

EXECUTIVE SUMMARY

CONFLICT RESOLUTION IN THE GREEN ZONE: A BETTER, FASTER, CHEAPER WAY A submission to the ESD Institute by the Michigan State Bar Alternative Dispute Resolution Section

Introduction

We all know that almost all lawsuits settle before trial. But usually this is only after significant legal and transactional costs have been invested. ADR is all about early, candid communication to explore resolution at the *beginning* of the dispute to achieve a better, faster, more cost-effective result.

A recent study, published in *The Journal of Empirical Legal Studies*,¹ determined that on average the financial outcome of settling civil lawsuits is better than going to trial. The use of ADR collaborative processes to resolve civil disputes and lawsuits has become a key settlement mechanism in recent years. A “green zone” presents unique opportunities for conflict resolution systems design that could provide a model for similar endeavors in years to come.

This paper provides examples of businesses, corporations, and other public and private entities, including health care and educational institutions, governmental bodies, and court systems which already use ADR problem solving mechanisms with high success rates and satisfaction to stakeholders. The paper proposes the design and use of ADR systems specific to individual enterprises in the Green Zone in order to mitigate legal risk and foster collaborative problem solving within the Zone.

Examples of potential approaches to mitigate legal risk and resolve disputes through ADR in the Michigan Green Enterprise Zone include the following:

- Contractual agreements or pledges between persons and entities in which the parties agree to immediate, real-time mediation as soon as the dispute arises and/or to at least first meet and confer in an effort to resolve their dispute followed by mediation, and if necessary, ending in binding arbitration.
- Providing entities within the Green Zone the opportunity to design, plan and sponsor symposiums and training for ADR systems to resolve internal as well as external disputes, which are tailored to the specific needs of diverse enterprises. These exciting choices are discussed herein under the heading of “An ADR Systems Approach In An Enterprise Zone.”
- Legislative bodies and courts instituting early resolution as a systematic and regular part of any case filing in court to effectuate early mediation intervention at the beginning rather than the end of a case, as North Carolina and other states have already implemented.

¹ "Let's Not Make a Deal: An Empirical Study of Decision Making in Unsuccessful Settlement Negotiations," Randall L. Kiser, Martin A. Asher, and Blakeley B. McShane, *Journal of Empirical Legal Studies*, Vol. 5, Issue 3, 551-591, September 2008.

- Adopting procedures already followed by numerous counties within the State of Michigan, under the current Michigan court rules, in which each court with an ADR Plan is free to institute early mediation in virtually all cases as an important step forward. The focus of these procedures shifts to problem solving versus fault-finding as a path to a more efficient administration of justice. Courts within the Green Zone are already well positioned to implement ADR processes as soon as new cases are filed.

Alternative Process Choices

A variety of alternative choices have come onto the horizon recently, including *facilitative mediation*, *arbitration*, and various court annexed processes such as *case evaluation and mini-trial*. The common denominator is to provide the parties with a choice other than traditional litigation when they are in search of a better, faster, or less expensive way to resolve their disputes. Additional options involve timing, such as the use of *early mediation* before or at the beginning of a lawsuit, and the use of additional processes at later points if the case does not settle early. If the parties in dispute choose one or more of these ADR options and are unable to reach a resolution, they are free to revert to the traditional pursuit of due process in court. Another procedural mechanism to consider would be a *collaborative law* model, where the initial attorneys assigned to the case are not litigators, but are charged with obtaining a favorable settlement for their client, with the help of subject matter experts; if the case proceeds to litigation, a litigator is then hired.

Design and Plan an ADR System

A diagram of an ADR system might look like a continuum of settlement interventions placed along a horizontal line prior to litigation, beginning with one-on-one negotiation as a first stage, followed by mediation. Other processes, such as mediation-arbitration, arbitration, consumer arbitration panels to resolve warranty claims, use of an ombuds office to investigate employment matters, case evaluation, mini-trials, or a collaborative law model could be incorporated into a system for resolving disputes at various points along the continuum prior to actual litigation. An ADR systems designer would provide useful counsel in planning an ADR system for the Zone.

Conclusion

Disputes are inevitable and can be costly. The use of ADR makes economic and good sense from the perspective of maintaining business relationships and mitigating legal risk. Incorporating a dispute resolution system into the initial planning process in a way that saves precious resources and relationships and minimizes barriers to progress and growth is critical.

The State Bar ADR Section submits that a more progressive system making alternative choices a part of the process early in the dispute cycle will favorably impact fairness, timeliness, and costs... for the parties, the Zone, and society as a whole.