

# 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 and the Detroit Metropolitan Bar Association

**Purpose of Submission:** 1. To recognize and discuss alternative ways for parties to resolve disputes fairly, quickly, and efficiently with the potential for greater satisfaction to the parties and less cost to society as a whole than traditional litigation. 2. To offer early alternative dispute resolution (ADR) as an intervention to mitigate legal risk and its consequences in the Michigan Green Enterprise Zone.

Will Rogers said, “When you find yourself at the bottom of a hole, the first thing to do is stop diggin.” Alternative dispute resolution (ADR) systems are used throughout the public and private sectors within the United States, as well as throughout the global community, as a means to “stop diggin” deeper, costlier craters in disputes and find alternative ways to address the problems, differences, and conflicts inherent between people within society and its institutions. The multiple advantages of ADR – preservation of resources, efficiency, user satisfaction, confidentiality, durability of solutions, etc. – are summarized herein.

A recent study, published in *The Journal of Empirical Legal Studies*<sup>1</sup> determined that on average the financial outcome of settling civil lawsuits is better than going to trial. It has long been said that defendant attorneys and insurance representatives save their clients and companies money by resolving disputes through collaborative processes. This study found that plaintiffs, more often than defendants, make the wrong financial decision by proceeding to trial. According to the study, most of the plaintiffs (61%) who decided to pass up the defendants’ offers wound up getting less money by going to trial. On average, misjudging the odds cost plaintiffs in the study about \$43,000, but the total could be higher because information on legal costs was not available in every case. For defendants, who were less often wrong about going to trial, the cost of deciding against settlement was even greater: \$1.1 million.<sup>2</sup>

Additionally, a recent Michigan study found that plaintiffs using mediation are significantly more successful in receiving payment than plaintiffs using litigation.<sup>3</sup>

An enterprise or green zone presents unique opportunities for conflict resolution that could provide a model for similar endeavors in years to come. ADR systems can be designed and developed to mitigate legal risk and foster collaborative problem solving. For example, participants in the enterprise zone could agree by contract to the specialized use of ADR that

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<sup>1</sup> "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.

<sup>2</sup> The New York Times, “Study Finds Settling Is Better Than Going to Trial,” August 8, 2008.

<sup>3</sup> Study – “Mediation in Michigan: Comparing Collection Rates in Adjudicated and Mediated Cases,” MSU Department of Communications, 2004.

applies specifically to their enterprise as outlined below (e.g., educational use of ADR would be different than that of health care systems and businesses). As a threshold, each entity could agree that, as a condition of employment, their employees would undergo specialized training in conflict management skills to increase their interpersonal and problem-solving skills to attempt to manage and resolve disputes at the first level before the problem escalates into a wider conflict either internally (within the workplace) or externally (in public relations or consumer or business relationships). If a conflict escalates, a written policy outlining the entity's individualized system for early resolution, tailored to the needs of the entity, can be mandated by contract for those participating in the zone.

Potential solutions for implementation of alternatives to litigation in resolving disputes in the Michigan Green Enterprise Zone include the following:

1. Persons and entities in the Green Enterprise Zone have the ability to enter into contracts in which they agree to give up traditional forms of litigation in favor of an agreement to first meet and confer in an effort to resolve their dispute followed by mediation, if necessary, and ending in binding arbitration. Panels of neutrals have already been created and can certainly be expanded to offer these early alternative dispute resolution interventions to help mitigate legal risk and its consequences.

2. Legislative bodies and courts can act to institute 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. The models followed by North Carolina and other states are instructive.

3. Procedures followed by various counties within the State of Michigan in implementing their ADR plans under the current Michigan court rules are also illuminative. At present the Michigan Court Rules, 2.410 and 2.411, make provision for alternative dispute resolution and mediation in which each court with an ADR Plan is free to institute early mediation in virtually all cases as an important step forward in focusing upon problem solving versus fault finding in search of a more efficient administration of justice. Many counties have done so successfully. Courts within the Green Zone are already well positioned to implement ADR processes as soon as new cases are filed.

4. Additionally, the Michigan Court of Appeals, through its Settlement Program, currently offers mediation early in the appellate process, which is provided at no cost to the litigants under MCR 7.213. This program could be extended in scope to help relieve the burdens presented by continuation of the litigation process in the appellate system.

5. Entities and institutions within the Green Zone have the ability to pledge and agree among themselves to first utilize ADR mechanisms to resolve disputes before going to court much like the CPR Corporate Pledge already in place with many corporations on a national and international level.

6. Entities within the Green Zone have the opportunity to design, plan and sponsor symposiums and training for ADR systems to resolve internal conflicts 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."

## **Historical Perspective**

Ever since the wild west became civilized parties in dispute have gone to the courts to seek a resolution. There they have encountered a series of processes and procedures steeped in due process leading to an enforceable adjudication, followed by a series of appellate procedures with the aim of rendering that adjudication final. At the end of this process we have a winner and a loser.

The core purpose of the American civil litigation system has been to provide a forum in which to resolve disputes fairly. This is the exemplary purpose and effect imparted by our fastidious devotion to due process. It is likewise hoped that efficiency of the litigation process will be such that the result will be obtained within a reasonable amount of time and at an acceptable cost. Fairness, timeliness, and cost are the fundamental parameters which the litigants and our society tend to use in evaluating the effectiveness of our civil litigation system.

As time has passed, participants in the litigation process and the society which is asked to pay for it have been less than satisfied with one or more of these vital parameters of fairness, time, or cost. While the rules and processes may be designed to provide objective fairness, it is just as important that the parties see it as a process which is fair and just. Timeliness and cost effectiveness are important ingredients to this perception. If the participants or their attorneys lose their focus on the goal of resolving disputes and instead devote inefficient amounts of time and resources to the process itself, participants are left with an empty feeling. If only some of the judges and even fewer of the lawyers really seem to understand the reasons for all of the rules, i.e., to promote fairness, how can we hope the participants will embrace them? If the time required is great and the costs are high, is there any wonder the winner feels like a loser at the end of the day? And, if the business entity “wins” and the former business partner / supplier or customer “loses,” is it a net gain for the “winner” if future business relationships are jeopardized or lost in the process?

The civil court system is necessarily a procedurally rigid system. It is both adversarial and coercive. In the end, an adjudication is binding, not because the parties have agreed to it but because it is enforced by the state or federal government when the result becomes final.

Deficiencies in fairness, time, cost of the litigation process, or durability of court decisions can be avoided by voluntarily disengaging from established litigation procedures in favor of pursuing alternative methods of dispute resolution. More and more litigants and lawyers are doing exactly that in search of greater customer satisfaction and efficiency. They have discovered that our civil litigation system is not the only way to resolve disputes fairly. Indeed the question of the day is whether it is the best way to resolve disputes fairly, quickly, economically, and durably.

## **Alternative 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. If the parties in dispute utilize one or more of these choices early on and are unable to reach a resolution they are free to revert to a more traditional pursuit of due process in court. Thus, this proposal is simply to increase dispute resolution options available to parties.

## Interest Based Negotiation and Early Facilitative Mediation

Interest based negotiation and facilitative mediation are all about communication. Candid exchange of information allows the parties 1) to jointly explore important underlying facts necessary to evaluate their positions and 2) to put their interests and concerns on the table. Facilitative mediation is founded upon the fundamental principal that reasonable people with access to accurate information will almost always resolve their dispute between themselves *in their own best interest*. If they don't, strangers to the dispute will need to decide it for them. Most disputants want to control their own destinies.

What does not make sense, and what many people think is broken in our civil litigation system, is for the disputants to wait until the *end of the case*, after incurring substantial transactional costs, to reach a resolution. So why does our current litigation system so frequently end in this fashion? Often clients abdicate to the lawyers, who focus upon the process and procedures in civil litigation, devoting inefficient amounts of time and resources to the process as an end in and of itself. In addition, both sides like to think they are right in clinging to their positions. When there is nothing pressing at the early stages, no one wants to appear to be weak.

**Early mediation** offers an alternative at the *beginning* of a lawsuit, or even better, before one is filed. Mediation is a process, not an event, in which the parties air their views, listen to one another, and focus upon problem solving in their own best interests. It may pave the way for an immediate settlement or multiple sessions may be required to allow for additional fact finding and information to be developed. Either way, it often allows the parties to reach a better, faster, and cheaper resolution. What advantages might this bring?

- Parties who enter into a candid exchange early in the process share information at a fraction of the cost of formal discovery in a lawsuit. Even more importantly, they learn the other side's *perspective* on what the evidence means to the case and to them.
- Frequently, early mediation will resolve the case. Even if a settlement is not reached right away early mediation improves the chances of timely resolution at some point, e.g., after needed documents or testimony are identified and obtained. Further, the mediator can frequently iron out contentious discovery issues among the parties and/or lawyers thus avoiding numerous motion hearings.
- Studies have shown that early mediation is extremely cost effective. A trained mediator can usually help the parties resolve a variety of issues in a problem solving, collaborative model at a fraction of the cost entailed in depositions, document production, and motion practice.
- The parties and their representatives/insurance carriers are more likely to evaluate, understand, and reserve the case correctly at the beginning when they undertake early mediation. Late changes in evaluation and reserving bring great anguish and recriminations which distract from the real goal: fair resolution.
- Early mediation sets a tone that is focused upon a resolution versus adversarial positions.
- Early mediation assists the parties in *understanding* the issues and facts that generate risk. Parties need to feel comfortable that they have accurately assessed risk and that they have arrived at the correct amount of money and/or other resolution. Mediation can provide this opportunity without reliance upon formal discovery, which can be time consuming, expensive, and cumbersome.

- Studies have shown that parties have a higher rate of satisfaction with mediation versus litigation. This is because mediation is more flexible than protracted litigation in addressing their true interests and is much quicker in gaining a resolution. Further, the parties themselves actively participate in framing the resolution. Parties with an ownership in the resolution that is tailored to meet their own needs are much more likely to stick to it.
- When the relationship or the future is important, as it often is in business disputes, employment cases, family law, corporate governance, intellectual property, land use and zoning, municipal law, etc., early mediation allows the parties to focus on their mutual interests and the future rather than the past and the drudgery of their dispute today. Litigation tends to destroy relationships. Mediation allows the relationship to grow and move forward.
- Frequently, in these types of disputes, the parties are able to fashion a win-win where both sides come out ahead of where they started. Mediation is a natural process to find win-win solutions that meet both parties' specific interests. Litigation has a winner and a loser. Courts cannot fashion win-win solutions unless the parties devise it.

### **Arbitration**

Another alternative method for dispute resolution is binding arbitration. The parties either agree upon one or more arbitrators to adjudicate the case or they agree in advance on a process for appointment of independent and neutral arbitrator(s) to decide the case. In this fashion the parties can decide upon the length, width, and breadth of discovery and when the case will be submitted for arbitration. It also allows the parties to keep the dispute and its resolution private.

Arbitration generally, but not always, comes after other forms of voluntary efforts in dispute resolution such as interest based negotiation and mediation. Commercial parties frequently have dispute resolution provisions in their contracts that require the parties to progressively move from a requirement to meet and confer in an attempt to negotiate a settlement themselves, to the next stage of mediation, and then finally move to binding arbitration if they are unable to resolve the dispute with other methods. This type of contract is fairly typical among OEMs and suppliers in the automotive industry, for example.

### **Case Evaluation and Mini-Trials**

Many courts currently provide for case evaluation, in which a panel of three experienced lawyers meet with the parties, review summaries and place a dollar evaluation upon a case in litigation after discovery has closed. Parties are free to accept or reject. There are sanctions if a rejecting party does not achieve a result at time of trial which is 10% better than the case evaluation award rendered by the panel. Some shortcomings of this process are that inadequate time is often available for the process and that case evaluation is conducted at the end of the case after the expense of litigation, discovery and motion practice and it is position based. There is nothing in the process which inherently promotes interest based negotiation or problem solving. Accordingly, its rate of success has dramatically declined over the years.

Another form of court annexed ADR is the min-trial. Again this is a voluntary process in which the parties agree upon the parameters in which a case will be presented to fact finders in an abbreviated session without strict observance of the rules of evidence. The idea is to reduce the cost of a protracted trial. Parties can chose to proceed with a mini-trial just about anywhere along the timeline of a case but almost always wait until the end. Again it is position based without the inherent benefits of problem solving.

### **Applications of ADR Systems to Diverse Enterprises**

Below is a partial list of public and private institutions that traditionally have implemented ADR processes to resolve disputes with examples of applications specific to each enterprise.

Schools. Schools in Michigan and throughout the U.S. have used ADR to resolve a myriad of problems that directly affect the education of students.

- The U.S. and state departments of education encourage school districts to use special education mediation and IEP facilitation by trained mediators, which has resulted in a savings of millions of dollars and valuable time in the education of children by resolving special education disputes early and reducing the use of the lengthy and costly special education hearing process and formal litigation.
- Public and private schools have implemented a variety of peer mediation programs that describe their success in terms of significant drops in expulsions (~70% decrease), assault (~90% decrease), and discipline referrals (~58% decrease)<sup>4</sup>.
- Truancy prevention mediation is used to improve attendance and remove barriers to school participation, reducing unexcused absences by 40-50% in many cities and states.<sup>5</sup> Locally, Wayne, Macomb, Washtenaw, and Oakland County use various forms of school mediation within their districts in public, private, and charter school systems.

Hospitals and Health Systems. Hospitals have used mediation for disputes between patients and doctors, hospital staff, ethics boards, or hospital management for many years. Recently, however, a handful of hospitals have taken the unprecedented step of beginning to work with plaintiffs in a conciliatory, cooperative manner upon the first allegation of wrong doing. Traditionally, malpractice attorneys have counseled hospital staff to “deny and defend” against allegations of wrongdoing for fear of compounding the negative and costly effect of litigation on pocketbooks and careers. On the other hand, health care practitioners blame the legal profession for the need to practice defensive medicine, which leads to billions of dollars in spiraling and unnecessary health care costs. University of Michigan Health System was among the first in the

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<sup>4</sup> Oakland Mediation Center program materials for peer mediation.

<sup>5</sup> Wayne Mediation Center truancy prevention mediation program evaluation data. Ohio Office of Dispute Resolution, Ohio Supreme Court, program evaluation data.

nation to make significant changes in its approach to risk management. A risk management department was created to determine whether the care was reasonable or unreasonable and whether the patient's outcome was adversely affected by unreasonable care in order to determine whether or not a patient should be compensated. The program centers on 3 principles:

- Quick and fair compensation when unreasonable medical care was the cause of the injury.
- Vigorous defense of reasonable medical care.
- Reduction of patient injuries (and resulting claims) by learning from patients' experiences.

When unreasonable care is involved, U-M's approach to lowering claims is to intercept the claim before litigation is filed and to seek an understanding and agreement with the plaintiff without sacrificing the institution's core principles.

Since implementation of these principles and policies, U-M's legal defense costs and the amount of money it sets aside to defend claims have been reduced by two-thirds. The time it takes to dispose of cases has been reduced by half.

The University of Illinois Medical Center at Chicago has begun a similar program within the last two years and has seen the number of malpractice filings against the medical system decrease by half since the beginning of the program. Other medical systems that are implementing similar plans include Harvard and some Veterans Administration health systems.<sup>6</sup>

Business and Corporate. Businesses, including auto companies, State Farm Insurance, Motorola, Xerox, GE, BASF, Chevron, BellSouth, Burger King, CIGNA, Whirlpool, and countless additional Fortune 500 companies have instituted ADR systems to resolve internal (workplace) as well as external (consumer-related) business disputes. Mediation, arbitration, mini-trials, are among the alternative settlement mechanisms used to resolve disputes in the business environment. While mediation is a frequently used model, it may be used as part of an ADR menu of multiple options for dispute settlement within an organization. Most of these programs not only rely on ADR as a settlement device after litigation has started, but attempt to resolve disputes early, before a lawsuit is filed, resulting in significant savings of money and time. By way of example,

- Motorola uses mediation and conciliation for employment disputes and also uses a corporate ombudsman for some employee relations matters. In addition, Motorola has established a consumer arbitration panel to resolve warranty claims early on.
- Ford uses several third party dispute resolution processes in the belief that these mechanisms provide consumers with a quicker and less expensive method for resolution of repair disputes than reliance on court proceedings - and an avenue of recourse for those consumers who would not elect to pursue a legal remedy.

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<sup>6</sup> Sources: Richard C. Boothman, University of Michigan Health System, Ann Arbor, MI and The New York Times, "Doctors Say 'I'm Sorry,' Before 'See You in Court,'" May 18, 2008.

- Bank of America offers internal workplace dispute resolution, as well as an “external” consumer program, which is triggered after a customer is unable to get satisfaction at the branch level. The external program is a separately funded program with independent settlement authority, which has positively affected the net profits of the branches.
- Home Owners Warranty has processed well over 35,000 complaint cases (as of 2002) through an independent (external) mediation service since the program began in 1974. The program is intended for qualifying builders to resolve warranty complaints for performance early on.<sup>7</sup>
- Locally, Taylor based Masco Corporation recognizes the inherent advantages of early mediation. As stated by Masco’s associate general counsel and director of litigation, Richard Hurford, in a recent article:

It’s really quite simple: litigation is not a profit center for Masco or any other company with which I am familiar. Historically, 98.2% of Masco’s risk portfolio is resolved prior to trial. As such, it is virtually impossible to make a sound business case for incurring all of the direct and indirect transactional costs in preparing a case for trial. Frequently, early mediation is way better, faster, far less expensive, and a more rational manner for the resolution of disputes. Why would we want to spend more money tying up our key people in protracted litigation only to settle at the end?

Masco has gone so far as to create matrix for outside counsel to hit specific targets in identifying cases for early mediation. As Hurford put it:

The question we ask, very early on in the life of a dispute, is whether this matter is typically one which will ultimately settle, or is this a case that has such significant institutional importance that it must be aggressively litigated? If it is going to settle, let’s focus on those steps that can be taken to enter into a reasonable resolution as early as possible in the litigation’s life cycle. If it deserves to be tried, let’s identify the case and focus all of the necessary resources appropriately. We have determined that both our litigation budget and settlement costs have been substantially reduced on a year by year basis with this emphasis upon early resolution.

- Georgia Pacific is another entity that has aggressively implemented early mediation. Their statistical analysis also documents tremendous cost savings over a ten-year period for the same reasons illuminated by Richard Hurford in the Masco experience.

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<sup>7</sup> Richard H. Weise, “Representing the Corporation: Strategies for Legal Counsel,” Aspen Publishers, 1995, 2000-2 Supplement, 8-Ex-82.

Construction and Design. Leaders in the field of construction litigation recently attended a symposium sponsored by the Engineering Society of Detroit in search of a better, faster, and cheaper way of resolving construction disputes. The traditional method of relying upon binding arbitration upon completion of the project was often found to be cumbersome in terms of document preservation, continuity of personnel and witnesses, keeping the issues straight, etc. One innovative solution, which was very well received in the symposium, focuses upon *real time mediation* utilizing the services of a mediator from a panel of well-trained neutrals *in the field as soon as the dispute erupts*. This is another example of flexibility offered to the parties by early mediation, which allows them to resolve their dispute in a timely fashion in their own best interest rather than holding it off to the side as a guaranteed headache to be resolved at a later date.

The New York based non-profit CPR Institute (formerly known as the Center for Public Resources) provides know-how, counseling, forms, procedures, and neutral panels for Fortune 500 corporations and top law firms and assists in designing ADR systems for corporations, including systems for employment disputes and ADR systems for early settlement of individual product disputes. Many of its clients, such as Motorola, have Corporate ADR Pledges, signed by the CEO and CLO (vowing to try to resolve cases by ADR before proceeding to trial, in recognition that “for many business disputes there is a less expensive, more effective method of resolution than the traditional lawsuit.”)<sup>8</sup> Among CPR’s publications is a book titled, “Representing the Corporation,” by Richard H. Weise, which provides detailed coverage of how corporate attorneys should represent corporations through the use of ADR, including ADR systems design for businesses and corporations. The author states,

If I had one message for outside counsel, it would be as follows: “You have buried your head in the sand and you are missing the boat. The traditional model is flawed. There is opportunity here for conceptual leadership on your part, which could stand you in good stead with your clients for years to come. If this does not interest you, at least know this: Corporate America is getting smart in many ways. Quality concepts are survival issues for them. Dispute resolution is too important to be ignored. You will not be permitted to continue doing things the same old way.”<sup>9</sup>

CPR also offers a litigation risk analysis model and a computerized system for determining whether a case would fare better through an ADR process or litigation.<sup>10</sup>

Independent ombudsman’s offices are found in corporations, universities and other institutions. The ombudsman’s role is to advocate for problem resolution, not on behalf of a party.<sup>11</sup>

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<sup>8</sup> Ibid, 2000-2 Supplement, 8-Ex-127.

<sup>9</sup> Ibid, 2000-2 Supplement, p. 8-10.

<sup>10</sup> Ibid. 2000-2 Supplement, p. 8 -Ex-173 - Ex-184.

<sup>11</sup> Ibid.

Labor Arbitration is mentioned here because it is a traditional mechanism for labor unions and corporate management to use to resolve disputes between them and therefore may be a necessary component of an ADR system for some companies within the enterprise zone.

Government and Military. Hundreds of governmental agencies and the military utilize ADR systems throughout their institutions for employment disputes. One of the better-known examples is the U.S. Postal System that created a broad mediation program for its employees, which has significantly reduced the incidents of workplace violence in local post offices. Other agencies that have employed mediation include the CIA, the Consumer Product Safety Commission, Defense Contract Management Agency, Department of Agriculture, Department of Commerce, Energy, Education, Health and Human Services, Civil Rights, EEOC, the CDC, multiple defense agencies and military departments. A much more comprehensive and lengthy list of governmental bodies employing ADR in the workplace can be found at: <http://www.eeoc.gov/federal/adr/mediation.html>.

In addition, agencies such as the Department of Education, FEMA, the U.S. Navy, and others have instituted more extensive ADR systems for dealing with issues beyond internal employment disputes. For example FEMA has instituted a mediation program for the victims of Katrina to use for disputes with the government and private contractors, the Department of Education has instituted the use of special education mediation, as noted in the section above under “Schools.” Military branches routinely train mediators to work in foreign bases with local governments and civilians. The U.S. Institute for Environmental Conflict Resolution ([www.ECR.gov](http://www.ECR.gov)) has an extensive conflict resolution system for resolving conflict and litigation involving environmental disputes within communities.

States, Judiciary. The North Carolina experience: Pursuant to statute, NC General Statute, sec. 7A-38.1, virtually all civil cases are referred into mediation as soon as they are filed. This program has been in place for several years and can be viewed on [www.ncdrc.org](http://www.ncdrc.org) with a click on Mediated Settlement Conference Program. Andy Little, author of the book “Making Money Talk in Mediation,” has been engaged in this program in North Carolina from the beginning. Little indicates that initially there was some concern the lawyers would oppose early mediation across the board. But key leaders in the judiciary and the bar saw how much sense it made for *consumers* in the legal industry. Little stated as follows in a recent article:

Early mediation has now become a way of life, which has resulted in a much more user-friendly system. Litigants who would prefer to utilize the benefits of early mediation now have this opportunity as a matter of course. Litigants who would rather fight certainly have this choice as well. Most lawyers in North Carolina will tell you that their clients appreciate having this choice right from the beginning. Client satisfaction is up and docket congestion is down. Even cases which don't settle during the initial session are still resolved much earlier in the process.

Municipal Cooperation. Governmental approvals related to objectives outlined by the ESD Institute can readily be subject to mediation principles, particularly when applied early in the

process. In fact, mediation may be an excellent tool for integrating the Governmental Structure & Regulation identified as one of the Institutes five innovations. Collaboration among and between governmental agencies to address the innovations applicable to the corridor and facilitative meetings between involved stakeholders may provide assistance in finding solutions for the benefit of the entire corridor.

Mediation and facilitated dialogue can serve as a process for identifying opportunities to contract for cooperative sharing of revenue and public services which might otherwise be limited by statutory requirements for townships, cities, community college districts and other government entities.

### **Designing and Planning An ADR System for Participants in An Enterprise Zone**

An ADR systems designer would provide useful counsel in planning an ADR system for an enterprise zone. 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. Mediation is a process that has broad potential application in municipal, environmental, and land use matters, particularly early on in a dispute. 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, and mini-trials could be incorporated into a system for resolving disputes at various points along the continuum prior to actual litigation.

Another procedural mechanism to consider when a case is headed toward litigation would be a process similar to collaborative law in domestic matters, where the initial attorneys assigned to the case are not litigators, but are charged with obtaining a favorable settlement for their client. Similar to domestic relations collaborative law, subject matter experts and specialists could be brought into the case by mutual agreement and designation of the settlement attorneys to provide necessary information to assist in decision-making. If the clients are unable to resolve the matter with the use of a collaborative process, they have the option of proceeding to trial, but they will be required to dismiss the “settlement attorneys” and obtain new counsel for the purpose of litigation. This method ensures that counsel for various mechanisms are specialists in those mechanisms (e.g., settlement attorneys practice only negotiation and collaborative processes focused on settlement; litigators are experienced in litigation, where they may be more comfortable than in the settlement process). It also precludes self-interest on the part of the attorney, causing delay or refusal to settle because of monetary benefits the attorney may obtain by taking the case to litigation.

The governing body of the enterprise zone could devise its own system for resolving disputes with enterprises, agencies, government, municipalities, and other stakeholders, during the development stages and thereafter. A continuum encompassing individual conflict management training, early mediation, med-arb or arbitration, or if the case is to go to litigation, the use of mini-trials or case evaluation prior to trial might be a model to consider. During the planning process, facilitation of collaborative decision-making and problem-solving could be implemented for discussion between stakeholders to jump-start creative thinking of ways in

which entities or enterprises could share resources and services and create additional efficiencies within the zone

CPR outlines the implementation steps for a corporate ADR System as:

- Design the Proposed System (includes assessment of current disputes, review of effective ADR programs, designating a team, etc.)
- Develop ADR Tools for the Law Department (contract clauses, policy statements, guidelines, decision analysis aids, etc.)
- Provide ADR Resources (formal training sessions, library, manuals, etc.)
- Motivate Potential Participants to Use ADR (including in-house and outside counsel, business personnel, adversaries, etc.)
- Develop Tracking and Evaluation Systems (forms, identifying data to collect, database for tracking, cost savings, recognizing inherent limits of system)<sup>12</sup>

### **Conclusion**

Locating examples of zone-wide ADR systems mandated by contract or agreement has proved difficult. This is a cutting edge idea. However, it is an idea that makes economic sense and good sense from the perspective of maintaining business relationships and mitigating legal risk. Disputes are inevitable. Why not incorporate them into the planning process in a way that saves precious resources and relationships and minimizes barriers to progress and growth?

It is important to note that these alternative choices are party driven and voluntary. If the parties in dispute utilize one or more of these choices early on and are unable to reach a resolution they are free to revert to a more traditional pursuit of due process in court. 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 and society as a whole.

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<sup>12</sup> Ibid, 2000-2 Supplement, p. 8-Ex-93.