The Use of Alternative Dispute Resolution in Civil Litigation in Kansas

Art Thompson

The use of formal dispute resolution such as mediation, conciliation, settlement conferences and a growing list of other similar methods continues to grow in the courts, in government, and in the private and nonprofit sectors. This paper is a very cursory overview of the genesis of this development in Kansas and a quick view of its potential future. The Kansas Dispute Resolution Act dictates my office's involvement in assisting the courts, the state government, or programs ordered by statute.[1] Those are the areas addressed in this paper.

It is important for me to begin with an overview of why negotiation techniques are different from the adversarial system. The key to understanding the underlining goal of mediation (and other forms of dispute resolution which use mediation techniques) is to understand that this process encourages the parties to consider the overall interests of all parties and to limit consideration of their positions. "Interests motivate people; they are the silent movers behind the hubbub of positions. Your position is something you have decided upon. Your interests are what caused you to decide," say Roger Fisher and William Ury of the Harvard School of Negotiation, in their book, *Getting to Yes*.[2]

The history of negotiating interests goes to the very heart of our government's development.

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When we consider the turmoil of disputes which confronted our newly formed country just after the revolutionary war and the wide variety of individuals involved in those disputes, it is significant that violence did not break out like it did with most of the other revolutions of that period. Joseph J. Ellis in his Pulitzer Prize-winning book, *The Founding Brothers*, gives several reasons for what he sees as our success.[3] He indicates that the diversity of personalities and ideologies was important but also that the people involved all knew each other as individuals not just as representatives of a particular position. "Politics, even at the highest level in the early republic, remained a face-to-face affair in which the contestants, even those who were locked in political battles to the death, were forced to negotiate the emotional affinities and shared intimacies produced by frequent personal interaction," he says.[4]

Fisher and Ury talk about separating the people from the problem.[5] At a Council of State Governments Association speech in 2000, Fisher told a story about being asked to settle a dispute that had caused a recent war between Peru and Ecuador. The ultimate settlement came after the two presidents were encouraged to meet face-to-face and to discuss the particular interests of each. After that a settlement was easier to negotiate and both countries were satisfied with the settlement, they declared victory and stopped sending young boys off to be shot at. Fisher indicated that "principled negotiation" can take place between countries or between divorcing parents. In his book, he suggests that you "look for mutual gains whenever possible, and that where your interests conflict, you should insist that the results be based on some fair standards independent of the will of either side."[6]

I. DISPUTES IN KANSAS COURTS

A total of 455,747 new cases were filed in the Kansas courts during fiscal year 2001.[7] The caseloads of our courts are climbing at a rate higher than increases in the resources to hear those cases. In her State of the Judiciary address to the Legislature this year (2002), Chief Justice McFarland referred to the strain on court resources by saying:

> By way of illustration, between fiscal years 1987 and 1999, there has been a 54.6% increase in case filings, excluding traffic cases. During that same period of time, the number of judges was increased by 5.5% and nonjudicial employee numbers was [sic] increased 9%. These figures do not show the increase in the workload arising from changes in federal and state law, which adds to the complexity of processing and hearing cases. Additional hearings are required, more notices need to be sent, more papers need to be filed, and the list goes on. Many types of cases, particularly domestic, juvenile, and probate, are still receiving

reviews and hearings many years after they are filed.[8]

There is some evidence that there may be as many as four post divorce motions for every divorce.[9] Generally these involve disputes over some aspect of jointly raising children. There were 11,143 divorces granted in 2001.[10]

The vast majority of cases filed in Kansas courts settle before a judge or jury has to make a decision in the case. There were 21,361 terminations of the regular civil caseload for the state in fiscal year 2001.[11] Of these, 1,575 were terminated by "trials to court" and 218 by "trials to jury."[12] This equals 1,793 out of the 21,361 that went to trial, or 12%. There were 32,888 domestic cases terminated and 5,529 that went to court, or 17%.[13] This does not count the post divorce motions for each divorce (custody or visitation disputes). There were 122,402 Limited Actions cases reaching termination and of those, 1,566 went to trial, or 2%.[14] The total number of general civil cases, Limited Actions cases, and domestic relations cases filed equals 174,746, and only 8,888 went to trial, or 5%.[15]

The parties and their counsel appear to find a way to negotiate the dispute and reach a settlement after the initial filing. Many of these cases will have a number of pretrial motions and hearings and take a great deal of court time prior to settling. In many of the cases headed for a jury trial, the jury may have been selected, and jurors may have taken time off to serve before the case settles just prior to trial. The current pressures on our court system are encouraging efforts to find ways to foster earlier settlement. At the same time, there is growing awareness that some types of disputes are more appropriately resolved through the use of less adversarial resolution methods. Many state and local courts are encouraging earlier settlements using dispute resolution methods that are specific to each case in the way they encourage the settlement.

A number of Kansas courts have been experimenting with or expanding their use of dispute resolution methods, primarily mediation. The Tenth Judicial District began experimenting with domestic mediation more than twenty-two years ago. There is a growing range of negotiation options that are lumped together in what is called the dispute resolution process. Litigation is just the last socially acceptable and most formal option in the dispute resolution continuum.

II. WHAT IS DISPUTE RESOLUTION?

The Kansas Legislature has defined dispute resolution as: " a process by which the parties involved in a dispute voluntarily agree or are referred or ordered by a court to enter into discussion and negotiation with the assistance of a neutral person . . . ."[16]

My first involvement with a formal dispute resolution process was as an employee with the Kansas Bar Association (KBA). I was assigned in 1984 to the fledgling Alternative Dispute Resolution Committee by incoming KBA President,

Darrell Kellogg. The KBA was an early supporter of the use of mediation because a number of its family law practitioners believed that it was a better way of keeping children out of court during custody and visitation battles. The family law practitioners involved in encouraging mediation did so based upon the belief that the parties involved would have to negotiate a number of issues over what could be many years (potentially even when they were grandparents). The attorneys saw a need for their clients to learn how to negotiate and to keep the best interests of the children in view over their feelings for each other (their positions). The KBA began sponsoring domestic mediation training seminars for both lawyers and non-lawyers in 1991 and civil mediation seminars for lawyers several years later.[17] With this beginning, the use of mediation has continued to evolve into other areas of law and into other variations of dispute resolution. Other forms of dispute resolution like arbitration and special masters had been used prior to mediation, but not in the same volume of cases.

A. Use is Expanding

There was a 36% increase in dispute resolution cases reported in 2001, according to court-approved mediators.[18] This is a larger than normal yearly increase, but the use of dispute resolution in the courts has been expanding each year. In addition, much of the ADR that takes place is never reported. In 2000, the Kansas Legislature passed a law allowing judges to use licensed attorneys to provide dispute resolution services, and they are not required to take any training, go through the approval process or report the number of cases they handle. There is anecdotal evidence that their use of dispute resolution is expanding. Also, parties who directly contact a mediator can choose people who do not report their statistics. Dispute resolution methods, other than mediation, are also used in a number of municipal and state courts and with state agencies. Unless they are conducted by an approved mediator, these do not have to be reported.

NUMBER OF DISPUTE RESOLUTIONS REPORTED BY KANSAS MEDIATORS IN 2001

	MEDIATION	OTHER METHODS	TOTAL
Custody/Visitation	2975	789	3764
Domestic (Full)	248	122	370
Agricultural	59	17	76
Personal Injury	218	11	229
Limited	3	0	3
Victim/Offender	96	26	122

Community	83	8	91
Domestic	68	20	88
Civil	126	23	149
Special Education	46	30	76
Environmental	3	0	3
Consumer	113	4	117
Church	22	16	38
Public Policy	32	2	34
Family	53	113	166
Employment	582	30	612
Malpractice	20	2	22
Small Claims	770	3	773
Parent/Adolescent	73	3	76
Probate	2	3	5
Other	306	190	496
Total	**5898**	**1524**	**7422**

(Statistics remitted to the Kansas Office of Judicial Administration with the 2002 Approved Mediator renewal forms, as of May 9, 2002).

B. Approval Ratings

The use of dispute resolution has had a high approval rating among the majority of Kansas judges and attorneys. There are two fairly recent Kansas studies of this approval rating. The Kansas Citizens Justice Initiative was authorized by order of the Supreme Court of Kansas on June 3, 1997 and completed its report in 1999. Members of the Commission were appointed by the Chief Justice, Governor, and leaders of the Judiciary Committees of the Kansas Legislature. One of the surveys they conducted was of a random sample of 435 attorneys and all Kansas judges (191). In their *Recommendation 18: Alternative Dispute Resolution*, they reported that:

> [Sixty-eight percent] of the respondents agreed that mediation should be used more frequently; 57% of the respondents agreed that domestic case management should be used more frequently; and 63% of the respondents believed dispute resolution counseling should be used more frequently. Respondents believed that they were adequately aware of available methods of alternative dispute resolution.[19]

The Kansas Supreme Court's Dispute Resolution Advisory Council, with the approval of the Office of Judicial Administration, also funded a survey of 139 judges, 236 randomly-sampled lawyers, and 171 approved mediators. The resulting report,

The Status of Alternative Dispute Resolution in Kansas, 1998-1999, showed a similarly high level of approval for the use of dispute resolution in Kansas courts.[20] Several of the key findings were:

- There was strong local court and bar acceptance of the process.
- Mediation is used in almost all courts and in all judicial districts.
- Mediation is the most accepted form of dispute resolution. 75% had a high opinion of mediation versus 26% for arbitration.
- Domestic mediation is good for children—respondents felt that there was more willingness to pay child support, parents learned to talk with each other, and mediation reduced the number of issues in disputes.
- ADR saves court time. The majority of judges indicated that they save from one to eight hours on mediated child custody and visitation cases. Some judges reported a 50% reduction in their domestic docket after mandatory mediation programs were implemented.
- The use of dispute resolution techniques does not infringe on the practice of law. (77% of attorneys versus 13% of attorneys.)
- Judges commented that they would like to see mediation centers to recruit, train, evaluate, and follow-up on their referrals.
- There is a perceived need for services for low income. Some courts have services; others don't.
- Judges want to know that the mediators they refer people to are qualified.

At the time of this Kansas survey, the majority of the referred dispute resolution cases were domestic in nature. There were similar results from the U.S. District Court for the Western District of Missouri for general civil cases.[21] Their results showed a strong statistical and practical support for the proposition that ADR saves time and money. The study indicated that ADR brought case terminations at a 28% faster rate than traditional litigation—often without the need for discovery. They reported that the program saved parties more than $16 million from May 1994 through December 1996.

In addition, there are a number of national studies that show high levels of satisfaction among users of various forms and in particular mediation. One of the better comprehensive reviews of this data was conducted when the Massachusetts Legislature requested that the Massachusetts trial courts provide information about the value of alternative dispute resolution to the courts.[22] The trial courts reviewed all of the research data available at the time of the study (1998) and conducted an evaluation of six of their state courts' programs. The evaluations showed two main benefits of ADR for the Massachusetts trial courts: reduction of trial dockets and increase time savings for the court. They concluded their review of both the list of studies from across the nation and from their in-state evaluations by listing their key findings that

ADR:

- produces high user satisfaction,
- improves pace of litigation (especially in domestic litigation),
- produces high settlement rates,
- produces more stable agreements over time,
- may reduce court workload, and
- may reduce litigant costs.[23]

It is important to note that there are variations in the success rates among the various programs they studied. Some programs did not fully meet the expectations of their sponsors and some exceeded the expectations.[24]

III. HISTORY OF THE KANSAS DISPUTE RESOLUTION ACT

In 1988, with the encouragement of the Kansas Bar Association, the Supreme Court appointed a Dispute Resolution Committee chaired by Judge Herbert Walton. The committee's task was to study the various methods of dispute resolution, review national examples, survey the needs of Kansas citizens, and make recommendations to the Kansas Supreme Court for implementing new methods of dispute resolution that would be compatible with the current court system.[25] After considering their report, the Supreme Court established a second committee chaired by Appeals Court Judge G. Joseph Pierron in 1992 to expand on the recommendations of the first committee.[26]

Also in the late 1980s, the Heartland Mediators Association was formed and began to actively encourage legislation establishing minimum qualifications for mediators. Its members include a wide variety of backgrounds including lawyers, social workers, court service officers, business people and retired people. Members of this organization have been active in encouraging mediation favorable legislation from the Kansas Legislature. Many of the recommendations made by these efforts can be found in the Dispute Resolution Act, passed by the Kansas Legislature in 1994, and the Supreme Court rules that have been promulgated on the subject.[27]

Representative Rochelle Chronister was one of the main advocates of the Kansas Dispute Resolution Act. She took mediation training in Kansas and visited Nebraska, which had passed a Dispute Resolution Act in 1991.[28] In large part because of her, the Kansas Dispute Resolution Act was modeled on the Nebraska Act.[29] At the time it was passed in 1994, it was almost a verbatim replica of the Nebraska Act. Like the Nebraska Act, the Kansas Act mandated the appointment of a director of dispute resolution, appointment of an advisory council on dispute resolution, formulation and implementation of standards and ethics for mediators, creation of a dispute resolution fund, and the establishment of an approval system for "centers."[30]

A main difference between the Nebraska and Kansas Acts was that the

Nebraska Legislature allocated funds not only to fund the Dispute Resolution Office but also funded the development of the dispute resolution centers.[31] Six regional mediation centers in Nebraska were subsequently developed and continue to expand their provisions of services. The Kansas Legislature only authorized funding for the coordinator and the advisory council.[32]

Another difference is that the six Nebraska mediation centers rely to a large degree on volunteers. The volunteers can earn a small fee (at last report $12 an hour[33]) or a progressive fee for more difficult mediations and group facilitations. The six Nebraska centers use a sliding scale system to pay for services.[34] Most of the mediations conducted in Kansas courts are conducted either by private approved mediators paid for by fees charged to the parties, or by court services officers who are approved mediators. There are a limited number of volunteers providing mediation services with two small claims projects and eight victim/offender mediation projects. The Kansas Act encourages the development of approved programs but gives very little incentive to become one. There are a variety of approved programs but they are generally very specialized and provide very select service. [35]

The Kansas Supreme Court's establishment of a Dispute Resolution Council was another requirement of the Dispute Resolution Act.[36] The first Council was appointed in 1995 with Judge Larry Solomon as the chair. He served six years. The current chair is Judge Robert Fairchild. This Council advises the court and Legislature on issues related to dispute resolution. They have promoted the establishment of specific court rules and legislation on the subject. The Council is appointed by the Chief Justice with consideration to ensure that a wide range of backgrounds and geographic areas are represented. The Legislature dictated that only six of the nineteen members may be people with law licenses.[37]

Another aspect of the Nebraska system and similar systems in other parts of the country is that within their centers there is someone to pair the case to the most appropriate process and the best neutral mediator for the particular type of dispute.[38] There is evidence that this type of system may have advantages. The American Judicature Society conducted a study of Court-Connected Mediation Programs in Northern Illinois.[39] Their findings indicated that, although the mediation programs in the 17th and 18th Judicial Districts of Illinois are relatively young, those attorneys and parties who have had their cases settled through mediation have been quite satisfied with the programs. They have attributed much of this success to the personal qualities and styles of the mediators. The report states: "Our study of the mediation programs in these courts indicates that it is the quality of the mediation session and the individuals involved, not the characteristics of the case referred to mediation, which have the greatest effect upon a case's propensity to be settled."[40] In other words, it is important which neutral handles a particular type of case. The Eighteenth Judicial

District in Wichita has used an employee to provide this same type of matching in domestic cases.

The "multi-door courthouse"—a concept originated by the Harvard Dispute Resolution Program founder Frank E. A. Sander[41]—offers a variety of resolution options (including litigation) to people who take their disputes to court. This process is designed to provide a more comprehensive approach to ADR than individual ADR programs can provide. For example, in the Middlesex County Superior Court in Cambridge, Massachusetts, cases filed are selected for "multi-door" processing, and the disputants are offered the options of arbitration, mediation, case evaluation, or litigation. [42] The difference between individual court-annexed dispute resolution programs and multi-door courthouses can be very different. "The multi-door courthouse model provides a coordinated approach to dispute resolution with intake and referral operating under one centralized program, rather than independently. This model allows for substantial flexibility of intake and referral procedures to meet the needs and resources of each jurisdiction," says one commentator.[43] The major constraint is the cost of such systems.

A. Kansas Supreme Court Rules

Kansas' Dispute Resolution Act says, "The supreme court, upon recommendation by the director in consultation with the council, shall adopt rules for the administration of the dispute resolution act and to prescribe ethics requirements and standards for approved programs and individuals."[44] Kansas Supreme Court Rule 901 was the first such rule, taking effect May 6, 1987.[45] This rule addresses when an attorney serves as a mediator. This rule indicates that attorneys who mediate family disputes must also comply with the more detailed Standards of Practice for Lawyer Mediators in Family Disputes. The Judicial Council added this section to clarify the interrelationship between the mediation rule and these Kansas Standards.[46]

The Kansas Supreme Court in 1996 approved Supreme Court Rule 902, which established minimum guidelines for becoming an approved mediator.[47] The genesis of Rule 902 was from the work of the early Supreme Court ADR Committees, the Heartland Mediators Association, the KBA ADR Section and finally from the Dispute Resolution Advisory Council. There was a general consensus to try to reach a middle ground in the many examples from other states.[48]

Rule 903 was promulgated February 16, 1996, and is intended to perform three major functions: 1) to serve as a guide for the conduct of mediators, 2) to inform mediating parties, and 3) to promote public confidence in mediation as a process for resolving disputes.[49] The standards set forth in Rule 903 draw on existing codes of conduct for mediators and take into account issues and problems that have surfaced in

mediation practice. The standards were developed to serve an educational function and provide assistance to individuals, organizations, and institutions involved in mediation. Rule 903 was developed primarily from the work of a national committee made up of representatives of the American Arbitration Association, the American Bar Association and the Society of Professionals in Dispute Resolution (now the Association for Dispute Resolution). The committee's efforts were intended to apply to all types of mediation. Slight modifications to the national committee guidelines were made by the Dispute Resolution Advisory Council in order to comport with current Kansas law and practice.

Rule 904 was also promulgated on February 16, 1996, and it provides the rules on how much continuing mediation education is required each year. The current number of hours is six annually. The Dispute Resolution Advisory Council has recommended that at least half the six hours should be in specific mediation skill training and the remainder can be in related areas. They have also recommended that three or more approved mediators can meet and discuss cases and obtain credit.

The Kansas Supreme Court's Dispute Resolution Advisory Council is currently working on a list of the most commonly used dispute resolution methods in Kansas and the statutes, court rules or other enabling processes. At this date, the list includes: mediation, settlement conferences, neutral evaluation, conciliation, summary jury trial, mini-trial, arbitration, special master, case valuation, settlement week, domestic case management, dispute resolution counseling/limited case management, family group conferencing, peer mediation, facilitation, and peer review. The primary techniques used in most, if not all, of these are mediation methods.

As the expansion of the use of dispute resolution continues, more questions arise as to what form of dispute resolution is best for a particular case. Some "neutrals" are very passive and encourage the parties to develop the settlement, others may provide a legal evaluation of the case and others may strongly encourage a particular settlement. All of this may be conducted as they act as an approved mediator.

B. What Makes a Good Neutral

The difficult question raised during the promulgation of the mediation court rules was what makes a good mediator. The primary components of many state rules are the educational and experiential backgrounds of the individual, the initial training, a practicum and annual continuing education. The 1994 Legislature in its deliberation of the Dispute Resolution Act encouraged following the Nebraska model which discouraged establishing educational and experiential or professional qualifications. The example was that anyone could be approved if they went through the educational

and practical training. In 2000, the Legislature changed the orientation of the Dispute Resolution Act to indicate that licensed attorneys did not have to take any training to be approved to conduct mediations.

The early discussion of the Dispute Resolution Advisory Council was that training was the key component to creating good mediators. Through numerous discussions of this issue, the consensus of the most recent Council members has changed to believe that the practicum experience is at least as important as training, and may be more important.

The primary official method of referring parties to mediators in Kansas is to give them a list from which they can pick. Several districts use court services officers to conduct all the mediations/ conciliations or at least those for the lower income parties. In the larger districts, court staff or judges may take into consideration the characteristics of a case in deciding to whom it gets assigned. Some parties are given a list of approved mediators from whom to choose a provider. As the dispute resolution process has grown in courts, many lawyers will now work with their clients to find the best provider to settle their dispute.

The American Judicature Society study mentioned earlier indicated that case age was negatively associated with settlement during mediation. Older cases are less likely to be settled in mediation than are younger cases. Analysis of case age and case types, however, indicated that these two variables are largely independent of each other – that is, older cases are not predominantly of a different type than are younger cases. The proxies they had available for case complexity showed no relationship to settlement, indicating that case age is by itself a good indicator of a case's likelihood to settle.

C. Dispute Resolution in the Courts

Some states have statewide ADR systems (Florida, Texas, Colorado and California). Kansas has developed its court-based dispute resolution systems on a district by district basis, and sometimes county by county basis. The Legislature and the Supreme Court, through its rules, have given some common direction. But neither mandates ADR use in the courts. This has allowed for a variation in the types and varieties of system. I would suggest that it allows for innovations based on local conditions. Local control is also necessary when there are no central funds to pay for services or extra staff.

Almost all the judicial districts in Kansas use some form of dispute resolution.[50] The Tenth Judicial District, Johnson County, started using mediation to resolve child custody and visitation (parenting time) cases around 1980.[51] They started and continue to use in-house mediators to handle most of the mediations. Gary Kretchmer was their

first member staff trained as a mediator and continues to provide mediations. Not long after this the Thirteenth Judicial District started using a private mediator, Jeanne Erikson, to handle their cases and in 1982, the Seventh Judicial District also began using a private mediator, Dr. Nancy Hughes with the University of Kansas School of Psychological Counseling. Since that time the majority of the judicial districts have implemented some type of mediation program for domestic cases. The majority use private mediators to provide the service. The KBA contracted with Mr. Kretchmer, Ms. Erikson and Dr. Hughes to provide the first domestic mediator training in Kansas.

The yearly reports of approved mediators show that district courts are expanding their use of dispute resolution methods to settle general civil cases. Several municipal courts have operated small claims mediation projects for more than ten years. Hundreds of these cases are resolved each year by volunteer mediators. The programs struggle each year to continue because of lack of funds to pay for administering the programs. There are also at least eight victim/offender mediation projects operating across the state. This process typically develops a diversion plan for a first time juvenile offender by having them negotiate with the use of a mediator with the victim of their crime. Frequently a victim/offender program is a cooperative effort of a nonprofit organization and the local court.

In my discussions with district court judges, they indicate that they are using settlement conferences more often in civil, non-domestic, cases. This is a process where they use another judge, who will not handle the case, to try to negotiate a settlement. The 18th Judicial District (Sedgwick County) is currently experimenting with two new forms of dispute resolution. The first is the permanency mediation pilot project. This is a facilitation process used with select cases in which it is likely a child will be taken out of their home or the child has just been taken out of the home because of an abuse or neglect filing. The facilitator/mediator meets in a group setting with any individual who is concerned about the child and attempts to find a place to put the child which is acceptable to the group. A similar test in Shawnee county had 90 out of 100 children placed with an extended family member or a significant adult in their life. The second project is just starting in their Probate Court and will experiment with using mediation in certain probate cases.

A growing number of state courts are using "case managers" to handle high conflict domestic. It's a method where a trained neutral assist the parties by providing a procedure, other than mediation, which facilitates negotiation of a parenting plan.[52]

A number of other states are also experimenting with the same concept and generally call the case manager a "parenting coordinator".[53] In September 2000, the American Bar Association, Family Law Section, sponsored a conference on high conflict custody cases. One of the recommendations was that "[p]arent monitors, coordinators, or masters who are professionals trained to manage chronic, recurring

disputes, such as visitation conflicts, and to help parents adhere to court orders" be provided through the courts.[54] The parties in these high conflict domestic cases can take up a lot of a court's time with post-divorce motions simply filed for the parties to argue with each other.

Kansas has not kept a statewide review of data for case success rates. The Office of Judicial Administration through the Dispute Resolution Advisory Council has used grant funds to evaluate a limited sample of mediation data. However, there is a growing body of data coming from other states. The Georgia Office of Dispute Resolution received a grant from the State Justice Institute in 2000 to review participant satisfaction. It reviewed 313 case outcomes and found that general civil cases were most likely to settle completely and partial settlements were more common in divorce cases.[55] It found that overall 54% of cases reached a full or partial agreement.[56]

Virginia has a statewide mediation system in which the court-paid contract mediators are required to obtain evaluations from the participants. Out of the 19,376 mediation evaluations they had collected as of July 30, 2002, they obtained an agreement on all issues in 61.3% of the cases, some issues in 22.1%, and none in 13.6%. The evaluations showed the participants found the mediation process to be very helpful in 72.1% of the cases, somewhat helpful in 20.9%, and not at all helpful in 4.7%. More than 93% would recommend the process to others.[57]

A State Justice Institute survey of domestic cases diverted to ADR in thirteen courts in Maine found that 41% of the cases reached a full settlement, 29% settled some issues, 15% did not settle, and 14% were scheduled for another mediation session. Fewer than 1% of the cases had been rejected for mediation because of domestic violence issues.[58]

In the same study, pre-and post-decree domestic cases in six courts in Ohio were reviewed. One or both parties reported violence or abuse in 43% of cases. A public agency had been involved in 65% of the cases. Fifty-two percent of the cases reached a full settlement, 18% settled some issues and 30% did not settle. The parties indicated that some of the mediators' characteristics that had the largest effect on favorable assessments were more hours of formal mediation training, more hours of continuing mediation education, and spending 11% to 50% of one's work time as a mediator.[59] A recently released comprehensive survey of the court-based domestic mediation in North Carolina had similar results.[60]

The Judicial Council of California studied how ADR affected the civil cases in the Los Angeles, San Diego and El Dorado Superior Courts as well as several municipals courts.[61] They found significant savings to the court system in reducing motions, hearings, conferences, and trials.[62] Besides reporting a high level of satisfaction from the parties and attorneys involved, they also found that the program

was associated with a reduction in the trial judgment rate, no change in median time to disposition, and possibly a reduction in relitigation compared to trial judgments. The data they developed also demonstrated that mediated parenting agreements are much more detailed than either non-mediated consent orders, or orders resulting from trials.[63]

Illinois has a provision for ADR in major civil litigation, generally cases of value greater than $30,000.[64] Two-thirds of the cases are personal injury cases, and court fees fund the program. Since 1993, when the first court implemented a mediation program, 1,748 cases have gone through the system. Of these 60% reached an agreement, 3% reached a partial agreement and 37% reached no agreement.[65] The Circuit Court of Cook County has established a probate court mediation program within their general civil case mediation program, and it settles 70% of the cases referred to the program.[66]

The Kansas Office of Judicial Administration continues to use grant funds to experiment with various projects to evaluate the effects of dispute resolution in the courts. In February of 2002, mediation trainers associated with Bethel College and Fort Hays State University conducted a mediation training aimed at bilingual court interpreters with the goal of having them available to courts to mediate disputes involving non-English speaking parties. They have also experimented with circuit riding mediators to provide mediators in under-served rural areas, group conferencing and sliding scale mediation systems for low-income custody disputes, and a system to work with low-income elderly in housing disputes. The Kansas Supreme Court also administers the Access to Justice Fund, which provides some funds to provide mediation services for pro se litigants.

IV. INFORMAL NEGOTIATIONS

What influence do mandatory or strongly encouraged dispute resolution programs have on early settlement of civil cases? What is the overall impact on the courts? Do these programs encourage attorneys to negotiate settlements at an earlier stage of the process?

As discussed earlier, many cases settle and don’t go to court. They settle just prior to the trial day or after some hearings have been held. The goal for the attorneys is to collect as much information as possible; the longer you take to negotiate, the more time it allows you to collect that information. Many cases are reported to settle after a number of pre-trial motions have been heard, and some of those settle as the parties stand in front of the courtroom door. No data has been collected on the number of motions held in the average general civil case. I assume cases that settle early will save courts the administrative costs required to get the case ready for a trial before a judge or, with greater expense, before a jury. In a study comparing court-based

mediation programs with courts without programs in four states, the evaluators found in all four jurisdictions (Florida, Nevada, New Mexico and North Carolina) that a substantial proportion of cases referred to mediation settled after referral but prior to mediation, even after unsuccessful mediation.[67]

So what tools do judges have to encourage the early settlement of cases? District and magistrate judges are beginning to use a variety of alternative dispute resolution methods to encourage early settlement. When the Kansas Dispute Resolution Act was passed in 1994, the primary dispute resolution method used in state court was mediation. There was a limited amount of arbitration and conciliation used. Since that time, a wider variety of methods have been developed. Local conditions seem to influence what is used. We now see use in courts of neutral evaluations (sometimes called evaluative mediation), judicial settlement conferences, domestic case management, limited case management, dispute resolution counseling, victim/offender mediation (restorative justice), and recently, conferencing circles.

I have sat in on or listened to descriptions of a number of both domestic and general civil mediations. The domestic mediations have generally been facilitative in nature where the mediator is very careful not to provide an evaluation of the case. The process has the parties negotiating face-to-face. The mediators in general civil mediations are much more likely to provide an evaluation of the case and are often expected to do so by the participating attorneys. The process most often has the parties in separate rooms with the neutral carrying ideas and proposals between the parties, called caucusing. At what point should this process be called neutral evaluation, and should it be governed by separate state or local court rules? Should there be any rules at all for any new process? Are they necessary?

V. STATE GOVERNMENT

State governments across the country are using dispute resolution methods to address four basic types of disputes: employment, citizen, vendor and public policy.[68] At the Council of State Governments' Summit of States on Conflict Management and Dispute Resolution held in June 2000, 98% of participants said they expected an increase in the use of ADR in state and territorial governments.[69]

Some parts of the Kansas state government have used dispute resolution methods for a variety of types of disputes. Initially the Division of Workers Compensation was conducting between 200 to 250 mediations a year; currently they are conducting about 120 to 150 a year. They have been conducting mediation for six years.[70] The Department of Social and Rehabilitative Services (SRS) is required by statute to use mediators in negotiations with disability programs with which they contract for services.[71] They also use an internal dispute resolution system with SRS

employee disputes. The employees can request that mediation or other methods of dispute resolution be used in conflicts with other employees.

Kansas Legal Services currently contracts with the Kansas Human Rights Commission (KHRC) to offer voluntary mediation to disputants involved in employment, housing, public accommodation and discrimination complaints filed with the KHRC. There have been hundreds of mediations offered through this program. Kansas Legal Services obtains evaluations of the process from the participants which shows a high satisfaction rate (82%) and a roughly 50% settlement rate.[72] The Legislature specifically approved this program in an attempt to address a long and timely backlog of outstanding complaints.

Various other departments within the state government also use dispute resolution mechanisms. The Kansas Department of Education has developed a special education mediation program that uses outside mediators to try to resolve special education disputes between schools and parents.[73] The University of Kansas' Public Management Center contracts with the State of Kansas to provide training for key managers. One component is core mediation training. The Department of Human Resources has trained its hearing officers in mediation, and they are beginning to conduct a variety of employment-oriented mediations across the state.[74] The Kansas Department of Insurance and five insurance companies are currently experimenting with a statewide mediation system to attempt to resolve consumer complaints. In the mid 1990s, the Kansas Legislature encouraged the Civil Rights Division to use mediation with civil rights filings. There are a number of other references to mediation and dispute resolution in state legislation. Many are not used frequently.[75]

One of the controversial elements of the use of dispute resolution in employee disputes is the use of in-house mediators. Will employees freely discuss their complaints with another employee serving as the neutral? A recent research report of the U.S. Postal Services, which handles the largest number of employee disputes in the Federal Government, reviewed 7,651 reports from participants.[76] The conclusion of the research was that an outside neutral program may outperform an inside neutral program in the absence of an integrated conflict management system:

> They indicate that a system design choice to allow parties any form of representation they prefer, while affecting the dynamics of mediation, does not appear to have any adverse impact on the program. Lastly, they show for the first time that a fully implemented employment mediation program can cause a measurable positive impact on the workplace by resolving conflict at an earlier stage in a complaint process.[77]

The major problem with using outside mediators is the cost.

VI. PUBLIC POLICY CONSENSUS PROCESSES

Bethel College and the Kansas Institute for Peace and Conflict Resolution sponsored several discussions in late 2001 and early 2002 on whether Kansas should create a "Consensus Council" to address larger public policy disputes.[78] In other states, Consensus Councils are used to facilitate a discussion about larger public policy issues. In nearly 20 states, publicly-supported statewide offices of dispute resolution assist public and private interests to utilize an array of consensus-building tools to solve critical public problems. These efforts involve mediation, facilitated citizen involvement, and other forms of dispute resolution and collaborative problem solving to deal with a variety of issues such as affordable housing, water management, emergency medical services, facility siting, community visions, budget priorities, environmental and land use issues, and public employment claims and grievances.[79]

One Kansas example of facilitated negotiation is when the Kansas Nongame and Endangered Species Advisory Task Force was created by the 1996 Legislature.[80] The task force included environmental, farming, ranching and building interests. The Task Force, which consisted of 17 members, met six times during the summer and fall of 1996. Issues and concerns addressed by the Task Force included listing procedures concerning non-game, threatened and endangered species, recovery plans for such species, and allowing tax credits for certain taxes and assessments. The 1997 Legislature enacted into law the Task Force's recommendations by amending existing state laws and by enacting new laws.[81]

Kansas is currently involved in a mediation with Nebraska over the water flow into the Republican River, which begins in Nebraska and runs through northern Kansas.[82] Chris Moore and Mike Hardy of the Center of Dispute Resolution (CDR) Associates were hired jointly by the parties and the United States in December 2001 to assist in initial settlement discussions.

Facilitated negotiations can be successful when the parties involved in a dispute can feel that they are adequately involved, can state their interests and believe the process is fair. Fisher and Ury state:

> The process of working out an agreement may produce a psychological commitment to a mutually satisfactory outcome. A working relationship where trust, understanding, respect, and friendship are built up over time can make each new negotiation smoother and more efficient. And people's desire to feel good about themselves, and their concern for what others will think of them, can often make them more sensitive to another negotiator's interests.[83]

This is not to say that the opposite reaction from people can take place and people can react very negatively in a negotiation. The key is that it is important to

address the sensitivity of human beings. "Failing to deal with others sensitively as human beings prone to human reactions can be disastrous for a negotiation," write Fisher and Ury.[84]

The following resolution was adopted at the Council of State Governments 53rd Annual Meeting of the Midwestern Legislative Conference: "RESOLVED, that the Midwestern Legislative Conference encourages the development by individual states of consensus building programs and resources to be used by state leaders as appropriate in fostering consensus solutions to complex policy issues . . . ."[85] The Western Governors' Association, on December 5, 1997, passed the Western Governors' Association Resolution #97-024 which also calls on the state and federal governments to use consensus processes when appropriate.[86]

VII. FEDERAL GOVERNMENT

In 1990, President George Bush signed into law the Administrative Dispute Resolution Act.[87] This Act authorizes every executive agency to designate a senior official to be the dispute resolution specialist of the agency, provide for training on a regular basis, adopt an official ADR policy, and review each of its standard contract agreements to encourage the use of ADR. The introduction to the Act said that:

> [ADR] has the potential to provide a variety of benefits, including greater satisfaction to the parties, innovative methods of resolving disputes, and greater efficiency in achieving settlements; . . . [ADR] may have potential to reduce the large backlog of cases now pending in some Federal courts throughout the United States, thereby allowing the courts to process their remaining cases more efficiently.[88]

Six years later, Congress ordered the creation of an Interagency Working Group to coordinate the government-wide ADR effort.[89] In 1998, Congress passed the Alternative Dispute Resolution Act, which required every district court in the country to devise and implement its own ADR program, and to require that litigants in all civil cases consider the use of an ADR process at an appropriate stage in the litigation.[90] Many Boards of Contract Appeals are requiring the use of ADR as well.

> Thanks to all of these factors, the government ADR effort is substantial and growing. Overall, federal executive agencies now dedicate over 400 full-time positions and 40 million dollars each year to ADR. All agencies have a senior official designated as their dispute resolution specialist, typically at the senior executive service level or higher.[91]

Jeffrey M. Senger, Deputy Senior Counsel for Alternative Dispute Resolution at the U.S. Department of Justice stated:

> Agencies have reported many benefits from their increased use of ADR. Here is a list of the most common advantages of ADR we have found so

far:

- Complaints are processed more quickly and resolved earlier.
- Litigation and other costs are lower.
- Future complaints are avoided as parties learn to communicate better with each other.
- Parties are more satisfied with the problem-solving process and with the results.
- Relations with outside parties are improved.
- The process leads to more creative solutions.
- Internal morale is improved.
- Turnover is lower.
- Parties comply better with their settlement agreements.
- Productivity is improved.[92]

In the U.S. Department of Justice, the numbers of ADR processes completed increased from 509 in 1995 to 2,662 in 1999.[93] The U.S. Postal Service, for example, has implemented one of the leading workplace mediation programs in the country.[94] Postal Service policy is to conduct a mediation within two weeks after a complainant requests it. The average mediation takes four hours, and 81 percent of mediated cases are closed without a formal complaint being filed. Satisfaction is extremely high. Twice as many employees report being satisfied with the amount of control, respect, and fairness of the process as they are with the traditional process (88% satisfaction rate versus 44%). Both employees and supervisors are equally satisfied with mediation.[95] The Air Force has used ADR in more than 7,000 workplace disputes between fiscal years 1997 and 1999, with a resolution rate higher than 70 percent.[96]

The U.S. Department of Justice conducted a study of nearly one thousand cases in which assistant United States attorneys used mediation over a four-year period ending in 1999.[97] Almost two-thirds of the cases settled during mediation. In those cases that did not settle, almost half of the time the attorneys reported that there were valuable results of the mediation nonetheless. Attorneys estimated substantial savings in time and money from the use of ADR.[98]

VIII. BUSINESS COMMUNITY

An ongoing study of the country's 1,000 largest corporations is being conducted by Cornell University in cooperation with the Foundation for Prevention and Early Resolution of Conflict (PERC), a nonprofit organization in New York City.[99] It shows that, in the past few years, the vast majority of U.S. corporations have used one or more forms of ADR in resolving a broad range of disputes, including: employment, environmental, sexual harassment, contracts, securities and age

discrimination claims.[100] Based on the survey responses of more than 600 corporate counsel, deputy counsel, and chief corporate litigators, Cornell researchers believe that this use is likely to grow significantly in the future, due at least in part to:

- the rising costs of litigation,
- an increase of ADR provisions in employment and commercial contracts, and
- court mandates of ADR processes.

Kansas Supreme Court Chief Justice Kay McFarland stated in her address to the 2002 Legislature:

> Public confidence in the ability of the Judiciary to do justice is a cornerstone of our system of government. The courts are frequently the last bulwarks of freedom as guaranteed by the Bill of Rights of the United States of America and the State of Kansas. A fully functioning court system is essential to the American way of life. Although much of the most important work of the Kansas courts includes matters that directly impact the lives of Kansas families and public safety, a high quality court system is also vitally important to the Kansas economy. Each year, innumerable business matters are resolved in our courts. Without just and efficient court operations, these cases would not receive timely attention and resolution, costing Kansas business money and creating a burden on the Kansas economy. Interestingly, the January 23, 2002, issue of *USA Today* contained the results of a survey conducted by the United States Chamber of Commerce which rated each state's court system on reasonableness and fairness from a business perspective. Kansas ranked in the top five in that survey.[101]

IX. CONCLUSION

Dispute resolution is not appropriate in all cases. It is a litigant's constitutional right to go to trial to get his or her dispute resolved, and there may be an overreaching benefit to society to establish a precedent in a particular situation. There may be previous acts of violence, mental illness or simply a proven inability to negotiate, which would make direct negotiations difficult. It is the responsibility of each judge in the court system, and of each hearing officer and some administrators in state government to determine whether a case is appropriate for dispute resolution. As the methods of dispute resolution expand in Kansas courts, they will have to decide which method is appropriate for each case, and potentially who is the best provider for each method.

The judicial and some portions of the executive branches of government are responsible for interpreting the laws and applying them equally to resolve legal disputes. They have to do so with set budgets that in recent years have not increased in proportion to the increase in disputes they face. The time to hear a civil case will probably increase. This will cause these government institutions to encourage the earlier settlement of disputes in an attempt to reduce the time government has to spend on them. There is also a growing awareness that the adversarial system might not be the most appropriate way to handle certain disputes.

The use of formalized dispute resolution systems with civil disputes has been a fairly recent phenomenon in Kansas, as it has in other states. It has only been in the last twenty years that dispute resolution has been extensively used. A number of Kansas judges took the early initiative to experiment in their judicial districts. These early mediation programs served the same type of case but with different program models. These variations encouraged more innovations than if there were just one model. These early programs allowed other judges to learn which systems would be the most effective and appropriate in their area. As of this date, most judicial districts use mediation in parenting time (child custody/visitation) cases and there still continue to be a variety of models. Courts are continuing to experiment with the use of dispute resolution in other areas of law. We employees of the state are being encouraged to do more with less resources. It then becomes important for government, which tends to be tradition-bound, to be flexible enough to allow experimentation in order to encourage new innovations.

When parties are willing to negotiate in good faith under the auspices of a skilled neutral at a point early in the process, the parties are likely to come away satisfied with the process. For the courts and other dispute resolution organizations, there is the interest to reach fair, constitutionally-based decisions in a cost-effective manner. A major factor affecting the use of neutrals is the cost to the parties and the overall system. It is not clear to me whether using alternative dispute resolution systems will always save the parties money. These savings are variable and are related to the type of case and the point in the dispute where the case is settled. However, the data is fairly clear that parties are likely to like the dispute resolution process better than the adversarial litigation process. They can participate much more readily in a dispute resolution process than in the litigation method, and they can propose and consider a wider variety of settlement options. The process is confidential, which appeals to many people including lawyers and those in the business community. Members of the legal profession have shown that they can adapt to changes in court settlement systems, and they are working to settle more disputes on their own, earlier in the process. If they know they probably will have to use a third party, there is more incentive to negotiate a settlement and save their clients the cost of the neutral. Setting the date for using a neutral may serve the same purpose as setting a trial date.

There are still many questions to answer. How much interference should there be from the government in the selection of the neutral parties? What minimum qualifications should be required for various forms of dispute resolution? How much information should the general public and the referring entities be provided on the background, training and performance of the neutrals? What dispute resolution system works best with particular types of cases? I am particularly concerned about how we will provide services for people with low incomes. In 1999, 18.3% of all families in Kansas had an income less than $25,000. Twenty-three percent of families with a female householder and no present husband were living below the poverty level.[102]

There is growing evidence that the use of dispute resolution in the courts and government saves resources and increases satisfaction with the institutions by users of those systems. Sometimes a program is not successful or as successful as desired. We proponents need to ensure that whenever a public-supported institution encourages the use of a form of dispute resolution that they measure the results long enough to ensure that the program is both cost-effective, good for the parties involved, and meets constitutional requirements. This will allow us to show its benefits, adapt the program so it can work better, or eliminate it if the results are not shown. This will ensure that the fairness we seek in the specific solutions to disputes also can be seen in the development of the process.

Notes

1. *See* KAN. STAT. ANN. § 5-501 et seq. (2001).
2. ROGER FISHER & WILLIAM URY, GETTING TO YES, NEGOTIATING AGREEMENT WITHOUT GIVING IN 41 (1981).
3. JOSEPH J. ELLIS, FOUNDING BROTHERS 13, 15-18 (2000).
4. *See id*. at 17.
5. FISHER & URY, *supra* note 2.
6. ROGER FISHER & WILLIAM URY, GETTING TO YES, NEGOTIATING AGREEMENT WITHOUT GIVING IN *I* xviii (Bruce Patton ed., 2nd ed., 1991) (1981).
7. Supreme Court of Kansas Office of Judicial Admin., Annual Report of the Courts of Kansas, (2001).
8. Chief Justice Kaye McFarland, State of the Judiciary: Annual Report of the Chief Justice of the Kansas Supreme Court (2002) *available at* www.kscourts.org/2002soj.pdf.
9. To gain a very simple view of how many post-divorce motions were filed, I asked the Office of Judicial Administration's technology department to give me dates from any court that kept track of post divorce motions. The very small sample over a short period of time indicated that there may be four post-divorce motions per divorce. There is a fee on post divorce motions and some courts check when that fee is paid. It is not a conclusive way to gain the number of post divorce motions because there are variations between courts and variations in the year

when filings occur between courts.

10. *See* Annual Report of the Courts of Kansas, *supra* note 7, at 5.
11. *See id.* at 4.
12. *See id.* “Statistically terminated" means that the case no longer requires judicial action for a primary determination. However, judicial action may be required post termination due to new motion filings, etc. "Terminated" has meaning when viewed relative to "pending" cases, or cases with no primary determination.
13. *See id.* at 5.
14. *See id.* at 6.
15. *See id.* at 4-7.
16. KAN. STAT. ANN. § 5-502(e) (2001).
17. The author set up the first training and was involved with the development of the subsequent training until 1999.
18. . *See* Annual Report of the Courts of Kansas, *supra* note 7; *See also* Kan. Stat. Ann. § 5-506(b) (2001) (requiring by statute all approved mediators to report the numbers of cases they handled each year).
19. Kansas Citizens Justice Initiative, Final Report of the Kansas Justice Commission 50 (June 11, 1999).
20. University of Kansas Clinical Psychology Department, *The Status of Alternative Dispute Resolution in Kansas, 1998-1999* (May 1999).
21. Kent Snapp, *Five Years of Random Testing Shows Early ADR Successful,* DIS. RESOL. MAG. 16-17 (Summer 1997). This article reports on the experience of the U.S. District Court for the Western District of Missouri, a Civil Justice Reform Act (CJRA) demonstration district. The program was designed to prompt earlier settlements. Early assessment meetings were held within 30 days after initial responsive pleadings. When case doesn't settle at first meeting, a second early assessment meeting is scheduled. After five years and 3,308 cases:
    - 73% more control cases than ADR cases went to trial,
    - 83% of respondents felt it was somewhat or very helpful in moving a dispute toward resolution, and
    - 94% of attorneys said they would volunteer an appropriate case for program.

    The median savings per case was $10,000, and the average savings per case was $36,215.
22. Report to the Legislature on the Impact of Alternative Dispute Resolution on the Massachusetts Trial Court. Prepared by the Supreme Judicial Court/Trial Court Standing Committee on Dispute Resolution for the Chief Justice for Administration and Management of the Trial Court (February 2, 1998).
23. *See id.* at 45-49.
24. *See id.* at 36-43.
25. *See* Kansas Supreme Court Alternative Dispute Resolution Committee Report (March 1989).
26. *See* Kansas Supreme Court Alternative Dispute Resolution Committee Report (September 1994).
27. *See* KAN. STAT. ANN. § 5-501 et seq. (2001); Kan. Sup. Ct. R. 902, 903, 904.
28. *See* NEB. REV. STAT. § 25-2902 et seq. (2002).
29. *See id.*

30. *See* KAN. STAT. ANN. § 5-501 et seq. (2001).
31. *See* NEB. REV. STAT. § 25-2921 (2002).
32. *See* KAN. STAT. ANN. § 20-367 (2001).
33. The author was told this information on a visit to the Nebraska mediation centers in 2000.
34. NEBRASKA OFFICE OF DISPUTE RESOLUTION, July 2001 – June 2002 Annual Report 4.
35. *See* KANSAS OFFICE OF JUDICIAL ADMINISTRATION, 2002 DISPUTE RESOLUTION REPORT 3, listing the following as approved mediation programs in Kansas:
    1. Douglas County Victim Offender Reconciliation Program,
    2. Kansas Agricultural Mediation Service (Manhattan),
    3. Washburn Law School Mediation Clinic (Topeka),
    4. Midland Mediation (statewide),
    5. Offender Victim Ministries of Newton,
    6. Counseling and Mediation Center of Wichita,
    7. Mediation Center of Wichita,
    8. Kansas Institute for Peace and Conflict Resolution (North Newton),
    9. Associates in Dispute Resolution (regional around Topeka),
    10. Offender/Victim Ministries,
    11. Topeka Victim Offender Mediation Project,
    12. University of Kansas Mediation and Conflict Resolution Program.
36. *See* KAN. STAT. ANN. § 5-504 (2001).
37. *See id.* at § 5-504(a).
38. *See* NEBRASKA OFFICE OF DISPUTE RESOLUTION, *supra* note 34, at 5.
39. *See* AMERICAN JUDICATURE SOCIETY, AN EVALUATION OF COURT-CONNECTED MEDIATION PROGRAMS IN NORTHERN ILLINOIS (1999). The American Judicature Society investigated the variables that affect settlements in court-connected mediation programs in the 17th and 18th Judicial Circuits of Illinois. They conducted this investigation through analysis of quantitative data provided by the courts on the types of cases referred to mediation and the outcomes of these mediation sessions, and through interviews with a sample of attorneys, parties, judges, and mediators involved in these mediation sessions.
40. *Id.* at 1.
41. Harvard Law School, School of Negotiation, Dispute Resolution Program, *at*: www.pon.harvard.edu/research/projects/drp.php3.
42. Frank E. A. Sander, *Varieties of Dispute Processing*, THE POUND CONFERENCE: PERSPECTIVES ON JUSTICE IN THE FUTURE (A. Leo Levin & Russell R. Wheeler eds., 1979).
43. Ericka Gray, *Multi-Door Courthouse*, National Symposium on Court-Connected Dispute Resolution Research 93 (State Justice Institute 1993).
44. KAN. STAT. ANN. § 5-516 (2001).
45. *See* KAN. SUP. CT. R. 901.
46. *See id.*
47. *See* KAN. SUP. CT. R. 902.
48. A good source for review of other state standards is the Consensus Polity Institute Website *at:* http://www.policyconsensus.org.
49. *See* KAN. SUP. CT. R. 903.
50. *See* THE UNIVERSITY OF KANSAS CLINICAL PSYCHOLOGY DEPARTMENT, THE STATUS OF

ALTERNATIVE DISPUTE RESOLUTION IN KANSAS 1998-1999 (May 1999).

51. Conversation with Gary Kretchmer, Chief Mediator, 10th Judicial District (Nov. 1, 2002).
52. *See* KAN. STAT. ANN. § 23-1001 (2001).
53. *See* Christie Coates, *Parenting Coordination: Implementation Issues*, Association of Family and Conciliation Courts Task Force on Parenting Coordination 2 (May 2002).
54. Conference Report and Action Plan, *High Conflict Custody Cases: Reforming the System for Children,* September 2000, sponsored by the American Bar Association and the Johnson Foundation, *printed in* FAMILY LAW QUARTERLY, vol. 34, no. 4 (Winter 2001).
55. "Participant Satisfaction Survey of Georgia's Court Connected ADR Programs", State Justice Institute Grant SJI-98–256, December 2000. Georgia Office of Dispute Resolution, *Participant Satisfaction Survey of Georgia's Court Connected ADR Programs*, Grant SJI-98-256 (State Justice Institute 2000).
56. *Id.*
57. Geetha Ravindra, Director, Dispute Resolution Services, Supreme Court of Virginia, *Using Technology to Evaluate Court-Connected ADR Programs*, Presentation at the Association for Dispute Resolution Annual Meeting, 2002.
58. *See* Roselle L. Wissler, *An Assessment of Domestic Relation Mediation in Maine and Ohio Courts*, Grant 65-03C-A-152 (State Justice Institute 1999).
59. *See id.*
60. *See* NORTH CAROLINA ADMINISTRATIVE OFFICE OF THE COURTS, THE CHILD CUSTODY AND VISITATION MEDIATION PROGRAM IN NORTH CAROLINA: AN EVALUATION OF ITS IMPLEMENTATION AND EFFECTS (2000).
61. *See* JUDICIAL COUNCIL OF CALIFORNIA, CIVIL ACTION OF MEDIATION ACT: RESULTS OF THE PILOT PROJECT (Nov. 1996).
62. *See id.*
63. *See id.*
64. *See* The Council of State Governments, *State Trends*, *in* INVESTING IN BETTER GOVERNMENT (Fall 2002).
65. *See id.*
66. Jennifer Shack and Danielle Loevy, *Summary of Court-Related ADR in Illinois*, Center of Analysis of Alternative Dispute Resolution Systems 3 (2002).
67. Keilitz et al, *Multi-State Assessment of Divorce Mediation and Traditional Court Processing*, National Center for State Courts, SJI, 1988-1990.
68. The Council of State Governments, *State Trends*, in INVESTING IN BETTER GOVERNMENT (Fall 2002).
69. *Id.*
70. KAN. STAT. ANN. § 44-5,117(a) (2001) states:

    Upon the request of any party to a workers compensation claim and the acceptance of the other party, the director of workers compensation shall schedule the parties for a mediation conference. The purpose of the mediation shall be to assist the parties in reaching agreement on any disputed issues in a workers compensation claim. If the director is advised that one party does not wish to participate in the mediation, the director is authorized to encourage that party to participate.
71. KAN. STAT. ANN. § 39-1806(b)(2) (2001) states that it "authorizes mediation by an independent

entity chosen by the parties to the contract in the event of contract disputes and if mediation is not completed prior to the end of any existing contract, authorizes an extension of time of such existing contract or entering into a temporary contract . . . ."

72. Kansas Human Rights Commission/Kansas Legal Services Mediation Project Progress Report for Fiscal Year 2000. 2000 KLS/KHRC ANN. REP.
73. KAN. STAT. ANN. § 72-966 (2001).
74. KAN. STAT. ANN. § 44-817 (2001)(a) states: The secretary of human resources shall have power to appoint any competent, impartial, disinterested person to act as mediator in any labor dispute either upon the secretary's own initiative or upon the request of one of the parties to the dispute. It shall be the function of such mediator to bring the parties together voluntarily under such favorable auspices as will tend to effectuate settlement of the dispute, but neither the mediator nor the secretary of human resources shall have any power of compulsion in mediation proceedings. The secretary of human resources or the secretary's designee shall be authorized to charge fees to the parties for mediation, conflict resolution services or training programs contracted for to be provided by the agency and shall prescribe reasonable rules of procedure for such mediators.
75. KAN. STAT. ANN. §§ 8-2431, 16-1505, 38-1663, 56A-803, 66-534, 72-963A, 74-9803 (2001).
76. Lisa B. Bingham & David W. Pitts, *Highlights of Mediation at Work: Studies of the National REDRESS Evaluation Project*, NEGOTIATION JOURNAL (April 2002).
77. *Id.* at 144.
78. The author has attended all the meetings and made this observation as a participant in the process.
79. The author meets each year with representatives of statewide programs. At the last meeting in August, we determined that approximately 20 states have some process to address limited numbers of public policy disputes.
80. Susan George, William Snape, Michael Senatore, State Endangered Species Acts, Defenders of Wildlife.
81. H.B. 2361 (1997).
82. Kansas v. Nebraska, No. 126 (U.S. Oct. 7, 2002).
83. FISHER & URY, *supra* note 2, at 19.
84. *Id.*
85. The Council of State Governments 53rd Annual Meeting of the Midwestern Legislative Conference of The Council of State Governments, August 2-5, 1998 *available at* www.csgmidwest.org/MLC/resolutions/98resolutions/98concensus.htm.
86. *Principles for Environmental Management in the West Western Governors' Association,* W. Governor's Ass'n Res. No. 98 – 001(Feb. 24, 1998).
87. 28 U.S.C. § 651.
88. 28 U.S.C. § 651 Note.
89. The Alternative Dispute Resolution Act of 1996, Pub. L.No. 104-320, 5 U.S C. 571-581.
90. 28 USC § 651-658 (Supp. IV 1998).
91. Associate Attorney General Jay B. Stephens, Remarks at the Alternative Dispute Resolution in Procurement Awards, (April 16, 2002).
92. *Hearings* Before, the Subcomm. on Commercial and Administrative Law Comm. on the Judiciary, 108th Cong.(2000)(testimony of Jeffery M. Senger).

93. Office of Dispute Resolution, United States Department of Justice, *at* www.usdoj.gov/ord/textstatistics.
94. Jeffrey M. Senger, *Turning the Ship of State*, 2000 JOURNAL OF DISPUTE RESOLUTION 79 (2000).
95. *Id.*
96. Senger, *supra* note 96.
97. Jeffrey M. Senger, *Turning the Ship of State*, 2000 JOURNAL OF DISPUTE RESOLUTION 79 (2000).
98. *Id.*
99. DAVID B. LIPSKEY & ROBERT SEEBER, THE APPROPRIATE RESOLUTION OF CORPORATE DISPUTES: A REPORT ON THE GROWING USE OF ADR BY U.S. CORPORATIONS (1998).
100. *Id.*
101. Annual Report of the Courts of Kansas, *supra* note 7.
102. Profile of Selected Economic Characteristics: 2000, Geographic area: Kansas, U.S. Bureau of the Census, Census 2000 *at* http://factfinder.census.gov.