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An Opportunity to Fix the Court Approach to ADR

By: Ronald F. Graham, Esq.

The national and state economic decline since 2007 has impacted virtually every segment of our state and local business community. Just as businesses have gone through cost cuttings and cutbacks in personnel, our Court administrators have been given the directive to find ways to trim judicial resources and programs. Consideration is being given to the consolidation of judicial district court venues and leaving unfilled new vacancies on the bench. In 2009, even before the growing concern about court budgets, the Michigan Supreme Court initiated a review of the effectiveness of alternative dispute resolution ("ADR") processes as an adjunct tool for the delivery of justice.

Approximately 20,000 attorneys in Michigan were sent a questionnaire in February 2011 by the Michigan Supreme Court Administrative Offices (SCAO) to obtain input on ADR practices in Michigan. Plans are underway to develop a report on the findings, recommendations, and "best practices" for the Michigan Supreme Court in September 2011. As opportunities surface during most every economic crisis, the Michigan judiciary now has a new inertia in place that may help refocus the court approach to ADR. This time, the *quality* of the process should be targeted as well as statistical *quantitative* objectives.

The term "ADR" properly applies to both court-governed and independently agreed upon procedures designed to promote the resolution of disputes. In the early 1980's, court docket backlogs existed in some counties and participants in litigation complained about the delay in obtaining "justice." Court administrators responded in some counties with "special settlement weeks" in which volunteer attorneys spent concentrated time facilitating the settlement of older cases on the docket. The adoption of MCR 2.403 subjected all tort cases filed in Circuit Court after 1986 to mandatory Case Evaluation. Case Evaluation typically occurs following the conclusion of discovery and with some notable exceptions, after the period for the filing or hearing of dispositive motions.

MCR 2.403(A)(1) and (3) provide circuit and district courts with the discretion to submit to Case Evaluation "any other civil action in which the relief sought is primarily money damages or division of property." MCR 2.410(A)(1) also provides that "All civil cases are subject to alternative dispute resolution processes unless otherwise provided by statute or court rule." MCR 2.410(A)(2) defines ADR as "any process designed to resolve a legal dispute in the place of court adjudication" including court mandated settlement conferences, case evaluation, domestic relations mediation, and other procedures provided by local court rule or ordered on stipulation of the parties. Through local court rules, some courts now provide an Early Intervention Conference ("EIC"), which is designed to settle civil actions prior to the completion of discovery or to narrow issues in litigation. Many courts will allow parties to have their case submitted to *voluntary* mediation by a neutral Mediator selected by the parties or appointed by the Court. MCR 2.411(B)(3) provides for a court to appoint a mediator from an approved list of certified mediators in accordance with an ADR plan adopted by the trial court as mandated by MCR 2.410(B). It is not uncommon for cases that do not settle within the 28-day Case Evaluation response period to be ordered into mediation.

At a focus group session in May 2011, a consensus was reached that mandatory Case Evaluation causes litigants and their attorneys to dedicate time to focusing their case claims and defenses, as well as their analysis of damages. However, the relative low settlement rates in a number of venues that are based upon acceptance of Case Evaluation by both sides during the 28-day response period was either described as misleading or a reason for revamping the way courts typically use the

ADR continuum. For example, in Oakland County, case management statistics for the period 1995 – 2009 reflect a case evaluation acceptance rate that has not varied much from the low of 14.91% in 2006 to a high of 18.83% in 2003. These figures are reportedly similar for most counties in southeast Michigan. Such figures do not reflect the additional cases that settle following Case Evaluation after the 28-day period. The fact is that regardless of year, 1979 or 2009, 97% or more of civil cases in Michigan have settled prior to the commencement of trial. The real issue is how the process can be **qualitatively** and not just **quantitatively** improved for civil disputants.

The courts in Traverse City have reportedly stopped using Case Evaluation unless requested by parties and instead rely upon mediation, which has been better received by most litigants. Unlike Case Evaluation, the parties directly participate in mediations and contribute to the ultimate resolution. This is a much different dispute resolution experience than receiving a Case Evaluation award from a hearing session the party did not attend and then determining whether to risk significant "non-acceptance" sanctions. When mediations take place *prior to* the entrenchment of positions encouraged by lengthy and expensive discovery and/or Case Evaluation awards, disputants typically have greater control over outcomes and expense. The mediation of civil cases reportedly results in 50% or more settlements. In 2008, the mediation of domestic relations cases in Oakland County resulted in an 87% settlement rate.

The challenge for neutral mediators is to foster a dialogue that uncovers an incentive to settle on both sides of a dispute. Undoubtedly, some parties do not bargain in good faith or they have an ulterior motive of seeking an advantage they think they can use for trial. For that smaller segment of disputes, the Case Evaluation process serves the purpose of allowing a party his or her right to trial that is subject to sanctions in the event the parties' trial position is untenable. Courts would do well to fix the current ADR process by employing mediation earlier in the litigation track and scheduling Case Evaluation later for the remaining cases that do not settle. Courts can thereby enhance the quality as well as the efficiency of the judicial experience.

Ronald F. Graham *has a civil litigation and family law practice in the law offices of* ***Condit, McGarry, Schloff & Graham*** *in Bloomfield Hills. He is a neutral mediator and arbitrator with* ***American Settlement Centers*** *(ASC) in Farmington Hills and serves as an arbitrator with BBB Autoline. He also serves as a court Discovery Master, EIC settlement facilitator, Case Evaluation panel member, and was recognized as a Volunteer Facilitator for the Michigan Court of Appeals Domestic Relations Settlement Program. Contact him at: rgrahamlaw@aol.com, rgraham@amsetcen.com, or visit www.amsetcen.com.*