

MINUTES OF THE HOUSE COMMITTEE ON JUDICIARY

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

3:30 ~~xxx~~ p.m. on February 28, 1984 in room 526-S of the Capitol.

All members were present except:

Representative Justice was excused.

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:

None

The minutes of the meetings of February 22 and 23, 1984, were approved.

The Committee discussed and took action on several bills.

HB 2987 - An act relating to marriage officiates.

Representative Schweiker moved to amend the bill to allow any former judge of the district court to perform marriages, seconded by Representative Harper. Motion carried. Representative Schweiker moved to report HB 2987, as amended, favorably, seconded by Representative Harper. Motion carried.

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

The Chairman explained the situation that prompted Representative Guldner to introduce the bill. There was discussion regarding possible abuse of a verbal debt agreement between a parent and a child. Representative Miller moved to report the bill adversely, seconded by Representative Whiteman. It was noted the bill would exempt situations explained by the Chairman. Representative Buehler made a substitute motion to report the bill favorably. The substitute motion was ruled out of order. Representative Douville made a substitute motion to table HB 2875, seconded by Representative Campbell. The substitute motion carried.

HB 2916 - An act relating to confidentiality in mediation.

The Chairman presented a letter and amendments suggested by Ken Peery of the Christian Justice Center, Kansas City, Missouri (Attachment No.1) which narrow the scope of the confidentiality privilege.

Representative Miller believed the bill would have a negative impact on the present system of judicial review of arbitration contracts. He moved to report HB 2916 adversely, seconded by Representative Ediger. Concern was expressed that courts are clogged and conciliation efforts would be an alternative. Representative Patrick made a conceptual substitute motion that no person who serves as a mediator or a secretary involved in the mediation may be subpoenaed for court hearings with the parties being exempt, seconded by Representative Cloud. There was discussion as to what other persons, such as witnesses, should be exempt. A member noted this motion would return provisions to present status. Representative Patrick changed his motion to strike all of line 23 after "writing" and lines 24, 25, 26, and through "discovery" on line 27. The Chairman ruled the motion was not clear enough to put to a vote. Representative Knopp made a substitute motion to amend HB 2916 so that, after "writing", in line 23, and to the end of the Section, the wording would be "no person who serves as mediator, conciliator or arbitrator nor that person's agent may be subpoenaed or otherwise compelled to reveal any information disclosed in the process of setting up or conducting the mediation, conciliation or arbitration". The substitute motion was seconded by Representative Cloud. It was clarified that the substitute motion would not give immunity from subpoena to the parties or witnesses. The substitute motion carried.

Representative Wunsch believed there should be a provision to require the results of arbitration to be put in writing and available for review in case something happens to the mediator. He moved to add, in Section 2, that the immunity granted in Section 1 will not take effect until the results of the mediation are put in writing and available for judicial review. The motion failed to carry. Representative Cloud moved to report HB 2916, as amended, favorable for

CONTINUATION SHEET

MINUTES OF THE HOUSE COMMITTEE ON JUDICIARY,

room 526-S, Statehouse, at 3:30 ~~am~~/p.m. on February 28, 1984.

passage, seconded by Representative Vancrum. Motion carried.

HB 3037 - An act relating to restriction on certain drug prescriptions.

Representative Duncan moved to amend the bill by striking, on line 22, "given any amphetamines" and inserting "give any amphetamine", and, in lines 58 and 59, to strike "is safe and effective" and insert "can be used". He said this would remove any concern regarding the authority of the Board of Healing Arts to rule on the safety and effectiveness of a drug. The motion was seconded by Representative Harper, and it carried. Representative Buehler moved to report HB 3037, as amended, favorably, seconded by Representative Campbell. Motion carried.

HB 2714 - An act relating to judges of the district court.

It was noted the bill needed clarification that in each county of the state there should be at least one judge. Representative Matlack moved to strike, in line 23, "each" and insert "the county of the state where the judge is serving". It was noted this motion takes away the intent. Representative Knopp made a substitute motion to say that in each county of the state there shall be at least one judge, seconded by Representative Whiteman. The substitute motion carried. Representative Harper moved to report HB 2714, as amended, favorably, seconded by Representative Blumenthal. Motion carried.

HB 3027 - An act relating to legal services for agriculture-related businesses.

Representative Blumenthal moved to report the bill favorably, seconded by Representative Harper. Representative Vancrum said the concept of the bill should be tested and reviewed to determine if it is working. He made a substitute motion for the bill to expire July 1, 1986, seconded by Representative Duncan. Substitute motion carried.

Amendments (Attachment No.2) suggested by the Kansas Bankers Association and furnished by Ron Smith, Kansas Legal Services, were distributed. Representative Harper moved to adopt the amendments, seconded by Representative Matlack. Representative Miller said eligible persons should have legal representation regarding loans in private lending institutions. He made a substitute motion to strike the language after the period on line 40 and all of lines 41 and 42, seconded by Representative Whiteman. There was discussion regarding the fiscal impact of his motion, an open-ended entitlement type program being created, and if the definition of "eligible person" should be broadened. The vote on the substitute motion failed to carry. Representative Duncan made a substitute motion to add, in Section 2, line 58, that the service be provided subject to appropriations therefor, seconded by Representative Knopp. The substitute motion carried.

Representative Patrick moved to strike the language in lines 46 and 47 and include farmers home administration, federal land banks, and production credit associations in the definition of private lending institutions, seconded by Representative Knopp. Representative Patrick pointed out that these groups are no longer backed, controlled, or funded by the federal government. Motion carried.

There was discussion regarding Section 3 and using the state's law schools and extension service in advising farmers. It was noted a management decision of the K-State Extension Service had been not to allocate funds to this program. Representative Miller moved to delete Section 3 (a), seconded by Representative Harper. Representative Knopp made a substitute motion to delete lines 90 through 98 of the section leaving the Extension Service in the bill, seconded by Representative Patrick. The substitute motion failed to carry. The vote on the original motion failed to carry.

Representative Harper moved to report HB 3027, as amended, favorably, seconded by Representative Buehler. Having voted on the prevailing side, Representative Wunsch made a substitute motion to reconsider action taken on Representative Patrick's motion to put land banks, farmers home administration, and production credit associations under the definition of private lending institutions, seconded by Representative Solbach. The substitute motion carried. Representative Wunsch moved to reverse the action of Representative Patrick's motion, seconded by Representative Douville. Motion failed to carry.

CONTINUATION SHEET

MINUTES OF THE HOUSE COMMITTEE ON JUDICIARY,
room 526-S, Statehouse, at 3:30 ~~a.m.~~/p.m. on February 28, 1984.

Representative Harper moved to report the bill, as amended, favorably, seconded by Representative Matlack. Representative Solbach made a conceptual substitute motion to extend the representation and advice to include federally chartered banks, savings and loans, and other lending institutions, seconded by Representative Buehler. The substitute motion failed to carry. Representative Patrick objected to the bill setting up rule and regulation procedures to affect only one agency, the Kansas Legal Services. He made a substitution motion that lines 54 through 57 be stricken, seconded by Representative Vancrum. Substitute motion failed to carry. The vote was taken on the original motion to report HB 3027, as amended, favorably. Motion carried.

The meeting was adjourned at 5:20 p.m.

HEART OF AMERICA
CHRISTIAN JUSTICE CENTER, INC.

1221 BALTIMORE AVE., SUITE #500
KANSAS CITY, MO 64105

Attachment # 1

CHRISTIAN CONCILIATION SERVICE
RELIGIOUS FREEDOM

KENNETH E. PEERY
EXECUTIVE DIRECTOR
(816) 421-1555
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February 27, 1984

Hon. Robert G. Frey
Chairman, House Judiciary Committee
Room 115-S House of Representatives
Topeka, KS 66612

Dear Mr. Frey:

Subject: H.B. 2916 - Confidentiality of Conciliation/Arbitration

Thanks for the opportunity to meet with the Committee to review the above measure. As the result of the very good questions posed by committee members I have consulted the statutes of other states and visited with some of my trial attorney friends about the technical aspects of this bill. Accordingly, we are willing to accept a revised and improved (we hope) version of this measure that will obviate some of the perceived objections.

Here is how we would revise the measure:

Sec. 1. If parties to a dispute agree to submit their dispute to any forum for mediation, conciliation or arbitration and all parties agree in writing that all matters disclosed in the process of setting up or conducting the mediation, conciliation or arbitration shall be confidential, all oral or written communications made during the process by any person present (including all memoranda, work products and case files of any mediator, conciliator or arbitrator) shall be privileged, not admissible as evidence, and not subject to discovery in any forum. No person who serves with the permission of the parties as mediator, conciliator or arbitrator or any other persons present or connected with the mediation, conciliation or arbitration process may be subpoenaed or otherwise compelled to disclose any such privileged matter in any forum.

This revised draft narrows the scope of the privilege. It is not the facts or information that we are trying to protect, only the disclosures made at the sessions. This revision also conforms more to the New York statute on this subject. A copy of the N.Y. statute is enclosed.

In further discussing the situation we found a possible loophole we would like to close. Frequently other parties such as friends, spouses, pastors, prayer partners, attorneys, or trainee mediators attend the sessions. These are admitted to the sessions only by the express consent of all parties. It could be argued that their admission constituted a waiver of the privilege. To forestall that argument we have included the phrase "other persons."

Hon. Robert G. Frey - Page 2

Again this bill as amended, if passed, would not apply inexorably to all cases of conciliation, mediation or arbitration but only as to those cases where the parties have expressly agreed in writing to invoke its consequences. We encourage, but do not necessarily require, the parties to seek legal advice prior to signing such an agreement. If they are already represented by an attorney, we do recommend that they seek their attorney's advice prior to signing the agreement.

The output of a conciliation or mediation is an agreement arrived at by the parties and which is accepted by them. Our panels do not draft a formal memorandum agreement for the parties. If the parties desire a legally binding agreement they are referred to their lawyers to prepare and supervise the execution of this document.

I have enclosed for your information copies of similar statutes already enacted in New York, California and Colorado.

Please be assured of our willingness to consider other amendments as well to perfect this measure. We stand ready to help with any further research or discussion.

Thanks again to the committee for considering this bill.

Sincerely yours,


Kenneth E. Peery

KEP/dp
Enclosures

§ 849-a N.Y., JUDICIARY LAW

Effective Date; Expiration. Section 5 of L.1981, c. 847, provided: "This act [adding this section and sections 849-b, 849-c, 849-d, 849-e, 849-f and 849-g, enacting section set out as a note under section 849-h, and amending CPL § 170.55] shall

take effect immediately [July 27, 1981] and shall remain in full force and effect until the first day of October, nineteen hundred eighty-four."

Library References

Courts §59.

C.J.S. Courts § 144 et seq.

§ 849-b. Establishment and administration of centers

1. There is hereby established the community dispute resolution center program, to be administered and supervised under the direction of the chief administrator of the courts, to provide funds pursuant to this article for the establishment and continuance of dispute resolution centers on the basis of need in neighborhoods.

2. Every center shall be operated by a grant recipient.

3. All centers shall be operated pursuant to contract with the chief administrator and shall comply with all provisions of this article. The chief administrator shall promulgate rules and regulations to effectuate the purposes of this article, including provisions for periodic monitoring and evaluation of the program.

4. A center shall not be eligible for funds under this article unless:

(a) it complies with the provisions of this article and the applicable rules and regulations of the chief administrator;

(b) it provides neutral mediators who have received at least twenty-five hours of training in conflict resolution techniques;

(c) it provides dispute resolution without cost to indigents and at nominal or no cost to other participants;

(d) it provides that during or at the conclusion of the dispute resolution process there shall be a written agreement or decision setting forth the settlement of the issues and future responsibilities of each party and that such agreement or decision shall be available to a court which has adjourned a pending action pursuant to section 170.55 of the criminal procedure law;

(e) it does not make monetary awards except upon consent of the parties and such awards do not exceed one thousand dollars; and

(f) it does not accept for dispute resolution any defendant who has a pending felony charge contained in an indictment or information arising out of the same transaction or involving the same parties, or who is named in a filed accusatory instrument (i) charging a violent felony offense as defined in section 70.02 of the penal law, or (ii) any drug offense as defined in article two hundred twenty of the penal law, or (iii) if convicted, would be a second felony offender as defined in section 70.06 of the penal law.

5. Parties must be provided in advance of the dispute resolution process with a written statement relating:

(a) their rights and obligations;

(b) the nature of the dispute;

(c) their right to call and examine witnesses;

(d) that a written decision with the reasons therefor will be rendered;

and

(e) that the dispute resolution process will be final and binding upon the parties.

6. Except as otherwise expressly provided in this article, all memoranda, work products, or case files of a mediator are confidential and not subject to disclosure in any judicial or administrative proceeding. Any communication relating to the subject matter of the resolution made during the resolution process by any participant, mediator, or any other person present at the dispute resolution shall be a confidential communication.

Added L.1981, c. 847, § 3.

NEW YORK

(f) A judgment or decree entered pursuant to the provisions of this part 2.

(2) The appeal shall be taken in the manner and to the same extent as from orders or judgments in civil actions.

Source: Added, L. 75, p. 577, § 1.

When denial of application to compel arbitration not appealable. An appeal may not be taken from an order denying an application to compel arbitration on an employment contract

entered into before July 14, 1975. *Monatt v. Pioneer Astro Indus., Inc.*, 42 Colo. App. 265, 592 P.2d 1352 (1979).

13-22-222. Applicability. This part 2 applies only to agreements made on or after July 14, 1975.

Source: Added, L. 75, p. 578, § 1.

This section by its terms applies only to agreements made on or after July 14, 1975. *Rhoads v. Albertson's, Inc.*, 40 Colo. App. 198, 574 P.2d 114 (1977), rev'd on other grounds, 196 Colo. 159, 582 P.2d 1049 (1978).

taken from an order denying an application to compel arbitration on an employment contract entered into before July 14, 1975. *Monatt v. Pioneer Astro Indus., Inc.*, 42 Colo. App. 265, 592 P.2d 1352 (1979).

When denial of application to compel arbitration not appealable. An appeal may not be

Applied in *Ash Apts. v. Martinez*, 656 P.2d 708 (Colo. Ct. App. 1982).

13-22-223. Uniformity of interpretation. This part 2 shall be so construed as to effectuate its general purpose to make uniform the law of those states which enact it.

Source: Added, L. 75, p. 578, § 1.

COLORADO PART 3

DISPUTE RESOLUTION ACT

13-22-301. Short title. This part 3 shall be known and may be cited as the "Dispute Resolution Act".

Source: Added, L. 83, p. 624, § 1.

13-22-302. Definitions. As used in this part 3, unless the context otherwise requires:

(1) "Chief justice" means the chief justice of the Colorado supreme court.

(2) "Director" means the director of the office of dispute resolution.

(3) "Mediation" or "dispute resolution" means a process by which parties involved in a dispute voluntarily agree to enter into one or more settlement discussions with a mediator in order to resolve their dispute.

(4) "Mediator" means a trained individual who assists disputants to reach a mutually acceptable resolution of their disputes by identifying and evaluating alternatives.

(5) "Office" means the office of dispute resolution.

Source: Added, L. 83, p. 624, § 1.

13-22-303. Office of dispute resolution - establishment. There is hereby established in the judicial department the office of dispute resolution, the head of which shall be the director of the office of dispute resolution, who shall be appointed by the chief justice of the supreme court and who shall receive such compensation as determined by the chief justice.

Source: Added, L. 83, p. 624, § 1.

13-22-304. Director - assistants. The director shall be an employee of the judicial department and shall be responsible to the chief justice for the administration of the office. The director may but need not be an attorney and shall be hired on the basis of his training and experience in mediation. The director, subject to the approval of the chief justice, may appoint such additional employees as he deems necessary for the administration of this part 3.

Source: Added, L. 83, p. 625, § 1.

13-22-305. Mediation services. (1) In order to resolve disputes between persons involved in civil litigation, dispute resolution programs shall be established in such judicial districts or combinations of such districts as shall be designated by the chief justice of the supreme court, subject to moneys available for such purpose. The director shall establish rules, regulations, and procedures for the prompt resolution of disputes. Such rules, regulations, and procedures shall be designed to establish a simple nonadversary format for the resolution of disputes by neutral mediators in an informal setting for the purpose of allowing each participant, on a voluntary basis, to define and articulate his particular problem for the possible resolution of such dispute.

(2) Persons involved in a dispute shall be eligible for the mediation services set forth in this section after the filing of a complaint in a civil action in either the county or the district court.

(3) Each party who uses the mediation services set forth in this section shall pay a fee as prescribed by rule of the supreme court. Any fee may be waived at the discretion of the director. Any fees collected shall be transmitted to the director, shall remain in his custody, and shall be available to the director to administer this part 3.

(4) All rules, regulations, and procedures established pursuant to this section shall be subject to the approval of the chief justice.

(5) No adjudication, sanction, or penalty may be made or imposed by any mediator or the director.

Source: Added, L. 83, p. 625, § 1.

13-22-306. Mediators. (1) In order to resolve disputes, the director may contract, on a case-by-case basis, with mediators who he feels are qualified to mediate such disputes. The tasks of such mediators shall be defined by the director. The director may also use qualified volunteers to assist in mediation efforts.

(2) The liability of mediators to suit shall be limited to willful or wanton misconduct.

Source: Added, L. 83, p. 625, § 1.

13-22-307. Confidentiality. Dispute resolution meetings may be closed at the discretion of the mediator. Mediation proceedings shall be regarded as settlement negotiations, and no admission, representation, or statement made in mediation not otherwise discoverable or obtainable shall be admissible as evidence or subject to discovery. In addition, a mediator shall not be subject to process requiring the disclosure of any matter discussed during mediation proceedings.

Source: Added, L. 83, p. 625, § 1.

13-22-308. Settlement of disputes. If the parties involved in a dispute reach an agreement, the agreement shall be reduced to writing and approved by the parties and their attorneys and shall be presented to the court as a stipulation and, if approved by the court, shall be enforceable as an order of the court.

Source: Added, L. 83, p. 626, § 1.

13-22-309. Reports. The director shall report annually to the chief justice, the general assembly, and the governor on the operation of the dispute resolution programs. Such information shall include, but shall not be limited to, the number and types of disputes received, the disposition of these disputes, and any problems being encountered. In addition, the report shall contain a comparison of the cost of mediation with the cost of litigation.

Source: Added, L. 83, p. 626, § 1.

13-22-310. Funding. In addition to any fees collected pursuant to section 13-22-305 (3), the director shall explore methods for obtaining federal and private funds to assist in implementing this part 3.

Source: Added, L. 83, p. 626, § 1.

EVIDENCE

ARTICLE 25

Evidence - General Provisions

| | | | |
|------------|--|------------|--|
| 13-25-103. | Mortality table. | 13-25-129. | Statements of child victim of unlawful sexual offense against a child — hearsay exception. |
| 13-25-126. | Blood tests to determine parentage. | | |
| 13-25-128. | Rules of evidence — grant of authority subject to reservation. | | |

13-25-101. Printed statutes - reports of decisions.

Applied in *Sego v. Mains*, 41 Colo. App. 1, 578 P.2d 1069 (1978).

13-25-103. Mortality table. The table referred to in section 13-25-102 is as follows:

month of January by the judge of the superior court in counties having only one such judge, and by a majority of the judges of the superior court in counties having more than one such judge.

(Added by Stats.1945, c. 1296, p. 2445, § 1.)

Cross References

Judicial power of state, see Const. Art. 6, § 1.

Library References

Pleading—Civil Actions, Grossman and Van Alstyne, § 17.

§§ 1734 to 1739. Repealed by Stats.1907, c. 389, p. 728, § 2; Stats.1931, c. 281, p. 687, § 1700

Historical Note

For disposition of repealed §§ 1734 to 1739, enacted in 1872, see italicized note and Table at the head of Title 11, following § 1712.

CALIFORNIA

Article 2

FAMILY CONCILIATION COURTS

Sec.

- 1740. Jurisdiction; designation of court.
- 1741. Assignment of judges; number of sessions.
- 1742. Transfer of cases; reasons; duties of transferee judge.
- 1743. Substitute judge; appointment; powers and authority.
- 1744. Supervising counselor; secretary; powers and duties; other assistants; classification; compensation.
- 1744.1. to 1744.4. Repealed.
- 1745. Supervising and associate counselors; qualifications.
- 1746. Probation officers; duties.
- 1747. Privacy of hearings; conferences; confidential nature of communications; closed files; inspection of papers.
- 1748. Destruction of records, papers or documents in office of counselor; exception; microfilming.
- 1749. Counties; joint family conciliation court services; provisions.
- 1750 to 1759. Repealed.

Article 2 was added by Stats.1980, c. 48, § 2, eff. March 27, 1980.

Former Article 2, Children's Courts of Conciliation, amended by Stats.1955, c. 1230, p. 2243, § 4, to read: Conciliation Courts, was repealed by Stats.1980, c. 48, § 1.5, eff. March 27, 1980.

Historical Note

Former § 1746, added by Stats.1939, c. 737, p. 2263, § 1, amended by Stats.1955, c. 1230, p. 2245, § 8, relating to duties of probation officers, was repealed by Stats. 1980, c. 48, § 1.5, eff. March 27, 1980.

Derivation: Former § 1746, added by Stats.1939, c. 737, p. 2263, § 1, amended by Stats.1955, c. 1230, p. 2245, § 8.

Forms

See West's California Code Forms, Civil Procedure.

Cross References

Powers and duties of probation officers, see §§ 131.3, 131.4; Penal Code §§ 1203, 1203.5, 1203.1 to 1203.13, 1203c; Welfare and Institutions Code § 270 et seq.

Notes of Decisions

1. In general

The superior court may require an investigation and report by probation officer in any matter involving the custody, status, or welfare of a minor or minors under the Welfare and Institutions Code, and is not limited to those matters arising under the Juvenile Court Law. 27 Ops. Atty.Gen. 292.

§ 1747. Privacy of hearings; conferences; confidential nature of communications; closed files; inspection of papers

Notwithstanding the provisions of Section 124, all superior court hearings or conferences in proceedings under this chapter shall be held in private and the court shall exclude all persons except the officers of the court, the parties, their counsel and witnesses. Conferences may be held with each party and his counsel separately and in the discretion of the judge, commissioner or counselor conducting the conference or hearing, counsel for one party may be excluded when the adverse party is present. All communications, verbal or written, from parties to the judge, commissioner or counselor in a proceeding under this chapter shall be deemed to be official information within the meaning of Section 1040 of the Evidence Code.


The files of the family conciliation court shall be closed. The petition, supporting affidavit, conciliation agreement and any court order made in the matter may be opened to inspection by any party or his counsel upon the written authority of the judge of the family conciliation court.

(Added by Stats.1980, c. 48, § 2, eff. March 27, 1980.)

Historical Note

Former § 1747, added by Stats.1955, c. 1230, p. 2245, § 10, amended by Stats. 1965, c. 299, p. 1358, § 22, relating to privacy of hearings, conferences, confidential nature of communications, closed files and inspection of papers, was repealed by Stats.1980, c. 48, § 1.5, eff. March 27, 1980.

Former § 1747, added by Stats.1939, c. 737, p. 2263, § 1, was repealed by Stats. 1955, c. 1230, p. 2245, § 9. It authorized

| | | |
|-----------------|---|--|
| Issue Update | BRIEFING: Confidentiality |  |
| (202) 331- 2258 | AMERICAN BAR ASSOCIATION SPECIAL COMMITTEE ON RESOLUTION OF MINOR DISPUTES - | Issue No. 1 Sept. 1981 |

CONFIDENTIALITY PROVISIONS CONTAINED IN NEW DISPUTE RESOLUTION LAW IN NEW YORK

On July 27, 1981, New York enacted a new law (Chapter 847 of the laws of 1981) which insures confidentiality of mediation sessions through the following provision:

"Except as otherwise expressly provided in this article, all memoranda, work products, or case files of a mediator are confidential and not subject to disclosure in any judicial or administrative proceeding. Any communication relating to the subject matter of the resolution made during the resolution process by any participant, mediator, or any other person present at the dispute resolution shall be a confidential communication."
§ 849(b) (6)

The inclusion of this provision marks a significant step in protection of the confidentiality of mediation programs.

Legislative staff members and other sources involved in the drafting and passage of the new law noted that the question of a confidentiality provision was debated extensively before finally deciding to include it. Mediation program directors argued for inclusion of the provision, citing the need to create an atmosphere where program participants could talk openly and freely. However, others argued that keeping mediation sessions confidential would give the impression of a closed, secret, process shielded from public and media scrutiny and subject to possible abuse. Judges referring cases to the programs expressed concern that they were delegating important responsibilities to mediators, and thus wanted powers of review. The final result was thus a compromise between these positions, reached in the hopes of insuring the long run success of the mediation programs.

The confidentiality provisions will apply to all programs receiving funds under this law, which could potentially be either new or existing mediation projects.

"This law will be explained in its entirety in an upcoming issue of "Dispute Resolution."



To provide confidentiality, I as your mediator will now shred and eat my notes on your case.

EXPERIENCE OF NEW YORK PROGRAM ILLUSTRATES NATURE OF THE CONFIDENTIALITY ISSUE

The recent experience of the Citizens Committee of New York City (CCNYC) illustrates the ways in which confidentiality can pose serious problems for a developing mediation program.

CCNYC is developing a dispute resolution project which is scheduled to start hearing cases within a month. Their program was recently challenged, however, by a member of the bar, on the ground that confidentiality potentially deprived participants of important rights.

Representatives of CCNYC and the Special Committee discussed responses to this problem and general methods for insuring confidentiality of mediation programs. Three basic ways to aid in protecting confidentiality were identified, including informal agreements, court rules, and legislation. Many mediation programs have informal agreements with the local prosecuting authorities and courts, stating that statements made during mediation sessions may not later be used in court. These agreements are not enforceable, however, and may not encompass the entire scope of potential litigants. An administrative rule by a court can be the fastest way, as exemplified by a recent court rule in Kentucky. The best method of protecting confidentiality is through legislation; however, this is a lengthy and difficult process. The best strategy for a program to pursue is probably a combination of these options, aiming for quick action and long run protection.

Important court decisions include the "Whittington" decision (Francis v. Abben, Civ. Div. 78-0088-46, 6th Jud. Cir., Pinella Cty., Fla.) which upheld the confidentiality of a mediation program against subsequent subpoena. It was also successfully argued in another case (Charles v. Charles, Fam. Div., 79-9164 FC-04, 11th Jud. Cir., Dade Cty., Fla.) that mediation statements should be privileged as offers of compromise under the common law.

CCNYC now possesses a great deal more information with which to argue its case for confidentiality, and to pursue means of protecting it in the future. The future of their program hinges to some extent on their success in this effort.

EDITOR'S NOTE

The purpose of "Briefings" is to provide focused, updated information on a specific topic in dispute resolution. This premiere issue will be followed by regular publication of "Briefings," with our next topic being the question of whether mediators are legally liable for the consequences of their agreements. We encourage your contributions on this topic.

Larry Freedman
Editor

HOUSE BILL No. 3027

By Committee on Judiciary

2-17

0016 AN ACT authorizing the attorney general to provide certain legal
0017 services for eligible persons engaged in agriculture-related
0018 business.

0019 *Be it enacted by the Legislature of the State of Kansas:*

0020 Section 1. As used in this act:

0021 (a) "Eligible person" means any person who (1) is primarily
0022 engaged in the business of farming, ranching, agribusiness or
0023 other agriculture related activities; (2) is eligible for financial
0024 assistance under any United States government program; (3)
0025 cannot afford to pay for private legal advice and representation
0026 by reason of low income and family obligations; and (4) meets
0027 the eligible criteria prescribed by the attorney general.

0028 (b) "Eligible services" means the provision of (1) legal ad-
0029 vice and representation for or on behalf of an eligible person
0030 with respect to participation by the eligible person in any United
0031 States government program. Such legal advice and representa-
0032 tion may include, but is not limited to, the provision of informa-
0033 tion, advice, counsel and representation (A) in judicial or ad-
0034 ministrative proceedings involving federal credit agencies, (B)
0035 for the protection of rights of redemption under state or federal
0036 law, and (C) with regard to the credit relief provisions of 7 U.S.C.
0037 1981a, and acts amendatory or supplemental thereto; and (2)
0038 general information and educational outreach services concern-
0039 ing rights in relation to the process of borrowing, debt service,
0040 and debt relief. "Eligible services" does not include legal rep-
0041 resentation in any action or proceeding involving a private
0042 lending institution.

[under any United States government program]

[or advice]

[or borrowing]

Atch. 2

0043 (c) "United States government program" means any federal
0044 program which is designated to benefit persons engaged in

5 agriculture related business activities and includes specifically
0046 any program offered by the farmers home administration, federal
0047 land banks or production credit associations. "United States
0048 government program" does not include any credit program of-
0049 fered by a private lending institution.

0050 (d) "Private lending institution" means any state or federally
0051 chartered bank, savings and loan association, credit union or any
0052 corporation owning a bank under Kansas law and any subsidiary
0053 activity of such corporation.

0054 (e) "Legal services provider" means any nonprofit corpora-
0055 tion organized under the laws of this state which receives funds
0056 directly from the legal services corporation pursuant to the legal
0057 services corporation act (42 U.S.C. 2996, et seq.).

0058 Sec. 2. (a) The attorney general may provide, supervise and
0059 coordinate, in the most economical manner possible, eligible
0060 services for eligible persons.

0061 (b) In order to comply with the requirements of subsection
0062 (a), the attorney general shall enter into contracts with legal
0063 services providers to provide for eligible services for eligible
0064 persons. Any such contract shall specify that only eligible ser-
0065 vices may be provided and that such services may only be
0066 provided for eligible persons.

0067 (c) The attorney general shall adopt rules and regulations
0068 necessary to effectuate the provisions of this act and shall pre-
0069 scribe by rules and regulations the criteria for determining
0070 eligible persons. In prescribing such criteria, the attorney gen-
0071 eral shall consider the following factors:

0072 (1) Household income as defined in the homestead property
0073 tax relief act;

0074 (2) family size;

0075 (3) medical, child care and work-related expenses;

0076 (4) cost of legal assistance if provided by a private attorney;

0077 (5) the size and type of the agricultural business operation;

0078 (6) liquid and nonliquid assets;

0079 (7) net worth; and

0080 (8) any other factors which the attorney general deems nec-
0081 essary for determining whether a person is financially unable to

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