Approved April 25, 1984
Date

MINUTES OF THE SENATE COMMITTEE ON JUDICIARY.

The meeting was called to order by Elwaine F. Pomeroy at
Chairperson

10:00 a.m./~~p.m.~~ on March 22, 19 84 in room 514-S of the Capitol.

All members ~~were~~ present ~~except~~ were: Senators Pomeroy, Winter, Burke, Feleciano, Gaines, Mulich and Werts.

Committee staff present: Mary Torrence, Office of Revisor of Statutes
Mike Heim, Legislative Research Department
Jerry Donaldson, Legislative Research Department

Conferees appearing before the committee:

Representative David Louis
Ken Peery, Prairie Village Attorney
Austin Vincent, Topeka Attorney
Kenneth W. Schafermeyer, Kansas Pharmacists Association
Ron Miles, Board of Indigents' Defense Services

House Bill 2916 - Admissibility of matters disclosed in mediation, conciliation or arbitration.

Representative David Louis, the sponsor of the bill, testified in support of his bill. Copies of two letters from the Better Business Bureau of Greater Kansas City in support of the bill and a copy of Colorado and California statutes are attached (See Attachments No. 1). A committee member inquired, what is the problem? Representative Louis replied, people are going to mediation and arbitration to resolve disputes and sometime that does not work. The chairman noted the Family Law Advisory Committee of the Judicial Council is looking into conciliation services.

Ken Peery, an attorney from Prairie Village, testified they are concerned these moderators could be subpoened into court. Since they recruit volunteers, it would be disastrous for their program. They need to protect volunteers from having to go into court. A committee member inquired about the outside information? Mr. Perry replied, the bill covers only matters disclosed during the process of the case. There are about 200 independent programs that have been recognized by the bar association. Mr. Peery pointed out his handout indicated legal concern nationally about confidentiality (See Attachment No. 2). Confidentiality could be solved by court rule; they would not like to go through court process to gain confidentiality. Some states have adopted a dispute resolution provision. He stated they prefer to have this bill as originally written, then they may be back next year for an enlargement. Mr. Peery said Judge Walton shares their concern, and he favors some action of this type. The chairman inquired what type of matters are usually handled? Mr. Peery replied, real estate issues, consumer issues, family disputes and divorce. The chairman inquired, in Kansas? Mr. Peery replied, concerning child support and custody. The chairman inquired, could it be worked out in advance of the divorce action? Mr. Peery replied, could be worked out without court intervention. The chairman inquired, what are your fees for the services? He replied, in their case, services are rendered without any charge; they use volunteers. The chairman inquired, how many cases did you have last year? Mr. Peery replied, their caseload was not very great; probably a dozen cases in one year. They started in August of 1982.

Austin Vincent presented testimony explaining why present common law and statutory privileges and immunities are insufficient to protect against evidentiary use of matters disclosed in mediation and arbitration. A copy of his testimony is attached (See Attachment No. 3). Mr. Vincent explained it is most important to present a forum in the resolution of disputes in which the parties are comfortable. He suggested using the original language or "or not otherwise discoverable". The chairman

MINUTES OF THE SENATE COMMITTEE ON JUDICIARY,

room 514 S, Statehouse, at 10:00 a.m./pxx on March 22, 1984.

House Bill 2916 continued

inquired, would this prevent action for perjury or an action for fraud? Mr. Vincent replied, as presently written if that is the only place that is presented, the answer is yes. The chairman inquired, how is it going to be refutable by the court? Mr. Vincent replied, I think that is one of the risks you have to take; the line should be drawn where other states have drawn the line.

House Bill 2783 - Deletion of loperamide from schedule V uniform controlled substance act.

Kenneth Schafermeyer testified in support of the bill. A copy of his testimony is attached (See Attachment No. 4). He explained the federal government felt the drug had potential for minor abuse; it is not a narcotic.

House Bill 2800 - Indigents' defense services, acquisition of investigative, expert and other services.

Ron Miles testified in support of the bill, and pointed out the bill provides a private attorney, must go through the judge in the ex parte matters, but the public defenders would not need to get a court order; they would be controlled by the budget.

HB 2801 - Criminal procedure, out-of-state witness fees.

Ron Miles testified the board supports this bill, because this bill standardizes all witness fees. The attorney general's opinion found out this is a county responsibility, and there is no fiscal impact to the state, but it will be to the county. Senator Burke then made a motion to report the bill favorably and be placed on the consent calendar; Senator Mulich seconded the motion, and the motion carried.

House Bill 2800 - Indigents' defense services, acquisition of investigative, expert and other services.

Senator Mulich made a motion to report the bill favorably and be placed on the consent calendar; Senator Winter seconded the motion, and the motion carried.

House Bill 2783 - Deletion of loperamide from schedule V uniform controlled substance act.

Senator Feleciano made a motion to report the bill favorably and be placed on the consent calendar; Senator Mulich seconded the motion, and the motion carried.

House Bill 2916 - Admissibility of matters disclosed in mediation, conciliation or arbitration.

Following committee discussion, Senator Burke made a motion to report the bill favorably; Senator Winter seconded the motion, and the motion carried.

The meeting adjourned.

3-22-8,

GUESTS

SENATE JUDICIARY COMMITTEE

NAME	ADDRESS	ORGANIZATION
Joe Ferguson	Topeka	KASB
Ron Wilson		Bd of Ind Def
Tom Fritzler	Lawrence	Sen Hess
Sabi Welty	Topeka	Budg Div
Jim Clark	"	KCDAA
Christa K. Wright	Topeka	
Kenneth E Leery	133 Baltimore	KC Mo 64105
Ron Miller	Lawrence	Sen Steineger
Dave Louis	House	
Meadow View 7th Grade		Parsons KS
Ed Wallbaum	Topeka	Wallbaum
Lynette Cordova	KC	KPhA
Ken Schatzmeyer	Topeka	KS Pharmacists Assoc

3-22-84
Attach. # 1

BBB of Greater Kansas City

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

Atch. 1

3-22-84
Attach. #1

BBB of Greater Kansas City

March 19, 1984

Honorable David F. Louis
Room 174-W
House of Representatives
Topeka, KS 66612

Dear Representative Louis:

The Better Business Bureau of Greater Kansas City, which serves Johnson, Wyandotte, and Leavenworth counties in the State of Kansas, as well as the Western half of Missouri, would like to go on record as being in favor of passage of House Bill2916 re Arbitrators, Mediators and Conciliators Immunity from Subpoena.

We understand that the measure is up for hearing on Thursday, March 22, before the Senate Judiciary Committee.

The measure, similar in nature to those passed in numerous other states, would afford a great meaure of assurance to dispute resolution arbitrators, mediators and conciliators that their actions and decisions would be immune from recourse and retaliatory actions by parties to the actions.

The Better Business Bureau has a special interest in the passage of such a protective meaure in that it is become more and more that the Bureau is relying on arbitration as a prime alternative to referring disputants to costly and time-consuming courts of law.

In addition, the measure would aid the Bureau, as well as other organizations which apply this form of complaint resolution to secure more arbitrator-volunteers for the implementation of their programs.

We would hope that this letter could be submitted to the proper officials to show our interest in the passage of the measure in the Senate.

Sincerely yours,

Ray Buckley
President - General Manager

3-22-84

Attach. #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".

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.

Title 11.5

CONCILIATION PROCEEDINGS

CALIFORNIA

Article 2

FAMILY CONCILIATION COURTS

§ 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.)

§ 849-a N.Y. JUDICIARY LAW

§ 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.

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.

"The obligation of our profession is to serve as healers of human conflicts."

—Warren E. Burger

"The people of our country must always have access to our courts. The availability of alternative ways of resolving disputes, however, has helped the public recognize that justice can be found outside the courtroom, in some situations faster and at a lower cost."

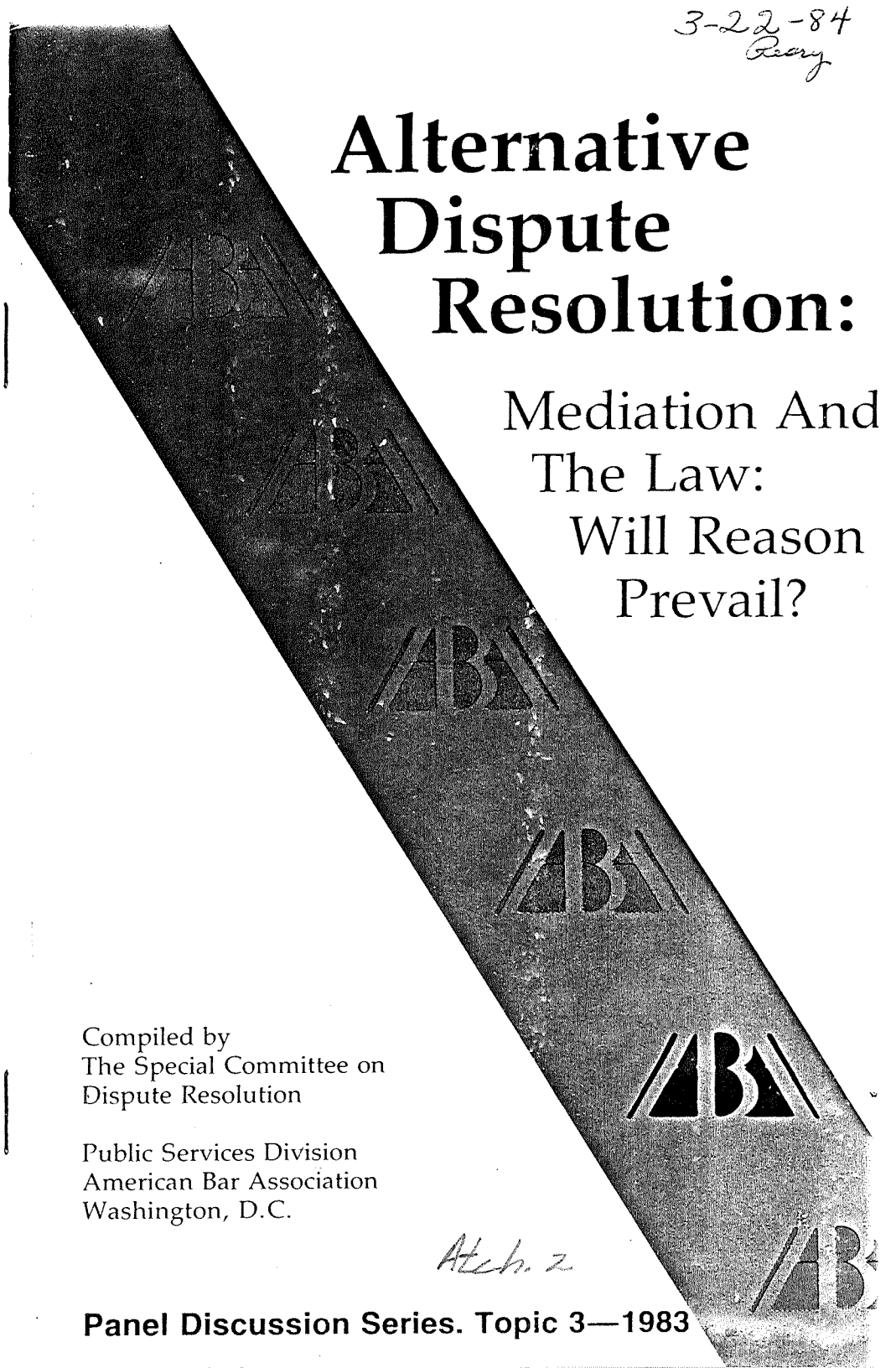
—Morris Harrell

"I envision a day when attorneys will be viewed as counselors, problem solvers, and deliverers of prompt, appropriate, and affordable justice."

—David R. Brink

"The success of alternative dispute resolution will depend on an informed public as well as on knowledgeable professionals who operate dispute resolution centers. Community awareness and support is a prerequisite to successful programs."

—Ronald L. Olson



Alternative Dispute Resolution:

Mediation And The Law: Will Reason Prevail?

Compiled by
The Special Committee on
Dispute Resolution

Public Services Division
American Bar Association
Washington, D.C.

Panel Discussion Series. Topic 3—1983

#2

PART II

CONFIDENTIALITY: A CLOSER LOOK

by
Lawrence Freedman

Introduction

If you want to hop onto one of the fastest moving bandwagons in the parade of new ideas in the administration of justice, you should catch up with the growing number of alternative dispute resolution programs now operating in the United States and abroad.

In the United States and Canada, nearly 200 independent programs now specialize in mediation, arbitration, or conciliation.[1] Chief Justice Warren Burger of the United States Supreme Court has noted a "policy of favoring extrajudicial methods of resolving disputes . . ."[2] He cites data suggesting that "small disputes may be resolved more swiftly and to the satisfaction of the parties without employing the cumbersome, time-consuming and expensive process of litigation."[3] He further notes that the "people's patience with the judicial process is wearing thin."[4] The American Bar Association has made the area one of the organization's chief priorities,[5] and articles about the new alternatives have appeared in many newspapers and magazines.[6]

However, some programs have been sidetracked by legal issues which have emerged as a result of the rapid growth in this field and the unique position the new alternatives occupy in the judicial system. Legal problems have vexed the growth and, in some cases, threatened the existence of otherwise successful mediation programs.

Even as the Citizens Committee for New York City was developing its mediation project, it was threatened with a lawsuit on the issue of confidentiality. Thorny questions on the legal liability of mediators forced trustees in Stockton, New Jersey, to decide

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th growth of mediation programs as professional institutions of justice. In addition, follow-up or enforcement work is made difficult without complete records.

Carefully designed operating policies can aid a mediation program in minimizing confidentiality problems. Program goals and rationale should be explained to and understood by both the participants in mediation and the key actors in the justice system, such as judges and prosecutors.

Careful intake interviews can help detect situations where confidentiality issues might be more likely to arise, such as appearance of parties intent to simply use the hearing to gain information for a later court case.

Quality control of the program in terms of case management and follow up can ensure that mediated agreements will be reached and kept, thereby reducing the chance of subsequent litigation. To the degree that mediators can control proceedings, they should direct the discussion to avoid needless forays into potential legal traps, such as admissions.

Most of the commentators agree that clearly the best long-term solution to the problem of confidentiality is legislation. Aside from the laws of evidence, such as Rule 408, giving generic protection to compromise negotiations, or privilege statutes as authorized by Rule 501, a substantial movement has developed over the past five years advocating laws which specifically protect the testimony and records of dispute resolution programs.[64]

Legislation provides the best alternative for protecting confidentiality because it would enable mediation programs, many of which are on tight budgets, to avoid the expense, time, and distraction of "fighting it out" in court. The legal system as a whole would benefit from a clear expression of law and pol as to the role of mediation pograms.

On the Federal level, the Dispute Resolution Act of 1980,[65] in its criteria for dispute resolution mechanisms, calls for procedures which would "ensure reasonable privacy protection for individuals involved in the dispute resolution process."[66] These criteria would have applied to programs funded under the Act; however, no funds were allocated.

Regulations (pursuant to statute) of the Federal Mediation and Conciliation Service prohibit mediators from testifying about information disclosed in a mediation hearing.[67]

Local legislation would be of assistance to individual programs, although the limitations in scope discussed in reference to informal agreements with local authorities would apply here as well.

Mediation proponents are now pushing very hard, however, for state legislation[68] and often cite the need for protection of confidentiality as one of their main reasons. At least a dozen states are now considering legislation in dispute resolution and the majority of those bills contain confidentiality provisions.[69]

One of the first states to enact comprehensive legislation in dispute resolution was New York. The New York law, signed by the governor on July 27, 1981, contains the following provision:

> . . . 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.[70]

This provision covers both oral testimony and program records, thus closing the avenues in the common law

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dependent statements of fact) and under Federal Rule 408 (offered to show another purpose) which previously allowed such evidence.

In 1983, Oklahoma enacted its Dispute Resolution Act.[71] One of the main goals of this law, which contained no funding, was to gain confidentiality protection. The per tinent provisions read:

> A. Any information received by a mediator or a person employed to assist a mediator, through files, reports, interviews, memoranda, case summaries, or notes and work products of the mediator, is privileged and confidential.
>
> B. No part of the proceeding shall be considered a matter of public record.
>
> C. No mediator, initiating party, or responding pary in a mediation proceeding shall be subject to administrative or judicial process requiring disclosure of any matters discussed or shall disclose any information obtained during any part of the mediation proceedings.
>
> F. If a party who has participated in mediation brings an action for damages against a mediator arising out of mediation, for purposes of that action the privilege provided for in subsection A of this section shall be deemed to be waived as to the party bringing the action.[72]

Section A of these provisions includes a very expansive definition of persons and data protected.

Section B provides that even if a "public" agency is conducting mediation hearings, Oklahoma has by statute insulated those records from the general right of public access to public records.

Section C provides immunization to mediators and parties from process, thus alleviating the need for

programs to enter into an extensive legal battle in any particular case. It also expands the scope of protection to include administrative as well as judicial proceedings.

Section F allows confidentiality to be pierced if evidence is sought to prove the liability of a mediator for damages arising out of mediation. Other subsections, however, set a high standard for finding such liability , i.e., "gross negligence with malicious purpose" or "willful disregard of the rights, safety, or property of any party to the mediation."[73] Clearly this provision applies in actions against the mediator, and not against a party in mediation.

Colorado also recently passed legislation[74] which provides for treatment of mediation hearings as settlement negotiations, thus explicitly bringing the common law protections into play. The Colorado law also prevents information from mediation hearings from use either as evidence or in discovery, and immunizes the mediator from process. The pertinent provision states:

> 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.[75]

Both houses of the California legislature approved a dispute resolution bill containing confidentiality provisions.[76] The Florida legislature has also considered such legislation,[77] and a bill is pending in North Carolina which contains a provision modeled after the New York confidentiality section.[78]

In considering legislation, lawmakers have reflected the views of the substantive competing interests which underlie the confidentiality issue.

63. ABA Confidentiality Survey, supra note 7.
64. See generally, Freedman, State Legislation on Dispute Resolution, ABA Special Committee, Monograph Series No. 1, June 1982. An update of this monograph is scheduled for publication in November 1983.
65. Dispute Resolution Act, Public Law 96-190 94 stat. 17 (February 12, 1980).
66. Id., Section 4 (F).
67. 29 CFR 1401.1-37.
68. See, i.e., Shepherd and Freedman, 1983: State Legislators Act on Dispute Resolution, 11 Dispute Resolution 5, (Summer 1983).
69. Freedman, supra note 64.
70. 1981 N.Y. Laws Chapter 847.
71. Enrolled House Bill No. 1136 (July 1, 1983) Okla. Stat. tit. 12, Sections 1801-1806.
72. Id., Section 5.
73. Id., Section 5 (E).
74. House Bill No. 1506 (1983), Colo. Rev. Stat., tit. 13, art. 22 (1973).
75. Id., Section 307.
76. Assembly Bill 1186 (Levine) (1978).
77. HB 82 (Davis, Silver); SB 258 (Dunn) (1982).
78. SB 77 (Martin) (1983).
79. Promislo, Confidentiality and Privileged communication, Social Work (January 1979) 11.
80. N.Y. Social Service Act, Sections 419 et. seq. (McKinney).
81. See, Tarasoff v. Regents of the University of California, 551 P. 2d 334 (1976).
82. McLaughlin v. Superior Court, No. A018674 (Ct. App., 1st Dist., CA, March 1, 1983).
83. Cal. Civ. Code Section 4607.
84. Id.
85. Id.
86. Id.

3-22-84
Attach. #3

Testimony of Austin K. Vincent of Topeka, Kansas
in support of HB 2916 before the
Senate Judiciary Committee on March 22d., 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.

E. K.S.A. 60-452 only protects offers to furnish money or other acts in settlement negotiations and, therefore, would not protect admissions and other statements made during conciliation, mediation or arbitration proceedings.

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.

Atch. 3

3-22-84

Attach. # 4

THE KANSAS PHARMACISTS ASSOCIATION
1308 WEST 10TH
PHONE (913) 232-0439
TOPEKA, KANSAS 66604

KENNETH W. SCHAFERMEYER, M.S., CAE
PHARMACIST
EXECUTIVE DIRECTOR

TO: Members of the Senate Judiciary Committee

March 22, 1984

House Bill 2783

Description: Deletion of Loperamide from Schedule V of the Kansas Uniform Controlled Substances Act.

KPhA Position: We support passage of this bill. It was passed 122-0 by the House of Representatives.

Effect of Bill: Would put the state and federal Controlled Substances Acts into agreement. The federal Drug Enforcement Agency (DEA) removed Loperamide from Schedule V over a year ago (See attached Federal Register Notice). DEA has found that this drug "does not have sufficient potential for abuse to justify its continued control in any schedule of the Controlled Substances Act"

Bill Requested By: Kansas State Board of Pharmacy

Use of Drug: Prescription—only drug used for the treatment of diarrhea

Atch. 4