

2004

## State Legislative Update

Robert J. Fisher

Katherine M. Massa

Benjamin B. Nelson

Cassandra A. Rogers

Follow this and additional works at: <https://scholarship.law.missouri.edu/jdr>



Part of the [Dispute Resolution and Arbitration Commons](#)

---

### Recommended Citation

Robert J. Fisher, Katherine M. Massa, Benjamin B. Nelson, and Cassandra A. Rogers, *State Legislative Update*, 2004 J. Disp. Resol. (2004)

Available at: <https://scholarship.law.missouri.edu/jdr/vol2004/iss2/4>

This Legislation is brought to you for free and open access by the Law Journals at University of Missouri School of Law Scholarship Repository. It has been accepted for inclusion in Journal of Dispute Resolution by an authorized editor of University of Missouri School of Law Scholarship Repository. For more information, please contact [bassettcw@missouri.edu](mailto:bassettcw@missouri.edu).

# State Legislative Update\*

Robert J. Fischer  
Katherine M. Massa  
Benjamin B. Nelson  
Cassandra A. Rogers

## I. STATE LEGISLATIVE FOCUS

### A. Confidentiality in Mediation: Florida Senate Bill 1970<sup>1</sup>

Bill Number: Florida Senate Bill 1970

Summary: This bill creates the Mediation Confidentiality and Privilege Act. It provides for standardized proceedings, so that both court-ordered and non court-ordered mediation are entitled to the same confidentiality status.

Status: Signed by Governor, June 10, 2004

#### 1. Introduction

Confidentiality in mediation communications is an issue of vital importance to all those involved. The assurance of confidentiality in mediation proceedings promotes openness and candor between the parties. Often, it is openness that will lead parties to a resolution of a dispute. With the passage of Senate Bill 1970 the Florida legislature has recognized the importance that confidentiality protections play in the encouragement of successful mediations.

Senate Bill 1970 was introduced in the Florida Senate on March 2, 2004.<sup>2</sup> It was initially referred to the Senate Judiciary Committee where it passed on April 19 with an 8-0 vote.<sup>3</sup> Senate Bill 1970 was read for the first time in the Senate on April 21.<sup>4</sup> The bill passed the full Senate on April 24 with a 39-0 vote.<sup>5</sup> It was then sent to the full House on April 26 where it was substituted for House Bill 1765.<sup>6</sup> Senate Bill 1970 was read and passed in the House on April 27 with a 114-

---

\* The State Legislative Update is an annual article appearing in the fall edition of the *Journal of Dispute Resolution* and is compiled and written by selected *Journal* members. It is designed to provide readers with a listing of pertinent legislation affecting alternative dispute resolution. The update also provides a more detailed look at certain bills due to their importance and/or novelty within the ADR field. If you have comments or suggestions about this feature, please feel free to e-mail the *Journal of Dispute Resolution* editorial board at [umclawjournal@missouri.edu](mailto:umclawjournal@missouri.edu).

1. S.B. 1970, 2004 Leg., Reg. Sess. (Fla. 2004).

2. S.B. 1970, Bill History, available at [http://www.flsenate.gov/session/index.cfm?BI\\_Mode=ViewBillInfo&Mode=Bills&SubMenu=1&Year=2004&bilnum=1970](http://www.flsenate.gov/session/index.cfm?BI_Mode=ViewBillInfo&Mode=Bills&SubMenu=1&Year=2004&bilnum=1970) (last visited Nov. 16, 2004).

3. *Id.*

4. *Id.*

5. *Id.*

6. *Id.* House Bill 1765 was similar to Senate Bill 1970. H.B. 1765, 2004 Leg., Reg. Sess. (Fla. 2004). House Bill 1765 received a favorable recommendation from the State Administration Commit-

0 vote.<sup>7</sup> The bill was presented to Governor Bush for signature on June 9 and signed into law on June 10, 2004.<sup>8</sup>

## 2. The Bill

Chapter 44 of the Florida statutes<sup>9</sup> provides the statutory guidance for mediation proceedings in the state.<sup>10</sup> Senate Bill 1970 amends certain sections of Chapter 44, but most notably it creates six new sections in the chapter dealing with mediation confidentiality.<sup>11</sup> The six new sections are known as the Mediation and Confidentiality Act.<sup>12</sup> Prior to the enactment of the Mediation and Confidentiality Act, only court-ordered mediations were granted explicit statutory confidentiality protections under Chapter 44.<sup>13</sup> Now, non court-ordered mediations are afforded statutory confidentiality protections as well.<sup>14</sup> In particular, this bill makes all mediation communications confidential and provides that a mediation participant may not disclose a mediation communication.<sup>15</sup> In addition, the bill grants participants a privilege to refuse to testify regarding the communication.<sup>16</sup>

The bill also provides certain remedies for violations of mediation confidentiality, including equitable relief, compensatory damages, attorneys' fees and mediators' fees.<sup>17</sup> Further, the bill sets a statute of limitations and provides that a mediation participant is not subject to a civil action when he acts lawfully in compliance with a public records law.<sup>18</sup>

Another important aspect of the bill is that it offers judicial immunity for arbitrators and mediators.<sup>19</sup> However, the bill makes clear that judicial immunity for non court-ordered mediations only applies when the liability arises from the performance of the mediator's duties while acting in the scope of the mediation function.<sup>20</sup> The bill makes clear that immunity is not provided if the mediator "acts in

---

tee before it was substituted by Senate Bill 1970 on April 27, 2004. See H.B. 1765, Bill History, available at [http://www.myfloridahouse.gov/bills\\_detail.aspx?Id=14949&sBillNumberText=1765&sStatuteAmendedText=&sBillSubjectText=&iSponsorSelectedIndex=0](http://www.myfloridahouse.gov/bills_detail.aspx?Id=14949&sBillNumberText=1765&sStatuteAmendedText=&sBillSubjectText=&iSponsorSelectedIndex=0) (last visited Nov. 16, 2004).

7. S.B. 1970, Bill History, *supra* note 2.

8. *Id.*

9. FLA. STAT. ch. 44 (2004).

10. SENATE STAFF ANALYSIS AND ECONOMIC IMPACT STATEMENT, S. 2004 Leg., Reg. Sess., at 1 (Fla. 2004).

11. *Id.*

12. FLA. STAT. §§ 44.401-44.406 (2004).

13. SENATE STAFF ANALYSIS, *supra* note 10, at 2.

14. *Id.* Section 44.402 of the Mediation and Confidentiality Act reads:

Except as otherwise provided, §§ 44.401-44.406 apply to any mediation: (a) Required by statute, court rule, agency rule or order, oral or written case-specific court order, or court administrative order; (b) Conducted under §§ 44.401-44.406 by express agreement of the mediation parties; or (c) Facilitated by a mediator certified by the Supreme Court, unless the mediation parties expressly agree not to be bound by §§ 44.401-44.406.

FLA. STAT. § 44.402 (2004).

15. FLA. STAT. § 44.405(1).

16. *Id.* § 44.405(2).

17. *Id.* § 44.406(1)(a)-(d).

18. *Id.* § 44.406(2)-(3).

19. *Id.* § 44.107(1).

20. *Id.* § 44.107(2).

bad faith or with malicious purpose, or in a manner exhibiting wanton and willful disregard of human rights, safety, or property.”<sup>21</sup>

### 3. Conclusion

The idea of confidentiality in mediation proceedings is often in conflict with a judicial system that prefers to look at all of the relevant evidence.<sup>22</sup> However, Florida’s passage of the Mediation and Confidentiality Act did not come after a highly contentious debate among lawmakers, as evidenced by the overwhelming support the bill received in both the Florida House and Senate.<sup>23</sup> Perhaps this is an indication of an increasing willingness among lawmakers—at least in Florida—to acknowledge the benefits of effective mediation.

#### *B. Mandatory Attorneys’ Fees in Insurance Arbitration: Hawaii House Bill 2786*<sup>24</sup>

Bill Number: Hawaii House Bill 2786

Summary: This bill would have required insurers to pay reasonable attorneys’ fees to any insured who was successful in enforcing his or her rights under a policy through arbitration.

Status: Vetoed by Governor, July 13, 2004

### 1. Introduction

Hawaii law requires an insurer that contests its liability resulting from an insurance policy and is later found liable in court to pay the insured’s “reasonable attorney’s fees and the costs of suit.”<sup>25</sup> Hawaii House Bill 2786 would have extended an insurer’s obligation to pay attorney’s fees and the costs of litigation to cases where the insurer had been found liable by an arbitrator or arbitration panel.<sup>26</sup>

21. *Id.* § 44.107(2)(c).

22. Paul Dayton Johnson Jr., Note, *Confidentiality in Mediation: What can Florida Glean from the Uniform Mediation Act?*, 30 FLA. ST. U. L. REV. 487, 490 (2003).

23. S.B. 1970, Bill History, *supra* note 2.

24. H.B. 2786, 22nd Leg., Reg. Sess. (Haw. 2004). A bill identical to the original version of House Bill 2786 was introduced in the Senate on January 28, 2004 as Senate Bill 3225. S.B. 3225, 22nd Leg., Reg. Sess. (Haw. 2004). However, after being approved on February 17, 2004 by the Senate’s Commerce Consumer Protection and Housing Committee, the bill has not been acted on. S.B. 3225, Measure History, available at <http://www.capitol.hawaii.gov/session2004/status/SB3225.asp> (last visited Nov. 16, 2004).

25. HAW. REV. STAT. § 431:10-242 (1993). The statute reads:

Where an insurer has contested its liability under a policy and is ordered by the courts to pay benefits under the policy, the policyholder, the beneficiary under a policy or the person who has acquired the rights of the policyholder or beneficiary under the policy shall be awarded reasonable attorney’s fees and the costs of suit, in addition to the benefits under the policy.

*Id.* The Hawaii Supreme Court has ruled that this statute is inapplicable to cases resolved through arbitration. *Labrador v. Liberty Mut. Group*, 81 P.3d 386, 393 (Haw. 2003).

26. H.B. 2786, 22nd Leg., Reg. Sess. (Haw. 2004).

House Bill 2786 was introduced and read for the first time in the Hawaii House on January 28, 2004.<sup>27</sup> It was initially passed by the House Judiciary Committee on March 3 by a 14-0 vote.<sup>28</sup> It was then sent to the full House where it passed 43-6 on March 9.<sup>29</sup> House Bill 2786 was read for the first time in the Senate on March 11 and transferred to the Senate's Commerce Consumer Protection and Housing Committee where it passed on March 22 with a 4-0 vote.<sup>30</sup> It was next referred to the Senate Judiciary Committee, where, after several amendments, it passed 6-0 on April 2.<sup>31</sup> The amended version of the bill then went to the full senate and passed 25-0 on April 13.<sup>32</sup> Because the House expressed disagreement with the Senate's amendments, the bill was sent to a joint conference committee.<sup>33</sup> The committee submitted a compromise version on April 29 and, on May 3, the final amended version was approved by both houses.<sup>34</sup> The final bill passed 24-0 in the Senate, and the Democratic-controlled House approved it 39-11 in a vote reflecting party affiliation.<sup>35</sup> The bill was vetoed by Republican Governor Linda Lingle on July 13, 2004.<sup>36</sup>

## 2. The Bill

The original version of House Bill 2786 would have expanded the scope of section 431:10-242 of Hawaii law to apply to an order by "an arbitrator or arbitration panel" and would have added "costs . . . of the arbitration" as one of the categories that a successful insured would be able to recoup from an insurer.<sup>37</sup> An amended Senate version, in addition to extending the statute to apply to arbitration, would have also made the statute applicable to orders by the state insurance commissioner.<sup>38</sup> However, that clause was removed in the final version, amended in the joint conference committee, because it was found to have exceeded the scope of the bill's title.<sup>39</sup> The final version approved by the joint conference committee also removed any reference to arbitration or suit costs and simply stated that a successful insured would be awarded, "reasonable attorney's fees and costs" whenever an insurer had been found liable by "the courts, an arbitrator, or an arbitration panel."<sup>40</sup>

---

27. H.B. 2786, Measure History, available at <http://www.capitol.hawaii.gov/session2004/status/ HB2786.asp>.

28. *Id.*

29. *Id.*

30. *Id.*

31. *Id.* One of the amendments would have postponed the effective date of the Revised Uniform Arbitration Act in Hawaii—which had been approved by the legislature in 2003—from June 30, 2004 to June 30, 2005. H.B. 2786, 22nd Leg., Reg. Sess. (Haw. 2004). The measure was later removed by the conference committee. H.B. 2786, Measure History, *supra* note 27.

32. H.B. 2786, Measure History, *supra* note 27.

33. *Id.*

34. *Id.*

35. *Id.*

36. *Id.*

37. H.B. 2786, 22nd Leg., Reg. Sess. (Haw. 2004). See also HAW. REV. STAT. §§ 431:10-242 (2003) (listing statutes that would have been affected).

38. *Id.*

39. J. CONF. REP. NO. 22-54-04, Reg. Sess., at 1 (Haw. 2004).

40. H.B. 2786, 22nd Leg., Reg. Sess. (Haw. 2004).

### 3. *Support and Opposition*

House Bill 2786 was supported by the Hawaii Department of Commerce and Consumer Affairs, the Hawaii Commission on Uniform State Laws, and the Consumer Lawyers of Hawaii.<sup>41</sup> Although there was a consensus that the bill could make arbitrating insurance claims at least marginally more expensive, it would also make the same remedies available in arbitration that were available in a lawsuit, thereby encouraging parties to arbitrate.<sup>42</sup> Also, because of the backlog in Hawaii courts, directing more insurance claims to arbitration would both relieve the strain on the court system and help aggrieved parties to recover the proceeds of their policies in nearly half the time it takes to litigate a claim in court.<sup>43</sup>

The bill was opposed by several major insurance groups and carriers, including State Farm Insurance, the largest insurance carrier in Hawaii.<sup>44</sup> State Farm expressed concern that by requiring a payment of attorney's fees anytime an insurer was unsuccessful in "contesting its liability" there would be a dramatic increase in the amount of money paid out to cover attorney's fees and therefore, an even steeper rise in insurance premiums.<sup>45</sup> State Farm also stated that amending the statute could upset the Hawaii courts' stance that the statute has traditionally only awarded attorney's fees in instances where insurers have denied that the insured is entitled to coverage for a certain claim.<sup>46</sup> By amending the statute, State Farm worried that a court or arbitrator could conclude that it also applied to cases where insurers had conceded coverage but contested only the amount of coverage available.<sup>47</sup> As such, it could result in plaintiff's attorneys seeking policy limits in certain cases only in hopes of also receiving payment for attorney's fees.<sup>48</sup> There was further concern that by requiring one of the parties to bear the entire cost of the arbitration, the Hawaii legislature was essentially dictating the insertion of a clause into an arbitration agreement, a violation of Hawaii public policy.<sup>49</sup>

In vetoing the bill, Governor Lingle expressed concern that the bill could potentially complicate straightforward disputes such as uninsured and underinsured motorist disputes.<sup>50</sup> The Governor joined the insurers' concern that under the language of the bill, an insured might be entitled to payment of her attorney's fees

---

41. J. CONF. REP. NO. 22-3274, Reg. Sess., at 1 (Haw. 2004).

42. Written testimony supplied to the House and Senate by the Hawaii Department of Commerce and Consumer Affairs (Apr. 7, 2004).

43. *Id.*

44. *Id.*

45. Written testimony supplied by State Farm to the House and Senate by the Hawaii Insurers Council (Apr. 14, 2004). The conference committee noted that the legislative intent was limited to making section 431:10-242 applicable to arbitration awards and that the legislature did not intend to change the court's interpretation of the statute. J. CONF. REP. NO. 22-54-04, Reg. Sess. (Haw. 2004).

46. Written testimony supplied by State Farm to the House and Senate by the Hawaii Insurers Council. (April 14, 2004).

47. *Id.*

48. *Id.*

49. Written testimony supplied by the Hawaii Insurers Council to the House and Senate (Feb. 12, 2004). See HAW. REV. STAT. § 658 (1993) (explaining the public policy surrounding Hawaii's arbitration laws).

50. Governor's Message No. 753, Statement of Objections to House Bill 2786 (July 13, 2004).

even if they were successful in establishing the insurer's liability for only a small portion of the damages at issue.<sup>51</sup>

### *C. Mandatory Mediation for Residential Construction Claim: Missouri Senate Bill 1081*<sup>52</sup>

Bill Number: Missouri Senate Bill 1081

Summary: This bill was a version of the "Right to Repair" bill passed in several other states. The bill would have restricted a residential homeowners' access to the judiciary by establishing mandatory procedures to be followed prior to filing suit. Specifically, the contractor would be given time to remedy any alleged problem.

Status: Vetoed by Governor, July 6, 2004

#### *1. Introduction*

The stated purpose of this bill was to allow residential contractors to settle disputes outside of litigation.<sup>53</sup> With the exception of claims brought in small claims court or personal injury and wrongful death claims,<sup>54</sup> under this bill homeowners would have been required to provide contractors with time to remedy defects in the purchased home, either through payment or repair, and to participate in non-binding mediation prior to filing suit.<sup>55</sup> As long as the contractor responded to the notice, the parties would be required to participate in non-binding mediation prior to filing a lawsuit.<sup>56</sup> The parties would have to share the cost of the mediator.<sup>57</sup> If the contract specified mandatory arbitration to resolve any disputes between the parties, this law would have not applied.<sup>58</sup>

#### *2. The Bill*

Senate Bill 1081 was introduced by twelve senators on January 15, 2004.<sup>59</sup> The bill eventually passed through the Senate Pensions & General Laws Committee and later passed through the Senate onto the House and the Local Government Committee.<sup>60</sup> The bill was finally passed on May 14, 2004,<sup>61</sup> and was signed by

---

51. *Id.*

52. S.B. 1081, 92nd Gen. Assemb., Reg. Sess. (Mo. 2004).

53. See the full text of S.B. 1081 at <http://www.senate.mo.gov/04info/billtext/intro/sb1081.htm> (last visited Nov. 16, 2004).

54. *Id.*

55. *Id.* §§ 431.300-431.315.

56. *Id.*

57. *Id.* § 431.312(1).

58. *Id.* § 431.315(2).

59. Journal of the Senate, Second Reg. Sess., at 114 (Jan. 15, 2004), at <http://www.senate.mo.gov/04info/pdf-jrnl/DAY06.pdf> (last visited Nov. 16, 2004).

60. See S.B. 1081, Actions, available at [http://www.senate.mo.gov/04INFO/actionsSB1081\\_a.htm](http://www.senate.mo.gov/04INFO/actionsSB1081_a.htm) (last visited Nov. 16, 2004).

61. See Journal of the Senate, Second Reg. Sess. (May 14, 2004), at <http://www.senate.mo.gov/04>

both the Senate President Pro Tem and the House Speaker on May 28, 2004.<sup>62</sup> Governor Bob Holden vetoed Senate Bill 1081 on July 6, 2004.<sup>63</sup> On September 15, 2004, the Senate failed in an effort to override the Governor's veto.<sup>64</sup>

Senate Bill 1081 would have mandated that a claimant seeking a remedy arising from construction or substantial remodel of a residence must provide the contractor with a reasonably detailed written notice of the claim.<sup>65</sup> The purpose of the written notice would have been to alert the contractor to the alleged construction defect and would require sufficient detail to "determine the general nature of the defect as well as any known results of the defect."<sup>66</sup> Further, the claimant would have been prohibited from filing an action prior to ninety days after serving the contractor with the required written notice.<sup>67</sup> The contractor would then be required to respond within fourteen days with an inspection proposal, settlement offer, or challenge to the claim.<sup>68</sup> If the contractor disputed the claim, or simply failed to respond, the claimant would have been able to proceed with litigation unimpeded.<sup>69</sup> Alternatively, if the contractor responded with a settlement offer or inspection proposal, the claimant would then have had the option to reject the contractor's response, but would have been required to provide written notice to the contractor providing the basis for the rejection.<sup>70</sup> Mediation would have been required at that point.<sup>71</sup> Only after the parties had attempted resolution through mediation would a claimant have been able to file suit.<sup>72</sup> Under the bill, homeowners who failed to comply with the procedures outlined would be unable to file a lawsuit.<sup>73</sup> Further, where a lawsuit would be allowed, repairs made by the homeowner would not be reimbursable unless the repairs were necessary for safety reasons or to mitigate damage.<sup>74</sup>

### 3. Successful Opposition

The homebuilding industry has dubbed similar laws "Right to Repair" laws; such laws have been successfully passed in numerous states.<sup>75</sup> Supporters of the bill allege that the bill was designed to protect homebuilders from frivolous law-

---

info/pdf-jml/DAY72.pdf (last visited Nov. 16, 2004).

62. See S.B. 1081, Actions, *supra* note 60.

63. *Id.* See also *Consumer Advocates Praise Missouri Governor Veto on Law Championed by the Home Building Industry*, PR WEB: THE FREE WIRE SERVICE, July 9, 2004, at <http://www.prweb.com/releases/2004/7/prwebxml139712.php> (last visited Nov. 16, 2004) [hereinafter *Consumer Advocates*].

64. See S.B. 1081, Actions, *supra* note 60.

65. S.B. 1081, 92nd Gen. Assemb. (Mo. 2004).

66. *Id.*

67. *Id.*

68. *Id.* § 431.306.2(1)-(5).

69. *Id.* § 431.306.3(1).

70. *Id.* § 431.306.3(2).

71. *Id.* § 431.306.2.

72. *Id.*

73. *Missouri Bar-Drafted Measures Gain Last-Second Legislative Approval*, MO. B. BULLETIN: ONLINE EDITION, July 2004, at <http://www.mobar.org/publications/bulletin.php>.

74. *Id.*

75. *Consumer Advocates*, *supra* note 63 (alleging that the Missouri veto is the first of its kind and that "Right to Repair" bills have passed in fourteen other states).



suits and to ensure that any defects would be remedied quickly.<sup>76</sup> However, homeowner groups and advocates have spoken out against such laws and praised Governor Holden for his veto of the Missouri bill.<sup>77</sup> Nancy Seats, President of the St. Louis chapter of Homeowners Against Deficient Dwellings, stated, "The governor deserves credit for standing up to contractors who wanted to put more obstacles in the way of consumers."<sup>78</sup>

The first of the "Right to Repair" laws was passed in Texas in 1989, and others have since been passed in over a dozen states.<sup>79</sup> The Texas law has been described by some consumer advocates as a "miserable failure."<sup>80</sup> "Right to Repair" laws have generally been accused of creating "a time consuming, costly, resolution process that homeowners [are] required to follow, before filing a lawsuit, if they [have] a problem with the house."<sup>81</sup>

Governor Holden vetoed the bill on July 6, 2004 and asserted three reasons to support his action.<sup>82</sup> First, he emphasized that the bill "fail[ed] to adequately protect consumers" because the waiting period would result in an undue burden due to the length of time forced to elapse before consumers are made whole.<sup>83</sup> Second, Governor Holden noted that the bill "gives unwarranted protections that tip the scales of justice against homeowners" by requiring a complicated series of actions in order for regular citizens to assert their rights as homeowners and by "forcing mediation on two parties in unequal bargaining positions."<sup>84</sup> Governor Holden's final reason for rejecting Senate Bill 1081 was that it "may violate the open courts provisions of the Missouri Constitution's Bill of Rights" in that it "contain[s] procedural hurdles that, without adequate justification, delay the claimant from filing a lawsuit against a contractor."<sup>85</sup>

#### *D. Child Custody Reform Act: New York Assembly Bill 7095; New York Senate Bill 1969<sup>86</sup>*

Bill Number: New York Assembly Bill 7095; New York Senate Bill 1969

Summary: This bill would amend the domestic relations law by enacting the Child Custody Reform Act, which would establish uniform state wide standards for the litigation and mediation of child custody disputes.

---

76. Paul Wenske, *Bill Would Build Many Obstacles for Homeowners*, THE KANSAS CITY STAR, May 9, 2004, available at [http://www.kansascity.com/mld/kansascity/business/columnists/paul\\_wenske/8606575.html](http://www.kansascity.com/mld/kansascity/business/columnists/paul_wenske/8606575.html) (last visited Nov. 16, 2004).

77. *Consumer Advocates*, *supra* note 63.

78. Paul Wenske, *Midday Business Report: Consumer Groups Applaud Holden Veto of "Repair" Bill*, THE KANSAS CITY STAR, July 9, 2004, available at <http://www.kompolt.com/pdfs/buffet/KansasCityStar.pdf>.

79. *Consumer Advocates*, *supra* note 63.

80. *Id.*

81. *Id.*

82. Veto Letter from Bob Holden, Governor, Senate Bill 1081 Veto Letter (July 6, 2004), at <http://governor.mo.gov/legis04/SB1081vl.htm> (last visited Nov. 16, 2004).

83. *Id.*

84. *Id.*

85. *Id.*

86. S.B. 1969, 2003-04 Leg., 226th Sess. (N.Y. 2003).

Status: Pending as of November 16, 2004

### 1. Introduction

Senate Bill 1969, introduced on February 18, 2003, would establish uniform statewide standards for the litigation and mediation of child custody disputes.<sup>87</sup> The purpose of the bill is to encourage parents to resolve their child custody differences through mediation centered on the child's best interests, before the conflict culminates into drawn out litigation.<sup>88</sup>

### 2. The Bill

This bill, known as the Child Custody Reform Act would amend New York domestic relations law by adding a new section entitled "Special Provisions for Resolution of Child Custody, Parenting, and Child Support Disputes."<sup>89</sup> The overarching goal of the Child Custody Reform Act is to provide for the best interests of a child in all custody and parenting disputes, as well as in child support disputes where applicable.<sup>90</sup> The Act seeks to resolve custody, parenting, and child support disputes "expeditiously, voluntarily, and without adversarial litigation" whenever possible.<sup>91</sup>

The Child Custody Reform Act would provide uniform statewide standards for the litigation and mediation of child custody disputes.<sup>92</sup> Under the uniform statewide standards, an initial planning conference between the judge and all the parties involved in the child custody dispute would be required to attempt a settlement.<sup>93</sup> The new standards would also provide that mediation be initiated except where the court finds mediation to be inappropriate.<sup>94</sup> The new standards would also require local courts to furnish mental health services to prepare family evaluations.<sup>95</sup>

### 3. Legislative History

Senate Bill 1969 was originally introduced as Senate Bill 6494 in 2002.<sup>96</sup> On February 18, Senate Bill 1969 was introduced and referred to the Committee on Children and Families.<sup>97</sup> In May 2003, the bill advanced to a third reading in the

87. See also S.B. 1969, Summary, at <http://assembly.state.ny.us/leg/?bn=s1969> (full bill text also available).

88. S.B. 1969, 2003-04 Leg., 226th Sess. (N.Y. 2003).

89. *Id.* § 1, 3.

90. *Id.* § 2.

91. A.B. 7095, 2003-04 Leg., Reg. Sess. (2004); Assembly Bill 7095, Memo, at <http://assembly.state.ny.us/leg/?bn=A07095> (last visited Nov. 16, 2004).

92. S.B. 1969, Summary, *supra* note 87.

93. S.B. 1969, 2003-04 Leg., 226th Sess. (N.Y. 2003). Whenever practical, a child custody dispute will be assigned to a single judge. *Id.* § 3(B)(1).

94. *Id.* § 3(A)(15). Non-mediatable issues include issues involving domestic violence, child abuse, or both. *Id.* Non-mediatable issues also include circumstances where the parties are unable to adequately represent themselves. *Id.*

95. *Id.* § 3(D).

96. A.B. 7095, Memo, *supra* note 91.

97. See S.B. 1969, Actions, at <http://assembly.state.ny.us/leg/?bn=s1969> (last visited Dec. 9, 2004).

Senate.<sup>98</sup> The bill was committed to rules in June 2003.<sup>99</sup> In January 2004, the bill was again referred to the Committee on Children and Families.<sup>100</sup> The bill was reported and committed to the Senate Finance Committee in April 2004.<sup>101</sup> No further Senate action has occurred.<sup>102</sup>

Senate Bill 1969's Assembly counterpart, Assembly Bill 7095, has had several prior introductions in the Assembly. A Child Custody Reform Act was first introduced in 1997 as Assembly Bill 750; appeared again in 1999 as Assembly Bill 3492; and then again in 2002 as Assembly Bill 1913.<sup>103</sup> Assembly Bill 7095 was referred to the Judiciary Committee on March 19, 2003 and then again on January 7, 2004.<sup>104</sup> No further action has been taken by the Assembly as of November 16, 2004.<sup>105</sup>

#### 4. Support and Opposition

New York state courts have embraced the idea of mediation as an alternative to litigation in child custody matters.<sup>106</sup> All of New York's judicial districts currently have a Community Dispute Resolution Center Family Court mediation program in place.<sup>107</sup>

Support for Senate Bill 1969 is founded not only in the New York State courts, Senate Bill 1969 has gained much support from the New York State Dispute Resolution Association (NYSDRA).<sup>108</sup> NYSDRA believes that in many child custody cases, mediation is the preferable way of settling disputes.<sup>109</sup> At the crux of the NYSDRA's belief is the notion that mediation is appropriate for resolving interpersonal conflicts.<sup>110</sup> "Studies have shown that while children are traumatized by the actual divorce or separation of their parents, the children suffer the most emotional scars as a result of the degree of conflict between their parents after the divorce or separation process."<sup>111</sup> Because a number of courts have incorporated mediation into their procedures, NYSDRA feels that it is important to establish uniform statewide standards.<sup>112</sup>

---

98. *Id.*

99. *Id.*

100. *Id.*

101. *Id.*

102. See S.B. 1969, Actions, *supra* note 97.

103. A.B. 7095, Memo, *supra* note 91.

104. A.B. 7095, Actions, at <http://assembly.state.ny.us/leg/?bn=7095> (last visited Nov. 16, 2004).

105. *Id.*

106. New York State Unified Court System Division of Court Operations Office of ADR Programs, Court-Connected Alternative Dispute Resolution in New York State 10 - 14 (2003), at [http://www.courts.state.ny.us/ip/adr/Publications/Reports/CAP\\_Report.pdf](http://www.courts.state.ny.us/ip/adr/Publications/Reports/CAP_Report.pdf).

107. *Id.* at 10.

108. See Brett P. Linn, The Child Custody Reform Act (Dec. 4, 2003) (position paper for New York State Dispute Resolution Association), at [http://www.nysdra.org/articles/article\\_details.asp?ID=91](http://www.nysdra.org/articles/article_details.asp?ID=91) (last visited Nov. 16, 2004).

109. *Id.*

110. *Id.*

111. *Id.* (citing JUDITH S. WALLERSTEIN & SANDRA BLAKESLEE, SECOND CHANCES: MEN WOMEN AND CHILDREN A DECADE AFTER DIVORCE (1989)).

112. *Id.*

The National Organization for Women New York State Inc. opposes this bill.<sup>113</sup> One argument in opposition of Senate Bill 1969 is that mediation in the context of child custody disputes can be unfair and unsafe for women. Other arguments against the Child Custody Reform Act include: (1) Custody mediation should be mandatory rather than permissive; (2) Mediators are too focused on reaching an agreement; (3) Mediator qualifications; and (4) Disagreement over whether there is a *prima facie* right to a shared parenting arrangement.<sup>114</sup>

### 5. Commentary

The passage of bills like New York's Child Custody Reform Act is an important step toward establishing a better environment in which to resolve child custody disputes, which "can be emotionally charged, contentious, and characterized by an inability or an unwillingness of parents to put aside failed interpersonal relationships."<sup>115</sup> The traditional adversarial system often creates a hostile environment—one side wins, one side loses. The adversarial make-up naturally pits one parent against the other, to the point where, "Ultimately, the real 'loser' is the child."<sup>116</sup> The best interests of a child should be determined by a team of participants, including both parents, the child, and a neutral third-party.

#### *E. Medical Arbitration Agreements: Utah Senate Bill 245*<sup>117</sup>

Bill Number: Utah Senate Bill 245

Summary: This bill amends provisions of the Utah Health Care Malpractice Act that authorized health care providers to refuse care to a patient who does not agree to sign a binding arbitration agreement.

Status: Signed by Governor, March 16, 2004

### 1. Introduction

In 1999, the Utah Legislature enacted section 78-14-17 of the Utah Health Care Malpractice Act that sets out the requirements that must be met before a health care provider and a patient may enter into a binding arbitration agreement.<sup>118</sup> In 2003, the Utah Legislature passed Senate Bill 138, thus, amending section 78-14-17 to authorize a health care provider to refuse care to a patient who

---

113. See Issues and Legislation, N.Y. National Organization for Women, at <https://ssl.capwiz.com/nownys/issues/bills/?type=ST>.

114. See generally *id.*

115. Linn, *supra* note 108.

116. *Id.*

117. S.B. 245, 56th Leg., Reg. Sess. (Utah 2004).

118. UTAH CODE ANN. § 78-14-17 (1999). The pertinent provision of section 78-14-17 read, "[A] patient may not be denied health care of any kind on the sole basis that the patient . . . refused to enter into a binding arbitration agreement with a health care provider." *Id.*

does not agree to binding arbitration.<sup>119</sup> Senate Bill 245 effectively repeals the 2003 amendment, and specifically prohibits a health care professional from refusing to provide health care to a person solely on the basis that the person refused to sign a medical malpractice arbitration agreement.<sup>120</sup>

Senate Bill 245 was introduced and read for the first time in the Utah Senate on February 9, 2004.<sup>121</sup> The bill was given a favorable recommendation by the Senate Business and Labor Committee on February 12, 2004 with a 7-1 vote.<sup>122</sup> It was then sent to the full Senate on February 13.<sup>123</sup> On February 23, an amendment to the bill was proposed that would have allowed a patient and the health care provider to agree to use a single arbitrator, rather than a three-member arbitration panel as required by the original bill.<sup>124</sup> However, on February 25, a substitute version of Senate Bill 245, which left out the amendment, was passed by the full Senate with a 22-5-2 vote.<sup>125</sup>

Senate Substitute Bill 245 was read for the first time in the House on February 26, 2004.<sup>126</sup> The bill was amended and passed by the full House on March 1 by a 64-10-1 vote.<sup>127</sup> It was then returned to the Senate for concurrence on March 2.<sup>128</sup> The Senate refused to concur in the House's amendment and sent it back to the House on March 3.<sup>129</sup> The House refused to recede from its amendment, and House and Senate Conference Committees were appointed.<sup>130</sup> Both House and Senate Conference Committee reports were adopted and the final bill was approved by both houses on March 3.<sup>131</sup> The final bill passed 64-6-5 in the House and passed 26-0-3 in the Senate.<sup>132</sup> The bill was sent to the Governor for signature on March 15 and signed into law on March 16, 2004.<sup>133</sup>

---

119. S.B. 138, 55th Leg., Reg. Sess. (Utah 2003). Section 78-14-17 was amended to read "[A] patient may not be denied health care of any kind, from the emergency department of a general acute hospital as defined in § 26-21-2, on the sole basis that the patient . . . refused to enter into a binding arbitration agreement with a health care provider." *Id.* (emphasis added).

120. S.B. 245, 56th Leg., Reg. Sess. (Utah 2004). Senate Bill 245 removes the language added by Senate Bill 138. *Id.*

121. S.B. 245, Bill History, available at [http://www.le.state.ut.us/~2004/status/sbillsta/sb0245\\_s01.htm](http://www.le.state.ut.us/~2004/status/sbillsta/sb0245_s01.htm) (last visited Nov. 16, 2004).

122. *Id.*

123. *Id.*

124. *Id.* The purpose of this proposed amendment, according to its sponsor, Senator David Gladwell, was to reduce the costs of arbitration. *Senate Passes Medical Arbitration Bill to House*, ABC 4: NEWS, Feb. 26, 2004, available at [http://www.4utah.com/local\\_news/local\\_headlines/story.aspx?content\\_id=410BF72D-A607-4EAA-B97E-C193EDB9187E](http://www.4utah.com/local_news/local_headlines/story.aspx?content_id=410BF72D-A607-4EAA-B97E-C193EDB9187E) (last visited Nov. 16, 2004).

125. S.B. 245, 56th Leg., Reg. Sess. (Utah 2004).

126. S.B. 245, Substitute Bill, 55th Leg., Reg. Sess. (Utah 2004) at <http://www.le.state.ut.us/~2004/status/sbillsta/SB0245S01.htm> (last visited Nov. 16, 2004).

127. *Id.* The House amendment proposed to change the method of selection of the third arbitrator on the three-member arbitration panel. *Id.* The amendment proposed to change section 78-14-17 to require the other two arbitrators on the panel (one chosen by the patient and one chosen by the health care provider) to select the third arbitrator, rather than having the patient and the health care provider jointly select the third arbitrator. *Id.*

128. S.B. 245, 56th Leg., Reg. Sess. (Utah 2004).

129. *Id.*

130. *Id.*

131. *Id.* The final version of Senate Bill 245, worked out in the conference committee, requires the parties to jointly select the third arbitrator, unless they cannot come to an agreement. *Id.* If the two parties cannot come to an agreement, the other two arbitrators will appoint the third arbitrator. *Id.*

132. S.B. 245, 56th Leg., Reg. Sess. (Utah 2004).

133. *Id.*

## 2. The Bill

Senate Bill 245, as it was introduced in the Senate, prohibited a health care provider from denying health care to a patient on the sole basis that the patient refused to sign an arbitration agreement.<sup>134</sup> Another reform that Senate Bill 245 brought about was to remove the requirement that the patient must be given a verbal explanation of the consequences of agreeing to arbitration (i.e., forgoing the right to a jury trial, no appeal, etc.) as well as a written explanation; Senate Bill 245 removes the requirement of a verbal explanation.<sup>135</sup> Senate Bill 245 also reduces the amount of time a patient may rescind an arbitration agreement from thirty days to ten days.<sup>136</sup> The final substitute bill, signed by the Governor on March 16, 2004 included these reforms.<sup>137</sup>

## 3. Support and Opposition

The passage of Senate Bill 245 was the Utah legislature's response to more than one year of public outcry over the passage of Senate Bill 138 in 2003.<sup>138</sup> The public dismay with Senate Bill 138 was spurred largely by the policy of Intermountain Health Care, a Salt Lake City based health care provider and Utah's largest health care network, of not treating patients who refused to sign a mandatory arbitration agreement.<sup>139</sup> It was the passage of Senate Bill 138 that allowed Intermountain Health Care to implement this policy in 2003.<sup>140</sup>

The most vocal groups calling for the repeal of Senate Bill 138 were Patients Against Mandatory Medical Arbitration (PAMMA), the American Association of Retired Persons (AARP), and Utah trial lawyers.<sup>141</sup> Though these groups supported the repeal of Senate Bill 138, these groups were most vocal in their support for another bill—Senate Bill 117—a competing bill with Senate Bill 245.<sup>142</sup> Senate Bill 117 would have repealed the mandatory effects of Senate Bill 138, but would have left alone several pro-patient provisions in section 78-14-17 that Senate Bill 245 changed.<sup>143</sup> However, Senate Bill 117 failed to make it out of the Senate Business and Labor Committee.<sup>144</sup>

Although the Utah legislature responded to the public outcry over Senate Bill 138 by removing the biggest objection of the bill—the provision that allowed health care providers to deny care to patients who refused sign an arbitration

---

134. *Id.*

135. *Id.*

136. *Id.*

137. *Id.*

138. AARP, *Utah's Medical Malpractice Law: Support AARP Utah to Amend SB 245 to Include Needed Changes*, March 3, 2004, at <http://www.aarp.org/states/ut/Articles/a2004-03-03-ut-malpractice.html> (last visited Nov. 16, 2004).

139. *Senate Passes Medical Arbitration Bill to House*, *supra* note 124.

140. *Id.*

141. See AARP, *supra* note 138; *Seek Neutral Arbitration*, THE SALT LAKE TRIBUNE, Feb. 14, 2004, at A12, available at <http://166.70.44.66/2004/Feb/02142004/opinion/opinion.asp> (last visited Nov. 16, 2004).

142. See AARP, *supra* note 138; *Seek Neutral Arbitration*, *supra* note 141.

143. S.B. 117, 56th Leg., Reg. Sess. (Utah 2004).

144. S.B. 117, Bill Documents, at <http://www.le.state.ut.us/~2004/htmldoc/sbillhtm/SB0117.htm> (last visited Oct. 16, 2004).

agreement—many thought that Senate Bill 245 did not go far enough to protect patients' rights.<sup>145</sup> In particular, many advocacy groups were disappointed with Senate Bill 245's elimination of the requirement that a health care provider give a verbal explanation of the consequences of agreeing to arbitration, and in the reduction in the amount of time a patient has to rescind an arbitration agreement from thirty days to ten days.<sup>146</sup>

Additionally, these groups were disappointed that Senate Bill 245 kept the requirement of a three-arbitrator panel, instead of providing for just one arbitrator as Senate Bill 117 proposed.<sup>147</sup> Opponents of the three-arbitrator panel argued that using a three-arbitrator panel is more expensive for a patient to arbitrate. Further, using a three-arbitrator panel favors the health care provider because a patient will be unlikely to find an expert doctor in their state to argue against another doctor on the panel.<sup>148</sup>

Predictably, Senate Bill 245 was supported by Intermountain Health Care and the Utah Medical Association.<sup>149</sup> These proponents of Senate Bill 245 mention the benefits of arbitration, citing its increased speed and lower expense as compared to litigation.<sup>150</sup> In general, supporters of Senate Bill 245 point out that the high cost of medical malpractice insurance brought about the need for pro-arbitration reform in the health care field.<sup>151</sup>

#### *F. Family Team Decision Meetings: Washington House Bill 2362<sup>152</sup>*

Bill Number: Washington House Bill 2362

Summary: This bill would require the Department of Social and Health Services to engage in family team decision meetings in order to create a family plan for children involved in the child welfare system.

Status: Pending as of November 16, 2004

#### *1. Introduction*

House Bill 2362 was introduced on January 9, 2004.<sup>153</sup> This bill would require Washington's Department of Social and Health Services to engage in family team decision meetings in order to create a family plan for children involved in the child welfare system.<sup>154</sup> The purpose of this bill is to build and strengthen fami-

---

145. *See Neutral Arbitration*, *supra* note 141.

146. *Id.* *See also* AARP, *supra* note 138.

147. *See Neutral Arbitration*, *supra* note 141.

148. *Id.*

149. *Id.*

150. Lois M. Collins, *Arbitration Foes Rally to Protest IHC Policy*, DESERT NEWS, Dec. 24, 2003, available at <http://desertnews.com>.

151. *Id.*

152. H.B. 2362, 58th Leg., Second Reg. Sess. (Wash. 2004).

153. *See* H.B. 2362, History, at <http://www.leg.wa.gov/wsladm/billinfo1/dspBillSummary.cfm?billnumber=2362> (last visited Nov. 16, 2004).

154. H.B. 2362, 58th Leg., Second Reg. Sess. (Wash. 2004).

lies of children who are involved in the child welfare system by encouraging the families to play an integral role in the decision-making process in order to “reduc[e] the number of out-of-home placements” and “increas[e] the number of successful reunifications.”<sup>155</sup>

## 2. *The Bill*

This bill would amend sub-section 74.13 of the Revised Code of Washington by creating a new section.<sup>156</sup> This new sub-section would make it a goal of the Department of Social and Health Services to use family team decision meetings at key decision points in cases where “a child is involved in the child welfare system.”<sup>157</sup> Family team decision meetings, as used in this sub-section, refers to “family group conferences, family unity meetings, family mediation or other professionally recognized interventions that include the extended family and decision making centered around the child.”<sup>158</sup> If the Department chooses not to instigate family team decision meetings, the Department must clearly document its rationale.<sup>159</sup> If the Department chooses to engage in family team decision meetings, it must “locate and notify the parents” and anyone else who has a “significant relationship with the child.”<sup>160</sup> At the family team decision meeting, the family would create a family plan. The plan will include the expectations of the parties, “services the department [provided by], timelines for implementing the plan, consequences of noncompliance with the plan, and a schedule of subsequent meetings, if appropriate.”<sup>161</sup> Finally, the new sub-section would provide that the Department incorporate the family plan into the “service plan for the child to the extent that the family plan protects the child,” strengthens family relations, and is focused on permanency.<sup>162</sup>

### *G. Requirements for Family Mediation: Wisconsin Assembly Bill 279*<sup>163</sup>

Bill Number: Wisconsin Assembly Bill 279

Summary: This Act requires mediators and guardian ad litem assigned to family court cases, those requiring family counseling sessions in particular, to have training in the recognition of domestic violence. Where domestic violence is discovered, court officers must take specialized action.

Status: Signed by Governor, February 27, 2004

---

155. *Id.*

156. *Id.*

157. *Id.* § 3(1).

158. *Id.* § 2(2).

159. *Id.* § 3(3).

160. *Id.* § 4(1).

161. *Id.* §§ 5(1)(a) – (f).

162. *Id.* § 5(3).

163. A.B. 279, 96th Leg., Reg. Sess. (Wis. 2004) (as introduced on April 18, 2003 by Representatives Berceau et al., during the 2003 legislative session).



## 1. Introduction

Wisconsin Assembly Bill 279<sup>164</sup> was signed into law by the Governor as Wisconsin Act 130 on February 27, 2004.<sup>165</sup> The Act creates a rebuttable presumption against awarding a parent joint or sole legal custody if it has been established that the parent has engaged in a pattern or serious incident of abuse.<sup>166</sup> When a case is opened, mediators are required to complete an initial screening for the possible existence of domestic violence, and the guardian ad litem must investigate whether a party affecting the family engaged in domestic violence.<sup>167</sup> Further, specialized training relating to domestic violence is required for any mediator or guardian ad litem.<sup>168</sup>

## 2. The Act

Wisconsin Assembly Bill 279 was first introduced on April 18, 2003 in the Wisconsin Assembly.<sup>169</sup> The purpose of the bill was to create a rebuttable presumption that a parent who has “engaged in a pattern or serious incident of abuse”<sup>170</sup> should not be awarded joint or sole legal custody in a custody or placement dispute.<sup>171</sup> Further, the bill placed new demands and training requirements on both guardian ad litem and mediators.<sup>172</sup> The bill progressed through both the Assembly and the Senate and was signed by the Governor on February 27, 2004.<sup>173</sup>

Prior to the passage of Act 130, Wisconsin law supported a presumption that joint custody “was in the child’s best interest.”<sup>174</sup> Due to the passage of Act 130, this presumption no longer exists. Act 130 demands that where domestic violence is identified—in that “a parent has engaged in a pattern of or serious incident of spousal abuse—there is a rebuttable presumption that it is detrimental to the child and contrary to the child’s best interest for that parent to have either sole or joint custody of the child.”<sup>175</sup> This presumption may only be overcome by a preponderance of the evidence.<sup>176</sup>

---

164. *Id.*

165. Act of Feb. 27, 2004, ch. 103 §§ 1-39 (to be codified in WIS. STAT. § 767). See the full text of Wisconsin Act 130, at <http://www.legis.state.wi.us/2003/data/acts/03Act130.pdf> (last visited Nov. 16, 2004).

166. Act of Feb. 27, 2004, ch. 103 § 20.

167. *Id.* The guardian ad litem inquiry is to be focused on “whether there is evidence that either parent has engaged in interspousal battery . . . or domestic abuse . . . .” *Id.* § 2.

168. *Id.* The Act specifically directs both the guardian ad litem and the mediator to receive “training on the dynamics of domestic violence and the effects of domestic violence on victims of domestic violence and on children.” *Id.* §§ 1 (guardian ad litem), 3 (mediator).

169. See Assembly Bill 279, History, at <http://www.legis.state.wi.us/2003/data/AB279hst.html> (last visited Nov. 16, 2004).

170. *Id.*

171. *Id.*

172. *Id.*

173. *Id.*

174. Memorandum from Kitty Kocol, Administrator, Department of Health & Family Services, to various area administrators and county department directors (Mar. 26, 2004), at [http://dhfs.wisconsin.gov/dcfis\\_info/infomemos/2004/2004-03.htm](http://dhfs.wisconsin.gov/dcfis_info/infomemos/2004/2004-03.htm) (last visited Nov. 16, 2004).

175. Act Memorandum from Wisconsin Legislative Council, Act Memo: Legal Custody in an Action Affecting the Family: Effect of Abuse (Mar. 4, 2004), at [http://www.legis.state.wi.us/2003/data/lc\\_act/](http://www.legis.state.wi.us/2003/data/lc_act/)

Courts in Wisconsin previously required mediation in many family court situations. Contested cases involving child custody or placement required one session of mediation, unless otherwise excused by the court.<sup>177</sup> Act 130 highlights the frequent presence of domestic violence in custody and placement disputes and requires specialized training for guardian ad litem and mediators to recognize the presence of domestic violence and take appropriate action. Mediation may not be appropriate for situations involving domestic violence.<sup>178</sup>

Of particular interest and importance are Act 130's new requirements for specialized training of both guardian ad litem and mediators. The guardian ad litem is ordered to investigate and report on the presence or absence of interspousal battery or domestic abuse.<sup>179</sup> Every mediator assigned to family court counseling services "shall have training on the dynamics of domestic violence and the effects of domestic violence on victims of domestic violence and on children."<sup>180</sup> If there is evidence of inter-spousal battery or domestic abuse, the parties may not be required to attend joint mediation sessions.<sup>181</sup> The court may waive the mediation requirement for undue hardship or a risk to the health and safety of the parties.<sup>182</sup> The court must inform the parties of this opportunity for waiver of the mediation requirement, and must also inform the parties that "evidence of inter-spousal battery or domestic abuse" may be a basis for such a waiver.<sup>183</sup>

#### *H. Medical Review Panels and ADR for Medical Malpractice: Wyoming House Joint Resolution 11*<sup>184</sup>

Bill Number: Wyoming House Joint Resolution 11

Summary: This legislation authorizes a vote to amend the state constitution to allow the legislature to pass a bill mandating ADR or a medical review panel for any civil claim against a health care provider.

Status: Signed by Governor, March 5, 2004

#### *1. Introduction*

In 1986, the Wyoming legislature passed the Wyoming Medical Review Panel Act, which required that any claim against a health care provider must first

---

act130-aba279.pdf. See also A.B. 279 § 767.24, 96th Leg., Reg. Sess. (Wis. 2004).

176. A.B. 279 § 767.24(2)(d)(1), 96th Leg., Reg. Sess. (Wis. 2004).

177. See Wis. STAT. § 767.11 (2003).

178. A.B. 279 §§ 767.11, 767.115, 96th Leg. Reg. Sess. (Wis. 2004).

179. *Id.* § 767.045(4).

180. *Id.* § 767.11(4).

181. *Id.* § 767.115(1).

182. Wisconsin Legislative Council, *supra* note 175. See also A.B. 279 § 767.24, 96th Leg. Reg. Sess. (Wis. 2004).

183. A.B. 279 § 767.24, 96th Leg. Reg. Sess. (Wis. 2004).

184. H.J.R.11, 57th Leg., Budget Sess. (Wyo. 2004). See H.J.R.11, Resolution History, available at <http://legisweb.state.wy.us/2004/HBIndex.htm> (last visited Nov. 16, 2004).

have been approved by a medical review panel.<sup>185</sup> For a claim to proceed, the review panel had to find that there was substantial evidence that the alleged acts occurred, that they constituted negligence, and that there was a reasonable probability that the acts were the cause of the plaintiff's injury.<sup>186</sup>

The Wyoming Supreme Court, in 1988, taking a clear minority position among state courts, ruled that the Act was unconstitutional because it violated the equal protection clause of the state constitution.<sup>187</sup> The court held that the Act singled out a specific class of plaintiffs, placed an additional hurdle in their attempt to pursue a claim, and the Act was not rationally related to the legitimate state interest of holding down the high costs of health care.<sup>188</sup>

In 2003, the American Medical Association declared Wyoming a "crisis state" due to the reduction in health care access created by a rise in medical malpractice premiums.<sup>189</sup> In response, State Representative Colin Simpson introduced Wyoming House Joint Resolution 11.<sup>190</sup> The resolution authorizes a statewide vote to amend the Wyoming constitution by an addition to Section 4 of Article 10 of the constitution to state that, any other portion of the constitution notwithstanding, it will be lawful for the state legislature to mandate alternative dispute resolution or review by a medical review panel for any claim against a health care provider.<sup>191</sup>

House Joint Resolution 11 was introduced in the Wyoming House on February 13, 2004.<sup>192</sup> The resolution passed through the House committee with a 9-0 vote on February 20 and through the full House by a 51-6 vote on February 25.<sup>193</sup> The resolution was introduced in the Senate the following day.<sup>194</sup> On March 1, the Senate Judiciary Committee passed the resolution by a 3-2 vote.<sup>195</sup> When the resolution appeared before the full Senate, an amendment was adopted which would have also authorized the Senate to create a fund from which to operate medical review panels, compensate patients injured by medical malpractice, and supplement medical insurance premiums for health care providers.<sup>196</sup> On March 2, the Senate voted 15-14 in favor of the resolution, but failed to provide the two-thirds majority necessary to propose a constitutional amendment.<sup>197</sup> The following day, the Senate removed the amendment pertaining to the medical review fund and approved the original House version 24-6.<sup>198</sup> The resolution was signed by Democratic Governor David Freudenthal on March 5, 2004 and was placed on the

---

185. WYO. STAT. ANN. § 9-2-1501 (Michie 1977).

186. *Id.* § 9-2-1502.

187. *Hoem v. State*, 756 P.2d 780, 784 (Wyo. 1988).

188. *Id.* at 783-84. Other state courts have held that medical review panels are not an equal protection violation. See e.g., *Eastin v. Broomfield*, 570 P.2d 744, 750-51 (Ariz. 1977); *Stephens v. Snyder Clinic Assoc.*, 631 P.2d 222, 235-36 (Kan. 1981); *Paro v. Longwood Hosp.*, 369 N.E.2d 985, 989 (Mass. 1977); *Armijo v. Tandysh*, 646 P.2d 1245, 1247 (N.M. 1981), *overruled on other grounds by Roberts v. Southwest Cmty. Health Servs.*, 837 P.2d 442 (N.M. 1992); *Roberts v. Durham County Hosp. Corp.*, 298 S.E.2d 384 (N.C. 1983) (per curiam).

189. Allison Fashek, *Doctors Rally for Tort Reform*, WYO. TRIBUNE-EAGLE, Jan. 21, 2004, at A1.

190. H.J.R. 11, 57th Leg., Budget Sess. (Wyo. 2004).

191. *Id.*

192. H.J.R.11, Resolution History, *supra* note 184.

193. *Id.*

194. *Id.*

195. *Id.*

196. *Id.*

197. *Id.*

198. *Id.*

November 2004 general election ballot as Amendment C.<sup>199</sup> Amendment C received the support of 50.5 percent of those casting ballots in the general election, and thus became an amendment to Wyoming's constitution.<sup>200</sup>

## 2. The Resolution

In light of the ruling in *Hoem v. State*,<sup>201</sup> House Joint Resolution 11 was seen by legislators as necessary for ensuring the constitutionality of mandatory alternative dispute resolution for health care claims.<sup>202</sup> The resolution authorizes voters to amend the state constitution by adding to the section pertaining to personal injury litigation a clause that stated, "the legislature may by general law, mandate alternative dispute resolution or review by a medical review panel before the filing of a civil action against a health care provider."<sup>203</sup>

An amendment was offered by Senators Charles Scott and Tex Boggs to also authorize the state to operate a fund to compensate victims of medical malpractice and to subsidize medical malpractice premium payments. The sponsors believed that Wyoming's health care crisis was so severe that medical review panels and alternative dispute resolution were not enough to solve the state's problems.<sup>204</sup> The amendment had the support of a majority of the Senate, but when it became apparent that the amendment would cost the resolution the necessary two-thirds majority needed to pass, Senators Scott and Boggs removed the amendment and the Senate passed the original House version of the bill.<sup>205</sup>

## 3. Support and Opposition

One of the main groups opposing the resolution was Citizens for Real Insurance Reform, which was backed by the Wyoming Trial Lawyers Association (WTLA) and the AFL-CIO.<sup>206</sup> Although many opposed to the resolution favored instituting medical review panels on a voluntary basis, they opposed such panels being mandatory.<sup>207</sup> Mirroring arguments of many who have opposed similar tort reform measures in other states, WTLA claimed that the real cause of Wyoming's medical crisis was not frivolous lawsuits, but rather the failure of malpractice

---

199. *Id.*

200. Official Wyoming General Election Results – November 2, 2004, at <http://soswy.state.wy.us/election/2004/results/GS-State.pdf> (last visited Nov. 16, 2004). The vote was 53 percent to 47 percent in favor of the amendment among those who voted on the amendment, but Wyoming law requires any constitutional amendment to receive a majority of total votes cast, which would include ballots where no vote was recorded for the issue. *Id.*

201. 756 P.2d 780, 784 (Wyo. 1988).

202. H.J.R. 11, 57th Leg., Budget Sess. (Wyo. 2004).

203. *Id.*

204. Allison Fashek, *Amendment to Malpractice Bill Jeopardizes its Future*, WYO. EAGLE-TRIBUNE, Mar. 3, 2004, at A6.

205. H.J.R. 11, 57th Leg., Budget Sess. (Wyo. 2004), Status, available at <http://legisweb.state.wy.us/2004/digest/hj0011.htm> (last visited Nov. 16, 2004).

206. Ilene Olson, *Wyoming in the 'Center of the Bull's Eye'*, WYO. EAGLE-TRIBUNE, Oct. 26, 2004, at A4.

207. Allison Fashek, *Medical Review Panel Gets OK*, WYO. EAGLE-TRIBUNE, March 2, 2004, at A6.

insurers to control expenses and charge a reasonable premium.<sup>208</sup> They proposed that a more appropriate response would be to have the legislature cap the amount that insurers could increase medical malpractice premiums.<sup>209</sup> WTLA also expressed agreement with the holding in *Hoem*, saying that it was unfair for the legislature to impose obstacles against only one class of plaintiffs.<sup>210</sup> WTLA also expressed support for the Scott/Boggs amendment as a stand-alone amendment to the state constitution.<sup>211</sup>

The resolution was supported by several medical interest groups, including the American Medical Association and the Wyoming Medical Society (WMS).<sup>212</sup> WMS noted that although there had been a slight decrease in the amount paid to cover medical malpractice awards over the last several years, the percentage of premium payments going to cover defense costs was nearing an all-time high.<sup>213</sup> They noted that medical review panels would effectively reduce defense costs by either knocking out frivolous claims before they reached the defense stage or by deterring questionable claims from being brought in the first place.<sup>214</sup>

WMS also supported the Senate amendment to the resolution, noting that due to the state's dispersed population, it was appropriate for the state to use tax dollars to supplement malpractice premium payments and awards because of the need to maintain a supply of doctors of all specialties within a reasonable distance from all population centers.<sup>215</sup>

## II. HIGHLIGHTS

### A. Colorado House Bill 04-1403<sup>216</sup>

This bill, introduced to the Colorado House on March 18, 2004 creates an independent Office of the Child's Ombudsman in the legislative branch.<sup>217</sup> The Office of the Child's Ombudsman would investigate health and safety complaints about children needing and receiving child protection services.<sup>218</sup> The bill sets forth the necessary qualifications for the ombudsman, establishes the duties and powers of the ombudsman, and specifies procedures and processes the ombudsman must adhere to in performing functions related to investigations.<sup>219</sup> The bill also establishes an Ombudsman's Child Death Review Panel within the Office of

---

208. Ilene Olson, *Scope of Health Care Crisis Pinpointed*, WYO. EAGLE-TRIBUNE, June 23, 2004, at A1.

209. *Id.*

210. *Id.*

211. *Id.*

212. *Id.*

213. *Id.*

214. *Id.*

215. *Id.*

216. H.B. 1403, 64th Leg., Second Reg. Sess. (Colo. 2004).

217. H.B. 1403, History, available at <http://www.leg.state.co.us/Clics2004a/csl.nsf/BillFoldersHouse?openFrameset> (last visited Nov. 16, 2004).

218. H.B. 1403 § 1, Part 1, 64th Leg., Second Reg. Sess. (Colo. 2004).

219. *Id.*

the Child's Ombudsman.<sup>220</sup> The House Committee on Information & Technology, on April 19, 2004 postponed House Bill 04-1403 indefinitely.<sup>221</sup>

### B. Hawaii Senate Bill 2444<sup>222</sup>

Hawaii law requires an agreement by interested parties before a claim can proceed to arbitration.<sup>223</sup> Bill 2444, referred to as the Probate Mediation and Arbitration Choice Act, would have amended Hawaii's Uniform Probate Code to provide that a testator's wish to arbitrate or mediate disputes pertaining to his or her estate be binding on the beneficiaries and trustees of the estate.<sup>224</sup> The bill also made provisions for notifying beneficiaries and trustees of the testator's selection.<sup>225</sup> The bill passed through the Senate with a 23-0 vote on March 1, 2004 but the Hawaii House has not acted on the measure as of November 16, 2004.<sup>226</sup>

### C. Illinois Senate Bill 2757<sup>227</sup>

This bill, referred to as the Reviewing Court Alternative Dispute Resolution Act, is an attempt to encourage, and provide funding for, cheaper means of claims settlement.<sup>228</sup> The bill authorizes the Illinois Supreme Court to order that a portion of filing fees collected by appellate court clerks be set aside to fund alternative dispute resolution programs.<sup>229</sup> The court would have the authority to order that a minimum of twenty-five dollars of a petitioner's filing fee and fifteen dollars of a respondent's fee be set aside in a state treasury account.<sup>230</sup> Funds would be maintained in a separate account for each appellate district that chose to participate in the program and would be used to fund dispute resolution programs within each district.<sup>231</sup> The bill would leave to the Illinois Supreme Court the authority to promulgate further rules for administering the fund. Governor Rod Blagojevich signed the bill into law on July 22, 2004.<sup>232</sup>

---

220. *Id.* § 1, Part 2.

221. H.B. 1403, History, *supra* note 217.

222. S.B. 2444, 22nd Leg., Reg. Sess. (Haw. 2004). A bill identical to Senate Bill 2444 was introduced in the House on Jan. 27, 2004 as House Bill 2675 but has not been acted on. H.B. 2675, Measure History, available at <http://www.capitol.hawaii.gov/session2004/status/HB2675.asp> (last Nov. 16, 2004).

223. HAW. REV. STAT. § 658A (2001 Supp.).

224. S.B. 2444, 22nd Leg., Reg. Sess. (Haw. 2004).

225. *Id.*

226. S.B. 2444, Measure History, available at <http://www.capitol.hawaii.gov/session2004/status/SB2444.asp> (last visited Nov. 16, 2004).

227. S.B. 2757, 93rd Gen. Assemb., Reg. Sess. (Ill. 2004).

228. *Id.*

229. *Id.*

230. *Id.*

231. *Id.*

232. S.B. 2757, Bill Status, available at <http://www.legis.state.il.us/legislation/BillStatus.asp?DocNum=2757&GAID=3&DocTypeID=SB&LegId=12830&SessionID=3> (last visited Nov. 16, 2004).

*D. Iowa House Bill 2462*<sup>233</sup>

After House Bill 2462 unanimously passed the Iowa House and Senate, Governor Thomas Vilsack signed the bill into law on May 3, 2004.<sup>234</sup> This bill requires the Department of Human Services to implement one or more child welfare diversion and mediation pilot projects through separate county attorney offices. The pilot projects will run during the fiscal year beginning July 1, 2004 and ending June 30, 2005.<sup>235</sup> The goal of House Bill 2462 is to reduce the number of children placed in state custody by selecting certain child abuse and neglect cases and diverting them away from adjudication. The goals are improving permanency for children, promoting family unification, and reducing state expenditure.<sup>236</sup> Children and families would be selected for participation in the pilot project based on diversion criteria agreed upon between the department and an individual pilot project.<sup>237</sup> The bill also requires the Department of Human Services to determine the effectiveness of the pilot project and to submit an initial evaluation to the General Assembly by December 15, 2007.<sup>238</sup>

*E. Utah Senate Bill 117*<sup>239</sup>

This bill would have repealed a provision in a 2003 amendment to the Utah Health Care Malpractice Act that authorized health care providers to refuse care to a patient who does not agree to binding arbitration.<sup>240</sup> Specifically, the bill would have prohibited a health care professional from refusing to provide health care to a person on the basis that the person refused to sign a medical malpractice arbitration agreement.<sup>241</sup> In addition, the bill would have provided that a patient may require mandatory mediation before proceeding to arbitration.<sup>242</sup> The bill was introduced by state Senator Parley Hellewell on January 20, 2004.<sup>243</sup> The bill was referred to the Senate Standing Committee, where it eventually died.<sup>244</sup>

*F. Vermont Senate Bill 275*<sup>245</sup>

Vermont Bill 275 proposes to require those insurers who contract with the state to provide employee benefits to submit any contract disputes with health care

233. H.F. 2462, 2004 Leg., Second Reg. Sess. (Iowa 2004).

234. Journal of the House and Senate, available at <http://www.legis.state.ia.us/>.

235. *Id.* An earlier version of House File 2462 had required the Department of Human Services to implement five or more pilot projects. On March 11, 2004, Amendment No. 8230 was filed reducing the number of pilot projects from five to "one or more." H.F. 2462, Amendment No. 8230, 2004 Leg., Second Reg. Sess. (Iowa 2004).

236. H.F. 2462, 2004 Leg., Second Reg. Sess. (Iowa 2004).

237. *Id.*

238. *Id.*

239. S.B. 117, 56th Leg., Reg. Sess. (Utah 2004).

240. *Id.*

241. *Id.*

242. *Id.*

243. *Id.*

244. See S.B. 117, History, available at <http://www.le.state.ut.us/~2004/htmldoc/sbillhtm/SB0117501.htm> (last visited Nov. 16, 2004).

245. S.B. 275, 2003-04 Leg., Reg. Sess. (Vt. 2004).

facilities to mandatory dispute resolution.<sup>246</sup> It provides that the dispute resolution shall include mediation, followed by binding arbitration if mediation is unsuccessful.<sup>247</sup> The bill was introduced by state Senator Vincent Illuzi on January 6, 2004.<sup>248</sup> The bill was referred to the Government Operations Committee on the same day it was introduced, and was transferred to the Senate Finance Committee on February 13, 2004 where, as of November 16, 2004 it had not been acted on.<sup>249</sup>

### III. CATALOG OF STATE LEGISLATION

The following is a state-by-state list of measures introduced during the first eleven months of 2004 concerning alternative dispute resolution.

#### Alabama

*Bills Enacted* – H.B. 42 (mediation of public teacher suspension disputes); H.B. 43 (mediation of public teacher suspension disputes).

*Other Legislation* – H.B. 397 (confidentiality of mediation proceedings); H.B. 737 (alternative dispute resolution (ADR) for residential construction disputes); S.B. 148 (mediation of public teacher suspension disputes); S.B. 191 (confidentiality of mediations); S.B. 481 (ADR for residential construction disputes).

#### Alaska

*Bills Enacted* – H.B. 83 (Revised Uniform Arbitration Act (RUAA)).

*Other Legislation* – None.

#### Arizona

*Bills Enacted* – None.

*Other Legislation* – H.B. 2003 (arbitration clauses in employment agreements); H.B. 2249 (RUAA); S.B.1080 (RUAA); S.B. 1210 (RUAA); S.B. 1361 (requires ADR for certain state tax disputes).

#### Arkansas

*Bills Enacted* – None.

*Other Legislation* – None.

#### California

*Bills Enacted* – A.B. 1836 (dispute resolution for common interest developments); A.B. 2629 (creates pilot program for local mental health authorities to mediate disputes); A.B. 2870 (authorizes the Fair Employment and Housing Com-

---

246. *Id.*

247. *Id.*

248. *Id.*

249. See S.B. 275, History, available at <http://www.leg.state.vt.us/database/status/summary.cfm?Bill=S%2E0275&Session=2004> (last visited Nov. 16, 2004).



mission to mediate complaints); S.B. 64 (requires Department of Insurance to establish mediation procedures for disputes involving residential property losses); S.B. 1034 (arbitration for disputed royalties owed to recording artists); S.B. 1548 (requires veterinary malpractice insurers to report arbitration settlements to the state board).

*Other Legislation* – A.B. 9 (dispute resolution in collective bargaining agreements); A.B. 1714 (enforces written agreements to arbitrate); A.B. 1968 (Motor Vehicle Board's authority to mediate claims involving automobile sales); A.B. 2081 (modifies procedures for making a settlement offer prior to an arbitration hearing); A.B. 2599 (requires custody mediations to be videotaped); S.B. 4D (validates ADR provisions in workers' compensation agreements); S.B. 1146 (arbitration procedures for disputes between builders and subcontractors); S.B. 1311 (validates arbitration agreements in employment contracts); S.B. 1348 (funds local ADR programs for disputes in the special education system); S.B. 1682 (arbitration for debts owed to common interest developments).

### Colorado

*Bills Enacted* – H.B. 1080 (RUAA).

*Other Legislation* – H.B. 1403 (investigation procedures for the Office of the Child's Ombudsman).

### Connecticut

*Bills Enacted* – None.

*Other Legislation* – H.B. 5291 (additional funding for arbitration of state insurance department disputes); S.B. 10 (clarifies duties of the Long-Term Care Ombudsman); S.B. 51 (RUAA); S.B. 115 (expanded definition of people eligible for services of the Managed Care Ombudsman); S.B. 354 (appointment of a chairperson for the Office of Mental Retardation Ombudsman); S.B. 513 (mandatory mediation for public works contracts).

### Delaware

*Bills Enacted* – S.B. 154 (mediation for equal employment violation claims); S.B. 302 (ADR for construction contract claims).

*Other Legislation* – None.

### District of Columbia

*Bills Enacted* – P.R. 15-609 (arbitration for Board of Education employees).

*Other Legislation* – None.

### Florida

*Bills Enacted* – S.B. 1970 (confidentiality for statements made in mediation).

*Other Legislation* – H.B. 461 (ADR for liens on commercial real estate); H.B. 1549 (repeals cap on arbitrator compensation); H.B. 1763 (creates ombudsman for public school teacher certification); H.B. 1765 (confidentiality for statements

made in mediation); H.B. 1788 (ADR for liens on commercial real estate); S.B. 1862 (repeals cap on arbitrator compensation); S.B. 1972 (confidentiality for documents produced in mediation); S.B. 2162 (removes an insurer's right to arbitrate rate-filing disputes); S.B. 2760 (ADR for parties harmed by municipal annexation); S.B. 2992 (mediation for grandparent visitation).

### Georgia

*Bills Enacted* – S.B. 563 (creates ADR system for residential construction disputes).

*Other Legislation* – H.B. 91 (Fairness in Arbitration Act).

### Hawaii

*Bills Enacted* – None.

*Other Legislation* – (arbitration for public employees); H.B. 2675 (protects testator's wishes to have estate disputes settled by arbitration); H.B. 2693 (delays effective date of RUAA to 2005); H.B. 2786 (requires insurers to pay attorney's fees when found liable in arbitration); S.B. 2105 (ADR system for disputes between tenants and landlords); S.B. 2444 (protects testator's wishes to have estate disputes settle by arbitration); S.B. 2803 (arbitration for public employees); S.B. 3225 (requires insurers to pay attorney's fees when found liable in arbitration).

### Idaho

*Bills Enacted* – H.B. 526 (ADR for disputes involving mobile home dealers).

*Other Legislation* – H.B. 703 & 817 (arbitration for disputes involving sales of agricultural equipment).

### Illinois

*Bills Enacted* – S.B. 2726 (requires background checks for long-term care ombudsman employees); S.B. 2757 (Appellate Court Arbitration Act).

*Other Legislation* – H.B. 4374 (arbitration for collective bargaining disputes); H.B. 6549 (extends the enforcement period of health care arbitration agreements); S.B. 2414 (requires insurers to recognize medical malpractice arbitration awards); S.B. 3041 (funds a committee to examine feasibility of a new ADR system for medical malpractice claims).

### Indiana

*Bills Enacted* – None.

*Other Legislation* – H.B. 1162 (requires arbitration in family law disputes); H.B. 1192 (optional arbitration for state employee grievances); S.B. 115 (requires arbitration in family law disputes).

### Iowa

*Bills Enacted* – H.F. 2462 (creates pilot program for mediating child abuse cases).

*Other Legislation* – H.S.B. 719 (arbitration for creditors of agricultural livestock); S.F. 2235 (Uniform Mediation Act (UMA)); S.S.B. 3087 (UMA).

### Kansas

*Bills Enacted* – H.B. 2658 (informal ADR for claims involving adult care homes).

*Other Legislation* – None.

### Kentucky

*Bills Enacted* – None.

*Other Legislation* – H.B. 133 (ADR for local agencies involved in land disputes); H.B. 590 (funds a full-time long-term care ombudsman program); H.R. 244 (urges Department of Fish and Wildlife to mediate disputes involving animals on private property); S.B. 1 (ADR procedures for state health care providers); S.B. 33 (ADR for local agencies involved in land disputes).

### Louisiana

*Bills Enacted* – H.B. 823 (ADR for workers' compensation claims); H.B. 880 (mediation of state tax cases); H.B. 1037 (mediation procedures for workers' compensation claims); S.B. 53 (qualifications of child custody mediators).

*Other Legislation* – H.B. 383 (arbitration clauses in mobile home contracts); H.B. 730 (protects arbitration clauses in insurance contracts); S.B. 228 (sets minimum rate for arbitrator compensation); S.B. 708 (authorizes Department of Revenue to mediate state tax disputes); S.B. 738 (allows courts to order civil cases to mediation).

### Maine

*Bills Enacted* – H.P. 464 (funding for Maine-Canada Ombudsman Program).

*Other Legislation* – H.P. 81 (creates the Children's Ombudsman Program).

### Maryland

*Bills Enacted* – None.

*Other Legislation* – H.B. 98 (arbitration deadlines for easement disputes); H.B. 214 (creates an ombudsman program for the Department of the Environment); H.B. 321 (RUAA); H.B. 430 (ADR pilot program for construction claims); H.B. 559 (binding arbitration for collective bargaining disputes); H.B. 1237 (mandatory mediation for medical malpractice claims); S.B. 312 (binding arbitration for collective bargaining disputes); S.B. 582 (mediation of homeowner's insurance claims).

### Massachusetts

*Bills Enacted* – None.

*Other Legislation* – H.B. 3050 (state employees to have disputes heard by the American Arbitration Association); H.B. 3077 (mandatory ADR for public works construction disputes); S.B. 306 (arbitration for teachers terminated by the public school system); S.B. 1608 (binding arbitration for police officers and fire fighters).

### Michigan

*Bills Enacted* – None.

*Other Legislation* – H.B. 5794 (investigation procedures for the long-term care ombudsman); H.B. 6304 (environmental ombudsman).

### Minnesota

*Bills Enacted* - None.

*Other Legislation* – H.F. 2647 (creates the Office of Crime Victim Ombudsman); H.F. 1408 (amendment of no-fault arbitration clauses in insurance policies).

### Mississippi

*Bills Enacted* – S.B. 2982 (allows state colleges to submit international disputes to arbitration).

*Other Legislation* – H.B. 711 (creates ombudsman to investigate claims made by hospital patients); H.B. 1204 (requires mediation for all civil tort claims); H.B. 1150 (allows state institutions of higher learning to submit international disputes to arbitration).

### Missouri

*Bills Enacted* - None.

*Other Legislation* – H.B. 1166 (arbitration for residential construction disputes); H.B. 1443 (Missouri Emergency Response Strike Prevention and Arbitration Act); S.B. 1081 (arbitration for residential construction disputes).

### Montana

*Bill Enacted* – None.

*Other Legislation* – H.B. 191 (role of the Mental Health Ombudsman).

### Nebraska

*Bills Enacted* – None.

*Other Legislation* - None.

### Nevada

*Bills Enacted* – None.

*Other Legislation* – None.

*New Hampshire*

*Bills Enacted* – H.B. 1266 (establishes the Office of Long-Term Care Ombudsman); H.B. 1298 (creates a committee to study ADR for disputes involving public employees).

*Other Legislation* – None.

*New Jersey*

*Bills Enacted* – S.B. 679 (UMA).

*Other Legislation* – A.B. 622 (arbitration of delinquent health insurance claim payments); A.B. 841 (UMA); A.B. 849 (creates victim-juvenile offender mediation program); A.B. 2131 (arbitration of state employee disciplinary matters); A.B. 2314 (arbitration for non-teaching school employees); A.B. 3471 (would provide for State Business Ombudsman in the Board of Public Utilities).

*New Mexico*

*Bills Enacted* – None.

*Other Legislation* – H.B. 68 (employment eligibility for former ombudsmen); H.B. 404 (arbitration for disputes between charter schools and school boards); S.B. 30 (employment eligibility for former ombudsmen); S.B. 403 (arbitration for disputes between charter schools and school boards).

*New York*

*Bills Enacted* – None.

*Other Legislation* – A.B. 4356 (binding arbitration in collective bargaining disputes with fire fighters); A.B. 7313 (arbitration of claims involving investment banking); A.B. 9608 (binding arbitration in collective bargaining disputes with forest rangers); A.B. 9782 (authorizes municipal legislative bodies to mandate mediation of land disputes); A.B. 9946 (establishes the Crime Victim Ombudsman); A.B. 10217 (binding arbitration in collective bargaining disputes with corrections officers); A.B. 10218 (binding arbitration in collective bargaining disputes with fire fighters); A.B. 11318 (binding arbitration in collective bargaining disputes with employees of the sheriff's office); A.B. 11606 (binding arbitration in collective bargaining disputes with court employees); S.B. 1340 (U.M.A.); S.B. 1969 (uniform standards for child custody mediation); S.B. 3065 (would repeal provisions of Civil Service Law that limited binding arbitration for state police); S.B. 4210 (would allow for an alternative to arbitration committee procedure in workers' compensation cases); S.B. 5950 (binding arbitration in collective bargaining disputes with civil service employees); S.B. 6184 (authorizes municipal legislative bodies to mandate mediation of land disputes); S.B. 7487 (would provide for binding arbitration for some court officials; vetoed by Governor).

*North Carolina*

*Bills Enacted* – S.B. 52 (provides for confidentiality of statements made in mediations regarding personnel matters in the state university system).

*Other Legislation* – None.

#### North Dakota

*Bills Enacted* – None.

*Other Legislation* – None.

#### Ohio

*Bills Enacted* – H.B. 51 (allows probate judges to establish rules for resolving disputes under their jurisdiction).

*Other Legislation* – H.B. 125 (U.M.A.); H.B. 476 (ADR mechanism for medical malpractice claims).

#### Oklahoma

*Bills Enacted* – S.B. 553 (ADR procedures for Indian gaming).

*Other Legislation* – None.

#### Oregon

*Bills Enacted* – None.

*Other Legislation* – None.

#### Pennsylvania

*Bills Enacted* – S.B. 1099 (amending Title 42 to provide for compulsory arbitration).

*Other Legislation* – H.B. 1466 (establishes the Municipal Authority Ombudsman); H.B. 1621 (creates Children's Ombudsman); H.B. 2372 (informal ADR for long-term care homes); H.B. 2578 (ADR for bargaining with public employees); H.B. 2761 (ADR for residential construction claims); H.B. 2765 (authorizes Public Utility Commission to mediate payment disputes); H.B. 2886 (would provide binding resolution alternative in collective bargaining for public school employees); H.B. 2895 (would expand options in managed care contracts); H.B. 2899 (would provide authority for counties to establish ombudsmen positions for senior housing); H.B. 2952 (would further provide for district judges to serve as arbitrators); S.B. 1189 (ADR for residential construction claims).

#### Rhode Island

*Bills Enacted* – H.B. 7085 (enacts the "Correctional Officers Arbitration Act").

*Other Legislation* – H.B. 7307 (state would pay for portion of cost of compulsory mediations between a negotiating agent and a municipal employer); H.B. 7475 (provides for charging interest on arbitration awards); H.B. 7671 (rules for vacating arbitrator's award involving labor controversies); H.B. 7674 (school teacher and non-teacher school district employees, and a school committee to

mediate salary matters); H.B. 7797 (establishes and defines duties of Motor Vehicle Arbitration Board); H.B. 7978 (establishes an arbitration board for resolution of some school committee disputes); S.B. 2200 (to amend "Labor Relations Act"); S.B. 2201 (stiffens rules for vacating an arbitrator's award in arbitration of labor controversies); S.B. 2286 (arbitration for firefighters); H.B. 7797 & S.B. 2355 (establishes and defines the duties of the Motor Vehicle Arbitration Board); H.B. 7859 (where employee striking is against public policy, provides for mandatory arbitration of disputes); S.B. 2391 (establishes arbitration board for resolution of some school committee disputes); S.B. 2405 (provides for charging interest on arbitration awards); S.B. 2444 (would submit all claims involved with construction of a highway or bridge for less than one hundred thousand dollars to arbitration without consent of parties); S.B. 2446 (state will pay for a portion of the cost of compulsory mediations between negotiating agent and municipal employer); S.B. 2596 (school committees may request binding arbitration).

### South Carolina

*Bills Enacted* – S.B. 90 (provides mediation as alternative to resolve dispute between district board and district superintendent).

*Other Legislation* – H.B. 4291 (implements ADR in disciplinary matters for nurses); H.B. 4556 ("Relocation and Reconstruction Agreement Act"); S.B. 831 ("Relocation and Reconstruction Agreement Act"); S.B. 932 (would develop and implement mandatory mediation process for Workers' Compensation claims); S.B. 948 (would enact the "Medical Malpractice and Patient Safety Reform Act" requiring mediation prior to trial).

### South Dakota

*Bills Enacted* – None.

*Other Legislation* – None.

### Tennessee

*Bills Enacted* – None.

*Other Legislation* – H.B. 3197 (authorizing workers' compensation specialist to act as arbitrator where necessary); H.B. 3058 (would alter established method of settling disputes on comprehensive growth plans); S.B. 2503 (authorizing workers' compensation specialist to act as arbitrator where necessary); S.B. 3058 (would alter established method of settling disputes on comprehensive growth plans).

### Texas

*Bills Enacted* – None.

*Other Legislation* – None.

### Utah

*Bills Enacted* – H.B. 179 (when report of adult abuse of a long-term care resident is made, long-term care ombudsman must be notified); S.B. 9 (changes procedures for eminent domain); S.B. 107 (enacts the “Advanced Practice Registered Nurse Compact”); S.B. 162 (enacts the “Interstate Insurance Product Regulation Compact”).

*Other Legislation* – H.B. 116 (involves dispute resolution in land use disputes); H.B. 160 (limits arbitration clauses in home loans); S.B. 54 (establishes an ombudsman position for Child and Family Services); S.B. 117 (health care professionals may not refuse to provide health care on sole basis of patient’s refusal to sign medical malpractice arbitration agreement); S.B. 245 (ADR of medical malpractice disputes).

### Vermont

*Bills Enacted* – None.

*Other Legislation* – S.B. 275 (ADR for disputes between health insurers and health care facilities).

### Virginia

*Bills Enacted* – H.B. 1450 (relates to disbursements to compensate for bodily injury and property damage under the Petroleum Storage Tank Fund).

*Other Legislation* – None.

### Washington

*Bills Enacted* – H.B. 2988 (extends the duties for the Office of the Family and Children’s ombudsman to include accepting and processing foster parent complaints against department employees); H.B. 3085 (extends involvement of families in decision-making process where child is in child welfare system); S.B. 5536 (mediation and arbitration of claims relating to conflict between condominium buyers and sellers).

*Other Legislation* – H.B. 1927 (involves mandatory mediation of health care claims prior to trial; establishes mediator qualifications); H.B. 2338 (establishes procedure for licensing of non-federal hydropower projects and how to acquire mitigation recommendations); H.B. 2362 (would allow broadly-defined “family” members involvement in family team decision meetings in the child welfare system); H.B. 2515 (overhauls long-term care oversight and maintains right of facilities or home to enter into arbitration agreements with residents); H.B. 2839 (seeks to investigate ADR as a means to address injuries relating to health care); S.B. 6616 (in civil action where mandatory arbitration is relevant, maximum amount of disputed claim raised to fifty-thousand dollars); S.B. 6635 (subjects all properly filed medical malpractice claims to mandatory mediation where action is not already subject to mandatory or voluntary arbitration).

### West Virginia

*Bills Enacted* – None.



*Other Legislation* – H.B. 2053 (RUAA); H.B. 2227 (provides ADR for state employees); H.B. 4646 (relates to payment of mediators in Workers' Compensation cases); H.B. 4695 (state employees may choose binding arbitration for grievance handling); S.B. 20 (RUAA); S.B. 400 (authorizes research of ADR to resolve tax disputes); S.B. 684 (modifies state employees' grievance procedures); S.B. 677 (establishes the Office of Child Protection Ombudsman).

### Wisconsin

*Bills Enacted* – A.B. 279 (modifies mediator training requirements and duties where domestic violence is suspected in child custody proceedings); S.B. 284 (establishes a grievance procedure for employees displaced under the "Wisconsin Works" program).

*Other Legislation* – A. B. 82 (to restrict use of arbitration of controversies arising from open-end consumer credit plans); A.B. 272 (to change procedure for settlement of disputes for local government employees, excluding law enforcement or firefighters); A.B. 337 (related to changes in right to strike and binding arbitration under State Employment Labor Relations Act); A.B. 617 (related to grievance procedure for displaced employees in the state's "Wisconsin Works" program); A.B. 644 (would expand long-term care ombudsman authority in regard to selected residential care situations).

### Wyoming

*Bills Enacted* – H.J.R. 11 (amends state constitution to allow for ADR or medical review boards for medical malpractice claims); S.F. 5 ("Interstate Compact for Juveniles").

*Other Legislation* – H.B. 102 (provides for ADR alternatives when addressing medical malpractice claims).