Michigan Supreme Court

State Court Administrative Office

Office of Dispute Resolution

Early ADR Summit Meeting Summary

September 4, 2013

Michigan Hall of Justice
Lansing, MI 48909

Summary of the "Early ADR Summit"
Michigan Hall of Justice

The "Early ADR Summit" was convened on September 4, 2013 by the State Court Administrative Office, Office of Dispute Resolution, to assess strategies for promoting earlier resolution of disputes in litigation.

Attendees included judges, representatives of seven Michigan State Bar sections, litigators, in-house counsel, mediators, and others. A roster of participants appears as Appendix 1.

The Summit was convened in response to a number of recent developments in the judiciary, including:

1. SCAO's 2011 study of case evaluation and mediation which questioned the continued efficacy of case evaluation in light of rapidly growing mediation practices;

2. The Michigan Supreme Court's adoption of a statewide initiative to monitor and improve court performance based on metrics, under the caption "Courts Working Smarter for a Better Michigan;"

3. The recent creation of the "business court," through which litigants expect to achieve more predictable and expeditious outcomes;

4. Emerging experimentation with less common alternative dispute resolution (ADR) techniques;

5. The growth of ADR survey and training programs in Michigan's law schools; and,

6. The expansion of problem-solving courts into a wide variety of issue-areas.

A key question for summit participants was how ADR could be utilized more efficiently and effectively earlier in civil litigation than traditionally managed.

<u>Recommendations for Improving ADR's Efficiency and Effectiveness:</u>

Four groups were tasked with identifying obstacles to earlier dispute resolution, brainstorming options for addressing the obstacles, and then identifying their top recommendations. Two groups focused on recommendations for courts, and two groups focused on recommendations for attorneys, law firms, and unrepresented litigants.

The combined top recommendations for courts were:

1. Judges should meet lawyers, client, and pro se litigants in a scheduling conference. Early involvement helps identify issues and focuses resources. Judges can use discretion to tailor a scheduling order to a case.

2. Judges, lawyers, and parties should consider using a broader array of ADR procedures, not just familiar "stand by" options.

3. Differentiated case management should be adopted. This practice recognizes a number of tracks for various kinds of cases, and offers a filtering mechanism like the Federal Rule 16 process. The Michigan Supreme Court should consider adopting a special master court rule.

4. Judges should be more actively involved in determining the scope and amount of discovery.

5. If case evaluation is ordered at all, it should take place after mediation.

6. Business court litigation protocols should be standardized across the state so that attorneys, parties, and others have a generalized understanding of the expectations of business court judges and to encourage counsel prior to the litigation to address and perhaps resolve disputed issues. This may also reduce judge/forum shopping.

7. Courts should track and share ADR metrics of what works and what does not work; this would be especially effective for the business courts. Parties should be surveyed regarding their experience with the ADR processes.

8. Mediators should be permitted to provide feedback to the judge following mediation. Judges should be permitted to provide advisory opinions.

9. Parties should engage a knowledgeable neutral third party who is respected by all parties early in the case to help resolve contested issues throughout the litigation.

The combined top recommendations for lawyers, law firms, and unrepresented litigants were:

1. Lawyers should be encouraged to adopt alternative billing models, e.g., phased billing, bonuses for early dispute resolution.

2. Lawyers should take advantage of early resolution or scheduling conferences convened by judges that would take place around 30 days after an answer or summary disposition motion is filed. The focus should be on "resolution" as opposed to "settlement" or "disposition."

3. Early Resolution Conferences might also include discussions of: (a) early disclosures; (b) whether clients should be present; (c) whether discovery could be abbreviated, e.g., to 60 or 90 days; and (d) early mediation.

4. Encourage pre-suit and early mediation, even prior to the filing of the answer, by such means as:
    a. Tolling the statute of limitations and defenses for parties. [This would require legislative and supreme court action to amend statute and court rule.]
    b. Excusing parties from taxable costs if mediation is requested.

c. Excusing parties from later court-ordered mediation if the parties voluntarily mediate early.
d. Requiring certification on the summons that party has attempted to meet and confer with the other party(ies) before filing suit.

5. Case evaluation should become a discretionary process and not automatically ordered in every case. Consider amending statutes to eliminate the mandate to case evaluate tort cases.

6. Bar associations and Community Dispute Resolution Program (CDRP) centers should host ADR orientation sessions for pro se litigants. Greater use should be made of online videos and brochures.

7. The Michigan Rules of Professional Conduct should be amended to require attorneys to apprise the clients of ADR options.

8. Lawyers should have mandatory continuing legal education regarding ADR.

The summit also included brief presentations of emerging ADR practices that may benefit litigants in appropriate circumstances. These included:

Early Expert Evaluation:

Hal Carroll and Mark Cooper discussed the use of early expert evaluation in insurance and indemnity cases. In this process, as the name implies, a subject matter expert is employed early in the litigation to candidly discuss the merits and values of the parties' claims. Because contracts and related documents determine these cases, very little discovery is needed to resolve the disputes. This differs from other ADR processes in that the focus is on insurance and indemnity disputes, the ADR focus is early in the cases, a neutral subject matter expert is engaged before the parties' positions have hardened, and the neutral is more engaged with the parties than is common in typical general civil mediation in which a neutral shuttles between parties.

The Insurance and Indemnity Law Section of the Michigan State Bar is developing an online database of experts in the field that parties can consult for neutral experts willing to serve in this role.

Early Intervention Conference:

Richard Lynch provided an overview of a process utilized for a time by the Sixth Circuit Court (Oakland) where parties in commercial cases met with a volunteer attorney approximately 100 days after filing to discuss trajectory of the litigation, including appropriateness of the scheduling order, whether ADR has been attempted, whether any issues can be narrowed, etc. Lawyers and clients met with the volunteer attorney for approximately 30-45 minutes. Occasionally the volunteer would be later selected by the parties to be their mediator. The process is currently on hiatus pending resolution of resource issues.

Two judges reported that they meet with parties about 30 to 45 days after the filing of the complaint. The judges limit discovery, schedule motions, and refer parties to mediation early before litigation costs limit settlement options.

Early Case Evaluation without Sanctions:

Doug Van Epps suggested that while many attorneys dislike case evaluation for a variety of reasons, many do like "having a number" they can work with. Additionally, and anecdotally, a growing number of attorneys are asking how, in an era of so few cases being adjudicated by judge or jury, will the next generation of attorneys value their cases?

One option may be to pilot the use of case evaluation as currently configured under MCR 2.403, but offered earlier in the litigation, and conducted without sanctions. This may respond to attorneys' needs in "having a number," or at least in obtaining a workable range, without fear of rejecting the number.

Conflict Coaching:

Anne Bachle Fifer, who also served as the session's co-facilitator, explained that conflict coaching resembles counseling, but is focused on the psychological, social, even spiritual impact of the conflict on the person's life. As example, a coach might help a client who has unrealistic expectations of the case: a simple slip and fall is now the lottery, or a divorce that will never end. It is especially helpful to use a conflict coach if a case involves a person whose identity is so wrapped up in the conflict that no litigated result will be satisfactory. The coach helps the client understand the impact of the litigation process on the person's life by exploring the ramifications as the process goes forward. Coaching often occurs pre-litigation, but could be done after the process begins. The coach is not a counselor, but understands conflict, and may have mediation experience. Conflict coaching permits an advocate to focus on the legal aspects of the conflict without also having to manage the emotional needs of the client.

Having a coach involved in the litigation would not necessarily create additional expenses for the client; the attorney could recommend conflict coaching as a helpful service to avoid the client paying the attorney to discuss non-litigation topics. The process could be very helpful in cases involving family businesses.

Fast Track Jury Trial:

Don Michelle, Court Management Supervisor, Charleston, SC reported on a process that formerly was called "summary jury trial." In this voluntary process, attorneys stipulate to have a jury hear their case. The jury's award is binding, and there is no right of appeal. An attorney stipulated to by the parties serves as the judge. Lower level auto negligence cases constitute 98 percent of the cases, and parties establish high/low parameters. Juries almost always return numbers within those parameters. The court closes the cases upon receiving the stipulation, but will convene the jurors and provide the courtroom; there is no court reporter, however.

The court considers the cases as a settlement facilitated by a jury, so a verdict is not entered as a judgment. Enforcement of the award would be done through a motion to enforce a settlement, rather than a judgment. Three local counties in SC currently actively use this tool, although

owing to a new administrative order adopted by the South Carolina Supreme Court endorsing the process, fast track trials are likely to become more common.

The court has not had to increase the size of the jury pools to accommodate the process. Benefits to parties include: (a) obtaining a date certain for trial (which is apparently otherwise atypical in these cases); (b) lowers costs for both sides; and (c) relaxed evidentiary rules if stipulated to by parties. The court has not received any complaints by jurors; the cases are viewed simply as being tried through an expedited process.

Although one summit judge participant remarked that he had found an advisory jury helpful in the past, two other judges had concerns both from the perspective of closing a case prior to the expedited trial taking place (akin to arbitration), and from the process still requiring the use of judicial resources. It did not appear to one judge that much accountability had been built into the system for attorneys to promptly move toward settlement.

Despite concerns, several participants viewed this as another option available for parties, and in light of other concerns about the increasing cost of litigation, it may be an option for parties that "want their day in court" but may not want the expense of a traditionally managed trial. It may be time to offer processes to parties that go beyond the "one size fits all" approach of the current system. It may also have practical implications for cases in the business court.

Med/Arb:

Richard Hurford reported that "mediation/arbitration" is a process in which parties most typically agree at the beginning of a case that in the event they reach impasse on one or more issues, the mediator will become an arbitrator as to any undecided issues, and whether the decision of the arbitrator is binding or advisory. If parties have not arranged for med/arb at the beginning of the mediation, with the consent of the mediator, the process can switch to med/arb upon reaching impasse. An advantage of this process is that only one neutral needs to be engaged, rather than two. Knowing that the case may be arbitrated puts pressure on the parties to settle in the mediation phase. Cases rarely reach the arbitration phase.

This is not a process without controversy. A number of mediators will not participate because of confidentiality concerns for the parties and mediator, for example in learning information during caucus in mediation that should not be used in arbitration. Parties may also change their rapport with the mediator and be less candid, knowing that the mediator may be their arbitrator later in the process.

Many view the process as being flexible in that it can be tailored to meet the needs of the parties and is cost-effective.

Intent to Sue:

Mark Hauck suggested that creating a mechanism by which a party could file an "intent to sue" could be more beneficial in business litigation than the traditional approach, which results in a scheduling order, discovery demands, case dates, etc. An "intent to sue" notice of dispute, or intent to sue filed with the court, could open the door to the court's encouraging parties' efforts to resolve the dispute without the "baggage" associated with litigation. Many business disputes are not about reaching the "number," but rather involve seeking other resolutions: can a partner

return to the office; is the defendant collectible; who will run the business; and who gets the business? The idea is to permit flexibility to encourage the parties toward a remedy.

Next Steps:

In addition to guiding the work of the SCAO's Office of Dispute Resolution and other SCAO divisions, the report can help encourage and guide the work of local bench/bar efforts to most effectively assist parties in resolving disputes filed in court.

Facilitators: Doug Van Epps and Anne Bachle Fifer

Reporter: Doug Van Epps

Acknowledgement: SCAO extends its gratitude to Richard Lynch for the use of his extensive meeting notes and to Richard Hurford for his assistance in designing the meeting's agenda.

Appendix 1: Participant List

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Appendix 2: Additional Ideas

The following are brainstormed options for increasing the effectiveness and efficiency of ADR in litigated cases as identify by the summit workgroups.

Options Related to Early Settlement Conferences:

Encourages counsel to consider the results up front rather than 12 – 18 months down the line.

Early intervention conferences provide an opportunity to offer alternative roads and break down litigation inertia. One track litigation is a challenge.

Can help identify issues that are suitable to resolve up front.

Would require attorneys to know the file earlier than typically takes place.

Notice for scheduling conferences could require parties to be prepared to discuss issues.

Judges can ask about ADR—which process(s) and when should they take place.

Eliminate mandatory case evaluation.

Options for pro se litigants:

Conduct an orientation (similar to jury orientation) hosted by young lawyers, the local bar, CDRP centers.

Orientation brochures might include trial statistics (filings/verdicts) and ADR options.

Information on filings and verdicts should be provided to litigants.

Information on the costs involved with ADR and court processes should be shared.

A video could be developed specifically for viewing by persons prior to filing a lawsuit. [See Kalamazoo video developed for PPO petitioners].

Invite lawyers to direct self-represented litigants to ADR/mediation/conflict resolution alternatives.

Options related to lawyers/law firms:

Educate attorneys and corporate clients through articles, presentations. Also educate attorneys on in-house counsel options.

Create sanctions for not using ADR.

Establishing and enforcing deadlines for completing court-ordered ADR (show cause for not completing).

Make ADR mandatory.

Develop a mediation culture among the bar.

Conduct early evaluation, then conduct another form of ADR later.

Law firms should institute phase billing (and generate more business by resolving cases sooner).

Face to face interaction early on between counsel and with court to develop relationship and trust.

Obstacles to improving ADR services in courts, and options for addressing them:

Obstacles:

Court rules themselves are impediments to achieving early resolution.

Problematic attorney attitudes include: a bias toward discovery; resistance to early settlement; fear of malpractice; and a perception that initiating ADR is a sign of weakness.

Judges may not have time for early meeting with attorneys and their clients. The current system does not force the judges to meet with clients/ lawyers.

Having parties on hand who have authority to settle is difficult.

Insufficient expertise about ADR may cause discomfort for judges, lawyers and self-represented litigants.

Judges may lack the desire to apply ADR if they were formerly prosecutors.

Reluctance to order ADR may include: (1) perceived additional costs of mediation; (2) belief that ADR abrogates judicial role to decide contested matters; (perception that ADR/early resolution is inconsistent with the law firm profit model); and (3) ADR may interfere with lawyer/judge egos.

Possible solutions:

Courts should order early scheduling conferences that include lawyers and clients.

Courts should provide choices to litigants with incentives, e.g., tracks I, II, and III.

Order mediation before the pretrial status conference.

Scheduling orders should be customized to the case.

Bi-weekly status conferences/dockets should be set to identify and resolve any problems.

Discovery conferences should be available by telephone.

Explore greater use of technology for disputes.

Involve a knowledgeable neutral early in the case.

Make case evaluation mandatory in every case/dispute, but remove sanctions.

Develop a registry of neutrals along with backgrounds by practice areas.

Convene blue ribbon panels of neutrals.

Develop standardized, state-wide (pre)litigation protocols to reduce judge shopping, particularly in the business court.

Develop the “multi door courthouse,” where parties pick specific programs to participate in.

Provide for apology conferences.

Increase judicial intervention around the size/scope of discovery.

Increase the use of the offer of judgment.

Include parties in the case evaluation with the parties present.

Develop mandatory early disclosures and then conference with the court.

Offer expedited binding summary jury trials.