Approved February 28, 1984
Date

MINUTES OF THE HOUSE COMMITTEE ON JUDICIARY.

The meeting was called to order by Representative Bob Frey at
Chairperson

3:30 ~~a.m./~~p.m. on February 23, 1984 in room 526-S of the Capitol.

All members were present except:

Representatives Duncan, Justice, Knopp and Wunsch were excused.
Representative Erne was absent.

Committee staff present:
Jerry Donaldson, Legislative Research Department
Mike Heim, Legislative Research Department
Mary Ann Torrence, Revisor of Statutes' Office
Nedra Spingler, Secretary

Conferees appearing before the committee:

Jerry Palmer, Kansas Trial Lawyers Association
Representative Harold Guldner
Representative David Louis
Kenneth Peery, Executive Director of the Heart of America Christian Justice Center
Austin Vincent, Topeka
Jim Robertson, SRS/CSE Senior Legal Counsel
James Cobler, Director of the Division of Accounts and Reports

Hearings were held on HB 2881, HB 2875, and HB 2916.

HB 2881 - An act relating to wrongful death actions.

Jerry Palmer, Kansas Trial Lawyers Association, supported the bill and said it adds to the list of specific damages for wrongful death those items incurred in rearing a child. Although children are not ordinarily regarded as persons who produce for the family, there was a need to include in the statute damages for expenses incurred in rearing, training, and educating the deceased. Section 1 (a)(6) infers that the deceased is a child and was not intended to cover other persons. Mr. Palmer had no objection to removing the limit on wrongful death.

HB 2875 - An act relating to evidence of child-parent debt.

Representative Harold Guldner supported the bill and gave a statement (Attachment No. 1) giving his rationale for that support. Present law requires that evidence of debt between a parent and child be in writing. HB 2875 would exempt parents and children and allow oral agreements to be recognized. Representative Guldner said another conferee would be sending information to the Committee in support of the bill.

HB 2916 - An act relating to admissability of matters disclosed in mediation.

Representative David Louis supported the bill which allows confidentiality in mediation and conciliation proceedings when the parties concerned agree in writing to go into mediation and that information revealed will not be used in discovery regarding a court case. He noted the increasing number of lawsuits and believed the bill would expand mediation in lieu of lawsuits. He furnished a statement in support of HB 2916 from the Greater Kansas City Better Business Bureau (Attachment No. 2).

Kenneth Peery, Executive Director of the Heart of America Christian Justice Center, who requested introduction of the bill, gave a statement (Attachment No. 3) supporting it. He told of the conciliation services provided by volunteers in his group which he believed provided the opportunity for the parties to be frank and open if they knew any matter or information disclosed would not be subject to subpoena or admissable in a court of law. The intent of the bill was to cover information that will not be obtained through ordinary discovery means and that all present discovery methods will be preserved. Mr. Peery said conciliation programs as alternatives to the legal process involve many types of industries. Excerpts in this regard are in Attachment No. 4.

Austin Vincent, Topeka, told of his experience in mediation and supported HB 2916. Attachment No. 5 contains what he believes to be concerns regarding present statutes in protecting the

confidentiality of mediation.

HB 2896 - An act relating to collection of child support by means of setoff.

Jim Robertson, SRS/CSE Senior Legal Counsel, said SRS supports the bill if it is amended to apply to non-ADC applicants. Without an amendment, no federal funds would be available and the state would have to assume 100 percent of the funding. He said HB 2896 was an ambitious undertaking, and, if the program was 70 percent federally funded, SRS could add 19 staff members to handle the increased child support, non-ADC, setoff cases. Mr. Robertson's statement and proposed amendments are attached (Attachment Numbers 6 and 7).

It was clarified that the last word in line 35 of the amendments should be "owing", and not "owning".

James Cobler, Director of the Division of Accounts and Reports that administers the SRS setoff program, called attention to line 47 of the bill regarding the secretary of SRS approving warrants which was a function of his Division. Staff said all language in that line after "approved by" should be stricken. Mr. Cobler said the setoff program is a limited resource to SRS, and Accounts and Reports' portion of the program has worked well with SRS. He supported the bill and amendments suggested by Mr. Robertson.

The Chairman said, because of the large number of child support issues before the Committee and the legislature, he planned to request an interim study in order to avoid a hodge-podge of legislation in this regard.

The meeting was adjourned at 4:30 p.m.

STATE OF KANSAS

HAROLD GULDNER
REPRESENTATIVE, 122ND DISTRICT
GREELEY, HAMILTON, KEARNY, SCOTT,
WICHITA COUNTIES
P.O. BOX 648
SYRACUSE, KANSAS 67878

TOPEKA

HOUSE OF
REPRESENTATIVES

COMMITTEE ASSIGNMENTS
VICE-CHAIRMAN: ELECTIONS
MEMBER: ENERGY AND NATURAL RESOURCES
TRANSPORTATION

Attachment # 1

February 23, 1984

MR. CHAIRMAN AND COMMITTEEMEMBERS:

I guess this bill is kind of a negative connotation of what I would really like to do. If we could have a law that says it is illegal to have a debt of any size between parent and children without having a signed and registered note and people would obey that law it would certainly be a better way.

Unfortunately I don't think even a law like that would make most parents think they have to have a written document with their children until something happens that makes them wish they had, I guess that is good. There should be faith between parent and child.

The problems I have heard about along this line have all come from a father and son relationship in operating a farm together. It is probably the exception and not the rule that a farmer father gets a note from a son when money is loaned and I have not heard of many problems with this until a third party, usually the wife of the son or the new wife of the father objects.

Now, I know that a judge in the case of a suit would not necessarily have to pay any more attention to verbal contract of debt if this was law than he does now but it lets him, in some cases, feel better about doing it than is the case now.

Att. 1

BBB of Greater Kansas City

Attachment # 2

February 22, 1984

The Honorable David F. Louis
House of Representatives
#174 West State Capitol Bldg.
Topeka, KS 66612

Dear Mr. Louis:

We have been made aware of HB 2916, which you are sponsoring, amending the Kansas Evidence Code to assure participants' confidentiality and providing privileged protection from subpoenae and/or being compelled to disclose any matter in connection with the conduct of third party dispute resolution forums.

As you may know, Better Business Bureaus (this includes the Better Business Bureau in Topeka, and in Wichita), as well as the Kansas City BBB, conducts many arbitration and mediation cases in the course of a year, and the service is growing in popularity.

Speaking for the Kansas City BBB, we have considered the contents of your bill, HB 2916, and feel that it is a beneficial and needed amendment and should be passed.

From time to time we have had some misgivings expressed on the part of arbitrators who volunteer their time about their own vulnerability in associating themselves with this dispute resolution procedure. If they were assured they would not be subpeonaed later to testify and would not be compelled to divulge to anyone the nature of testimoney at such hearings, it would assist the Better Business Bureaus in securing the numbers of volunteers needed to keep a viable program going that affords the people of the State a free service in help to alleviate their marketplace problems.

I am sure that you could get similar testimony for support of your HB 2916 from Mr. Rollin McCartor, President, BBB of Northeast Kansas, Inc., and of the BBB, Inc., 300 Kaufman Building, Wichita, Ks. 67202.

Sincerely yours,
Ray Buckley, President

Comments re HB 2916

Attachment # 3

INTRODUCTION

I am Kenneth E. Peery, Executive Director of Heart of America Christian Justice Center, a Kansas City based affiliate of the national Christian Legal Society. Among other ministries, we provide a conciliation service to enable people to resolve disputes out of court. I wish to address you in support of HB 2916.

BACKGROUND

Our nation is burdened by an avalanche of lawsuits. New lawsuits are being filed at the rate in excess of 22,000,000 every year. One out of 17 Americans are involved in a lawsuit every year. This "litigation explosion" has been termed "HYPERLEXIS" by one Federal Judge. The concern for its ramifications has reached the highest levels of the legal establishment in Chief Justice Warren E. Burger who has issued a plea for help for better ways to settle disputes.

Not only are the court systems overburdened, the threat of lawsuits and fear of liability casts a negative pall over the nation that is socially, economically and spiritually oppressive. Increased costs for liability insurance, legal fees, taxes to support more courts and judges, increase record-keeping and documentation in hospitals and many other institutions add to the cost of doing business. Fear of liability and lawsuits also stifles creative economic endeavor as companies are wary of new products and professionals seek types of practices with less exposure to malpractice claims.

TRENDS

Led by Chief Justice Burger there is a surprisingly extensive movement towards alternative means of resolving disputes. Arbitration, mediation and conciliation are among such alternatives.

Atch. 3

Various private and quasi-public agencies offer a variety of alternatives to litigation. American Arbitration Association, Intercorporate Disputes Task Force sponsored by Council of Public Resources, Insurance Arbitration Forum, Council of Better Business Bureaus, National Association of Securities Dealers, National Funeral Directors Association, to name a few, provide non-court methods of resolving disputes in the textile, insurance and construction industries, and for settlement of consumer disputes in the automobile, securities and funeral businesses.

Procedures vary widely. Techniques being used include both binding and non-binding arbitration, unilaterally binding arbitration, a two-step process that combines a mini-trial with negotiations, and various types of mediation and conciliation formats.

I have attached to this testimony a copy of a Reprint from "Alternatives to the High Cost of Litigation," Vol. I, No 6., May, 1983, which gives a more complete listing and description of this entire subject.

This is an immensely growing field that will continue to expand. I think it is healthy move in the right direction. Our law ought to encourage private settlements. HB 2916 will strengthen the viability of these alternative methods.

WHO WE ARE AND WHY WE ARE INTERESTED:

Our Center is one of a national network of Conciliation Centers sponsored by the CLS using volunteer mediators to help people resolve disputes without going to court. A lawsuit fractures relationships beyond repair and is counterproductive to healing.

Our panels of volunteer peacemaker-mediators, usually a lawyer, pastor, and an expert in the subject matter, help disputants resolve disputes according to biblical principles. Disputants pay no fees for the service and

we are financed by contributions from individuals and churches. Our informal mediation procedures allow each person to give full vent to his or her version of the dispute and how he would like to see the dispute resolved. Use is made of private discussions with each party to explore areas of potential agreement. Other mediation and conciliation techniques are also used to enable disputants to discover their best solution for all involved.

Law is relevant to a resolution of disputes and disputants are encouraged to seek legal counsel and even bring lawyers with them. But other practical and biblical principles may also enter into a final resolution. Admissions, confessions, forgiveness are some of the principles we encourage. In order to promote forth-right candidness we pledge mediators, parties and others to strict confidentiality.

SPECIFIC NEED TO BE REMEDIED

As Mr. Vincent is prepared to show in some detail, the existing statutory privileges afforded attorney-client and pastor-confessor communications in the Evidence Code are not adequate to provide the iron-clad confidentiality we would like to offer the disputants. Neither is the settlement negotiations statutory provision considered absolute in all cases.

Therefore, we have proposed a measure (HB 2916) that we believe will achieve the necessary degree of confidential assurance to enable us to persuade more disputants to at least try to conciliate or mediate. We need to be able to say "What have you got to lose but your whiskers?" Under existing law, their attorneys would advise them that they should be careful what they admit because it could be used against them later as evidence if the process breaks down.

Also since our mediators are uncompensated volunteers, we want them protected from discovery or trial subpoena with relation to matters disclosed

in the process.

In order to assure a continuing supply of volunteers we need to reduce the likelihood that they will be subpoenaed for related legal proceedings.

APPLICATION

We do not perceive any persons or groups being prejudiced at all by an iron-clad privilege, since all parties will have consented to the rule of confidentiality. The Better Business Bureau of Kansas City, Mo., in the attached letter, concurs in the desirability of this legislation.

CONCLUSION

Thank you for the courtesies shown to us here today. This is one measure that costs no tax dollars, can benefit many people and can hurt or burden none and it's in the public interest. I ask you to report the bill favorably for passage.

Respectfully submitted,

Kenneth E. Peery

February 23, 1984

Heart of America
CHRISTIAN JUSTICE CENTER, INC.
1221 Baltimore Ave., Suite #500
Kansas City, MO 64105

Special Supplement

Attachment # 4

CPR Working Taxonomy Of Alternative Legal Processes

by Kim Taylor, Erika S. Fine, and Rosemary A. Moukad

During the past three years, the legal community—prodded by the growing high cost of litigation—has witnessed and participated in a burgeoning set of alternatives to resolving disputes in court through conventional legal process.

As part of its ongoing research activities, CPR is organizing a framework to show the variety of existing and newly developing processes to prevent, manage, and resolve disputes. From the experiences of CPR members and of other lawyers in law firms and corporate legal departments, from activities of national and local bar associations and industry and trade groups, and from scholarly commentary, a four-part working Taxonomy of Alternative Legal Processes has been devised: (1) privately initiated dispute resolution processes, (2) publicly supervised dispute resolution processes, (3) dispute prevention processes, and (4) dispute management processes.

Each of these parts will be presented in an issue of *Alternatives*, commencing with this supplement, which describes private dispute resolution processes and case studies only. The other three categories will be described in subsequent supplements this year. What follows is a brief description of the four principal parts of the Taxonomy.

I. *Private Dispute Resolution Processes* are used when litigation has begun or been threatened. Instead of seeking final court resolution, the parties choose a private forum and procedures of their own design to resolve their dispute. This category includes processes which litigating attorneys have traditionally considered as alternative private processes, such as arbitration and mediation, as well as the newer mini-trial and private judging procedures.

II. *Publicly Supervised Dispute Resolution Processes* are practices governed by local, state, and federal court rules and legislation and practices developed by judges to manage their caseloads. These include the state judicial reference statutes governing private use of retired judges, court use of special masters to narrow issues or give advisory opinions, and the court ordered mini-trial.

III. *Dispute Prevention Processes* are those which dampen potential disputes before they become lawsuits. These processes include intracorporate devices which identify and change unsound business practices, and corporate programs for continuing compliance with regulated activities. In the area of environmental policy they include consensus building negotiations among public and private sector adversaries.

IV. *Dispute Management Processes* are often applications of business management techniques to the law business. These are developed by inside and outside counsel to manage their offices, their caseloads, individual cases, and the attorney-client relationship. In this part of the taxonomy we will describe litigation budgeting, discovery management, joint defense or plaintiff cooperation, and case staffing alternatives, among others.

This is a "working" Taxonomy. CPR members and other lawyers who have created and legitimized

CPR WORKING TAXONOMY:
PART I. PRIVATE DISPUTE RESOLUTION PROCESSES

I. ARBITRATION
- A. Binding Result Imposed By Third Party
- B. Business Sponsor Agrees To Abide By Result
- C. Parties Not Bound By Result

II. MEDIATION
- A. Contract Results From Process
- B. Mediator Acts As Facilitator
  - 1. Advises On Merits Of Case
  - 2. Proposes Settlement Options
  - 3. Hears Confidential Settlement Terms

III. MINI-TRIAL
- A. No Neutral Presides
- B. Neutral Presides
  - 1. Makes Binding Decision
  - 2. Makes Non-Binding Decision with Sanctions
  - 3. Gives Advisory Opinion
  - 4. Acts As Expert Fact Finder
  - 5. Hears Confidential Terms
  - 6. Moderates Proceedings

IV. UNSTRUCTURED SETTLEMENT NEGOTIATIONS
- A. Parties Settle Conditionally
- B. Parties Represented By Two Teams
- C. Single Settlement Covers Two Actions

V. PRIVATE TRIAL SERVICES
- A. Neutrals Available To Conduct Proceedings
- B. Private Fact Finding Organized

these processes to resolve inadequacies in existing legal practices and procedures have not ended their efforts. Instead, the processes are now part of daily routines in law offices, businesses, and courts, and are included in the range of legal services offered clients. Furthermore, lawyers are modifying and refining them as well as inventing new processes to meet other special requirements of clients and unique sets of facts. As a result of this momentum, many processes have yet to be publicized and are still to be developed. In that sense the Working Taxonomy is preliminary and, CPR hopes, a catalyst to spur new developments. As new techniques are uncovered, and existing ones refined, the Working Taxonomy will be periodically modified and updated.

CPR WORKING TAXONOMY: PART I: *PRIVATE DISPUTE RESOLUTION PROCESSES*

I. ARBITRATION

A species of adjudication almost always backed by public process. The parties choose the arbitrator and give him authority to make a decision after hearing relevant evidence. Traditionally, the decision is binding on the parties and is final on the law and facts. In most jurisdictions the award is enforceable by courts, unless there are defects in the arbitration procedure.

A. *Binding Result Imposed By Third Party*

The most common form of arbitration is that in which the parties consent to be bound by the arbitrator's decision. A variety of private organizations have established innumerable bodies of rules for governing the arbitration process. Some of the best known are American Arbitration Association, International Chamber of Commerce or United Nations Committee on International Trade Law ("UNCITRAL") commercial rules. See W. Gilbert Carter, "Matching Technique To Need In the Resolution of International Business Disputes," CPR Intercorporate Disputes Task Force Workshop, April 1982; Lawrence Perlman and Steven C. Nelson, "New Approaches To The Resolution of Commercial Disputes" (1982). The AAA has also developed rules for arbitration of textile and construction industry disputes. See Robert Coulson, *Business Arbitration—What You Need To Know* (AAA 1982). Another private organization, the Insurance Arbitration Forum, Inc., has developed several programs for resolution of insurance related disputes. See Bernard L. Hines, Jr., "The Work of Insurance Arbitration Forums, Inc.," Speech at ABA National Institute, San Diego, February 1983. The automobile industry has adopted the Better Business Bureau program of mediation and arbitration to process consumer complaints. See William Lovell, "The Auto Industry and the Consumer," *Consumer Dispute Resolution: Exploring the Alternatives* (ABA Special Committee on Alternative Dispute Resolution, 1983), p. 631.

NASD Uniform Arbitration Code and NYSE Arbitration Rules

Procedures have been developed by National Association of Securities Dealers (NASD) and New York Stock Exchange (NYSE) to resolve disputes between public customers and broker-dealers or among broker-dealers and/or their employees. Securities Industry Conference on Arbitration, *Arbitration Procedures* and *How to Proceed with the Arbitration of a Small Claim* (both undated).

Project Autoline

A three-step procedure developed by the Better Business Bureau and automobile manufacturers and new car dealers to resolve consumer complaints, the third step of which is arbitration. (1) A special telephone line at participating Better Business Bureaus puts consumers in touch with a representative at dealerships. (2) If that does not resolve the dispute, the Better Business Bureau will attempt to help the parties settle it. (3) If the dispute is still not resolved, the matter is arbitrated. The parties select the arbitrator, whose services are free, from a pool of trained volunteers, and they agree in advance that the decision of the arbitrator, who is assisted by automotive experts when necessary, is final. Better Business Bureau, *Project Autoline* (undated). General Motors has adopted a similar BBB arbitration program nationwide. Bruce I. Waxman, "Moving the Apart Together: Alternatives to Litigation," *District Lawyer*, March/April 1983, p. 28; William Lovell, "The Auto Industry and the Consumer," *Consumer Dispute Resolution: Exploring the Alternatives* (ABA Special Committee on Alternative Dispute Resolution, 1983), p. 631.

National Consumer Arbitration Program

Procedures developed by the Council of Better Business Bureaus to resolve consumer disputes. If it appears that efforts to resolve a dispute informally have been exhausted, the parties, who may be assisted by counsel, prepare an arbitration agreement in which they stipulate to the issues. The parties may waive oral hearings and permit arbitration to be based on written testimony. If there is a hearing, each party can cross-examine the other party and his witnesses. Council of Better Business Bureaus, *Uniform Rules for a National Program of Consumer Arbitration* (1977) and related pamphlets.

Executive Discharge

Pre-litigation executive discharge case. Both parties agreed to have the arbitrator issue a final and binding decision. The entire case consisted of affidavits, rebuttal affidavits, and a one-day oral presentation with counsel. At any time during the one-day hearing, the parties could suspend presentation for settlement discussions. In the end, counsel for each side jointly fashioned their own remedy instead of

having the arbitrator issue an award. Bernard Wray, "Using the Mini-Trial in an Executive Discharge Case," *Corporate Dispute Management* (Matthew Bender, 1982), p. 243. See also description under III B, *infra*.

Two-Step Process

The first step is a mini-trial and the accompanying negotiations. If the parties have failed to achieve a settlement, the neutral is authorized, after expiration of a cooling off period during which further settlement efforts might take place, to render a binding arbitration award. W. Gilbert Carter, "Matching Technique to Need in the Resolution of International Business Disputes," *CPR Intercorporate Disputes Task Force Workshop*, April 14-15, 1982. See also Bruce I. Waxman, "Moving the Apart Together: Alternatives to Litigation," *District Lawyer*, March/April 1983, p. 29. See also description under III B, *infra*.

National Funeral Directors Association's ThanaCAP

This consumer action program was conceived by the National Funeral Directors Association at the suggestion of the U.S. Office of Consumer Affairs after years of FTC investigation. The two-step process starts when ThanaCAP receives a written complaint. If the case is not resolved within 30 days by the ThanaCAP staff, the matter proceeds to binding arbitration if both parties are willing. Howard C. Raether, "Establishing and Managing Dispute Resolutions: Funeral Service," *Consumer Dispute Resolution: Exploring the Alternatives* (ABA Special Committee on Alternative Dispute Resolution, 1983), p. 405.

B. Business Sponsor Agrees to Abide by Result

Many industries and trade associations have developed private consumer dispute programs, some as a result of FTC pressure or Magnuson-Moss legislation, with AAA, BBB, or U.S. Office of Consumer Affairs assistance. Consumers using the procedures are free to pursue other legal remedies, but the individual businesses agree to abide by the result.

The Automotive Consumer Action Program (AUTOCAP)

Procedures developed by the National Automotive Dealers Association (NADA) to resolve consumer complaints against new car or truck dealerships. The AUTOCAP staff forwards written complaints to the dealership. If the dealer and consumer cannot resolve their dispute, it is refered to the AUTOCAP panel, which is composed of at least 50 percent consumer (nonautomotive industry) representatives. The dealer, through its voluntary participation in the program, agrees to be bound by the AUTOCAP panel's decision, but the consumer is free to pursue other remedies. National Automobile Dealers Association, *AUTOCAP Handbook* (1980); Richard C. Wagner, "AUTOCAP Presentation," *Consumer Dispute Resolution: Exploring the Alternatives* (ABA Special Committee on Alternative Dispute Resolution, 1983), p. 643; Edward A. Dauer, "Proceedings of the Consumer Dispute Task Force," *Corporate Dispute Management* (Matthew Bender, 1982), p. 377.

Ford Motor Co. Consumer Appeals Board

Review process starts when a consumer files a one-page form describing his problem and what steps he has already taken. If dealers and Ford representatives are unable to resolve satisfactorily a consumer's complaint, the consumer may appeal to a five-member board which consists of three consumer representatives and two dealers. The consumer and dealer each submit a one-page form and supporting data to the board, which may initiate another step, e.g., oral argument, an inspection, or an independent evaluation. Each board meets once a month and renders a decision based on majority vote. N.A. Smith, "The Ford Motor Co. Consumer Appeals Board," *Corporate Dispute Management* (Matthew Bender, 1982), p. 219.

Home Owner's Warranty

Warranty program with a two-stage dispute resolution procedure offered by a home builder's trade group. First, in an attempt at conciliation, a neutral expert meets on-site with both parties. If that fails, the matter goes to unilaterally-binding arbitration, which proceeds under AAA rules. Edward A. Dauer, "Proceedings of the Consumer Disputes Task Force," *Corporate Dispute Management* (Matthew Bender, 1982), p. 379.

C. *Parties Not Bound By Result*

Parties agree to procedures leading to advisory opinions by the arbitrator. Some businesses and trade groups participate as a result of FTC pressure or Magnuson-Moss legislation.

FTC And General Motors Proposal

This proposal, just accepted by the FTC, would resolve the FTC's two-year old complaint against General Motors for failure to warn buyers of defects in the V-8 diesel engines. Under the plan, GM pays the Better Business Bureau to administer the program, provides briefs to the arbitrators on the background of the controversy and on the technical aspects of the problem, and provides impartial experts to testify before the arbitration panels. *Alternatives*, April 1983, p. 4; *New York Times*, April 27, 1983, p. A1.

Furniture Industry Consumer Advisory Panel (FICAP)

This procedure was formed at the suggestion of the U.S. Office of Consumer Affairs. FICAP notifies the business when a consumer complaint is filed. If the business and consumer are not able to resolve

their dispute, it is submitted to the FICAP panel, which is composed of furniture industry and consumer representatives and meets three or four times annually to issue advisory opinions. Nancy High, "Consumer Disputes in the Furniture and Manufacturing Realm," *Consumer Dispute Resolution: Exploring the Alternatives* (ABA Special Committee on Alternative Dispute Resolution, 1983), p. 483.

II. MEDIATION

A voluntary, consensus-building process which has been used extensively in labor negotiations. An experienced neutral facilitates communication between parties so that they can fashion an acceptable result, but he generally has no authority to impose a decision. The parties are bound by their agreement only if it is a contract enforceable in court. See Edward A. Dauer, Preface, *Corporate Dispute Management* (Matthew Bender, 1982), p. xx and *Proceedings of the Conference on Environmental Disputes*, April 30-May 1, 1981, p. 364. Mediation is used increasingly to settle small consumer, family or neighborhood justice matters as well as large multi-party environmental disputes. Many of the former are conducted at local mediation centers. For a current listing of programs see ABA Special Committee on Alternative Dispute Resolution, *1982 Dispute Resolution Program Directory*. The rules for these new dispute resolution forums have been developed with assistance of such private organizations as the ABA Special Committee, AAA, and Ford Foundation.

A. *Contract Results From Process*

At the conclusion of negotiations, the parties record their agreement in a binding contract.

Homestake Mining v. Colorado Coalition

When a Colorado coalition of environmentalists opposed Homestake's plans to mine uranium in the Gunnison National Forest, both sides agreed to try to negotiate a compromise through mediation. The process started with a succession of meetings where representatives of the various parties attempted to identify the issues with the assistance of scientists who provided technical information. The final result, after about a year, was a statement of understanding and a mediation agreement. Furthermore, the environmentalists, in a covenant not to sue, agreed to drop claims that they might have had against Homestake and U.S. and state environmental agencies. Larry Lempert, "Lawyers Sans Armor Resolve Environmental Clash," *Legal Times*, May 24, 1982, p. 1.

Storm King Settlement

Settlement of multi-party environmental dispute concerning industry use of the Hudson river. After years of litigation and administrative proceedings, negotiations commenced. Settlement was reached after about twenty meetings of the principals and several technical meetings among the biologists which took place over the course of fourteen months. The mediator served as chairman and moderator of the meetings and saw to it that the next meeting was scheduled and that the parties had tasks to accomplish. Russell E. Train, "Mediating Storm King: Approach to Environmental Issues." *Corporate Dispute Management* (Matthew Bender, 1982), p. 163.

B. *Mediator Acts As Facilitator*

At the outset, the parties agree to enlist the assistance of a mediator for several different kinds of activities.

1. *Advises on Merits of Case*

Proposal for Securities Fraud Case

Plaintiffs and defendants would submit their written contentions to a jointly selected neutral advisor who would submit his written opinion only to the defendants. The purpose of the plan was to educate defendants about their potential liability and, therefore, it was funded only by defendants. Eric D. Green, Mini-Trial Handbook at 32, *Corporate Dispute Management* (Matthew Bender, 1982).

2. *Proposes Settlement Options*

The WNET/New York University Law School Consumer Help Center

A telephone complaint center was staffed by volunteers and law students. They attempted to resolve disputes through direct contact with the party, referral to another agency or by offering advice on legal remedies. The WNET/New York University Law School Consumer Help Center-Description of Procedures and Operations, June 1978.

Grant Appeals Board of the Department of Health & Human Services

Procedure for resolving disputes arising from federal grants. The Board provides or assists in the selection of a mediator. The results are not binding unless the parties so agree. The mediator may take any steps agreed upon by the parties either to resolve the dispute or clarify the issues. Mediation is used in appropriate cases in lieu of the normal appeal procedure. *Federal Register*, August 31, 1981, p. 43820 Sec. 16.18.

3. *Hears Confidential Settlement Terms*

Parties choose a third party to whom they confide their high and low settlement numbers. If the numbers overlap, the case is settled with the difference split. If not, the mediator reports this fact to the parties and tries again. This procedure can be combined with the mini-trial procedure. See Eric D. Green, Mini-Trial Handbook, at 35, *Corporate Dispute Management* (Matthew Bender, 1982). See also Lawrence Perlman and Steven C. Nelson, "New Approaches To The Resolution of International Commercial Disputes" (1982), p. 29.

III. MINI-TRIAL

Also referred to as structured settlement negotiation, the mini-trial is a flexible process by which a

dispute is resolved by business executives under procedures devised by the parties. The businessmen attend the proceedings, hear the other party's case and actively participate in deciding what result to reach. Often their goal is to settle the dispute without disrupting the business relationship. A neutral third party and/or outside counsel may assist the parties. See Edward A. Dauer, Preface, *Corporate Dispute Management* (Matthew Bender, 1982) p. xvi-xvii; Blair White, *CPR Legal Program Proceedings*, February 1983, p. 17; Thomas Grilk, *Id.* p. 23.

A. *No Neutral Presides*

Proceedings conducted and attended by parties and, perhaps, their lawyers.

Warner Lambert v. Insurer

This business interrupton claim was settled several months after the parties met for one day with presentations by lawyers and experts from each side. There were no briefs, no questions, and no deadlines. Douglas Parker, "Mini-Trial: Insurance Claim for Business Interruption Losses," *CPR Legal Program Proceedings*, February 1983, p. 20.

NASA v. Spacecom v. TRW

After a year of active discovery in this contract dispute with the government, parties agreed to exchange briefs and have top management hear 2½ hour presentations by counsel for each side. Only management could ask questions. After the hearing, the management representatives met several times and resolved the dispute. Douglas Parker, "Mini-Hearing: Multi-party Contractual Dispute with the Government," *CPR Legal Program Proceedings*, February 1983, p. 20; *The Business Lawyer*, November 1982, p. 35.

Amoco v. 5 Construction Contractors

Six-party construction contract dispute. After 9 months of pre-litigation skirmishes, the three main parties agreed to a one-day hearing where each company was allowed one hour to present evidence and arguments to company executives. During the half-hour rebuttal session, only the businessmen could ask questions. An independent engineer was available to all parties. After the trial, the businessmen reached a settlement in less than 4 hours. *Alternatives*, January 1983, p. 1; Mathew Gallo, *CPR Legal Program Proceedings*, February 1983, p. 22.

Texaco v. Borden

After several years of complex litigation involving a $200 million antitrust and breach of contract claim. Texaco and Borden agreed to resolve the dispute through a mini-trial, to be held on neutral ground, with an executive vice president from each company acting as judges. The attorney for each side was allowed one hour, plus rebuttal time, for his presentation, which included live testimony. The judges were permitted to use operations and financial experts. *Alternatives*, March 1983, p. 1; Charles F. Kazlauskas, Jr., *CPR Legal Program Proceedings*, February 1983, p. 24.

Gillette v. Competitor

After Gillette filed suit against two of its former executives for patent infringement and theft of trade secrets, the parties agreed to a mini-trial before two business executives without a neutral third party present. The ground rules provided for abbreviated discovery and limited examination of parties according to a tight yet flexible timetable. *Alternatives*, February 1983, p. 1; Joseph E. Mullaney, in *CPR Legal Proceedings*, February 1983, p. 19.

Control Data Corporation v. Contractors

After suit had been filed, the three parties in the construction dispute agreed to a mini-trial. Presentations were made by managers and counsel, with counsel taking a small role. The three panelists were senior managers from each company. The trial, which included a question period, lasted about 5 hours and was followed by a meeting of the panel at which settlement was reached in about 1½ hours. *Alternatives*, April 1983, p. 1; Lawrence Perlman, "Mini-Trial: Construction Dispute," *CPR Legal Program Proceedings*, February 1983.

B. *Neutral Presides*

Parties agree that a neutral third party should hear their case. He may have any one of several roles, such as acting as a fact finder, particularly if he has an expertise in the subject matter; deciding the case, if the parties are deadlocked; or providing an advisory opinion.

1. *Makes Binding Decision*

Shell Oil Company v. Intel Corp.

After Shell filed suit claiming patent infringement, face-to-face negotiations between counsel succeeded in narrowing the dispute to one issue, which was then submitted to a neutral patent attorney from whom there would be no review or appeal. The parties engaged in expedited discovery and submitted deposition transcripts and briefs. Oral presentations took about 1½ hours per side. Eric D. Green, Mini-Trial Handbook at p. 29, *Corporate Dispute Management* (Matthew Bender, 1982); Paul Janicke and Roger Borovy, "The Shell Oil Company—Intel Corporation Mini-Trial," *Corporate Dispute Management* (Matthew Bender, 1982), p. 47.

2. *Makes Non-Binding Decision With Sanctions*

The parties agree that, if the party whose position is rejected by the neutral later brings suit and loses, such party must pay a stipulated penalty. Apart from this penalty, the neutral's opinion is advisory and neither the opinion nor any of the mini-trial proceedings are admissible in court. In another variation, the parties agree in advance that the neutral's opinion would be admissible by either party in any subsequent formal proceedings. Lawrence Perlman and Steven C. Nelson, "New Approaches to the Resolution of International Commercial Disputes" (1982), p. 30.

3. *Gives Advisory Opinion*

Department of Agriculture's Water District Financing Case

Mini-trial presided over by a non-lawyer expert who was not previously involved in the dispute. Each side had 2½ hours to present its case and answer questions, plus additional time for rebuttal and summation. The rules of evidence did not apply. The neutral third party submitted a non-binding report, without any ultimate recommendation, to the decision-making official at the agency. The decision-maker adopted the report and neither party challenged it, although litigation had previously appeared imminent. Eric D. Green, Mini-Trial Handbook at 48, *Corporate Dispute Management* (Matthew Bender, 1982).

Telecredit, Inc. v. TRW, Inc.

The mini-trial was decided upon after three years of litigation in this patent infringement suit. During the six-week preparation period, the parties conducted expedited discovery and depositions. An agreement was drawn specifying the mini-trial rules. The two-day mini-trial started with an information exchange in which attorneys, experts and various employees of each company orally presented their case to top management of both companies. A mutually selected "neutral advisor"—chosen for his expertise in patent law—moderated, but did not try to effect a compromise. Management then assessed the case and met without counsel to resolve the dispute. Had they not been successful, the advisor would have submitted a nonbinding opinion and management would have met again. Eric D. Green, Mini-Trial Handbook at 23, *Corporate Dispute Management* (Matthew Bender, 1982); James F. Davis, "A New Approach to Resolving Costly Litigation," *Journal of the Patent Office Society*, August 1979, p. 482.

Industry v. Public Power District

After a year of unsuccessful negotiations, the parties agreed to a mini-trial which consisted of joint submission of key designated documents and eight hour presentations by each side to a mutually selected neutral advisor with expertise in the field. The advisor then investigated the dispute independently for a month by talking to employees, visiting the job site and requesting documents. After the advisor submitted his written report, top managers met and resolved the dispute. Eric D. Green Mini-Trial Handbook at 41, *Corporate Dispute Management* (Matthew Bender, 1982).

Threatened Patent Infringement Case

In view of potential litigation over possible patent infringement, both parties agreed to hire a noted patent attorney as a neutral third-party to investigate the positions of both parties and to issue a non-binding opinion. During the fact-finding process, the advisor had access to all the papers and employees of each company, met individually with counsel for both sides, and personally tested the purportedly infringing products. Settlement followed the issuance of the opinion. Eric D. Green, Mini-Trial Handbook at 28, *Corporate Dispute Management* (Matthew Bender, 1982).

Automatic Radio v. TRW, Inc.

After nearly five years of litigation, the parties in this $27 million products liability case agreed to try a mini-trial. A mini-trial agreement was drawn up, setting out the rules, and a former judge and law professor was chosen as a neutral advisor. At the two day information exchange, each side presented its case, primarily through expert testimony with films and tapes. This was followed by rebuttal and cross examination. After the trial, the presidents of both companies met, but were unable to reach an immediate settlement. Instead of asking the advisor for a written advisory opinion, they questioned him about his view of the case and asked for his estimate of the probable trial result. A compromise was then reached quickly. Eric D. Green, Mini-Trial Handbook at 26, *Corporate Dispute Management* (Matthew Bender, 1982).

Unionized Employees v. Employer

Non-binding, informal and off-the-record procedure developed to resolve employee grievances short of arbitration. Each side, preferably represented by an individual with authority to settle, presents its best case in summary, narrative form to a neutral advisor, who may also meet privately with each side to help them fashion a solution. If the parties cannot agree, the neutral advisor gives a non-binding opinion as to who he thinks would prevail in arbitration. The parties may then meet again to see if this added information helps them resolve their dispute. Eric D. Green, Mini-Trial Handbook at 50, *Corporate Dispute Management* (Matthew Bender, 1982).

Proposed FTC Consumer Protection Mini-Trial Program

Proposed procedure in which counsel for both sides would, in a few hours, present their arguments before a mutually acceptable neutral advisor. High company and agency officials with authority to resolve the matter would be present. The neutral advisor would give an opinion on strong and weak points of each side's case, probable outcome if litigated and proposed settlement. The principals would then negotiate. If they were unable to settle, all that transpired, including the neutral's opinions, would be inadmissible in subsequent proceedings. Eric D. Green, Mini-Trial Handbook at 49, *Corporate Dispute Management* (Matthew Bender, 1982).

4. *Acts as Expert Fact Finder*

The FTC-Yamaha Joint Research Project

Since the main issue to be resolved in this proceeding was how the consumer interpreted the commercial, the parties agreed to sponsor jointly a consumer marketing research study. The parties participated equally in the design and methodology of the research and then hired a neutral firm to conduct the research. The unambiguous results of the

study greatly facilitated a consent agreement. H. Keith Hunter, "The FTC-Yamaha Joint Research Project," *Corporate Dispute Management* (Matthew Bender, 1982), p. 259. See also *Industry v. Public Power District* and *Threatened Patent Infringement Case* under III, B 3, *supra.*

5. *Hears Confidential Terms*

Parties agree to report acceptable settlement figures or terms to the neutral only. If they are close, the neutral works with them to settle the case. This process can be used with other mini-trial variants to narrow issues or shorten the length of the proceedings. For example, the neutral can become the confidential listener after information is presented at the trial. Eric D. Green, Mini-Trial Handbook at 35, *Corporate Dispute Management* (Matthew Bender, 1982).

6. *Moderates the Proceedings*

Executive Discharge

This case was begun as an arbitration. At the end of the presentations by the parties, the arbitrator invited counsel to discuss the case with him. Counsel met the next day and fashioned a compromise which they agreed would be binding. Bernard Wray, "Using the Mini-Trial in an Executive Discharge Case," *Corporate Dispute Management* (Matthew Bender, 1982), p. 243; Eric D. Green, Mini-Trial Handbook at 30, *Corporate Dispute Management* (Matthew Bender, 1982). See also description under I A, *supra.*

Two-Step Process

At outset of parties' contractual relationship, a neutral is designated to referee or facilitate a mini-trial if a dispute arises. If the accompanying negotiations fail to achieve a settlement, parties move to the second step, which is binding arbitration with the neutral referee acting as arbitrator. This process is recommended for use in long-term international commercial transactions. W. Gilbert Carter, "Matching Technique to Need in the Resolution of International Business Disputes," *CPR Intercorporate Disputes Task Force Workshop*, April 14-15, 1982. See also description under I A, *supra.*

IV. UNSTRUCTURED SETTLEMENT NEGOTIATIONS

Traditionally, these begin sometime after suit has been filed and may continue as the litigation proceeds. Counsel conduct negotiations without the principals and without a neutral. The purpose is to reach an agreement (on some or all issues in the lawsuit) which may be reduced to a formal release. There are now several variants. The substance of the negotiations are private.

A. *Parties Settle Conditionally*

Parties attempt to settle by reaching an agreement on how much each party would owe assuming possible trial outcomes. The theory of this approach is that, by quantifying their potential liabilities, the parties will develop a zone of compromise. See Lawrence Perlman and Steven C. Nelson, "New Approaches To The Resolution of International Commercial Disputes," (1982), pp. 29-30.

B. *Parties Represented By Two Teams*

Lawyers not involved in the litigation conduct settlement talks. This theory of negotiation was developed by Roger Fisher and William Ury of the Harvard Negotiation Project. See *Getting To Yes: Negotiating Agreement Without Giving In.* It was the basis for a two-team approach to settle a major securities case. See Jerold S. Solovy, "Jenner and Block Dispute Resolution Department," *CPR Legal Program Proceedings*, February 1983, p. 71.

Penn Central v. U.S.

After four years of litigation, Penn Central and the federal government settled their dispute using a "two team" approach. Each side created (1) a negotiation team composed of corporate specialists and (2) a separate litigation team that continued to litigate while negotiations took place. Louis Cohen, *CPR Legal Program Annual Meeting*, June 22-25, 1982, pp. 29-30.

C. *Single Settlement Covers Two Actions*

Consumers v. Great Western Cities, Inc.

A consumer class action and an FTC action sought to correct the same wrong, but the FTC action would not have had a *res judicata* effect on the consumer actions. Settlement with the FTC provided for cash sums to be paid to the consumers in return for a full release. Unsatisfied consumers could resort to a government sponsored and supervised arbitration program to recover greater damages. Class action was then dismissed. *Griffin v. Great Western Cities, Inc.*, 76-210B (D.N.M.), Memorandum of Points and Authorities in Support of Defendants' Motion to Dismiss the Alleged Class Action Allegations.

V. PRIVATE TRIAL SERVICES

Parties are assuming different amounts of responsibility for conducting these processes. Some do it themselves; others consult private dispute resolution services which provide the forum, propose third party neutrals, or tailor rules of procedure and evidence. The services conduct any one of the processes to resolve legal or factual disputes. Profit and non-profit corporations and bar associations provide these services. See Eric D. Green, "The Conceptual Framework of Alternative Dispute Resolution," *CPR Legal Program Proceedings*, February 1983, p.18; H. Warren Knight, "Private Dispute Resolution—A Going Concern in California," *Corporate Dispute Management* (Matthew Bender, 1982), p. 113.

A. *Neutrals Available to Conduct Proceedings*

In these services, neutral parties are available to

_.eside over private proceedings. The neutral may be a retired judge or a practicing lawyer. His role may be to work out a settlement or make a substantive decision on the merits. See Alan Kohn, "Bar Council Seeks Method To Settle Complex Disputes," *New York Law Journal*, December 13, 1982; H. Warren Knight, "Private Dispute Resolution—A Going Concern in California," *Corporate Dispute Management* (Matthew Bender, 1982), p. 113.

CPR Offers Judicial Panel

The Judicial Panel, composed of prominent lawyers and former judges, helps companies find and use private alternatives to litigation. Panelists can serve disputing parties in a variety of ways. For example, they can help parties design a fair and cost-effective dispute resolution procedure, act as neutral fact finders or advisors in a mini-trial, or act as mediators.

Federal Bar Sponsors Panel

The Federal Bar Council has assembled a panel of trial lawyers to settle or decide disputes involving membes' clients and to arbitrate partnership or fee matters. See Alan Kohn, "Bar Council Seeks Method to Settle Complex Disputes," *New York Law Journal*, December 13, 1982; *Alternatives*, March 1983, p. 2.

EnDispute Organizes Hurricane Iwa Panel

EnDispute is one of the for-profit businesses which provides a wide variety of dispute resolution services. An example of its work is the ten-member panel organized to settle property damage insurance claims from Hurricane Iwa. The panel offered three basic services: a) a voluntary, non-binding settlement conference; b) a mini-arbitration or c) a special process, such as a mini-trial, that is tailored to the needs of each dispute. In the conference, which can be scheduled for either 90 minute or three hour sessions a panel member may serve as a mediator to help the parties negotiate a settlement. In the mini-arbitration, the panel member hears both parties in a half-day and renders a decision within 24 hours. The award may not exceed the insured's request or be less than the insurer's offer. *Alternatives*, April 1983, p. 4.

Denver Bar Association Develops Referee Program

In consultation with the Chief Judge of the Denver District Court, the Denver Bar Association has developed a voluntary system of resolving disputes speedily and inexpensively outside the state court system. Either before or after a case is filed, an attorney may, with the consent of opposing counsel, file an application and registration fee form. The total cost is $100 per side plus $25 for administration costs. The parties then choose a panel and set a date for the two-hour hearing. The panels are chosen from a list of prominent Denver attorneys. It is recommended that only one referee be used, but a panel of up to three attorneys may be selected. Parties may submit selected reading materials to the referee three days before the hearing. After the hearing the referee recommends a settlement orally and then issues a written evaluation which is not binding on either party. *Alternatives*, May, 1983.

Judicial Arbitration Service (JAS) Relieves Courts

JAS is a California business which offers a variety of public and private dispute-resolving processes. Parties choose a neutral third party and arbitration procedures, binding or voluntary settlement conferences, or structured settlement procedures. While this concept for dispute resolution is theoretically suited to any kind of dispute, the types of disputes which it has successfully resolved include complex personal injury cases, insurance, construction and contracting cases. H. Warren Knight, "Private Dispute Resolution—A Going Concern in California," *Corporate Dispute Management* (Matthew Bender, 1982), p. 113. The publicly regulated activities of JAS will be discussed further in a later part of the Taxonomy.

B. *Private Fact Finding Organized*

Private businesses and industry groups also have organized their own fact finding forums to meet a variety of needs. In each description below, the function is to prevent complaints from escalating into lawsuits.

Control Data Corporation Employs An Ombudsman

The ombudsman's role is dual: to prevent employee disputes as well as to resolve them. To aid in dispute resolution, the ombudsman, as a neutral, not a partisan, first tries to advocate the use of the grievance procedure, a series of informal conferences with a succession of management personnel. If and only if the system cannot or will not respond to an employee's problem does the ombudsman step in. He does not make managerial decisions, but tries to insure that the system operates as it should. In addition, the ombudsman uncovers policies which are inadequate to resolve employee problems or are not being followed in employee matters. D. J. Reed, "Control Data Corporation's Ombudsman," *Corporate Dispute Management* (Matthew Bender, 1982), p. 229. This model will be discussed further in a later part of the Taxonomy.

National Advertising Review Board (NARB) Reviews Advertisements

Complaint handling component of a self-regulatory arm of the advertising industry. The National Advertising Division (NAD) is the investigative division of the review body, the NARB, and makes initial decisions on complaints, prior to review by NARB panels. The appointed five-member panels review written evidence and oral testimony from NAD, the advertiser and witnesses and then issue written judgments, to which advertisers have ten days to respond. If the advertiser refuses to comply, the NARB reports its finding to a government agency. Norman E. Gottlieb, "Self-Regulation in National Advertising," *Corporate Dispute Management* (Matthew Bender, 1982), p. 3.

Attachment # 5

Testimony of Austin K. Vincent of Topeka, Kansas
in support of HB 2916 before the
House Judiciary Committee on February 23, 1984

I. Present common law and statutory privileges and immunities are insufficient to protect against evidentiary use of matters disclosed in mediation and arbitration.

A. Attorney-Client privilege K.S.A. 60-426 is waived when communications are in presence and hearing of third persons. Fisher v. Mr. Harold's Hair Lab, Inc. 215 Kan 515, 519 (1974); and other cases cited therein.

B. Clergyman-Penitent privilege also requires confidential communication and, therefore, is likewise waived in mediation or arbitration process.

C. K.S.A. 60-2801 et seq., deeming certain statements inadmissable as evidence, deals with the very narrow circumstance of statements made by a declarant who disavows the statements within fifteen (15) days after release from the care of a physician or hospital after incurring personal injury.

D. Court is not required to give effect to stipulations unless reduced to writing and signed by the counsel to be charged therewith. S. Ct. Rule 163, K.S.A. 60-2702a.

II. Kansas has a comprehensive statutory scheme for arbitration of dispute, including judicial enforcement procedures. K.S.A. 5-201 et. seq. and 5-401 et. seq., Uniform Arbitration Act.

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H.B. 2896

Attachment # 6

Testimony by Jim Robertson
SRS/CSE Senior Legal Counsel
(913) 296-3410

Social and Rehabilitation Services supports H.B. 2896 if an amendment is made which would require applicants for offset services to apply for Title IV-D non-ADC status pursuant to K.S.A. 39-756 (copy attached). If such cases are made "non-ADC", the federal government will provide 70% FFP for the cost of processing the caseload and for additional CSE staff necessary to handle an expected 20,000 additional non-ADC cases. Also, if these cases are processed as "non-ADC" cases by SRS, the State of Kansas will be eligible to receive an incentive payment from the federal government for the amounts collected. Without the amendment, the bill would require SRS to collect delinquent support by using 100% state funds. Also, SRS would receive no fee, no reimbursement for expenses, and no federal credit for the collections (therefore, no federal incentive payment).

Fiscal Note: The Kansas Child Support Enforcement Unit currently has the responsibility for processing in excess of 90,000 support enforcement cases with a little over 100 state employees scattered across the state. If this bill became law, it could encourage an estimated 20,000 additional non-ADC cases. To accomplish the mandates of this bill in an acceptable manner, we estimate that an additional 19 1/2 employees will be required. The total costs for these positions (including attorney time, travel and subsistance) are estimated to be $378,880. With the federal match, the cost to the state would be $113,664.

To process offset cases pursuant to this bill, SRS would have the following responsibilities:

(1) determining the legal validity of the support order and arrearages;
(2) representing the claimant in due process administrative hearings and appeals to district court;
(3) establishing a system to accept and validate applications;
(4) preparing and referring a state debt setoff computer tape to the Department of Administration;
(5) dealing with complaint calls from obligors and obligees;
(6) settlement negotiations;
* (7) if the cases are established as "non-ADC", CSE would be responsible for providing a full range of support establishment and enforcement services other than setoff.

If SRS receives 20,000 such cases, we could expect to accomplish a state income tax refund offset on 15,000 cases with collections of at least $1,125,000 per year.

Potential legal problem: At some point a question could be raised concerning the use of setoff when a debt is not actually owed the state. "Setoff" is a legal theory which allows for the satisfaction of a debt when both parties to the offset owe a debt to each other.

An attempt to counteract this potential problem is made at lines 0064-0066 by stating "for purposes of this act (the amount due) shall be considered a debt

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due and owing the department of social and rehabilitation services."

Since this is a relatively new concept, no case law in Kansas or any other state has developed as yet. However, 26 states and the District of Columbia have implemented a state tax refund offset program. Of this number , Iowa, Minnesota, and Wisconsin have enacted setoff provisions which apply in non-ADC cases. Several other states in addition to Kansas are considering legislation this year to offset support debts in non-ADC cases.

the discontinuance of such aid. The notice shall include:

(1) A statement that the assignment has been partially terminated;

(2) the name of the child and the caretaker for whom support has been ordered by the court;

(3) the number of the case in which support was ordered; and

(4) the date the assignment was partially terminated. Upon receipt of said notice and without the requirement of a hearing or order, the court shall forward all payments made to satisfy support arrearages due and owing as of the date the assignment of support rights was partially terminated to the secretary of social and rehabilitation services until the court receives notification of the termination of the assignment.

(d) If the secretary of social and rehabilitation services or the secretary's designee has on file with the court ordering support payments, a notice of assignment of support rights pursuant to subsection (b) or a notice of partial termination of assignment of support rights pursuant to subsection (c), the secretary shall be considered a necessary party in interest concerning any legal action to enforce, modify, settle, satisfy or discharge an assigned support obligation and, as such, shall be given notice by the party filing such action. Notice shall be provided according to the rules of civil procedure.

History: L. 1976, ch. 210, § 3; L. 1980, ch. 125, § 2; L. 1982, ch. 186, § 1; April 15.

39-756. Certain services concerning location of parents, paternity establishment and child support available to persons other than persons receiving aid to families with dependent children; application, fee; assignment of support rights; distribution of collections; attorneys representing department of social and rehabilitation services, attorney-client relationship. The secretary of social and rehabilitation services shall make services required under part D of title IV of the federal social security act (42 U.S.C. § 651 *et seq.*), or acts amendatory thereof or supplemental thereto, and federal regulations promulgated pursuant thereto relating to the location of parents, the establishment of paternity and the enforcement of child support obligations available to persons not receiving aid to families with dependent children upon application by such persons. The secretary shall fix by rules and regulations a fee or fees for services rendered pursuant to this section as required by federal law or federal regulations, or both. The secretary may take an assignment of support rights from an individual applying for paternity or child support services under this section. The amounts collected on behalf of persons who apply for and receive such services shall be paid to them unless the secretary of social and rehabilitation services retains an assignment of support rights pursuant to subsection (c) of K.S.A. 39-709. If such an assignment is retained by the secretary, current support payments shall be paid to the obligee and the secretary may retain any support arrearage to which social and rehabilitation services has a claim. Any support arrearage collected in excess of the amount assigned to social and rehabilitation services shall be paid to the obligee. In any action brought pursuant to this section, or any action brought by a governmental agency or contractor, to establish paternity or to establish or enforce a support obligation, the social and rehabilitation services' attorney or the attorneys with whom such agency contracts to provide such services shall represent the state department of social and rehabilitation services. Nothing in this section shall be construed to modify statutory mandate, authority or confidentiality required by any governmental agency. Any representation by such attorney shall not be construed to create an attorney-client relationship between the attorney and any party, other than the state department of social and rehabilitation services.

History: L. 1976, ch. 210, § 5; L. 1982, ch. 187, § 1; April 29.

39-758. Location of absent parents; cooperation of governmental units with secretary; availability of information; rules and regulations. (a) State, county and local units of government, their officers and employees, shall cooperate with the secretary of social and rehabilitation services in locating absent parents and shall on request supply the secretary of social and rehabilitation services with available information about the location, employment status, income, date of birth and social security number of an absent parent including any information

Suggested Amendments to H.B. 2896

From: J.A. Robertson
CSE Senior Legal Counsel
(913) 296-3410

AN ACT concerning child support; relating to enforcement of orders thereof; providing for setting off certain amounts against moneys held for or owed to the obligor by the state; amending K.S.A. 1983 Supp. 75-6202 and repealing the existing section.

Be it enacted by the Legislature of the State of Kansas:

New Section 1. (a) Any individual not otherwise eligible as a public assistance recipient may apply to the secretary of social and rehabilitation services for assistance in collecting delinquent court-ordered child support payments ~~by use of the setoff~~ procedure provided by K.S.A. 1983 Supp. 75-6201 *et seq.* and amendments thereto

in accordance with K.S.A. 39-756 which would include the use of the setoff

(b) Any application for assistance under this section shall be accompanied by verification, satisfactory to the secretary of social and rehabilitation services, of: (1) A court requiring that child support be paid to the applicant; (2) one or more delinquent child support payments; and (3) the amount of support that is delinquent. If the secretary determines that court-ordered child support in an amount greater than $25 is due and owning the applicant, the secretary shall initiate collection of the delinquent child support under K.S.A. 1983 Supp. 75-6201 *et seq.* and amendments thereto.

(c) Upon completion of a setoff transaction to collect delinquent child support as provided by this section, the director of accounts and reports shall transfer the net proceeds collected, after deduction of the collection assistance fee authorized by K.S.A. 1983 Supp. 75-6210 and amendments thereto, to the child support enforcement fund, which is hereby established in the state treasury. Such proceeds shall promptly be paid to the

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individual upon whose behalf they are collected, upon warrants approved by the secretary of social and rehabilitation services ~~(~~ or the director of accounts and reports issued pursuant to vouchers approved by the secretary of social and rehabilitation services or a person or persons designated by the secretary.

Sec. 2. K.S.A. 1983 Supp. 75-6202 is hereby amended to read as follows: 75-6202. As used in this act:

(a) "Debtor" means any person owing a debt to the state of Kansas or any state agency *or owing court-ordered child support to an individual who has applied for assistance in collecting that support under section 1.*

(b) "Debt" means:

(1) Any liquidated sum due and owing to the state of Kansas or any state agency which has accrued through contract, subrogation, tort, operation of law, or any other legal theory regardless of whether there is an outstanding judgment for that sum; *or*

(2) any amount of court-ordered child support due and owing an individual who has applied for assistance in collecting that support under section 1, which amount, for the purposes of this act, shall be considered a debt due and owing the department of social and rehabilitation services.

(c) "Refund" means any amount of Kansas income tax refund due to any person as a result of an overpayment of tax, and for this purpose, a refund due to a husband and wife resulting from a joint return shall be considered to be separately owned by each individual in the proportion of each such spouse's contribution to income, as the term "contribution to income" is defined by rules and regulations of the secretary of revenue.

(d) "Net proceeds collected" means gross proceeds collected through final setoff against a debtor's earnings, refund or other payment due from the state or any state agency minus any collection assistance fee charged by the director of accounts and reports of the department of administration.

(e) "State agency" means any state office, officer, department, board, commission, institution, bureau, agency or authority or any division or unit thereof.

(f) "Person" means an individual, proprietorship, partner-