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RESOLUTION OF MINOR DISPUTES

JOINT HEARINGS
BEFORE THE
SUBCOMMITTEE ON COURTS, CIVIL LIBERTIES,
AND THE ADMINISTRATION OF JUSTICE
OF THE
COMMITTEE ON THE JUDICIARY
AND
SUBCOMMITTEE ON CONSUMER PROTECTION
AND FINANCE
OF THE
COMMITTEE ON
INTERSTATE AND FOREIGN COMMERCE
HOUSE OF REPRESENTATIVES
NINETY-SIXTH CONGRESS
FIRST SESSION
ON
RESOLUTION OF MINOR DISPUTES

JUNE 6, 7, 14 AND 18, 1979

Serial No. 25
(Committee on the Judiciary)

Serial No. 96-78
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for the use of the Committee on the Judiciary and
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(C) BY LINDA R. SINGER, ESQ.

THE GROWTH OF NONJUDICIAL DISPUTE RESOLUTION: SPECULATIONS ON THE EFFECTS ON JUSTICE FOR THE POOR AND ON THE ROLE OF LEGAL SERVICES

(By Linda R. Singer*)

INTRODUCTION

Non-judicial methods of resolving disputes have come into their own. Endorsed by the Chief Justice of the United States Supreme Court and by the Attorney General of the United States, discussed at national bar-sponsored conferences and supported with federal, local and private funds, non-judicial forums have begun to proliferate throughout the country. Legislation to foster the development of non-judicial remedies, or occasionally, to require them as a precondition of litigation, has been introduced in Congress and a few state legislatures.¹

In this context, this paper has two purposes: to provide a basic level of information and analysis concerning the relevance of alternative methods of handling disputes to the achievement of justice for the poor; and to stimulate debate concerning the benefits and drawbacks of non-judicial dispute resolution among members of the legal services community. Such a debate is extremely important: the fate of different forms of dispute resolution could have a significant effect on the allocation of resources within legal services as well as on the activities of individual lawyers.

The author approaches this discussion from the perspective of an active participant in the development of non-judicial remedies in community and institutional settings. At the same time, she is a practicing attorney who is involved in the enforcement of constitutional and statutory rights on behalf of individual, often poor, clients. The questions raised and tentative conclusions offered are based on that experience, as well as on the observations of the few legal scholars who have written about the subject. Empirical data are scarce and incomplete; one early and obvious conclusion is that much more study is needed.

II. EMERGING MODELS FOR PROCESSING DISPUTES

Several approaches to resolving disputes short of litigation are in the process of evolving in the United States and other countries.² These approaches, virtually all of them less than ten years old, vary in the types of disputes handled (whether they are traditionally dubbed "civil" or "criminal;" whether they involve property or interpersonal relationships), the identity of the parties (whether they are individuals or organizations; strangers, neighbors or relatives), the techniques employed and the enforceability of the results. Common to all the models, however, is the use of processes that are more flexible and less formal than those associated with litigation and a greater emphasis on accommodation between the parties than on a definitive adjudication of their rights and liabilities.

A. Techniques of resolution

The two principal techniques employed in the various models are mediation, in which an impartial third party, who has no power to dictate a solution, attempts to assist the parties to a dispute in arriving at a mutually satisfactory resolution; and arbitration, in which the third party is given the power to impose a binding resolution. Variations include conciliation, a term used to describe the efforts of

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¹ E.g., S.423, H.2863, H.3719 (96th Cong. 1st Sess., 1979); S.957 (95th Cong. 2nd Sess., 1978); Assem. Bill No. 2763 (introduced by Assemblyman Fazio, California Legislature, 1977-78 regular session); S.4012 (introduced by Senator Ornstein, New York Legislature, 1979); see Dispute Resolution Act, Hearings Before the House Judiciary Subcommittee on courts, Civil Liberties, and the Administration of Justice (95th Cong. 2d Sess., July 27, Aug. 2, 1978).

² See generally E. J. Johnson, V. Kantor and E. Schwartz, *Outside the Courts: A Survey of Diversion Alternatives in Civil Cases* (1977); Ford Foundation, *Mediating Social Conflict* (1978). For a broader historical and cultural perspective, see L. Nader (ed.), *Law in Culture and Society* (1969); R. Danzig, "Toward the Creation of a Complementary Decentralized System of Criminal Justice," 26 *Stanford Law Review* 1 (1973).

an intermediary to facilitate communication between disputing parties without becoming actively involved in settlement efforts; fact-finding, a non-binding determination of the facts underlying a controversy; and mediation/arbitration, a newly coined term that denotes the activities of a third party who first attempts to mediate, then, if unsuccessful, proceeds to decide the merits of a dispute.³ A few of these definitions overlap; in addition, some of the techniques can be combined or used sequentially in the same model or even in the same dispute.

B. Applications of nonjudicial techniques

1. *Community disputes.*—Mediation of disputes involving large numbers of people and broad social issues was first tried in the 1960's, in response to increasingly divisive community conflicts. A growing group of "community mediators" has augmented efforts of federal mediators employed by the Community Relations Service of the Justice Department, which has been active in this regard since 1964. Both public and private mediators have had dramatic success in resolving multi-party conflicts over diverse subjects including access to a limited number of publicly funded housing units by members of competing ethnic groups; Indian claims to land and fishing rights; and developers' plans to build dams or highways over the objections of environmental groups. The techniques of peaceful conflict resolution honed in such highly visible arenas soon appeared useful in other contexts.

2. *Dispute centers.*—Building on the techniques of peaceful conflict resolution that were developed in community disputes, tribunals known as "community dispute centers" or, more recently, "neighborhood justice centers" have been organized to resolve conflicts between individuals. This model recently has received a great deal of official encouragement and has proliferated rapidly.

Major characteristics of individual community dispute centers may vary substantially. Centers may be sponsored by state or local courts, prosecutors' offices or independent government agencies; by established private organizations, such as bar associations; or by ad hoc neighborhood groups. They may be operated by lawyers and social workers or by community residents of all occupations. They may be located in a courthouse, a bank building or a store front. Criteria for accepting disputes also vary. Virtually all centers handle cases involving minor "criminal" conduct, whether or not a charge actually has been filed. Most also accept "civil" cases involving no such conduct; often, in instances of ongoing relationships between the parties, these distinctions are blurred.

3. *Institutional grievance procedures.*—Already accustomed to participating in grievance procedures negotiated with their unionized employees, large governmental and private organizations have begun to provide procedures based on some of the same principles for their non-unionized employees and, most significantly, for their clients. A small but growing number of prisons, high schools, universities and hospitals have adopted procedures for responding to clients' complaints. Some of these procedures have done little more than formalize the processes used by various agency officials to respond to complaints unilaterally; others involve the clients themselves and/or outside neutrals in significant roles as fact-finders, mediators or joint decision-makers.

4. *Consumer conciliation.*—Consumer complaint offices, media action lines, state and local government ombudsmen and private trade associations deal with a large volume of complaints regarding the quality of goods and services, credit terms and various forms of bureaucratic red tape. The complaint-handling organizations may simply facilitate communication between the parties in cases in which complainants have been unable to get a response. Or they may actively investigate complaints and, if they consider them justified, attempt to persuade the respondents to settle. Some of these organizations keep records of companies frequently complained about or found to be at fault; some publicize what they consider egregious cases.

Consumer complaint organizations generally do not conduct any sort of hearing; indeed, the disputants rarely meet face-to-face. These agencies are attractive to many consumers because they are simple to use and because they sometimes are willing to represent the interests of complainants to large organizations. However, they have been criticized as ineffectual and incapable of compensating for the ineffective bargaining position of the individual who confronts large corporations or government bureaucracies.⁴

³ See D. McGillis and J. Mullen, *Neighborhood Justice Centers: An Analysis of Potential Model 10-25* (1977).

⁴ See L. Nader, "Disputing Without the Force of Law," 88 *Yale Law Journal* 998 (1979).

5. *Government-sponsored mediation.*—Federal and local government agencies have been assigned increasing responsibilities for enforcing individual civil rights against private employers or recipients of federal funds. In response to growing backlogs of unresolved complaints, a few agencies are experimenting with mediation as an initial method of resolving complaints without formal fact-finding and enforcement. The parties' participation in mediation efforts is sometimes voluntary, sometimes mandatory. In some agencies, the mediation is carried out by employees who have enforcement powers; in others, mediation is separated from enforcement and conducted by outside mediators.

6. *Consumer arbitration.*—Commercial contracts long have contained clauses committing both sides to binding arbitration in case of a claimed breach. Following this model, some trade associations, such as Better Business Bureaus, and professional groups, such as bar associations, have begun to require their members to precommit themselves to binding arbitration of disputes with consumers. Consumers' use of arbitration is voluntary; occasionally, however, contracts for the purchase of goods and services may specify arbitration as the only remedy for a breach claimed by either party.

7. *Court-annexed arbitration.*—Beyond such private arrangements, a growing number of courts require that certain civil cases, generally those involving claims for damages between the ceiling for small claims court and a higher amount of up to \$10,000, be submitted to arbitration by court-sponsored panels of attorneys. Decisions of such panels are binding unless either party exercises the right to appeal. Trials de novo are permitted but not encouraged; monetary penalties sometimes are imposed if the party who appeals does not improve on the arbitrators' award by a specified amount or percentage.

This is the only model that diverts all of its cases from court after complaints have been filed. It is also the only model that requires all parties to submit to arbitration as a precondition of obtaining access to court.

III. DIVERGENT OBJECTIVES OF ALTERNATIVE FORUMS

Reformers of the legal system do not necessarily share the same objectives. Even those who seek the same goal may differ concerning appropriate legal strategies for achieving that goal. Consequently, it becomes necessary to articulate the frame of reference within which legal policies or institutions are to be evaluated. In discussing the consumer movement, for example, Eric Steele distinguishes among the functions of regulation, criminal law enforcement and dispute settlement and demonstrates that the approach chosen to solve substantive legal problems will depend on the conceptual frame of reference adopted:

An emphasis on regulatory or preventive law may lead one to perceive the problem as originating in widespread business practices and to advocate rule-making and administrative supervision. . . . An emphasis on law enforcement may lead one to perceive the problem as deviance and advocate the prosecution of criminals and enforcement of civil laws against fraud, deceptive advertising, and unfair business practices. An emphasis on dispute settlement would lead one to perceive the problem as lack of bargaining power and lack of access to legal forums and to advocate improvements in the delivery of lawyers' services, paralegal personnel, community advocates and advisers, the creation of forums for arbitration and mediation, and the reform of small claims court. . . .⁵

The supporters of non-judicial forums also have different, sometimes unstated objectives. Judicial endorsement of informal dispute resolution, for example, frequently proceeds from the desire to make the courts more efficient by reducing caseloads, costs and delays. Government sponsorship of community dispute centers generally is based on the hypothesis that the centers are faster and less expensive to operate than courts and that the courts themselves can be made to operate more efficiently if congestion is reduced by diverting minor disputes to other forums.

A different (and possibly conflicting) objective is to augment the access of citizens to a variety of tribunals that can resolve their complaints. Achievement of this objective would bring a large number of disputes into some forum, whether judicial or non-judicial, and thus, presumably, increase the total resources devoted to dispute resolution.

A third objective of alternative forums is to reduce conflict by settling individual disputes that, if unresolved, might fester, recur or escalate into violent

⁵ E. H. Steele, "Two Approaches to Contemporary Disputes Behavior and Consumer Problems," *Law and Society Review* 667, 669 (1977).

confrontations. In this regard, supporters of mediation frequently cite its superiority to formal adjudication in addressing the "root causes," as opposed to the most recent symptoms, of ongoing conflicts.

On the other hand, the achievement of a fourth objective, the use of the legal system to further social, economic and political conceptions of equal justice, sometimes may result in the escalation of conflict. For the past generation, legal efforts to achieve equal justice have concentrated on litigation, frequently by means of class actions. Recently, some scholars and practitioners have begun to question such heavy reliance on the courts to enforce rights and deter unfair practices; they advocate a variety of forums and procedures to redress the grievances of members of underrepresented constituencies, ranging from prisoners to consumers. Such advocates are sometimes vocal supporters of non-judicial forums.

Many advocates of non-judicial dispute resolution are motivated by still other objectives, whether explicitly or implicitly: increased fairness of both legal processes and their results; increased satisfaction with the legal system on the part of participants; and increased ability of various segments of society to govern their own affairs, without having to resort regularly to judicial intervention. The last objective has been expressed quite differently in different contexts. In institutional contexts, the objective is expressed as one of self-governance or avoidance of the imposition of rules by outsiders. In neighborhoods or, occasionally, tightly knit ethnic communities, it may be expressed as community empowerment or neighborhood justice. Finally, on an individual level, the objective is one of increased self-sufficiency or the capacity to manage one's own affairs without heavy reliance on representatives of the legal system.

In examining the potential effects of alternative methods of processing disputes on the achievement of justice for the poor, it is useful to separate these varied and sometimes conflicting objectives. Naturally, all of the objectives do not have equal relevance to low and moderate-income disputants, furthermore, the relevance of a particular objective may vary with the circumstances. For example, the reduction of conflict may be less important than their compensation or deterrence if a low-income consumer is cheated by a local merchant; yet conflict resolution may well be paramount when the dispute is between the same consumer and her husband. Judicial efficiency generally is of little concern to poor litigants who find themselves involved with the courts far more often as defendants than as plaintiffs. Yet efficiency suddenly becomes crucial when a tenant sues for the return of a security deposit wrongfully withheld by a landlord.

The conclusions reached by each individual concerning the desirability and importance of creating and expanding non-judicial forums will depend both on the priorities one places on various objectives as methods of achieving justice and on the degree to which the forums actually meet each of the objectives. Thus, members of the legal services community, although committed to the same goals and the same client constituencies, may well differ concerning the utility of different types of dispute resolution.

In order to facilitate critical analysis, various hypotheses concerning the potential effects of alternative forums will be discussed in terms of the different objectives that have been identified.

IV. POTENTIAL EFFECTS OF NON-JUDICIAL DISPUTE RESOLUTION ON JUSTICE FOR THE POOR

A. Efficiency

According to many of the supporters of alternative forums, the greatest improvement: shortening the delay between registration of a complaint and final resolution; and reducing the costs of resolution to the disputants and the public.

According to many of the supporters of alternative forums, the greatest increase in efficiency will come from the diversion of minor, inappropriate or simply "junk" cases from the courts, thus reducing court backlogs and making litigation more efficient for the cases that remain. At the same time, the cases diverted are expected to be resolved more quickly, less expensively and more effectively than they would be in court.

Because of these expectations, it is relevant to consider whether the disputes submitted to alternative forums actually are diverted from judicial processing or represent additional cases that would not have been taken to court in the absence of alternative forums. This is a difficult question to answer definitively, since there have been so few attempts to develop the necessary data. It appears at present, however, that only a small minority of the disputes handled non-judicially would otherwise have gone to court.

Court-annexed mediation or arbitration projects clearly handle cases diverted from judicial processing (although, even here, processes that are viewed as particularly efficient or effective may have the effect of attracting a larger number of filings). Other types of mechanisms, such as dispute centers and institutional grievance procedures, handle some disputes that would have ended up in court. But operators of alternative forums seem to agree that only a minority of the disputes they handled ever could have been litigated; most of these involve criminal charges (many of which would have been dismissed by the prosecutor or the judge). Even in the case of prisoners, generally considered unusually litigious, a recent study revealed that fewer than half of the grievances filed with a New York prison grievance mechanism involved claims that conceivably could have been taken to court; far fewer actually would have been filed.⁶

For those cases that are diverted, sufficient empirical data do not yet exist to permit precise comparison of the delays and costs involved in resolution of similar cases through the courts with resolution through other means. It does seem clear that the alternative mechanisms are faster than either judicial or formal administrative processing. The time between filing and resolution generally is measured in days, as opposed to years. Although there are exceptions (some institutional grievance mechanisms can take months to run their course), the average time to some sort of resolution is greatly reduced.

Assessment of alternative costs is more difficult. Courts do not record their operating costs on a per-case basis (and never on the basis of different types of cases), and rarely consider capital costs at all. Furthermore, comparisons of costs generally focus on those that can be measured easily in dollars and attributed to the system itself, such as salaries, while ignoring hidden costs, such as the time spent by litigants and volunteers. For example, compulsory arbitration of certain categories of court cases by panels of volunteer lawyers clearly saves the time of a limited number of judges. Yet it is difficult to term the process more efficient (unless, of course, it takes much less time) if cases that formerly were heard by one judge now are heard by panels of three lawyers. (The equation changes in cases that would have involved jury trials.)

Perhaps the most difficult question associated with determining efficiency involves the degree to which disputes are, in fact, resolved. An ongoing dispute between neighbors, for example, can involve many calls for police, as well as the possibility of personal injury, destruction of property and criminal proceedings. The most efficient mechanism for resolving such a dispute is the mechanism that has the best possibility of resolving it once and for all. Similarly, various disputes involving similar questions of law or policy may be resolved most efficiently by a clarification or change in the relevant law or policy.

B. Access

Despite frequent references to a "litigation explosion" and a documented increase in filings in both federal and state courts,⁷ it is quite probable that most disputes that could be litigated are not brought to court and that many of these disputes are not settled in any other way.⁸ Individuals, particularly low income individuals, do not generally take their complaints to lawyers or courts. Yet there are preliminary indications that some poor people are using alternative forums and that increased access to some form of remedy may be a result of the growth of such forums.

Civil courts are used overwhelmingly by organizations (both business and government) against other organizations or individuals.⁹ (Domestic relations cases may be the one large category of exceptions.) This disproportionately low use of the courts by individual plaintiffs may occur because individuals do not perceive many of their problems as "legal,"¹⁰ because many categories of disputes have not been defined in constitutional or statutory terms, or because "legal" remedies require the services of lawyers. For those who can afford to pay some-

⁶ J. R. Hepburn, J. H. Laue, and M. L. Becker, *To Do Justice: An Analysis of the Development of Inmate Grievance Resolution Procedures and a Final Report to the Center for Community Justice* 237-43 (1978).

⁷ See J. Barton, "Behind the Legal Explosion," 24 *Stanford Law Review* 567 (1975).

⁸ See W. L. F. Felstiner, "The Influence of Social Organization on Dispute Processing," 9 *Law and Society Review* 63 (1975); R. Danzig and M. Lowy, "Everyday Disputes and Mediation in the United States: A Reply to Professor Felstiner," 9 *Law and Society Review* 675 (1975).

⁹ M. Galanter, "Delivery Legality: Some Proposals for the Direction of Research," 11 *Law and Society Review* 225, 244 (1977).

¹⁰ See L. M. Mayhew, "Institutions of Representation: Civil Justice and the Public," 9 *Law and Society Review* 401, 411-12 (1975).

thing for legal services, disputes may involve less money than the price of the lawyer, or may have no monetary value at all. For poor people, there remains an acute shortage of civil attorneys in some parts of the country and for many types of cases.

Except for the studies of the costs and availability of legal services to people of low and middle income, few efforts have been made to examine the use of traditional mechanisms for resolving disputes in terms of the income of the disputants. The Center for the Study of Responsive Law recently conducted a ground-breaking study of consumer behavior. Its findings support the hypothesis that poor people make less use of civil remedies (both judicial and non-judicial) than members of other income groups. The study revealed that a significantly smaller proportion of households of low socioeconomic status perceive problems with purchases of typical consumer products and services that those of higher status (and a smaller proportion of blacks than whites even within income groups). Furthermore, consumers of higher socioeconomic status (and whites) complain to sellers and third parties about a greater proportion of the problems they perceive:

Whites complain more than blacks within each SES (socioeconomic status) category; and within the white population, complaints vary directly with SES . . . If we combine the effects of socioeconomic status on perception and voicing, then for every 1,000 purchases, households in the highest status category voice complaints concerning 98.9 purchases, while households in the lowest status category voice complaints concerning 60.7 purchases.

Finally, of all complaints about purchases, complaints to third parties (as opposed to complaints directly to sellers) are made disproportionately by members of the better educated, better informed and politically more active households.²¹ These findings are consistent with impressions of the socioeconomic status of consumers who invoke complaint-handling mechanisms, such as consumer arbitration, and with analyses of access to dispute mechanisms as a function of the capability of the disputants.²²

In contrast to the observation that the poor use civil remedies disproportionately less than other segments of the population is the observation that they use criminal remedies disproportionately more. Whether because of the state's provision of police and prosecuting attorneys and acceptance of full responsibility for criminal prosecutions, or because prosecution, like divorce, is a remedy whose possibilities are widely understood, poor people seem to file criminal complaints far more readily than civil. Hard data do not exist to support or refute this proposition; however, a recent study of a Boston slum by an anthropologist revealed that the filing of criminal complaints is used as a weapon by poor people (frequently females) who are too old or too weak to fight.²³

In this regard, perhaps the most interesting finding of the interim evaluation of the three LEAA-funded Neighborhood Justice Centers is the predominance of low income disputants: typical participants during the first six months were blacks earning less than \$6,000 per year in Atlanta; roughly equal proportions of blacks and whites earning less than \$6,000 in Kansas City; and whites earning between \$6,000 and \$12,000 in Los Angeles.²⁴ This apparent success in attracting low income disputants may simply be a function of the fact that many cases are referred to the centers by police, prosecutors and criminal court judges. (No correlation is given for income level and type of case or source of referral.) But the participation of the poor also may indicate that the centers are proving successful in attracting poor people with non-criminal disputes and thus are expanding access to a civil remedy.

The small number of studies of alternative forums indicates tentatively that use of such forums is increased by the presence of the following features: simplicity and ease of access (the newspaper ombudsman, for example); the presence of intake people with whom potential users can identify (minority "neighborhood aides" in a city ombudsman's office, inmate grievance clerks in

²¹ A. Best and A. R. Andreasen, "Consumer Response to Unsatisfactory Purchases: A Survey of Perceiving Defects, Voicing Complaints, and Obtaining Redress," 11 *Law and Society Review* 701, 707, 722-23, (1977).

²² See M. Galanter, "Why the 'Haves' Come out Ahead: Speculation on the Limits of Legal Change," 9 *Law and Society Review* 95 (1974).

²³ S. Merry, *Going to Court: Strategies of Dispute Management in an American Urban Neighborhood* (unpublished manuscript, 1978).

²⁴ D. I. Sheppard, J. A. Roehl and R. F. Cook, *National Evaluation of the Neighborhood Justice Centers Field Test—Interim Report 47-48* (1979).

prisons); the speed of the process; and the perceived impartiality of the decision-makers.²⁵ These features are present in many alternative forums, particularly those that rely heavily on lay mediators and neighborhood intake and referral personnel. If these forums can avoid problems of professionalization and bureaucratization (one dispute center already has had a strike by its "volunteer" mediators, who demanded higher pay and greater opportunities to find careers at the centers), they should continue to attract people who do not use the civil courts.

Although it is too early and the data are too sparse to make definite conclusions concerning increased access to the legal system as a result of the growth of alternative forums, the indications are that at least some of these forums are providing access to low income disputants who otherwise would not have taken their complaints to the courts. Unless one believes that the only meaningful access to justice involves access to a court, this is a potentially significant finding. It also may mean that, in evaluating the procedures and results of some alternative forums, the relevant comparison is not to civil courts but to no forum at all.

C. Conflict resolution

The proliferation of forums that rely heavily on mediational techniques has been both praised and criticized as a means of reducing conflict. In the case of individuals with ongoing relationships, such as family members and neighbors, there generally is no other forum to deal with their disputes. (Family counseling, while applicable to some of the same conflicts, emphasizes the re-ordering of complex relationships rather than the settlement of more immediate, concrete disputes.) The spread of informal dispute resolution coincides with an increased public interest in and recognition of the seriousness of domestic violence (particularly wife beating and child abuse), for which no satisfactory legal remedies exist. In the case of broad community or intra-institutional disputes that can be taken to court if they involve recognized legal rights, adversarial procedures may exacerbate the conflict, further polarizing the parties.

Again, there are no satisfactory data regarding the extent to which disputes are resolved permanently by different forums. It is clear that most dispute centers and arbitration programs spend significantly more time on each case than a small claims or misdemeanor court ever could; much of this time is devoted to increasing communication between the parties and discussing ways of avoiding the escalation of disputes in the future. There is a conscious effort to resolve all relevant aspects of ongoing conflicts, not just those involving single crimes or clearly defined legal rights. Evaluations of dispute centers indicate a high degree of success in actually settling interpersonal disputes.²⁶

These observations apply to disputes between individuals with ongoing relationships. Preliminary results indicate that dispute centers have a significantly higher degree of success in resolving such cases than those involving disputes between strangers or disputes between individuals and organizations.²⁷ This reservation is not intended to detract from the potential of dispute centers for resolving such disputes and the likely result of preventing violent crimes by and against the poor, particularly within families and neighborhoods.

D. Social and economic justice

This objective, clearly of crucial importance to the poor (and to those who represent them), involves the use of the legal system to decrease inequities in the distribution of benefits through society. Due to the increasing concentration of power in governmental and corporate bureaucracies, efforts to increase social and economic justice necessarily focus on the relationship between individuals and large organizations, such as manufacturers, landlords, schools and welfare departments.

1. Individuals versus organizations.—In addition to the obvious differences in power and resources, there is a significant disparity between large organizations, such as those mentioned above, and their clients—particularly poor clients—in their capacity to use legal institutions of all kinds:

²⁵ See J. M. Keating, Jr., V. A. McArthur, M. K. Lewis, K. G. Sebellus, and L. R. Singer, *Grievance Mechanisms in Correctional Institutions 13-26* (1975); L. Tibbles and J. H. Hollands, *Buffalo Citizens Administrative Service: An Ombudsman Demonstration Project 61* (1970); J. A. Hannigan, "The Newspaper Ombudsman and Consumer Complaints: An Empirical Assessment," 11 *Law and Society Review* 679 (1977).

²⁶ W. F. Moriarty, Jr., T. L. Norris and L. Salas, *Evaluation, Dade County Citizen 61* (1970); J. A. Hannigan, "The Newspaper Ombudsman and Consumer Complaints: An

²⁷ D. I. Sheppard et al., *supra*, n. 14, at 33.

Legal contests (or noncontests) do not ordinarily take place between rich guys and poor guys. They take place, for the most part, between individuals and large organizations. The contract, grant, license, or other transaction—even the accident—is routine for the organization, which designs the transaction. If trouble develops, the occasion is typically one of a kind for the individual—it is an emergency or at the least a disruption of routine propelling him into an area of hazard and uncertainty. For the organization (usually a business or government unit), on the other hand making (or defending against) such claims is typically a routine and recurrent activity.¹⁸

Provisions for resolving disputes between individuals and organizations must take into account the disparities in power and in the familiarity with legal problems and procedures.

Community dispute centers have been receiving the lion's share of attention as mechanisms for resolving disputes out of court. Yet it is important to recognize that most of the centers never were intended to deal with disputes between individuals and institutions. The design for the LEAA-funded Neighborhood Justice Centers specifically limits the centers to handling disputes "between individuals with an ongoing relationship . . . Consumer complaints (should) be confined to those involving individuals or an individual and a small local merchant rather than a large institution."¹⁹ This limitation prevents community dispute centers from being a solution to many of the most acute problems of dispute resolution. However, the limitation also puts into perspective a common criticism that the centers serve to deflect needed reforms, by "buying off" individual complainants. Such criticism is misplaced if neighborhood justice centers do not resolve disputes between individuals and institutions.

Although many types of institutions have a continuing relationship with individuals as clients, customers or employees, few have attempted to develop effective mechanisms for responding to individuals' complaints. Government agencies, spurred by judicial requirements of due process, have developed procedures for taking adverse action against individual clients or employees; but they have failed to develop similar procedures for responding to action initiated by individuals. Indeed, the low priority placed by agencies on responding to individual complaints is implicit in the language agencies use to describe them; complaints against organizations generally do not rise to the level of "disputes;" they are merely "grievances."

Yet even in this context, there are relationships worth preserving through means less divisive than litigation or formal agency procedures. Employees or students, for example, may wish to have their complaints resolved without polarizing or severing their relationships with their employers or schools; present adversarial procedures make such a result extremely difficult to achieve.

It is generally agreed that mediation between parties of significantly unequal power is inappropriate. For example, even where disputes are between individuals, no responsible mediator would attempt to mediate between a child abuser and the victim of the abuse. Where institutions are concerned, the question is whether sufficient leverage can be developed to equalize the power of disputants to the point where mediation becomes a realistic alternative. A recent report by the Ford Foundation concludes that, over the past ten years, such a shift in the distribution of power has started:

"The growing use of mediation to resolve social conflicts signals a changing attitude towards compromise among social activists, community representatives, and institutional officials. Compromise or to use the gentler term, "accommodation," is no longer reflexively regarded as ethically unsavory. Among the reasons that compromise is now more feasible is that power is better distributed, which in turn is the result of the work of civil-rights organizations, public interest law firms, and consumer and environmental groups."²⁰

2. *Sources of power for individual disputants.*—Several methods of equalizing power between disputants exist or are in the process of being developed. Following the example of labor unions, individuals with similar interests have organized into groups whose power more nearly approximates that of the institutions with which they must deal. Organizations that can afford to ignore the complaints of individuals cannot afford to ignore those of entire groups. Media-

¹⁸ M. Galanter, "Delivering Legality: Some Proposals for the Direction of Research," 11 *Law and Society Review* 225, 231-32 (1977).

¹⁹ Proposed National Institute of Law Enforcement and Criminal Justice Design for Neighborhood Justice Centers, reprinted as Appendix B to D. McGillis and J. Mullen, *supra*, n. 3.

²⁰ Ford Foundation, *Mediating Social Conflict* 6-7 (1978).

tion between tenant organizations and landlords, between consumers' cooperatives and suppliers, and between environmentalists and industrialists has been possible only where individuals with similar but diffuse interests have been able to achieve some degree of organization.

Another development involves the precommitment of institutions to handle individual complaints in a specific fashion. The potential expense and uncertainties associated with litigation or intervention by enforcement agencies, even where the actual incidence of individual law suits or enforcement action is rare, can provide the impetus for a business or, more rarely, a government agency, to agree to submit future disputes to an alternative forum under conditions specified in advance. Such precommitments can be of great importance to the individual complainant; they constitute an agreement on the part of the institutional party to participate in a non-judicial forum without regard to the strength of the individual case. (Without such precommitment, the sophisticated institutional party might reserve participation for those cases in which it believed it would be taken to court and risk losing.) Recent examples of such precommitment include programs in the marketplace and in prisons and jails: some members of the Council of Better Business Bureaus (including some large automobile manufacturers) have agreed to submit certain types of disputes to binding arbitration at the option of consumers; a small but growing number of correctional administrators have agreed to submit complaints by inmates to advisory arbitration.

If institutional parties insist that the individuals with whom they deal also commit themselves in advance to non-judicial dispute resolution, a question of fairness will arise. If, for example, contracts for purchasing automobiles limited purchasers to arbitration as the exclusive remedy for a claimed breach, they might well be invalidated as taking unconscionable advantage of the disparity in bargaining power and sophistication between purchasers and sellers. The requirement that both parties attempt mediation or arbitration before invoking adjudicatory remedies is less drastic. Judgments concerning the fairness of such a requirement may depend on its onerousness; for example, the requirement that each party to a complaint of age discrimination participate in mediation efforts for a period not to exceed sixty days prior to seeking administrative or judicial remedies is far less onerous than the mandatory, court-annexed schemes that impose financial penalties for unsuccessful appeals.

Statutes or administrative regulations requiring institutions to participate in non-judicial procedures can serve a function similar to precommitment. There must be sufficient incentive in the procedure itself or in the availability of more onerous enforcement procedures, however, to induce genuine efforts to resolve the dispute.

In some cases, the forum itself may have a source of power sufficient to induce participation by the more powerful disputant. The prestige of some ombudsmen and the ability of media action lines to publicize gross or repeated refusals by organizations to respond to complaints probably explain whatever success they have as conciliators. Furthermore, their occasional function as advocates for complaints also can help redress the parties' imbalance of resources and sophistication.

Once inside a forum (whether judicial or non-judicial), individual parties, particularly low income parties, may suffer significant disparities in knowledge of the subject matter in dispute and in their ability to argue persuasively to the other party or (in the case of arbitration) the decision-maker. These disparities may be reduced by technical legal requirements applied to institutional disputants, such as the Truth-in-Lending Law, or exacerbated by other requirements, such as the Statute of Frauds. Similarly, procedural protections can protect less sophisticated parties or trap them in technicalities.

Two obvious ways of compensating for these disparities are the provision of advocates and the provision of experts. The need for legal assistance to thread through technical procedures may be greatly reduced in alternative forums. Furthermore, some mediators are trained to obviate the need for advocacy by attempting to elicit facts or arguments from less articulate parties. Yet the need for advocacy may persist where parties are not equally sophisticated or articulate. Advocates may be lawyers, paralegals or friends; their specific roles will be discussed below.

Technical experts clearly are unnecessary in some types of disputes; they are crucial in others. The furnishing by the Council of Better Business Bureaus of free, independent automotive experts to consumers with complaints involving car warranties may prove a significant innovation, although it does not reach the complaints of low income consumers regarding less expensive purchases.

3. *Systemic reform.*—One measure of the usefulness of alternative forums in resolving disputes involving large organizations is the degree to which alternatives can achieve solutions to systemic social or economic problems. The class action suit seeking injunctive as well as compensatory relief against fraudulent business practices or illegal discrimination is the classic example of a legal process designed to achieve such solutions. Yet it is important to remember that the class action is not the typical law suit; most litigation proceeds on a case by case basis, resolving only a single factual situation.²¹

Significant criticisms of alternative forums have been made on the basis that such forums, unlike courts, cannot contribute to the solution of systemic problems. According to Mark Budnitz, former Director of the National Consumer Law Center, "The private, settlement-oriented approach of arbitration and mediation will not deter the future unfair practices . . . These forums can at best provide only limited relief in individual cases brought before them. They cannot provide the deterrence and broad remedial relief which is often needed when industry-wide practices are exploiting consumers or certain merchants are engaging in exceptionally abusive practices."²² Richard Hofrichter has criticized informal dispute resolution as being divorced from the type of political action needed to effect basic economic change:

The need for a collective response or policy transformation cannot be achieved through individualized dispute resolution.

The prevention of repeated fraudulent activities, for example, housing code violations or excessive rates charged by finance companies, requires a substantive reordering of property rights. The political dimension of these injustices is excluded when translated into a misunderstanding resolvable by negotiation and the avoidance of conflict . . .

Such informal systems provide the sense of having had one's day in court without challenging the wrong committed at a more general level of confronting the problem in another arena.²³

In addressing these criticisms, one must ask, "compared to what?" If alternative forums are diverting potentially significant test cases from the courts or masking patterns of abuse from the scrutiny of regulatory and enforcement agencies, their acknowledged virtues will be outweighed by considerable shortcomings. If, on the other hand, the great majority of the cases resolved in such forums never would have been brought to an existing mechanism, the criticisms miss the point. It is impossible to answer this question definitively; as has been discussed, however, alternative forums appear to be attracting new cases, not diverting cases from traditional processing. If this is so, particularly in light of the small proportion of complaints that are brought to any remedial forum, the existence of alternatives actually may serve to increase the number of cases brought to public attention.

Even in cases where informal dispute settlement does serve to resolve disputes that otherwise would have been decided formally, complainants themselves should have the right to make a voluntary, informed choice between faster, often partial relief and enforcement of substantive standards through litigation. Some claims (for example, those based on proof of a pattern and practice of discrimination) can be enforced most effectively through class actions. Yet as every lawyer knows, many clients do not wish to become involved in test cases. As one study of legal services for the poor observed, "serving the clients' interests" as clients (quite properly) perceive them ordinarily implies compromise, settlement with minimum delay and expense, and taking what one can get.²⁴

The desire of low income clients for speedy relief, particularly where monetary compensation is involved, may be particularly acute.²⁵ At present, only about fifteen percent of the cases handled by programs funded by the Legal Services Corporation are resolved through litigation.²⁶

The ability of different types of forums to facilitate general solutions to classes of problems has received little attention. Clearly, the courts themselves are constrained from focusing on aggregate patterns of complaints by accepted doctrines of what constitutes a "case," thus they have serious shortcomings in this regard. Enforcement agencies, which should be aggregating complaints and seeking

²¹ See T. Ehrlich and J. L. Frank, *Planning for Justice*, 4-9 (1977).

²² "Consumer Dispute Resolution Forums," *Trial*, Dec., 1977 45, 47, 49.

²³ Justice Centers Raise Basic Questions," 2 *New Directions in Legal Services* 168, 170 (1977).

²⁴ L. H. Mayhew, *supra*, n. 10, at 415.

²⁵ But see G. Bellow, "Turning Solutions into Problems: The Legal Aid Experience," 34 *NLADA Briefcase* 106, 108-09 (1977).

²⁶ Legal Services Corporation and the Activities of Its Grantees: A Fact Book 23 (1979).

systemic solutions to regulatory problems, frequently become "passive recipients of privately initiated complaints . . . the focus is more on settling disputes than on affirmative action aimed at realizing public goals."²⁷ The proliferation of methods of informal resolution could have the effect of freeing enforcers to concentrate on their law enforcement function.

Furthermore, alternative forums themselves may be able to generate information concerning individual complaints that can be used to facilitate systemic solutions. For example, the former director of a state corrections agency reported that the information generated by a formal grievance mechanism concerning the complaints of inmates, the investigation of those complaints and their disposition was extremely useful in detecting previously hidden, recurrent problems and in highlighting the failure of agency staff to implement agency policies.²⁸ Such information could be helpful to outside monitors as well. Some media action programs have succeeded both in exposing patterns of abuse and in putting information concerning recurring complaints on computers for the use of enforcement agencies concerned with consumer fraud.²⁹

Specialized mechanisms that respond to certain categories of complaints seem better situated than general dispute centers for facilitating solutions to systemic problems. Specialized tribunals can accumulate a body of information concerning patterns of violations of particular laws to be referred to appropriate regulatory agencies. They also may acquire sufficient experience and expertise to enable them to inform the parties of relevant legal requirements, such as the disclosure of consumer finance charges.³⁰ Of course, other considerations, such as ease of access, may mitigate against such specialization.

The role of confidentiality in alternative tribunals also is relevant to the tribunals' potential usefulness in detecting patterns of abuses. Many businesses may agree to submit to mediation or arbitration with consumers only if the process is kept confidential. Programs administered by the Council of Better Business Bureaus respect this desire for privacy. Other forums, such as ombudsmen and media action lines, clearly are public. Some prison grievance mechanisms publish decisions without complainants' names. The role of confidentiality in community dispute centers has yet to be clearly defined, although some proposed legislation would establish a mediator's privilege. Among traditional mediators, the general rule is that anything said in a mediation session is confidential; however, the fact of submission to mediation and the results of mediation (a particular settlement or the failure to reach a settlement) is not.

E. *Fairness and acceptability of results*

Few empirical data exist concerning the actual results of dispute resolution in different types of forums or the subjective perceptions of parties to the disputes regarding the process or the outcome. Without such data, no firm conclusions can be drawn about either the procedures or the results of non-judicial tribunals.

In the field of institutional grievance resolution, a recent evaluation of prison grievance mechanisms revealed that most prisoners believe their complaints are handled fairly and are satisfied with the results where procedures adhere to three principles: inmates themselves participate in grievance resolution; decisions may be appealed to neutral outsiders; and the written procedures are adhered to in practice. Conversely, the great majority of prisoners consider procedures that leave the resolution in the hands of institutional staff unfair and unacceptable. The actual results of the different types of procedures are consistent with the users' perceptions; participatory procedures produce far more institutional change than do the traditional, chain-of-command responses.³¹ Furthermore, earlier research indicated the importance to complainants of some sort of face-to-face hearings, even where the results are not what the complainant seeks.³²

Comparisons among three community dispute centers, and between such centers and traditional court processing, should result from the current evaluation of

²⁷ P. Selznick, *Law, Society, and Industrial Justice*, 225 (1969).

²⁸ A. Breed, "Administering Justice: Implementation of the California Youth Authority Grievance Procedure for Wards," 10 *Loyola Law Review* 113 (1976).

²⁹ See D. P. Rothschild and Bruce C. Throne, "Criminal Consumer Fraud: A Victim Oriented Analysis," 74 *Michigan Law Review* 601 (1976).

³⁰ C. Rubenstein, "Procedural Due Process and the Limits of the Adversary System," 11 *Harvard Civil Rights-Civil Liberties Law Review* 49, 81 (1976).

³¹ Center for Community Justice, *Evaluation of Inmate Grievance Mechanisms in Correctional Facilities* (preliminary draft, 1979).

³² D. Dillingham and A. Klaus, *Final Evaluation of Ward Grievance Procedure at Karl Holton School* 46 (1974).

neighborhood justice centers. Before an informed judgment concerning the fairness of alternative procedures can be made, several questions should be answered:

What is the relationship of various procedural protections to achieving just outcome? What is the importance of active participation by the parties in reaching an acceptable and equitable result and in increasing perceptions of fairness? Does participation exacerbate disparities between parties' capabilities or does it mitigate some of the differences in resources? One recent study of the voluntary arbitration of small claims in New York concluded that "the advantages of experience appear to be diluted in the informal, compromise-oriented atmosphere of arbitration and highlighted in processes of adjudication."³³

What is the effect of the amount of time spent on each dispute? Do characteristics (such as social class or race) shared by disputants and decision-makers contribute to a more just result? There is some evidence that the existence of common characteristics, such as a similar handicap where discrimination against the handicapped is at issue, contribute to a complainant's sense of both the fairness of the decision-maker and the effectiveness of the advocate.³⁴

The need for consistency to ensure fairness should also be explored.³⁵ Where means other than formal adjudication are used, it may be important to determine the effect of precedent and the existence of alternative means, if any, of achieving some predictability of results if the use of some decisions as precedents for others is rejected. Settlements achieved through negotiation or mediation between the parties cannot serve as precedents for settlements between other parties cannot serve as precedents for settlements between other parties (although they can serve as models of creative solutions to similar problems). The results of arbitrations, on the other hand, can serve as precedents, although they need not be given precedential effect. In the field of commercial arbitration, for example, precedents are not considered binding; the custom of the trade, based on the parties' shared experiences and goals, serves to provide the predictability needed in the business world.

The appropriate role of coercion in alternative forums must also be explored. The amount of official coercion or community pressure that ought to be applied to induce unsophisticated respondents to participate in community dispute centers has been hotly debated. Supporters cite the importance of getting disputants into some forum where they can address their problems, together with the coerciveness of the alternatives theoretically available (often criminal prosecution) if respondents do not cooperate.³⁶ Critics argue that the court system is available only in theory and that coercing participation in alternative methods of dispute resolution, whether explicitly or implicitly, ensnares a larger number of citizens in some form of social control.³⁷ Particularly where diversion to community dispute centers occurs in the early stages of the criminal process, without a trial to determine whether the defendant has violated the law, there is at least the potential for applying sanctions without proper concern for due process protections.³⁸ Such concern becomes even more acute with regard to those programs in which disputants are asked to sign agreements to submit to binding arbitration in the event that efforts to mediate their dispute should fail. The interim evaluation of the LEAA-funded Neighborhood Justice Centers observed that all three are using some degree of "implicit" coercion:

In the development of the three NJC projects, all of them avoided the use of overt coercion. However, there are some subtle and not so subtle pressures placed on the disputants when deciding if they should participate in the "voluntary" program. In all three centers, the parties can refuse to participate in a hearing, but in many instances, the parties understand that such a refusal may result in court action . . . If either party decides not to be involved in a mediated settlement, then his wishes are accepted. However, the fact that the other party can still pursue his case through traditional channels may be passed on to the reluctant disputant . . .

The concerns about coercion . . . are certainly justifiable. . . . It does appear, however, that subtle forms of coercive pressure are very important elements in

³³ A. Sarat, "Alternatives in Dispute Processing: Litigation in a Small Claims Court," 10 *Law and Society Review* 334, 336 (1976).

³⁴ Center for Community Justice, *Grievance Procedures Under Section 504 of the Rehabilitation Act 27-31, 38-43* (unpublished report, 1978).

³⁵ See L. Fuller, *The Morality of Law* 39 (rev. ed. 1969).

³⁶ E.g., E. Fisher, "Community Courts: An Alternative to Conventional Criminal Adjudication," 24 *American University Law Review* 1253 (1975).

³⁷ R. Hofrichter, "Justice Centers Raise Basic Questions," 2 *new directions in Legal Services* 168, 170-71 (1977).

³⁸ Cf. P. Nejeleski, "Diversion: the Promise and the Danger," 22 *Crime and Delinquency* 393, 410 (1976).

the building of sizeable caseloads. Unless a dispute center wishes to exclude the established criminal justice system and concentrate on small numbers of community self-referrals, it will probably have to engage in some coercion.³⁹

Present methods of obtaining the consent of both parties to participate in mediation sessions at community dispute centers raise troubling questions of parties' understanding of the process and of their right to choose whether to participate. Some of the centers send letters to parties who have criminal charges pending against them "inviting" them to participate in mediation and explaining that if they do so and reach a resolution the criminal charge will be dropped. In a few of the centers, these letters request that the recipient sign a form consenting to binding arbitration. It is doubtful that all of the people who sign such forms understand what they are signing. Some centers refuse to employ binding arbitration for this reason. Some of them also talk to all parties on the telephone or in person and carefully explain the process before seeking their consent to participate in informal resolution.

Any pretense of voluntary participation is dropped under mandatory arbitration schemes, which require parties in civil actions for damages below a certain amount to submit their disputes to "binding" arbitration. The arbitration awards may be appealed to a trial de novo, but generally there are significant financial deterrents to an appeal. Such schemes, first implemented in Philadelphia in 1966, have been praised for reducing court backlogs and providing speedy relief.⁴⁰ Yet they raise troubling questions. For one thing, the jurisdictional amount involved in a law suit may have no relationship to the complexity of the issues involved or their importance to the parties or the public and hence to their suitability for arbitration. For another, diverting only so-called "minor" disputes over relatively small amounts of money may have a disproportionate impact on poor people, implying that their disputes are less important than others' and that they are not equally entitled to judicial attention. Finally, there has been no attempt to determine whether the relatively low rate of appeal from arbitrators' awards is due to disputants' satisfaction with the results of arbitration or to the burdens imposed by new hearings and additional court costs and fees for lawyers.

Finally, the enforceability of the results of informal dispute resolution and the forum in which they are enforced is relevant to their usefulness. Logically, it would seem that solutions jointly arrived at would be more easily implemented than judicial decrees imposed on losing parties. Indeed, there is some empirical evidence to support this logical assumption.⁴¹

Some forums make no pretense of enforceability in cases where one of the parties fails to comply; others produce formal agreements, decisions or "awards." In states with developed arbitration statutes, such awards appear to be enforceable civilly, at least where they involve traditional civil remedies, such as the payment of money. On the other hand, where interpersonal disputes are resolved by agreements of the parties to stay away from each other, or by one party's promising not to harass the other, it is difficult to determine how they could be enforced through civil suits brought for breach of contract.

In some programs that involve referrals from the criminal justice system, parties are told that the criminal process may be invoked if mediated agreements are breached. The use of criminal prosecution to enforce individual agreements appears to violate not only traditional notions of due process but also the spirit behind mediated settlements. Without some method of enforcement, on the other hand, many of the agreements could turn out to be useless.

To date, most centers report that the failure to abide by agreements, at least in interpersonal disputes, is not a serious problem. Ongoing evaluations should provide more information in this regard. One evaluation criticized the concern of one dispute center's staff over the lack of enforcement "teeth" in agreements produced through the program. In the opinion of the evaluators, coercive enforcement would run counter to the program's expressed goals of providing an informal, non-coercive forum for the settlement of disputes.⁴²

F. Avoidance of outside imposition of rules

Institutions implementing grievance mechanisms have as at least one of their objectives the retention—or the wresting back from courts or outside adminis-

³⁹ D. I. Sheppard, et al., *supra*, n. 14, at 56.

⁴⁰ E.g., "Compulsory Judicial Arbitration in California: Reducing the Delay and Expense of Resolving Uncomplicated Civil Disputes," 29 *Hastings Law Journal* 475 (1978).

⁴¹ M. Cappelletti and B. Garth, eds., *Access to Justice: A World Survey*, v. 1, p. 61 (1978); Kaplan, *Support from Absent Fathers of Children Receiving A D C, 1955* (U.S. Bureau of Public Assistance, Report No. 41, 1960).

⁴² W. F. Moriarty, Jr. et al., *supra*, n. 16, at 88.

trative agencies—of their autonomy. Private businesses, private and state universities, and state and local prisons and jails are all confronted by increasing intrusions of government into what were previously considered internal affairs. In some cases, the institutions are beginning to respond with more or less effective procedures for responding to clients' complaints internally. Some entities, such as factories or trade associations, adhere to well-developed systems of self-governance. The most widespread example involves collectively bargained agreements between labor and management to submit disputes to arbitration; similar provisions exist in commercial contracts between buyers and sellers with continuing, interdependent relationships. Other types of organizations, such as schools or prisons, feel a similar need to avoid the outside imposition of rules or standards; yet their alternatives are much less developed and their power much less well distributed.

It is clear that such procedures have handled grievances that, if left unresolved, could have ripened into lawsuits; but there is as yet no conclusive evidence that the implementation of even the most responsive procedures actually has reduced the incidence of litigation. Indeed, the legitimation of complaining through recognized channels could serve to increase the number of complaints that are voiced. In commenting on the growth of administrative grievance mechanisms in prisons, for example, a recent study of litigation by prisoners noted, "It is possible that the introduction of a grievance mechanism could increase the number of suits by educating prisoners to make formal complaints, guiding them to articulate inchoate grievances and insist on their adjudication."⁴³

The development of responsive, institutional grievance mechanisms has many potential benefits for low income clients, offering at least the possibility of speedy responses through accessible channels. A recent survey of consumers revealed a far greater incidence of complaints to sellers than to third parties and thus placed the highest priority on the improvement of sellers' complaint procedures.⁴⁴ During the past five years, it has become clear that grievance mechanisms in correctional institutions can handle large numbers of intra-institutional complaints effectively. Where inmates and outsiders are involved in resolving grievances, significant policy changes have been achieved at far less cost in time and resources than would have been required for litigation.⁴⁵

From the clients' perspective, however, there is a danger that a general requirement of exhaustion of administrative remedies could be instituted as a jurisdictional prerequisite to litigation. Such a requirement might make the resolution of some types of grievances even more expensive and time consuming. Where trade-offs seem necessary as the price of more resources for either administrative or judicial remedies, the choice may be close. William Turner, an experienced litigator on behalf of prisoners, supports open access by prisoners to both administrative grievance mechanisms and federal litigation and opposes the imposition of a jurisdictional requirement that a prisoner plead and prove exhaustion of administrative remedies. Yet Turner has concluded that it would be useful to permit brief, court-imposed stays to enable the processing of grievances underlying lawsuits through administrative channels. Turner supports stays of litigation only so long as administrative procedures meet recognized standards and resort to them would be likely to yield meaningful results.⁴⁶

G. Community empowerment

Some organizers of community dispute centers have attempted to decentralize the administration of justice and place tribunals under the control of neighborhood residents. This objective is best exemplified by the publication of the Grassroots Citizen Dispute Resolution Clearinghouse and the operation of the Community Boards program in San Francisco.⁴⁷

In order to be a true neighborhood justice center, run by local residents and separate from the official, governmentally controlled system of justice, a dispute center must be operated strictly by local volunteers or have a source of funding that does not make the center dependent on close ties to the official system for referrals and enforcement. Supporters of this type of tribunal stress that all parties must come to them voluntarily; as was discussed above, this avoidance

⁴³ W. G. Turner, "When Prisoners Sue: A Study of Prisoner Section 1983 Suits in the Federal Courts," 92 Harvard Law Review 610, 634-35 (1979).

⁴⁴ A. Best and A. R. Andreasen, *supra*, n. 11.
⁴⁵ See, e.g., D. McGillis, J. Mullen and L. Studen, *Controlled Confrontation* (1976); J. R. Hepburn, J. H. Laue and M. L. Becker, *supra*, n. 6, at 398-408.

⁴⁶ W. B. Turner, *supra*, n. 43, at 642-46.
⁴⁷ E.g., *The Mooter* (published quarterly); *Citizen Dispute Resolution Organizer's Handbook* (undated); *Community Boards, Annual Report* (1978).

of express or implied coercion, at least to date, probably limits these centers to a relatively small number of cases.

Where neighborhoods have some degree of cohesiveness, and for disputes within the power of the neighborhood itself to resolve, community dispute centers have the potential for administering justice in a way that is responsive to local needs, thereby returning some degree of autonomy to local communities and enriching community life. In communities based on ties other than those of residence, such as those comprised of tightly knit religious or ethnic groups, this form of justice has been traditional and contributes to the community's cohesion.

The only danger in adhering to this objective (other than those connected with the demands of funding agencies) is that its fulfillment probably is restricted at best to a limited category of disputes among community members themselves. It is unrealistic to presume that large institutional disputants will submit to community justice or that most modern disputes can be dealt with in such tribunals. Furthermore, the extent to which sufficiently cohesive communities continue to exist in this country is open to question.⁴⁸ Richard Hofrichter has warned of the dangers of imposing a community model where no real community exists:

The pretension of informal neighborly justice disregards the political nature of conflict and the danger of indirect elite control. Thus, what on the surface appears as a movement toward a more personalized, decentralized and community controlled justice, may actually represent a new form of State bureaucracy, extending the purview of State authority well beyond that of conventional courts.⁴⁹

Writing about the subject in the mid-1960's, Jean and Edgar Cahn stated simply that "some conflicts and grievances are primarily *internal* and can be handled quite well as intra-neighborhood disputes, while other grievances are *external* and require that consumers be equipped with the means necessary to battle interests and groups outside the neighborhood."⁵⁰

H. Self-sufficiency

Cutting across all models of informal dispute resolution is the objective of giving parties a greater role in resolving their own disputes; this will in turn, enhance their capability to use similar mechanisms in the future and to solve their own problems without the need for intervention by outsiders, such as lawyers or police. A tribunal in which the parties themselves play a central role presents the opposite picture from that of the English court, in which the defendant stands at the back of the courtroom while his lawyer argues his case; although disputants may be advised and aided by advocates, the bulk of the responsibility for articulating their views is their own. Thus both procedures and substance need to be kept simple and free from legal mystique.

It is too early to tell whether informal procedures can remain simple and informal over time; there is a constant danger of bureaucratization and the accretion of rules and ceremonies. The cost of simplicity, on the other hand, may be non-application of substantive legal reforms which were intended to reorder the relative rights of landlords and tenants or merchants and consumers. If such laws are unknown (or considered overly legalistic), they cannot (or will not) be applied. It also is unclear whether informality and participation by disputants reduces parties' disparity in capability or sophistication or accentuates it because of their enlarged role. In some cases, intervention by active decision-makers may serve to assist weaker parties and to give inarticulate participants the confidence to tell their own stories.⁵¹

It is clear that, if access to justice is to become more than a slogan, people must be given the resources and the confidence to pursue at least some of their rights on their own. If the lack of capability is the most fundamental barrier to access to existing legal mechanisms, minimization of the need for special expertise, together with the possibility of acquiring whatever skills and self-confidence are necessary for using the system, is crucial.

V. THE SIGNIFICANCE TO LEGAL SERVICES OF NONJUDICIAL FORUMS

A. The role of legal services in alternative forums

As has been discussed, the role of professional advocacy in nonjudicial forums is less significant and less pre-emptive of the parties' own participation than it is

⁴⁸ See W. L. Felstiner, "Avoidance as Dispute Processing," 9 Law and Society Review 695, 704 (1975).

⁴⁹ R. Hofrichter, *supra*, n. 23, at 171-72.
⁵⁰ E. Cahn and J. Cahn, "What Price Justice: The Civilian Perspective Revisited," 4 Notre Dame Lawyer 927, 943 (1966).

⁵¹ See M. Cappelletti and B. Garth, *supra*, n. 41, at v. 1. p. 75.

in court. The reduced importance of legal advocacy does not obviate the need for representation in all cases, however, particularly where there are significant disparities between parties. Because of the reduced complexity of the proceedings, representation frequently can be provided by paralegals. Paralegals can be recruited or trained to deal with particular types of problems, such as intrafamily violence, or particular types of disputants, such as people with physical or mental handicaps.

Most alternative tribunals permit the parties to be represented by attorneys. Some discourage the presence of lawyers, fearing they will cause the process to become excessively adversarial or, with considerable justification, believing it unfair to have one party represented while the other is not. Where attorneys are present, they generally are encouraged to play a less active role than is customary, providing advice but allowing their clients to speak for themselves. Both organizers of non-judicial forums, and lawyers and paralegals who have participated in their proceedings, report success with such a role, at least with advocates who are able to restrain themselves.

Participation of lawyers in collaborative conflict resolution also may have the potential for educating lawyers in the usefulness of non-adversarial methods in resolving some types of disputes. In the area of family law, for example, some non-lawyers have criticized the misapplication of attorneys' traditional adversarial training.

Most attorneys retained by a party to a divorce perceive their role as that of an adversary, advocating the client's statutory rights. The client is often led to concentrate on specific legal goals and to abandon any attempt at assessing the total family situation or individual responsibilities. This procedure does not encourage collaborative conflict resolution. In fact skillful constructive problem solving may be discouraged.⁵²

In many cases, professional representation may not be necessary, but access to legal advice may be. A flexible arrangement through which lawyers could be on call for disputants (or mediators) who have legal questions, without actually being present throughout frequently hours-long mediation sessions, would be an efficient way of meeting this need. For example, a community dispute center might be located next to a neighborhood legal services office, thus facilitating collaboration between the two. It does not seem appropriate for a legal services organization to operate its own dispute center; questions of conflicting interests between representing clients and resolving disputes would be inevitable.

The use of lawyers as mediators raises novel ethical questions. The most troubling is whether, and to what extent, a mediator should advise the parties of the substantive law that would be applied to their dispute in court. Such advice may help to resolve the dispute; it also may preclude any settlement. Suppose, for example, that two neighbors disputing a boundary line are ignorant of the fact that the common-law period necessary to establish adverse possession has expired? Or that the Statute of Frauds requires all agreements for the transfer of real property to be in writing? At present, there is disagreement between those who believe that lawyer-mediators are obligated to inform the parties of the law and those who consider that the injection of such legalisms would subvert the very purpose of non-adversarial dispute resolution. The problem is exacerbated where the parties are unequal in power or sophistication and the substantive law in question, such as a tenants' rights law, is one that was designed to protect the less powerful.

In addition to providing representation or advice, lawyers can help their clients make informed choices among alternative forums by explaining the benefits and drawbacks of each and helping clients to relate them to their own needs and objectives:

The consumer should be assisted in deciding what reasonable primary objectives are. These may vary from maintaining a decent relationship with the other party to the dispute, to settling as quickly as possible, to exposing the dispute to a public forum, to taking advantage of a new consumer protection law.⁵³

B. Potential for redirecting the energies of legal services

Some of the most articulate participants in the legal services movement have acknowledged and encouraged the need for directing some energies away from the processing of individual cases by lawyers who represent the poor. In the course of an informal study of the operations of local legal services offices, for example, Gary Bellow observed several troubling patterns: the domination of

⁵² M. S. Herman, P. C. McKenry, and R. E. Weber, "Mediation and Arbitration Applied to Family Conflict Resolution: The Divorce Settlement," 34 *Arbitration Journal* 17, 18 (1979).

⁵³ A. Budnitz, *supra*, n. 22, at 47.

lawyer-client relationships by the lawyers; a narrow definition of clients' grievances; and a failure to group clients with similar problems in order to make a concerted challenge and to expose patterns of problems. Bellow concluded:

There is too much mechanical communication with clients, too few motions and other aggressive legal actions, too much routine processing of cases, too little enthusiasm and awareness of missed opportunities among legal aid lawyers for anyone concerned with the problem to be sanguine any longer about the character and quality of representation and advice in legal services work. When one learns, from the limited empirical work available on legal aid practice, that legal services attorneys are regularly handling caseloads of one hundred fifty to two hundred ongoing cases, generally seeing their clients only once in the course of an entire representation, and spending an average of twenty minutes per interview on the client's substantive legal problems, it seems a certainty that the cases are being superficially and minimally handled.⁵⁴

Although others have criticized Bellow for overstating the problem, it is clear that the pressure to handle large numbers of clients does serve to limit the quality of legal services that can be provided. Among Bellow's recommended solutions are to restrict caseloads and to adopt a "focused case strategy," geared to affecting institutional practices and conditions.⁵⁵

In a recent article discussing future directions for the legal services movement, Alan Houseman, Director of the Research Institute of the Legal Services Corporation and a long-time legal services attorney, charted several courses through which legal services programs could become more effective in securing equal justice for the poor. All of these courses involve a reordering of priorities away from individual case handling in order to achieve greater leverage on the problems of the poor.

Houseman advocates the adoption of "broad strategies for addressing traditional poverty problems." These would include giving a greater priority to implementing and monitoring change in public institutions—a strategy that will require continued use of class action litigation (the need for which no institutional grievance mechanism ever can obviate completely) and much greater attention to effective remedies. Houseman also recommends that legal services offices work to strengthen the capacity of groups of poor people to effect change, by educating members of the community concerning their legal rights and the available means of enforcing those rights and by training lay persons in advocacy skills, negotiation and, one might add, mediation.⁵⁶

Alternative methods of settling disputes have the potential for significantly transforming the role of legal services in the directions advocated by Bellow and Houseman, although realization of this potential will most probably require years. Enormous unmet need for traditional legal services continues to exist. Alternative forums do not appear to be reducing this need; rather they appear to be attracting disputes that may never otherwise have reached a lawyer. Yet there is a real possibility that the growth of alternatives will release legal services lawyers, and even paralegals, from their preoccupation with individual complaints and enable them to concentrate a greater portion of their energies and resources on solutions to systemic problems.

As an example, intrafamily disputes have occupied the time of legal services programs since their inception. The largest category of cases handled by field programs funded by the Legal Services Corporation continues to be family/domestic: these cases comprise 35 percent of the national average caseload; in some programs, as much as 60 percent of the cases are domestic. (Admittedly, domestic disputes probably do not occupy as large a proportion of attorneys' time as these figures would indicate.) At the same time, a significant proportion of the caseload of virtually every community dispute center, as well as the entire caseload of a few specialized family conciliation programs, is devoted to intrafamily disputes. In addition to providing a nonadversarial forum for dividing jointly held property and arranging for child custody and visits, mediation programs have supplied a new approach to the often intractable problem of spousal abuse—a problem for which there is a dearth of successful solutions. The growth of alternative forums for resolving domestic disputes, coupled with access to legal advice concerning the rights of various parties, could relieve legal services programs of much of the burden of active representation in contested domestic cases.

⁵⁴ G. Bellow, "Turning Solutions into Problems: The Legal Aid Experience," 34 *NLADA Briefcase* 106, 108, 109 (1977).

⁵⁵ *Id.* at 121-22.

⁵⁶ A. W. Houseman, "Legal Services and Equal Justice for the Poor: Some Thoughts on our Future," 35 *NLADA Briefcase* 44, 49, 56-57 (1978).

C. Participation of legal services in developing alternative forums

Many of the alternative forums discussed in this paper (neighborhood justice centers and prison grievance procedures are obvious examples) are being used primarily by poor people. Others, including most of the consumer complaint mechanisms, should be reaching out to include the complaints of the poor but have not done so. Yet the only organized source of lawyers for the poor, the legal services movement, has been uncharacteristically silent about the growth of non-judicial remedies and the role of the poor in their design and operation.

To date, alternative forums have been organized and operated by a variety of groups: local bar associations, law schools, private businesses and private nonprofit corporations. With few exceptions, legal services programs have not participated in organizing such programs or in opposing them; by and large, they have simply ignored them. This lack of attention to a world-wide movement that has the potential for drastically expanding and, in some cases, modifying the remedies available to a large number of people for a wide range of problems, may be attributable to the coincidental proliferation of non-judicial forums with the reorganization and expansion of federally funded legal services programs. Whatever the explanation, a continuation of the laissez-faire position on the part of the legal services community can serve only to exclude poor people and their representatives from vital processes of decision-making concerning the design of programs, their accountability and the allocation of resources.

Members of the legal services community should be taking active positions concerning the development of alternative methods of dispute resolution in their communities. First, both attorneys and paralegals need to inform themselves about the issues involved and to develop their own positions concerning the relative importance of the various objectives discussed in this paper. Second, local offices should raise questions about the range of alternatives available for the resolution of disputes in their communities, as well as about the performance of any experimental programs. It is important that empirical data be collected that will permit evaluation of the extent to which various remedies meet their objectives. At a minimum, legal services offices should follow up on the clients referred by them to alternative mechanisms, in order to determine their satisfaction with the process and its results, and to make their own assessment of the quality of justice being provided.

Third, the legal services movement should press for the establishment of effective grievance mechanisms in institutions such as prisons, schools and hospitals, where none exist or where existing mechanisms are not responsive to clients' complaints. Finally, legal services attorneys must insist on the participation of the client community (and themselves, where their advocacy is needed) in both the design and the operation of local programs and on adherence to those objectives most likely to achieve justice for the poor.

It seems likely that increased federal funding soon will be available to support local experimentation with alternative forms of dispute resolution. It is important that legal services play a role in developing and implementing these experiments. Specifically, legal services attorneys, paralegals and clients should serve as members of boards of directors, or oversight committees, as mediators and case screeners, and as evaluators—in other words, in every capacity in which they can influence policy or practice.

In order to be effective, this sort of participation will require the education of clients concerning the use of alternative remedies and their training in specific skills of negotiation, advocacy and mediation. These activities may result in a functional reorganization of some legal services offices. They will take time and may require skills as yet incompletely developed. Yet they comprise the only way to ensure that the proliferation of remedies is responsive to the concerns of the poor and that the growth of alternatives will hasten the achievement of equal justice.

(d) By LARRY E. RAY, Esq.

INTAKE AND THE NIGHT PROSECUTOR'S PROGRAM—THE YEAR IN REVIEW: 1978

(Larry Ray, Assistant City Attorney, Coordinator)

INTRODUCTION

The Night Prosecutor's Program has completed its sixth year of operation. It is considered one of the most successful and flexible mediation programs in the

nation. Each innovative idea in the criminal justice system which is introduced as a program such as the Night Prosecutor's Program must progress through several stages: Planning, implementation, institutionalization, and re-examination. The year of 1978 was a time to re-examine the goals of the Night Prosecutor's Program and its means of achieving these goals.

Various aspects of the Night Prosecutor's Program was procedurally reorganized as a result of this re-examination. Some functions were redefined. For example to achieve the goal of screening all civilian-filed criminal complaints, the Intake Division was created.

(I) Intake Division

The intake division is in charge of the initial screening of all civilian complaints. Nine law students have been designated as "intake counselors" who are supervised by a coordinator-attorney. The intake division is assisted in this screening process by "a duty prosecutor", a rotating position among the trial prosecutors for one week periods.

(A) Intake procedure

The intake counselors interview the complaints in an attempt to identify (1) the problem and (2) the most appropriate action to be taken. Frequently, the complainant needs information and/or direction; thus, a phone call, interview, or referral is all that is necessary.

From the total number of screening interviews, approximately sixty per cent (60 percent) of the complainants are initially scheduled for a mediation hearing.

If a formal charge is necessary, the intake counselor will assist the complaint in completing a questionnaire. This questionnaire will then be reviewed by "the duty prosecutor." The duty prosecutor will evaluate the complaint and inform the intake counselor whether a charge should be filed. The intake counselor will then contact the complainant and advise him/her of the recommendation.

In crisis situations, the intake counselor may evaluate the complaint and if necessary assist the complainant in filing the charge.

(B) Counselors:

Frequently, the student human relations counselors will assist in the screening process. They will provide short term counseling and referrals to community agencies.

(C) Intake statistics:

Statistics were recorded from the intake cards on a random basis resulting in the following:

Categories	TYPE OF COMPLAINTS	
	[Random sampling]	
	Percentage	Number
Animals.....	1.2	15
Assaults.....	31.0	378
Criminal damaging.....	5.3	65
Disorderly conduct.....	1.2	15
Harassment.....	11.5	140
Interference with custody.....	3.0	37
Landlord/tenant.....	1.1	13
Menacing threats.....	16.6	202
Non-support.....	.3	4
Passing bad checks.....	3.7	45
Failure to deliver title.....	1.2	15
Telephone harassment.....	1.2	15
Theft.....	10.2	124
Trespassing.....	7.3	89
Unauthorized use of motor vehicle and property.....	1.5	18
Felony charges.....	.4	5
Other.....	3.3	39
Total.....	100	1,218

DISPOSITION OF COMPLAINTS

Categories	Number	Percentage
Night prosecutors hearings.....	743	61
Criminal complaints:		
Summons.....	195	
Warrants.....	97	
Total.....	292	24
Dog letters.....	0	0
Referred.....	73	
Detective bureau.....	12	
Attorney.....	17	
Small claims.....	5	
FCCS.....	5	
Clerk of courts.....	10	
Other.....	24	6
Other (cancel hearing, drop charges, information, etc.).....	110	9
Total.....	1,218	100

(II) Night prosecutor's program components

(A) Columbus Health Department

The Columbus Health Department has been an integral component of "the Night Prosecutor's Program" for the past two years. One evening each week a representative from the health department scheduled hearings. The department exhausts their own particular resources to obtain compliance with a health ordinance such as cutting weeds or removing trash. Then, before filing the criminal charge of "failing to comply," a hearing is scheduled.

The results have been impressive: Approximately sixty-five percent (65%) compliance after the hearing is scheduled. Frequently, the respondent does not realize the seriousness of the complaint. This is explained to them during the hearing.

(B) Bureau of Motor Vehicles

The Bureau of Motor Vehicles' (State Department of Highway Safety) participation in the Night Prosecutor's Program begin in March, 1978. After the Bureau exhausts its resources in attempting to obtain compliance in returning the driver's license, license plates, and/or auto registration, the bureau representative schedules a night prosecutor hearing. These hearings involve drivers who have accumulated twelve (12) or more points against their record in a two year period or who have an unsatisfied judgment arising out of an auto accident.

Approximately seventy percent (70 percent) of the hearings result in compliance without the filing of a criminal complaint. Frequently, the respondent needs additional information or does an explanation of the situation during the hearing.

(C) Counseling

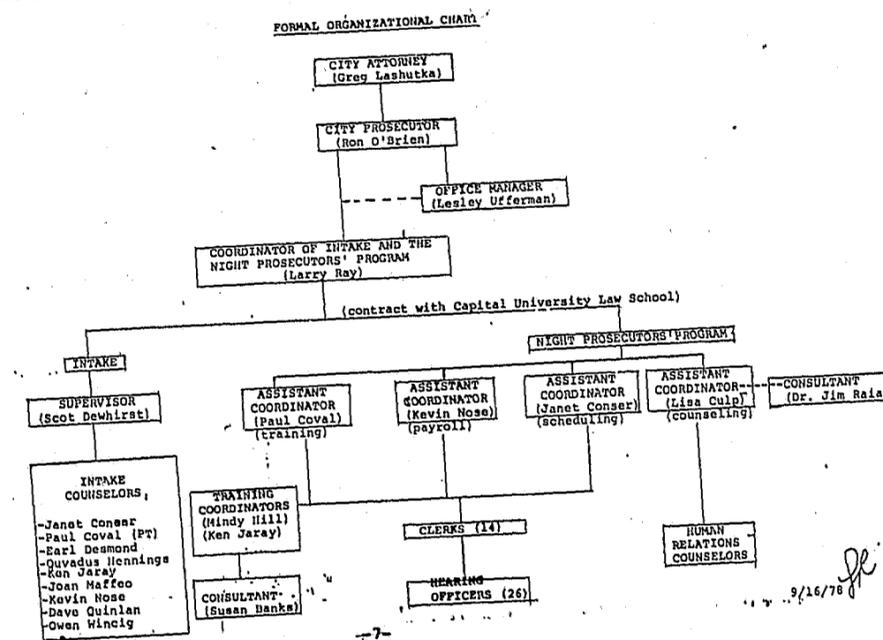
Records indicate that the majority of the cases referred to the Night Prosecutor's Program involve domestic strife, or other forms of human relations dysfunctionality. Recognizing that many "crimes" result from the inability of citizens to resolve their interpersonal disputes by themselves, it is evident that continued counseling would be an effective means to prevent new interpersonal crises. The Human Relations Counseling Program as an integral adjunct to the Night Prosecutor's Program helps meet a critical need; personalization of human needs in the criminal justice system. In order to fill this need, graduate students from the Ohio State University School of Social Work and graduate students from the Lutheran Theological Seminary at Capital University are available in the Prosecutor's Office to provide further counseling. Undergraduate students from Otterbein College and Ohio Wesleyan also participate.

Objectives:

- (1) To alleviate the immediate crisis situation;
- (2) To determine the precipitating factors leading to the crisis situation;
- (3) To foster an understanding of the interpersonal relationships bearing upon the case; and
- (4) To discover additional sources of help within the community in terms of social agencies.

Prior to the beginning of each hearing session, a Human Relations Counselor should review each case that is scheduled for that particular evening to determine beforehand (if possible) which cases obviously entail purely legal problems; for example, writing of bad checks, and which other cases involve problems which appear to indicate domestic disharmony or other human relations difficulties which probably would be assigned to the Human Relations Counselor later.

All cases which are handled internally by the Night Prosecutor's Program must have a follow-up: that is, calling each party to inquire into the status of the situation posthearing. This follow-up is done either by the hearing officer or the Human Relations Counselor.



(D) Bad check program

"The Bad Check Program" is an integral component of Night Prosecutor's Program. More than 9,000 bad check hearings were scheduled during 1978. In most cases, scheduling the hearing should be the first step in processing a bad check complaint. The purpose of the hearing is twofold:

- (1) To settle the dispute which usually means restitution to the complainant, and
- (2) To educate the respondent as to the possible ramifications of writing a check which subsequently "bounces." The hearing officer should inquire;

Why the incident occurred,
How it could have been avoided, and
If there are additional outstanding checks.

The Prosecutor's Office is not a collection agency, but rather the last step before the filing of formal charges. The Bad Check Program provides an opportunity for the complainant to notify the respondent that he/she intends to pursue the complaint through formal channels if necessary.

Hearing time and place: All bad check hearings for merchants or individuals having (3) or more respondents and/or planning to use the program on a regular basis are to be held on Monday and Wednesday evenings from 6:00 P.M. to 8:00 P.M. in Courtroom No. 12 on the first floor of the City Hall Annex, 67 North Front Street.

(III) Program operations

The Columbus Night Prosecutor Program is one of the most successful diversionary programs in terms of its effectiveness in existence. Designated as an Exemplary Project by the National Institute of Law Enforcement and Criminal Justice of L.E.A.A., the goals of this program are: (1) to develop a procedure

which would be able to rapidly and fairly dispense justice to citizens of Franklin County who become involved with minor criminal conduct; (2) to eliminate one of the burdens on the criminal justice system by reducing the number of criminal cases which cause a backlog in the courts; (3) to ease community and interpersonal tensions by helping the parties involved find equitable solutions to their problems without resorting to a criminal remedy; (4) to provide a public agency forum for the working population during hours which would not interfere with their employment; and (5) to remove the stigma of a criminal arrest record arising from minor personal disputes.

(A) *Scheduling mediation hearings*

In operation, the intake counselor (described previously) will schedule the mediation hearing. It is possible that a night prosecutor may schedule the hearing. The hearing is scheduled for a date that does not interfere with employment, approximately one week later. The complainant is informed that he/she may bring "a witness" to the hearing. Notice is mailed to the respondent stating the date of the hearing and captioning the complaint (assault, harassment, dog running at large, landlord-tenant problem, etc). Hearings are scheduled on a docket sheet at one half hour intervals:

6:00-10:00 P.M. during weekdays, 10:00-3:00 P.M. Saturdays, and 2:00-10:00 P.M. Sundays

In a crisis situation, the hearing may be scheduled within twenty-four (24) hours. Notification may be made to the respondent by phone call or the police department may deliver the notices.

(B) *Hearing procedure*

Hearings are conducted in a private room in the office of the prosecutor. Present at the hearing are the hearing officer, the complainant, the respondent, a human relations counselor, attorneys (which is rarely the case) and witnesses (if necessary). The hearing officer conducts the hearing informally, in such a way that each party has an opportunity to tell his/her side of the story without interruption. The hearing officer asks questions and the parties may talk with each other in an attempt to work out a resolution to the underlying problem. The hearing officer, acting in the role of a mediator and conciliator, pays special attention to what the parties are saying in an effort to discover and reveal the basic issues which may in fact have precipitated the dispute which brought the parties into the prosecutor's office.

The most successful resolutions have proved to be those in which the parties themselves suggest a solution and agree about what should be done. Often, the most effective solution is suggested by a witness, who in many cases, is a friend of both parties. If, however, the parties are not capable of or willing to do this, the hearing officer will suggest a solution which is palatable to the parties. An additional responsibility of the hearing officer is to inform the parties of the law and criminal sanctions which may apply. This may include criminal statutes or city ordinances which carry criminal penalties.

Occasionally, the problem involves many parties or even an entire neighborhood. In such cases, the hearing moves to a court room. These hearings usually last one hour or more.

Hearings are free flowing without regard to rules of evidence burdens of proof or other legalities. Emotional outbursts are common with the responsibility of the hearing officer being to insure that they do not get out of control. Experience has shown that without the opportunity for the controlled display of emotionalism, shouting and other forms of confrontation, the basic truth often does not come to the surface.

Hearings are scheduled for thirty minutes; in many cases, however, additional time was needed to try and sort out the basic problems underlying the legal problem.

(C) *Field hearing officer*

The Field Hearing Officer is a position designed primarily to serve the needs of those individuals who have a need for the Night Prosecutor's Program, but are unable to use the services due to lack of transportation, age or disability. This hearing officer also handles those cases where a "view of the site" is critical to the decision-making process (that is, decision making by the parties involved with the aid of a third party mediator—the hearing officer).

Usually, the hearings are held in one party's home. Although this situation creates a more personal relationship with the hearing officer, it may be viewed as a violation of neutrality by the other party. In that case, negotiations must be conducted in separate locations, with possibly the hearing officer traveling to and fro.

The hearings for the Field Hearing Officer are scheduled for the convenience of the parties; therefore, the hearings are not necessarily held at night.

(IV) *Crisis intervention training*

A Crisis Intervention Conflict Management Training Program has been tailored for use with the Night Prosecutor Program. This is a twelve (12) hour training program for clerks, hearing officers, and intake counselors, on how to handle conflict situations, how to run a hearing, and how to take a mediational approach rather than an adversarial one to the hearing process. The ability of hearing officers to effectively handle their hearing dockets is a direct result of the training they receive in this program. The Crisis Intervention Training Program not only helps to alleviate the time burden on hearing officers but also offers them guidelines on how to effectively structure the informal hearing in a fair, impartial way that will result in a fair and just hearing.

In addition to these twelve hours, all the law students are required to attend four to six hours of "in-house" training which focuses on procedure of intake and mediation.

This training is facilitated by a counselor/psychologist from the local mental health center. The facilitator works with program student administrators in the planning and the implementation stage. This facilitator has proven invaluable to the program, not only in facilitating the crisis training using his/her particular expertise, but as a consultant. The facilitator is not integrally involved in the daily operations of the program and usually provides an objective view of program concerns.

After the weekend of crisis training, the facilitator returns to the program and does twenty (20) hours of follow-up training. The facilitator observes and evaluates the trainees' mediation skills and leads group process at the evening's end.

(V) *Program statistics*

Statistics for the year 1978 are as follows:

	Total scheduled	Total held	Total settled	Summons issued	Warrants issued
Interpersonal hearings.....	7,422	4,548	4,213	318	83
Bad check hearings.....	8,342	4,197	5,654	1,184	219
Columbus health department.....	547	313	406	81	0
Bureau of Motor Vehicles ¹	920	644	644	152	0
Total.....	17,231	9,702	10,917	1,753	302

¹ The Bureau of Motor Vehicles hearing component began March of 1978.

Note: A total of 17,231 hearings were scheduled. Hearings were held in 56 percent of the cases. Of the interpersonal hearings held, 93 percent were settled. Of the total bad check hearings scheduled, 68 percent were resolved.

(VI) *Future considerations*

The new facilities for the Night Prosecutor Program in the Municipal Court Building should greatly enhance the effectiveness of the program, as separate facilities on a permanent basis should increase the level of public acceptance. In addition the expanded centralized quarters will provide for a smoother operation of business in both keeping of records and the screening of complaints.

The Domestic Violence Bill (amend. Subst. H.B. 835) recently passed by the State Legislature presents many new factors to consider in the intake procedure, as well as in the Night Prosecutor hearings. Since domestic violence problems are quite numerous, the evaluation of new procedures, which the Bill allows, should contribute to a more effective resolution of domestic violence situations.

(A) *Intake-refining intake procedure*

The first contact an individual has with the Prosecutors office is when he/she speaks with an intake counselor. Continued examination of all facets of solving an individual's problem is made with emphasis on finding an effective out-of-

court solution. A more complete utilization of community resources which can provide alternative remedies is contemplated.

Availability of record checks would increase the intake counselors effectiveness in determining what course of action to follow. Since the emphasis is on solving problems outside the formal court process, the individual's previous contact with the legal system could indicate whether an out-of-court settlement is possible or even desirable.

Closer and more direct contact with police officers involved in an incident would contribute to the intake counselor's analysis of the complaint. Since police have first hand knowledge of the incident, then input into the intake process could prove to be invaluable.

Increased use of human relations counselors (HRC) in the intake procedure is of extreme importance. Many of the problems seen in the office are ones in which an HRC can assist and provide important counseling and/or necessary referrals. The addition of HRC's between the hours of 8:30 a.m.-6:00 p.m. is desirable and necessary for the continued growth of the program.

(B) Night prosecutor program

The refinement of the process of notifying parties of a Night Prosecutor's hearing is contemplated. Many complaints demand immediate attention and resolution. Police cruiser delivery of notices of emergency hearings can be done rapidly and is being done now on a limited basis. Plans for expansion and refinement of cruiser delivery of notices is being studied. In addition, telephone notice of hearings would increase the program's acceptability to the public. A phone call to a respondent would be less threatening than a notice received in the mail, and it would allow the party to ask questions about the complaint and the process in which he will be participating.

Increased follow-up of hearings to ensure that agreements made by the parties are being fulfilled. Extreme time pressures and heavy work loads of hearing officers have prevented effective and structured follow-up in the past. Procedures are being developed that will contribute to a quicker and more intensive follow-up.

The goal of the Night Prosecutor Program is to have human relations counselors present in 60% of all hearings. Their skills are of extreme importance in handling the numerous non-legal problems that are encountered in the hearing process.

Continual training of hearing officers and human relation counselors is a necessary component. New procedures and services are always arising. Training is a vital component of the program that will insure a coordinated and informed staff prepared to handle the public in an intelligent and effective way.

END