

ADMINISTRATIVE LAW ADVISORY COMMITTEE

REPORT OF THE SUBCOMMITTEE TO STUDY THE USE OF ALTERNATIVE DISPUTE RESOLUTION IN REGULATORY ADJUDICATION AND RULEMAKING

Mission of the Subcommittee

The federal government and many states have recently passed legislation specifically authorizing agencies to utilize consensus building processes, mediation, or other alternative dispute resolution (ADR) techniques in resolving disputes and issues. Utilizing ADR processes may lead to less expensive and more efficient resolution of issues that might otherwise be subject to extensive litigation. In addition, implementation of agency decisions that result from consensus based processes are often less contentious and may foster strong relationships between formerly adverse parties. In Virginia, legislation has been adopted authorizing specific agencies or programs (the Department of Environmental Quality, the Department of Employee Relations Counselors) to utilize alternative dispute resolution. The legislation often sets forth the parameters for the use of these processes and may address issues unique to the use of ADR in a public policy arena.

The Virginia Bar Association (VBA) Joint Committee on Alternative Dispute Resolution and the Virginia Mediation Network have reviewed the work of the federal and various state governments in this area and are seeking introduction of similar legislation in Virginia. John Forbes, Chairman of the Administrative Law Advisory Committee (ALAC), appointed a subcommittee to evaluate the proposal and to work with the proponents to identify and address issues that may be of interest to the Code Commission. To this end, members of the subcommittee monitored and provided feedback to the proponents over the summer and staff conducted research on the use of ADR in other states (Appendix A). The following members of ALAC were appointed to serve on the subcommittee: Kathy R. Frahm, Senior Policy Analyst, Department of Environmental Quality, Chair; Roger L. Chaffe, Senior Assistant Attorney General; Mark K. Flynn, Director of Legal Services, Virginia Municipal League; Mark E. Rubin, attorney with Shuford, Rubin and Gibney, PC; Katherine E. Slaughter, Senior Attorney, Southern Environmental Law Center; and M. Coleman Walsh, Chief Administrative Law Judge, Virginia Employment Commission.

Background and Summary of the Proposed Legislation

The goal of the proposed legislation is to authorize public bodies (state agencies, local governments, school boards, advisory commissions, planning commissions and others) to use ADR processes without mandating utilization. A second goal of the proposal is to establish a framework for the employment of ADR processes with as little cost as possible. Over the summer, an ad hoc group of individuals from within and outside government met with members of the VBA Joint Committee on ADR and the VMN to review and provide feedback on versions of the proposed legislation. Members of the ad hoc group included individuals from the Office of Consumer Affairs, the Office of the Attorney General, the Virginia Freedom of Information Advisory Council, The Department of Employee Dispute Resolution, the Department of Environmental Quality, and the Administrative Law Advisory Committee. It must be noted that none of the organizations or agencies listed here has endorsed the legislative proposal and all members of the ad hoc group participated in this project in their individual capacity.

The proposed act, called the Virginia Administrative Dispute Resolution Act, is limited to the use of ADR in adjudicated matters and includes a clear grant of authority for any public body to use a broad array of ADR processes if parties to a dispute agree. The draft legislation states that decisions by a public body to use or not use ADR are not subject to judicial review and that any agreement arising out of an ADR process is not binding on the public body unless affirmed by its governing authority.

To encourage the implementation of the proposed act in executive branch agencies, an Interagency Dispute Resolution Advisory Council (Council) is proposed. Under the auspices of the Secretary of Administration, the Council would serve as a statewide resource for training, education, and utilization review. Policies for the implementation and management of ADR processes would be determined by each executive branch agency. The proposed act further authorizes the creation of a neutral sharing program to allow one state agency to borrow an employee from another agency to serve as a neutral in a dispute resolution proceeding. This provision is modeled on the program already in place for the mediation of state employee grievance issues within the Department of Employee Relation Counselors. Finally, the legislative proposal addresses confidentially and Virginia Freedom of Information Act (VFOIA) issues. While the proposed act subjects dispute resolution proceedings to the VFOIA, it expressly exempts materials prepared for and used in a mediation.

Recommendation

The subcommittee respectfully submits this report and notes four issues that it feels require careful consideration by the members of ALAC and, if the report is adopted, the Code Commission in its deliberation on any proposed legislative initiative.

Issues Identified by the Subcommittee

Public access to information versus confidentiality of ADR documents

The draft legislation would exempt mediation documents from discovery and disclosure under the VFOIA. Exceptions are provided if the parties agree to a document's disclosure and for any documents not specifically prepared for the mediation. The legislative proposal also specifies that the final settlement agreement will not be confidential unless the parties agree in writing. This language is based upon provisions in Title 8.01 related to the use of ADR in other settings.

The VFOIA exemption raised some ALAC subcommittee members' concern about the need for public access to relevant information as the basis for meaningful participation in any public comment period or appeal of the final action. The proponents pointed out that the draft language tracks other statutory provisions related to ADR and that confidentiality is essential to effective mediation. Proponents also point out that the draft legislation ensures access to all non-mediation specific documents.

Quality assurance for non-certified mediators

The draft legislation specifies that each agency is to develop criteria or standards for mediators. Some members of the ALAC subcommittee expressed concern that citizen participants to ADR will not be able to ascertain which mediators will be qualified without some standardization or certification requirements like those required for mediators used for court ordered mediations. The proponents of the legislation suggested that the certification program established by the Supreme Court of Virginia may be overly burdensome for non-litigated issues and pointed to the voluntary nature of the ADR process as a check on quality assurance. The proponents would like to initiate the program with more flexibility to minimize resistance to its use.

Consistency between agency adopted ADR policies

The draft legislation specifies that each agency is to develop procedures for the utilization of mediation and other alternative dispute resolution techniques. Some subcommittee members expressed concern that statewide standardization would be simpler and more effective. The proponents of the legislation feel that creation of statewide standards may complicate the use of ADR and may limit agencies' ability to establish programs that meet agency-specific needs.

Cost of implementation

While subcommittee members agree that increased use of ADR processes may result in long-term cost savings to state and local governments as they reduce time spent resolving conflicts and litigation costs; this legislative proposal will impose some short-term costs. The legislation requires each agency to designate an employee responsible for implementing an ADR program, to develop guidelines and to participate in the statewide advisory council and training activities. While existing agency employees may absorb these functions, the additional responsibilities may replace existing functions. Additionally, the office of the Secretary of Administration will incur the costs associated with coordinating and staffing the proposed Interagency Dispute Resolution Advisory Council. The proponents suggest that short-term costs will be readily absorbed in existing agency funding structures. Some members of the subcommittee expressed concern that failure to fund and staff the ADR initiative may be viewed by agency staffers as an unfunded mandate and, thus, create a barrier to the program's successful implementation.

Date: November 28, 2001

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APPENDIX A