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LOCAL DISPUTE RESOLUTION

House Bill 4208 as enrolled
Sponsor: Rep. Richard Bandstra

Second Analysis (2-9-94)
House Committee: Judiciary
Senate Committee: Judiciary

THE APPARENT PROBLEM:

Community dispute resolution centers provide an option for disagreeing parties for whom formal litigation is unnecessary or inappropriate. Alternative dispute resolution programs can relieve courts of additional burdens to their dockets, and parties to a dispute can benefit from mutually acceptable solutions developed with the aid of trained volunteers. In recognition of the potential public benefits of alternative dispute resolution, the legislature in 1988 created the Community Dispute Resolution Act, which established a grant program to provide funding and guidance for community dispute resolution centers. Administered by the State Court Administrative Office (SCAO), the program has been funded through a temporary \$2 increase in civil filing fees. That \$2 increase was originally scheduled to expire on January 1, 1993, but was extended to January 1, 1996 by Public Act 292 of 1992.

Although the program is only in its fifth year of providing grants, indications are that it is enjoying at least modest success: the numbers of disputes resolved increased from 599 in 1990 to 2,460 in 1992. The State Court Administrative Office reports that agreements are reached in about 90 percent of the cases; about 85 to 90 percent of agreements are still in effect after 60 days. According to one 1992 report, of the nearly 1,500 settlements reached in the first eighteen months of operation, approximately 80 percent of all agreements reached were kept, a success rate roughly double that attributed to small claims court.

Now that several years have passed since the program was first enacted, various improvements to the program and to statute have been proposed.

THE CONTENT OF THE BILL:

The bill amend the Community Dispute Resolution Act to do the following:

****explicitly allow a court to refer parties to a community dispute resolution center. Participation in community dispute resolution would continue to be voluntary, and courts would be forbidden from requiring that parties reach a settlement through community dispute resolution.**

****authorize the state court administrator to conduct one or more pilot projects in which courts were authorized to require parties to a civil action to attend a center for an introduction to the dispute resolution process. The court could not, however, require that parties reach a settlement through dispute resolution at the center. The pilot program would expire January 1, 1996.**

****specify that written agreements developed through dispute resolution would be enforceable as contracts.**

****provide liability protection for mediators. A mediator would not be held liable for civil damages for any act or omission in the scope of his or her employment or function, unless he or she acted in bad faith or with malicious purpose or in a manner exhibiting wanton and willful disregard of the rights, safety, or property of another.**

****clarify the definition of "mediator." Instead of being an "impartial, neutral person responsible for reaching a resolution in each case," a mediator would be an "impartial, neutral person who assists parties in voluntarily reaching their own settlement of issues in a dispute and who has no authoritative decision-making power."**

****explicitly provide that the interest generated by the community dispute resolution fund be credited to the fund and used exclusively for the purposes of the act. (Such language has been included each year in the program's annual appropriations act.) The bill also would specify that money in the fund**

at the end of a fiscal year remain in the fund, and not revert to the general fund.

****narrow the confidentiality provisions of the act.** At present, a mediator's or center's files are confidential and not subject to disclosure in a judicial or administrative proceeding; communications relating to the subject matter of a resolution also are confidential communications. Under the bill, there would be no confidentiality protection where all parties agreed in writing to waive confidentiality, in a subsequent action between the mediator and a party for damages arising out of the mediation (e.g. when a party subsequently sued the mediator), or for materials that were not prepared specifically for use in the dispute resolution process.

****increase the minimum training requirement for mediators from 25 hours to 40 hours, and specify that principles of the legal system, as well as conflict resolution techniques, be a part of the training curriculum.**

****require a grant recipient to provide for community participation and respond to local community needs.** In determining whether this requirement had been satisfied, the state court administrator would consider the extent to which the applicant had: active board members and mediators drawn from the community and client constituencies, programs and services aimed at local dispute resolution needs, local financial and in-kind support, and a diversified base of referral services.

****increase the maximum amount of state funding under certain circumstances from 50 percent to 65 percent of a grant recipient's needs.** (If the pro rata share of the amount generated by court fees is a higher amount, then the sum represented by court fees is the maximum funding amount.)

MCL 691.1552 et al.

FISCAL IMPLICATIONS:

According to the 1992 report of the Community Dispute Resolution Program, the portion of civil filing fees allocated to the program generates about \$1.2 million annually. In 1992, about \$760,000 in grants were awarded to 12 community-based agencies serving 21 counties. The remaining money (about \$440,000) represents the fees generated in counties not yet served by community dispute

resolution centers; that money remains in the fund from year to year, until an eligible dispute resolution program is formed.

The Senate Fiscal Agency has noted that the bill could reduce administrative costs to state and local courts to the extent of any increase in the use of community dispute resolution centers. Any funds left over at the end of each fiscal year would accrue to the fund. (11-23-93)

ARGUMENTS:

For:

The bill would improve the community dispute resolution grant program. Although the full potential of the program has yet to be realized, the number of clients served by alternative dispute resolution centers is on the rise, and the proportion of cases successfully resolved is very high: agreements are reached in 90 percent of the cases, and 60 days after the mediation, agreements are still in effect in about 85 percent or more of the cases. The high success rate is no doubt a reflection of the manner in which agreements are reached: a trained volunteer mediator assists the disputing parties in arriving at their own mutually satisfactory solution. With both parties feeling that they have been treated fairly, agreements are kept, a potentially costly court battle is avoided, and strained court resources are relieved of extra burdens. Community dispute resolution has a great potential to keep landlord-tenant disputes, neighborhood complaints about noise or pets, and interpersonal problems out of the courts.

Several of the bill's provisions are aimed at finding ways for local programs to meet their potential. Provisions specifying that courts may refer parties to community dispute resolution would reflect what is being done in many courts now, and encourage other courts to follow suit. Provisions for a pilot program in which courts could require parties to attend a community dispute orientation (but not require parties to resolve a dispute through the process) also would increase referrals, and test centers' abilities to get otherwise reluctant parties to agree to the process and come to a mutually acceptable resolution.

Other provisions would clarify a number of aspects of the enabling statute. The revised definition of "mediator" would better describe what this sort of mediator does, and better distinguish mediation

under the community dispute resolution program from court-ordered mediation, which under court rules is more like non-binding arbitration. Grant eligibility requirements would be modified to reflect current mediator training requirements and emphasize the importance of having a program that reflects the needs and preferences of the community as a whole. Obtaining funding to supplement court fees has been a real problem for many local programs, so the bill would increase the state funding limit to 65 percent of a program's budget (the statute, however, sets the funding ceiling at the higher of the percentage figure or the sum represented by the pro rata share of court fees; thus far, the court fee figure has generally been the ceiling that applied). Finally, the bill would confine assurances of confidentiality to only those matters that dealt directly with the matter being mediated, and provide for sensible exceptions to even those assurances.

Against:

In the past, some have expressed concerns over existing and proposed provisions for confidentiality in mediation. Criminal admissions or other admissions of culpability could be protected. The provisions contain the seeds for a miscarriage of justice, and may go farther than is necessary or customary in such matters.

Response:

Without a reasonable assurance of confidentiality, parties in a dispute might be reluctant to seek mediation. Assurances of confidentiality are common not only to community dispute resolution programs in Michigan: they are provided by statute in a number of other states, and are a policy of the American Arbitration Association. Criminal admissions would have no place in community dispute resolution: a grant recipient is required by statute to reject any dispute involving alleged acts that are or could be the subject of criminal prosecution for a violent or drug-related felony. Moreover, the bill proposes confidentiality protections that are narrower than currently contemplated by the act.

Against:

The bill could do more to resolve what is perhaps the greatest problem faced by community dispute resolution programs: the low numbers of people seeking the service. Many still seem unaware of the programs, and people appear reluctant to choose an avenue other than litigation and judicial resolution. Something should be done to increase referrals to

and use of dispute resolution programs. For example, second party objections to mediation could be overridden if statutory language requiring mediation to be voluntary was eliminated, thus opening the way for courts to order the use of community resolution.

Response:

The voluntary nature of community dispute resolution is a key to its success; reluctant participants would be less likely to negotiate a mutually acceptable solution. However, the bill would increase referrals through specifically encouraging courts to do so and through authorizing a pilot program in which parties were required to attend an introduction to the dispute resolution process. In addition, program administrators in the State Court Administrative Office are focusing on obtaining more referrals from a wider variety of community sources, and on learning how to overcome objections to mediation. For example, pilot projects have been developed with the state Bureau of Occupational and Professional Regulation to increase the use of community mediation in unlicensed builder disputes and with the 36th District Court to increase referrals of landlord-tenant disputes.

Against:

The bill overreaches itself in extending liability protection to people associated with a dispute resolution center. Many believe that it is poor policy to offer immunity from liability; a person should be held accountable for his or her own actions, and injured parties should be able to have legal recourse. There evidently have been no problems in Michigan with lawsuits against mediation centers or volunteers; there is no demonstrated need to create liability immunity in this situation.

Response:

Centers and volunteers have expressed concerns about potential liability for performing a community service. Liability protection for volunteers is common in Michigan statute, and other state statutes on community dispute resolution offer volunteers some form of immunity from liability. Michigan law should do so as well.