and who did what to whom, when they do have a problem. If it is going to be future-oriented--how are we going to live together in this neighborhood and this kind of thing--then we don't have that kind of fact-finding problem. The second problem they had, which may be more particular to that neighborhood, is that many of the victims are nonresidents of the neighborhood. The store owner that get ripped off by the kids that lived across town, and they couldn't get

the store owners to show up. There were a couple of other problems we'll run through. One was sort of a conflict of interest within the program. They ran counseling services, they ran sort of a shelter house, and there was a feeling that this whole process and the forum and all was a way of steering kids into their own program--I've heard that from some people. And I think there is a basic mistrust of kids. In a mediating setting I think we have to trust people to be able to make decisions about their own lives. And in this one, by having an advocate right at the beginning, the advocate's job is sort of to help the kid, in some ways, to prepare his case and present it to the forum, you are already putting a barrier, an intermediary, between the kid and whoever is going to deal with it. You'll see this problem popping up in the next one I discuss. The kid is already kind of put back from the process and they act upon him. After going through the hearing, by the way, they end up filing a summary. . . . At the end of a period, I think it is six weeks but I forgot to put it down in my notes, they come to a conclusion if the kid lives up to it, they report back to the court, the case is adjusted (the term I think used in juvenile court), and that's the end of it. But for that six week period we have our monitoring or surveillance problem. The kids who have gone into this are now in some way being watched by somebody, and that somebody can report back to the court. So, in our community paranoia sense, if that's the way you look at it, we are expanding the web of those who are being monitored. There weren't any statistics then on whether we were really getting into the case overload. It is probably cheaper, and we do have community people involved in some interesting ways.

Another program, and Paul Nejelski referred to this kind of thing, is the East Palo Alto Youth Responsibility Program. There is a very inadequate write up about this by some research outfit in San Francisco, but I'm relying more on a confidential paper written by a Stanford law student who managed to get in and look the place over. This program is basically (there are ones like it all over the place) where you get a group of respectable citizens from an area, and quite often you end up having these in affluent areas, and if a kid is picked up he is given the option, instead of going down to juvenile court, to be brought in front of the responsible citizens, they go over the case there, they tell him how he has impinged upon the values of their community, and he better sweep up the schoolyard for a couple of weeks. Basically that format. The principle is at least the kid gets an option to stay out of court. It is supposed to reinforce community values, and the panel is lay people from the area who play sort of a disciplinarian/role model function. It gets into alternative kinds of sentencing. It doesn't have any formal power to sentence, usually. But the choice of "do this or you go down to the court" is enough coercion that the people will go along with a lot of things, including, I gather from Nejelski comment on some of the New Jersey ones, fines. The positives on it are it is fairly closely tied to the community and it gives at least some community people a say in what's going on, and it gives those community people who serve on the panel an idea of what some of the problems in their community are. And it shows some community interest in the defendant. Let's look more specifically at how it worked in this East Palo Alto project, because I think it shows some of the problems. You have a lay panel, they basically had no training and maybe they don't need any

training; they had a little orientation from the project director and then he would sit in on cases and say "well, you were a little too harsh on that one", or "this one could have been handled another way". The referrals came from the police departments in the county, and I gather before any papers were filed so we are beginning to get out of the surveillance/monitor thing. You pick up the kid and say "Okay, we can file papers and run you through court, or you can go through this thing. A nice plus from my value reference is getting out of the paper department. The kinds of cases that came in were kids shop lifting, light vandalism, bicycle theft; generally they were first offenders and "not hardened to criminal life". The police offer this program as an alternative to the kid--there is some question as to how much coercion is involved with that voluntary alternative. There is some problem of broadening the net or the web of people who are involved in some way because the observer's report indicates that it looks like most of the cases that came in to this program are ones that would have been settled on the curbstone. In other words, the cop would have gotten everyone together, there would have been a lecture, and then gone home. So these weren't cases that would have penetrated the system. How we get around that I don't know. I think it relates back to what I generally said is court overload, but it can be police overload, and I have had the same response from police departments. When you get down to real brass tacks of what kinds of cases are going to go in, people hang on to the cases they have. Whether expanding that web of control, having somebody look over your shoulder rather than a court record system, is a question I'm not going to resolve in two minutes. In this program, once again they have an investigator. The report comes in from the police department, the project assigned an

investigator who, particularly if the facts are disputed, would check that out, and then when the case comes before the panel they would have the police report and the investigator's report. One of the serious problems I see, from my viewpoint, is that once the panel has those reports the strong presumption of the panel is that the police report and the investigator's report are true, and the kid is guilty. It seemed to the observer very hard for the kid to overcome this presumption of guilt. Hence, the way the panel worked was that if the kid agreed that he was indeed guilty, and he was very sorry for what he did, they went very easy on him. If the kid contested unsuccessfully that he was not guilty, then the panel became rather more tough. The kinds of sanctions that they used, in this particular project, was counseling--they loved counseling. Almost everybody was referred to counseling, even if they were innocent because, even if you were innocent, you got picked up so there must be some problem. The counselors seemed to have a field day. Another problem with this one, and I don't know why, was it seemed to take one or two months to get a hearing off the ground. It may be putting an investigator in, and here once again we don't trust the kid to be able to express his case and his side very well so we put an investigator in.

A third project, and one that I like alot more, is in the American Arbitration Association gambit. It's the Juvenile Mediation Program of the Rochester citizen's dispute forum. For your reference on this my program publishes a quarterly journal, The Mooter, which the next issue due to come out at Christmas will have an article on the Rochester program based on a presentation by Betty Werner, who was then the head of the

the juvenile mediation thing. And Josh, who is now here, may have stuff on it too, being an AAA program. Basically, they have had an ongoing citizen dispute resolution program for a number of years. Rochester I think is one of the early AAA ones, and this last September they opened up a special segment specifically for kids. It is different in that they only use mediation, whereas in the adult half they use mediation and arbitration. I gather the reason for opening up the kids' wing is that there seemed to be the need for a little more special understanding and empathy in dealing with kids. So the mediators, who were lay mediators once again, go through the regular AAA training process and then another session or two on problems of youth and families. The intake in this particular one comes from the judge and that is sort of a political accident. When I'm talking about intake, quite often it is a political question. You grab a case wherever you can get it and you try to get it as early as you can, but you really look at where cases come into the system and who is willing to let them get out. In this case it was a judge, so they had already gone through the intake workers in juvenile court and come before the judge on a petition. And I gather the only criteria is that any case is eligible where there is a contest of fact. If the kid doesn't admit that he did it, then it is eligible. In actual fact I don't know what the criteria are because the judge singles out cases that he thinks are appropriate for the project and sends them over. I don't think he sends 100% of the court's contested cases to the mediation project. I gather that they deal a lot in truancy cases, some juvenile delinquency ones, and a lot that involve restitution. The judge refers it over, the petition then is suspended while the process takes place.

There is a representative of the mediation program in the courtroom, the judge calls them forward and puts them together with the two parties, they go into a back room and arrange for the mediation session to be held sometime in the future. They then have the classical mediation session. The kids, the other party--for instance if it's the school district there will be a representative of the truancy department except they call it something else. And they sit down and hassle it through. One thing I like about it is there is a real trust of kids. They don't put in an advocate or an intermediary; the burden is on the kid to state his case well and there is a lot of sensitivity to how you make a kid state his case. A kid who isn't going to school may have some very good reasons for not going to school. The school may not be worth going to, or things like that. The kid may not be able to say that in the formal setting in a juvenile court with the judge looking down at him from up high, or even informal juvenile court where the judge is behind the table; it is still a very intimidating atmosphere. But you can structure your mediation process to bring it out. The kid may not be able to bring it out in the open hearing, but if you get him separately in the caucus with the mediator he may be able to state his case more clearly. Sometimes the bureaucracy, the person representing the school system, can get pretty angry and violent in language and the job of the mediator is to begin to tone that down. We don't mind ventilating in adult mediation between two equal parties. If it is a kid, to have the school system yelling and screaming at him is very intimidating. So you kind of structure it a little to bring the kids point of view out. As I mentioned they use lay mediators trained by the AAA with the extra sessions on kids. The positive things I like about this program (oh, and it is run by a private agency) is: it gets

it out of the court, it's a non-court administered program, it's informal, it trusts kids, it's supportive of them. Oh, enforcement--I skipped that section here. If the kid doesn't live up to it there are two kinds of... well, if a person doesn't live up to enforcement, if it's a kid the case is still pending before the court for a period of time so you can take it back to the judge and the threat is to run the kid back through the official court system, so you do have that sanction. You don't have the same sanction over the school system, you can't really bring the school system in for non-compliance but they have discovered that some good, healthy jaw-boning by the judge usually gets results, and maybe technically they could bring the school system in. Problems with this is it is still sort of a pre-trial diversion thing, and we are still under court surveillance. The kid, even though he has gone through this informal community based thing, is still in jeopardy to that court. The structure of AAA programs is not sort of the community empowerment/community learning model. It is community in the sense that lay people from the broad community are involved. When I'm talking about community, I'm often talking about the central city, a specific neighborhood, and the structure of the program doesn't give any way, for instance, for all the arbitrators to get together monthly, or whenever, and have a bull session about their cases and talk about what kinds of problems have come up. Correct me if I'm wrong on this, Josh. There are a lot of truancy cases and we discover there are some fundamental problems in that school if we can all get together and talk about our truancy cases. But if we keep them as individual cases, or each mediator and arbitrator keeps each case separate and never talks to the other ones about it, we don't see those patterns and we can't develop a way of attacking the problems in the school.

The fourth alternative I want to lay out for you is the generalized, community-based, informal mediation program. There are two models here. One is the community board program in San Francisco which is highly structured, foundation money, but works in concise communities and does a lot of community organizing and the community essentially owns the program. The other is a program that might be called Gloria Patterson's program, because it is basically one woman working out of her house. Very similar in concept, but some differences. In the first place, these programs are structured as a first line of defense. The message that goes out is the community boards go door to door, telling people about their program, or Gloria Patterson holds little meetings in her house and has people over after dinner. She is a black woman in Pittsburgh who knows her community very well and has identified people in that community, the kind of people that you take your problems to already. Some are block club leaders, some are well-known mothers, some work for social agencies. She just calls them together for informal meetings in her house and does some very informal training on mediation techniques in this group, and they reinforce each other by periodically coming back--we could call it in-service training. The community board is like that, only in a structured way. The message they get out is, "If you get in a hassle, have a complaint or problem, don't dial 911, don't call the police. Call a neighbor, call a friend, call our project. Let's see if we can work it out in the neighborhood first, and only as a last resort call the police." It is one way to attach the overload in the system, particularly if the people in the system are reluctant to admit they have an overload in reality. We go to the community and we say, "You decide whether the problem is going to go to court, go to the police, or go to some of our internal institutions".

If you do it that way we don't increase the web of government control and we do increase the influence of community groups. There is a neighborhood learning process going on here too, because as the mediators mediate cases and come back and they are talking within the neighborhood, they may not talk, breaching the confidentiality of the case, about exactly who the parties were and exactly what they did, but "Gee, the kinds of problems I faced in mediating out a dispute the last week were 1, 2, 3, 4, 5 . . ."; and they might find things like all of them are running into problems with alcoholics and that's what is at the base of a lot of their problems. So they look around for something to do with their alcoholics and find that there is no AA in the neighborhood, and maybe they should get together and form a local branch of Alcoholics Anonymous. That kind of learning process can take place in a very informal way. They can do that structured, as community boards does, with a director, and offices, and telephones, and people to call in, and that may meet the need, as Paul Nejelski said, that some people have for formal structure. They need to call somebody who sits behind a desk. Or you may have a very informal system for people who really can do much better with just talking it out with a neighbor. These latter two, the Gloria Patterson and community board, deal with adults, they deal with kids, they deal with kids and adults together. They have broken down all the categories.

I see my five minute thing and I'm really at the end. I just want to make one more commercial. One of the books I published in mimeographed form is the Citizen Dispute Resolution Organizers Handbook. It's \$2.00, and it's sort of a potpourri: it writes up about 7 different mediation projects, has some articles on the feasibility of it, a little bit on

training and some of the practical problem areas. It is also a book that I update with articles from The Mooter, so if you buy it six months from now you'll have different material in it than today.

In conclusion, I was brought up here to talk about juvenile projects, but it may be that as we talk about moving things out of the court, we have got to break down those barriers. And if we talk about moving things out of the court I would hope that we would talk about really moving them out of the court and building up that community responsibility rather than extending the court's work.

91483  
"THE LEGAL IMPLICATIONS OF THE MEDIATION/ARBITRATION  
ALTERNATIVE TO CONVENTIONAL CRIMINAL ADJUDICATION"

Paul Rice

Despite the proliferation of mediation/arbitration programs throughout the country, little attention has been given to the legal implications of the use of such programs as an alternative to conventional methods of adjudication--and specifically as an alternative to criminal prosecution. Therefore, I was very pleased to be asked to address you today on this issue.

Because of the limited time that we have, I am compelled to select only three problem areas for presentation. They are: (1) the confidentiality of communications and records within the programs; (2) the equal protection implications of screening criteria; and (3) the procedural due process implications of actions taken within the programs.

So that you might better understand the context in which the problems I will discuss might arise, I would like to refer to the diagram that has been provided to you on page \_\_\_\_\_ of your materials. This diagram illustrates the flow of disputes into the programs and the potential consequences of participation.

In 1976 I surveyed approximately 40 mediation/arbitration type programs to determine: (1) How they obtain cases; (2) the types of disputes accepted; (3) the method of dispute resolution employed; and, (4) the means by which they enforced the dispute settlement if there is non-compliance. I conducted this survey following an evaluation which I participated in of the D.C. Citizen's Complaint Center. My interest in the programs



stems from their potential as diversions from the formal criminal justice system. I am impressed with the potential of these programs for giving real relief to victims of crime and for minimizing the hardships of litigation for both witnesses and victims. In my experience as a prosecutor and in my present role as director of the prosecution litigation clinic in The American University Law School, I have encountered many types of offenses and many types of offenders that could appropriately be diverted to programs of this nature. Therefore, the diagram reflects my concerns and interests and is premised on the mediation/arbitration program acquiring its cases after a "criminal prosecution" has begun. I propose to discuss the legal implications to these programs in this context since it presents the most, the more interesting, and the more difficult, legal issues.

At the point of entry into the program, whether it be from a direct complaint by citizens or by way of diversion from the criminal justice system, the first potential legal problem arises. It will be raised by those individuals who are excluded from the program. This is an equal protection claim under the Fourteenth Amendment.

A second problem area arises at the conflict hearings at the beginning of the mediation/arbitration process. At these hearings the parties confront one another and attempt to reach a mutually agreeable settlement of their underlying problems with the aid of a mediator--usually a trained individual from the community. If the parties are unable to reach an agreement, some jurisdictions provide for the mediator to impose solutions on them. The mediator becomes an arbitrator in these programs. This is possible only if the parties agree to this process when they enter the program. The potential problems are ones of procedural due process under the Fourteenth Amendment.

The reaching of the settlement ends the first phase of legal problems. The next series of potential problems revolve around non-compliance. If there is compliance and the case was diverted from the criminal justice system, the suspended criminal action against the defendant will either be dismissed or nullified. If there is an allegation of non-compliance, there are three courses of action available. First, the program can take no action. It can ignore the non-compliance and leave the parties to their own remedies. Surprisingly, this is done in more programs than you might expect. This action, or more accurately, inaction, occurs more often as a result of a failure of those who established the programs to anticipate this problem and establish procedures for dealing with it, than a conscious choice to ignore the matter. Without some enforcement mechanism available to the programs, the most that the programs can do is attempt to renegotiate the settlement agreement. This is listed in the diagram as Option No. 2. Of course, there are only so many times that this can be done and the program still maintain some semblance of credibility. A second course of action, which is utilized in most of the programs that I surveyed, is to compel compliance with the threat of sending the violating party back to the criminal court from which he was diverted. This is listed as Option No. 1 in the diagram. Of course, this can only work if the case was originally diverted from the criminal courts, and then only if the party violating the agreement was the original defendant.

If this second course of action is taken, a second round of procedural due process issues arises. By sending defendants back to the criminal courts, and revoking their participation in the program, their contractual rights

to stay in the program and have their criminal charges dismissed if their participation is successful, is being jeopardized. A third course of action, which was followed in only one of the projects at the time of my survey, and which, to my knowledge, has subsequently been pursued only by the Justice Department's new Kansas City Neighborhood Justice Center, is civil enforcement of the settlement agreement through an action in contract.

The first legal problem which I will address pervades the entire program. It is the issue of confidentiality. It relates to communications from parties at all stages of the process, and to all records that are maintained by programs.

#### CONFIDENTIALITY

The integrity, and ultimate success of these programs may be substantially influenced by the degree to which their business is open for public airing. The potential for harm to the participants in these programs is substantially greater than in conventional civil and criminal litigation since the scope of the hearings is relatively unlimited.

Unlike a conventional action which is limited in scope to evidence logically relevant to legally defined claims and defenses that must be specifically pleaded and proven by a comprehensive set of evidentiary restrictions, the scope and nature of any given mediation hearing is often limited by nothing in particular. The issues to be discussed and resolved may not be clear until the underlying causes of a souring relationship begins to unfold at the hearing. Necessarily this must be so if the programs are to successfully resolve conflicts and not just resolve claims.

Many statements might be made during these discussions that could later prove to be embarrassing, if not otherwise damaging, to the parties in both civil and criminal litigation. As a consequence, if the parties are not protected from the use of such statements, they may be discouraged from participating.

In a similar vein, the records maintained by the program may be quite revealing with regard to the issues explored and resolved by either the parties or by an arbitrator. Many programs presently avoid this latter problem by simply not keeping complete records--or at least maintaining the records in such a form as to render them meaningless to outsiders. This is not an adequate solution. Comprehensive records should be maintained if the programs are to operate in a professional manner and to develop and evolve as institutions of justice. Without adequate records, the programs cannot reasonably be examined and improved upon. And if civil enforcement of the arbitration award is to be sought, factual justification for those awards must be given so that they will withstand judicial scrutiny.

Some protection for the oral statements made during negotiation sessions might be found in a very old and well established common law evidentiary rule which gives a limited privileged status to offers of compromise. Those offers are not admissible in evidence in subsequent judicial proceedings on the issue of liability.

Keeping oral statements out of subsequent judicial proceedings is explained by the need (1) to encourage the settlement of disputes without costly and time-consuming trials; (2) to enable litigants to buy their peace without fear of future collateral consequences in subsequent litigation with third parties; and (3) to allow parties to a controversy, in the interest of peace, to tender terms for a settlement which they believe to be proper, and if the terms are rejected by the other party, to avoid the unfairness of allowing that party to use the offer as an admission of liability.

This rule has been recognized in both civil and criminal courts. In a similar fashion, the policy of cooperative dispute settlement would seem to dictate that the rule be applied to the conflict hearings in the mediation programs.

The compromise privilege is recognized in Wisconsin. It was codified in 1974 in Section 904.08 of the Wisconsin Statutes Annotated. That provision makes all offers of compromise and all statements made by parties during their negotiations in the settlement of the dispute privileged. The statements are not admissible to prove liability for or invalidity of any claim that has been made or of its amount.

The more troublesome confidentiality issue relates to the records of the programs. In the absence of legislation making these records privileged (as has been done with juvenile court records in all states), the degree to which they will be open to public scrutiny will turn on whether the programs are considered state agencies.

In Wisconsin, as throughout the nation, there is a strong public policy favoring the public's right of access to public documents. It is a public policy that is based on the nature and spirit of our democratic institutions. And this right of access includes all branches of the government, legislative, executive, as well as judicial. This right is generally reflected in Section 19.21 of the Wisconsin Statutes Annotated.

The right of access can be restricted by the custodian of the records only if inspection would result in harm to the public interest which outweighs any benefit that would result from granting inspection. This may be an existing legal basis upon which program directors can maintain confidentiality; however, it has its limitations. The procedure must be employed on a case-by-case basis, and specific reasons must be given with regard to each document. General claims of public need will not suffice. Overall administrative policies barring any inspection have been looked upon with disfavor by your courts and probably would be declared void. If you wish to examine the relevant state law in more detail, I would refer you to the 1966 case of State ex rel. Youmans v. Owens, 28 Wis.2d 672, 137 N.W.2d 470.

Whether these programs will be considered state agencies or not may turn on the source of their funding and their relationship to establish branches of the executive and judiciary. If your programs were similar to the District of Columbia Citizens' Complaint Center, which, in the past, has been manned by Assistant U.S. Attorneys, lawyers from the Office of Corporation Counsel, and employees from the Department of Human Resources, they would probably be seen as a public agency.

Complete protection for records and oral communications can be assured only through legislation similar to that adopted for your juvenile courts in §48.26 Wisc. Stat. Annot. That provision absolutely forbids the disclosure of contents of juvenile court records without an order from juvenile court. In this regard, if juvenile courts utilize such programs, it is possible that the statutory privileges that have been given to their records will inure to the benefit of the programs.

#### SCREENING CRITERIA--THE EQUAL PROTECTION ISSUE

When we establish diversion programs of any kind, we usually can't address all problems of a similar kind, or even all facets of the same problem. There are too many monetary, time, and other resource restrictions. As a consequence, we have to limit participation in the program. We do this by the use of screening criteria. This screening, of course, is a form of discrimination that gives rise to potential equal protection claims by those who are excluded from the benefits of the program.

Constitutionally, the principle is well established that social programs established by the legislature do not have to address all evils at once. Therefore, a diversion program of limited scope, like the arbitration and mediation programs, is permissible. However, in pursuit of the limited goals we establish for our new programs, the screening criteria that we promulgate to identify those who may participate in our new programs are often crude and imprecise, because of our lack of experience. For equal protection purposes, how much

freedom will be given us in addressing problems on a limited and initially experimental space? Stated differently, how stringent a standard of review will the court apply to our admission criteria?

In general, the Supreme Court has recognized two standard of review for equal protection claims--"strict scrutiny" and "rational basis."

If screening criteria infringe upon "fundamental rights," that is to say, rights guaranteed by the Constitution, or if they are based upon "suspect classes" (like race or national origin), the court has historically applied the "strict scrutiny" test. This test requires the state to demonstrate that the discrimination it is engaging in is justified by "compelling state interest." In practical terms, this generally means that the discrimination will be held invalid--especially when the discrimination is based upon race.

Assuming that you will be wise enough to not discriminate on the basis of race or national origin (the only two suspect classes recognized by the Supreme Court to date), the potential for "strict scrutiny" will necessarily turn on whether fundamental rights are involved.

Does exclusion from a diversion program that allows one to avoid the potential incarceration and stigma of the criminal justice system, infringe upon a "fundamental right"? Does a criminal defendant have a fundamental right to avoid the possibility of criminal sanctions, by exclusion from the criminal system, when alternative methods for dealing with the cause of his criminal or antisocial conduct have been

established? The answer is clear--he does not. The Supreme Court has said as much in regards to narcotic diversion and treatment programs in Marshall v. United States (1974). The right to participate in diversion programs is neither explicitly nor implicitly guaranteed by the Constitution. The probability that the same result will be reached with regard to our mediation/arbitration programs is substantial. As a consequence, one could reasonably predict that most screening criteria will stand a much greater chance of survival under the "a rational basis" standard of review. Under this analysis, if the screening criteria employed is rationally related to the legitimate objectives of the mediation/arbitration programs, equal protection muster will be passed. If there is some "rational basis" for the statutory distinctions made, that is to say, if those distinctions have some relevance to the legitimate purpose for which the classifications are made, they will be upheld. The laxity of this standard of review is demonstrated by the Marshall decision. In that case the Court upheld the screening standard of two felony convictions, even though the two convictions could be for the possession of the narcotic the person is addicted to, and even though the "felony" label is often meaningless since it is based solely on possible sentence and so many jurisdictions treat the same acts differently. The Court upheld the standard because such individuals may be less susceptible to rehabilitation and might interfere with the rehabilitation of others.

I offer this advice to you when you are establishing screening criteria--state the goals of your program clearly, and logically think through the screening criteria you are considering to insure that, at

least in your mind, each screening factor has some logical relationship to the furtherance of the goals that you have stated.

#### DUE PROCESS

As I previously mentioned, the issue of procedural due process arises at two points in the mediation/arbitration programs--at the conflict hearing and later when revocation and referral back to the criminal court is contemplated because of complaints of non-compliance.

At the initial conflict hearing, I am not sure that any procedural process is due. My doubt stems from the fact that there is a question about whether there is any "state action," and also whether the program jeopardizes any constitutionally protected "liberty" or "property" interests.

The source of procedural due process is the Fourteenth Amendment. That provision only prohibits the "state" from depriving an individual of "life, liberty, or property" without due process of law.

The provision simply does not apply to actions of private agencies and individuals.

If a program is funded with public money, I'm sure that "state action" exists. But if we assume that it does exist, either because of state funding or because other "significant" state involvement is found, I am equally unsure that a "life," "liberty," or "property" interest is jeopardized in most of the programs I have examined. Since so few of them can enforce the product of the program--the settlement agreement--it is difficult to find any interest that is jeopardized by participation in the programs. Everything is voluntary. The worst that can happen to a

criminal defendant by being subjected to unfair procedures in the program is that no settlement will result, or if one is imposed through arbitration, he will not comply with it and will be returned to "square one" and proceed in the criminal process where he left off. He will have lost nothing but his time, and that by itself is probably constitutionally insignificant.

But to be safe, let's assume that some process is due because state action is involved and constitutionally protected interests are at stake. What process is due?

Due process is an extremely flexible and practical concept that is intimately related to time, place, circumstances, and consequences. Despite its flexibility, however, there are rudiments of procedural due process that have long been recognized. They include (1) an opportunity to be heard, (2) notice to make that opportunity meaningful, and (3) an impartial decision maker.

These basic rights will not create problems in the "mediation" programs. The hearing and notice are inherent in the nature of the process, and the unbiased or impartial decision maker is not an issue since the parties themselves are the decision makers. Only when arbitration is employed will the programs be faced with the issue of an unbiased decision maker, and to satisfy that requirement, the decision maker need only not have been involved in the matter about which he is asked to render a decision.

The nature of the hearing right, has given rise to the greatest number of specific procedural due process problems. Does it require an evidentiary hearing? If there is an evidentiary hearing, is there a right to call witnesses and an corresponding right to confront witnesses presented by the adverse party? Is there a right to counsel? Because of time constraints, I will address only the issue of the right to counsel in detail. With regard to the rights to call witnesses and confront and cross examine witnesses of the adverse party, I would only note that these rights have generally been considered basic to a fair hearing. When the hearing must deal with the resolution of conflicting facts, the Supreme Court has allowed these rights to be dispensed with only when a compelling governmental interest has been shown. And this has been shown to the satisfaction of the Court only in prison disciplinary hearings. I do not think that such an overriding governmental interest exists in the mediation/arbitration programs. Consequently, I don't think that the rights can be absolutely restricted. They probably can be modified or limited in some fashion, however, if it can be shown to be necessary for the successful operation of the program.

The right to counsel is the most complex issue relative to the nature of the hearing, because it has so many potential sources in the Constitution. The Sixth Amendment explicitly guarantees the right to counsel. It states that in all criminal prosecutions, the accused shall have the assistance of counsel. The due process clauses of both the Fifth and Fourteenth Amendments also guarantee the right to counsel. Their guarantee, however, is indirect. The Fourteenth Amendment

provides, in part, that the state shall not deprive any person of life, liberty, or property, without due process of law. The equal protection clause in the Fourteenth Amendment has also been a source for the counsel right. In that clause, it is generally provided that the state shall not deny any person within its jurisdiction the equal protection of the laws. And so, if the state has set up a system in which monied people can bring a lawyer, the state may have to provide free counsel to those who cannot afford it. And finally, we have even seen the Supreme Court reading a counsel right into another constitutional protection. This was done in Miranda v. Arizona. The Court read a counsel right into the Fifth Amendment privilege against compelled self-incrimination.

It is my conclusion that there is probably no constitutional right to the assistance of counsel at any stage of the mediation/arbitration process.

The Sixth Amendment applies only to "criminal prosecutions." And even then, the Court has construed the Amendment to apply only to "critical stages" of a criminal prosecution. From the case law, I am convinced that the mediation/arbitration programs are neither criminal prosecutions in and of themselves, nor critical stages of any criminal prosecution. I base my conclusion on the following facts relative to the nature of these programs: (1) the defendants are not opposed by a legally trained prosecutor who represents the organized forces of society; (2) the rules of evidence are not enforced; (3) procedural rights do not hinge on the timely assertion of claims; (4) the proceedings are not adversarial in nature; (5) the adjudications do not carry with them the penalties, the opprobrium and the collateral consequences of a criminal conviction;

(6) there can be no sanction of incarceration; and (7) the goals of the programs are inherently different from a criminal prosecution. In arriving at this conclusion I place great reliance in the recent Supreme Court decision in Middendorf v. Henry.

I conclude that there is no due process right to counsel because of the informal and flexible procedures that make counsel's presence generally unnecessary. But equally, if not more, important to this conclusion is my belief that the court can be convinced that the presence of lawyers would be affirmatively undesirable because it would change the inherent character of the proceedings. My speculation is that counsel's presence at the conflict resolution hearing stage would detract from the atmosphere the programs are trying to create. My concern is that the presence of counsel would make the parties more combative and adversarial and less conciliatory. I believe that the presence of counsel could hinder the effectiveness of those programs equally as much as their presence was found to detract from the parole revocation hearings in Morrissey v. Brewer, the military court-martial hearings in Middendorf v. Henry, and prison disciplinary hearings in Wolff v. McDonnell.

Despite the fact that neither a Sixth nor Fourteenth Amendment due process right to counsel may exist, it is not clear that you can forbid the presence of counsel by those who wish to bring, and can afford to retain, counsel. In the welfare termination case of Goldberg v. Kelly, the Supreme Court held that the presence of a lawyer, although not required, could not be forbidden unless an overriding governmental interest could be shown. At the initial conflict resolution hearing,

this showing might be possible if it can be demonstrated that counsel's presence detracts from the atmosphere of conciliation and ultimately the success of the programs. I would be surprised, however, if the court were to find such a compelling interest at the subsequent termination hearing. At these termination hearings, although counsel's presence may not be sufficiently important to be required, his presence may certainly be helpful, without the undesirable consequences that his presence may give rise to in the initial conflict resolution hearings.

If we allow monied people to bring retained counsel to our hearings, do we create equal protection claims by those parties who cannot afford to bring retained counsel? My conclusion is that we do not.

Although the Supreme Court has gone a long way in requiring monetary disadvantages to be equalized by the state, there are limits--even though they may not be clearly defined. The government cannot reasonably be expected to duplicate the "legal arsenal" that may be privately retained by some parties. As the Supreme Court has recently stated in the case of Ross v. Moffitt, the equal protection clause will not come into play to require the appointment of counsel for indigents until the inequality is so significant that it amounts to "fundamental unfairness." In denying an equal protection claim to a right of counsel on a second level discretionary appeal in Moffitt, the Supreme Court held that the indigent party must demonstrate that he was denied an "adequate opportunity to present his claims fairly." The opinion read very much like due process reasoning was being superimposed on what is professed to be an equal protection analysis. This leads me to suspect that for counsel purposes,

anyway, the concepts of due process and equal protection may be substantially overlapping. As a consequence, if the right to counsel in a given proceeding, like the dispute resolution hearing in the mediation program, is not sufficiently important under basic notions of fair play (due process), the right will not be required under the equal protection clause. The resolution of the due process issue may well be controlling.

When dealing with most procedural process rights, one should understand that when important interests are at stake, if fairness has to be sacrificed for informality, flexibility, and economy, the Constitution is going to require that the more time-consuming and costly route to be taken. Often, however, significant interests are furthered by informality and flexibility. When this is true, rigid procedural rules that are usually needed for protection of an individual's rights, may be sacrificed, when, in a particular context, their appeal stems more from the simplicity of their application than from their substance.

In conclusion, I would like to emphasize that although potential legal problems clearly exist with the establishment of these proposed programs, for practical purposes those problems are insignificant in light of the potential benefits that the programs offer. I am convinced that they deserve our serious attention and active support.



"TECHNIQUES OF DISPUTE RESOLUTION"

Joseph Stulberg

91484

Due to technical problems, a transcript could not be prepared from the conference tape recording of Joseph Stulberg's remarks. The following notes, supplied by Mr. Stulberg, were the basis of his conference presentation.

I. Identify Dispute Resolution Process: "How do we solve a problem?"

A. Processes

1. Litigation
2. War, Fight
3. Negotiate
4. Delay, etc.

B. Litigation

1. Parties
2. Define Issues by Law
3. Seek Legal Remedies

C. Negotiation

1. Parties
2. Define Issues
3. Define Solutions

D. Mediation

1. Third Party
2. Impartial
3. Assists at Request of Parties

E. Arbitration

1. Third Party
2. Imposes Solution

II. Techniques: "Is It Simply Cutting the Pie in Half?"

A. Negotiation, mediation, arbitration:

Not new - most frequently used processes in "Alternatives" programs.

1. Skills are ones which everyone calls on frequently--but examine them in the context of an impartial posture.

B. Mediation

1. Goal: help parties reach a settlement challenge: restore trust
2. General Skills: objective, knowledgeable, listening and questioning skills, patience
3. Case Study:
  - a. College student rents a house with a driveway common to an elderly couple. The student plays loud music at night, the couple park in the driveway to drop off groceries. As a result of the couple blocking the driveway, the student was late for an exam and received a poor grade. Following the exam, the student had a party, and abruptly ignored a call from the couple requesting to lower the noise. The next day, the couples garden and flowers were damaged. The following week, one member of the couple threw a rake at the student, and that night the couples phone rang on and off throughout the night. The next day, the couple filed a criminal complaint, against the student for harassment.
  - b. What does the mediator do? Split 50-50? What, meet within 7-10 days, while the parties are still agitated?
    1. Calm environment: coffee, smoke, etc.
    2. How do you start?
      - a. "I'm an authority of the DA's office" (Authority) "I'm judge. . ."  
"I'm a person arranged by the CDS to see if I can be of assistance in helping both of you to resolve the situation that brings you here today. Let me explain my function. . ."
    3. Where do the Mediator/parties sit?  
(Near the door) don't permit interruption
    4. Establish ground rules
    5. What does the mediator then do?
      - a. What are issues?
      - b. What do parties want?
      - c. What things are most important to parties?

A. Issues: Court--Telephone harassment

Mediation:	<u>Couple</u>	<u>Student</u>
1.	Loud music	1. Driveway parking
2.	Loud parties	2. Calling the police
3.	Damage to garden	3. Rake being thrown

B. Remedies

1. Student moves
2. Couple moves
3. ?

C. Now what does the Mediator do?

1. Which issue do you address first?
2. How important is it to establish guilt for the garden? Admission vs. Settlement or "I broke items" vs. "it is worth \$25 to me to settle this hassle."
3. Counting Issues
  - a. Generally a bad idea
  - b. But also generates equality of power
  - c. Also, when near settlement, count: "you've settled 4 of 5 issues, don't give up now."
4. Posture of impartiality is essential to getting an agreement.
  - a. "What I think is irrelevant, the two of you must agree to it."
  - b. "If there is no agreement, I walk away, but you still have a problem. Now do you want to solve it?"  
  
(But, if you are working for a court or DA's office, this is not possible because of warnings "if you don't settle than I'll prosecute.")
5. Taking what one party has said and communicating it to the other.
  - a. e.g., (Mediator): "Propose that no record playing between 11:00 p.m.-7:00 a.m." vs. "Jack, I know playing records is important to you, would you consider an arrangement whereby you could play the record player from 7:00 a.m. to 11:00 p.m. each day."
6. Durability of the agreement (to judge): "I'll park the car without blocking the driveway if he stops playing records at all hours of the night."  
(Judge to student): "Agreeable to you?"
  - a. of course, but there will be no sustained compliance.
  - b. Mediator:
    1. Learns of an offer in caucus
    2. Goes to other side:  
"Let's review where we are. Apology - the problem, but what do you want the most?"
    3. Party articulates it and the mediator trips in a hypothetical way, if rejected no found offer, and the parties can come back to the issue.
    4. The mediator often knows there is agreement before the parties do.

WHY BOTHER WITH MEDIATOR

"PROGRAM IMPLEMENTATION"

91485

Fred Dellapa

I have a rather thankless task here. You have heard Paul, Paul, Paul and Josh talk to you about various aspects of dispute resolution, ranging from what the Federal government wants to do and how they are supporting this particular movement, and how they support more or less the "establishment" type programs. You have heard Paul Rice (that was Paul Nejelski, incidentally) discuss all the various legal issues and, as we lawyers do very well, confound things and then rather dramatically end up: "Well, maybe it doesn't really mean a whole hell-a-va lot anyhow. It probably is going to work quite well and quite adequately". You heard Paul Wahrhaftig talk of community-based grass roots types of operations that come out of things like Ray Shownhotz's community boards project in San Francisco based on a fellow by the name of Danszig who proposed this in a rather lengthy article which is quoted in your bibliography. I would highly recommend that you read that. And then you listened to Josh tell us about all the different forms of dispute resolution, primarily mediation and arbitration. And my job in 40 minutes or less is to tell you, or hope to try to tell you, or put you on the road to, how to do it, how to implement it. My contract here has six separate things, that would take me 60 minutes allowing 10 minutes each per segment. That is absolutely impossible, but I am going to try anyhow. I have two pages of outline, I would hope you will bear with me on this.

Basically I am going to make the assumption that because we are meeting here today you have, hopefully, already decided perhaps the state of Wisconsin could utilize a system like this. I am going to try to take you down the road, and it is going to be right dead up the middle.

I adhere neither to the establishment owned and operated program such as Miami which is operated by the circuit court system there, nor am I going to advocate the purely grass roots. I am going to try and be as pragmatic and as practical as I possibly can, and tell you what works. A lot of this is based on my own experiences in setting up the Miami dispute program, which I tried to make a hybrid. We began in Miami with the idea that the court system was grossly overburdened. A lot of these, what some of us attorney's would call misdemeanors, are really nothing more in my estimation than interpersonal disputes translated by us lawyers into crime or criminal activity. We felt that, one, the system had a lot of cases going on and they were not being adequately resolved. Most state attorney's offices or prosecuting attorney's offices or court systems consider a problem solved after it has gone through the "process" and it is effectively disposed of. That means it is out of the system, a judge or somebody did something. What they did not concern themselves with is the after-shock--whathappens if this isn't done. So we suggested at that time nothing novel, it has been going on for centuries actually, the possibility of sitting people down and trying to get them to solve their own problem in a rather neutral forum. We drew off the experiences of the Citizen Dispute Services, the American Arbitration Association, and a program in Columbus called the Night Prosecutor's Program. So this is where we will launch our discussion.

Where do you put the program? There are those who will advocate that you must put in some way or another identified with an ongoing governmental agency. This is a very wise thing to do. Why? Because you need money to operate such a program, and generally federal funds at least

are available on a general basis only to a local governmental entity, state governmental entities, LEAA and other such sources. There are also those that will say, as Paul Wahrhaftig would, that you should put them with private non-profit organizations or purely, if possible, into the community. Now how do you judge this? How do you decide where you want to put your program? I am afraid that what you re going to have to do is take a good hard look at your own community, where you are going to put the program, what might be acceptable. In Miami we felt very strongly that it would not be acceptable for us to just go out and open up a Danszig type model because at that time Dade County just proliferated in programs--drug abuse programs, programs to do this and programs to do that. People would sometimes get the idea that if they came to their judicial system someone was going to shuffle them out into the woods somewhere and forget all about them. So we opted out for what I call the "ostensible authority" of the circuit court, where if we ask for the grant through the office of the court administrator to operate a program that would work in cooperation with the circuit court there, but would not be totally and absolutely owned by them. It would be administered by the court. There are some projects that operate through prosecutor's offices. A couple of good examples, the Columbus Night Prosecutor's Program and the Los Angeles County Attorney and Los Angeles City Attorney Hearing Officer programs which do essentially the same thing. My opinion is I feel I would lean pragmatically toward identification with your judicial system only to the extent that they will give you some form of ostensible authority, where it is a good place to start. I am not too keen on the idea of a prosecutor's office running the program. As Paul Rice said, that could cause some complications as you

go along. There are such things as if an assistant state attorney or district attorney talks to someone who may be a potential defendant in a criminal matter, then you are going to have an immunity problem and some other things, as basic confidentiality. The other thing is effectiveness. If you are involved in a hassle with your neighbor and you walked into a program like the Los Angeles City Attorney Hearing Officer Program, and you sat down to have what you thought it was to be a friendly discussion with a third party neutral and this third party neutral immediately stood up upon your entry and began reading you your rights you might have different thoughts about it. You must, when you implement, stress the voluntariness of this program.

You decide for yourselves, this is the key things. I've gone about talking about this before and I always want to stress that. Don't let any national organization or any other group with vast amounts of experience, no matter who they may be, dictate to you what is going to work in your locale, because they don't know. I'm from Miami, Florida, what do I know about Madison, Wisconsin? I don't know about the people here, I don't know how they think. You have to develop that kind of thing yourself. The best possible way is, I believe, to try and thread it right down the middle. Try and play it so that you do connect yourself, at least in the beginning, with someone that has got some kind of authority, some kind of backing for your project that will make it at least acceptable to your own community. That would be a fairly strong suggestion. Now, that part leads us into how do you convince the members of the judicial system, whom these projects tend to work with? (I am in no way suggesting to you that these programs are strictly for criminals. It appears that in the beginning the majority of the programs that are started throughout

the country did work primarily in the criminal area. They have now, most of them, drifted off--still working in interpersonal dispute and in a criminal area, but they are also getting into landlord-tenant problems, consumer problems, and just disputes in general. Remember, that no matter what people in the judicial system call something, whether it be a crime or a civil action, to the people it is just a problem and they would like a solution to it.) How do you sell this to the bench, the prosecutor, the local Bar Association, to the citizens in general? What do you do? It has been suggested that you develop a citizen's advisory board. I can give you arguments on both sides of the fence about that. I could have you talk to the ex-director of the Boston Urban Corp., one Lois Garriman, who wishes to God she never had an advisory commission because she allowed them to involve themselves in just about every single aspect of the program, including, almost including, the day to day operations. That is foolish at best. If you have to go to a board and decide whether you want to change some language on your notices to appear to something, it is going to cause you some difficulties. But, you should have some type of a group made up of people from the community that you intend to serve and from the established judicial system,, involved in the planning and the development and possibly the policy setting. I doubt very seriously if you'll get away without having them involved in the policy of the program. My own personal opinion is, use the board, select the majority of people, if you can, from the community involved, and balance them off with some people, perhaps your chief judge, your head prosecuting attorney or representative, somebody from the public defenders office, somebody from the local Bar, somebody from the county commissioners' office or city government office--your sources of referral. We found

in Miami, in the very beginning, the best way to get cases was to literally sit in the state attorney's office. Myself and my assistant would rotate and go sit at the criminal intake desk on a daily basis and just take cases right away from the prosecutor's hand. This was done, obviously with the blessings of the prosecutor. They generally become your first source of referral. Now, this again doesn't bring about the idea that they are always criminal. You would be surprised, those of you who may not work in a prosecuting attorney's office, the number of things or problems that come in that really have nothing at all to do with criminal law. You go out, at least in my experiences, to the average citizen and just say, "well, you have this problem here, who are you going to call?" and they say "I'm going to call the state attorney". The state attorney's office, most of them say "You got a what?" Boom. They hang up the phone. If you have a state attorney's office, that is cooperative and you sit there in the office and you take the cases out without them filing on it, that may be, probably, your best initial source. The other sources are legal services corporations, private attorneys and the local Bar--if you can convince the local Bar, and this is not always an easy task. However, the American Bar Association does advocate or promote this concept and are willing to lend hands in convincing members of the local Bar Associations that these are good programs. In fact, there are at least two programs right now that are more or less operated by the local Bar Association. Other sources of referral: police departments. Police also are called in a lot of situations that really are not criminal and other than writing down on the back of a piece of paper and handing it to someone saying go see the state attorney, the police officers, as in Columbus, Ohio and some other programs around the country, will

hand the person a card that tells them to go see the citizen dispute settlement center, the neighborhood justice center, the community board, or what have you. A referral source that is not too often talked about, why I don't know, is just the walk-in trade alone. This is what the Community Boards Project in San Francisco relies upon. That type of program built itself up in the community, did a tremendous amount of leg work and field work to get itself ready to operate so that the people there are shaped into the idea that if you have a complaint of the nature that can be handled by the board you go there first before you do anything else. That took a lot of time, a lot of effort, but it can be done. But it is something that would take a lot of study and a lot of work. It could, eventually and hopefully, turn into the prime referral source. People coming to know the center and walking into it on their own and voluntarily. You have other sources too. Hospital emergency rooms. One would be surprised at the number of matters that come through a hospital emergency room: child abuse, spouse abuse--and not cases to an extreme degree but just (there really isn't any such thing as minor violence) matters where say a woman will come in and her boyfriend or husband has hit her or harmed her in some way, and some of them are under an obligation to say, "Well, we must report this to the police department" and the people say, "No, I don't want that." If you have a place like a dispute center where you can refer them, this can also be a very good source. A lot of social service agencies of a whole variety--probation parole offices, welfare offices, guidance and counselling centers that use sliding scales (we're not saying here that we are just looking for indigent folks) can also be used as referral, but this takes cultivation, you have to go out and spread the word about the program. How do you do that, how do you promote your program?

In Miami, we invited media down and talked to them. We showed them the grant, we talked to them about how we wanted to run the program, we let them sit through all the stages of the program, from the day we started developing the program to the day we opened the doors up. We didn't make it like a great big supermarket store--grand opening today, CDS is opening, media come on down here and take pictures and things. But we did send them press releases, we kept real good relationships with a couple of the writers from the Miami Herald, we had some people in TV and radio who were quite interested. You will find that in the beginnings of a dispute settlement project of any kind the media has almost an instant like for it. Why? Because it is something that shows where the government, or at least the community is banding themselves together, working to solve "people problems". And this is always appealing for certain writers for the newspaper, particularly those that write in the political spectrum and those that write in the human interest area. After that, you can use things like community service spots. A lot of television and radio stations give out free time on the network or on the air to run a community service spot. You can sometimes get access to video taping equipment or something like, that or some of them will even make them for your for television purposes. Radio is just someone going down and getting on a talk show. I use to go on talk shows in Miami at midnight or 2:00 in the morning and we would get referrals from that. You also spread it around some of your elected officials. One of our beginning early sources of referral with Dade County was a county radio program called "Let's Scream at Dade County", where citizens would call up with all kinds of strange complaints. We told the county manager's office that he could refer these strange complaints to the citizen dispute

center. The county manager's response was "What the hell is that?" When we explained it to him he said, "Oh, that's a good idea." So he started shoving his cases. People call a lot of places in the governmental structure to make complaints, if you can just tag into that. Drop cards, drop pamphlets, drop whatever you can to let people know, they will start channelling them in, little by little. Building relationships with the various elements of the judicial system, the governmental system--that is going to depend on staffing and the type of people that you have running the program. You would try to get people to staff such an operation who, bluntly speaking, are very good diplomats. They are not the kind of persons who are going to be offensive to a chief judge, a prosecuting attorney, chief of police, mayor of the city, saying "Right on, I know how to do all of this, you leave me alone, I'll build you an A-number one system". You need someone who is patient, willing to work long and hard hours in the beginning to shape the program up, and has a real good feel for dealing with people and their problems. Josh talked briefly about the criteria and the qualifications for the people on your mediation staff. I agree 100% with everything that he has said, in particular about my own profession. Early on in this business people were saying that a lawyer shouldn't even be involved in this kind of thing. It was almost like an anti-lawyer feeling, and to some extent they may be right. Lawyers are not necessarily trained to be mediator types. We are trained to punch it out with our adversary. But remember also, lawyers are trained to look at both sides of an issue, and if they really put their mind to it some lawyers can be real, real find mediators. The programs around

the country now, we've located a number in excess of 85, have a while variety of types of people that they use as mediators. They range from Miami, which in the very beginning, used what we called "professionals" as mediators. In the beginning we felt we couldn't afford a training program for our mediators, so we had to take people that were already used to dealing with people. We took some psychologists, we took social worker types, people who were used to dealing with other people, and used them as mediators. There are other programs that use people right off the street--they recruit them, they train them, they show them how to mediate properly, what the program is all about. And those programs are equally successful. I don't think that the type of person that you have in terms of education background has a whole lot to do with whether they are going to be good mediators. It's how they can deal with folks, and how they can help balance issues between people or at least show them how to resolve difficulties amiably.

Incidentally, on the selection of people we do have available at our staff office some questionnaires of some programs around the country that we have used in soliciting mediators. They are very interesting; if any of you are interested feel free to write us and we'll be glad to send them. They are like a little test that you aren't even sure that it's a test that you are being given, but it more or less attempts to measure your abilities to be a mediator.

(Question from the audience about using volunteers): I was going to get to that. There are some programs that pay and there are some programs that use strictly volunteers. In the beginning my feeling was that if you paid them you would have more reliability that they

were going to show up. In Miami at that time, and still, we ran approximately 25 cases a night. We used to run 5 mediators with 5 cases a night, 4 nights a week. I was nervous that if one of my mediators blew out on me, we were in trouble. I was afraid that if we used volunteers the likelihood of that happening was extreme. The other side of the coin, the Orlando, Florida program uses all volunteers and all volunteer lawyers on top of it. They have a list of 120 attorneys and they can rotate them where they only have to serve maybe one night every one or two months as a mediator, and they do quite well. When we say pay we are not talking in terms of a high-powered American Arbitration Association arbitrator cracking in his \$200 an hour or whatever it is, no slander intended--lawyers do better than that. We paid them a maximum scale of \$10 an hour, and a minimum of about \$5 an hour. It wasn't really arbitrary, we tend to try and do it on their degree of experience as best we could. Another program only pays a maximum \$3 an hour and still gets the same response. However, it is interesting to point out, and we have been surveying programs now for about a year and a half, there is very, very little problem with getting volunteers to work with these programs, very little. I have yet to hear a project complain to me or say to me that the volunteer program stinks because they don't come in. People given the opportunity to get involved in some way or another with the judicial process (I hate to have to use the terminology like that), like it. And especially people from the behavioral sciences--they love it in particular. My program had some very, very high-priced private clinical and social psychologists who worked for us for next to nothing in their terms, just because they liked it, they really



liked it. You can go to your university, you can go to social agencies of any kind, and just say we are going to start this program, we are looking for people, how would you like to do it. That's if you want to lean a little bit more toward, what I call, the professional type of mediator. You don't have to do that. Putting out the call to the neighborhood in general is sufficient. Speaking of that neighborhood, you hear Paul Nejelski say that neighborhood justice centers were based on the idea of a fixed neighborhood, 50,000 to 90,000 population. Their initial attempt was to service only one area. Well, you take New York, you have the Bronx. Well, you know, the Bronx is like a million and a half people--that's an awful big neighborhood. Dade County is 1.6 million people. In Miami we use the concept of a decentralized-centralized operation, if you can conceptualize this. We were centrally located in that we were in the Criminal Justice building, a very bad name, but that's what it is called, in the middle of the city. But we had branches. Dade County is about the size of the state of Rhode Island, so we had branches in the south part of the county, in the north part, and the east, and we would service a local population. I personally feel it is foolish, if not eventually going to be cost suicide, to try and set up a program for every single neighborhood and area. You just take a look at New York City and that alone would stagger you. You would go broke. It would probably cost more than operating the whole judicial system of the State of New York to operate to series of neighborhood justice centers in the City of New York using 50,000 to 90,000 as your population base. You just could not do it. I would urge you, if you are looking into it, to try to lean toward county-wide, metro-wide area servicing through the branch system. It is not as difficult as one would think. If you take the given

that a program consists of one project director, anywhere from 2 to 4 permanent intake officers on a full-time basis--we used to use one of our intake people as a circuit rider, Monday, Tuesday, Wednesday be such and such a place, then we could skew it according to the case load and the volume that would come in. We started seeing we got more cases out of South Dade than we got out of the central part, so we increased the hours and the intake function of the South Dade office. The Miami Beach office the same thing happened. In North Dade we didn't get too many people--for some reason the people in North Dade always wanted to come downtown anyway. We also held hearings out in the branch courts--excuse me, the branch offices. I say branch courts because we happen to use the court facility, we do not have to rent spaces. Dade again is a metro system and they have their little branch governmental places scattered all over the County of Dade, and also the municipal courts were abolished in Dade and the entire State of Florida in 1973, which left an awful lot of vacant municipal court buildings or parts of City Halls that were used as court buildings, that we were offered to go and set up if we wanted to. At one time, Dade was considering operating no less than 7 branches, which would have been a fantastic service. That was never quite realized but it is always there as a potential.

The training aspect for your mediators: this is a real, real interesting proposition that I am going to make to you. I myself, personally, recommend this: there are a number of training sources that are absolutely top drawer. You've got one of the best right over here--Josh Stulberg's American Arbitration Association. They do a fantastic job of training people to be mediators, neutrals, or what have you. You have another group called the Institute of Mediation

and Conflict Resolution out of New York City, and then there are various other, more or less independent operations that are now springing up that are also offering training. One of them is an outfit out of Georgia State University that is doing the same type of thing. And I'm sure you can find them around. I believe Hennepin County (Minneapolis) is also offering training. But what you might consider doing is approach a training source, if you feel that need and you probably should, and ask them to train for you your initial people, what I call your hard-core bunch, your first bunch of mediators. Then use those folks to train the next batch, and the next batch, and the next batch. This is essentially what we did in Miami. We had a difficulty because when we started our program we got some residue money. They weren't going to fund us at first and then somebody found \$50,000 that they had either forgotten to spend or a program didn't work right or something, and then gave it to me to use for the CDS program. I could not afford the training program, quite point blank, so I went and I found myself a social psychologist and a clinical psychologist who had experience in this area. In fact the one fellow that we did use extensively was, at least he said, one of the original board members of the Citizen Dispute Service, a fellow by the name of Harold Cramer. And he trained our initial mediators, and then from that we developed our own training program that consisted of a person who was being considered to be a mediator coming in, working a couple, three nights of a mediation session with a trained mediator, generally Harold. This would consist of sitting there, watching the process, for actually two weeks--a total of four sessions, and then deciding whether or not they even liked it, if they thought they could handle this kind of thing. If they did, and they

were acceptable to the program which obviously was the first instance, we would do on the job training. We also had monthly training sessions where we would get the permanent staff, some of the people who were involved in the referral business to us like people in the prosecutor's office, people from the police offices, this and that, coming into our training sessions and sitting down once a month, talking about problems with the mediators. The mediators would share their experiences. All kinds of things would come out of it, and you could develop your own training program. That is an economical way of doing it if you can't afford to get good, heavy training. That's good also. I kind of leave it up to local option. It is my own personal opinion that training resources can be found in your area, you just have to locate them. American Arbitration does have regional offices scattered all over the United States. I believe they also engage in this kind of training. If you want information on that, obviously you contact the sources for that type of discussion.

Procedures for accepting and monitoring the cases. Generally, like I think I said earlier on, the one criterion that you must always maintain is any problem that comes into the dispute center rightfully comes in there totally voluntarily. Miami tried to make it a point that the people understood completely that this was voluntary, that they were in no way coerced. If a complaint was sent to us, no matter who sent it to us, we would sit down and explain to them that we are not a court--"well your sign there says 11th judicial circuit." "Yes, that's right, they are an administering agency--we do not adjudicate, we have no power to adjudicate, you only come here if you want to come here." "Why would I want to come here, what can

you do for me?" "We can help you solve the problem." "The court can help me solve the problem." "Can the court really help you solve the problem?" You know, courts like to think they can help solve some of these problems. I'm giving you some of the patter that we would give to the citizen. Like if you are complaining about a barking dog, just because the judge, God bless their souls, sitting on a bench says, "If that dog barks again I'm going to fine you . . .", that isn't going to stop a dog from barking. That "peace bond", as we call them in Florida and their constitutionality sometimes comes under question, like in lover situations--boyfriend/ girlfriend breakup and one of the two of them just cannot get it through their head that the thing is over, they spend the next months or year running like a sick person harassing the other person--if someone on the bench says, "If you don't stop that you're going to be in real serious trouble", that's a piece of paper, that doesn't stop feelings, that doesn't stop emotions, that doesn't stop anything. So we would explain to them that if they would sit down and confront the situation, talk about it, maybe you are going to get a lasting solution. That kind of triggers people, "A lasting solution, oh really, I don't have to come back again." "That's right, maybe it is going to work." You sell them on the idea, you sell them on the program. If they balk at any point in time, you don't have to have the hearing, you really don't. With the respondents that would be the other side of the story, when they are notified the first thing that generally happens is you get a call into the office, people screaming and yelling, "What is all this about, badda, badda, badda, badda . . .", you explain to them what the program is about. A lot of times some of the complaints

that are made are completely spurious; I mean really, people just make something up to get somebody in trouble. But there is at least the germ that something is going wrong, something is going on that isn't right, and the other person will start giving you their side so you say, "Look, why don't you come down to the center and let's talk it over." "By God, I'm going to do that because I have a side of this story too." And they come. We found out in studying Miami that we ran about the same no-show rate as the regular formal court process--about 20% to 30% of the people didn't show up, one side or the other. Again stressing the voluntariness, if any one at the hearing or before the hearing says no, we don't want to do it, we would have to tell them I'm sorry we're not going to be able to conduct this hearing. We would generally talk with the person, if they did show up, and explain to them what all their different possibilities for relief or remedy were available to them. We did not recommend to anyone that they go prosecute or go to a civil court or anything like that, we would just tell them that they could take this down and maybe talk to the state attorney, about it, you could go to civil court, you could forget about it or try to negotiate it through yourself.

In terms of the types of cases that we took in, in our original grant we listed approximately nine subject areas. To be quite frank about it, I just pulled these out of the air. They seemed to be the most logical types of interpersonal disputes that weren't going to be too well handled by the court system. Assaults, lovers' quarrels, family types of disturbances, barking dogs, petty larceny to the

extent of I borrow your lawn mower and I don't bring it back. You would be surprised how many times that happened. People would split up in a relationship and cart off what they think was their part of the deal. We didn't restrict it actually to those nine categories, we were more or less wide open in terms of what we would take. My opinion was, and in the beginning I was obviously the guiding philosopher or policy-maker for the program, that if someone had a problem and they wanted to come into this dispute center to help solve it, then that was okay. Because I remembered all through law school something that always stuck in my head was that, between people, they can do what they want. Those of you who are attorneys in this room remember, they don't need us, they don't need lawyers, they don't need judges. If I got up right now and walked out there and smashed anyone of you over the head with a chair, you would always have the option, unless there was a prosecutor or police officer sitting in here who saw that happen, of going over and saying to Josh, "Gees, Josh, Fred just hit me with this chair. We want to talk about it". And we could do that. Josh would say, Fred why did you hit him with the chair, you could go to jail". We could resolve it that way, and remember that until it comes into the all-encompassing arms of the system, that if the system doesn't know the system can't do much about it and I'm not sure the system wants to do a lot about it.

Criteria. Just to give you an idea of how these things can range. The Miami program handled three cases of statutory rape. These are felonies in Florida. The definition of statutory rape is intercourse with a female under such and such an age, and in Florida I believe it

is 16. We did not solicit the case like that or anything, but they came to us quite voluntarily. The mother of the daughter came in and said so and so here, we didn't realize that if we made a complaint to the police or the prosecutor the poor guy is going to go away for 20 years, 30 years, whatever it happens to be. We don't really want that, we want this thing solved so that they will stop. They came to us voluntarily. We handle some felony cases but never by referral from anyone other than the people, the disputants, themselves. When I participated in the writing of the legislation for Florida on citizen dispute which is yet to pass, I will add, it was suggested to me at that time that perhaps I ought to put a monetary limit, that citizen dispute centers will not handle claims of more than . . . I think they fixed it at the same amount as the small claims court which was \$2,500. The Chief Justice of our State Supreme Court said no, that's silly, why would you want to do that. If someone wants to come in to a dispute center to solve a million-dollar problem, that should be their privilege. I think he was absolutely correct. I think that's what Paul Rice was alluding to hear. It it is voluntary and it keeps the voluntariness, the parties elect to do this through an informed decision, so to speak, to satisfy the legal minds, then that should be their privilege and their option. There are some difficulties because it is a state-sponsored, or something like that, type of an issue, but he again felt, as he very adequately said, in the long haul he doesn't think that that is going to cause a whole lot of problems.

I only have a couple of minutes here. I have tried very rapidly to cover all of this. I would like to add, a lot of things on program implementation we have available at our staff office. The two gentlemen here, Paul Wahrhaftig and Josh Stulberg, both of their offices can

supply you with a wealth of information from both sides of the fence-- from grass roots to the established order. I am also going to do a pitch. This is a free pitch. This is one of the best things I have ever read. It is called "Courts in the Community". It was given at the Williamsburg II Conference in March, 1978. It's written by one of the members of our committee, Earl Johnson. This little booklet here of about 20 to 25 pages does a beautiful, beautiful job of explaining exactly what this whole business is about, and why he as an individual feels that the judicial branch ought to be involved in this whole movement. I think that the way he puts it would be very, very informative. If you can't get hold of it, you can try writing the National Center for State Courts, and if you can't, drop me a line and I'll duplicate this and send it out to you. I think it is an excellent publication. Beyond that, the special committee that I represent is available to do any kind of technical assistance or consultation that you want. We cannot charge for that, we are not permitted to. We will help you in any way that we can. Primarily, we act as a funnel. You call me up and you have a problem, you want to try and do something, if I can answer it I will. If I can't, I will try to put you together with the person I think can. Generally, what that amounts to is, let's say you call and say we want to do something in Eau Claire. Oh, good, why don't you call the people in Minneapolis, Minnesota, because they are running a program and they are pretty much like you folks down here in Wisconsin.

QUESTION (can't hear on tape): Our attempts in Miami, in our grant if you happen to read it you'll see things like "Hearing time, 45 minutes". That was a myth. You know whenever you are writing grants or thing, you always have to be kind of specific. No, we set no limitations. One of my reasons, I used to use the team concept in mediation. I did not

use more than one mediator. By a team, that consisted of one unit that would always be on duty two nights a week. What we would do was have it so they would lap. You could always depend upon a certain amount of no-shows, so we knew that we would always have one mediator who might be freed up, just not doing anything in one sense of the word. So what would happen is if a mediator had a problem and was working it over, and it was time for the next hearing to go in, we used to pride ourselves on the promptness of the hearings--if we said 6:15, we meant it, the mediator would excuse himself for just a brief second and tell the supervising mediator on duty that they were going to be running over and they would simply move the case to another mediator. We also had some other unique features of our program. Miami is a very large tri-ethnic population. We have Latin, Anglo, and Black. What we would do is offer mediation services totally in the native tongue of Spanish. To be a mediator of the Spanish-speaking team you not only had to speak Spanish, but it was also required that you were brought up in the Spanish culture, preferably you were born in Latin America--that was our strong preference. It is one thing for me as an Anglo, or even for an Hispanic who was born in the United States second or third generation, to be able to speak Spanish fluently; but to be able to understand the culture of the people is another thing. I think this was a very strong point of our program, one of the features that is rather unique. No interpreters, no nothing. You go in, it's done in Spanish. We would offer white mediators, black mediators, green mediators--whatever you want. Some people say you are discriminating. No I am not. The option is there. If you want a Spanish-speaking mediator you've got it. If you want a black mediator you've got it. We would also tend to try and put people in front of mediators that might have a better feel for the type of problem. We had two women as mediators with our program who were very big into family violence and spouse abuse. So any

cases like that that we would get in we would tend to put there, because they know how to deal with the situation better than some folks. Some mediators had specialties in resolving monetary types of difficulties between people. I don't want to say that we seeded each and every single case. But on intake they would mark up that this case here may require the services of Harold or Florence, check out with them, let them review it, see if they want to mediate the case.

QUESTION: It depends on who didn't show up, and if we can get a handle on why they didn't show up. In our situation, on intake, the intake officer in taking the case has prime responsibility for that file. It was that person's job to make all these determinations. We had a night supervisor, so to speak, down there at night. If there was a no-show, if that mediator wasn't going to be utilized for another case, that mediator would sit and talk to the person that did show up. It more or less balanced out between respondents and complainants who didn't show up. If it was a complaint they would review what the nature of the difficulty was and what has happened. A lot of times you get things like, "You know, I knew this would happen. As soon as I made a complaint and he got that notice, that S.O.B. stopped following me and stopped harassing me". I'm going to admit to something. The Miami program touted that as a success. I am not going to say that that was a success because I don't really know that. We again, unfortunately, could not beat the money out of our state planning agency to study that. A year after I left, maybe they didn't like me, I don't know, they did give the money and we did a very comprehensive evaluation of the program and

found in reality, we were saying we were successful in 96% of the instances, we were hitting in the high 70's, close to 80. And a lot of them were exactly that: they stopped coming, we haven't any more problems. Another thing that went by the boards for a long time, my own ignorance was the reason for this, it never dawned on me, was that the intake people on intake solved a lot of the problems. Someone comes in with a complaint, they start talking, and you say, "Why don't you try this?" "Oh, I didn't think of that." "Well, why don't you try that?" "Okay, good idea." "Call me back later if it doesn't work." And someone will call back and say it did. A real good example is the animal cases. Those are real problems. You have the "hate-the-dogs" and the "love-the-dogs." We had some situations where, it got out by somebody doing a cartoon of us in Action Line with our mediators and dogs holding hands saying, "We solved the problem" and that just opened the flood gates, it got to be like every third call was an animal complaint. We were dutifully saying to come in and make the complaint. We had to get down to the position where we wouldn't take them over the phone any more. We figured, this was an old prosecutor trick, if they really mean it they will come in to see you, instead of taking it over the phone. It finally was just getting to be a real problem. So we said, now look we talked to them on the phone, and this one I did myself and that's why it sticks in my head so well: a lady called up and she said, "I want that guy put in jail, and that dog shot because it barks all the time. I said, "It does?", and she said, "Yes". I said, "When does it bark?" You see in Dade County it has to bark between the hours of 11:00 p.m. and 7:00 a.m., otherwise it's not valid, it is not an illegal dog. So she said, "It

barks all the time, especially at night". I said okay, I didn't want to throw at her does it bark over 100 decibels because I even thought that that was too ridiculous. I said, "How long has this been going on?" "Oh, about three or four years." "I see. How long have you lived there?" "About three or four years." "Good. Have you ever talked to him?" "What, why would I talk to that dirty so and so over there? The dog barks all the time, I don't want to talk to those people." I said, "Why not?" "Because their dog barks and they'll probably get mad at me or something." So, I said, "Well, let me try something". So I took the names of the people next door--I found it strange that she didn't know their name, their family history and their phone number. I called up and spoke to the woman in the other house, told her my name was Fred Dellapa, I'm with the Miami Citizen Dispute Settlement Center, and that a next door neighbor, who for now will remain anonymous, is complaining about your dog barking. And she said, "Oh my goodness, she never said anything to us about that". So I asked if she knew what the problem was and she said she thought what the problem was was that the dog did bark at night. Anytime someone walked by or a car drove by, the dog would bark. It bothered the people who owned the dog, so they chained it up on the other side of the house away from their bedroom, which just happened to be under the woman next door's bedroom. She said, "I've got the solution, Mr. Dellapa. I'll just take the dog and either chain it in the garage, keep it in the house, or move it underneath the window and we'll be bothered by it". I said, "Fine, will you promise me you'll do that?" No agreements, no nothing, just will you promise me that? Sure. I called the other woman back and told her what we did and she said, "I'm

glad someone took some kind of action". I said, "Okay, if that dog does bark I don't want you to go over there and cause any kind of trouble or call the police or anything. You just call me back". Never heard another word out of them. So we consider that a solution, a resolution. So we adopted as a policy with people calling about dog barking cases we would ask them had they talked or discussed it with the person. This is one of the little subtitles, or maybe the hidden agendas of this whole idea of alternative dispute resolution mechanisms, the hidden thing is communication. Getting people to talk again. It was personally gratifying for me to find out that people could honest to God be trusted. If they give you their word on something, if they participated in it; you see, it's one thing for me to judge, "You shall do this, God love you", it's another thing for me to say, "You know, I was wrong, I should have chained my dog on the other side." "Well, no hard feelings, let's see what happens". And people can be trusted. I like to call it "preventative law". You try and spot something before it gets big. Like Josh was giving you that description of the senior citizen's dispute. That thing just kept escalating, and escalating, and escalating. We had an incident, it was kind of freakish--I thought he was talking about the thing that happened in Miami until he mentioned Rochester, very similar with the frisbee tossing and everything else that ended up with the old guy running out with a shotgun and blowing the kid in half, that was the God's truth. And it could have been stopped, months, years ago, if they just would have talked. That's what it takes. And that I think is one of the real beauties of this. It gets people going back together. And again, not to beat Earl Johnson's book to death, he goes into that kind of thing here. He talks about all the different problems with the formal court system, and why these things happen.

"ADMINISTRATION: THE FLORIDA EXPERIENCE"

91486

Ken Palmer

I am in the unenviable position of being your clean up batter today, and trying to keep your interest for a few more minutes. I would like to clarify my background, and our involvement in the citizen dispute settlement movement. I am with the office of the Court Administrator which works directly with the Supreme Court of Florida, but we are not in the business really of administering directly dispute resolution programs. The one thing that I would like to talk about today is the fact that Florida is a little bit different in that we have so many citizen dispute settlement programs in the state, probably an unusual number compared to many of the other states. This is what prompted the involvement of our office, and specifically our Supreme Court in the area. My perspective is somewhat a state-wide perspective for that reason, and when I talked to Peter Trzyna earlier he said that you were interested in the administration of programs. What I will try and do is talk about some of the problems that some of the local programs have had that we have found to be common across the state. I'd like to emphasize that they are often not so much problems of how you get the program started, as they are problems of how do you keep the program going, for a variety of different reasons.

I would like to go back to the point I made a second ago, that Florida is different. When we first got into the dispute resolution area there were only 6 programs in the state. That may be a lot of programs for some states, but we now have 12 of those programs. Those initiatives, unlike what I anticipate will probably occur in Wisconsin, were primarily

the result of local work, local initiative, not any kind of state direction or state-wide involvement or discretionary grant funds at the state level, or anything like that. Many of the programs developed independently of one another, and in most instances they didn't even know that the other programs existed. Only occasionally were they made aware of the fact that there was a program in the neighboring county, or something like this, and in those cases they would go and talk to them. But, they were fairly independent from one another and so, as a result, we have a considerable amount of variety in how they are structured and how they are organized. Because there was a great deal of interest at the local level and because there were a large number of programs, the Supreme Court, and our office specifically, as well as the committee to which we report, embraced the whole concept and kicked off the state-wide study of what actually was happening with Florida's dispute resolution programs. Were the programs working, what kinds of problems were they having, and, really, I think the committee was searching for some way to become involved in the programs. We wanted to make sure of one thing, however, when we got into the business, and that was that we not infringe on any of the prerogatives of the local programs as to how they run their programs, how they were structured, and this type of thing. To go back to the variety of the organizational models in the state, this has made it quite interesting to watch the growth of dispute resolution in Florida, because we really have seen it work under a number of different models. Funding for the programs, the populations they serve in terms of whether they are urban or rural, the caseloads, the number of mediators that they use, types of mediators



**CONTINUED**

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that they select, and the location organizationally of the programs differ in almost all of the counties that have programs at this point in time. Funding--some of the programs run on existing budgets right now. I know that this is going to be a consideration for some of the programs here in Wisconsin. You will be, I understand, receiving grant applications from local programs. The range runs from existing budgets, no additional funds, to \$150,000 a year. If you are working with a total budget of about \$250,000 as I understand it, you may find you might be able to only fund one and a half programs, by some standards in Florida. I think that that is going to be a problem that you will have to address. But programs have run on as little as \$10,000 to \$15,000 in Florida as well. It is all dependent upon how you want to staff the program, and whether or not you can take advantage of existing resources. Another characteristic of our program is that we have programs of both urban and rural character. We were very hesitant at first about whether or not citizen dispute or mediation programs could survive in some of our more rural counties, and we have a large number of rural counties, primarily because of the cost. In Dade County it cost \$150,000 to put the program in. It cost \$135,000 in Pinal County, which is the St. Petersburg-Clearwater area. It's costing close to \$9,000 in Hillsborough, which is the Tampa area. By those standards it would be very difficult to expect that some of our more rural jurisdictions could actually afford programs, or that they could find resources sufficient under say LEAA or the CETA program, or something like this, to support programs based on the staffing configurations and the procedures for paying mediators, and things like this, in the rural counties. Caseloads also vary significantly from county to county. Some of the programs only

than others. Two of the programs are located in prosecutor's offices at the present time, and they handle almost exclusively criminal cases. The other programs work in the civil area. They handle landlord and tenant actions, they handle various types of small claims, some of them handle juvenile cases. In one county--Florida has a juvenile arbitration statute--they have worked out a consolidated mediation-arbitration process under that statute with the services authorities. We don't feel that this variety, in terms of program models, is bad. In fact, we feel that it is a definite strength. Many of the programs have been developed and tailored to local considerations that almost require that they be operated in the specific fashion. And so, we have not tried to encourage, or worked toward, any type of uniform model in the state, especially for the new counties, because we feel that whatever they do has to be tailored to their local circumstances and the requirements in their respective jurisdictions. One final note, with respect to the Supreme Court, is that while the court does not want to dictate to the local program, it is bending over backwards to try and establish partnerships with the local programs so that our efforts at the state level are compatible with what they are doing. And for this reason, we have tried to identify and deal with only those problems that the local people can't solve, that they seem to be having continuing trouble with. I have outlined about 5 or 6 of those problems, that are really kind of a potpourri. They certainly don't cover the spectrum, but they are things that, because you are interested now in going ahead with some type of statewide program, you may want to consider how to deal with, either at the local level or through some sort of statewide initiative.

handle between 10 and 15 cases a month. Dade County, when it first started out was handling several hundred, 300 to 400 cases a month. One thing that we have found in studying the program on a state-wide basis is that the case loads may tend to taper off after the program is initiated for a variety of reasons that I will talk about a little later on. The type of mediators that are selected, as Fred suggested, vary. He started with professionals in the community, some of the programs started with exclusively lawyers, many of them started with students, or they would use lay volunteers. We found that there was also considerable variation in terms of their philosophy about paying mediators. I know this question came up earlier. Payment of mediators, from our perspective, we don't feel is necessary because we think you can get quality mediation from volunteers. The programs that do not use volunteers, that pay their mediators, spend close to \$100,000 a year collectively on paid mediators. So, that is a major expenditure of funds, that you may wish to consider when you get to a point where you are designing your program. Another point that I mentioned was the fact that the programs in Florida vary in terms of organizational location. Fred mentioned this also. We have programs in State Attorney's offices, we have them under the supervision of courts, and, where court administrator's office exist, they are often run out of those offices. Local Bar Associations are responsible for some of the programs, and specifically the one in Orange County, and just recently a law enforcement agency in St. Cloud, Florida, which is near Disneyworld, obtained an LEAA grant to run a citizen dispute settlement program. Finally, the types of cases that are handled. The programs handle just about every kind of dispute that you can imagine. Some are a little bit more restrictive

The first one is orientation and training courses. This is something that is tied very closely, not only to the type of people that you have as mediators, the quality of the mediation product, but also to the flow of cases and to the dollars that you spend on the program. There is almost a symbiotic relationship between whether or not you can have good mediators with no training or whether you should pay professionals to come in and do your mediation for you. In any event, the approach that we have taken in Florida is to try and come up with alternatives for providing training for mediators, at the local level, that overcomes one of the basic problems they have, and that is money. They don't have the funds to pay for any type of mediator training. It is done differently in every single county, and usually it is done at a very cursory level. Most of the counties have come up with what they call an orientation manual for their mediators. They will run anywhere from 5 to 50 pages of material. Two of the counties use the same program. It was developed down in Broward County. It includes kind of an orientation on what is CDS, how does it work, it has some forms in there that the mediator may or may not be interested in, it has a general description of the hearing procedures and the other processes associated with that particular program, and it has a couple of role-playing exercises which are probably the best part of the program. Another county has a brochure that defines CDS in two pages, and provides three pages of suggestions to the mediators on what they should and shouldn't do, and then they shuffle the people right in to a co-mediation situation where they have found that often they are not very comfortable. In Pinal County they took a different route. When they created their program they blocked out, they had \$135,000 which is more than many of the programs have, X amount of dollars for a contract with AAA, and AAA people came down and ran a training program

for about 20 people. The Pinales program has been in operation now for about two years and they are still working with that original group of mediators, they have not expanded the number of mediators that they are using. We don't know right now whether or not they plan to use that original set of mediators to try and develop some new training programs, but one problem that they indicated they had when they contracted with AAA was that they can only reach so many people with that type of a contract. And this is a problem state-wide. Because contracting for someone to come in and do the training is usually a one-shot deal unless you have the money to do it on a repeated basis. And certainly you are limited in terms of the number of people that you can train at any given time. One other approach that was taken in Florida by a local program was to borrow almost all of the family crisis intervention techniques that had been developed for a law enforcement agency to handle domestic quarrels. This applies somewhat to the situation, but usually when you are in a mediation hearing you are not at a crisis situation--somebody is not holding a hammer or a gun, or anything like that--and the techniques are a little bit different. The general consensus of the local people was that they do need the training, and they they do need it on a continuing basis. So what we have tried to do in developing the statewide resource is to come up with a package program, in consort with the locals, that we can give them, give each of the programs, that they can use not only one time but on a continuing basis to train mediators. We want to develop a program with the benefit of whatever consulting resources we can tap into--this program is in its preliminary stages right now--but, just to give you an idea of some of the basic components, we are starting with the assumption that there are certain things related to the mediation technique

itself that all of the mediators are going to have to know. We are going to build it in a modular fashion, and we are going to put together a mediation technique modular where we do the kinds of things with role-playing, with video-tape, with dialogue, other types of program instruction materials if we can develop them, to teach mediation technique, per se. This is something that is going to be common for most all of our programs. They all work in basically mediation format, except for the Pinales program with respect to juveniles.

The second thing we will do is try and develop a module for mediation in the CDS setting. Joseph Stulberg made the point, I think in some of his articles and also today, that the techniques that you will employ may vary with the types of cases that you are handling, and with the local circumstances concerning whether or not you are going to work in the arbitration mode in addition to mediation, this type of thing. Most of our programs are called citizen dispute settlement. They work in basically the same format, again with the one exception being Pinales County, so we are going to build this module around mediation in the citizen dispute settlement setting in Florida.

The third thing that I have on the list of local concerns. Certainly there are many things that could not be built into a package program at the state level that the mediator is going to want to know. Some of those things, the most critical of those things are referral agents and referral resources. Many of the mediators in Florida rely very heavily on community referral resources as part of the agreements. They will suggest perhaps a counseling program, or perhaps taking the dispute

to another forum or something like this. The local people say that they just don't have time to keep those people abreast of those things, and they often don't even know how to go out and identify the community resources. What we are going to try and do in this section is provide the program administrators themselves with the techniques necessary to go out and identify the resources first of all, and then tell them how to structure that information so that it is available for ready use by their mediators. That is basically the first part of the program we are trying to design for the mediators themselves.

The second part of the program is going to involve some directions and instruction as to how they can go about what we will refer to, for lack of a better term, as an immersion phase, where the mediators will go into an observation period where they will actually observe the session. We will provide the program administrators with some feedback as to what they saw going on relative to the things they learned through the previous module. The second stage of this process would be co-mediation and the final stage would be solo-mediation. That is not the only component of the training problem that the local people have identified. They also feel that one of their major problems is, first of all, orienting the referral agent that they rely upon for the cases to the capabilities of the program, and then secondly, keeping them abreast of any changes in the program. We have polled the judges in some of the counties, and we have also polled law enforcement people, through a survey technique, as well as prosecutors. One thing that we found is that, for the most part, they don't even know that the CDS program exists. It is not through any lack of hard work on the part of the program staff themselves, but

the judges, the prosecutor and the law enforcement people are the bread and butter for the program, at least in Florida, because of the way they are set up. All of the referrals come from these people. What we are going to try and do is work with and use the resources at the local level, and specifically the program staff, to try and develop instructional components that we can use with the annual judicial conferences in Florida, as well as with the annual meetings of the clerk's association, prosecutors, and the sheriff and police chief's associations. We feel that this way maybe we will be able to reach a larger percentage of the agencies in Florida, and not only make them aware of the fact that a CDS resource might be available in their jurisdiction, but also, make them aware of CDS generally so that should there not be such a resource they might be interested in getting something going. Again, we hope to do that using local people so that those local people can bring that message to the conferences.

The last thing with respect to training is training for the program staff themselves. One thing we found in Florida was, as I mentioned, that programs evolved independently of one another. Often, many of the things that they tried in their jurisdiction, in some instances working, in some instances failing, they did after other people had already done it. They were reinventing the wheel for the most part, and there was no communication between the programs so they really couldn't benefit from one another's experiences. We are going to try to put together some type of a statewide program for the program staff themselves so they can not only get some feedback from the other CDS efforts in the state, but also hopefully bring in some of the people from the national level who have had experiences with similar types of mediation techniques.

Finally, just a brief minute on public education. We'll call it public education. Fred talked about it as just getting out and hustling to get people aware of the fact that this resource exists. Several of our programs have complained about the fact that after their program gets off the ground they get an initial rush of cases filed in their intake sessions. Pinales County had this experience after they had a video-tape message on TV. It was an excellent PR technique that they used, but it is a capability that they don't have on a continuing basis. One thing that we anticipate working with the programs in the future on is building some radio spot types of messages, television spots, giving them some tips on the types of things that Fred has done in Miami, and some of the other programs have done, to keep the public aware of the fact that that resource is still available, that it has not gone away, that they can use it. This relates to another area that I will refer to as "maintenance of effort". It is not just related to the orientation and training function. Several reasons were identified in our statewide survey for the cases falling off after the initiation of the program. One of the reasons was that while the program people had gone out and had done an excellent job of getting the prosecutor involved and law enforcement interested in it, getting their referrals, the people doing those types of things turn over. In the prosecutor's office in particular many of the prosecutors are not interested in staying in the screening section for the rest of their lives. They get rotated out, new prosecutors come in and do the screening and may not be aware of the program. One of the things that has to be done is to keep those people

appraised of the fact that the dispute resolution alternative is there. It is a re-education problem because it requires that the program people keep going back to the prosecutor's office and remind them that the resource is there. This is a particular problem in Dade County. After Fred left, they had some administrative turnover and there was kind of a lag in the program services. When they came back the people in the prosecutor's office had already gone. They had relied on the prosecutor's office at this time for much of their caseload and it has just completely tapered off. A second problem is the fact that programs do not, in many instances, have the resources to provide feedback to the referring agency. In our survey of the law enforcement officers in one of the counties, almost across the board, their big concern, was, "Well, I send these types of cases over there, but I never hear what happens to them. I never see anything from them again." This is something that the clerks who refers small claims cases over has mentioned to us. All it requires is that some type of mechanism be established in the program to provide feedback to the referral agency. It is something that seems simple but it is something that has resulted in the law enforcement agencies becoming less inclined to refer cases to the CDS programs.

Another major area that the Supreme Court has indicated it is somewhat concerned about is the installation of, not only CDS but other types of dispute resolution programs in the court environment without it being planned well enough. Right now they have had some problems in Pinales County in terms of the juvenile arbitration component of the project, because when they went in with citizen dispute settlement,

they started getting a lot of referrals of juveniles from law enforcement agencies and the people at Youth Services were setting up, or were interested in setting up, an arbitration capability, and there was a good deal of conflict between CDS people and the juvenile authorities. It was simply a result of the fact that there was already an established procedure for handling certain types of criminal matters, and they had not touched base with the juvenile people in that regard. Now they have the program worked out to allow for the referral of those cases by the juvenile authority. There is no conflict in terms of the two competing procedures and there is no conflict in terms of the duplication in screening, which is one problem they had before. These types of things, as well as the possibility that Florida may have family divisions in their courts, are something that the committee wants to work on so that guidelines can be developed for the local programs to preclude any problem when the programs are actually installed in the first instance. One of the counties in Florida is now moving toward family or conciliation court concept at this point in time and they are experiencing a considerable amount of difficulty in trying to determine precisely how citizen dispute settlement and the conciliation court services can be put in compatibly with one another without resulting in the expenditure of excess funds for duplicate screening. They have used a separate screening function for citizen dispute settlement for some time, and now they are in the business of trying to obtain federal funds for a separate screening mechanism for the conciliation court, and they are having considerable difficulty doing that. They are moving

toward a consolidated screening for both types of cases which may solve some of those problems and certainly cut down on the amount of money that they will have to spend.

Funding is a problem that has been mentioned several times today. I mentioned that the initial program cost in Florida has run anywhere from \$10,000 to \$150,000. At the present time in Florida we are spending about, probably, \$500,000 or \$600,000 for citizen dispute settlement alone. This does not include expenditures for other types of dispute resolution mechanisms in the consumer area, and that kind of thing. There is a fairly large network of consumer advocacy alternatives in Florida. Two of the things that we are trying to explore at this point in time are how could the local people utilize existing staff resources to take care of certain of the functions that are generally performed by separate staff for a CDS program. One application of this is in the rural area. We have an already established network of court administrators in Florida, and we hope to develop some simple procedures whereby we can use the court administrators to perform some of the screening function. Another alternative, of course, is to try and employ the services of the clerks of court in various counties, especially in the rural areas, to serve this purpose. The counties that we have talked to out in the Panhandle, in the central Florida area, in the Everglades area, have on several occasions indicated that their biggest concern is that they don't feel they can justify having a completely separate staff for dispute resolution in their jurisdiction. So it is these types of things we are trying to document for the benefit of those local areas, so that when they do feel that they can move ahead with that kind of thing they can do it without having to have

a substantial investment of either county or federal funds. The second thing I mentioned earlier is that we are recommending to the locals that they not use paid mediators because, primarily, of the cost involved. As I mentioned, the two programs, in Pinales and Dade Counties, mediation costs alone are running between \$35,000 and \$40,000 apiece. Hillsborough County has just taken a similar approach and Proposition 13 has caught up with one of the counties--they have already reached their assumption of cost ceiling in terms of LEAA funds and are at the point now where they have to convert to county general revenue. The first thing that was talked about in terms of cuts was the paying of mediators. So I think that sooner or later many of the programs are going to have to address that, even if initially they decide that they want to go ahead and pay their mediators. The Second funding problem that we found in Florida is that while they are reliant for the most part on LEAA funds, and some CETA money, they have a problem with multi-county jurisdictions. In Florida we have all of the local regional planning districts drawn up on water and on natural resources boundaries. Flood control districts don't coincide with circuit court districts. So the problem that we have in Florida is that several of the counties have not been able to get programs off the ground using LEAA funds because their jurisdiction includes two or three local regional planning councils to cooperate with them. All we can do in that regard is try to assist them in identifying other funding resources, CETA monies, or what have you. But the problem with lack of common boundaries for LEAA planning districts and for our circuits has caused some problems in Florida. In our search for funds, we have learned some interesting things. We thought we would go the foundation route, we'll try and

find foundation monies. And generally we found there are not a tremendous number of national foundations that will commit to this type of continuing support at the local level. We did find that there are foundations called community foundations at the local level, that we did not know existed, in almost every county in the state. Some of the large counties, like Orange County which is the Orlando area, and Pinales and Hillsborough, have as many as 20 or 30 of these programs. Often they involve themselves in joint ventures and so we are exploring that possibility right now. I think that that is something that might be considered for programs that can't receive funding, but can operate on a fairly limited budget. Obviously one of the best alternatives for the local programs, if you can't find federal dollars, or foundation dollars or generate their own revenues, is to go to local units of government. The only problem there is convincing the local unit of government that the programs work. As Fred indicated, when he first started his program they didn't have funds to evaluate their program, and this is the case with most all the programs in Florida as well. These projects, even the larger projects because they pay their mediators, are working on fairly limited budgets. They don't have the funds to contract for any type of an outside evaluation, and yet they are going to be put in the position, and have been put in the position, of trying to justify their existence to local funding commissions, county commissions and state commissions. One thing that we have tried to do to solve that problem is to work with them to try and develop a research methodology that is more state-wide in scope. We sat down with the local people and we asked them what kinds of assessments they wanted to do of their programs.



Some of them pulled out little follow-up forms they use to send out to their disputants two or three weeks after the mediation hearing. We sat down with them and consolidated some of those forms into one master form, and we are really pleased at the whole process because the local people sat down, including many of the judges from our circuit and our Supreme Court justices, and they spent about six hours going through every single data item on the form looking at the codes and looking at the types of data that would be generated from the gathered analysis of the information on the forms. It really was, probably, the best manifestation of the state local effort that we have got going right now. To date we have gone out and used the form to follow-up on about 2,500 cases. We have also collected case-based data on about 4,000 cases. One of the biggest problems that we have had to overcome, and you will probably have to overcome if you want to look at any of the programs from a comparative standpoint--that's a touchy proposition all by itself, is to come up with some common definitions of what you are going after, what kind of evaluation you are doing. We have had various claims from some of the programs saying, "Well, our program was more successful than their program because we are resolving 85% of our disputes and the other program is only resolving 65% of their disputes." The problem is that the program that is solving 85% of their disputes is including any of their disputes that they referred to other agencies to handle, and the other program is not. These types of definitional variation have to be considered when you are going to design any kind of evaluation methodology. I think

that it is prudent for you to come up with some standard specifications for your research or evaluation methodology at the state level, and then work with the local people to try and assist them in any way that you can to implement the evaluation. The follow-up is almost universally a problem at the local level--they don't have the time, they don't have the resources, they don't have the money for postage, they don't have the money for the forms, but most of all they don't have the money or the expertise to process the data on the computer to analyze it. I think that is one area you might want to consider in terms of your statewide program: building an evaluation capability to assist the local programs, naturally learning whether or not they are successful. One final note on the evaluation of programs is, I think that necessarily you are going to have to evaluate a program in terms of its stated goals. One of the problems that some of Florida's programs have gotten into is that they have put too much stake on their ability to try and divert cases from the criminal justice system, and in many instances they have attempted to put dollar figures on it and show that they are saving hundred of thousands of dollars for the system when our experience so far is that most of the referrals would never come into the system anyway. And because many of the programs handle a large number of civil disputes that also would not be filed in small claims court or in the other civil courts they can't generally make that claim. I think that the problem manifests itself when you go to a county commissioner and you say, "We want to convert to general revenue dollars, will you pick up \$50,000 for our grant", and they say, "Well, how many cases have you diverted from the criminal justice system?" Unless you can really document it and give a good rationale for your projections of what the

savings are, you are in trouble. And that has generally been the case at the local level.

The last thing that we are trying to do in Florida in terms of assistance to the local people relates to new areas that are trying to build the programs. We are taking the information that we have gathered from our case-based samples, we are taking any evaluative data that exists from the programs that are already established, and we are trying to consolidate that into a series of guidelines similar to some that were shown to you earlier to give the local people an idea of how to do it. Fortunately, we have the resources of 12 programs currently in existence, people like Fred Dellapa and some of the other program directors who have already gone through the process of how to do it, they know what the obstacles are and we hope to document some of those problems so that we can go beyond the 12 that we currently have going in Florida, and possibly even expand some of those programs into the juvenile arbitration area consistent with the statewide statute that we have.

QUESTION (Can't hear on tape). From the law enforcement survey. We surveyed the law enforcement people to find out whether or not they would have filed a complaint on the cases and they indicated they probably never would have filed a complaint.

QUESTION. No. Walk-ins in Florida are fairly limited in most of the programs. Probably 40% to 50% of all the program intake in Florida is from law enforcement agencies.

QUESTION. That has been kicked around. One of the programs was thinking about experimenting with it but they haven't gotten serious about it yet. None have ever charged a fee. All the programs in

Florida have shied away from any kind of charges--any amount for any purpose at all, I think primarily because many of them are new and they felt that that kind of a thing would really reduce the interest in the program. I think it would have to be put to some kind of a test. Like I said, some of the programs have been interested in experimenting with it, and if they decide to go ahead with that kind of thing we will probably have a better idea of whether it would work.

**END**