

An Assessment of the Case Evaluation Process in Michigan Circuit Courts:

Best Practices and Recommendations
for the Future



Prepared for Macomb County Courts by:

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EXECUTIVE SUMMARY

Macomb County Circuit Court, like all other Circuit Courts in Michigan, are mandated per the Michigan Court Rules to use an Alternative Dispute Resolution technique called Case Evaluation. Case evaluation's purpose is to help provide parties with a true valuation of their case and a number around which the parties can negotiate in any civil action in which the relief sought is primarily money damages or division of property. Due to the fact that Macomb County is a large volume Circuit Court that handles a number of case evaluation eligible cases, it was important to Macomb County Circuit Court to compare their process with similarly sized counties, specifically Oakland County, Wayne County, and Washtenaw County, to ensure they are in line with best practices and to identify any ways to improve.

Central Project Question

As a result of Macomb County Circuit Court's desire to evaluate and compare their case evaluation process, I was approached to conduct in-person interviews with three similarly sized circuit courts to answer the central project question:

“What actions can Circuit Courts in Michigan take to improve the case evaluation process and implement ‘best practices’?”

The Interview Process

The interviews were conducted in-person with employees from the Oakland County Circuit Court, Wayne County Mediation Tribunal, Washtenaw Trial Court and the Macomb County Circuit Court. The format of the interviews was a semi-structured interview, which included a list of pre-determined questions that allowed for open-ended answers. In-person interviews, as opposed to email surveys or other methods are preferred to allow for more open-ended explanation and are better for understanding processes, as this is. The questions spanned five main thematic categories regarding the case evaluation process: Scheduling, Selection of Case Evaluators, Payment, Acceptance/Rejection of Case Evaluation Award, and Case Evaluation Summaries.

Analytical Approach

The analytical approach used on the resulting interview data was called Thematic Coding. Thematic coding is a process by which the researcher organizes the qualitative data from the interviews by transcribing and combining responses (in this instance, using Excel). Once all the qualitative responses are in the same place, they are reviewed to identify and themes presented across all of the answers. These themes are given a code. Once all answers have been reviewed in this way, the codes are again reviewed to determine any further themes that can be identified. Finally, a final report is generated, which identified major themes, both in process and overall. The process themes become what has been referred to in the project as “The Process in Practice,” and the overall themes across each step of the case evaluation process, become the “best practices” highlighted within the report.

RESULTS AND RECOMMENDATIONS

The following results and general themes were identified following analysis:

- ❖ Though the counties sometimes differ in how they perform the functions of each step, each county complies with the Case Evaluation process as set forth in Michigan Compiled Laws MCL 600.4901-600.4969 and Michigan Court Rule MCR 2.403.
- ❖ Wayne County Mediation Tribunal's process, being that it is a non-profit organization separate from the Wayne County Circuit Court, that handles payment via a half-day and full-day per diem

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amount to case evaluator attorneys, and is not located in the same location as the Court, has the most drastically different case evaluation process as compared to the other counties interviewed.

- ❖ Those counties with a case management systems (CMS) that allows for automation of any aspect of the process, including but not limited to: (1) notification to the case evaluation that a case needs to be scheduled for case evaluation, (2) automated matching of case evaluators to cases, (3) automatic generation of case evaluation notices for mailing, and (4) computerized scheduling of case evaluation panels, tend to be the most efficient and most equipped to handle large volumes of cases, in comparison to the counties that lack this technology.
- ❖ Counties that ask the parties to write case evaluation checks directly to the Court, and pay the case evaluators via the accounting department of the Court, are more efficient with the payment process and may have an opportunity to make small amounts of additional money for their general fund on the process. However, no county interviewed was dissatisfied with their current payment process, nor did any county express having difficulties receiving, organizing and accounting for received payments, or dealing with non-payment.
- ❖ All counties expressed being generally satisfied with their current case evaluation process. The only specifically addressed areas of dissatisfaction were with the fact that there is no page limit placed on the exhibits allowed to be attached to summaries, that too much of the process is still done manually (without computer assistance) and should be more automated, and that an e-filing solution should be developed to include the case evaluation process.

Best Practices

The best practices identified in each of the major sections from the interview are as follows:

Scheduling – Identify cases that have been ordered to case evaluation (automated if possible) early after the Complaint has been answered and a scheduling order has been issued. Send a notice to the parties (automate creation of notice if possible) at least 2 months prior to the scheduled case evaluation date and include the evaluators names on the notice to help parties identify potential conflicts early to ease scheduling of substitutes.

Selection of Case Evaluators – A committee should be formed by the Court (or a local bar association), have the committee meet at least one time a year to review applications and fill a list of available rotating attorneys to sit as evaluators. Allow applications to be submitted online for ease, set forth a 2 or 3 strike policy for no shows to remove people from the rotating list. Organize the list to make it clear attorneys who have offices in the area, as this makes for good last minute substitutes.

Payment – Payment should be easy for the parties, the most efficient practice being that parties can make checks out to the Court, and the Court will handle payment to the attorneys. Due to this practice, attorneys are always paid on time and within the time limits of the Court, though the court may acquire late fees for summaries from the parties, which can be deposited into the Court’s general fund and used to cover non-payment situations before they are resolved. This also helps to ease the process should case evaluation ever be included in e-filing, then the payments can be made through the e-filing system directly to the court and automated to pay the case evaluators.

Acceptance/Rejection (A/R) of Case Evaluation Award – allow parties to call, fax, email, or hand-deliver A/R forms.

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Case Evaluation Summaries – Summaries should be as small as possible, and a limit of exhibit pages should be considered. Evaluators should be informed of when they can pick up summaries, and this should be within the last week before scheduled case evaluation only, providing time for the case evaluation department to gather and organize them.

Recommendations

Short-term

- ✓ Conduct an IT audit regarding the automation capabilities of the Court's current CMS, with regards to automatically assigning evaluators, creating lists of cases to be scheduled, and auto-generating case evaluation notices for mailing. It may already be capable of some of this but not currently utilized. These practices greatly increase efficiency in the process.
- ✓ Discuss with Court Administrators, Chief Judges, local attorneys, and the local bar association the possibility of limiting the number of pages of exhibits that can be attached, perhaps providing parties the opportunity to send exhibits directly to the evaluators digitally, as opposed to attaching them to the briefs.

Intermediate Term

- ✓ Convert payment process so that the parties pay the Court directly and the Court issues payment to the evaluators, on their own time-table, and maintain any fees for late summaries in a fund for the case evaluation department.

Long-Term

- ✓ Develop a process to integrate the filing of case evaluation summaries through the e-filing system of the Court. Allow the system to include online payment for the summaries. Negotiate with evaluators regarding potentially printing the summaries or viewing them exclusively digitally to save storage space and resources for court and parties.

BACKGROUND

Introduction

One of the major goals of the modern court system is to aid the parties to a lawsuit, by helping them come together early in a case and discuss the case's potential for resolution, hopefully allowing the parties to come to an agreement which disposes the case prior to trial. This practice is referred to as Alternative Dispute Resolution (ADR), and it can save the parties, as well as the courts, a lot of time and money, while still keeping the number one goal of justice and due process in the forefront of the judiciary. The State of Michigan embraces ADR practices by allowing for facilitation, mediation and case evaluation. Specifically, the State of Michigan makes the case evaluation process, one type of ADR, mandatory for all tort cases filed in the Courts.

Macomb County Circuit Court, as a large volume Circuit Court who handles a number of tort and other case evaluation eligible cases, was motivated to evaluate their case evaluation process in comparison to other similarly sized Circuit Courts in the State, to ensure that the processes and practices employed there are in line with the identifiable "best practices" from the group as a whole and to answer the question: **"What actions can Circuit Courts in Michigan take to improve the Case Evaluation Process and implement best practices?"** Macomb County hopes to improve case evaluation by adapting new practices, if needed, to provide for better case evaluation outcomes at all levels of the process. As such, an evaluation of the case evaluation processes at four comparably sized Circuit Courts in the State of Michigan was conducted. The following counties were contacted for semi-structured, in-person interviews to discuss the case evaluation process: Wayne County, Oakland County, Washtenaw County, Kent County, and Macomb County. Kent County declined to participate. The information received from these in-person interviews was then analyzed using a qualitative data analysis method called thematic coding to discern any identifiable best practices. The results of that analysis, as well as recommendations and an in-depth description of the analysis methods employed, are presented herein.

What is Case Evaluation?

Alternative dispute resolution (ADR) includes dispute resolution processes and techniques that act as a means for disagreeing parties to come to an agreement short of litigation. It is a collective term for the ways that parties can settle disputes, with (or without) the help of a third party.¹ Mediation, Facilitation and Case Evaluation are three such examples of alternative dispute resolution techniques used to help parties settle prior to litigation.

For our purposes, we are concerned with **Case Evaluation**, which is **"a process through which a panel of three attorneys, appointed by a Court and not involved in the dispute, hears issues specified by the parties and then renders a monetary evaluation of the case."** The case evaluation process in the State of Michigan is detailed by Michigan Compiled Law MCL 600.4901-600.4969, which mandates referral of tort and medical malpractice cases to the Case Evaluation process and expanded by Michigan Court Rule MCR 2.403(A)(1) to "any civil action in which the relief sought is primarily money damages or division of property."²

MCR 2.403 specifically addresses the major components of the case evaluation process and is attached as **Appendix 1** to this report. The categories addressed in this Court Rule include (A) Scope and Applicability of the Rule, (B) Selection of Cases, (C) Objections to Case Evaluation, (D) Case Evaluation Panels, (E) Disqualification of Case Evaluators, (F) ADR Clerk, (G) Scheduling of Case Evaluation Hearings, (H) Fees, (I) Submission of Summary and Supporting Documents, (J) Conduct of Hearing, (K)

Decision by Panel, (L) Acceptance or Rejection of Evaluation, (M) Effect of Acceptance of Evaluation, (N) Proceedings After Rejection, and (O) Rejecting Party's Liability for Costs.³

The goal of case evaluation is to provide the parties, early in the timeline of a case, with:

- (1) A true valuation of the case; and,
- (2) A number around which the parties can negotiate.²

Case evaluation, as opposed to other types of alternative dispute resolution, has primary focus of placing value on a case and using that value as a negotiation point between the parties. Part of this approach includes penalties, which may be attached for not accepting the award, if the rejecting party does not improve upon a trial verdict by 10 percent over the award, and the other party(ies) accept the award. This penalty is supposed to provide motivation to the parties to seriously consider the value that has been placed on their case by the Case Evaluators, and to specifically consider their chances of doing better than that amount if the case continues to progress. The penalty can be a strong motivator for parties, as trials can be very expensive and the cost of paying the opposing parties attorneys fees if they do not improve by 10 percent, could be a significant amount, depending on the length of the case and the representation of opposing counsel.

Literature Review

Introduction

Most of the literature that was reviewed regarding case evaluation itself tended to focus on case evaluation only as compared to mediation, as differing alternative dispute resolution techniques. Campbell, T., & Pizzuti, S., noted in their report that while case evaluation is currently widely used in Michigan, some courts are moving away from case evaluation toward a greater use of mediation.² Hilliker, conducted a study that examined the effect of ordering mediation in select civil cases where case evaluation awards have been rejected.⁴ The data from that study suggested that by simply ordering a case to mediation, a significant number of cases will settle. An additional significant number could be expected to settle "at the table," resulting in significant savings to a court in reducing the amount of time and resources expended in scheduling subsequent events; e.g., case evaluation, settlement conferences, and trial. Information from this study will provide insight into the use of case evaluation in the counties used for the study, and provide supplemental information to the interviews.

Literature regarding the research method used for this project was also reviewed. The research method used is a quantitative research technique called the semi-standardized or semi-structured discovery interview. The analysis method is thematic coding. The literature reviewed reveals the following about this type of research method and how it should be analyzed:

In the 1970s, there was a reaction against the supremacy of quantitative methods which therefore split researchers into two groups: qualitative and quantitative researchers.⁵ For our research purposes, we use primarily qualitative research techniques. Qualitative research is concerned with the nature, explanation and understanding of phenomena. Unlike quantitative data, qualitative data are not measured in terms of frequency or quantity but rather are examined for in-depth meanings and processes.⁶ Sandelowski, purports that one-to-one interviews are the most commonly used data collection tools in qualitative research.⁷ Qualitative researchers generally rely on face-to-face interviewing when conducting semi-structured and in-depth interviews.⁸ The literature on interviewing as a data collection method is particularly robust.⁹

Interviews as a Data Collection Method

Interviews are a flexible and useful method of data collection and are especially appropriate for collecting information on participants' experiences, beliefs and behaviors. As in this project, it was particularly important to capture the experience of those who work within the case evaluation process at the various courts, and capture their perspective of the process. Tod, believes the interview structure's flexibility to be among its greatest strengths. The interview facilitates the collection of large amounts of in-depth data, however, it is pertinent to note that it may be a costly and time-consuming method of data collection and analysis.¹⁰

Alsaawi explains, there are a number of different types of interviews that can be implemented in social research. Each type has its own objective and focus.¹¹ The types of interviews include structured interview, semi-structured interviews, unstructured interview and focus groups. The type used in this evaluation, semi-structured interviews, are a mix of the two types mentioned above, where the questions are pre-planned prior to the interview but the interviewer gives the interviewee the chance to elaborate and explain particular issues through the use of open-ended questions. This type is appropriate to researchers who have an overview of their topic so that they can ask questions. However, they do not prefer to use a structured format which may hinder the depth and richness of the responses.¹² For this project, a general overview of the process was known, as it was largely outlined in the Court Rules which mandated the use of case evaluation, making semi-structured interviews an appropriate data collection method for this project. Tod, also speaks of semi-standardized (or semi-structured) interviews, stating they offer a more flexible approach to the interview process. While they may use an interview schedule for predetermined topics, they allow for unanticipated responses and issues to emerge through the use of open-ended questioning.¹⁰

Discovery interviews are an example of a semi-standardized approach to interviewing. These are one-to-one interviews which use open-ended questions and probes, based on the principle of allowing the interviewee control over the interview process. The focus is on permitting the interviewee to tell his/her own story rather than answer a series of structured questions. Underpinning the discovery interview is the principle that participants understand the world in varying subjective ways. Therefore, issues are explored from an individualistic perspective.¹³ A discovery interview was specifically chosen to allow the case evaluation clerk or administrator the most control over the interview process, acting as the instructor on their court's case evaluation process. This facilitates the collection of richer more textured data from the participant than that obtained through formally structured scheduled questions.¹⁴

Prior to interviewing, the development of the interview schedule is an important first step in the construction of the interview process.¹⁴ For a semi-structured interviews, your interview guidance might include specific topics to be covered in the interview and may also include some questions.¹⁵ Using this information, an interview guide was created including some questions and a number of different topics to cover in the interview.

When interviewing, it is important to gain a verbatim account of the interview in order to analyze data from interviews. This is usually done by either tape or video recording the process and then transcribing the recording.¹⁴ Quality interviews, according to Bryman, begin with transcribing the data obtained from being spoken to being written. Transcription has the merit of keeping intact the interviewee's words.¹² The intention was to use a recording device for all the interviews conducted. However, due to court policies regarding the use of recording equipment, for two of the four interviews, we had to transcribe the interviewee's answers by hand, which was less efficient than recording but still maintained the quality of the interview and gained a verbatim account of the interview for analysis.

Analysis of Interview Data

For analysis of the interview data, according to Robson, the three most common approaches are: a quasi-statistical approach; a thematic coding (thematic analysis) approach; and, a grounded theory approach.¹⁶ Among these three approaches, the thematic coding approach is the most heavily employed analytical tool in social research. The thematic coding approach was used for this analysis. Thematic Analysis emphasizes pinpointing, examining, and recording patterns (or themes) within data.¹⁷ The thematic coding process is described in detail below in the Analysis of Interview Data section.

Determining the Quality of the Data

Finally, with regards to the determining the quality of the interview data, a survey of introductory texts on qualitative interviewing reveals that there is no consistency in the terms used in relation to the assessment of ‘quality’ of qualitative interview research. However, Tod, argues that with semi-structured or unstructured interviews, a consistent approach and well-designed questions will help achieve rigor.¹⁰ Rigor, or trustworthiness, refers to the concepts of credibility, transferability and dependability.¹⁸ As a result, it was important throughout the process that consistency be maintained to every extent possible. Kvale, has summarized some of the ‘best practices’ frequently recommended in methodological literature by suggesting six criteria for judging the quality of an interview:

- The extent of spontaneous, rich, specific, and relevant answers from the interviewee.
- The shorter the interviewer’s questions and the longer the subjects’ answers, the better.
- The degree to which the interviewer follows up and clarifies the meanings of the relevant aspects of the answers.
- The ideal interview is to a large extent interpreted throughout the interview.
- The interviewer attempts to verify his or her interpretations of the subjects’ answers in the course of the interview.
- The interview is ‘self-communicating’ – it is a story contained in itself that hardly requires much extra descriptions and explanations.¹⁹

The Interviews

Four in-person interviews were conducted over the period of January – February, 2016 for this evaluation. The participating circuit courts include Oakland County Circuit Court, Wayne County Mediation Tribunal, Washtenaw Trial Court, and Macomb County Circuit Court. Five circuit courts were initially contacted via electronic mail, stating the purpose of the project and asking if they would like to participate in an in-person interview regarding their court’s case evaluation process. Oakland County Circuit Court, Wayne County Mediation Tribunal, and Washtenaw Trial Court all elected to participate in the interviews, Kent County Circuit Court declined. Macomb County Circuit Court also participated in the interview and serves as the county requesting this research.

Answers to the interview questions at the Wayne County Mediation Tribunal and the Macomb County Circuit Court were recorded digitally to provide a verbatim account of the interview, with permission of the interviewee. Due to restrictions regarding recording devices, the interviews conducted at the Washtenaw Trial Court and Oakland County Circuit Court were documented by hand by the interviewer.

Semi-Structured Interview Questions

The interviews were semi-structured, so a set of questions were prepared prior to the interviews, to allow the interviewer a guide to follow during the interviews. This question set was used, in order, for each of the interviews. The question set covered the following main thematic categories: Scheduling, Selection of Case Evaluators, Payment, Acceptance/Rejection of Case Evaluation Award, and Case Evaluation

Summaries. There were no pre-determined answers to these questions, they were open-ended to allow the interviewee to expand on their answer and provide additional insight that would otherwise be lost with a pre-determined set of answers for them to choose from.

Examples of a few questions used in the interviews from each main thematic category include:

Scheduling:

When do notices go out?

For what cases does the Court mandate case evaluation? Are there any exceptions within those case codes?

Selection of Case Evaluators:

How are evaluators selected?

How are conflicts handled?

Payment:

What is the cost of case evaluation?

Who is the check made out to?

Acceptance/Rejection of Case Evaluation Award:

How long to the parties have to accept or reject? How do they do it?

Could a case be ordered to a second case evaluation?

Case Evaluation Summaries:

What happens to the summaries prior to the evaluation?

What happens to the summaries after evaluation?

Ethical Concerns

When conducting in-person interviews, there are certain ethical concerns that need to be addressed in order to obtain permission to acquire, record, and use the data.

Informed Consent and Self Determination

For these interviews, it was important to receive informed consent and self-determination from each of the participants. Informed consent can be gained after individuals are provided with sufficient information about the research, in a format that is comprehensible to them, and make a voluntary decision to participate in a research study. Self determination is the concept that individuals have the right to determine their own participation in research, including the right to refuse participation without negative consequences.²⁰

For the research conducted for this paper, the interviewees were contacted via email with regards to their interest and availability to sit down for an in-person interview regarding their court's case evaluation process. If they agreed to the interview, at the onset of the interview, the purpose of the project and the purpose of the interview was explained to them verbally, along with who the interviewer was and their affiliation with the Oakland University and Macomb County Circuit Court. They were informed of the approximate time the interview would take and how the collected data would be used. Finally, there were informed that participation is voluntary and any portion of the interview may be skipped and they can

refuse to answer any question. This information was also provided upon request via email or telephone, prior to deciding to participate in the interview.

Anonymity and Confidentiality

Anonymity is the idea that researchers should protect the identity of research participants at all times. Confidentiality is that researchers should ensure that all data records are kept confidential at all times.¹⁹ The participants in these interviews did not have their personal identities disclosed for this research, however, they were only represented as employees of their respective Courts. Further, all the interview data and any further data provided by the participants were kept confidential at all times, in the possession of the interviewer.

Analysis of Interview Data

In order to analyze the data collected from the in-person interviews conducted, a thematic analysis was done, which included the use of thematic coding. The process of thematic coding is described below. As a result of this analysis, the identified themes were then evaluated to discern if they represented what could be considered a “best practice” for the case evaluation process. If so, they are included in the Best Practices section of this paper. From the identified themes, conclusions and recommendations were developed to help stakeholders address improvements to the case evaluation process moving forward.

Thematic Analysis Using Thematic Coding

Thematic analysis or thematic coding is performed through the process of coding in six phases:

- (1) **Familiarization with the Data**, re-reading data to become familiar, including transcribing recorded data, organize the data, looking for any emerging patterns.
- (2) **Generating Initial Codes**, generate codes for data sections, combine similar codes through data reduction and document where patterns emerge.
- (3) **Searching for Themes Amongst Codes**, combine codes to develop overarching themes.
- (4) **Reviewing Themes**, examine how the themes support the data and overarching theories and hypotheses.
- (5) **Defining and Naming Themes**, define each theme, which aspects of data are being captured and what is interesting about that theme.
- (6) **Producing the Final Report**, decide which themes are meaningful to understanding what is going on within the data and use that information for the final report.¹⁷

Results

The results of the thematic coding identified the major steps in the case evaluation process across all courts interviewed. This is referred to as the Process in Practice. The data concerning the process in practice shows all the steps of case evaluation process and how each step must be fulfilled by the courts in order to meet the goals of case evaluation.

From these themes, best practices were identified, showing which courts specifically were performing each major step in the most efficient and/or effective way.

With the knowledge of the best practices per each step of the process, actionable recommendations are provided to help the circuit courts who are not currently employing the best practice on that particular step of the process, to implement the identified method in their Court.

General Results

The following general results/themes were identified in the thematic coding process:

- ❖ Though the counties sometimes differ in how they perform the functions of each step, each county complies with the Case Evaluation process as set forth in Michigan Compiled Laws MCL 600.4901-600.4969 and Michigan Court Rule MCR 2.403.
- ❖ Wayne County Mediation Tribunal's process, being that it is a non-profit organization separate from the Wayne County Circuit Court, that handles payment via a half-day and full-day per diem amount to case evaluator attorneys, and is not located in the same location as the Court, has the most drastically different case evaluation process as compared to the other counties interviewed.
- ❖ Those counties with a case management systems (CMS) that allows for automation of any aspect of the process, including but not limited to: (1) notification to the case evaluation that a case needs to be scheduled for case evaluation, (2) automated matching of case evaluators to cases, (3) automatic generation of case evaluation notices for mailing, and (4) computerized scheduling of case evaluation panels, tend to be the most efficient and most equipped to handle large volumes of cases, in comparison to the counties that lack this technology.
- ❖ Counties that ask the parties to write case evaluation checks directly to the Court, and pay the case evaluators via the accounting department of the Court, are more efficient with the payment process and may have an opportunity to make small amounts of additional money for their general fund on the process. However, no county interviewed was dissatisfied with their current payment process, nor did any county express having difficulties receiving, organizing and accounting for received payments, or dealing with non-payment.
- ❖ All counties expressed being generally satisfied with their current case evaluation process. The only specifically addressed areas of dissatisfaction were with the fact that there is no page limit placed on the exhibits allowed to be attached to summaries, that too much of the process is still done manually (without computer assistance) and should be more automated, and that an e-filing solution should be developed to include the case evaluation process.

The Process in Practice

When analyzing the process at each of the four courts, I was able to discern a board overview of how the practice of case evaluation is being conducted in Michigan courts. The "process in practice" is an outline of each of the steps necessary to effectively provide case evaluation.

Step One

The case evaluation office is notified that a case will be sent to case evaluation in the future and will need to be scheduled for such.

- Best practices dictate that this happen through an electronic notification, but it may also occur via paper or telephone call to the department. In some cases, it may the

responsibility of the case evaluation department to use information at their disposal, such as the date of the Answer to the Complaint in order to determine if a case will be scheduled for case evaluation and when.

Step Two

The case evaluation office determines a date and time for the case evaluation that is approximately 2-3 months from the current date.

- Case Evaluation department employees must make sure that the date selected is one in which 14 days prior there is no holiday or court closure, because 14 days prior to the date selected, the summaries will be due and summaries cannot be due on a date the court is closed.

Step Three

The case evaluation office consults their list of available case evaluators, and matches three evaluators to the case evaluation, in accordance with their specialties (Defendant's attorney, Plaintiff's attorney, or Neutral attorney). The case evaluation office then notifies the evaluators of the date and time of the case evaluation for which they have been scheduled.

- The list of available evaluators is compiled mostly via committees that meet once or twice a year to review applications. This committee is sometimes in house at the Court, but may also be separate, such as a bar association.
- Case Evaluators may be notified electronically, or may be called personally by the case evaluation department to be notified that they have been chosen to serve. When notified, they are instructed to let the case evaluation department know of any conflicts of interest with the parties to their assigned evaluations.
- Specialty panels can also be formed for certain case types, these panels include evaluators with expertise in that field, as selected by the committees.

Step Four

The case evaluation office issues a notice to the parties of the case, letting them know the selected date and time of the case evaluation, the fees due, and that their case evaluation summaries and payment are due no later than 14 days prior to the set date and time. These notices are mailed to the parties.

- The notices may be automatically generated by the case management software used by the Court, or they may be typed by case evaluation staff. The most efficient way, if possible, is to input the date, time, and evaluator's names into the CMS software and have it automatically generate the notices to the parties.
- Case Evaluation Notices may or may not have the names of the evaluators on them, although if possible, putting the names on them is a best practice in order for the parties to have an opportunity to identify any conflicts of interest with the evaluators ahead of time.

Step Five

Barring any conflicts of interest or need for adjournment, which is handled through the Court, the parties submit their fee payment and case evaluation summaries no later than 14 days prior to their scheduled case evaluation date. This submission can occur either via mail, or hand delivery to the case evaluation office.

- When case evaluation summaries are received, the case evaluation office will time-stamp them, mark if the fees have been paid, and collect them physically within a storage room which is organized by the specific case evaluators.

Step Six

The case evaluation office notifies the case evaluators, no sooner than two weeks prior to the scheduled case evaluation date, that they can come to the case evaluation office to pick up the case evaluation summaries for the cases they will be evaluating. They can do so in person or send a courier.

- Case Evaluation staff may notify the case evaluators via electronic mail, or telephone that the summaries are ready for pick up. If the summaries are not picked up, they will remain at the case evaluation office until the date of case evaluation. Attorneys may need to pick up summaries more than once due to late summaries.

Step Seven

Case evaluation occurs at the case evaluation office. Each party gets time to present information from their summaries to the case evaluators. The case evaluators determine awards for the parties. Following the case evaluation, all summaries and notes are either taken by the parties or recycled. The parties are given a copy of the awards, along with an Acceptance/Rejection sheet to take with them.

- Case evaluation awards are confidential and are not filed with the Court.

Step Eight

Twenty-eight (28) days after case evaluation, the parties send in their Acceptance/Rejection sheet to the court, notifying the case evaluation department of each parties' decision. The case evaluation department then determines based on the responses if the case evaluation awards have been "accepted" or "rejected" and forwards that information to the Court. This ends the case evaluation process.

- The parties can hand-deliver or mail the A/R form to the case evaluation department. Some departments allow the parties to simply call, write a letter, or fax the A/R form to the Court.
- If any party rejects the case evaluation award, it is considered a rejection. A case evaluation award is only considered "accepted" if all parties accept.
- If the parties accept, this usually indicates they have agreed to settle and can submit paperwork to the Court regarding their settlement and dismissal of the case.

“Best Practices” Identified

Best practices are methods or techniques that have consistently shown results superior to those achieved with other means, and that is used as a benchmark.²¹ The best practices identified in each of the major sections from the interview are as follows:

Scheduling – Identify cases that have been ordered to case evaluation (automated if possible) early after the Complaint has been answered and a scheduling order has been issued. Send a notice to the parties (automate creation of notice if possible) at least 2 months prior to the scheduled case evaluation date and include the evaluators names on the notice to help parties identify potential conflicts early to ease scheduling of substitutes.

Selection of Case Evaluators – A committee should be formed by the Court (or a local bar association), have the committee meet at least one time a year to review applications and fill a list of available rotating attorneys to sit as evaluators. Allow applications to be submitted online for ease, set forth a 2 or 3 strike policy for no shows to remove people from the rotating list. Organize the list to make it clear attorneys who have offices in the area, as this makes for good last minute substitutes.

Payment – Payment should be easy for the parties, the most efficient practice being that parties can make checks out to the Court, and the Court will handle payment to the attorneys. Due to this practice, attorneys are always paid on time and within the time limits of the Court, though the court may acquire late fees for summaries from the parties, which can be deposited into the Court’s general fund and used to cover non-payment situations before they are resolved. This also helps to ease the process should case evaluation ever be included in e-filing, then the payments can be made through the e-filing system directly to the court and automated to pay the case evaluators.

Acceptance/Rejection (A/R) of Case Evaluation Award – allow parties to call, fax, email, or hand-deliver accept/reject forms.

Case Evaluation Summaries – Summaries should be as small as possible, and a limit of exhibit pages should be considered. Evaluators should be informed of when they can pick up summaries, and this should be within the last week before scheduled case evaluation only, providing time for the case evaluation department to gather and organize them.

Actionable Recommendations

Short-term (within 1-2 years)

- ✓ Conduct an IT audit regarding the automation capabilities of the Court’s current CMS, with regards to automatically assigning evaluators, creating lists of cases to be scheduled, and auto-generating case evaluation notices for mailing. It may already be capable of some of this but not currently utilized. These practices greatly increase efficiency in the process. Following this audit, meet with the relevant stakeholders to discuss the capabilities of the current CMS regarding automation and how automation, with regards to the case evaluation department could be improved, either through current technology or through the potential purchase of new technology in the future, including a timeline and projected budget for same.
- ✓ Discuss with Court Administrators, Chief Judges, local attorneys, and the local bar association the possibility of limiting the number of pages of exhibits that can be attached, perhaps providing parties the opportunity to send exhibits directly to the evaluators digitally, as opposed to attaching them to the briefs. A survey sent to those on the case evaluator list, regarding their openness to the idea of limiting exhibits pages is a good start, followed eventually by a survey sent to counsel practicing in

the case evaluation department. Coordination with the local bar association on reaching this specific subset of counsel would be valuable.

Intermediate Term (2-5 years)

- ✓ Convert payment process so that the parties pay the Court directly and the Court issues payment to the evaluators, on their own time-table, and maintain any fees for late summaries in a fund for the case evaluation department. Discuss with relevant stakeholders the current payment system through the accounting department and potential issues regarding issuing checks to evaluators in a timely manner and collecting and cashing fees from the parties.

Long-Term (5-7 years)

- ✓ Develop a process to integrate the filing of case evaluation summaries through the e-filing system of the Court. Allow the system to include online payment for the summaries. Negotiate with evaluators regarding potentially printing the summaries or viewing them exclusively digitally to save storage space and resources for court and parties. Discuss with relevant stakeholders and complete an IT audit of current e-filing capabilities and whether case evaluation could be integrated into the current e-filing system. If case evaluation cannot be integrated, discuss a timeline and project budget for acquiring the needed e-filing capability to include case evaluation filings. Reach out to attorneys practicing in case evaluation in this court using a survey or an open forum, to discuss the potential change to e-filing and to negotiate a compromise regarding printing and mailing of summaries.

Efficiency and Effectiveness

The recommendations made above are all specifically made to increase efficiency long-term and make the case evaluation process more effective.

Short-Term Recommendations

The short-term recommendations focus on gathering information that would be needed to make effective changes in the future. These recommendations include discussing the issues with stakeholders, communicating with counsel regarding their feelings on making changes (to hopefully acquire stakeholder buy-in for the change) and making rule changes that can be implemented in the short-term. These recommendations promote efficiency and effectiveness because when you achieve buy-in from relevant stakeholders, and have all the information necessary to make the change, you can be the most efficient and effective at implementing that change. Further, the changes, if implemented, make the case evaluation process more efficient because the more automation in the process, the more efficient the interviewees felt the process was, and it allows for less staff and less staff time to handle the same amount of cases, which also promotes efficiency. In addition, the case evaluation process would be made more efficient if there were less exhibits (and less paper in general) for the case evaluation department to have to store, handle, and organize. The short-term recommendations also help make the process more effective because automation and lessening the size of the summaries all help speed the process up for case evaluation department employees, which allows them to have more time to answer questions, respond to conflicts, and explain the process to those who are new to case evaluation. These things all make case evaluation more effective.

Intermediate Recommendations

Converting the payment process makes the case evaluation process both more efficient and more effective, in that efficiency is increased because parties can write the checks directly to the Court and do not have to call the case evaluation department, consult their notice, or discuss with the other parties to

whom each check should be made out to, and from which party. The process is made more effective because, by easing this burden on the parties, they look at the process more favorably, and as such may be more likely to actively participate in the process.

Long-Term Recommendations

The long-term recommendation of switching to a system where the case evaluation summaries can be filed via e-filing is potentially more efficient and more effective than the current process. Efficiency would be increased for the parties because there would no longer be the need to mail, pay postage, or hire a courier to deliver case evaluation summaries. This increased efficiency is already noticeable in the cases that can be e-filed with the court currently. Further, the court would find it more efficient to electronically store the documents, rather than to store, organize, and re-organize the summaries in the months following the case evaluation. It also increases the ease of delivering the summaries to the various evaluators, eliminating their need to make a trip to the court to pick up summaries (sometimes more than once). As with the intermediation recommendations, anything that can ease a burden placed on the parties, can make parties look at the process more favorably and possibly make them more likely to actively participate in the process, leading to more effective outcomes for the process.

Equity and Diversity

It was important to address equity and diversity in this project because even though the courts are being compared, they are not the same in all ways. The volume of cases going through case evaluation department at each of the courts is varied, along with their available resources, staffing and funding. For this reason, it was important to consider that the data from the interviews would not give the whole picture of what challenges that court may be dealing with as a whole, and with their case evaluation departments. In order to try to make the process as equitable as possible, it was important that the interview questions be the same for all courts. In addition, it is important that the data be viewed in light of the different diverse circumstances of the Courts, and that was taken into consideration when developing the recommendations above. Each court will not have equal availability of resources, so the recommendations were designed to be investigative in nature. Rather than suggesting immediate action, the recommendations above take into consideration a need to audit resources, and discuss with stakeholders the ability to implement the recommendations and allow the parties to come to a conclusion for their individual courts as to whether implementation is practical for that particular court, and when.

The Organizations Mission

It is important that any recommendations made support the organization's mission. In this case, the short-term and long-term recommendations are in line with the Macomb County Court's purpose and core values. It also helps to support the Court's critical functions.

The Macomb County Court's purpose is "to serve the public by providing a fair, expeditious and impartial forum for the resolution of civil and criminal matters through the rule of law." The case evaluation process is a means by which the Court can help provide a fair and expeditious and impartial forum for the resolution of certain types of civil matters, using the process as outlined in MCR 2.403. The recommendations made support this purpose by increasing overall efficiency and effectiveness of the case evaluation process, which may help to increase the probability of resolution through the case evaluation process and create positive feedback for the program by those who use it.

The Court lists the following core values:

Core Values

- Honesty and Integrity – telling the truth and fulfilling promises.
- Principled decision making – guided by the rule of law and due process.
- Independence of the judiciary.
- Impartiality of the tribunal – free from bias and discrimination.
- Reasonable access to justice – reasonable schedules, promptness and continuously striving to improve processes.
- Courtesy and consideration for all.
- Openness – our processes are open to public scrutiny and critical analysis.
- Cost effectiveness.

The recommendations made as a result of the interviews most specifically support the Court’s core values of principled decision making, reasonable access to justice, courtesy and consideration for all, openness, and cost effectiveness. The short-term recommendations, specifically those that involve consultation with relevant stakeholders, help support the core values of openness, courtesy and consideration for all, and principled decision making. The long term recommendations, such as integrating case evaluation into electronic filing systems, also helps support the core values of reasonable access to justice, principled decision making, and cost effectiveness.

Finally, the court has the following critical functions: administration of court and staff, management of case flow, record keeping/county clerk, jury management, and public information and education. The short-term and long-term recommendations most specifically support the management of case flow, record keeping, and public information functions. Overall, the recommendations above are inline with the mission and functions of the Court, which is important as any recommendations not in line with the mission of an organization will be difficult to implement and would be unwise for the organization, because it would take them away from their stated goals.

Stakeholders

As with an organization’s mission, if recommendations cannot be supported by relevant stakeholders, it is unlikely those recommendations could be properly implemented, and further, it was be unwise to implement recommendations not supported by stakeholders, whose buy-in helps support the process from beginning to end.

The stakeholders relevant to the case evaluation process include the Chief Judge and other Judges, Case Administrator, case evaluation staff, additional court staff including accounting and information technology, evaluator attorneys, parties to case evaluation, attorneys that practice in the area and use case evaluation with the court, and the public.

As such, it was important in making the recommendations that stakeholder buy-in be considered. As with the short-term recommendations, consultation with relevant stakeholders for opinions and information is critical to the recommendation itself. The short-term recommendations reflect the reality that many stakeholders, with differing challenges and involvement in the process must agree in order to make changes. It is entirely possible that this buy-in cannot be achieved, and therefore the recommendations made would not be appropriate for that particular court, at least not at that time. That is why the

recommendations made above are focused more on the information gathering process and consultation, to determine if buy-in can be achieved for the recommendation.

Specifically for the recommendations made regarding changing the exhibit page amount and incorporating case evaluation into the electronic filing process, attorneys and evaluators will be the key to gaining buy-in for these recommendations. Both of these recommendations involve big changes in the process for these parties, which are outside of the Court's control. As such, it is important to involve them early and listen closely to their concerns when considering the implementation process.

With regards to changing the payment process, which has a great effect on other departments within the Court, such as accounting and information technology, it will be important to consider the accounting process and how to integrate smoothly with their existing payment processes, in order to have a smooth transition of the process from outside of the court, to an internal payment process.

Conclusion

The recommendations supported by the results of my in-person interviews with Oakland County, Wayne County, Washtenaw County, and Macomb County answer the main project question and represent the actions that a Circuit Court in Michigan can take to improve their case evaluation process and implement the best practices identified during the process.

Moreover, the recommendations made above are designed to help boost efficiency and effectiveness of the case evaluation process at circuit courts, while still considering stakeholders, ethical concerns, equity and diversity, and the mission of the organization.

It is my hope that this information can help Macomb County, as well as other Circuit Court's in Michigan to improve their case evaluation process and look to the future of the process, while continuing to provide relevant and effective case evaluation services to the public.

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APPENDIX 1

Rule 2.403 Case Evaluation

(A) Scope and Applicability of Rule.

- (1) A court may submit to case evaluation any civil action in which the relief sought is primarily money damages or division of property.
- (2) Case evaluation of tort cases filed in circuit court is mandatory beginning with actions filed after the effective dates of Chapters 49 and 49A of the Revised Judicature Act, as added by 1986 PA 178.
- (3) A court may exempt claims seeking equitable relief from case evaluation for good cause shown on motion or by stipulation of the parties if the court finds that case evaluation of such claims would be inappropriate.
- (4) Cases filed in district court may be submitted to case evaluation under this rule. The time periods set forth in subrules (B)(1), (G)(1), (L)(1) and (L)(2) may be shortened at the discretion of the district judge to whom the case is assigned.

(B) Selection of Cases.

- (1) The judge to whom an action is assigned or the chief judge may select it for case evaluation by written order after the filing of the answer
 - (a) on written stipulation by the parties,
 - (b) on written motion by a party, or
 - (c) on the judge's own initiative.
- (2) Selection of an action for case evaluation has no effect on the normal progress of the action toward trial.

(C) Objections to Case Evaluation.

- (1) To object to case evaluation, a party must file a written motion to remove from case evaluation and a notice of hearing of the motion and serve a copy on the attorneys of record and the ADR clerk within 14 days after notice of the order assigning the action to case evaluation. The motion must be set for hearing within 14 days after it is filed, unless the court orders otherwise.
- (2) A timely motion must be heard before the case is submitted to case evaluation.

(D) Case Evaluation Panel.

- (1) Case evaluation panels shall be composed of 3 persons.
- (2) The procedure for selecting case evaluation panels is as provided in MCR 2.404.
- (3) A judge may be selected as a member of a case evaluation panel, but may not preside at the trial of any action in which he or she served as a case evaluator.
- (4) A case evaluator may not be called as a witness at trial.

(E) Disqualification of Case Evaluators. The rule for disqualification of a case evaluator is the same as that provided in MCR 2.003 for the disqualification of a judge.

(F) ADR Clerk. The court shall designate the ADR clerk specified under MCR 2.410, or some other person, to administer the case evaluation program. In this rule and MCR 2.404, "ADR clerk" refers to the person so designated.

(G) Scheduling Case Evaluation Hearing.

(1) The ADR clerk shall set a time and place for the hearing and send notice to the case evaluators and the attorneys at least 42 days before the date set.

(2) Adjournments may be granted only for good cause, in accordance with MCR 2.503.

(H) Fees.

(1) Each party must send a check for \$75 made payable in the manner and within the time specified in the notice of the case evaluation hearing. However, if a judge is a member of the panel, the fee is \$50. If the order for case evaluation directs that payment be made to the ADR clerk, the ADR clerk shall arrange payment to the case evaluators. Except by stipulation and court order, the parties may not make any other payment of fees or expenses to the case evaluators than that provided in this subrule.

(2) Only a single fee is required of each party, even where there are counterclaims, cross-claims, or third-party claims. A person entitled to a fee waiver under MCR 2.002 is entitled to a waiver of fees under this rule.

(3) If one claim is derivative of another (e.g., husband-wife, parent-child) they must be treated as a single claim, with one fee to be paid and a single award made by the case evaluators.

(4) Fees paid pursuant to subrule (H) shall be refunded to the parties if

(a) the court sets aside the order submitting the case to case evaluation or on its own initiative adjourns the case evaluation hearing, or

(b) the parties notify the ADR clerk in writing at least 14 days before the case evaluation hearing of the settlement, dismissal, or entry of judgment disposing of the action, or of an order of adjournment on stipulation or the motion of a party.

If case evaluation is rescheduled at a later time, the fee provisions of subrule (H) apply regardless of whether previously paid fees have been refunded.

(5) Fees paid pursuant to subrule (H) shall not be refunded to the parties if

(a) in the case of an adjournment, the adjournment order sets a new date for case evaluation and the fees are applied to the new date, or

(b) the request for and granting of adjournment is made within 14 days of the scheduled case evaluation, unless waived for good cause.

Penalties for late filing of papers under subrule (I)(2) are not to be refunded.

(I) Submission of Summary and Supporting Documents.

(1) Unless otherwise provided in the notice of hearing, at least 14 days before the hearing, each party shall

(a) serve a copy of the case evaluation summary and supporting documents in accordance with MCR 2.107, and

(b) file a proof of service and three copies of a case evaluation summary and supporting documents with the ADR clerk.

(2) Each failure to timely file and serve the materials identified in subrule (1) and each subsequent filing of supplemental materials within 14 days of the hearing, subjects the offending attorney or party to a \$150 penalty to be paid in the manner specified in the notice of the case evaluation hearing. An offending attorney shall not charge the penalty to the client, unless the client agreed in writing to be responsible for the penalty.

(3) The case evaluation summary shall consist of a concise summary setting forth that party's factual and legal position on issues presented by the action. Except as permitted by the court, the summary shall not exceed 20 pages double spaced, exclusive of attachments. Quotations and footnotes may be single spaced. At least one inch margins must be used, and printing shall not be smaller than 12-point font.

(J) Conduct of Hearing.

(1) A party has the right, but is not required, to attend a case evaluation hearing. If scars, disfigurement, or other unusual conditions exist, they may be demonstrated to the panel by a personal appearance; however, no testimony will be taken or permitted of any party.

(2) The rules of evidence do not apply before the case evaluation panel. Factual information having a bearing on damages or liability must be supported by documentary evidence, if possible.

(3) Oral presentation shall be limited to 15 minutes per side unless multiple parties or unusual circumstances warrant additional time. Information on settlement negotiations not protected under MCR 2.412 and applicable insurance policy limits shall be disclosed at the request of the case evaluation panel.

(4) Statements by the attorneys and the briefs or summaries are not admissible in any court or evidentiary proceeding.

(5) Counsel or the parties may not engage in ex parte communications with the case evaluators concerning the action prior to the hearing. After the evaluation, the case evaluators need not respond to inquiries by the parties or counsel regarding the proceeding or the evaluation.

(K) Decision.

(1) Within 14 days after the hearing, the panel will make an evaluation and notify the attorney for each party of its evaluation in writing. If an award is not unanimous, the evaluation must so indicate.

(2) Except as provided in subrule (H)(3), the evaluation must include a separate award as to each plaintiff's claim against each defendant and as to each cross-claim, counterclaim, or third-party claim that has been filed in the action. For the purpose of this subrule, all such claims filed by any one party against any other party shall be treated as a single claim.

(3) The evaluation may not include a separate award on any claim for equitable relief, but the panel may consider such claims in determining the amount of an award.

(4) In a tort case to which MCL 600.4915(2) or MCL 600.4963(2) applies, if the panel unanimously finds that a party's action or defense as to any other party is frivolous, the panel shall so indicate on the evaluation. For the purpose of this rule, an action or defense is "frivolous" if, as to all of a plaintiff's claims or all of a defendant's defenses to liability, at least 1 of the following conditions is met:

(a) The party's primary purpose in initiating the action or asserting the defense was to harass, embarrass, or injure the opposing party.

(b) The party had no reasonable basis to believe that the facts underlying that party's legal position were in fact true.

(c) The party's legal position was devoid of arguable legal merit.

(5) In an action alleging medical malpractice to which MCL 600.4915 applies, the evaluation must include a specific finding that

(a) there has been a breach of the applicable standard of care,

(b) there has not been a breach of the applicable standard of care, or

(c) reasonable minds could differ as to whether there has been a breach of the applicable standard of care.

(L) Acceptance or Rejection of Evaluation.

(1) Each party shall file a written acceptance or rejection of the panel's evaluation with the ADR clerk within 28 days after service of the panel's evaluation. Even if there are separate awards on multiple claims, the party must either accept or reject the evaluation in its entirety as to a particular opposing party. The failure to file a written acceptance or rejection within 28 days constitutes rejection.

(2) There may be no disclosure of a party's acceptance or rejection of the panel's evaluation until the expiration of the 28-day period, at which time the ADR clerk shall send a notice indicating each party's acceptance or rejection of the panel's evaluation.

(3) In case evaluations involving multiple parties the following rules apply:

(a) Each party has the option of accepting all of the awards covering the claims by or against that party or of accepting some and rejecting others.

However, as to any particular opposing party, the party must either accept or reject the evaluation in its entirety.

(b) A party who accepts all of the awards may specifically indicate that he or she intends the acceptance to be effective only if

(i) all opposing parties accept, and/or

(ii) the opposing parties accept as to specified coparties.

If such a limitation is not included in the acceptance, an accepting party is deemed to have agreed to entry of judgment, or dismissal as provided in subrule (M)(1), as to that party and those of the opposing parties who accept, with the action to continue between the accepting party and those opposing parties who reject.

(c) If a party makes a limited acceptance under subrule (L)(3)(b) and some of the opposing parties accept and others reject, for the purposes of the cost provisions of subrule (O) the party who made the limited acceptance is deemed to have rejected as to those opposing parties who accept.

(M) Effect of Acceptance of Evaluation.

(1) If all the parties accept the panel's evaluation, judgment will be entered in accordance with the evaluation, unless the amount of the award is paid within 28 days after notification of the acceptances, in which case the court shall dismiss the action with prejudice. The judgment or dismissal shall be deemed to dispose of all claims in the action and includes all fees, costs, and interest to the date it is entered, except for cases involving rights to personal protection insurance benefits under MCL 500.3101 *et seq.*, for which judgment or dismissal shall not be deemed to dispose of claims that have not accrued as of the date of the case evaluation hearing.

(2) If only a part of an action has been submitted to case evaluation pursuant to subrule (A)(3) and all of the parties accept the panel's evaluation, the court shall enter an order disposing of only those claims.

(3) In a case involving multiple parties, judgment, or dismissal as provided in subrule (1), shall be entered as to those opposing parties who have accepted the portions of the evaluation that apply to them.

(N) Proceedings After Rejection.

(1) If all or part of the evaluation of the case evaluation panel is rejected, the action proceeds to trial in the normal fashion.

(2) If a party's claim or defense was found to be frivolous under subrule (K)(4), that party may request that the court review the panel's finding by filing a motion within 14 days after the ADR clerk sends notice of the rejection of the case evaluation award.

(a) The motion shall be submitted to the court on the case evaluation summaries and documents that were considered by the case evaluation panel. No other exhibits or testimony may be submitted. However, oral argument on the motion shall be permitted.

(b) After reviewing the materials submitted, the court shall determine whether the action or defense is frivolous.

(c) If the court agrees with the panel's determination, the provisions of subrule (N)(3) apply, except that the bond must be filed within 28 days after the entry of the court's order determining the action or defense to be frivolous.

(d) The judge who hears a motion under this subrule may not preside at a nonjury trial of the action.

(3) Except as provided in subrule (2), if a party's claim or defense was found to be frivolous under subrule (K)(4), that party shall post a cash or surety bond, pursuant to MCR 3.604, in the amount of \$5,000 for each party against whom the action or defense was determined to be frivolous.

(a) The bond must be posted within 56 days after the case evaluation hearing or at least 14 days before trial, whichever is earlier.

(b) If a surety bond is filed, an insurance company that insures the defendant against a claim made in the action may not act as the surety.

(c) If the bond is not posted as required by this rule, the court shall dismiss a claim found to have been frivolous, and enter the default of a defendant whose defense was found to be frivolous. The action shall proceed to trial as to the remaining claims and parties, and as to the amount of damages against a defendant in default.

(d) If judgment is entered against the party who posted the bond, the bond shall be used to pay any costs awarded against that party by the court under any applicable law or court rule. MCR 3.604 applies to proceedings to enforce the bond.

(4) The ADR clerk shall place a copy of the case evaluation and the parties' acceptances and rejections in a sealed envelope for filing with the clerk of the court. In a nonjury action, the envelope may not be opened and the parties may not reveal the amount of the evaluation until the judge has rendered judgment.

(O) Rejecting Party's Liability for Costs.

(1) If a party has rejected an evaluation and the action proceeds to verdict, that party must pay the opposing party's actual costs unless the verdict is more favorable to the rejecting party than the case evaluation. However, if the opposing party has also rejected the evaluation, a party is entitled to costs only if the verdict is more favorable to that party than the case evaluation.

(2) For the purpose of this rule "verdict" includes,

(a) a jury verdict,

(b) a judgment by the court after a nonjury trial,

(c) a judgment entered as a result of a ruling on a motion after rejection of the case evaluation.

(3) For the purpose of subrule (O)(1), a verdict must be adjusted by adding to it assessable costs and interest on the amount of the verdict from the filing of the complaint to the date of the case evaluation, and, if applicable, by making the adjustment of future damages as provided by MCL 600.6306. After this adjustment, the verdict is considered more favorable to a defendant if it is more than 10 percent below the evaluation, and is considered more favorable to the plaintiff if it is more than 10 percent above the evaluation. If the evaluation was zero, a verdict finding that a defendant is not liable to the plaintiff shall be deemed more favorable to the defendant.

(4) In cases involving multiple parties, the following rules apply:

(a) Except as provided in subrule (O)(4)(b), in determining whether the verdict is more favorable to a party than the case evaluation, the court shall consider only the amount of the evaluation and verdict as to the particular pair of parties, rather than the aggregate evaluation or verdict as to all parties. However, costs may not be imposed on a plaintiff who obtains an aggregate verdict more favorable to the plaintiff than the aggregate evaluation.

(b) If the verdict against more than one defendant is based on their joint and several liability, the plaintiff may not recover costs unless the verdict is more favorable to the plaintiff than the total case evaluation as to those defendants, and a defendant may not recover costs unless the verdict is more favorable to that defendant than the case evaluation as to that defendant.

(c) Except as provided by subrule (O)(10), in a personal injury action, for the purpose of subrule (O)(1), the verdict against a particular defendant shall not be adjusted by applying that defendant's proportion of fault as determined under MCL 600.6304(1)-(2).

(5) If the verdict awards equitable relief, costs may be awarded if the court determines that

(a) taking into account both monetary relief (adjusted as provided in subrule [O][3]) and equitable relief, the verdict is not more favorable to the rejecting party than the evaluation, or, in situations where both parties have rejected the evaluation, the verdict in favor of the party seeking costs is more favorable than the case evaluation, and

(b) it is fair to award costs under all of the circumstances.

(6) For the purpose of this rule, actual costs are

(a) those costs taxable in any civil action, and

(b) a reasonable attorney fee based on a reasonable hourly or daily rate as determined by the trial judge for services necessitated by the rejection of the case evaluation, which may include legal services provided by attorneys representing themselves or the entity for whom they work, including the time and labor of any legal assistant as defined by MCR2.626.

For the purpose of determining taxable costs under this subrule and under MCR 2.625, the party entitled to recover actual costs under this rule shall be considered the prevailing party.

(7) Costs shall not be awarded if the case evaluation award was not unanimous. If case evaluation results in a nonunanimous award, a case may be ordered to a subsequent case evaluation hearing conducted without reference to the prior case evaluation award, or other alternative dispute resolution processes, at the expense of the parties, pursuant to MCR 2.410(C)(1).

(8) A request for costs under this subrule must be filed and served within 28 days after the entry of the judgment or entry of an order denying a timely motion

- (i) for a new trial,
- (ii) to set aside the judgment, or
- (iii) for rehearing or reconsideration.

(9) In an action under MCL 436.1801, if the plaintiff rejects the award against the minor or alleged intoxicated person, or is deemed to have rejected such an award under subrule (L)(3)(c), the court shall not award costs against the plaintiff in favor of the minor or alleged intoxicated person unless it finds that the rejection was not motivated by the need to comply with MCL 436.1801(5).

(10) For the purpose of subrule (O)(1), in an action filed on or after March 28, 1996, and based on tort or another legal theory seeking damages for personal injury, property damage, or wrongful death, a verdict awarding damages shall be adjusted for relative fault as provided by MCL 600.6304.

(11) If the "verdict" is the result of a motion as provided by subrule (O)(2)(c), the court may, in the interest of justice, refuse to award actual costs.

Rule 2.404 Selection of Case Evaluation Panels

(A) Case Evaluator Selection Plans.

(1) Requirement. Each trial court that submits cases to case evaluation under MCR 2.403 shall adopt by local administrative order a plan to maintain a list of persons available to serve as case evaluators and to assign case evaluators from the list to panels. The plan must be in writing and available to the public in the ADR clerk's office.

(2) Alternative Plans.

- (a) A plan adopted by a district or probate court may use the list of case evaluators and appointment procedure of the circuit court for the circuit in which the court is located.
- (b) Courts in adjoining circuits or districts may jointly adopt and administer a case evaluation plan.
- (c) If it is not feasible for a court to adopt its own plan because of the low volume of cases to be submitted or because of inadequate numbers of available case evaluators, the court may enter into an agreement with a