1049 HJ INTERIM FILES, CITIZEN DISPUTE CENTER

PART I: NEEDS ASSESSMENT

Research Methodology

We employed three general methods to determine the quality of dispute resolution presently being accorded various types of minor controversies in Anchorage. First, we examined the records of the governmental agencies which purport to handle minor disputes: the small claims and district courts, the Anchorage Police Department, and the Consumer Protection Division of the Attorney General's Office. As of the initiation of this project the small claims court had never been systematically evaluated to the extent necessary for the purpose of our study. Therefore, to determine the range of disputes comprising the caseload of this court and its success in resolving them, we had to read and analyze 2585 files--all of the cases the agency has handled since its separation from the district court until May 1977. For each controversy we collected data on the status and representation of both parties, the nature of the dispute, the disposition, and the elapsed time from filing to resolution. A copy of the coding form we used and a summary of our results is included in Appendix A.

Our evaluation of the Anchorage Police Department was similar in approach and scope. Again, no other agency previously had analyzed the department's treatment of selected minor disputes, so we were forced to collect our own data

from the original police reports. From our study of similar dispute resolution projects operating in other jurisdictions, we knew that the types of problems resulting in police calls most likely to benefit from alternative dispute processing were minor criminal offenses involving parties engaged in an ongoing relationship. Therefore, we read all of the reports filed in 1976 in which the police had classified the incident as a "family dispute", "assault and battery", or "disorderly conduct". We collected only summary statistics on those controversies in which the parties did not know each other. From the files of those cases involving ongoing relationships, however, we derived a great deal of information Among the variables which we examined were: the relationship and living arrangement of the disputants, the nature of and apparent cause of the controversy, the involvement of weapons, the injury claimed by each party, the action taken by the police, and recorded indications of the likelihood of the reoccurrence of the dispute. The coding form we used and the results of our analysis are included in Appendix B.

When a police report indicated that one or more parties had been arrested, we reviewed the district court records to determine whether the case resulted in a prosecution. If so, we read the court file and collected data on the defendant's representation, the plea, the court or jury's verdict, the sentence (if any) imposed, and the elapsed time from arrest to disposition. Appendix C contains our coding form and results.

Finally, in order to corroborate the information we had received concerning the operation of the Consumer Protection Division of the Attorney General's Office, we reviewed that agency's records for the first four months of this year. Fortunately, the office had already collected most of the data we needed so we had only to summarize and interpret their statistics. Appendix D contains the results of that brief study.

The second major phase of our evaluation of minor dispute resolution in Anchorage was an anlaysis of the efficacy of the various private and governmental agencies which attempt to assist the police and court system. We interviewed representatives of Anchorage Housing and Community Services, the Alaska Legal Services Corporation, AKPIRG (Alaska Public Interest Research Group), the (now defunct) Rent Review Board, the State and City Ombudsmen's Offices, and the Consumer Protection Division of the Attorney General's Office. The facts and opinions we derived from those interviews are included in the narrative which follows.

Finally, the third aspect of our research effort consisted of a questionnaire distributed to all of the 800 members of the Greater Anchorage Chamber of Commerce. Our purpose was to determine the reaction of the business community to the mediation/arbitration of various types of disputes, the nature and number of the controversies in which businessman are involved, and the willingness of the members of one sector of the community to volunteer as

hearing officers in our proposed program. Appendix E contains a copy of the questionnaire and a summary of the responses received to date.

On the basis of the results of our data collection and analysis, we conclude that six types of minor disputes are being handled inadequately by current methods and could be processed more efficiently and effectively in a mediation/arbitration center. The remainder of this section of the report consists of a description of each of those categories of dispute and an analysis of why the proposed Citizen Dispute Center would be a better forum for handling them.

Disputes Arising Out of Ongoing Relationships (1)

- A husband periodically gets drunk and threatens his wife and children. One night, when his threats are particularly vehement, his wife attempts to defend herself with a kitchen knife. The husband seizes the knife, throws it away, and beats her with his hands.

- Two female roomates argue over who should have the right to carry the mailbox key. The argument leads to a fist-fight and one of the women is slightly injured.

- A young married couple is under a lot of financial and emotional pressure. The husband works in the day and attends school at night. The wife is chronically ill and has to care for a four-year-old child. One night the two get into an argument which leads to a fight. The wife is slightly injured but does not require medical care.

- A young woman is badly beaten up by her drunken ex-boyfriend. When the police arrive, she admits that this is a regular occurrence. She refuses to press charges against her attacker, insisting that she "only wants him to leave her alone".

- A 36-year-old woman assaults and injures an 11-year-old boy who lives in her neighborhood--allegedly for repeatedly calling her a prostitute. The boy's parents decide not to press charges.

- A young man threatens, then later attacks and injures his sister's boyfriend. He justifies his actions by claiming that he is the oldest man in his family and he has a duty to protect his siblings.

- A landlord goes to his tenant's residence to demand payment of two months' back rent. The tenant refuses, claiming that the landlord has failed adequately to maintain the apartment. The landlord assaults and seriously injures the tenant.

These are a few examples of a type of case the Anchorage police routinely encounter: violent disputes between two or more people involved in an ongoing relationship. Typically, the parties know each other reasonably well and have interacted, if not harmoniously, at least non-violently, for some time in the past. Then, for some reason, they come into violent conflict. Sometimes the incident will represent a rare fracture in an otherwise friendly or intimate relationship. Sometimes it will be the culmination of a long smoldering antagonism. In most cases, both parties would like to prevent a reoccurrence of the dispute and to be able to continue to interact comfortably in the future.

These conflicts are being handled inadequately through the criminal justice process, commencing with initial police contact, through final resolution, if any, in the district court. Many disputes of this sort are not being processed at all.[3] Frequently, the participants

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3 It is difficult, if not impossible to determine the number of incidents that could benefit from some sort of mediation intervention. The true incidence of unreported crime is unknown but believed to be many times larger than reported crime. We do know that of the 4,085 reported incidents of disorderly conduct occur-

themselves decide not to initiate formal legal proceedings,[4] or often the police or prosecutors refuse to process some disputes.[5] Of the fraction of cases which do enter the court system,[6] most are withdrawn or dismissed before they

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ring in the Anchorage/Spenard area, only 681 resulted in arrest. There were 732 calls to the police during 1976 to report family disturbance incidents, but since "family disturbance" is not a criminal violation, no arrest records exist for that category.

4 In reviewing all of the reported incidents of assault and battery, disorderly conduct, and family disturbance, we selected only incidents which involved parties engaged in some ongoing relationship. We then collected extensive information on each of these 371 reported incidents. We found that in 22% of the cases the police were unable to act because the victim refused to sign a complaint. Since Alaska law requires that a misdemeanor be committed in the presence of an officer before he can arrest a suspect without a warrant, unless the officer sees the illegal altercation, he cannot act. AS 12.25.030.

5 In about 12% the police took no action concerning the incident. (The reason for inaction is unknown except that it was for some reason other than continued investigation for inability to locate the suspect since these explanations were separately noted.) In 5% of the cases, the police refused to act even though the victim was willing to sign a complaint.

Once the police have arrested a suspect it is within the discretion of the prosecutor to decide whether or not formally to pursue the charge. Our data revealed that there were 107 arrests but only 53 cases that could be traced to the district court. Thus it appears that the district attorney declines to prosecute near half of those arrested. (There could be other explanations for our inability to locate a district court file for each of the arrested suspects; but the incidence of lost files or improper record-keeping is not likely to be significant.)

6 In order to understand the unrepresentative nature of a criminal occurrence reported to the police which results in a final disposition in the district court, it becomes necessary to review the "funnelling" effect of the system. Because of the non-uniform nature of police and court records in labeling certain incidents,

reach the trial stage.[7] And in the few instances in which a case is pursued to a final disposition, the parties often find that the decision rendered either fails equitably to apportion blame for their actions and injuries or fails to resolve the problem which sparked the incident.[8]

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it is impossible to trace this funnelling effect through each of the three categories of disputes we studied. However, reported incidents of disorderly conduct could be traced from a citizen request for help to final disposition in the district court. Although there is no claim that disorderly conduct violations are representative of most citizen disputes, the method in which they are handled is indicative of traditional processing. There were 4,085 incidents of disorderly conduct reported to the police during 1976 (and one must assume the occurrence of many more unreported occurences). Six hundred eighty-one resulted in arrest. Of the 83 disorderly conduct incidents involving ongoing relationships 35 resulted in arrest. Eighteen of the arrested suspects were formally prosecuted.

7 There were 35 arrests for disorderly conduct. Eighteen resulted in formal prosecution. Of the 18, 5.6% were dismissed by the prosecutor, 5.6% were dismissed by the court, and the victim withdrew the complaint in 5.6% of the cases. Thus, about 17% of the small number of cases that actually reach the courtroom are dismissed prior to trial.

There were 229 assault and battery incidents. Seventy-nine or approximately 35% resulted in arrest. Thirty-five, or about 15% of the reported incidents actually became district court cases. Of the 35, 29% were dismissed by the prosecutor either at arraignment or before trial and 22% were dismissed because the complainant withdrew the complaint. Therefore, over half of the 15% of incidents which do reach court are dismissed before trial.

8 A. Sarat, Alternatives in Dispute Processing: Litigation in a Small Claims Court, 10 Law and Soc. Rev., 340, 341-342 ft.2. (Spring 1976).

The failure of the justice system derives from six major factors. First, the atmosphere and procedures of formal adjudication are ineffective in exposing the important issues and problems in these cases. Typically, the specific controversy or incident which is before the court represents only one aspect or manifestation of a much larger and more complex relationship or conflict--the tip of an iceberg." Thus, to decide the case fairly and to repair the disputants' relationship, the adjudicator needs, at a minimum, a knowledge of the context and history of the controversy. In a variety of ways, the climate and procedures of the courts systematically deny the judge access to that background. The narrow definition of "relevance"[9] in formal adjudication excludes from the hearing a great deal of contextual information. All evidence relating to the parties' previous interactions which lies outside a rather tightly drawn sphere of narrowly defined issues is excluded from the forum.[10]

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9 "'Relevancy', as employed by lawyers and judges, is the tendency of the evidence to establish a material proposition." McCormick, Evidence, 435 (2nd ed. E. W. Cleary 1972).

10 Having defined and refined the issues in the case, the parties are constrained to offer evidence that is "material" and "relevant". Materiality deals with the relationship between the issues of the case and the fact which the evidence tends to prove, relevancy deals with the requirement that the evidence must tend to prove a material fact. Azimow's Estate v. Azimow, 141 Ind.App. 529, 230 N.E.2d 450 (1967). However, even relevant evidence may be excluded. "The great body of the law of evidence consists of rules that operate to

But even if the structure of formal adjudication permitted the presentation of such testimony, the formality and public nature of court adjudication exerts a powerful inhibitory effect on the participants.[11] The disputants may feel that they have to "keep to the point", to present their claims and defenses as quickly and simply as possible. Many would be embarrassed to explain the context of their dispute to the court; they feel that it would be "washing their dirty laundry in public". The net effect is that the adjudicators in the existing forums do not have the information necessary to resolve these cases in a way designed to lessen the likelihood of their future reoccurrence.

(2) The second cause of the inadequacy of the existing courts is that the decisional style of formal adjudication is, at best, a clumsy mechanism for satisfying the parties' needs and resolving their problems. As indicated in the introduction, courts of record use a retrospective decisional technique; their objective is to allocate responsibility and sanctions for the violation of legal norms. The system is simply not designed to focus on the victim's needs

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exclude relevant evidence. Esamples are the hearsay rule, the rule preferring original writings and the various rules of privilege for confidential communication." McCormick, Evidence, 121 (2nd ed. E. W. Cleary 1972).

11 The research staff personally observed many small claims proceedings. The parties to the action often seemed overwhelmed and confused by the proceedings despite repeated explanations and reassurance from the most patient judge. Those parties that appeared to have more regular contact with the court did not seem to exhibit the same hesitancy.

and expectations or to consider what decision would best enable the parties to get along in the future.

The structure of formal adjudication often prevents a judge from rendering the decision which might fulfill the parties' desires and solve the problem which gave rise to the dispute. In a criminal prosecution in district court, the judge has only a few dispositional options: he may sentence the defendant to jail, exact from him a fine, or let him go free. None of these dispositional alternatives is well designed to deal with any of the cases described at the outset of this section.

Formerly, a few more flexible dispositional alternatives were available through the mechanism of deferred prosecution. For example, in the first of the incidents set out preceding the discussion in this chapter, the husband might be charged with assault and battery or even with assault with a dangerous weapon. Recognizing that neither prosecution nor conviction on either of those charges would serve the ends of justice or resolve the underlying conflict, the prosecutor and defense attorney might have arranged an informal disposition of the case. For example, prosecution might be deferred on condition that the defendant stop drinking, seek and follow through with professional help, and refrain from future assaults. In the past year, however, the future of such negotiated settlements is very uncertain. In August of 1975, the Attorney General instituted a statewide policy which prohibited district attorneys from engaging in

plea bargaining. While the prohibition itself certainly does not eliminate the dispositional option of deferred prosecution, it has frequently been interpreted by assistant district attorneys and defense counsel as preventing the representatives of the defendant and the state from openly discussing agreed-upon programs pursuant to such arrangements. The fear that a settlement by deferred prosecution with attached conditions will be labelled a "plea bargain" has discouraged many prosecutors from working out flexible alternative arrangements in cases involving ongoing relationships.[12]

Until June of 1976 district court judges could avail themselves of the option of placing a misdemeanant on probation. The Misdemeanor Probation Project, a federally-funded program, provided supervised probation services to approximately 60 to 70 misdemeanor offenders.[13] The federal grant expired June 30, 1976 and the legislature failed to appropriate funds to continue the program, thus probation is no longer a dispositional alternative for misdemeanants. The need for alternative resolutions to minor criminal disputes

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12 The Alaska Judicial Council is engaged in a two-year research effort evaluating the impact of the elimination of plea bargaining in Alaska. As part of that research task, the staff has interviewed prosecutors and defense attorneys who have noted the increased reluctance to utilize deferred prosecution as an alternative. More reliable data on this perceived shift will be included in the Plea Bargaining Final Report available Spring 1978.

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13 The actual monthly caseload was about 125 cases, but half of that number served as a control group and did not receive supervisory attention.

takes on added importance in light of attorneys' increased reluctance to employ deferred prosecution and judges' inability to sentence a misdemeanant to probation.

The two procedural constraints of traditional court processing--the narrow definition of legal issues and the retrospective style of decisionmaking are exacerbated by four practical problems when dealing with disputes involving ongoing relationships. First, the victims in many of these cases refuse to sign criminal complaints.[14] This reluctance is caused by a variety of factors. Often the victim will be unwilling to subject a family member, lover, or friend to the stigma of a criminal prosecution or conviction. If the suspect is a member of the injured party's immediate family, the victim will be aware that the costs associated with a criminal action, such as lost wages, will come in part out of his or her own pocket. Many victims fear that filing charges will only further antagonize the defendant and provoke an even more violent attack. Finally, many injured parties recognize that, whatever the problem which sparked the incident, criminal prosecution will do nothing to solve it--that the most they can hope for from the criminal justice system is a hollow sort of revenge.

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14 In 22.4% of the reported incidents of disorderly conduct, assault and battery and family disturbance involving at least some acquaintance among the parties, the police were unable to act because the victim refused to sign a complaint. Looking at the category of family disputes separately, the victim refused to sign a complaint in 33.3% of the incidents.

Second, many of the cases which do enter the criminal justice system drop out before they come to trial. In a significant percentage of the disputes the victim either withdraws the complaint[15] or refuses to testify. Their awareness of the likelihood of this occurrence combined with their sense of the inappropriateness of the available dispositional alternatives make district attorneys very reluctant to prosecute cases involving ongoing relationships. And the police officers' knowledge of the prosecutors' attitude, in turn, makes them hesitant to make arrests. Our data indicates that in 5% of the controversies involving ongoing relationships, the police refused to take any action even when the victim wanted to file charges. In 56% of the disputes which were recorded in the police files the officer did not pursue the matter beyond filing the police report. Major Brian Porter of the Anchorage Police Department indicates that, taking into account the controversies the police respond to but for which they do not fill out a report, the incidence of inaction is actually much greater. Finally, in only 31% of the cases recorded was any party arrested. Thus, in fewer than a third of these disputes is the criminal justice system even given a chance to address and resolve the problem.

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15 In approximately 26% of the cases, the prosecutor was forced to dismiss the charges because the victim withdrew the complaint.

The third defect in the existing system is that the courts do not have the resources and time adequately to process most cases arising out of ongoing relationships. As indicated above, the issues involved in these disputes are often quite complex; to get a full sense of the background and context of the controversy requires considerable patience, time and effort. Because the charges typically are minor, however, the judges tend to dispose of the cases fairly rapidly in a routine fashion. Thus, even if the atmosphere and procedures of formal adjudication permitted the judge to explore the underlying problem which provoked the incident, time constraints and the customary judicial style would tend to prevent him from doing so.

Finally, resolution of a dispute through the existing court system can require a great deal of time. Unless the defendant pleads guilty, the process can be lengthy. Misdemeanor cases in Anchorage's district court require an average of 61 days to reach a final disposition.[16] During that period, the defendant is stamped with the stigma of an impending prosecution, the victim may be threatened by further attacks, and, most importantly, their problem remains unresolved.

The effects of these defects in the treatment presently accorded disputes involving ongoing relationships

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16 Alaska Court System 1976 Annual Report, 90, (March 31, 1977). The report also notes that ten percent of misdemeanors disposed of in 1976 were over four months old at closing.

are dramatic and unpleasant. Our data indicates that in 41% of cases in which the parties knew each other, the participants previously had been involved together in a similar conflict. And, in 46% of the reported incidents, the responding offices indicated that violence was likely to reoccur.

Finally, we have reason to believe that many of these unresolved disputes between people involved in an ongoing relationship escalate into much more serious crimes. We were unable to collect any data on this process in the Anchorage area. However, a recent study by the Vera Institute of Justice on the Disposition of Felonies in New York City concluded that:

> In half of all the felony arrests for crimes against the person, the victim had a prior relationship with the defendant. . . . The study found an obvious but often overlooked reality: criminal conduct is often the explosive spillover from ruptured personal relations among neighbors, friends and former spouses. Cases in which the victim and defendant were known to each other constituted 83% of rape arrests, 69% of assault arrests, 36% of robbery arrests, and 39% of burglary arrests.[17]

In sum, institutions comprising the existing criminal justice system are not only failing adequately to resolve most minor disputes between parties who know each other, but their deficiencies appear to contribute to the incidence of very serious criminal conduct.

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17 Vera Institute of Justice, Felony Prosecutions in New York City (1977).

The advantages of processing disputes between parties in an ongoing relationship through a mediation/arbitration program mirror the limitations and failures of the existing system. First, the atmosphere and procedures of alternative dispute resolution are designed to expose the important issues in such disputes. Hearings are informal and private. The parties are encouraged to tell their full stories, to describe how and why the dispute arose and how they would like to see it resolved. They are not inhibited and embarassed by being forced to air their grievances in a public forum before officials and onlookers. The loose definitions of relevance and materiality permit the parties to explore the history and context of their controversy and thereby to provide themselves and the hearing officers with the information necessary to help work out a sensible solution to the problem.

The decisional style of mediation/arbitration is likewise geared to generate effective dispositions to disputes involving ongoing relationships. The objective of alternative dispute resolution is to satisfy or to formulate a workable settlement of the parties' needs and expectations, not to allocate blame and impose sanctions.[1] Because it does not stigmatize one of the parties, it avoids arousing his resentment and thereby exacerbating the problem. Because the process is shaped by the desires of the disputants, it is more capable of generating a settlement or award amenable to both. And because the system is primarily designed to

enable the parties to get along in the future, it deliberately seeks to minimize the likelihood of a reoccurrence of the dispute.

The practical attractions of alternative dispute resolution similarly parallel the defects of formal adjudication. First, the victims who seek police intervention but do not want to institute a criminal prosecution in disputes involving ongoing relationships are much more likely to bring their grievances to a well planned and properly administered mediation/arbitration program than to a court of record. They do not need to fear stigmatizing the suspect and the danger of provoking retaliation consequently may be lessened. The process is free, so the family income is not reduced. (Ideally, mediation/arbitration sessions are scheduled to avoid conflict with the normal working hours of most people.) Finally, there is the hope that the center is capable of generating a real solution to their problems.

For the same reasons, a victim is less likely to withdraw a complaint from a mediation/arbitration center once he has initiated it. And the program would never drop an active case unless both parties request that it do so. The knowledge of the police that cases referred to the center are likely to get processed should reduce the incidence of disputes in which they now take no action, mainly because there is no suitable forum. The net effect is that more cases are likely to get considered and resolved.

Third, a mediation/arbitration program would have adequate time and resources fully to process disputes involving ongoing relationships.[18] Hearings would last for as long as two hours and rehearings would be scheduled if that time were not sufficient. Parties would never be made to feel rushed or pressured or that their dispute is somehow not worthy of the court's attention.

Finally, resolution of a dispute through mediation/arbitration would require very little elapsed time from filing to final award or settlement. All hearings would be held within ten days of the filing of the complaint. Thus there would be a reduced opportunity for the problem to fester or explode.

Other aspects of the results of our data collection reinforce our conclusion that there is a large category of disputes for which mediation/arbitration would provide the most appropriate solution. For example, most of the cases we examined did not involve a level of premeditation, violence or injury so serious that most people's notions of the requirements of justice would be violated by a non-criminal solution. In only 11% of the cases did the victim claim an injury which required medical attention. No weapon was involved in 80% of the disputes. And when a weapon was

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18 See Appendix F. Three of the five programs which were reviewed allotted a hearing time of two hours which is considerably more time than allocated to hearings in the district court.

present, it was used in only 5% of the incidents. As we indicated above, if not resolved, these disputes can easily escalate into serious crimes. But at the stage at which we studied them, and at which a mediation/arbitration program could consider and resolve them, most of the cases involved only minor violence.

Next, our data indicated that these controversies were generated by a wide variety of sources of dissension. Among the issues which precipitated disputes were: rights to money or property (11.6%); jealousy or infidelity (10.8%); problems associated with the dissolution of relationships (12.9%); and control of offspring (5.9%). Other alternative dispute resolution programs have been successful in dealing with precisely these problems. With the exception perhaps of the first category, these are also precisely the kinds of problems to which the narrowly legal expertise of the judge has its most doubtful applications.

Alcohol abuse is a serious problem in Anchorage. However, the intoxication of the suspect precipitated somewhat fewer disputes than we had anticipated; in only 30% of the cases was there a definite indication that one or more of the parties was intoxicated. Other mediation/arbitration have dealt successfully with disputes involving alcohol abuse.[19] But these controversies are somewhat less amenable

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19 P. Chirivas and S. Bulfinch, The Urban Court Program: Mediation--The First Hundred Cases (Sept. 1976).

to alternative dispute resolution than other types of cases. Therefore the relatively low incidence of alcohol-related problems is encouraging.

Finally, our research confirmed the hypothesis that one of the most serious problems in Anchorage is battered women. Data analysis revealed that 70.6% of the victimes in reported incidents were women. One hundred thirty-nine or, 37.5% of the disputes involved assaults by men upon their wives, ex-wives, and girlfriends. These are the controversies which are being least adequately processed at present--primarily because the victims are most reluctant to utilize formal criminal procedures. The high incidence of this type of unprosecuted dispute indicates that an alternative dispute resolution program is very badly needed, and could provide an effective alternative where none presently exists.[20]

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20 Anchorage Women Aid in Crisis (AWAIC), a group concerned with the plight of battered women, has secured funds to establish a shelter for abused women. They also have attempted to provide support for women who choose to formally prosecute their partners. The focus of the group's effort is on temporary physical safety and normalization of the abused woman's life pattern rather than mediation of the conflict for those who choose to remain with abusive partners.

The Minneapolis Citizen Dispute Settlement Project reports that 78% of its caseload involves "battered women" and that less than 5% of the cases have been referred to criminal court because of contract violations. (Letter and program information from Richard Enga, Project Director, Office of the City Attorney to the Alaska Judicial Council, May 12, 1977.)

Consumer Protection

- A woman buys a pair of "pre-shrunk" blue jeans from a department store. She wears them for a few days, then washes them. The jeans shrink. She calls the store and demands her money back. A store representative indicates that their policy is only to refund money in exchange for the return of merchandise and, because she has worn the pants, she cannot return them.

- A homeowner hires a professional house painter to paint his garage with an enamel paint. The painter completes the work but uses a latex paint on a portion of the building. The homeowner refuses to pay the bill unless the painter redoes the job. The painter claims that the use of the different paint was an honest mistake and refuses to repaint the garage unless he is provided with more money.

- A car owner has his muffler replaced by a local gas station. The muffler falls off within a week. The owner demands his money back.

At present, the Consumer Protection Division of the Attorney General's Office is the only agency which regularly handles cases of this sort. And unfortunately, the office is not adequately processing many of the disputes. Most of the deficiencies of the agency are caused by its limited jurisdiction.[21] Its primary responsibility is the investigation and prosecution of patterns of fraudulent trade practices--activities by corporations which violate the Alaskan Federal Trade Commission statutes. It has no power to pursue isolated consumer grievances. However, when it receives a complaint of the sort described above, the

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[21] The Consumer Protection Division of the Alaska Attorney General's Office is authorized under Alaska law (see AS 45.50.471 through 45.50.561) to investigate "unfair methods of competition and unfair or deceptive acts or practices in the conduct of trade or commerce". The attorney general is not specifically authorized by statute to engage in mediation of consumer complaints, but does so under its investigatory authorization. (AS 45.50.495)

office will intervene informally as a mediator. The agency notifies the business of the consumer's claim, encourages it to contact the customer and, if it finds the allegations justified, to make a suitable adjustment. If the business fails to respond to the request within a reasonable period of time, the agency sends a few mildly threatening reminders. But if the business still refuses to respond, or if it simply denies the allegations and refuses the complainant any relief, the office can do nothing.

The records kept by the Consumer Protection Division indicate that in approximately 69% of the cases it processes, either the consumer withdraws the complaint, the dispute is referred to another agency, or the office is able, through its informal mediation techniques, to resolve the controversy. In 31% of the cases, however, either the business fails to respond or the controversy is reduced to a "factual dispute" between the parties.[22] In these instances the office usually refers the complainant to a private attorney and drops the case.

Even if its jurisdiction were not so limited, however, for two reasons the agency would probably not be able effectively to pursue many of these claims. First, as it is presently structured, the office does not have the staff or resources to investigate and/or arbitrate isolated

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22 See Appendix D.

consumer complaints.[23] Second, the Attorney General is naturally perceived by many businessmen as a "consumer protector"; thus the office would have little credibility as a neutral arbitrator. While the first problem might be eliminated with increased funding of the agency, the second seems irremediable.

Our data also indicates that if the Attorney General's Office is unable to resolve a consumer complaint the injured party is very unlikely to pursue his claim in another forum. A recent questionnaire distributed by the agency indicates that plaintiffs who are "referred to private attorneys" very rarely avail themselves of that option. And our study of the small claims court reveals that only 28 or 1.1% of the cases processed in that forum in the past year were consumer complaints.[24]

We hypothesize that three factors account for the consumer's reluctance or inability to press his claim through civil litigation--specifically in the Small Claims Court. First, the cost of the system, while not prohibitive, is a major disincentive to plaintiffs with very minor claims. It costs a minimum of $7.00 to institute an action in the court. When the respondent is difficult to contact, the cost may easily run as high as $42.00. When the buyer's claim involves defective blue jeans or a poorly installed

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23 The Anchorage office, which handles the bulk of complaints statewide, is staffed by three attorneys, two investigators and three secretaries.

24 See Appendix A.

muffler, these costs of litigation may prevent him from pursuing the matter. Related expenses such as lost wages, transportation and child care must also be added to the cost of processing a small claim.

Second, it takes a long time to process a dispute in the small claims court. The average elapsed time from filing to disposition for those cases which have been resolved is over three months.[25] In addition, many cases filed in the past year are still pending. Thus, the true average disposition time is even longer. A consumer's knowledge of this delay is likely to dissuade him from starting an action.

Finally, the current analyses of small claims courts nationwide indicate that these tribunals have failed to fulfill their roles as "the people's court" and have managed to acquire the image of debt collection agencies--mechanistic processing houses where large department stores obtain default judgments on their outstanding accounts.[26] Unfortunately, our research indicates this reputation is well earned. Sixty-five percent of all actions in the court

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25 See Appendix A.

26 B. J. Graham and J. R. Snortum, Small Claims Court: Where the little man has his day, 60 Judicature 260 (1977), B. Ingresson and P. Hennessey, Small Claims, Complex Disputes: A Review of the Small Claims Literature, 9 Law and Soc. Rev. 219 (1975), Buyer vs. Seller in small claims court, 36 Consumer REports 624 (1971). For an account of Alaskans' view of small claims see Anchorage Times, July 24, 1977 at B-2, col. 1.

involve debt collection and 60% of the plaintiffs are corporations, partnerships, or associations. We hypothesize that this image of a business-oriented debt collection service, combined with the more general bureaucratic and formal aura of any court may well convince consumers that they have little chance of relief in this forum. We must point out, however, that our research did not at all substantiate the latter conclusion. In reviewing all actions filed in small claims, we found that generally private citizens were somewhat more likely than corporations to get redress when they did pursue their claims.

Our conclusion--based on analyzed data and interviews--that many consumer complaints presently are being inadequately resolved, was confirmed by the third phase of our research: Only 16% of the 210 respondents to the questionnaire we distributed to the business community thought that the existing system adequately handled consumer complaints. Fully 75% of those who thought they might become involved in a consumer complaint case expressed a willingness to submit the dispute to a mediation/arbitration center.[27] From the sector of the community we expected to be least receptive to our proposals, this represents a significant expression of support.

For three reasons we believe that mediation/arbitration would be an improved method for the resolution of

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[27] See Appendix E.

consumer complaints. First, such a system has a number of procedural advantages over the existing forums: Alternative dispute resolution would be free of charge and thus would not discourage plaintiffs with minor claims. A mediation/arbitration program would be fast; it could render a decision within 10 days of the filing of a complaint. Finally, the procedures of the program would be simple and informal--and thus more attractive to complainants and respondents both.

Second, mediation/arbitration would enable the parties to a consumer controversy to communicate and thus facilitate the negotiation of an equitable solution to their dispute. All interviewees who had experience in handling these cases made the same comment: Often the basic problem is that the parties are unable or unwilling to talk to one another. If the disputants, brought together in a room on "neutral" territory, are allowed to make their positions clear to each other, they may quickly settle their controversy.

Finally, alternative dispute resolution would be capable of generating the kinds of flexible settlements and awards which often are most effective in resolving consumer complaints. For example, the three cases described at the beginning of this section might be resolved as follows: (1) The buyer may return the pants and select another pair which fits her. (2) The homeowner must pay the amount of his bill less the cost of repainting the defective section, and then pay the full amount if the painter corrects his mistake. (3) The car owner cannot get his money back, but the garage

must reattach the muffler properly. None of these decisions would be obtainable in the small claims court; the only dispositional option in that forum is a money judgment. And, while the Attorney General's Office might, through mediation, induce the parties to make a settlement of this variety, it could neither issue a binding arbitration award nor compel the parties to abide by any agreement they made. A mediation/arbitration program would be designed to generate precisely this kind of decision and would have the power to make it binding and enforceable.

3 Landlord-Tenant Disputes

- A landlord claims that one of his tenants has not paid his rent for two months and, through his negligence, has allowed plumbing leaks to stain the carpet in his apartment. The landlord demands the back rent and compensation for the damage to the residence. The tenant responds that the landlord has failed to fulfill his obligation to maintain the plumbing, and that the landlord is therefore responsible for the stains. Claiming that the leaks make the apartment uninhabitable, he refuses to pay anything.

- A former tenant demands the return of his $200 security deposit. The landlord claims that the tenant left the apartment dirty and that the deposit is a reasonable assessment of the value of his own labor in cleaning it.

- On January 1, a landlord informs his tenant that he is raising the rent for the apartment by $20--effective February 1. When the landlord comes to collect rent on February 1, the tenant refuses to pay the extra amount. The landlord demands that the tenant vacate the premises immediately.

There is at this time no effective forum in Anchorage for the resolution of controversies between landlords and tenants. During the construction phase of the trans-Alaskan pipeline, when the demand for housing was extremely high,

the state temporarily established a Rent Review Board to handle controversies between the owners and lessees of residential property. The Board was designed and established as an emergency agency; its purpose was to prevent the exploitation of tenants by landlords--to retard (but not to stop) the rate of increase of rents. The jurisdiction of the Board was very limited; it was empowered to review only the legality of evictions and the "reasonableness" of rent increases. Thus, of the three cases described above, the Board could have considered only the third. Evaluations of its effectiveness vary widely. Some observers and participants say that it kept rents down and protected tenants from unjustified evictions while allowing landlords a fair profit margin. Others say that it merely "rubber-stamped" rent increases. In any case--whether because it had achieved its objectives and rendered itself obsolete, or because it was simply ineffective, when the pipeline housing crisis passed, the Board was eliminated.

Housing and Community Services has attempted to fill the tenants' and landlords' need for information on renter's rights and landlord's duties. Unfortunately, however, the services provided by that agency are limited. The office performs two functions: First, it informs landlords and tenants of their rights and obligations, when contacted by an aggrieved landlord or tenant, it provides him with literature designed to assist him in equitably settling the dispute and explains (but doesn't "interpret")

the statutes relevant to his complaint. Second, the office acts as a referral agency. For example, when it receives a complaint from a tenant alleging that he has been discriminated against, the office directs him to the State Human Rights Commission. When it receives a complaint of the kind described at the outset of this the section, the agency simply refers the caller to a private attorney or to Alaska Legal Services Corporation. In sum, though the agency performs a useful function in making landlords and tenants more aware of their rights and duties and in directing them to other services, it does not and cannot resolve any controversies itself.

The only other agency in Anchorage which processes a significant volume of landlord-tenant disputes is the small claims court. One hundred and seventy-six or 6.8% of the actions filed in that forum in the past year were suits by landlords--either to collect back rent or to recover damages for injury done to their property. And 79 or 3.1% of the cases were suits by tenants to recover security deposits. In most of these actions, the plaintiff, whether a landlord or tenant, was successful in obtaining relief either through a settlement prior to a hearing or through a judgment in his favor.

These statistics would seem to indicate that the small claims court is adequately handling landlord-tenant problems. Though the number of cases processed is relatively small, the complainants usually got relief--suggest-

ing that the low caseload reflects a relatively stable and conflict-free housing market and not any inadequacies in the forum itself. However, our interviews with the representatives of all the dispute processing agencies in Anchorage indicate that this is not an accurate picture of the services available to aggrieved landlords and tenants. All interviewees reported that the number of cases being processed in small claims court represents only a small percentage of the disputes between lessees and lessors of residential property. The vastly greater number of these cases are going unresolved.

We hypothesize that the same three factors discussed in the context of consumer complaints account for the reluctance of landlords and tenants to utilize the small claims court. The cost, the long disposition time, and (for tenants) the image of the forum as a business-oriented debt collection agency apparently deter most complainants. Even though, were they to press their claims they would most likely get relief, the initial filing fees, the prospect of having to wait three months for a judgment, and the "legalistic" aura of the forum probably discourage all but a few.

The advantages of an alternative dispute processing program in handling landlord-tenant cases closely parallel the benefits of its use in consumer protection matters. First, a mediation/arbitration center would be procedurally more attactive to prospective disputants than the existing forums. In contrast to the small claims court, the program would be free, fast, and informal.

Second, mediation/arbitration would be the ideal mechanism for exposing the salient issues in most landlord-tenant controversies and for facilitating quick settlements. As in consumer-merchant disputes, often all the parties need is an opportunity to communicate on neutral territory. Once they know each others' positions, they are often willing to agree to a resolution to their problem.[28]

Third, alternative dispute resolution would be able to generate the kinds of decisions most appropriate in many landlord-tenant cases. For example, in the first of the disputes described at the outset of this section, an effective settlement or award might be: The landlord must repair the plumbing and bear the loss for the damage to the rug. The tenant must resume rent payments immediately and must agree to pay the full amount of the back rent due, (but without interest), in installments, in the course of the next six months. A mediation/arbitration center would be designed to produce precisely this kind of flexible arrangement which is unavailable to the parties in small claims court.

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28 A. Sarat, supra at 346. B. Hoff and J. Stein, Interim Evaluation Report: Philadelphia 4-A Program, 13 (Dec. 1973). The former director of the Rent Review Board concurred in this analysis, stating that in her experience once the channels of communication were opened between the two disputants by some neutral party, the disputants usually found some mutually satisfactory area of agreement.

Finally, one characteristic of most landlord-tenant disputes makes them especially appropriate for mediation/arbitration: Typically, these controversies arise out of long-term relationships and/or conflicts. The former director of the Rent Review Board reported that the disputants in rent increase hearings constantly wanted to bring up old grievances--to justify their current actions in terms of previous interactions with the other party. The Rent Review Board with its limited jurisdiction was unable to consider such evidence. And the small claims court similarly is constrained to exclude this kind of contextual testimony. But, as indicated in the first section of this report, one of the objectives of alternative dispute resolution is to shape each decision to fit, not only the merits of the current dispute, but the history and underlying causes of the controversy, and thereby to enable the parties to interact more comfortably in the future.

4

Disputes Between Citizens and Governmental Agencies

A homeowner claims that the state highway department destroyed a section of fence bordering his property while constructing a road. The department denies the allegation.

A landowner claims that an old forest service road which crosses his property has been abandoned by that agency, that the government's right of way across his property has therefore lapsed and he has a right to prevent other people from using the path. He posts signs to that effect. Hunters, who have been using the road for years, ignore the signs and continue to cross the property. The owner fells a tree across the road to prevent its use. The hunters bring chain saws and remove the tree. The tension and potential for violence increases. All disputants appeal to the Forest Service to rule on the status of the road.

- A complainant charges that he was unfairly denied an outside electrical contractor's license by the state Board of Electrical Examiners. The State Ombudsman determines the claim to be justified and recommends that the agency review the complainant's file. The agency refuses to accept the recommendation.

Most disputes between private citizens and state and municipal agencies are handled quite adequately by the State and Municipal Ombudsmen's Offices. The ombudsmen have two responsibilities:

> (1) to receive complaints from the public and to investigate and act upon such complaints; and (2) to improve public administration[29]

Upon receiving a complaint, an ombudsman typically first encourages the citizen to work out a settlement with the agency, on his own. If that strategy fails, he assumes the role of a mediator: He contacts the two parties, requests that each provide him with information on the controversy, and then makes the position of each clear to the other. Often this informal correspondence will culminate in a settlement. If the ombudsman is unable to resolve the problem through mediation he conducts an investigation. He may inspect each party's records, hold separate conferences with the disputants, or even arrange a formal hearing. If he concludes that there is no basis for the claim the ombudsman informs both parties of that finding and the case is dropped. If the grievance is determined to be justified the agency will usually agree to cooperate voluntarily. In

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29 State Ombudsman's Second Annual Report, 2 (1976).

those few cases in which he finds that the claim has merit but the agency refuses to rectify the situation, the ombudsman makes a formal recommendation. These recommendations have no legal force; agencies cannot be compelled to accept them. However, the State Ombudsman may present his findings to the governer, the legislature, a grand jury, or the public. And the Municipal Ombudsman has similar recourse to the mayor and municipal assembly. As a result, in almost all cases the agency will agree to abide by the ombudsman's decision.

Three factors seem to account for the ombudsmen's ability to resolve most disputes through informal procedures. First, unlike the attorney general's office, the ombudsmen have the authority, resources, and staff to conduct extensive investigations of individual complaints. Thus they are able to collect the information necessary to determine the merits of each grievance. Second, though the ombudsmen's recommendations are not legally binding, the potential sanctions of publicity or appeal to the state or municipal government do lend them considerable force. Finally, both ombudsmen seem to have acquired reputations as neutral and fair investigators. Thus most agencies are willing to accept their findings and proposals.[30]

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30 In reviewing the types of actions instituted in small claims court, our data indicated that only 0.3% (five cases) of the caseload involved controversies between private citizens and governmental agencies. Whether citizens are reluctant to bring such matters to small

There are, however, three small categories of cases (exemplified by the three disputes described at the outset) which the ombudsmen have difficulty in handling and which would be better resolved by a mediation/arbitration program. The first category consists of disputes in which the ombudsman is confronted with a simple conflict of testimony. As the Municipal Ombudsman describes these cases:

> Occasionally a dispute boils down to a matter of one person's word against another's. When there are no outside corroborative factors, I cannot act as forcefully as might be warranted.[31]

Submitting controversies of this sort to an alternative dispute resolution center would have two advantages. First, a panel of trained mediators might well persuade the disputants to work out a compromise solution to the problem--without requiring either to abandon his version of the facts of the case. Thus, for example, in the first of the incidents described above, the Highway Department might assist the homeowner in reconstructing the fence. Second, if the parties refused to negotiate a settlement, the panel of hearing officers could evaluate the evidence presented by the two sides and then quickly and inexpensively arbitrate

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claims court or whether the ombudsmens' office is adequately handling this entire category of disputes such that few end up in the court cannot be determined from the data. Apparently most complainants found that the ombudsmen adequately met their needs.

31 Letter from the Municipal Ombudsman to the Alaska Judicial Council, August 20, 1977.

the controversy. The resulting award would be binding and enforceable--unlike the recommendation of an ombudsman. The decision would be rendered within 10 days and at no cost to the litigants, and, therefore, would likely be preferred by both parties to a disposition obtained through the courts.

The second category of cases is exemplified by the dispute described earlier involving the forest service. The State Ombudsman reports that periodically he receives complaints which involve a state agency but which, when investigated, prove to consist essentially of a dispute between two private parties. The governmental agency may have a significant or even controlling role in the controversy but it has no stake in the matter itself. Most often the agency is being asked to make an administrative decision which will affect the rights and obligations of the private disputants.

The State Ombudsman suggests that these problems would be far better handled by an alternative dispute resolution center than by either the ombudsmen or the courts. All the disputants should be brought together in a single session and, through mediation or arbitration, a flexible compromise solution should be arranged. Thus, in the forest service example, the hunters might be permitted to use the road but only during certain seasons. Or if the landowner wished to use the property containing section of the road for a different purpose, an alternative route might be designed. The objective would be to fashion a settlement or

award which would best satisfy the needs of all parties involved.

The third category of cases appropriate for mediation/arbitration is exemplified by the dispute over the contractor's license. In a small number of controversies between citizens and government agencies, the ombudsman investigates the claim, determines it to be justified, and makes a recommendation; but the agency refuses to abide by the decision. The Municipal Ombudsman reports that he has been able eventually to resolve all of these cases by exercising his power to publicize the dispute or by appealing to the mayor or municipal assembly. The State Ombudsman, however, indicates that in several disputes he handles, the situation is never rectified.

Mediation/arbitration of these problems would be effective for the same reasons discussed in the context of the highway department case: Trained mediators may be able to work out a compromise solution amenable to both disputants while allowing them to continue to insist upon the validity of their claims or defenses. And, if necessary, the same panel could quickly and cheaply arbitrate the dispute. We recognize that in the early stages of the operation of the program it may be difficult to induce the parties to many of these cases to consent to binding arbitration. But if the center is well managed and establishes itself as a neutral and fair forum, we believe eventually they will be willing to utilize the service.

Shoplifting

- A student attempts to steal a carton of cigarettes from a drug store but is apprehended by the proprietor.

We did not perform comprehensive statistical research on the quality of the treatment presently accorded to shoplifting offenses in Anchorage. However, data gathered by the Judicial Council Plea Bargaining Project indicate that the number of arrests for shoplifting offenses, as well as the severity of penalties imposed on convicted offenders have increased dramatically.[32] Two aspects of our needs assessment lead us to believe that a mediation/arbitration center would be able to handle these cases more effectively than the existing forums. First, the respondents to our business community questionnaire, the victims, were overwhelmingly in favor of submitting shoplifting cases to an alternative dispute resolution program. Over 80% of the owners and managers of retail and grocery stores (the only types of businesses likely to become involved in shoplifting disputes) indicated that they at least would "probably submit" such cases to a mediation/arbitration center. And 12.8% responded that they would be willing to consent in

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32 From August 1974 to August 1975 there was a 28% increase in the number of concealment of merchandise prosecutions in Anchorage. Alaska Judicial Council, Interim Report on the Elimination of Plea Bargaining, 138 (May 1977). On a statewide basis, there was a 22% increase in cases in which jail time was imposed, a 48% increase in cases in which fines were imposed, and an increase of 178% in the number of defendants receiving a sentence for the crime. Alaska Judicial Council, supra at 159.

advance to submitting all shoplifting disputes to the program. Only 7.8% of the combined respondents thought that the existing court systems were adequately handling these cases.

This assessment of the quality of the treatment of shoplifting offenders in Anchorage was confirmed by the representatives of the major dispute processing agencies in the city. The majority of our interviewees thought that prosecution of at least first offenders was inappropriate and ineffective. For first offenders at least, criminal conviction may be an overly harsh sanction in cases such as the one described above. And judging by the rate of shoplifting in the metropolitan area, sporadic prosecution and p. ıment has not operated as an effective deterrent.

For three reasons, a mediation/arbitration center would be a better forum for handling these cases. First, such a program would have several procedural advantages over the existing court systems. Most importantly, it would process cases quickly. All studies of the deterrent effect of various kinds of punishment stress the importance of rapidly imposing penalties. A judgment rendered within ten days of a shoplifting offense is likely to have a far greater effect on the defendant and on prospective shoplifters than a decision after several months.

Second, the kinds of settlements and awards obtainable through mediation/arbitration would be preferred by both the merchant and the offender to criminal sanctions. Thus, in the case described above, the student might agree to

work for the proprietor for a few weekends or to help install some mirrors in the store. The merchant would thereby be benefited and the defendant would avoid criminal conviction or even going to jail.

Discretion for the diversion of defendants from the courts to the Citizen Dispute Center would remain with the prosecutors and judges. These officials might develop guidelines for keeping certain offenders in the criminal process while diverting others. For many first-timers, however, diversion to an alternative dispute resolution center followed by the imposition of informal, restitutionary awards of the sort described above could be the ideal compromise between outright dismissal and criminal sanctions.

Debts and Bad Checks

- A man buys a toaster from a large department store using the store credit card. The toaster breaks within a week and the man refuses to pay his bill.
- A car owner pays for a tune-up of his vehicle with a personal check. He drives the car home, concludes that the tune-up was poorly done and stops payment on the check.
- A man is fired from his job and consequently is unable to pay a dentist's bill. After two months, the dentist writes him demanding payment in full plus 8% interest.

Our statistical study of the small claims court seems to indicate that the court is adequately handling cases of the sort described above. The forum does seem to be an effective debt collection agency. In the past year it processed 413 suits on promissory notes, 1173 actions for the recovery of debts, and 99 bad check cases--a total of

1685 controversies involving some form of debt collection. In 45.3% of those disputes the complainant obtained relief--either through a settlement prior to a hearing or through a judgment in his favor.

Surprisingly, however, the responses we have received from the business community indicate dissatisfaction with the small claims court. Only 6.8% of the respondents thought that the courts were adequately handling controversies over outstanding debts and only 5.5% thought that bad check cases were being effectively processed. A substantial majority of those who thought they might become involved in disputes over debts, or bad checks indicated either that they "probably" would submit the controversy to a mediation/arbitration program or that they would be willing to consent in advance to submitting all such cases to the center.[33] In sum, despite the impression one might receive from the results of our data collection, there seems to be a widely held belief in the business community that there is need for an improved mechanism in Anchorage for handling debts and bad checks.

In assessing the advantages of using a mediation/arbitration center to process these cases one must distinguish two different kinds of controversy. Cases similar to

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33 Sixty-seven percent of the respondents who encounter customer debt problems indicated they would be willing to agree to such an arrangement, and 63% of the respondents who are likely to encounter bad check disputes concurred.

the first two of the examples described above--where the real dispute is over the quality of a good or service--would be highly appropriate for alternative dispute resolution. In effect, these are simply consumer complaint cases; the only difference being that the buyer has not yet paid for the product. The benefits of resolving these disputes through mediation/arbitration are precisely those discussed in the section on consumer complaints.

Disputes like the third example, in which the consumer does not contest the fact that he owes the debt, are quite different. Typically, there are no contested issues in these cases; the only controversy concerns when and how the consumer must pay the money. The advantages of mediation/arbitration in handling these cases are less obvious than in the first kind of dispute, but they are nevertheless significant. As has been indicated several times, an alternative dispute resolution center would process cases quickly and cheaply; a complainant would not have to wait three months and pay filing fees in order to recover his money. Even more importantly, a mediation/arbitration program would be able to generate flexible decisions which might better satisfy both parties than would simple money judgments. For example in the case involving the dentist bill, the parties might agree that the patient would execute a promissory note obligating him to pay off the debt at a rate of ten dollars a month as soon as he got a new job. Clearly the patient would prefer such an arrangement to

paying the full amount at once; and the dentist would be more likely eventually to recover the full amount than if he attempted to collect the entire balance immediately. Thus, while the need for an alternative dispute resolution program to handle simple debt and bad check cases is not as pressing as in other categories of disputes, such a program would constitute a significant improvement over the existing forums.

PART II: DESIGN OF THE CITIZEN DISPUTE CENTER

This chapter describes a structure for the alternative dispute resolution program which we think would best compensate for the deficiencies in the existing mechanisms in Anchorage and would comport with the legal and philosophical principles outlined in the preceding chapter. The discussion is organized into seven sections. Each section provides a focused analyses of particular aspects of the design of the center: The agency which will sponsor and oversee the program; the types of controversies the center will handle; the mechanisms for the referral of disputes; the intake procedures; the resolution techniques employed; the staff of the program; and the follow-up and record-keeping procedures, are all discussed below.

In the course of our research we examined nine alternative dispute processing projects established in other parts of the country: The Boston Urban Court Project, the Columbus Night Prosecutor Program, the Miami Citizen Dispute Settlement Program, the Minneapolis Citizen Dispute Settlement Project, the Institute for Mediation and Conflict Resolution Dispute Center (New York City); the Orange County, Florida Citizen Dispute Settlement Program; the Philadelphia 4A Program; the Rochester, New York Community Dispute Services Project; and the San Francisco Community Board Program. Our review of the design and relative success of these centers has aided us greatly in the planning of our own

project; however, were we to include a complete description and critique of each program in this report the narrative would be repetitious and unweildy. Appendix F contains a chart which summarizes the important features of six of the nine projects. Where a particular characteristic of another program has some bearing upon an aspect of our own design we have referred to it in the following section.

Sponsoring Agency and Location

We recommend that the Citizen Dispute Center be implemented by the Alaska Court System. As we indicate later, the Center should have its own full-time staff and should, in some ways, be autonomous. But we think that the court system should supervise the establishment of the project, eventually assume responsibility for its funding, with the Judicial Council, periodically evaluate its effectiveness and, if necessary, change it.

There are four main advantages to court sponsorship. First, the court system is perceived by the community as neutral, almost by definition. Virtually all other established organizations capable of implementing the project are seen by some groups as biased. For example, two of the programs operating in other cities--the Columbus Night Prosecutor Program and the Minneapolis Citizens Dispute Settlement Project--are run by city attorney's offices. The danger in such sponsorship is that the parties to many disputes are likely to perceive the program as an arm of law enforcement--to expect it to function like a prosecutor.

Victims are likely to be misled into expecting retribution from the program, and to be disappointed and resentful when the project fails to provide that kind of relief. Conversely, defendants are likely to be either intimidated, or scared off and, in either case, angry at being dragged before someone they perceive as a district attorney. Also, since a great number of potentially soluable disputes are more in the nature of civil than criminal proceedings, involvement of the district attorney seems less appropriate.

Another potential sponsoring agency, the attorney general's office, suffers from a similar aura of partiality. A number of businessmen in Anchorage have indicated that they consider the attorney general's office a "consumer protector" and would be reluctant to consent to the arbitration of a dispute in a program sponsored by that agency. We may assume that many disgruntled consumers share this (mis)conception and would probably expect more partisanship of a dispute center sponsored by the Attorney General than the program can or should provide.

A second advantage of implementation through the courts is that during the initial stages of the project the stature, authority, and "image" of the courts may add credibility to the Center and help to dispel perceptions of the program as another gimmicky "do-good" effort.

The third advantage of court sponsorship is that it would facilitate efficient coordination of the operation of the center with other components of the civil and criminal

justice systems. Because the same agency would oversee both the Citizen Dispute Center and the various civil and criminal courts, referral procedures could be designed and implemented more efficiently. Similarly, the court system would be able to coordinate effective procedures for the enforcement of awards.

Finally, the court system eventually would provide the center with a reliable source of funding. In the first three years of its operation the center should be operated primarily on LEAA funds. Once the program is well established and has proved its ability effectively to process a variety of disputes, the financial responsibility for its operation should gradually be transferred to a state agency. Because the proper operation of the center will reduce caseloads and thereby the costs of the civil and criminal courts, we think the court system is the most appropriate agency to assume that function.

Despite these advantages of court system sponsorship, six of the nine dispute processing centers we studied had been established (by choice or by chance) under the auspices of wholly private organizations. For the reasons discussed above, we think that court system sponsorship is preferable. However, there are two significant benefits of sponsorship by a private agency which should be considered, particularly in the early stages of the operation of the program. First, a project run by a private organization is less likely to stigmatize respondents and thereby to provoke

their resentment and antagonism. When a defendant is brought before a board of arbitrators acting under the auspices of the court system, he is liable to think (or to fear that others will think) that he is being branded as a criminal. His resentment at being placed in that position may impede the mediation process and exacerbate the problem which originally brought the disputants to the center. This factor is the converse of the advantages of the stature and authority of the court system; the benefits of respectability are at least partially offset by the dangers of being perceived as an adjudicatory body.

We suggest two strategies for minimizing these dangers. First, the publicity concerning the program and the material distributed to potential disputants should stress the fact that the Center <u>does not adjudicate guilt or innocence</u>. The legal mechanism underlying the diversion of minor criminal offenses should be emphasized: The criminal complaint is converted, with the consent of the complainant, to a civil tort action; and that civil action is then submitted, with the consent of both parties, to binding arbitration. Thus the Citizen Dispute Center hearing is qualitatively different from a criminal prosecution. Above all, disputants should be encouraged to view the center as a forum for resolving their differences, not as a means of achieving the vindication of their claims and the vanquishment of their adversaries.

Second, the center should be located in a store-front or set of offices physically independent of the courthouse. The atmosphere of the center should be relaxed and informal. The manner in which the parties are greeted and interviewed, and the decor of the hearing rooms should all correspond to the tone of the dispute processing offered and should manifest the difference between this alternative and the criminal and civil justice systems.

If these two strategies are adopted we believe there will be little danger of stigmatizing and antagonizing respondents and thereby threatening the effectiveness of the mediation process. In addition, all parties will be made more aware of both the benefits and the limitations of the program and will be less likely to be disappointed by the disposition of their controversy.

The second advantage of a privately sponsored program is that, in practice, it is somewhat more likely to develop a broad base of support among community members and to use the services of community members in all phases of the project's operation.

We recommend that the Citizen Dispute Center encourage citizen support and utilization of the center in two ways. First, we recommend that the project be supervised by an nine-member Board of Directors. Three of the directors would be appointed by the Judicial Council, three would be selected by the Administrative Director of Courts, and three would be representatives of various community

organizations. The composition of the community groups represented would be flexible; if more than three expressed interest in the project, membership on the board might rotate periodically. We suggest, as an initial selection: the Anchorage Chamber of Commerce, AWAIC (Anchorage Women Aid in Crisis), and either a tenant's organization or one representing a minority ethnic group.

We suggest that the directors assume primary responsibility for hiring the permanent staff, for periodically reviewing the operation of the program and, if necessary, for restructuring the project. The Judicial Council has been in contact with Professor Frank Sander of Harvard Law School and with Mr. Fred Delappa, Staff Director of the ABA Special Committee on the Resolution of Minor Disputes, who have expressed interest in assisting the program. Both men are very experienced in the field of alternative dispute resolution. If candidates of comparable ability are selected by the court system and recruited from the community, the board will be quite capable of overseeing the program.

The second strategy for involving a diverse group of community members in the operation of the project is to use laypersons as hearing officers. For reasons discussed later in this report, we believe that one-third or approximately 17 of the mediators/arbitrators should be attorneys. But the remaining two-thirds, approximately 33, of the officers can and should be lay volunteers recruited from a wide spectrum of community groups. The community contact

gained thereby will be considerable. By word of mouth, a large number of citizens will learn of the existence and nature of the program, will be more likely to use the center to resolve their disputes, and may be willing to volunteer as hearing officers in the future. Sixty-seven percent of those businesses that responded to our questionnaire indicated that the responding officer or member of the respondent's business would be willing to volunteer to be trained as a lay hearing officer.

Jurisdiction

In order not to overload the program in its first months of operation, we recommend that the center begin by accepting only a few categories of disputes and then gradually expand its jurisdiction as it becomes more established and experienced. As we indicated in Part I, the types of minor controversies most in need of mediation/arbitration are disputes arising out of ongoing relationships, consumer protection cases, and landlord-tenant disputes. Thus we propose the program initially accept only controversies falling into one of these categories. Once the project staff feels comfortable with this caseload they should begin to accept: controversies between private parties and governmental agencies; bad checks and debts when the underlying dispute concerns the quality of a good or service; shoplifting offenses; and ordinary bad check and debt cases. The timing of the incorporation of each cate-

gory must be left to the Board of Directors and the staff. But we suggest as a general guideline that the center begin accepting all types of disputes within two years.

Also, in order not to overburden itself at the outset, we recommend that the center initially accept only misdemeanors and civil matters in which the amount in controversy is less than $1000. There is no reason in principle why the program eventually could not handle disputes of greater seriousness and magnitude. However, until it acquires considerable experience and credibility, we propose the center limit itself to minor controversies.

Intake Procedures

We recommend that a member of the project staff screen all disputes to determine their appropriateness for mediation/arbitration. In most cases screening will entail interviewing at least one of the parties to determine the nature of the controversy and the relationship between the disputants. In those few cases which have been partially processed by another agency, the intake officer might be able to gain the necessary information by reading the case file.

The determination of the appropriateness of a dispute will consist of the application of a set of strict standards. In the early stages of the operation of the program the intake officer will ask: (1) Are the disputants involved in an ongoing relationship? (In other words, did

they know each other prior to the development of the dispute, or are they likely to continue to interact in the future?) (2) Is or was one of the parties renting residential property to the other? (3) Is it the complainant's claim that he bought a defective product or service from the respondent? If the answer to any of the questions is yes, the officer will accept the case. If not, he will refuse to process it. As the jurisdiction of the program is gradually expanded, the acceptance standards will broaden; but similar guidelines will still be used to regulate the admission of cases.

Of course, the screening process cannot be completely mechanical; the intake officer must have some discretion. For example, an "ongoing relationship" cannot be rigidly defined. In borderline cases the officer will have to use his or her own judgment in deciding whether the parties really do know each other or whether their relationship is so tenuous as to be insignificant. In other instances, the dispute may clearly fall within an acceptable category but, for some reason, alternative dispute resolution would be inappropriate. For example, an interview may reveal that the respondent in a wife-beating incident is so unstable or dangerous that mediation/arbitration of the dispute without the possibility of confinement of the defendant would endanger the victim. The officer would therefore refer the case (back) to the criminal justice system. Here, as elsewhere, the selection and hiring of intelligent and discerning staff people will be a key to success; and the project may rise or

fall on the quality of its screening officers.

None of the nine centers operating in other cities takes this firm stance with regard to screening. Three of the projects--Boston, Columbus, and San Francisco--make no independent judgments at all as to what cases they process; jurisdictional decision are left to the referral sources. The remainder of the programs do use intake officers to screen disputes, but the standards used in selecting cases are considerably less specific.[34]

We have decided to use screening criteria which narrowly focus on the relationship of the disputants and the type of dispute for two reasons. First, we are concerned that the center become a successful, credible agency, even if the number and nature of disputes it processes in the initial stages are limited. We would want to exclude cases that are best resolved through traditional court procedures or through other agencies that can better deliver specialized aid. We do not wish to offer a redundant service. Second, we believe that, in many cases, if the parties are fully informed of the services offered by the center they will themselves be better to decide whether circumstances make their dispute inappropriate for mediation/arbitration. Thus we think a "self-selection" procedure in conjunction with strict guidelines will contribute to a more stable commencement phase and increased likelihood of continued successful

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34 See Appendix F.

operation.

We recommend, at least during the first year of operation, that use of the center be voluntary for both parties, and that the resulting settlement or award be binding on both. The consent of the defendant in a criminal case is clearly necessary. In submitting to mediation/arbitration, the defendant would be giving up important constitutional rights.[35] The Sixth Amendment requires that the relinquishment of those rights be intelligent and voluntary.[36]

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35 The accused in a criminal proceeding is guaranteed important procedural rights under both the federal and Alaska constitution. Article I, section 11 of the state constitution provides that in all criminal prosecutions, the accused shall have the right to a speedy and public trial by an impartial jury. The accused is entitled to know of the nature and cause of the accusation, to be released on bail, to confront witnesses against him, to have compulsory process for obtaining witnesses in his favor and to have assistance of counsel.

36 A defendant may waive consitutional rights, such as the right to counsel, provided he does so "knowingly and intelligently". Johnson v. Zerbst, 304 U.S. 458 (1938). By "knowing and intelligent" the court must take into account the defendant's age, mental condition and the entire setting to determine that the defendant's choice was a reasoned and deliberate one based on adequate knowledge. J. Israel and W. Scott, Criminal Procedure, Constitutional Limitations, 356 (1975). The Alaska Supreme Court stated in Gregory v. State, 550 P.2d 374, 379 (1976):

> Furthermore, after this information (detailing the right to and advantages of legal representation) an unequivocal statement by the person that he does not want counsel, should not put an end to the matter. The court can make certain that a defendant's waiver of counsel is intelligently made only from a penetrating and comprehensive examination of all the circumstances. . .

Alaska's Rules of Criminal Procedure also require the defendant "demonstrates that he understands the bene-

In addition, in order both to maintain the public's confidence in the center and to ensure true negotiation and mediation between the parties, the consent of the victim is indispensable.

We recommend that for civil disputes also, mediation/arbitration be contingent upon the consent of both parties. First, as we indicated above, self-selection by the disputants seems a reliable way to get only those cases appropriate for alternative dispute resolution into the center. Thus if either party objects to mediation/arbitration he should be able to prevent diversion. Second, we want the settlements or awards which issue from the center to have the legal status of binding arbitration awards. In other words, the only grounds for appealing a decision would be fraud, evident partiality by an arbitrator, or misconduct by an arbitrator which prejudiced substantially the rights of a party. Otherwise a court of record would be bound to confirm the award.[37] Thus, diversion to a non-judicial forum would entail a waiver[38] of the disputants' rights to a trial

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fits of counsel and knowingly waives the same". Alaska Rules of Criminal Procedure 39(b)(3).

37 See AS 09.43.110 which provides in part that "the court shall confirm an award unless. . . grounds are urged for vacating, modifying, or correcting the award".

38 Alaska Rules of Court Civil Rule 38(d) provides:

> The failure of a party to serve a demand as required by this rule and to file it as

by jury guaranteed by both the federal and state constitutions.[39]

The constitutional basis of the requirement of the disputants' consent has two other implications. First, in order that any waiver of rights be "knowing and intelligent", both parties must be fully informed of the nature of the services offered by the center before they elect to divert their case. In practice, then, the first step after the

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> required by Rule 5(d) constitutes a waiver by him of trial by jury. A demand for trial by jury made as herein provided may not be withdrawn without the consent of the parties.

[39] The right to a jury trial in certain civil trials is guaranteed by the seventh amendment to the United States Constitution and article 1, section 16, of the Alaska Constitution.
The seventh amendment to the United States Constitution provides:

> Trial by jury in civil cases. In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury shall be otherwise re-examined in any court of the United States, than according to the rules of the common law.

Article 1, section 16, of the Alaska Constitution provides:

> Civil Suits; Trial by Jury. In civil cases where the amount in controversy exceeds two hundred fifty dollars, the right of trial by a jury of twelve is preserved to the same extent as it existed at common law. The legislature may make provision for a verdict by not less than three-fourths of the jury and, in courts not of record, may provide for a jury of not less than six or more than twelve.

referral and screening of a case must be to explain to each disputant the nature and limitations of alternative dispute resolution. Only then would they be asked to sign a consent form.

Second, the parties' consent to diversion has to be fully voluntary; the center should not attempt to secure their cooperation with express or implied threats of any kind. The center may indicate that the alternatives to their attendance include criminal prosecution and/or a civil action. But it must be careful not to imply that submission to mediation/arbitration is legally required or that there are any penalties for not attending a hearing. In sum, the center simply must be honest about its jurisdiction and function and never suggest that it possesses powers or sanctions which it does not.

Existing Alaska statutes contain effective, ready-made procedures for the referral of most types of disputes to the Citizen Dispute Center. Alaska Statute 12.45.120 provides the requisite legal framework for the diversion of most criminal disputes:

> Authority to compromise misdemeanors for which victim has civil action: When a defendant is held to answer on a charge of misdemeanor for which the person injured by the act constituting the crime has a remedy by a civil action, the crime may be compromised except when it was committed
>
> (1) by or upon a peace officer, judge or magistrate while in the execution of the duties of his office;

(2) riotously;
(3) with an intent to commit a felony;
(4) larcenously.

The statute would be utilized as follows: If the prosecutor or judge decided that a case was appropriate for mediation/arbitration, he would suggest that the parties consider using the center. If the Citizen Dispute Center screening officer then accepted the case, each disputant would be asked to sign a form consenting to diversion to the program and to binding arbitration. In addition, the victim's form would contain a provision that if the defendant abided by the decision made by the center, he would agree that the dispute had been resolved to his satisfaction. The defendant's form would include a waiver of those rights constitutionally guaranteed to a criminal defendant. If the parties consented to the alternative procedure the district attorney would postpone prosecution or the judge would continue the case for three months. The Citizen Dispute Center would then process the dispute--either by inducing the parties to resolve the controversy themselves or by arbitrating the case. The settlement or award generated by the program would regulate the parties' behavior for a maximum of three months. If both abided by the decision for that period, the center would submit an affidavit to the prosecutor or judge indicating that the parties had successfully "compromised" the charge. The district attorney or judge would then dismiss the criminal case.

The only minimal offense within the proposed jurisdiction of the center which is excluded by the statute is shoplifting, a "larcenous" crime. An alternative mechanism for the diversion of criminal disputes which could be utilized in shoplifting cases is deferred prosecution. In cases which he determined were appropriate for mediation/arbitration, the district attorney would defer prosecution on conditio that the defendant participate in a Citizen Dispute Center hearing and abide by the settlement or award generated by the program. If the Citizen Dispute Center intake officer refused the case, the victim or the defendant refused to participate, or the defendant failed to abide by the decision, prosecution would be resumed. Otherwise the charges would be dismissed.

Finally, the simplest mechanism for getting a potentially criminal dispute into the center would be for the victim to bring the controversy directly to the program in lieu of filing a criminal complaint. The defendant would be notified of the claim, informed of the nature of the project and of the various alternatives available to the victim, and asked to agree to mediation/arbitration. If the respondent agreed and the center successfully processed the controversy, no formal court action would ever be taken. If the defendant refused or if the mediation/arbitration process broke down, the victim would still have time to file a criminal complaint.

The statute which provides the mechanism for the referral of civil disputes and for the enforcement of all decisions made by the center is the Alaskan version of the Uniform Arbitration Act.

> A written agreement to submit an existing controversy to arbitration or a provision in a written contract to submit to arbitration a subsequent controversy between the parties is valid, enforceable and irrevocable, except upon grounds which exist at law or in equity for the revocation of a contract. AS 09.43.10

In agreeing to submit their dispute to the Citizen Dispute Center, the parties to any controversy would be 1) consenting to binding arbitration and 2) forgoing the opportunity to bring a separate civil action in a court of record on the same claim. Sections AS 09.43.110 and AS 09.43.140 provide that, unless a disputant is able to allege and establish one of the few narrow grounds for vacating or modifying the decision, a court of record is bound to confirm and enforce the settlement or award which issues from the Citizen Dispute Center hearing. In sum, the decision rendered by the center would be the sole and final resolution of the dispute in almost all cases.

A disputant who failed to adhere to the terms of the arbitration award would be in the same position as one who failed to comply with a court judgment. Under the rules of court, a party may enforce a judgment through a writ of execution. Under such a procedure, a state trooper is given a copy of the judgment and ordered to attach property to satisfy its terms. If the judgment cannot be satisfied in

such a manner, more complex procedures ensue.[40] At least one program has incorporated special expedited procedures and fee waivers available to disputants seeking to enforce awards.[41]

Referral Sources

We recommend that the Citizen Dispute Center accept any case which falls within its jurisdiction from any source and at the earliest possible stage in the processing of the dispute. As indicated in the introduction, the program has two main goals: To provide a more effective resolution process for those disputes which are being poorly handled by the criminal justice system and agencies in Anchorage, and to provide some means for addressing those controversies which are not now being resolved in any forum. To maximize its service to those objectives, the project should accept a case at any point when either the parties or the administrators of the agency which is handling the dispute conclude that the Citizen Dispute Center would be a more appropriate forum.

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40 See Alaska Rules of Court, Civil Rule 69(a) through 69(c).

41 City of New York, Dept. of Consumer Affairs, "DCA Announces New Consumer Service to Collect Outstanding Small Claims Court Judgments" (August 29, 1977).

In practice, this means that the project will receive cases from five sources. First, complainants who were aware of the services offered by the project would bring original actions in the center--in lieu of instituting a civil suit or of filing a criminal complaint. In the first year of its operation the center will probably receive relatively few of these walk-ins. As the program becomes better known, however, we hope that most of the disputes would come from this source.

Second, other governmental agencies would refer appropriate civil controversies to the center. The State and Municipal Ombudsmen and representatives of the Attorney General's Office, Housing and Community Services, and Alaska Legal Services Corporation all have indicated that they receive hundreds of calls a year from tenants, landlords, injured consumers, and victims of intra-family violence which they would be glad to refer to the program.

Third, city and state prosecutors would divert appropriate controversies to the center. The Deputy Attorney General for Criminal Affairs has tentatively indicated an interest in deferring prosecution of selected criminal cases. Such cases, if they are amenable to mediation, could be referred to the center on condition that the defendant submit to mediation/arbitration. These cases might be dismissed if the defendant has abided by the settlement or award.

Fourth, if the prosecutor does not divert an appropriate controversy, the judge would still have discretion to continue further proceedings in the case to allow the parties to utilize the center. We would hope that few cases for which mediation/arbitration would be the best resolution technique would remain in the criminal justice system long enough for the judge to be forced to divert them. But referral from the bench would constitute a last resort for cases which happened to get that far.

Finally, the police would refer the parties in appropriate cases to the program. It would be unwise to require that a policeman when confronted with a dispute meeting certain criteria forego the right to make an arrest, and instead suggest or insist that the parties bring their controversy to the center. In many cases of intra-family violence, for example, the victim would be endangered were the police officer not immediately to arrest and confine the defendant. Instead, we recommend that the police simply be given the option of making a referral.

The San Francisco Community Boards program has adopted a system for discretionary police referral which we think would work well in Anchorage: Each police officer is given a stack of cards describing the services offered by the center. When he comes across a dispute which he decides does not merit an arrest, but which would be appropriate for mediation/arbitration, he gives each party a card, suggests that they utilize the program, and collects a minimal amount

of information--the disputants' names and a brief description of the controversy. At the end of the day he gives that information to the staff of the program. If the parties do not contact the center on their own, a member of the staff makes one phone call to each disputant. He explains how he came to hear of the controversy and asks whether the party is interested in mediation/arbitration. If both parties agree to use the program, the dispute is handled in the normal manner. If the parties are uninterested, no further contact is made.

We discussed using a similar system with Major Brian Porter of the Anchorage Police Department and he indicated that the Department would be willing to try it. It would be an ideal dispositional alternative, for example, for the approximately 33% of the family disturbances in which the police are unable to act because the victim refuses to sign a complaint. Some police officers are likely to be reluctant to use the referral mechanism at the outset. But if the center proves effective, within a year this system could become an established and important component of police procedures.

Of the nine dispute processing centers we studied, only Boston and Rochester rely upon a diverse set of referral sources. Most centers (by design or in practice) are heavily dependent on a few agencies--usually the prosecutor's and clerk's offices. For three reasons, we have decided to adopt the strategy of Boston and Rochester. First, as we

suggested at the outset, to maximize the improvement in the administration of justice in Anchorage, the program should ultimately accept appropriate cases whenever and from wherever possible. Second, we hope to prevent any single agency or office from acquiring practical control of the center. Several other cities' systems--particularly those which receive most of their cases from the prosecutor's office--have apparently become dominated by their referral source(s). We believe that the Citizen Dispute Center should be a fully autonomous organization--able to regulate its own procedures to maximize the quality of its dispute processing, not to suit the administrative convenience of any other agency. Finally, by accepting cases from virtually any source, we hope to process disputes as soon after they arise as possible. The more agencies a case has to pass through before referral, the longer the problem remains unresolved and the more the state is forced to pay for its disposition. By accepting cases from a diversity of sources and particularly by encouraging police referrals and walk-ins, we hope to avoid those unnecessary delays and costs.

Resolution Procedures

After screening a case and obtaining the parties' consent to mediation/arbitration the intake officers would schedule a hearing to resolve the dispute. The timing of the hearing would be arranged to suit the convenience of the parties. However, unless both parties request a delay in

the processing of the dispute, no hearing should be scheduled later than ten days after the referral of the controversy.

The atmosphere of the hearings would be highly informal. The customary trappings of formal adjudication--oaths, formal dress, physical separation of adjudicators and disputants, etc.--would be absent. Rules of evidence would be very relaxed.

The hearing officers would begin a session by clearly explaining the nature, powers, and limitations of the Citizen Dispute Center program. They would stress that the disputants have the primary responsibility for resolving their own controversy; the mediators are their assistants, not their judges.

The officers would then initiate the three-stage resolution process described in the introduction. They would begin by attempting to settle the dispute through conciliation. They would give each party a chance fully to present his side of the story--to state his claims or defenses, and especially to describe the circumstances or prior disputes which led up to the incident. Often this initial statement of grievances culminates in a settlement; the mere opportunity to state one's case before a neutral third party has cathartic effect, after this, disputants are often willing to agree upon a solution.

If conciliation alone is not sufficient, the hearing officers assume a more active role in the hearing; they employ the various techniques of mediation to clarify

the parties' positions and to determine their more important needs and fears. Private caucases may be necessary to determine the disputants' "bottom line" negotiating positions. In the course of the mediation, the officers periodically suggest resolutions to the controversies; ideally, each suggestion should be designed simultaneously to satisfy the more important desires of each party and to lead each disputant to sacrifice his less crucial demands. In most cases the disputants are willing to accept one of these suggested settlements.

If the parties are persistent in refusing to settle the controversy the officers gradually begin to arbitrate the case. For instance, if the parties are deadlocked on a particular aspect of the problem, the officers would tentatively arbitrate only that issue--preferably in a way which would catalyze further negotiation. Only if the parties refuse to negotiate at all or clearly are unable to agree upon a settlement would the officers assume complete control of the case. They would then call a halt to the hearing, retire, and by majority vote determine an appropriate award.

The purpose of all three stages of the resolution process is to design an agreement to solve the underlying problem which gave rise to the controversy. The goal of the hearing officers is to satisfy the disputants' needs and to enable them to interact comfortably in the future, not simply to allocate responsibility for past actions. Thus

even the third stage of the process--arbitration--only superficially resembles formal adjudication. In formulating their award the hearing officers do not decide whether a legal norm has been violated and then determine an appropriate penalty for the transgression. Instead, they assess the strength of each party's needs and expectations--revealed during their statement of grievances and negotiation, and determine the compromise most satisfactory to both.

It must be recognized, however, that in the course of the hearing the officers do assume more and more control of the outcome of the dispute processing. An arbitration award which issues from the third stage of the process will reflect the hearing officers' assessment of the merits of the case to a much greater extent than a settlement made by the parties following their initial statement of grievances. An appreciation of the implications of that fact is essential to the efficient and equitable operation of the program.

There are two primary methods for resolving any dispute. First, a neutral third party can evaluate the parties' acts and claims according to a set of extant rules--either natural law principles or socially established norms. Second, the parties can be permitted or assisted to design and apply their own rules--to distribute responsibility for and to determine the effects of their prior actions and to structure their relationship in the future. Most formal adjudication operates solely in the first mode. Pure medi-

ation (as used, for example, in labor contract negotiation) is an example of the second mode.

As we have stressed several times in this report, the primary form of dispute resolution offered by the Citizen Dispute Center is the second, non-normative mode. The program's unique ability successfully to process such diverse controversies as violent disputes between family members and landlord-tenant cases derives from its capacity to help the parties resolve their problems themselves. However, as a hearing moves through its successive stages, and as the hearing officers take on a more and more active role, the non-normative method gradually becomes mixed with an adjudicating technique. For example, the way in which the officers begin to shape and direct the negotiation--the way they probe the parties' stories, the concessions they encourage one or the other disputant to make, the settlements they suggest--will inevitably be determined in part by their assessment of the propriety of the parties' prior actions and the reasonableness of their present positions. And that evaluation will in turn be based upon some set of norms. Similarly, if the officers are forced to arbitrate the case, the award they select will not be a wholly neutral compromise between the disputants' needs and expectations. The officers' assessment of each disputant's moral or legal responsibility for the initiation of the dispute will naturally affect which of their conflicting demands they accept and which they reject.

There is nothing inherently wrong with this gradual shift to a normative dispute resolution technique. Often it will be exactly what the disputants need and expect. The parties to many controversies will not be able to resolve their problems entirely on their own. What they want is a reasonable and fair third party, someone who shares their general cultural orientation and set of moral values, to assist them in working out a solution and, if necessary, to evaluate their conflicting claims according to the hearing officer's own standards.

There are, however, two serious dangers in this increase in the hearing officers' control of the dispute resolution. First, the parties may not get a panel they consider to be reasonable and fair mediators/arbitrators. The hearing officers may not share their cultural orientations and moral standards and consequently may evaluate the propriety of their prior actions quite differently from the way one or both of the disputants perceive their conduct. This problem is inevitable when the parties themselves differ widely in background and personality; in that case no panel of mediators can fully conform to the expectations of both disputants.

Second, the decisions generated by the program in similar cases may differ widely. Even if each panel of arbitrators did meet the expectations of each set of disputants, the world-views and moral values of the various groups of officers are likely to vary considerably. Conse-

quently, the ways in which they perceive a particular controversy and the ways they shape the mediation of the dispute or arbitrate the case may be quite different.

To minimize whatever disparity may result, we make three recommendations: First, the hearing officers should be aware of the hazards of being overly directive and whenever possible, should allow the parties to control the development of the negotiation themselves. Thus, for example, they should follow the disputants' lead in suggesting settlements; they should propose agreements which correspond to the parties' demands and not which they think would be the most equitable solution. And they should be very reluctant to arbitrate. When the disputants are deadlocked, they should decide as limited an aspect of the problem as possible; their goal should be to enable the parties to continue negotiating, not to decide the entire matter.

Other centers have been very successful in resolving controversies through mediation. The Institute for Mediation and Conflict Resolution, for example, has been forced to resort to arbitration in less than 5% of its cases. We hope to equal that achievement.

Second, we recommend that the hearing officers assigned to a case be carefully selected (1) for their knowledge of the subject matter of the dispute and (2) for their ability to reflect and accommodate the parties differing economic and cultural orientations. Thus, for example, in a landlord-tenant case, ideally one of the mediators

would be a landlord, one would be a tenant, and one would be a member of some neutral occupational group who knew something of landlord/tenant law and affairs. And in a controversy between two native Alaskans, at least two of the hearing officers would be of the same race and social background. In this way, the parties would be most likely to present their case to and, if necessary, to have it decided by a culturally similar group of people who understood the real nature and importance of the dispute.

Third, we recommend that the hearing officers receive training in and remain aware of the legal norms relevant to the types of controversies they will be handling. If forced to arbitrate a dispute, they should not feel strictly bound by those rules. On the other hand, they should try to avoid making decision which clearly conflict with the applicable statutory or common law rules. We make this recommendation for two reasons. First, it is a simple and efficient way of lending some consistency to the decisions rendered in similar cases and of thereby giving prospective parties some idea of how the program will handle their controversies. Second, we believe that a resolution which is at least not widely different from what the parties would receive in a court of record is probably what most people expect from the program. Thus, unless the desires or circumstances of both parties clearly indicate that a different type of settlement would be more appropriate, hearing officers forced to arbitrate a dispute should not disregard

the relevant legal norms.

A number of commentators have questioned the feasibility and effectiveness of a dispute resolution process which combines mediation and arbitration. Professor Sander, for example, has commented that,

> there is an obvious difficulty if the mediator-arbitrator is unsuccessful in his mediational role and then seeks to assume the role of impartial judge. For effective mediation may require gaining confidential information from the parties which they may be reluctant to give if they know that it may be used against them in the adjudicatory phase. And even if they do give it, it may then jeopardize the arbitrator's sense of objectivity. In addition it will be difficult for him to take a disinterested view of the case--and even more so to appear to do so--after he has once expressed his views concerning a reasonable settlement.[42]

To avoid this confusion of roles and loss of objectivity, Professor Sander suggests that each stage of the process be conducted by a different hearing officer or panel. The disputants would first present their case to a set of mediators who would attempt to lead the parties to agree upon a resolution to the controversy. If a settlement were not forthcoming, the parties would move to another room, restate their positions before an arbitrator who would then impose a binding award on them.

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42 F. E. A. Sander, Varieties of Disputes Processing, 15 (1976) (a paper delivered at the National Conference on the Causes of Popular Dissatisfaction with the Administration of Justice, St. Paul, Minnesota, April 8, 1976).

In proposing the design for a mediation center, we have decided not to incorporate Professor Sander's suggestion for three reasons. First, three established programs--the Institute for Mediation and Conflict Resolution Dispute Center, the Rochester Community Dispute Services Project, and the Philadelphia 4A Program--employ a continuous mediation-arbitration resolution technique. None of the projects has reported any difficulties with the system. Nor have independent evaluators of the programs noted any problems.

Second, we believe that there are advantages to enabling the hearing officers gradually to assume control of the dispute resolution process. For instance, as indicated above, by arbitrating a single issue on which the disputants are deadlocked, they may facilitate further negotiation and eventually induce a settlement. Thus, what Professor Sander describes as a "confusion of roles" can be used constructively.

Finally, we believe it is important to preserve the simplicity and efficiency of the program. The need to present their case twice, to inform two separate panels of the details of their relationship and dispute, would discourage, frustrate, or embarass many parties. And the knowledge that they might have to undergo such an extended process may deter other prospective clients from utilizing the center at all.

In sum, to avoid unfairly surprising parties, we recommend that the intake staff make sure that the disputants

are aware (before signing consent forms) of the nature of the services offered by the center and particularly of the potential power of the hearing officers. But, unless the program experiences difficulties with the system, we propose that the Citizen Dispute Center utilize a unitary conciliation-mediation-arbitration dispute resolution process.

We recommend that the center have the power to render any type of decision except one which results in the involuntary incarceration or similar loss of liberty of any party. We expect that common settlements and awards would be: restitution (in money or in kind); bilateral behavioral restraints (e.g. the parties agree to avoid each other for three months); and unilateral behavioral restraints (e.g. one party agrees to stop playing their stereo after 10:00 p.m.). But any form of decision which is amenable to the disputants and/or solves their underlying problem would be acceptable. Parties and hearing officers should be encouraged to use their ingenuity.

At this point, we do not anticipate that compulsory social service referral would constitute a major part of the program. Compulsory referral to some agencies--for example, drug rehabilitation centers--would constitute an involuntary restraint on the liberty of a party and therefore would be beyond the jurisdiction of the center. Compulsory referral to many other programs--for example, marriage counseling services--would in most cases be ineffective and degrading. We wish to avoid psychic meddling

in this program. However, hearing officers should be encouraged fully to utilize available social services where it seems likely that the service rendered would result in a more enduring resolution of the dispute.

Follow-Up Procedures

We recommend that an intake officer reinterview both parties to each controversy three times--at intervals of two weeks, then two months, then six months after the hearing. In the first two interviews the officer will ask each disputant four questions: (1) Is the other party adhering to the settlement or award? (2) Are you satisfied with the settlement or award? (3) What is your opinion of services provided by the center? (4) What do you think is the likelihood that the dispute which brought you to the center will reoccur in the future?

This procedure will provide the staff with the information necessary to evaluate the effectiveness of the program and, if necessary, to make changes in intake procedures, methods of inducing settlement, or in the kinds of terms which are ultimately incorporated into settlements and awards. Also, we hope that this information will assist other, similar programs by identifying those kinds of conflicts which are most or least amenable to resolution by mediation-arbitration; and also give us better ideas for constructing longer-lasting, more durable settlement arrangements.

Another function that might be served by this re-interview process is aid in enforcement of settlements and awards. For example, if it comes to the attention of the staff that one of the parties has a complaint concerning a noncompliance by another party to the settlement, the re-interview may stimulate a renewal of the parties' agreement. If there is a complaint on one side, the intake officer will get in touch with the alleged offending party and attempt to discover the facts as he or she sees them. If the party admits not complying with the original settlement and offers no justification for his conduct, the intake officer will truthfully explain the potential sanctions for violation of settlements and awards rendered by the center and further indicate that if the party who is in noncompliance fails to conform his conduct the sanctions will be instituted. If, on the other hand, the party either disputes the fact of his noncompliance or alleges some grounds or justification on his side, the intake officer should then work with both parties to restore some equilibrium. It may even be necessary to schedule a rehearing of the matter. Other centers report that this combination of mild, honest threats and occasional modification of decisions serves to resolve almost all problems. In Columbus, for instance, formal procedures are required in only 2.2% of the cases. And the New York City projects reports that less than 1% of their disputes end up back in court.

Inevitably, however, informal sanctions will not be effective in insuring compliance in all disputes. Unless some formal enforcement procedure is available and occasionally utilized, even informal measures may soon lose their credibility. There are three general types of sanctions which might be used to back up the decisions rendered by the center: the resumption or initiation of prosecution of criminal cases; the enforcement of arbitration awards in the civil courts; and the activation of community peer pressure. Five of the programs we studied rely solely on the first method, three employ a combination of the first and second, and one relies solely on the third.

We recommend that the Citizen Dispute Center employ a combination of the first and second modes of enforcement. The party who is in compliance with the award would have the power to determine which strategy is used in a particular case. Confirmation and enforcement of the decision in a civil court would probably be the remedy used in most cases, unless the offending party has engaged in threatening, violent or otherwise clearly anti-social conduct. Civil enforcement has the advantage of ensuring that the innocent party still gets the benefit of the center's decision--e.g. restitution for his injuries or property loss, and is to be preferred.

The San Francisco Community Boards Program plans to use peer pressure as its sole device for the enforcement of awards. For three reasons, we strongly recommend that

the Citizen Dispute Center not adopt this strategy. First, as the founders of the San Francisco program recognize, the use of the opinions of neighbors to induce disputants to use a program and to abide by its decisions is only possible in a community characterized by a strong, stable "social network". The residents of a particular area must know each other, be accustomed to participating together in community activities, and must anticipate remaining in the neighborhood for some time. Only then can systematic peer pressure be brought to bear on a particular offender. A strong social network of this sort does not exist in Anchorage; hence there are few, if any, of the kind of established communities which would support the San Francisco approach.

Even more importantly, however, we find the Community Board's strategy extremely suspect if not in practice, at least in theory, from a social and philosophical perspective. The San Francisco program emphasizes that one of its primary objectives is to enable members of particular communities to establish and enforce standards of behavior--in effect, to impose upon all residents of a particular area the attitudes of the majority as to how individuals should interact.[43]

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[43] "Peer pressure" techniques of dispute resolution would be particularly inappropriate and probably ineffectual in Alaska. The Alaska Supreme Court has observed

> Our territory and now state has traditionally been the home of people who prize their individuality and who have chosen to settle or to continue living here in order to achieve

Finally, we recommend that the center keep only minimal records on the nature and outcome of the individual disputes it processes. When he signs the form consenting to mediation/arbitration, each party will fill out a single card. The data collected on this card will include some demographic information on each party, the referral source for each dispute, and each disputants' brief description of the controversy. No record will be kept of the settlements or awards rendered in individual cases beyond those award documents minimally necessary for enforcement in a court of law in the event of noncompliance.

We realize that a more extensive record-keeping system might aid the program in evaluating its effectiveness and in revising its procedures, but we can see no other way to preserve the confidentiality of the hearings. If, for example, a disputant in a subsequent civil suit based on an incident generated by the same underlying problem as gave rise to the controversy resolved in the center wished to subpoena the program's records relating to that dispute, the center would have no way of protecting its documents. Similarly, if an attorney in a subsequent criminal action requested relevant records, the program could not refuse to provide them.

> a measure of control over their own lifestyles which is now virtually unattainable in many of our sister states.

Ravin v. State, 537 P.2d 494, 504 (1975).

We believe that strict confidentiality is essential to the effective operation of the program. Only if parties know that their statements and admissions will not be used against them in subsequent actions will they be willing freely to discuss their problems and actions and to work out sensible solutions to their disputes. If some legal mechanism can be developed for protecting the center's documents, we would gladly revise our procedures. But, for now, we recommend that record-keeping be minimized.

Staff

We recommend that in its first year of operation the center employ four fulltime staff workers: a director; two intake officers; and a secretary-receptionist. The director would supervise the day-to-day operation of the program, review and revise screening standards, help the mediator/arbitrators, supervise follow-up procedures, maintain contact with other agencies and with the sponsoring organization, and implement the recommendations of the board of directors. The intake officers would interivew disputants, screen cases for admission to the center, collect pre-hearing data, schedule hearings, select mediation panels, and conduct follow-up procedures. The secretary would receive walk-ins, schedule interviews, make sure that all persons were notified and reminded of their appointments, and handle the paperwork of the office.

This represents, in our opinion, the bare-minimum staff which could successfully administer the program. Five would probably be better. We estimate that the first-year caseload of the center will be between 500 and 1000. The Rochester Community Dispute Services Project, the only program with a caseload which falls within this range, has a full-time staff of six. The five centers for which we have data relating to staffing employ an average of 5.1 full-time workers per 1000 cases. Thus, we are proposing a work force slightly smaller than that found necessary by other programs. As we begin to implement the project, we may well discover that more intake officers are needed. And, as the caseload of the center increases, we will certainly need a larger staff. But, at the outset, we think that four or five will be necessary and sufficient.

We recommend the following composition and distribution for the pool of hearings officers: Two-thirds of the mediator/arbitrators should be volunteer laypersons; one-third should be volunteer attorneys. Three officers should be assigned to each case--one attorney and two laypeople. The mediators should serve approximately twice a month and should handle two cases per session. A projected caseload of approximately 750 therefore, would require a pool of 50 volunteers.

Several considerations underlie our decision to use a mixed panel of lawyers and non-lawyers. First, we believe that an attorney's training and experience in ad-

versarial, investigatory and settlement skills will enable him more effectively to control the disputants' behavior and to draw out and test their stories. Second, in accordance with our recommendation in the preceding section, his knowledge of the law (and his ability to explain it) will help to prevent the panel from rendering an arbitration award which is grossly inconsistent with the decision the parties would have received in a court of record. Prospective participants, referral agencies, and funding sources, wisely or not, are likely to be less skeptical of a program with some ties to the legal system than of one administered entirely by laypeople.

The laypersons on each panel serve equally important functions. First, we hope that they will partially offset the lawyer's penchant for adversarial procedures; they will make the hearing less formal and imposing and ensure that the disputants realize that the goal of the program is to design a solution to their common problem, not to vanquish their opponents. Second, they will contribute to the image of the center as a community service; their presence will lead a disputant to perceive a hearing panel as a group of his peers and will help to give the center a more accessible and down-to-earth image. Third, the use of lay hearing officers will help to publicize the program; by word of mouth, many other citizens will learn of the program and will be more likely to bring their disputes directly to it. Finally, the proposed structure of the program will

allow many citizens to get involved in the administration of justice. Even apart from the quality of the dispute resolution thereby made possible, we believe that it contributes to a greater sense of community responsibility and concern for a city to enable its residents to learn about and to participate in the legal process.

Our decision to employ lay hearing officers effectively dictates our recommendation that three mediators/arbitrators be used to process each dispute. It might be possible to allot only one hearing officer to each case if we limited our pool either to attorneys or to professional mediators. The projects established in Miami, Orlando and Columbus report that a mediator/arbitrator with legal or professional training is quite capable of conducting a hearing on his own. Those programs which use lay mediators, however, have found panels more effective. The Boston Urban Court Program, for instance, reports that its sessions have been "more balanced and more comfortable for the mediators when more than one participates".[44]

In addition, we believe that the use of three hearing officers instead of one will lend greater consistency to the awards generated by the center. The prejudices or peculiar moral values of an individual mediator/arbitrator will be less likely to affect the decision rendered in a

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44 The Urban Court Program (December 9, 1974) (a descriptive summary prepared by the Justice Resource Institute Inc.).