

MINUTES OF THE SENATE JUDICIARY COMMITTEE.

The meeting was called to order by Chairperson John Vratil at 9:45a.m. on January 24, 2001 in Room 123-S of the Capitol.

All members were present except: Senator Pugh (excused)

Committee staff present:

Gordon Self, Revisor  
Mike Heim, Research  
Mary Blair, Secretary

Conferees appearing before the committee:

Peg Nichols, Coordinator, Kansas 10<sup>th</sup> Judicial District Small Claims Mediation Programs  
Larry Rute, General Counsel, Kansas Legal Services, Inc. (KLS) and Coordinator for Midland Mediation and Settlement Services. (MMSS)  
Tom Laing, Interhab  
Art Thompson, Office of Judicial Administration, Alternative Dispute Resolution Office

Others attending: see attached list

Minutes of the January 23, 2001 meeting were approved on a motion by Senator O'Connor, seconded by Senator Goodwin. Carried.

**SB 14—concerning mediation; re: disputes which may be ordered to mediation; re: certain costs of mediation**

Conferee Nichols presented a brief but informative review of the mediation process citing several instances where implemented mediation has been effective in dispute resolution. She provided a list of web sites available for information on this subject. (attachment 1)

Conferee Rute testified in support of **SB 14**. He discussed the history, structure and function of MMSS which is a statewide mediation center and praised the use of mediation techniques as a "just" method for dispute resolution. He described two goals of the bill amendments: to broaden standards for state mediation; and to provide compensation for mediators. He offered further amendments to the bill. (attachment 2) During discussion there was consensus on several suggested changes to his proposed amendments.

Conferee Laing testified in support of **SB 14**. He discussed how mediation has been used as a dispute resolution tool for Kansans with disabilities. He offered an amendment to the bill which would broaden the duties of the court on dispute resolution and clarify standards and guidelines for all mediation between the state and the community. (attachment 3) He presented a brief overview of testimony he previously submitted to the interim committee which includes a discussion of mediation within the developmental disability community system. (attachment 4)

Conferee Thompson testified in support of **SB 14**. He offered his services to Committee as a resource person and presented a brief background on the inception of dispute resolution discussing the Mediation Act which authorizes court appointed mediation. (no attachment)

Written testimony supporting **SB 14** was submitted by the Kansas Trial Lawyers Association (KTLA) (attachment 5)

The meeting adjourned at 10:31a.m. The next meeting is January 25, 2001.

# SENATE JUDICIARY COMMITTEE GUEST LIST

DATE: January 24, 2001

| NAME                     | REPRESENTING   |
|--------------------------|--|
| GEORGE WOLF              | KDHR   |
| Vidya Helsel             | Burke  |
| Kyle Smith               | KBI  |
| Mary Ruth                | KLS  |
| Margaret Pog Nichols     | _____  |
| Jean Barber              | KADC   |
| Barb Tombs               | KSC  |
| Joe Herald               | KSC  |
| Bill Henry               | KSGov. Consulting  |
| KERIA B. LAUDIS          | CHRISTIAN SCIENCE COMMITTEE<br>ON PUBLICATION FOR KANSAS |
| Ken Purcell              | Shawnee Co. Sheriff's Office                             |
| Dan Bracci               | Shawnee Co. Sheriff's Office                             |
| Tim Madden<br>Tim Madden | Ks Dept. of Corrections                                  |
| ROBERT JOHNSTON          | JOHNSON COUNTY SHERIFF OFF.                              |
| Jeff Botenbore           | Kansas Sheriff's Dept.                                   |
| Chris Muller             | Whitney Damon PA   |
| APT THOMPSON             | OFFICE OF JUDICIAL ADM.                                  |
| Auli Hyten               | OTA  |
| Dennis Roore             | ERS  |





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# Mediation is . . . a delicate balance

Remarks by: Margaret 'Peg' Nichols  
Coordinator, Kansas Tenth Judicial District Small Claims Mediation Program  
Newsletter Editor, Heartland Mediators Association  
Supreme Court approved mediator/trainer in core/civil/domestic

I've rubbed elbows with, and learned from, mediators who work in North Ireland, Guatemala, Colombia, South Africa and Russia, but I volunteer and work as the coordinator of the Kansas Tenth Judicial District Small Claims Mediation Program.

My name was placed on the list of speakers only yesterday, so I speak only for myself here today. As newsletter editor, I maintain some alternative dispute resolution websites, I am list manager for several e-mailing lists, and I am in frequent touch with a number of mediators in a six-state area.

The keystone of true mediation is the self-determination of the parties, and the mediation session allows parties to examine anxieties and concerns that are often far more important than monetary or property issues.

One of the most wrenching cases in our small claims was the divorced parents suing over the possession of the visitor book which was signed at the funeral of their adult, drug-plagued son who had died not even owning the clothes on his back.

One that I enjoyed tremendously was a case of two bar buddies, one of whom had sold the other an old truck for \$250. After hearing the defendant's story, the plaintiff decided the loss of a drinking buddy wasn't worth \$250 and the charges were dropped. They went off down the hall together, arms around each other's shoulders.

Often a plaintiff, with some regard for the human side of the defendant, will be willing to accept a lesser amount because he or she realizes that although the judge might well make a judgment in his or her favor, the efforts required to collect might well cost more time, energy, money and aggravation than they are willing to invest. The compliance rate, although not 100%, is very high. People who have a hand in crafting their own agreements are much more likely to keep them.

Mediation can be beneficial in a wide range of circumstances. The writing of the North American Free Trade Agreement marked the first time that mediation clauses have been an integral part of an international trade agreement. Mediation can be effective in civil cases; construction conflicts, racial, sexual or employment discrimination claims; special education needs evaluations; divorce/domestic issues, and victim/offender conciliation – an admittedly different type of mediation, where only the bravest of mediators tread.

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Because of the tragic consequences of workplace hostility, the United States Postal Service developed the REDRESS program. Mediators outside the USPS are brought to the worksite to mediate agreements between disputing employees.

Peer mediation programs have been established to defuse schoolyard disputes. Trainers who provide training courses for adults are now seeing the first wave of people who were first introduced to mediation in the schoolroom and who are looking for ways to carry those concepts in the adult world.

People who enroll in the mediation courses bring an incredible range of experiences with them. We've had mediators in the program who have been, and some still are, attorneys, accountants, doctors, therapists, human resources administrators, tax specialists, business owners, teachers, prison system executives, car dealers, counselors, labor negotiators, people who bring impressive credentials.

People who become mediators are people who are willing to search hard to help people resolve their conflicts. There is a lot of volunteer mediation, and most of that will probably continue, but to really encourage peaceful resolutions, there needs to be adequate compensation to allow practitioners to earn a living.

I believe that when people become more aware of the option of mediation, more of them will choose that route toward resolution. Judges can support that growth by choosing to send more cases to mediation.

As you consider this legislation, I urge you to seek input from mediators in your district. We are spread kind of thin across the state, but there are points of contact that can provide you with further information about mediation.

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Absolutely the best source is right here in Topeka, through the person of Art Thompson, who heads up the state Alternative Dispute Resolution office, and reachable through the website at <http://www.kscourts.org/adr/> or 785.291.3748.

The professional organization formed by the mediators themselves is Heartland Mediators Association. The executive director is Sandra Sabanske, whose e-mail is [sabanskes@aol.com](mailto:sabanskes@aol.com), telephone 913.381.4458. The official HMA website at <http://www.idir.net/~mediation> will soon carry a list of mediators.

My hodge-podge of websites includes a lot of information about regional mediation, and can be accessed at <http://home.att.net/~rmnichols/balance.html>, which also has my e-mail. If you will contact me – phone is 913.782.0189 – I will personally put you in touch with some mediators who can provide additional input as you consider this legislation.

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**TESTIMONY OF LARRY R. RUTE  
KANSAS LEGAL SERVICES, INC.  
(785) 233-2068**

**SENATE JUDICIARY COMMITTEE**

**Sen. John Vratil, Chair  
Sen. Ed Pugh, Vice-Chair**

**Senate Bill No. 14  
Wednesday, January 24, 2001**

I would like to thank the Chair and members of the Committee for the opportunity to appear before you today. My name is Larry Rute. I am the General Counsel for Kansas Legal Services, Inc. (KLS) and Coordinator for Midland Mediation and Settlement Services. As you may be aware, KLS is a private, non-profit corporation dedicated to providing free or low-cost legal services to low- and moderate-income Kansans. Last year our attorneys and support staff, located in thirteen legal services field offices, provided legal advice/representation to more than 31,000 Kansans in all 105 counties.

In 1995 KLS established Midland Mediation and Settlement Services (Midland), providing mediation, arbitration and other alternative dispute resolution services to Kansans at all economic levels. Midland serves as the sole private contractor providing voluntary mediation services in behalf of the Kansas Human Rights Commission. We provide significant court referred family law mediation services in behalf of the Kansas Supreme Court's "Access to Justice" mediation program.

Midland has served as the Program Administrator for the Equal Employment Opportunity Commission's voluntary mediation program in both Kansas and Western Missouri. Our mediators serve as members of the Early Assessment panel of the Western District of Missouri federal court, U. S. Postal Service "Redress" mediators and mediators and hearing officers for the Kansas Department of Education. Last year Midland Mediation and Settlement Services' three full-time mediators and twelve part-time mediators conducted 1,338 mediations throughout the state of Kansas. We are approved by the Office of Judicial Administration as a statewide mediation center.

The Kansas Legal Services supports the proposed amendments found in Senate Bill No. 14. Alternative dispute resolution is emerging as an important vehicle that is increasingly utilized as a just method of resolving disputes and settling cases. Development of conflict resolution techniques create a flexible and varied process which can be tailored to facilitate problem solving in a wide variety of settings.

It appears that the amendments to Senate Bill No. 14 have two important goals. The first goal appears to broaden the standards and guidelines by which mediation is conducted to include government assisted or sponsored mediation. The second goal will permit the Secretary of Human Resources to have the power to appoint qualified mediators without unduly restricting the amount mediators will be paid.

The Office of Judicial Administration has developed by Supreme Court rule mediation requirements, mediator and mediator training qualifications and ethical standards for mediators. The problem, as we understand it, is that one or more executive branch agencies have required contractees or

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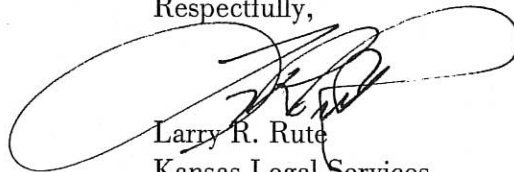
vendors to mediate disputes with mediators who do not have sufficient experience or may not have received formal training. We believe that it is vitally important that any state agency mandating a mediation utilize professional, qualified mediators properly trained in meeting the standards and guidelines established by the Supreme Court. To underscore this point, we recommend that Page 2, Lines 6 and 7 be amended as follows:

- (a) Establishing standards and guidelines by which governmental required or assisted mediation should be conducted:

We also note that on Page 2, lines 26, 27 and 28 of the Bill eliminate the current requirement that mediations conducted by the Secretary of Human Resources be restricted to \$50 per day for each mediation. Obviously, an attempt to restrict mediation fees to such a nominal amount restricts dramatically the availability of professional, qualified mediators to resolve very difficult and time consuming disputes.

In conclusion, the Kansas Legal Services is very appreciative of the support mediation activities have received from the Kansas Legislature and the Kansas Supreme Court. We believe that properly designed alternative dispute resolution systems, particularly mediation, does provide a unique opportunity to empower individual citizens, businesses, the judiciary and practicing attorneys to participate in the resolution of disputes. We appreciate the efforts of this committee to make the use of mediation more widely available.

Respectfully,



Larry R. Rute  
Kansas Legal Services  
(785) 233-2068



# InterHab

The Resource Network  
for Kansans with Disabilities

Jayhawk Tower ~ 700 SW Jackson ~ Suite 803 ~ Topeka, Kansas 66603-3737  
phone 785/ 235-5103 ~ tty 785/ 235-5190 ~ fax 785/ 235-0020  
[interhab@interhab.org](mailto:interhab@interhab.org) ~ [www.interhab.org](http://www.interhab.org)

January 24, 2001

TO: The Honorable Chair and Members  
Kansas Senate Judiciary Committee

FR: Tom Laing, Executive Director  
InterHab: The Resource Network for Kansans with Disabilities

RE: Senate Bill No. 14: An act concerning mediation.

InterHab represents community providers of services and supports for persons with disabilities. This network, as it is now supervised under the provisions of the Developmental Disabilities Reform Act (KSA 39-1801, *et seq*) represents perhaps the largest "test market" in the State for the broad systemic application of mediation as a dispute resolution tool. Mediation between and among State and community entities is woven throughout the Act in direct reference as both a contract negotiation tool in 39-1806(c), and as a tool by which to resolve contract or licensure matters in 39-1807. It is also currently used as a tool to address intra-community disputes between organizations as contemplated in 39-1805(c).

We are here today on Senate Bill 14 because of the opportunity to recommend an amendment to this bill which we believe will have a beneficial impact on the successful application of mediation in the community developmental disability network.

We would support an amendment to this bill that would broaden the duties of the Court's office on dispute resolution to clarify that its standards and guidelines would be promulgated *for all mediation settings of the State*. This amendment would address the growing use of mediation between and among community entities and between community entities and the State.

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We believe such amendment can be added on page two of the bill, in lines 6 and 7, with language as proposed today by Mr. Larry Rute of Kansas Legal Services.

The challenge as we see it in the community is this:

Mediation is only successful between parties if it emerges within a mutually recognized environment of fairness. Fairness is a fragile concept. When one party in a dispute has the authority to define fairness, as is the case in SRS mediation settings with the community, the quality of fairness is placed in question.

Irrespective of the integrity of SRS officials, it is hard to imagine that self-interest can always be overcome. The establishment of fundamental principles, standards, training requirements for mediators, etc. would go a long way toward assuring the fairness presumed in the DD Reform Act.

The types of mediation our members experience includes the mediation of state contracts with CDDOs. SRS is to be commended for their efforts to assure that mediation, if requested, does take place, but we believe if the mediation settings are to be fair, then SRS should be provided with guidelines established by an independent party. We propose that the Court's officers be the appropriate parties to independently establish such standards.

I appreciate your attention to this issue, and thank you for your thoughtful consideration of these comments.

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December 6, 2000

**Testimony for the Special Committee on Federal and State Affairs**

**“Mediation in the Developmental Disability Community System”**

**Submitted by Tom Laing,  
Executive Director, InterHab**

Thank you, Senator Oleen and Members of the Committee, for taking time today to hear our comments regarding the use of mediation in the community developmental disability system. We applaud your interest in mediation, and urge you to continue to monitor its use by state and local entities. We also urge you to offer whatever guidance you believe to be needed to improve this dispute resolution model for state/local partnerships.

The introduction of mediation into the DD Network:

In 1995, during the consideration of the DD Reform Act, community organizations supported language to establish a more level playing field for community organizations and the State. Prior to that time, other than the highly legalistic administrative appeals process, there was no formal method to negotiate contracts nor to utilize mediation in contract talks, or regulatory disputes. We supported language developed in the House, and adopted by the Senate to adopt mediation (now a part of the DD Reform Act, KSA 39-1806, *et seq.*) as a methodology to aid in contract discussions and dispute resolution. The statute establishes (for the network of community developmental disability organizations and community service providers) the right to negotiation and mediation – both between CDDOs and the State, and between community organizations. This statute has been employed on numerous occasions.

SRS has Utilized Mediation:

The first use of this approach was the SRS decision to use mediators in the finalization of draft rules and regulations that become the regulations for the DD Reform Act. Since that time, SRS has utilized mediators in contract discussions with CDDOs. In addition, various inter-organization disputes have been submitted to mediation in the community. We appreciate the willingness of the State to consistently use and encourage this new approach for dispute resolution. We believe the introduction of mediation to our field has been a positive step for relationship building between state and local entities committed to responsible problem solving.

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In its best moments mediation assures that the interests of the state are protected, and that the interests of the state's private sector partners are protected as well. The mediation language in the DD Reform Act has been modestly successful, insofar as it is slowly becoming established as an alternative dispute resolution technique.

### Mediation Guidance Needed

The successful introduction of mediation notwithstanding, our experience with the State in mediation settings is mixed, in part as a result of the lack of guidance and experience in the mediation process for both community and state officials.

Some problems in mediation settings arise from the fact that mediation was and continues to be a significant paradigm shift. SRS and the community network had a "parent/child" relationship for many years. Within SRS the introduction of negotiation and mediation rights for the community in the same year may have been internally perceived as a loss of authority. And, for community organizations, the opportunity for mediated dispute resolution may have been accompanied by unrealistic expectations.

Clearly, one of the stumbling blocks for success in mediation with the State is the perceived lack of fairness. The State has tended to have a stronger hand in all steps leading up to, and including, the mediation sessions themselves. On some occasions, basic factors – dates, times, and in some instances the selection of mediators – have been decided unilaterally by the State. Additionally, in recent years, the State has increasingly exercised a practice of unilaterally deciding which topics are "on or off the table". In the most recent mediation sessions, those "non-negotiable" topics were not revealed to the community entities until the day before the mediation, after many of the parties had already driven to Topeka for the sessions.

The full benefits of mediation have also not reached fruition in the community between organizations in dispute. In some instances, organizations continue to want the State to referee local disputes rather than utilizing the mediation process. In other instances – principally contract disputes between local organizations – the State urges continuing mediation, but with diminishing results when litigation may be the more appropriate route between parties who cannot find resolution.

It is our opinion that mediation only works when both parties are committed to finding common ground. It may be in the State and the Community's best interests to be able to better differentiate between mediation needs and litigation needs.

In the interests of making mediation a viable tool to assist in balancing the interests of state agencies and community organizations, and in helping to balance competing interests within communities, it would be good for legislators, state agency heads and community organizations to discuss how to improve the process.

Topics for consideration:

1. Expand the role of a state office on mediation to include the supervision of state-local mediation:

Just as the legislature concluded that a separate office of administrative appeals was needed to assure fairness, it is equally important to note that a state agency can exercise undue influence in a mediation settings, if they themselves are both the implementing agency for mediation, and a party to mediation. Therefore, we would recommend that mediation between state agencies and independent entities be supervised by an independent office.

2. Establish case-specific training for mediators:

In the case of the DD network, a unique set of statutes exists within which such mediation takes place, and the lack of knowledge of such system law hampers mediators. The state should consider establishing a requirement for case-specific training for mediators who are being asked to mediate state/local or local/local disputes in which common system issues and a clear system history is available for review. The cost for such training should be borne by both state and local stakeholders in the system.

3. Adopt mediation standards for state and local guidance:

The court, or another independent and qualified entity, should be asked to establish benchmark standards by which any mediation (in which the state is a party) should be conducted.

Summary:

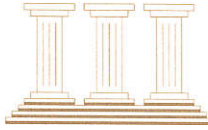
Mediation does not, nor should it, supplant state authority in the oversight and regulation of community DD services. However, as the state continues to assign formerly state-run programs to local management, one of the most important goals should be to assure fairness in the issuance and enforcement of state contracts, policies and rules.

We believe “fairness” is a value that is cherished at both the state and local levels, but that circumstances sometimes dictate that one side or the other abandons fairness for the sake of convenience or political necessity.

In such cases, the Legislature has a role to assure that the State’s business practices in dealing with Community partners are monitored and, when disputes arise, to encourage (if not require) that fair and productive non-litigious approaches are used to settle disputes.

Thank you for your continuing consideration of these issues,





KANSAS TRIAL LAWYERS ASSOCIATION

*Lawyers Representing Consumers*

TO: Members of the Senate Judiciary Committee

FROM: Terry Humphrey  
Executive Director  
Kansas Trial Lawyers Association

RE: 2001 SB 14

DATE: Jan. 24, 2001

Sen. Vratil and members of the Senate Judiciary Committee, thank you for the opportunity to comment on Senate Bill 14 which includes a proposed amendment to K.S.A. 5-509 related to disputes which may be ordered to mediation. The Kansas Trial Lawyers Association supports this amendment empowering a court to order mediation in certain cases. This provision also provides the means by which an order can be entered by involving persons in the mediation process who have the authority to help settle the claim. Judicial ordering powers provide a decision-maker who is remote and removed from the process.

We regret not being able to attend this morning's hearing on SB 14, but would be happy to answer any questions or provide any further information that the committee may have. Thank you for your consideration and we urge your support of this amendment.

*Terry Humphrey, Executive Director*

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*Sen. Vratil  
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