

Michigan Supreme Court  
State Court Administrative Office  
Office of Dispute Resolution

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2018 ADR Summit  
Meeting Summary

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August 2018

Michigan Hall of Justice  
Lansing, MI 48909

# Summary of the “2018 ADR Summit” Michigan Hall of Justice

## At a Glance: Key Themes

In general, ADR is working quite well, however, some aspects need tweaking. These include:

Judges should become involved in cases early in civil litigation to design an efficient and effective discovery process, set expectations about ADR, and resolve dispositive motions.

The use of special masters in discovery disputes should be approved.

The Michigan Rules of Professional Conduct should be amended to require lawyers to advise clients about ADR.

SCAO should provide an abbreviated mediation training program for judges.

SCAO should address the practice of sitting judges’ strongly recommending or appointing preferred lawyers and retired judges as mediators without the request of counsel.

Case evaluation should be made voluntary or amended to remove sanctions. [Majority view.]

Case evaluation panels should provide high/low settlement figures instead of a single award amount. [Majority view.]

Efforts should be made to address the lack of diversity in the mediator pool. [Majority view.]

## Background & Process

The “2018 ADR Summit” was convened on May 11, 2018, to permit users of court ADR services to provide input to the State Court Administrator on the state of ADR practice in Michigan and to provide recommendations for further developing ADR services in the trial courts. Attendees included representatives of judicial and court administration organizations and numerous sections of the Michigan State Bar Association, ADR professionals, and others. A complete list of attendees appears as Appendix 1.

The Summit was timed to follow the April 2018 publication of “Case Evaluation and Mediation in Michigan Circuit Courts: A Follow-up Study,” conducted by Courtland Consulting,

the same consultants that conducted the original study of case evaluation and mediation in 2011.<sup>1</sup> An earlier ADR summit was held in 2013 chiefly to focus on recommendations for promoting early ADR practices.<sup>2</sup>

To provide a focus for the Summit, the SCAO provided a set of seven questions to attendees in advance of the meeting. The set of questions appears as Appendix 2.

The Summit began with a presentation by Courtland Consulting on the key findings of its recent case evaluation/mediation study. Attendees were asked to identify “what’s working” in ADR before addressing areas of challenge and opportunity. Then small groups reported out their responses to the questions as well as additional considerations, and following the meeting, SCAO staff identified themes among the responses and sent a survey to attendees inviting further input on 12 topics. One-half (23) of the attendees responded to the survey.

This report incorporates recommendations provided at both the Summit meeting and through the follow-up survey.

## **What’s Working**

Summit participants were asked to briefly identify “what’s working” in current ADR practice. There seemed to be a general consensus on the notion that ADR was generally “working,” however that various aspects needed “tweaking.” Additional items said to be working include:

1. Standard discovery protocols/guidelines in civil/business cases.
2. Business court ADR, and particularly the early judicial conference.
3. The standing order to mediate all cases case-evaluated under \$25,000 [as exists in Wayne, Macomb, Oakland, and Kent Counties].
4. More attention is given to designing ADR process choices and their application.
5. Quick judicial settlement conferences for low-value cases.
6. Bench/bar meetings.
7. Discovery masters.
8. Mediation is working in all kinds of cases.
9. Mediation can help shorten the life of a case even if not settled.
10. Agreements are generally kept; compliance rates are high.
11. Parties generally follow judges’ orders to participate in mediation.
12. Joint sessions in mediation work.

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<sup>1</sup> The 2018 study of case evaluation and mediation practices appears here: <http://courts.mi.gov/Administration/SCAO/OfficesPrograms/ODR/Documents/2018%20Mediation%20and%20Case%20Evaluation%20Study.pdf>

<sup>2</sup> The 2013 Summit report appears here: <http://courts.mi.gov/Administration/SCAO/OfficesPrograms/ODR/Documents/ADRSummitReportSeptember4%2c2013.pdf>

## **The Study Questions**

An abbreviated version of the study questions follows.

1. What will the basis for evaluating claims and defenses be in an era where adjudication by judge or jury occurs in only one percent of cases, and settlement amounts are typically confidential?
2. What types of early engagement of a judge and mediator would be helpful in a case?
3. If mediation is evolving into traditional settlement conferences, what value would mediation hold in the future?
4. Should “problem-solving” approaches being developed to manage a growing number of conflicts in the judiciary be developed for general civil cases?
5. What can be done to advance parties’ awareness of mediation and other ADR processes?
6. To what extent are judges engaged in the mediator selection process when not requested by counsel, and what might SCAO do in response?
7. How much input/detailed control should a court have over the mediation process?

Attendees were also invited to identify any specific challenges not earlier identified, and to propose solutions and opportunities for improving ADR.

An expanded set of responses to the study questions appears in Appendix 3. Following the Summit, SCAO staff identified items for which it appeared that some action could be taken. These “actionable items” appeared to fall into four main categories:

### **Case Evaluation**

1. MCR 2.403 could specify that the evaluation be the “actual value” of the case or a recommended settlement number; currently, interpretations vary.
2. Award could provide a high/low settlement range rather than a single number.
3. Remove sanctions from the process.
4. Three business professionals/experts could deliberate, render an award and keep confidential, then work on settlement.
5. Make sanctions optional; only imposed upon stipulation of the parties.
6. Attorneys could provide anonymous reports of settlement amounts as a base of reference.
7. Promote more thoughtful awards by increasing the time evaluators spend with parties; adopt a sliding fee scale to compensate evaluators for their additional time.

## **ADR Education and Promotion**

1. Educate lawyers and judges about the array of ADR processes and timing of the involvement of neutral.
2. Promote more creativity in designing and selecting ADR processes.
3. Better lawyer preparation for ADR.
4. More focus on the value of joint sessions in mediation.
5. Require lawyers to advise clients of ADR.
6. Courts could include information about ADR's benefits and options in communications (notices and brochures) to parties.
7. Add mediation link to michiganlegalhelp.org, including how to find a mediator and local court rosters.
8. Develop incentives for early resolution.

## **Judges**

1. Educate judges about mediator selection rules; SCAO form could clarify the court rule prohibition of judicial selection unless requested by parties.
2. Develop guidance for judges on topics to discuss and effective tactics in holding scheduling conferences.
3. Judges should decide dispositive motions before conducting ADR.
4. Assess ADR options in light of the potential value of the case, and access to justice considerations, for example, the average hourly rate of lawyers (\$250).
5. Encourage early judicial involvement in a case.
6. Provide mediation training to judges, for example, a two or three-day program.
7. Develop a form for judges for use in considering mediation in all cases (checkboxes).
8. Address perceived cronyism in judges recommending specific mediators.

## **Other ADR Considerations**

1. Mandatory arbitration for Personal Injury Protection (PIP) cases.
2. Develop MED/ARB as a viable option.
3. Implement early case conferences to help focus discovery.
4. Implement quick judicial settlement conferences for cases of low value.
5. Explore the SCAO's "Court Express" concept: triage cases so that parties can have a disposition in three months.
6. Assess ADR options for managing the increasing number of PIP claims.
7. Scheduling order should require ADR, the specific method to be selected by the parties.
8. Develop capacity for online bench trials, mediation, and case evaluation; except jury trials, criminal, and complex civil cases.
9. Enlist State Bar sections to support increased funding for CDRP centers; encourage attorney Pro Bono service.

10. Develop online substantive law programs for CDRP centers.
11. Include ADR info on the Summons.
12. Expand/improve use of discovery masters.
13. Develop problem-solving approaches in civil litigation, carrying lessons from criminal docket.
14. Increase the diversity of neutrals.
15. Permit anonymous reporting of judges who disregard mediator selection rules.

After the Summit, participants received an online survey consisting of questions derived from the above “actionable items.” Fifty percent (23) of the Summit participants responded to the survey. The highest levels of support were for: (a) early judicial involvement in cases; (b) authorization of special masters to resolve discovery disputes; (c) amending the Michigan Rules of Professional Conduct to require lawyers to advise clients about ADR; and (d) limiting the use of case evaluation either to those cases for which the process is statutorily required, or to make it optional in all cases. Additional comments shared concerns about the lack of diversity among mediator practitioners, and in the engagement of judges in the mediator selection process. More detailed results follow:

Survey Statement	Agree or strongly agree	Neutral	Disagree or strongly disagree
Case evaluation should be made optional across <i>all</i> case types.	13	1	8
Case evaluation should be made optional for all cases except those statutorily required (torts/med-mal).	12	2	9
Sanctions provisions should be removed altogether.	6	4	13
Sanctions provisions should only apply if stipulated to by the parties.	8	4	11
Case evaluation panels should provide high/low settlement figures instead of a single proposed figure.	13	5	5
Case evaluation panels should provide a figure based on a likely verdict.	14	1	7
Case evaluation panels should provide a figure based on a recommended settlement amount.	12	5	6
Each panel session should last as long as necessary, even all day, with commensurate pay increases for panelists.	8	3	12
Judges should become involved early in civil litigation cases. <sup>3</sup>	17	1	5
The use of special masters to resolve discovery issues should be authorized.	17	5	1

<sup>3</sup> When asked how judges could best assist the parties, remarks focused on:

1. Early case triaging
2. Early judge-conducted case conferences with the parties present, possibly convening after the answer is received; design an efficient and effective discovery process
3. Clearly defining ADR expectations, e.g., identifying which ADR process would be most helpful, and the timing of the process
4. Earlier resolution of dispositive motions

Survey Statement	Agree or strongly agree	Neutral	Disagree or strongly disagree
There should be incentives for early resolution. <sup>4</sup>	7	13	3
The Michigan Rules of Professional Conduct should be amended to require lawyers to advise clients about ADR.	19	4	0
SCAO should provide an abbreviated mediation training program for judges.	20	2	1

Noted above, one question pertained to valuing claims in general: What will the basis for evaluating claims and defenses be in an era where adjudication by judge or jury occurs in only one percent of cases, and settlement amounts are typically confidential? One suggestion was to invite lawyers to voluntarily and anonymously publish settlement amounts. Asked in the survey to identify how likely it would be that lawyers would report this information, 11 respondents said lawyers would likely or very likely voluntarily publish case settlement amounts; 9 respondents were neutral; and, 2 said this would be unlikely or very unlikely.

Another study question asked about the extent to which judges were involved in the mediator selection.

Survey Statement	All of the time	About 75% of the time	About 50% of the time	About 25% of the time	Never
In your experience, how often do judges actively recommend specific mediators?	2	3	5	1	3
In your experience, when a judge recommends a specific mediator, how often is that mediator a retired judge?	1	2	5	3	3

When asked how the SCAO could research and address the issue, most comments centered on increasing education about the court rule prohibition on judges’ engaging in the mediator selection process unless requested by parties and providing anonymous means of reporting judges who disregard the court rule. The following are examples of remarks received:

1. SCAO should make a concerted effort to inform judges that this conduct is prohibited.
2. The SCAO should have an anonymous hotline or web-based reporting system to report judges who are alleged to have violated the court rule. Then, the judge should be investigated by an ombudsman. If a violation is found, the judge should be reminded of the requirement. If there are repeated violations, these should be reported to the JTC.
3. Provide for anonymous reporting and include (the court rule prohibition) with the scheduling order.

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<sup>4</sup> The following were identified as possible incentives:

1. If the case remains unsettled after early mediation, an earlier trial date could be made available;
2. Court pays for the first day of mediation;
3. Early resolution bonuses by insurers and corporate litigants;
4. Early “attempts” at resolution may be preferable, possibly offering an accelerated docket for cases that attempt early mediation.

4. Judges should be surveyed on a regular basis.
5. This is a very common practice in probate courts for contested cases in metro-Detroit (especially Oakland County). A confidential survey would be appropriate to research it. Better education would help as well. Many litigators and judge's staff attorneys are not even aware that this practice is not allowed.
6. SCAO and State Bar offer a confidential reporting vehicle. When a judge has received a number of credible complaints the Judge should be warned and when warranted reported to Judicial tenure.

A number of Summit comments expressed concern about the lack of diversity in the mediator pool in the state. The survey invited respondents to suggest how this issue could be addressed.

1. "Judges and other appointing authorities should be discouraged from looking only to the "usual suspects" to serve as mediators. People tend to use people they know, who tend to be people who look like them. Appointees must become acquainted with a larger pool, and the SCAO and Bar should recruit broadly."
2. "SCAO can contact minority Bar Associations, e.g. association of Black Judges of Michigan (ABJM), Wolverine Bar Association (WBA), Straker Bar Association, Arabic and Hispanic Bar Associations and express the need for mediators."
3. "Push the diversity initiative from the State Bar on down through each section and council to the local mediation clerks and tribunals."
4. "Steer potential mediators to the CDRPs [Community Dispute Resolution Program centers] for low-cost training and experience, and encourage ADR section to fund training scholarships."
5. "Include more people of color in all of SCAO's presentations to the Courts and to Bar Members so that Judges and attorneys will become "used to" and "familiar with" people of color handling presentations and managing and resolving disputes."
6. "I strongly believe in diversity, and hope the pool of competent mediators is diverse. However, I believe the best ADR system reflects a free market model, where the bar to become listed is relatively low, and it is up to the litigants and litigation counsel to decide who gets the work."
7. "I question this recommendation. I think it is based on the premise that a more diverse pool will serve a more diverse population. I question whether that premise is true. I think it is just as likely that an expanded pool will be competing for the same pool of disputants; the ones who can afford to pay for mediation. If the goal is to serve an underserved population, then provide free mediation based on income and divert court dollars to the CDRC's [Community Dispute Resolution Program centers]."

### **Additional Survey Comments**

Finally, the survey also provided an opportunity for respondents to convey any additional thoughts on Michigan's ADR practice. The comments, appearing in their entirety in Appendix 3, discuss mandatory/automatic mediation, early mediation, viewing mediation as more a case/discovery management process *en route* to reaching an omnibus settlement, qualifications



for judges serving as case evaluators, and the use of special case evaluation panels, among other topics.

### **Next Steps**

In addition to guiding the work of the SCAO's Office of Dispute Resolution and other SCAO divisions, this report can help encourage and guide the work of local bench/bar and State Bar of Michigan Sections in efforts to continue developing effective and efficient ADR services in the trial courts.

### **Acknowledgment**

SCAO extends its gratitude to Anne Bachle Fifer for her work in helping plan and co-facilitating the Summit, and in reviewing a draft of this report.

## Appendix 1

### Summit Participants

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Honorable Demetria Brue  
36th District Court  
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Mr. Thomas Bannigan  
Hom Arene Bachrach Corbett & Kramer  
Detroit

Honorable Robert Butts  
Cheboygan County Probate Court  
Cheboygan

Mr. Larry Bennett  
Seikaly Stewart & Bennett, PC  
Farmington Hills

Honorable Robert Colombo  
3rd Circuit Court  
Detroit

Honorable Annette Berry  
3rd Circuit Court  
Grand Rapids

Ms. Michelle Crockett  
Miller Canfield Paddock and Stone, PLC  
Detroit

Mr. Bruce Bigler  
Giarmarco Mulls & Horton, PC  
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Mr. Bernard Dempsey  
Wayne Mediation Center  
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Ms. Fatima Bolvea  
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Mr. Kevin Oeffner  
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Ms. Gwynne Starkey  
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Ms. Lisa Taylor  
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Honorable Betty Widgeon (Ret.) Widgeon  
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Honorable Christopher Yates  
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## Appendix 2

### ADR Summit Questions

1. Basis for evaluation: Attorneys are less enthusiastic about case evaluation than mediation, but mediators report that quite frequently, after some hours of “facilitative”-type discussions in mediation, attorneys nevertheless ask mediators for an evaluation. In prior decades, in settlement negotiations, experienced trial lawyers might suggest how jurors might respond to claims and defenses. In today’s environment, with adjudication rates at approximately 1 percent, fewer new lawyers and judges will have had trial experience, fewer trials will reduce an attorney’s ability to predict what a jury might do in any given case, and increasing use of ADR with confidentiality or non-disclosure provisions will reduce the amount of data available to determine settlement values.

Relatedly, the next generation of mediators, not having had significant trial experience, will have as the basis for providing evaluations only their own portfolio of mediation experience.

- A. In the years ahead, as the current cohort of experienced trial lawyers retire from practice, what mechanisms might be made available to provide lawyers with valuation information? What might these mechanisms look like?
- B. In the short term, should case evaluation as currently practiced be optional?
- C. Should the penalty (sanctions) provisions be eliminated or made optional?
- D. Should case evaluation be limited to cases for which it is statutorily required (torts and medical malpractice)? Put differently, should the current case evaluation process be replaced or complemented with some other means of providing attorneys with a means of valuing claims and defenses?

2. Timing of mediation: Based on the current study of case evaluation and mediation practices, a majority of lawyers believe that mediation is more helpful than case evaluation in reaching settlement, however mediation frequently takes place as a near-final event before trial, and often after case evaluation awards have been rejected. Judges opposed to mandatory mediation orders remark that since 99 percent of cases are disposed without adjudication, the additional expense and time of mediation late in the litigation lifecycle do not warrant mandatory referrals to mediation.

Some business court judges hold face-to-face conferences with attorneys and parties present early in the litigation to discuss the posture of the case, the status of settlement discussions, the scope of discovery, and the early identification of a mediator, if not to help parties reach a very early resolution, then to help resolve contested discovery issues.

- A. Would this type of early engagement of a judge and mediator early in a case be productive in other case types?

- B. How should some judges' concerns be addressed, that mediation saves neither time nor money since even without mediation, only 1 percent of cases are adjudicated? Put differently, is there a way of timing mediation so that there are more cost and time benefits to the process?

3. Mediation as a settlement conference: A key reason mediation court rules were advocated for in the late 1990's was for mediation to afford parties "an alternative to the judicial process." In implementing MCR 2.410 and MCR 2.411, the SCAO established a standard mediator training model that had as its foundation imparting mediator skills so that parties could directly engage with each other in a face-to-face setting to generate options and reach a solution (that might include both economic and non-economic terms) that they believed resolved their issues. While practices vary across the state, a recent trend in some areas is to place parties in separate rooms at the beginning of mediation and to keep them separate throughout, with the mediator shuttling back and forth.

Mediators report that this almost always eliminates the most significant part of the standard mediation model, which is to have the parties directly engaged in communications with each other to collectively generate possible resolutions, and instead requires mediators to filter and finesse offers and counter-offers. At the same time, litigators report that a court's order to participate in mediation is tantamount to having parties pay a private mediator to provide the equivalent of prolonged judicial settlement conference.

- A. If this is true, that parties do not directly engage each other to find mutually agreeable solutions, and that mediation is becoming the equivalent of an extended settlement conference, should the Michigan Court Rules continue to authorize judges to order parties, at considerable cost, to mediation? Why?

- B. Mediators report that the key reasons attorneys prefer separate room negotiations are related to fear: (a) fear of emotions/anger arising in the mediation session; (b) fear that the attorney's lack of preparation will become apparent to the client; (c) fear that counsel will determine that opposing counsel's client would present as a weak witness; and (d) fear that counsel's lack of understanding of how to effectively advocate in mediation, in contrast to an adversarial proceeding, will become known to other parties, other counsel, and the mediator.

1. Are these mediator reports valid?
2. If so, what steps can be taken to address attorney fears in mediation?
3. Are there other reasons lawyers are reluctant to have parties directly engage with each other? If so, what responses might be offered?

4. Problem-solving approach: "Problem-solving" is an increasing approach to a variety of conflicts brought into the judiciary. Michigan now has numerous types of problem-solving courts that address some of our society's most challenging issue areas, including mental health, drug, and sobriety problems, but the management of general civil cases still defaults to an adversarial approach until post-discovery, when mediation may be ordered, at which time parties are then encouraged to "problem-solve" their dispute.

For purposes of the following questions, “problem-solving” in general civil cases is defined as early triaging to determine: (a) what discussions have already taken place; (b) how far apart parties may be in reaching a resolution; (c) whether early engagement of a neutral may be helpful to manage discovery parameters; and (d) when it would be helpful for parties to meet in mediation to discuss a full settlement.

- A. To what extent, if any, should “problem-solving” approaches and processes be made available early in general civil litigation?
- B. What would an early problem-solving approach look like?

5. Awareness of mediation: UC Davis School of Law Professor Donna Shestowsky recently published a study of litigant survey responses in three states finding that relatively few litigants, whether represented or not, were aware of ADR services available in their court. This is the study’s abstract:

State courts have been overburdened with litigants seeking civil justice in a system still recovering from the economic downturn of 2008. In many cases, alternative dispute resolution procedures can provide litigants with relief from the expense and waiting time associated with trial. However, such procedures provide little opportunity for justice to litigants who are unaware of their existence. The present study examines litigants’ ability to identify their court’s mediation and arbitration programs. Following the disposition of their cases, litigants from three state courts were asked whether their court offered mediation or arbitration. Although all litigants had cases that were eligible for both procedures through their court, less than one-third of litigants correctly reported that their court offered either procedure. Represented litigants were not significantly more likely to know about their court’s programs than their unrepresented counterparts. *Litigants had more favorable views of their court when they knew it offered mediation* (as opposed to being unsure whether the court offered it), but a similar result did not emerge for arbitration. The implications of these novel findings for litigants, lawyers, and courts are discussed. [Emphasis added.]

Shestowsky, Donna, When Ignorance Is Not Bliss: An Empirical Study of Litigants’ Awareness Of Court-Sponsored Alternative Dispute Resolution Programs (April 3, 2017). Harvard Negotiation Law Review; <http://www.hnlr.org/wpcontent/uploads/Shestowsky-Updated.pdf>

- A. Without requiring participation in mediation via scheduling or other court orders, should courts, the State Bar of Michigan, or other entities do more to advance parties awareness of mediation or other ADR processes?
- B. If so, what specific actions should be taken, and by whom?

6. Judge-designated mediator: Mediators and litigators continue to report that, despite there being a court rule prohibiting judges from engaging in the mediator selection process unless explicitly requested by the parties, judges’ recommending or strongly encouraging specific

mediators without being asked by counsel remains a common practice. Because the mediators and litigators prefer not to identify the specific judges, however, the SCAO has been unable to confirm or address the practice in specific courts.

- A. If these reports are true, how common is the practice?
- B. Is this a problem that needs to be addressed?
- C. If so, how should the SCAO go about investigating and addressing this issue?

7. Court-ordered mediation details: Attorneys report that judges vary considerably on the extent to which they control the mediation process, e.g., identifying who should attend mediation, when it should occur, granting postponements, determining fee-splitting among multiple parties, etc.

- A. How much input/detailed control should a court have over the mediation process?
- B. Should court rules provide any additional guidance regarding the scope of judges' and mediators' authority in managing the mediation process?

8. Open-ended question: What recommendations would you like to offer the State Court Administrator and Michigan Supreme Court for improving ADR practices in the trial courts?

- A. Provide a specific problem/challenge, and if possible, please provide a specific solution. If you generate numerous recommendations, please prioritize them.
- B. If you don't have a specific problem in mind, but see an opportunity for advancing earlier and more efficient, effective, economical, and just dispute resolution, please discuss the opportunity as specifically as possible.



## Appendix 3:

### 2018 Summit Follow-Up Survey: Additional Comments

1. Misconceptions persist about ADR among lawyers and judges. E.g., failure to appreciate facilitative (vs. evaluative) mediation; tendency to assume people with litigation skills or public figures will make the best mediators, etc. Difficult to promote change in absence of mandatory CLE, but many of these problems persist even in mandatory CLE states. Old habits die hard.
2. The sooner ADR can be used the better. Sometimes, the parties don't need discovery and can get to mediation (the most common adr device used) immediately. So, the cases should be triaged at the beginning of the cases soon as an answer or other pleading is filed by all defendants to determine when cases can be mediated and what information is necessary to allow the parties to mediate. Then, if mediation fails, discovery could be broader.
3. Work with the SBM ADR Section to implement a court rule for automatic ADR absent an agreement by all parties to opt out. Then, provide options for the litigants to choose. If they don't choose some form of ADR, set mediation as the default method since it has the highest resolution rate.
4. I still believe case evaluation is helpful in resolving cases even if settlement occurs after the fact. Facilitation should typically occur prior to case evaluation if possible.
5. Our group suggested that mediation be redefined as a process for facilitating the case rather than just as a settlement procedure. Mediation should occur early to get the parties talking before positions harden. Mediation may happen in several sessions or just one and is useful to find common ground, change perspectives, narrow discovery, and narrow issues, as well as allowing for proposal exchange and resolution of some or all issues. The chart provided to Summit participants included, "Implement early case conference to help focus discovery," and "Expand/improve use of discovery masters," but I did not see early mediation or using mediators to help the parties resolve discovery issues and the other issues I mentioned above.
6. I support the concept of allowing courts and counsel to elect one or more appropriate forms of ADR in each case and substituting the choice of ADR for mandatory case evaluation. We need to streamline the court process so that cases that are not successful in an ADR setting can be promptly tried and resolved.
7. All cases (other than small claims and DV domestic) should be required to go through mediation. Mediators should be required to mediate at least two cases a year to maintain eligibility to be on a court roster.
8. Early, mandatory mediation would be useful, even if no settlement discussions occur, to help streamline discovery, open the dialogue between parties (and counsel), and help each side understand what the other is looking for (at least in non-tort cases, where the dispute is often about more than a "number", such as commercial, corporate, and probate disputes). In probate

litigation cases (which I primarily concentrate my practice in), mediation is often viewed rigidly as settlement negotiations through break-out sessions with the mediator shuttling back and forth. It can and should be so much more to open dialogues early in cases, narrow issues, refine discovery, and see if resolution can be possible through talking. While many probate judges realize the benefit of mediation, there is a strong tendency to recommend certain mediators to try to settle cases, and usually it's done late in discovery or after discovery. Early mediation may be very useful, using a diverse base of mediators.

9. MCR 2.404(B)(2)(c) requires that a substantial portion of the applicant's practice for the last 5 years must be devoted to civil litigation matters, including investigation, discovery, motion practice, case evaluation, settlement, trial preparation, and/or trial. The "and/or" should be removed and be replaced with "and" so that the Plaintiff and Defense case evaluators are actually current civil litigators, not just retired judges or attorneys who only practice ADR. However, if this is done, there should also be another section that allows retired judges and attorneys who have an active ADR practice to serve as the Neutral for the case evaluation panel. Within 30 days of the answer, the parties should have a pretrial scheduled and advise the court at to which ADR process they will participate. If no agreement, case evaluation to be set as a default.

10. Parties should be encouraged to utilize CE if mediation has not settled the matter but they should use a specialty panel of person with subject matter knowledge and there should be more time allowed for presentation and discussion, maybe even have decision makers present. The market should determine who it wishes to hire. 90% of the work goes to 10% of the neutrals. In part, because they are effective and in part because parties/counsel trust them. Cream rises to the top. Diversity in the ADR profession is difficult because it is a business that runs on reputation and experience. Younger attorneys lack experience in court annexed matters so it is hard for them to generate the neutral work and the experience as a neutral. The focus for younger and culturally diverse persons is to market to their specific market where they have stature and capital to rely on.

11. I think attorneys are reluctant to use mediation because: (1) they are not completely sold on the promise that mediation can really resolve matters early, (2) they don't want to decrease their billable hours and think that adding mediation and shortening the length of the conflict will cut into their bottom lines. (3) some mediation education should be required for all MI attorneys.

12. It would be efficient and productive for court rules or best practices to foster a case sequence where the task of preparing a case evaluation brief often equates with the task of preparing a summary disposition brief. Using substantially the same brief for both purposes reduces litigation cost.