

ADR in the

ESD Green Enterprise Zone

By Richard L. (Tony) Braun

In March 2009, The Engineering Society of Detroit (ESD) sponsored a two-day symposium on how to attract and retain new capital investments in Michigan through the creation of a virtual Green Enterprise Zone. The idea was to explore innovative ways to reduce the cost of business that will bring added value to potential investors and entrepreneurs, thus attracting and keeping future investment here. Diverse representatives from industry, labor, banking, health care, construction, government, and law were in attendance. The legal profession was represented by attorneys, mediators, law school educators, and judges.

One of the first items explored was legal risk mitigation through the use of early alternative dispute resolution (ADR). The question posed was simple: If we could start with a fresh sheet of paper in designing the process for resolution of legal disputes within a newly created Green Enterprise Zone, what would it look like and how would it work? The State Bar of Michigan ADR Section presented a comprehensive submission at the symposium entitled "Conflict Resolution in the Green Zone: A Better, Faster, Cheaper Way."^{1,2}

In the executive summary of the submission, the ADR Section noted the following:

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* 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.

Fast Facts

Alternative dispute resolution (ADR) is all about early, candid communication to explore resolution at the beginning of the dispute in search of a better, faster, more cost-effective result.

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



Specific examples of ways 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.
- 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.
- 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.

Disputes are inevitable and can be costly. The use of ADR makes 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.

Post-Symposium Work

After the symposium, a Legal Innovation Workgroup was created to formulate more specific values, goals, and objectives for conflict management and delivery of a dispute resolution system within the Green Enterprise Zone. The workgroup first identified the mission of the zone's conflict management and dispute resolution system: to foster innovation, fairness, continuous improvement, and social justice by managing relationships and conflict effectively through (1) stakeholder control of the process, (2) collaboration, (3) education and training, (4) early identification of issues, (5) honesty and candor, and (6) promptness and efficiency.

The next question addressed by the workgroup was whether it would be necessary, feasible, and appropriate to provide zone members with a *tangible dispute resolution system*. The group



recognized that to provide value to zone members and their constituents, the answer had to be yes. A consensus was reached that *hallmarks* of the systems would include:

- Availability of timely, predictable, accountable, and cost-effective dispute resolution mechanisms
- “Right-sizing” of conflict management and dispute resolution techniques to ensure lowest cost appropriate to the issue
- Help for businesses to limit risk by managing it better
- Limited and appropriate use of the current litigation system
- Fair risk allocation and accountability, best characterized as “if you control it, you own it”

The workgroup also identified 10 basic concerns that should be addressed in design and administration of a new conflict management and dispute resolution system:

- (1) The system should ensure social justice.
- (2) The system design should reflect the values that form the foundation of the zone, including fairness, honesty, candor, innovation, flexibility, continuous improvement, and cost-effectiveness.
- (3) The system should help manage conflict “to the positive” to prevent protracted disputes, with conflict and disputes identified and addressed early and properly to create a healthy and productive climate for business.
- (4) The system should promptly identify and apply the earliest and least evaluative mechanism for resolution and progress to more evaluative and directive mechanisms as needed.
- (5) The system should develop and use incentives to encourage or require early ADR.
- (6) The system should enhance self-determination in dispute resolution for participants.
- (7) The system should reduce the legal and structural friction necessary to bring technology to fruition.
- (8) Lawyer concerns should be understood and addressed to encourage their participation and support for the new system within the zone.
- (9) System design should include some consideration for methods by which qualified providers of conflict management and dispute resolution services will be identified for the zone.

(10) The system should operate with a different cultural approach to conflict and disputes with a goal of responding to a global perception that the U.S. legal system is an overwhelming obstacle to doing business.

Members of the workgroup were encouraged by opportunities in the current landscape that favor and support legal innovation for dispute resolutions including the following:

- Cost savings estimated to be at least 10 percent through reduced process costs over a broad range of transactions and disputes.
- Expansion of the zone through contractual agreement among zone members beyond any geographical borders.
- Improved predictability of risks and costs will reduce fear created by perceptions of the American legal system.
- Changes in workplace culture regarding conflict management could reduce the intensity and frequency of disputes.
- Existing judicial systems can support identification of those using zone conflict management and dispute resolutions mechanisms, including contracts.
- Current level of awareness and top-down support for alternative dispute resolution in Michigan courts.
- Unprecedented openness to change as a result of Michigan's desperate situation, providing a clearer mandate for looking forward, problem-solving approaches, and accountability.
- Current proven models for cost savings through alternative approaches to conflict and disputes that use company-wide support for ADR through incentives, benchmarking, study, scrupulous documentation, and appropriate crediting for results.
- Visionary leadership at the top of some companies or within divisions.
- Education of business leaders regarding the advantages of ADR through in-house legal staff.

Finally, the workgroup prioritized the design and administration of a "Zone Compact on Conflict Management and Dispute Resolution" to offer its constituents for relationships among zone partners and parties outside the zone. It was envisioned that this compact would fit nicely within a new enterprise zone, but it is not dependent on sovereign status for the enterprise zone, and zone partners are not necessarily limited to those organizations and businesses within the zone. It was further contemplated that

to provide maximum value, zone compact members would agree to use and would be provided with the following:

- Dispute resolution training, bottom to top, within organizations of zone members
- Template contracts and policies in areas including human resources and customer service that uphold the missions and hallmarks of the zone compact
- Conflict management and dispute resolution processes and professionals supplied and administered by the zone compact, including a menu of processes intended to right-size the process to the dispute
- A conflict management/dispute resolution advisor appropriate to a zone partner's needs for consultation on suitable conflict management and dispute resolution options

Conclusion

The work of the ESD Green Enterprise Zone and the Legal Innovation Workgroup is ongoing and continues to refine the details of how to deliver a better, faster, and cheaper way for zone constituents to manage conflict and resolve disputes. The focus remains on delivery of maximum value in a strong effort to attract and keep investment in Michigan. The lessons learned can be invaluable to the zone and to the state of Michigan. ■

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FOOTNOTES

1. State Bar of Michigan Alternative Dispute Resolution Section, *Executive Summary: Conflict Resolution in the Green Zone: A Better, Faster, Cheaper Way*, available at <<http://www.esdinstitute.net/symposia/Appendix%20G-1.pdf>> (accessed April 25, 2010).
2. The author acknowledges the invaluable contributions of Susan Butterwick and Jim Vlasic to the ADR Section's submission to the symposium. In addition, Chris Webb and David Skivens deserve special recognition for their tireless efforts as co-directors of the ESD Institute: Bridges of Innovation. Because of their full-speed energies, many innovations from the Green Enterprise Zone Symposium have come to life in Michigan.

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