

Michigan Supreme Court

Case Evaluation Court Rules  
Review Committee

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Report to the Michigan  
Supreme Court

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# Case Evaluation Court Rules Review Committee Report to the Michigan Supreme Court

## Background

Michigan’s case evaluation practice is governed by MCR 2.403. The selection of case evaluators is governed by MCR 2.404. Chiefly in response to growing criticism over the case evaluation process voiced by lawyers, the State Court Administrative Office (SCAO) commissioned a study in 2011 that, among other things, incorporated over 3,000 lawyers’ and judges’ survey responses and an assessment of the process’ impact on docket management. The study found that case evaluation added several months to case disposition times, that a significant number of lawyers felt the process was less valuable than mediation, and that judges rated the process more favorably than lawyers reported.<sup>1</sup> A follow-up study conducted in 2018, in which evaluators returned to three of the original courts and received survey responses from over 1,000 lawyers and judges, reported similar findings, however noted that support for the case evaluation process—among both lawyers and judges—had eroded further.<sup>2</sup>

Also in 2018, the SCAO convened an “ADR Summit” to assess the development of alternative dispute resolution (ADR) services in the state and to interpret the most recent case evaluation study’s findings. Among other recommendations regarding ADR practice in the state, a majority of attendees recommended that case evaluation should become voluntary and that the sanctions provisions should be removed.<sup>3</sup>

In light of this recommendation, in 2019, the SCAO convened the Case Evaluation Court Rules Review Committee to further assess the efficacy of the current case evaluation rules and to recommend to the Michigan Supreme Court any amendments the committee deemed appropriate.

## Committee Procedure and Issue Identification

The committee met four times between April 3 and October 21, 2019. After reviewing the recent case evaluation study results, the committee identified a number of areas of concern with the case evaluation process. These included:

### 1. Lack of Credibility of the Process

Many committee members stated that the case evaluation process lacks credibility among lawyers. Reasons for the lack of credibility included:

- panelists’ lack of subject matter expertise and court experience
- lawyers’ focusing on “winning case evaluation” rather than working toward settlement

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<sup>1</sup> The study appears here: [courts.mi.gov/2011CaseEvaluationStudy](https://courts.mi.gov/2011CaseEvaluationStudy)

<sup>2</sup> The follow-up study appears here: [courts.mi.gov/2018CaseEvaluationStudy](https://courts.mi.gov/2018CaseEvaluationStudy)

<sup>3</sup> The ADR Summit report appears here: [courts.mi.gov/2018ADRSummitReport](https://courts.mi.gov/2018ADRSummitReport)

- lawyers' lack of preparation for the hearing
- game-playing with the timing of submitting the case evaluation summaries
- the brevity of the process (in taking only 10-15 minutes in some jurisdictions)
- the cost of the process (summary-writing, chiefly)
- clients being locked out of the process and not understanding why they are not seeing the judge

## 2. Unclear Purpose of the Process

The committee noted that the purpose of case evaluation—whether to provide an actual value of claims and defenses, or to provide a reasonable settlement figure—has never been addressed in the court rule. Noting that in the former case, a very low or even zero valuation would not likely result in settlements, some committee members suggested that if the rule is retained, the stated purpose should be to provide a figure that parties could reasonably accept as a settlement. Other members believed the purpose may be case-dependent in that some parties may wish a “true” value of the case, while others may prefer a suggested settlement value.

## 3. Excessive Written Summaries

Despite court rule limitations on the size of the summaries under MCR 2.403(I)(3), committee members reported that summaries are too long, particularly when accompanied by limitless exhibits, and frequently arrive too late to be effective. The penalty for late filing (\$150) was viewed as too low to address the issue, prompting the committee to discuss whether to recommend reducing the due date to seven days prior to the hearing, and increasing the penalty for late filing.

## 4. Lack of Diversity

Committee members remarked that women and people of color remain poorly represented on case evaluation panels.

## 5. Unfairness and Inappropriateness of Sanctions

One purpose of sanctions was said to be “to make unreasonable people reasonable,” but sanctions were also said to unfairly penalize plaintiffs who may have a single case, in contrast to an insurance company that as a part of doing business could absorb sanctions across a large portfolio of cases.

## 6. Mandatory Participation

The committee noted that some states have similar processes, but more resemble non-binding arbitration and have caps on the dollar values of claims being evaluated, e.g., \$100,000, and do not have sanctions provisions.

## 7. Ineffective in Prompting Early Settlement

The committee noted that because case evaluation occurs late in the litigation life cycle, attorneys have no incentive to seriously assess a case and make settlement proposals prior to the case evaluation hearing. Members reported that typically less than 20 percent of awards are accepted by all parties within the 28 day acceptance/rejection window. Other members cited that the award nevertheless contributes to subsequent settlement negotiations and that judges use the award amount in promoting settlement during pretrial conferences.

A number of committee members noted that mediation is significantly more effective than case evaluation because in many cases, and particularly pre-filing, parties voluntarily choose to use mediation and also choose their mediator.

One suggestion was to require case evaluation in non-complex cases, as a means to get lawyers to look at their case, meanwhile making case evaluation optional in complex cases.

## 8. Hybrid Mediator/Case Evaluator Role

Examples of mediators assuming the role of case evaluators were noted. Some committee members questioned the authority for this, while one member said it offered broader flexibility than case evaluation alone, in that the mediator could consider liens, structured settlements, and trusts. The committee noted that the role of “evaluative mediator” already exists in MCR 3.216 (Domestic Relations Mediation) and could be recommended for inclusion in MCR 2.411 (General Civil Mediation).

## 9. Attributes of an Effective ADR System

The committee then identified what it considered to be attributes of an effective ADR system. These included the notions that:

- parties should have a choice of ADR processes
- judges should become involved in cases earlier, as in the business court cases (includes triaging the case for appropriate ADR processes and timing)
- the job of a case evaluator should be clarified such that panelists should not be participating as “advocates” for plaintiffs or defendants
- emphasis should be on “smarter” processes, not necessarily “faster,” for example, stage discovery, attempt mediation of discovery disputes, then conduct depositions, then conduct a final mediation

Recognizing that some attorneys still find the case evaluation process helpful, and to take into account the growing use of mediation and availability of other ADR process, the emerging vision for rule amendments would maximize party choice in the selection of an ADR process by allowing parties to waive participation in case evaluation by having a stipulated order to participate in an alternative ADR process. The stipulation would identify what ADR process they will use, who the intended neutral is, and when the process will take place. Case evaluation would remain the

default ADR process in cases in which parties that either wish to use it or where parties fail to obtain a stipulated order to use another process.

The committee also concluded that sanctions provisions should be removed for a variety of reasons, including that they were viewed as primarily working against plaintiffs, force settlements that are not based on the merits of claims and defenses, and are no longer needed. This led to a similar conclusion in the committee's consideration of MCR 2.405 (Offers to Stipulate to Entry of Judgment), that the sanctions provisions are not helpful in resolving cases and are no longer necessary.

Following the committee's drafting amendments to MCR 2.403, 2.405, and 2.411, the proposals were sent to a variety of judicial associations and State Bar of Michigan sections for informal comment. The comments received were considered at the committee's final meeting on October 21, 2019.

### **Committee Discussions**

Reflecting on both the evaluation studies and the concerns identified above, except where noted, the committee agreed on the following points:

1. Some form of mandatory or automatic ADR is needed.
2. Case evaluation should only be ordered if parties have not stipulated to their preferred ADR process in their early discovery plan. Case evaluation sanctions should be removed. "Sanctions" is the tail wagging the dog: it prompts settlements, but not based on the merits of the case. [One committee member opposed this notion and would retain the rule and sanctions as they presently appear.]
3. Having a variety of ADR processes available beyond just case evaluation is helpful.
4. Any new case evaluation proposals should be integrated with the new authority for parties to submit a "discovery plan" to the court under MCR 2.401.
5. Litigants should have more control over identifying processes that lead to a resolution of their case.
6. The right to trial should be preserved.
7. The rights of parties to opt out of ADR altogether should be preserved if that is what they put in their early discovery plan. Parties should determine if ADR is appropriate in their plan. [One committee member opposed this notion and would retain the rule and sanctions as they presently appear.]
8. If parties cite the prohibitive cost of ADR in their discovery plan, they should not be forced to use it.

9. Case evaluation outcomes could include providing: a high/low valuation; an actual value; or a settlement value.
10. “Gamesmanship” in the process should be eliminated.
11. MCR 2.405 (Offer of Judgment) should be updated to reflect the removal of sanctions in MCR 2.403.
12. The “evaluative mediation” process should be adopted in MCR 2.411.
13. Increase the competency of case evaluation panel members.
14. Case evaluation summaries and attachments should be due 7 days before the hearing.
15. Request the ADR Section to develop a recruitment system for case evaluators.

The committee lacked consensus on the following topics:

1. Increasing late fee. Some members felt the cost would simply be passed along to the client.
2. Summary and exhibits should not exceed 25 pages. Some members felt that critical documents may exceed 25 pages.
3. Providing documents at the time of the hearing should be prohibited. Some members felt that critical documents becoming available just prior to the hearing should be considered. If not considered, it is near certain that the award will be rejected.

#### Case Evaluator Qualifications

The committee considered a number of options in response to complaints about the lack of qualifications of case evaluation panelists, including:

1. Having a three-, two-, or one-member panel as in arbitration. Parties could pick one panelist from a list, then the other party picks, and the two panelists then pick a third.
2. Creating a web-based clearinghouse of case evaluators that permits ratings and reviews (e.g., to identify who is fast, inexpensive, and accurate). Otherwise, provide a means for parties to endorse effective evaluators.
3. Provide case evaluation training, for example, a mandatory 8-hour training course by subject matter categories to achieve a higher level of subject matter competence.
4. Develop semi-pro circuit rider panels that go from area to area.
5. Provide a statewide list of case evaluators.

6. Provide public funding of case evaluation.
7. Create a video on how to conduct case evaluation.

The single qualification-related item the committee did recommend was to expand the period of time in which the experience of neutral case evaluator applications could be considered. The increasing difficulty in identifying neutral case evaluators over a period of just five years prompted committee members to recommend that an applicant's experience up to 15 years may be considered, as well as other ADR experience as a neutral, such as serving as a mediator.

Otherwise, the committee concluded that if case evaluation is made optional and the sanctions provisions are removed, it is uncertain how large a problem "credibility of the panels" will be in the future.

### **Rule Proposals and Discussion**

The committee (with one dissenting member) recommends the following rule proposals for adoption by the Michigan Supreme Court. A discussion of the proposals follow each rule.

#### 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 unless the parties stipulate to an ADR process as outlined in subsections (A)(2)-(3) of this rule. Parties who participate in a stipulated ADR process approved by the court may not subsequently be ordered to participate in case evaluation without their written consent.
- (2) In a case in which a discovery plan has been filed with the court under MCR 2.401(C), an included stipulation to use an ADR process other than case evaluation must:
  - (a) identify the ADR process to be used;
  - (b) describe its timing in relation to other discovery provisions; and,
  - (c) be completed no later than 60 days after the close of discovery.
- (3) In a case in which no discovery plan has been filed with the court, a stipulated order to use an ADR process other than case evaluation must:
  - (a) be submitted to the court within 120 days of the first responsive pleading;
  - (b) identify the ADR process to be used and its timing in relationship to the deadlines for completion of disclosure and discovery; and,
  - (c) be completed no later than 60 days after the close of discovery.

~~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.~~

~~(34) 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)-(b) [Unchanged.]

(c) on the judge's own initiative if parties have not submitted an ADR plan under subsection (A).

(2) [Unchanged.]

(C)-(H) Unchanged.

(I) Submission of Summary and Supporting Documents.

(1) Unless otherwise provided in the notice of hearing, at least ~~14~~7 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~~7 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. Filing and serving the materials identified in subrule (1) within 24 hours of the hearing subjects the offending attorney or party to an additional \$150 penalty. An offending attorney shall not charge the penalty to the client, unless the client agreed in writing to be responsible for the penalty.

(3) [Unchanged.]

(J) [Unchanged.]

(K) Decision.

(1) Within 14 7 days after the hearing, the panel will make an evaluation and notify the attorney for each party of the panel's evaluation in writing. If an award is not unanimous, the evaluation must so indicate.

(2)-(5) Unchanged.

(L)-(N) Unchanged.

~~(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.~~

~~(e) 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 MCR 2.626.~~

~~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.~~

#### Discussion:

The committee first considered whether to simply recommend that case evaluation be abandoned altogether. Citing the above-mentioned studies’ findings that some lawyers still found the process to be worthwhile, the committee turned to whether the rule could simply be fixed to address the problems with the process. After lengthy discussion about the interrelationship of the numerous criticisms of the process noted above, and particularly in the recruitment, training, payment of, and retention of a diverse group of quality case evaluators, committee members concluded that the process could not be “fixed,” and that a better means of addressing criticisms was to afford parties the option of selecting a process they deemed better and more appropriate for their case than case evaluation.

The resulting proposals retain the central notion of MCR 2.403 that courts may consider case evaluation to be their default ADR process. Only in circumstances where a judge issues an order approving the parties’ stipulation to use a different ADR process may parties be exempted from participation in case evaluation. If parties do not file a stipulation, or if the stipulation is not approved by court order, they may be ordered to participate in case evaluation.

The committee also concluded that, in light of the adoption of amendments to MCR 2.401(C) (effective January 1, 2020) regarding the filing of discovery plans with the court, a single stipulated plan incorporating both discovery and ADR should be permitted to (a) make sure that discovery and ADR are considered together; and (b) to reduce the number of steps and parties must take to obtain an order addressing both discovery and ADR.

If parties do not file a discovery plan under MCR 2.401(C) the parties could file a separate stipulation to use an ADR process other than case evaluation. The stipulation must be received early in the case--within 120 days--and must identify which ADR process will be used, and when it will take place. Nothing in the proposals precludes a court from requiring additional information about the selection or timing of the ADR process as currently permitted under MCR 2.410(C).

Requiring an order following receipt of an ADR plan identifying the ADR process and timing was thought necessary to preclude parties’ simply averring that they will participate in some unidentified process at an indeterminate time, leaving courts without a means of effectively managing the case toward disposition.

With one member dissenting, the committee voiced strong support for eliminating the “sanctions” provisions of the rule. The reasons included:

1. Sanctions were thought to primarily penalize plaintiffs who had a single case, thus assuming a far higher level of risk of a negative outcome at trial than an insurance carrier who could spread the risk (meaning costs) among hundreds of other cases.
2. Sanctions for failure to accept an award that a lawyer believed was provided by a panel not competent to completely assess the merits of the case were viewed as unjust, and thus basing the disposition of the case not on the true merits of the claims and defenses, but rather on the fear that sanctions may attach.
3. Lack of any evidence, empirical or otherwise, that sanctions provided meaningful value to parties or the court.
4. Some judges use the threat of sanctions to “strong-arm” settlements during pre-trial conferences.

The committee believed that this approach would best address these concerns, chiefly in maximizing parties’ opportunities to select the ADR process and ADR provider that best suits a given case, and permitting parties to try or settle cases on the merits of the claims and defenses without the threat of sanctions.

The dissenting view reflected concerns that (a) the proposed changes to MCR 2.403 do not balance the need for flexibility with the realities of a high volume docket, like Wayne County’s, in which the vast majority of civil cases are no-fault “PIP” and auto negligence cases; and (b) the proposed amendments lack the specificity, structure, and enforceability mechanisms inherent in case evaluation, and this would be detrimental to effective docket management.

Alternative provisions offered included:

1. Retaining case evaluation as the default process for PIP and auto negligence cases unless a motion is filed within 28 days of the filing of the first responsive pleading and entry of an order by the court.
2. The order for an alternative ADR process should include details such as the name of the ADR provider; date the ADR process is scheduled to take place; guidelines for the ADR process; and, date by which ADR must be completed.
3. Rather than eliminate sanctions provisions, give judges the discretion to refuse to award sanctions in the interest of justice.
4. Make the proposed “interest of justice” standards in MCR 2.405 applicable to case evaluation.

In addressing the alternative proposals, the committee believed that addressing a single case type in a single court should be locally managed and should not guide the drafting of rules affecting courts throughout the state. Additionally, the committee noted that since waiver of case evaluation would require an ADR plan's approval by Order, a court simply could deny issuance of an order. This would still permit the parties to pursue other ADR options pre-case evaluation. Further, members suggested that the new discovery rule amendments, effective January 1, 2020, with provisions for early disclosures, are likely to improve courts' management of civil lawsuits, including auto negligence actions.

Regarding the specificity of parties' ADR plans, committee members expressed that early in the litigation parties may not be able to identify which ADR provider may best suit the case, the date of the provider's availability months away, or even which ADR process, whether non-binding arbitration, mediation, neutral evaluation, etc., may be most appropriate. Additionally, these items could be locally addressed in guidance the court provides in terms of its expectations in drafting discovery plans.

Regarding sanctions, the committee maintained its earlier recommendation to remove the provisions from MCR 2.403 and 2.405.

Under subrule (K)(1), the reduction of the time to notify attorneys of the award from 14 to 7 days is intended to reflect the current practice in which parties are most typically provided with the award at the hearing. The committee also considered reducing the time to accept or reject the award from 28 days to 14 days under subrule (L)(1), taking into account how technology permits quicker correspondence, a number of members cited circumstances where owing to the need to secure various levels of authority through local, regional, and national offices, 14 days would be too tight a deadline for clients to meet. The proposal was not adopted.

#### Rule 2.404 Selection of Case Evaluation Panels

(A) [Unchanged.]

(B) Lists of Case Evaluators.

(1)-(3) [Unchanged.]

(4) Specialized Lists. If the number and qualifications of available case evaluators makes it practicable to do so, the ADR clerk shall maintain

(a) separate lists for various types of cases, and,

(b) where appropriate for the type of cases, separate sublists of case evaluators who primarily represent plaintiffs, primarily represent defendants, and neutral case evaluators whose practices are not identifiable as representing primarily plaintiffs or defendants.

Neutral evaluators may be selected on the basis of the applicant's representing both plaintiffs and defendants, or having served as a neutral alternative dispute resolution

provider, for a period of up to 15 years prior to an application to serve as a case evaluator.

(5)-(8) [Unchanged.]

(C)-(D) [Unchanged.]

Discussion:

One issue brought to the committee concerned primarily larger courts' decreasing ability to identify "neutral" case evaluators for purposes of assignment on specialty sublists. While MCR 2.404 (B)(2)(d) currently requires that applicants demonstrate "...an active practice in the practice area for which the case evaluator is listed for at least the last 3 years," committee members shared their observation that lawyers more frequently switch between plaintiff and defendant representation and law practice areas than in the past. Accordingly, as to neutrals only, the proposed amendment would permit assessing an applicant's representation of both plaintiffs and defendants for a period of up to 15 years.

#### Rule 2.405 Offers to Stipulate to Entry of Judgment

(A) Definitions. As used in this rule:

(1)-(3) [Unchanged.]

(4) "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 offer of judgment, including a motion entering judgment on an arbitration award.

(5) [Unchanged.]

(6) "Actual costs" means the costs and fees taxable in a civil action and a reasonable attorney fee, dating to the rejection of the prevailing party's last offer or counteroffer, for services necessitated by the failure to stipulate to the entry of judgment.

(B)-(C) Unchanged.

(D) Imposition of Costs Following Rejection of Offer. If an offer is rejected, costs are payable as follows:

(1)-(2) [Unchanged.]

(3) The court shall determine the actual costs incurred. The court may, in the interest of justice, refuse to award an attorney fee under this rule. Interest of justice exceptions may apply, but are not limited to

(i) cases involving offers that are token or de minimis in the context of the case; or

(ii) cases involving an issue of first impression or an issue of public interest.

(4)-(6) [Unchanged.]

(E) This rule does not apply to class action cases filed under MCR 3.501.

~~(E) Relationship to Case Evaluation. Costs may not be awarded under this rule in a case that has been submitted to case evaluation under MCR 2.403 unless the case evaluation award was not unanimous.~~

Discussion:

The “offer of judgment” rule, MCR 2.405, came to the committee’s attention chiefly as a result of its conclusion that with case evaluation made optional for persons selecting other ADR processes, and the removal of sanctions, far greater use would be made of the offer of judgment. This prompted a more in-depth review of current practice under this rule.

The committee concluded that owing to the implications of recommended amendments to MCR 2.403, current MCR 2.405(E), regarding the relationship between case evaluation and the offer of judgment, is unnecessary.

Additionally, several proposed amendments were suggested by holdings in appellate cases as well as recurring problems in practice under this rule raised by committee members.

The committee recommends amending the definition of “verdict” under MCR 2.405(A)(4)(c) to include a motion entering judgment on an arbitration award. This provision adopts the holding of *Simcor Construction, Inc v Trupp* (322 Mich App 508, 2018), in which the court held that a “judgment” includes one issued following a motion to enter a judgment on an arbitration award.

Committee members noted that MCR 2.405(A)(6) is unclear as to the date at which costs and fees may become taxable, and reasoned that to maximize the rule’s effectiveness, the date should be tied to the date of the rejection of the prevailing party’s last offer or counter offer.

Committee members also noted that several appellate cases have considered refusing to award costs “in the interest of justice” under MCR 2.405(D)(3). The proposed examples of exceptions are drawn from *31341 Van Born Rd, LLC v McPherson Oil Company* (unpublished per curiam opinion of the Court of Appeals, issued May 16, 2019, (Docket No. 342740), which are in turn derived from *Luidens v 63<sup>rd</sup> Dist Court*, 219 Mich App 24, 1996. The committee believed it important for the rule to reflect these cases’ holdings that *de minimis* offers should not serve as the basis for determining costs, nor should costs be assessed in cases of first impression or public interest.

Finally, the committee considered whether this rule should apply in class action lawsuits, particularly where an individual plaintiff may have just hundreds of dollars at stake, and the defendant is a large corporate entity. The committee concluded that the rule could operate so inequitably as to plaintiffs that an exception should be made for this case type.

## Rule 2.411 Mediation

(A)-(H) [Unchanged.]

### (I) Evaluative Mediation.

- (1) This subrule applies if the parties requested evaluative mediation, or if they do so at the conclusion of mediation and the mediator is willing to provide an evaluation.
- (2) If a settlement is not reached during mediation, the mediator, within a reasonable period after the conclusion of mediation shall prepare a written recommendation for settlement purposes only. The mediator's recommendation shall be submitted to the parties of record only and may not be submitted or made available to the court.
- (3) If both parties accept the mediator's recommendation in full, within 21 days the attorneys shall prepare and submit to the court the appropriate documents to conclude the case.
- (4) If the mediator's recommendation is not accepted in full by both parties and the parties are unable to reach an agreement as to the remaining contested issues, the mediator shall report to the court under subrule (C)(3), and the case shall proceed toward trial.
- (5) A court may not impose sanctions against either party for rejecting the mediator's recommendation. The court may not inquire, and neither the parties nor the mediator may inform the court, of the identity of the party or parties who rejected the mediator's recommendation.
- (6) The mediator's recommendation may not be read by the court and may not be admitted into evidence or relied upon by the court as evidence of any of the information contained in it without the consent of both parties. The court shall not request the parties' consent to read the mediator's recommendation.

### Discussion:

Committee members suggested that MCR 2.411 should reflect the increasingly common practice of mediators being asked to provide a valuation at some point in the mediation process. Some members observed that a variety of “evaluative” ADR processes already exist, as appearing in the SCAO’s “Michigan Judges Guide to ADR Practice and Procedure,” and that recently adopted MCR 2.411(H), effective January 1, 2020 already permits “discovery mediators” who may also be experts. Concluding that the court rule should nevertheless comport with common practice, the proposal outlines an evaluative mediation process and is modeled on the “evaluative mediation” provision already appearing in MCR 3.216(I) regarding domestic relations mediation.

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