An ADR Game Changer - Eastern District of Michigan's New ADR Plan

By: Richard L. Hurford

The E.D. of Michigan's former ADR plan, LR 16.3, solely provided for case evaluation incorporating the provisions of MCR 2.403. Effective February 1, 2015, the Court implemented new Local Rules that address:

LR 16.3	Alternative Dispute Resolution
LR 16.4	Facilitative Mediation
LR 16.5	Case Evaluation
LR 16.6	Settlement Conferences
LR 16.7	Other ADR Procedures

See http://www.mied.uscourts.gov/PDFFIles/jan2015NoticeOfAdrRules.pdf

The Eastern District now affirmatively asserts "judges of this district favor ADR methods in cases where the court determines, after consultation with the parties, that ADR may help resolve the case." LR 16.3 (a). No such statement can be found in the predecessor Local Rule and expresses the current collective determination of the entire bench to espouse and require the use of all appropriate forms of ADR.

Practice Considerations

As a practical matter, after consultation with the parties, the district court will likely determine virtually all civil cases appropriate for some form of ADR. The only civil action exempted from any ADR process "are cases in which the United States is a party are not subject to case evaluation." LR 16.5 (b). A party's due diligence prior to the Rule 26 conference will involve a determination of several factors, such as:

- the individual practice of the trial judge as to timing and specificity of the ADR plan discussions (which are now mandatory);
- each judge's practices on the selection of a neutral;
- how early in the litigation the court will require the implementation of the ADR strategy (e.g., before the completion of all discovery and motion practice, late stage, and whether the trial court will entertain certain early dispositive motions before ordering ADR).

No doubt the district courts will continue to explore other "evidence based practices" long pioneered by the court such as:

- early mandatory exchange of information;
- identification of an agreed upon neutral at the Rule 26 (f) conference who, in addition to facilitating settlement of the entire dispute, might assist the parties in resolving discovery and other procedural disputes arising during the course of the litigation;
- aggressively pursuing early ADR; and,
- ordering proportional discovery which focuses initial discovery on the informational needs necessary to engage in an early meaningful ADR process and defers other discovery until it appears the case will likely proceed to trial.
  See, e.g., *ADR Within ADR: The Business Courts – A Laboratory for Litigation Process Improvement,* Honorable John C. Foster and Richard L. Hurford, MICHIGAN BAR JOURNAL (February 2015).

Procedural Rules for Mediation Process

*Confidentiality***.** LR 16.3 outlines a general limited confidentiality provision for all ADR processes and LR 16.4 (e) (1) further specifies in cases of "Facilitative Mediation" the "mediator may require the parties to sign an agreement consistent with this rule regarding confidentiality of the proceedings…." If the parties desire to protect the confidentiality of any ADR proceeding (i.e., facilitative mediation, neutral fact finding, neutral evaluation, mini trial, etc.) to the greatest extent permitted by law, they might consider entering into an independent agreement with the neutral that contractually provides more expansive confidentiality protections than those provided in the LR. *See e.g.*, *A Taxonomy of ADR*, Richard L. Hurford and Tracy L. Allen (2013) hurfordresolution.com/dispute-resolution-processes.

Disqualification. The standards for the disqualification of a neutral cites 18 U.S.C. § 455 and are fairly specific and not as broad as the requirements imposed on mediators in the *Mediator Standards of Conduct* that govern mediator disclosures and conflict of interest issues in all

Michigan State Court ordered mediations. *Compare* Standards II and III http://courts.mi.gov/Administration/SCAO/Resources/Documents/standards/odr/Mediator%20Standards%20of%20Conduct%202.1.13.pdf with 18 U.S.C. § 455. Again, the parties might request the court to provide the Michigan *Mediator Standards of Conduct* will govern any court ordered mediation. In the alternative, when entering into a written mediation agreement with the court-appointed mediator, the mediator or litigators might incorporate them. Any mediator who conducts mediations under the Michigan state court rules is familiar and comfortable with these standards.

Mediator Selection. Another difference between LR 16.4 and MCR 2.411 concerns the selection of the mediator. MCR encourages the parties to select the mediator and, if unable to do so, a mediator will be assigned at random from a list maintained by the state court's ADR Clerk. *See* MCR 2.411 (B) (3). A Michigan trial court is prohibited from "appoint[ing], recommend[ing], direct[ing], or otherwise influenc[ing] a party's or attorney's selection of a mediator" unless certain conditions are met. *See* MCR 2.411 (B) (4). Under the new LR the "parties may select a mediator" but also states "the court may *disapprove* the selection"…and

- Appoint a mediator from the parties' nominations
- Appoint a mediator from the judge's qualified mediator list, or
- Appoint another federal judicial officer, including a magistrate judge.

LR 16.4 (c) (emphasis added)

While the comment to the new LR indicates the "parties' choice of a mediator will generally be honored and disapproval is expected to be exceedingly rare," a best practice may involve counsel mutually agreeing in advance of the Rule 26 conference to a specific mediator as well as a potential second choice in the event the court disapproves the first choice. In the alternative, if the parties are unable to agree on the single "best" mediator, but agree that any of two or three mediators will be "satisfactory," counsel might nominate those mediators for the court's consideration and request the district court select from among the nominees.

Unlike the practice in Michigan where the state courts maintain one list of qualified mediators for all judges in the judicial circuit, each district court judge is authorized to compile a list of mediators who may be appointed by the judge in the event the court disapproves of the selection of the parties or the parties are unable to agree upon a neutral. LR 16.4 (b). In the event parties are having difficulty agreeing to a mediator, rather than simply asking the district court to select a mediator from the court's list, the attorneys might review the district court's list of qualified, experienced mediators and determine if they can agree in advance to one or more mediators on that list to either select or nominate for the court's consideration.

"Facilitative Mediation." It is noteworthy that unlike MCR 2.411 entitled "Mediation," LR 16.4 is entitled "Facilitative Mediation" and may suggest a collective decision by the district court the "facilitative" model of mediation is preferable to the "evaluative" or other mediation processes. *See generally*, *Styles of Mediation: Facilitative, Evaluative, and Transformative Mediation,* Zena Zumeta (http://www.mediate.com/articles/zumeta.cfm). LR 16.4 defines Facilitative Mediation as:

> Facilitative mediation (mediation) is a flexible, nonbinding dispute resolution process in which a neutral third party – the mediator – facilitates negotiations among the parties to help them reach settlement. **Mediation seeks to expand traditional settlement discussions and broaden resolution options, often by going beyond the issues in controversy.** The mediator who may meet separately or jointly with the parties, serves as a facilitator only and **does not** decide issues or make findings of fact. *(Emphasis added).*

Using Riskin's grid, this definition arguably suggests a preference for a facilitative-broad based approach as opposed to an evaluative-narrow focus. *See* Leonard L. Riskin, *Mediator Orientations, Strategies and Techniques*, 12 ALT. TO HIGH COST LITIG. 111 (1994). As such, those litigants who believe a narrow, evaluative approach is preferable to their dispute, might be well advised to mutually agree as early as possible upon a mediator who employs that style. In the alternative, if the parties cannot agree on the mediator style that is preferable (facilitative-broad v. evaluative-narrow), a litigant might consider using the text of LR 16.4 to urge the court to select a mediator whose style is preferred.

Case Evaluation

Rule 16.5 mirrors the former LR 16.3 but is entitled "Case Evaluation" instead of "Mediation." Clearly the court desires to preserve the option of ordering the parties to case evaluation. Two significant

issues, however, are whether the court will be inclined to order case evaluation only **after** there has been an unsuccessful mediation or order case evaluation over the objections of the parties. A recent study conducted by the Michigan State Court Administrative Office, *The Effectiveness of Case Evaluation and Mediation in Michigan Courts*, http://courts.mi.gov/Administration/SCAO/Resources/Documents/Publications/Reports/The%20Effectiveness%20of%20Case%20Evaluation%20and%20Mediation%20in%20MI%20Circuit%20Courts, seriously questioned the effectiveness of case evaluation as an ADR technique. Also, the cases surveyed in the study reflect an ADR strategy involving case evaluation followed by mediation significantly contributed to the length of a case and a delay in the ultimate resolution. When called upon to discuss and consider an ADR strategy with the district court, if the parties believe staging a facilitative mediation before case evaluation would be beneficial (or desire to avoid case evaluation entirely) this study provides significant empirical data to support those positions and the avoidance of potential "litigation waste."

Process Provisions. Unlike MCR 2.411, the court's new ADR plan specifically addresses a number of process issues:

a. The mediator may require the parties to "sign an agreement consistent with this rule regarding … discovery for the proceedings, and other procedural matters." LR 16.4(e)(1) Thus, the mediator is now expressly authorized to address the exchange of information the parties believe is necessary for a meaningful mediation. Particularly if the court orders early stage mediation, and a party believes additional information is required, the party should make that known to the mediator up front so the exchange of information can be meaningfully addressed well in advance of the formal mediation session.

   Other items to discuss in a pre-mediation conference call include: whether or not to have a "joint session;" the benefits or problems that might be encountered if opening statements are given; the length of the mediation; the mandatory exchange of mediation summaries; the order of issues to be mediated; who must be physically present at the mediation; whether the mediation may be conducted by telephone or other electronic means; etc.

   Practice Tip: Select a mediator whose practices include a robust pre-mediation conference call where all of these issues can be discussed and resolved in advance.

b. As LR 16.4 (e) provides significant latitude to the appointed mediator to determine unilaterally a number of process issues, litigators might address another matter. While some mediators desire to "own" their mediation process, such "ownership" may prove problematic given the nature of the dispute. In a study published by the *ABA Task Force on Improving Mediation Quality*, http://www.americanbar.org/content/dam/aba/migrated/dispute/documents/FinalTaskForceMediation.authcheckdam.pdf, experienced litigators catalogued a number of criticisms of mediator practices. One of the major criticisms of mediator practices included the belief, at times, mediators are insufficiently flexible in designing a mediation process in consultation with the parties.

   > Some mediators and some parties and counsel may, almost by rote, rely upon essentially identical approaches to every case. In most cases, however, mediators would be best advised to make an effort to evaluate each case on its own, and develop a process in coordination with the parties and counsel, that is best suited for that particular case. *Id.* at pp. 12-13.

   Mediators and the parties should take note of the admonition contained in the ABA Study and at least discuss during a pre-mediation conference how the process might be tailored to meet the needs of the particular dispute. If party input on process design is important, consideration might be given to incorporating the *Mediator Standards of Conduct*, *supra*, into the mediation agreement (Standard I requires party self-determination in a number of areas, including process issues) as well as selecting a mediator who is receptive to party input on process design.

c. Similar to the requirements of MCR 2.411, the LR also significantly limits the extent of communications between the court and the mediator concerning the mediation.

   > The mediator must advise the court of completion of mediation within seven days of completion, stating **only** the date of completion, who participated, whether settlement was reached, and whether further ADR proceedings are contemplated *(emphasis added).*

This closing report is similar to the practice in Michigan state courts as provided in SCAO form mc 280. (*See* Exhibit A, attached. Up-to-date copies are available at:

http://courts.mi.gov/Administration/SCAO/Forms/courtforms/alternativedisputeresolution/mc280.pdf

d. The new ADR Plan makes attorneys and law firms directly responsible for paying the fees of the selected neutral:

> The attorney or law firm representing a party participating in ADR is directly responsible for fees payable to the court, mediators, or arbitrators.
> LR 16.3 (h)

And, in the case of facilitative mediation, the LR prescribes how those fees must be allocated.

> The mediator must be paid his or her standard hourly rate, assessed in as many equal parts as there are separately represented parties, unless the parties agree in writing or the court orders otherwise.
> LR 16.4 (d)

If a different allocation or payment method is desired or agreed upon, that fact should either be placed in the court's ADR order, the written agreement with the neutral, or documented in the written settlement agreement.

Other ADR Processes

The LR specifically invites the use of ADR processes beyond facilitative mediation, case evaluation and arbitration:

> A judge may use other methods of alternative dispute resolution, including summary jury trials, summary bench trials and (with the parties' consent) arbitration, or recommend or facilitate the use of any extrajudicial procedures for dispute resolution not otherwise provided by these rules.
> LR 16.7

In sum, the LR invites the district court and parties to explore and experiment with timing and staging any ADR process(es) that might be appropriate for their dispute. Given this invitation, it will benefit the litigator to seriously consider and evaluate the panoply of ADR processes the parties might pursue. For example, *The Taxonomy of ADR, supra,* outlines 20 different ADR processes and discusses when and in what setting each process may be the most efficacious (it also provides forms, checklists and practice pointers for consideration). A supplemental source of invaluable information for litigators and the judiciary is SCAO's soon to be published *Michigan Judges Guide to ADR Practice and Procedure*. This judicial bench book, which draws significantly from the *Taxonomy*, is most worthy of consideration.

The adoption of the new ADR Plan in the Eastern District of Michigan presents a number of additional options and issues for consideration by litigators. Avail yourselves of those options fully and remember a variation of the legal maxim "Read the LR, Read the LR, Read the LR." Those who familiarize themselves with all the ADR options at their disposal and the individual practices of the district judges will have a decided tactical advantage in furthering the interests of their clients. Finally, know your neutrals and select those neutrals whose practices, processes, style and subject matter expertise are best suited to resolve your dispute.