Michigan Supreme Court

Dispute Resolution Task Force

Report to the Michigan Supreme Court

January 1999

State Court Administrative Office
309 N. Washington Square
Lansing MI 48933

Contents

Task Force Members

Ms. Karen P. Agacinski
Judicial Staff Attorney
6th Circuit Court
Pontiac

Mr. Jeffrey S. Albaugh
Calhoun County Circuit Administrator
Friend of the Court
37th Circuit Court
Battle Creek

Mr. Keith Beasley
Court Administrator
16th Circuit Court
Mt. Clemens

Ms. Donna Beaudet
Court Administrator
46th District Court
Southfield

Mr. Laurence D. Connor
Attorney-at-Law
Dykema Gossett PLLC
Detroit

Mr. Dennis Devaney
Professor
Wayne State University Law School
Detroit

Hon. Martin Myles Doctoroff
Michigan Court of Appeals
Southfield

Mr. William Donohue
Professor, Dept. of Communications
Michigan State University
East Lansing

Ms. Pamela Chapman Enslen
Attorney-at-Law
Miller, Canfield, Paddock & Stone
Kalamazoo

Mr. Clive D. Gemmill
Assistant Attorney General
Lansing

Ms. Amy J. Glass
Attorney-at-Law
Michigan Mediation & Arbitration Services
Kalamazoo

Hon. Dawnn M. Gruenburg
Chief Judge
37th District Court
Warren

Mr. Hanley M. Gurwin
Attorney-at-Law
Dickinson Wright P.L.L.C.
Bloomfield Hills

Ms. Jacqueline Hall-Keith
Attorney-at-Law
Director
Michigan Dept. of Civil Rights
Office of Legal Affairs
Detroit

Mr. Edward Hartfield
Executive Director
National Center for Dispute Settlement
Southfield

Mr. Richard Hurford
Attorney-at-Law
MASCO Corporation
Taylor

Ms. Dale Ann Iverson
Attorney-at-Law
Smith, Haughey, Rice & Roegge, PC
Grand Rapids

Hon. Charles W. Johnson
57th Circuit Court
County Building
Petoskey

Mr. Allyn D. Kantor
Attorney-at-Law
Miller, Canfield, Paddock & Stone
Ann Arbor

Hon. John N. Kirkendall
Chief Judge
Washtenaw County Probate Court
Ann Arbor

Hon. Dennis C. Kolenda
Chief Judge
17th Circuit Court
Grand Rapids

Ms. Karen Livingston-Wilson
Vice President and General Counsel
Citizens Insurance Co. of America
Howell

Ms. MaryAnne Macy
Court Administrator
13th Circuit Court
Traverse City

Hon. David W. McKeague
U.S. District Court, W D
Lansing

Mr. James McNally
Settlement Director
Michigan Court of Appeals
Detroit

Ms. Amy L. Meilink
Attorney-at-Law
Legal Services of Eastern Michigan
Midland

Hon. Patricia L. Micklow
Chief Judge Pro Tempore
96th District Court
Marquette

Mr. Harry Mika
Professor
Central Michigan University
Mt. Pleasant

Ms. Donna Morris
Friend of the Court
34th Circuit Court
West Branch

Hon. Nathaniel C. Perry III
Chief Judge
68th District Court
Flint

Hon. Michael Petoskey
Chief Judge
Grand Traverse Band of
Ottawa and Chippewa Indians
Traverse City

Mr. Martin Reisig
Attorney-at-Law
Birmingham

Ms. Mary Jo Schumacher
Alternative Dispute Resolution Clerk
U.S. District Court
Grand Rapids

Hon. Edward Sosnick
Chief Judge
6th Circuit Court
Pontiac

Hon. Cynthia Diane Stephens
Chief Judge Pro Tempore
3rd Circuit Court
Detroit

Ms. Marti Van Haecke, A.C.S.W.
Coordinator, Family Counseling Services
Muskegon Co. Friend of the Court
Muskegon

Mr. Robert J. VerHeulen
Attorney-at-Law
Meijer, Inc.
Grand Rapids

Ms. Deborah Zondervan
Executive Director
Dispute Resolution Center of West Michigan
Grand Rapids

Ms. Zena D. Zumeta
Attorney-at-Law
Ann Arbor Mediation Center
Ann Arbor

Facilitators/Staff:

Doug Van Epps, State Court Administrative Office
Tom Shea, Shea & Shea
Tara Verdonk, State Court Administrative Office
Peter Stathakis, Michigan Judicial Institute

Task Force Purpose

The Michigan Supreme Court Dispute Resolution Task Force was convened in early 1998 to provide recommendations to the Supreme Court to guide the continued development of “alternative dispute resolution” (ADR) processes in the Michigan trial courts.

The Task Force was charged to:

- Provide recommendations to the Michigan Supreme Court for integrating dispute resolution processes in the trial courts, including the MCR 2.403 "case evaluation" process, “facilitative mediation,” and other dispute resolution processes.

- Provide recommendations for new and amended court rules, guidelines, standards, and proposed statutory amendments which would facilitate the integration of dispute resolution processes in the state trial courts.

The Task Force was also provided with a set of goals to be considered in developing its recommendations. The purpose of enhancing dispute resolution options in the Michigan trial courts should be to:

- Provide more dispute resolution choices for litigants
- Establish a more "user-friendly" court system
- Promote early resolution of disputes
- Increase the involvement of parties in the process of resolving their disputes
- Increase parties' satisfaction and compliance with the results of dispute resolution
- Assist parties in developing a wider range of outcomes than are available through adjudication
- Provide access to processes that are less formal and intimidating than the traditional adjudicatory process
- Increase the court's ability to resolve cases within given resources
- Decrease the cost to parties of resolving disputes
- Ensure consistency and quality of alternative dispute resolution services in the state’s trial courts, and to the extent possible, with the federal and state court appellate mediation programs
- Seek and promote an integrated dispute resolution system in the courts

Task Force Process

The 39-member Dispute Resolution Task Force first met on April 28, 1998. After identifying a host of issues for discussion, members grouped the issues into six key areas. Work groups were established around these six areas, and members spent several meetings developing recommendations and rule proposals in the various issue areas. Work group reports were circulated for comment, and the final recommendations of the work groups served as the basis for the recommendations and proposed new and amended court rules in this report. The six workgroup topics were:

- Ethics & Code of Professional Responsibility
- Training
- Timing, Case Management & Scheduling
- Monitoring/Evaluating Program Services & Quality Assurance
- Voluntary/Mandatory Referral of Disputes
- Domestic Relations

The Task Force held its final meeting on October 30, 1998. Task Force members reviewed and commented on drafts of this Report through January 15, 1999.

Background of ADR in Michigan

Michigan state and federal courts afford numerous dispute resolution techniques to complement the traditional litigation process of dispute resolution. While such processes as arbitration, mediation, and summary jury trials have been available to litigants on a voluntary basis, the case evaluation process mandated for tort cases has been the most widely used "alternative" dispute resolution process. The case evaluation process (called "mediation" in MCR 2.403) is designed to provide an independent assessment of the value of a claim.

Since 1990, the Michigan Supreme Court, State Court Administrative Office, has administered the Community Dispute Resolution Program (1988 PA 260; MCL 691.1551), through which 3,500 disputes are annually resolved through a network of 25 nonprofit organizations. Approximately one-half of the cases opened at the community dispute resolution centers are matters pending in Michigan's trial courts. Volunteer mediators receive 40 hours of training approved by the State Court Administrative Office. The Community Dispute Resolution Program also incorporates the specialized mediation services of the Michigan Agricultural Mediation Program, the Special Education Mediation Program, and the Permanency Planning Mediation Project in addition to providing mediation in ADA, EEOC, and personal protection order contested matters.

In January 1996, the U.S. District Court for the Western District of Michigan began a voluntary facilitative mediation (VFM) program utilizing trained mediators. In the first six months of 1998, lawyers in 49 cases selected VFM to assist in the resolution of disputes; of 32 cases completing the process during the same six-month period, 24 (75%) were resolved. In the same period, lawyers in 64 cases selected the case evaluation process equivalent to Michigan's MCR 2.403 process; of the 35 cases completing the process during the period, 13 (37%) were resolved. Due to the success of the VFM program, in May 1998, the court trained additional mediators and has expanded the program to include the Upper Peninsula (Northern Division).

Following a successful pilot program, the Michigan Court of Appeals implemented a mandatory mediation program in January 1998. Two staff attorneys conduct in-person and telephone conferences at no charge to the parties. The parties may also retain the services of outside mediators, but this aspect of the program is infrequently used. The court's program has not only increased the settlement rate but has also improved the timing. Cases are being settled early in the appellate process, before the court's research staff has devoted time to preparing research reports and before the cases have been assigned to judges.

At the time of the formation of the Task Force, voluntary mediation processes for the resolution of civil matters had become available in the Grand Traverse, Macomb, and Oakland County Circuit Courts, and in the Washtenaw and Berrien County Trial Courts. Mediation of minor juvenile criminal matters was available in the Family Division of the Muskegon and Isabella County Circuit Courts, and pilot-testing of mediation in child

protective proceedings began in six jurisdictions through the Permanency Planning Mediation Program.

In addition to these developments, it is important to note that other forms and techniques of dispute resolution have been available, if not significantly used in some cases, in Michigan's trial courts. These include:

- Domestic Relations Mediation (MCR 3.216)
- Friend of the Court Mediation (MCL 552.513)
- Summary Jury Trial (Administrative Order 1988-2, expired June 30, 1997)
- Arbitration (MCR 3.602; MCL 600.5001-600.5035)

The need for offering alternative dispute resolution processes in the state trial courts has been underscored in numerous prior Task Forces convened by or having the participation of the Michigan Supreme Court. Reports containing recommendations for the increased availability of ADR in Michigan's trial courts include:

- Citizens' Commission to Improve Michigan Courts, Michigan Supreme Court, 1986
- Michigan Supreme Court Task Force on Racial/Ethnic Issues in the Courts, 1989
- Michigan Supreme Court Task Force on Gender Issues in the Courts, 1989
- Michigan's Courts in the 21st Century, A Report to the Legislature, Governor, and Supreme Court, 1990
- Charting the Course for Michigan Justice, A Report to the Michigan Supreme Court, 1995.
- The Michigan Plan: A State-Based Plan for the Delivery of Civil Legal Services to the Poor, 1995
- Mission, Vision and Fundamental Values of the Michigan Judicial System, 1995
- An Evaluation of Michigan's Community Dispute Resolution Program, 1996
- State Bar of Michigan Task Force on Racial/Ethnic and Gender Issues in the Courts and the Legal Profession, 1998
- Michigan Trial Court Assessment Commission Final Report, 1998

Definitions

For nearly two decades, the word “mediation” has been used in Michigan’s legal culture to describe the case evaluation process outlined in MCR 2.403. Outside of Michigan’s legal culture–including both organizations and persons in the dispute resolution field and in other states’ legal cultures–the meaning denotes a neutral facilitative process in which a mediator having no decision-making authority assists parties in reaching their own resolution of a dispute.

Because of this early misnomer in Michigan, other names for the facilitative mediation process have evolved to differentiate it from the MCR 2.403 case evaluation process, including: facilitative mediation, true mediation, and voluntary facilitative mediation.

To provide a common meaning of terms for purposes of Task Force discussions and report drafting, the following definitions were adopted:

- “Mediation” includes what has come to be called “facilitative mediation” in Michigan, and other terms describing the process whereby a neutral mediator, without decision-making authority, assists parties in the resolution of their dispute.

- “Case evaluation” includes the MCR 2.403 process of evaluation by a panel of attorneys, also known as “Michigan mediation” and “court rule mediation.”

- “Alternative dispute resolution (ADR)” includes any process designed to resolve a legal dispute in the place of court adjudication.

Recommendations

The Michigan Supreme Court Dispute Resolution Task Force recommends the following:

1. The Supreme Court should rename MCR 2.403 and change references to the process outlined in MCR 2.403 and MCR 2.404 to "case evaluation" to accurately reflect the nature of the process.

Comment: Outside of the Michigan legal culture, the process outlined in MCR 2.403 whereby attorneys independently provide a settlement evaluation to disputing parties is known as case evaluation. The term "mediation"–outside of the Michigan legal culture–is universally understood to refer to a process in which a neutral mediator without decision-making authority assists the parties in reaching a resolution of their matter. Changing the name would eliminate confusion over terminology and bring Michigan's legal culture into conformity with the common usages of this terminology among the public and throughout the national and international legal and dispute resolution community.

2. The Supreme Court should adopt new MCR 2.410 (Alternative Dispute Resolution) and MCR 2.411 (Qualification of Mediators and Other Neutrals) to guide the development of ADR services–and particularly mediation services–that courts provide to litigants. Recommended new court rules and amendments to current court rules begin at page 13 of this Report.

Comment: Task Force members determined that there should be a workable balance between the need for local control and flexibility in designing and implementing ADR services and a statewide need for some baseline level of uniformity and predictability of process by litigants, counsel, and persons serving as ADR providers. The proposed court rules reflect this balance in affording trial courts substantial flexibility in offering ADR services, such as in the selection of appropriate processes by parties, the timing of the process, etc., while also establishing statewide criteria in areas where predictability and uniformity are most needed, such as in the training of mediators and standards of conduct.

Proposed MCR 2.410 creates the general guidelines for courts' offering ADR services; proposed MCR 2.411 specifically addresses the qualification and selection of ADR providers, as well as standards of conduct for mediators. Amendments to MCR 2.401 (Pretrial Procedures) incorporate references to ADR in pretrial procedures.

Proposed amendments to MCR 5.403 (Probate Court Mediation) would bring this rule into conformity with general civil mediation provisions of proposed MCR 2.410.

3. The Supreme Court should amend MCR 3.216 (Domestic Relations Mediation) to improve the mediation process in domestic relations cases, including the authorization of mediation for child custody cases, and to insure that mediators appointed by the courts are qualified to perform mediation services. Recommended amendments to MCR 3.216 appear at page 42 of this Report.

Comment: Currently, MCR 3.216 is not utilized in a uniform manner throughout the state. Some of its provisions appear to be either unnecessary or not appropriate for an effective mediation process. The proposed amendments to the court rule are intended to improve and unify the mediation process throughout the state, without depriving the parties of their right to select their own ADR provider and ADR process. Any inconsistencies between legislation and court rules on the subject of domestic relations mediation should be addressed.

4. The Supreme Court should appoint a standing oversight committee to provide recommendations on the implementation, delivery, and evaluation of ADR services in the trial courts.

Comment: Aside from the key issues addressed in this report, the Task Force identified many design, implementation, and evaluation issues which could not be addressed in detail given the limited nature of the Task Force. A successor group–a standing committee appointed by the Supreme Court–is recommended to continue the work begun by the Task Force, and to provide ongoing recommendations to the State Court Administrator for the further development of ADR services to Michigan citizens. The credentialing of ADR providers, and the development and approval of training programs should be incorporated into the work of the successor group.

5. Mediators acting under the appointment or qualification of a court, either by court rule or statute, should be afforded the status of quasi-judicial immunity from suit.

Comment: The use of ADR, and particularly mediation, will be materially and substantially connected to the business of the courts under these Task Force proposals. Therefore, the mediator will play an integral role in the state's judicial system. Accordingly, while mediators will be subject to the constraints of ethical rules and regulations and under supervision by the courts, mediators, like other judicial officers, should not be subject to lawsuits for the breach of ordinary care in the performance of their duties. The Task Force recommends that court-appointed mediators be afforded the status of quasi-judicial immunity from suit. Language such as that which follows should be adopted by court rule or statute:

> "Mediators shall be immune from civil liability for or resulting from any acts or omissions done or made while engaged in efforts to assist or facilitate a mediation process, unless the act or omission was made or done in bad faith, with malicious

intent, or in a manner exhibiting a willful, wanton disregard of the rights, safety or property of another."

6. Courts should make ADR processes available both pre-filing and throughout the course of litigation.

Comment: Court-connected ADR programs and services generally are designed and implemented to provide alternatives to the litigation process. Courts can play an important role in promoting the use of ADR before disputes are filed in court as well as after cases have been settled or judgment has been rendered. Promoting ADR may include: (1) opening court-connected ADR programs and services to disputants before they file and when litigants have contested post-judgment matters; (2) working directly with agencies and individuals in the community to encourage the provision of ADR services; and, (3) advocating publicly through bar associations or otherwise for the increased availability of such services. To encourage pre-filing ADR, court statistical methods may have to be modified so that the court receives recognition for the services provided.

7. Referral to an ADR process generally should be made at the earliest possible time that the parties are able to make an informed choice about their participation in ADR.

Comment: There may be cases where immediate referral to ADR is needed. Eviction cases are an example, as are neighborhood disputes in which tensions are escalating. However, for many other cases, the timing of a referral should be determined on a case-by-case basis. In some kinds of cases early referral will be desirable before the parties' positions become hardened and substantial costs are incurred. In others, referral should be delayed to allow sufficient information to be gathered to ensure meaningful negotiations. In general, a determination as to timing should take into account both the parties' capacity to mediate and the ripeness of the issues for ADR.

Nationally, statutes that address this issue differ. For example in the domestic relations area, child custody mediation in Alaska may be ordered within 30 days after a petition is filed (Alaska Stat. 25.2g.080(1)); California requires that such cases be ordered to mediation no later than 50 days after the filing of a petition (Cal. Civ. Code 4607a); in other states referrals can be made "at any time." Iowa Code Ann. 598.16, Kan. Sta. Ann. 23-602(a); Me. Rev. Stat. Ann. Tit. 19 636, 637.

In other types of cases, the interests of court efficiency and speedy resolution of disputes appear to underlie references to timing. It is recommended that in all civil cases parties should be required to meet as soon as reasonably practical after the filing of the Answer to discuss management issues, including the selection of an ADR process and timing of its use, and to communicate the results, in writing, to the court. The Task Force concurs that "early referral to an appropriate ADR process has proven to facilitate speedy resolution of disputes." Minnesota Supreme Court and State Bar Task Force on Alternative

Dispute Resolution, Final Report, 1990.

Courts should not lose sight of the fact that ADR itself is a case management tool that can be used to help parties determine and set a schedule for their discovery needs and thus create the conditions most conducive to assisted negotiations.

8. Courts should provide the opportunity on a continuing basis for both the parties and the court to determine the timing of a referral to ADR.

Comment: Assessment of the parties' capacity to use ADR and the sufficiency of the information gathered through discovery should occur on a continuing basis. Otherwise, there is a danger that a case assessed initially as not ready for ADR will be allowed to languish, with parties' positions allowed to harden and the opportunity for early resolution lost. Case tracking should be built into the court's case management system and provide for regular and periodic assessment of readiness for ADR.

9. Courts should set presumptive deadlines for concluding ADR processes in the scheduling order, with the parties having primary responsibility for scheduling the ADR process within the parameters of the scheduling order.

Comment: It is important that courts retain the ultimate responsibility for case management. The scheduling order and the progress of the case can provide useful impetus to parties and counsel. The courts should assist the parties on an ongoing basis in determining the earliest point at which initiation of an ADR process would be likely to be productive. This will help prevent the hardening of positions and will initiate discussion the parties might otherwise find difficult to undertake given the adversarial nature of our justice system.

Once an ADR process is selected, the parties' participation in the decision as to timing will be important since the process is more likely to succeed if the parties feel they have the information they need and they have identified the appropriate people to attend the ADR proceeding(s).

With reference to Supreme Court Administrative Order 1991-4 (Case Flow Management), caseflow management techniques, guidelines, and caseload reports should accurately reflect the use of ADR processes by courts and parties. The caseflow time guidelines should be flexibly viewed to permit courts and parties the greatest possible latitude in the use of ADR processes.

10. Court-based ADR programs and services should be monitored to assure and enhance the quality of services, and evaluated to measure effectiveness.

Comment: Monitoring and evaluating are a joint responsibility of local courts and either the State Court Administrative Office or an oversight committee appointed by the Supreme Court which will set goals and standards, and gather and analyze information. Adequate resources and technical assistance must be allocated to these functions. Factors measured to identify program effectiveness should be carefully selected to reflect and serve overall program goals. Uniform goals for all court-annexed programs within the state should be identified, and local courts should be encouraged to identify local program goals (and factors to measure program effectiveness) which reflect local needs and values.

11. The legislature should provide funding to the Supreme Court for the development, implementation, and evaluation of ADR processes in the trial courts.

Comment: The Task Force identified numerous cost implications of further developing ADR services in the Michigan trial courts. These included ensuring that services are available regardless of ability to pay, oversight of ADR provider credentialing, ADR provider training, and program evaluation by the State Court Administrative Office or an ADR oversight committee established by the Supreme Court, and development of public education materials.

12. Either the legislature should enact legislation or the Supreme Court should adopt a court rule assuring the confidentiality of ADR processes.

Comment: While statements made in the course of settlement negotiations may not be used as evidence (MRE 408), there is currently no statutory confidentiality in ADR processes with the exception of that afforded mediators acting pursuant to the Community Dispute Resolution Program Act (1988 PA 266). Confidentiality provisions of this act should be extended to all ADR providers offering services pursuant to court-administered ADR programs. Similar protective provisions appear in proposed new court rules MCR 2.410 and MCR 2.411.

13. The Supreme Court should explore the application of the mediation process in criminal proceedings, and in particular, concepts and practices of restorative justice, through a newly formed subcommittee of the recommended successor oversight committee.

Comment: Restorative justice emphasizes restoring harmony to the lives of offenders and victims. Complementing traditional court services, restorative justice involves the victim and the offender in community-based conferences. This ADR process has become an integral response to criminal behavior in Minnesota, New York, Texas, and Vermont. To permit the Supreme Court to receive information and recommendations affecting the development of restorative justice concepts and practices in the Michigan trial courts, the Supreme Court should appoint a committee consisting of prosecutors, defense attorneys,

Michigan State Bar Prisons and Corrections Section members, Department of Corrections (Community Corrections), and Community Dispute Resolution Program center representatives.

Proposed New Dispute Resolution Court Rules

MCR 2.410 (Alternative Dispute Resolution)
MCR 2.411 (Qualification of ADR Providers)

SUBCHAPTER 2.400 PRETRIAL PROCEDURE; ALTERNATIVE DISPUTE RESOLUTION; ~~MEDIATION~~; CASE EVALUATION; OFFERS OF JUDGMENT; SETTLEMENTS

RULE 2.410 ALTERNATIVE DISPUTE RESOLUTION (New)

(A) **Scope and Applicability of Rule.** All civil cases are subject to Alternative Dispute Resolution (ADR) processes unless otherwise provided by statute or court rule. Mediation of domestic relations actions is governed by MCR 3.216.

(B) **Definitions.** The following terms shall have the meanings set forth in this rule in applying and construing these rules with regard to ADR proceedings. The terms are not meant to restrict or limit the use of other ADR processes created by agreement of the parties.

(1) Alternative dispute resolution (ADR): includes any process designed to resolve a legal dispute in the place of court adjudication.

(2) ADR provider: An individual or organization providing an ADR process. An individual ADR provider may be required to satisfy training and continuing education requirements as set forth in MCR 2.411.

(3) Arbitration: A forum in which each party and its counsel present its position before a neutral third party, who renders a specific award. If the parties stipulate in advance, the award is binding and is enforceable in the same manner as any contractual obligation. If the parties do not stipulate that the award is binding, the award is not binding and a request for trial de novo may be made.

(4) Consensual Special Magistrate: A forum in which a dispute is presented to a neutral third party in the same manner as a civil lawsuit is presented to a judge. This process is binding and includes the right of appeal.

(5) Moderated Settlement Conference: A forum in which each party and their counsel present their position before a neutral or panel of neutral third parties. The panel may issue a non-binding advisory opinion regarding liability, damages, or both.

(6) Summary Jury Trial: A forum in which each party and their counsel present a summary of their position before a panel of jurors. The number of jurors on the panel is six unless the parties agree otherwise. The panel may issue a non-binding advisory opinion regarding liability, damages, or both.

(7) Early Neutral Evaluation: A forum in which attorneys present the core of the dispute to a neutral evaluator in the presence of the parties. This occurs after the

case is filed but before discovery is conducted. The neutral then gives a candid non-binding assessment of the strengths and weaknesses of the case. If settlement does not result, the neutral helps narrow the dispute and suggests guidelines for managing discovery.

(8) Neutral Fact Finding: A forum in which a dispute, frequently one involving complex or technical issues, is investigated and analyzed by an agreed-upon neutral who issues findings and a non-binding report or recommendation.

(9) Case Evaluation: A forum in which attorneys present the core of the dispute to a panel of attorneys as described in MCR 2.403.

(10) Mini-Trial: A forum in which each party and their counsel present their opinion, either before a selected representative for each party, before a neutral third party, or both to define the issues and develop a basis for realistic settlement negotiations. A neutral third party may issue an advisory opinion regarding the merits of the case. The advisory opinion is not binding unless the parties agree that it is binding and enter into a written settlement agreement.

(11) Mediation-Arbitration (Med-Arb): A hybrid of mediation and arbitration in which the parties initially mediate their disputes; but if impasse is reached, remaining issues are arbitrated and the results of arbitration are binding on the parties unless otherwise agreed.

(12) Mediation: A forum in which a neutral third party facilitates communication between parties, assists in identifying issues, and helps explore solutions to promote a mutually acceptable settlement, and otherwise meets the requirements of MCR 2.411. A mediator has no authoritative decision-making power.

(C) **ADR Clerk.** The court shall designate the clerk of the court, the court administrator, the assignment clerk, or some other person to serve as the ADR clerk.

(D) **Notice of ADR Processes**. The court shall provide parties with information about available ADR processes as soon as reasonably practical. The information may include a list of ADR service providers.

(E) **Selection of ADR Process**.

(1) As soon as reasonably practical, the scheduling of a non-binding ADR process under this subrule may be made after consultation with all parties.
(2) If the parties cannot agree on an ADR process, or if the court does not approve of the parties' selection of an ADR process, the court may order the parties to utilize

a non-binding ADR process, or may find that ADR is not appropriate.

(3) The court's order shall designate the ADR process selected and the deadline for initiating the procedure. If ADR is determined to be inappropriate, the order shall so indicate.

(4) Upon motion by any party, or on its own initiative, the court may, at any time, issue an order for parties to participate in any non-binding ADR process.

(5) A party may move, within 15 days after entry of an order to a non-binding ADR process, to waive participation in the ADR process for good cause shown.

(F) **Selection of ADR Provider**.

(1) As soon as reasonably practical after the selection of an ADR process, parties shall select an ADR provider. If the parties are unable to agree on an ADR provider, the court shall appoint one from an approved list of ADR providers after consultation with all parties.

(2) The procedure for selecting an ADR provider from an approved list of ADR providers must be established by local administrative order adopted pursuant to MCR 8.112(B). A judge may be selected, but may not receive any payment and may not be the judge assigned the case. The rule for disqualification is the same as that provided in MCR 2.003 for the disqualification of a judge.

(3) The selection of ADR providers serving as case evaluators pursuant to MCR 2.403 is governed by MCR 2.404.

(G) **Time and Place of Proceedings**. Upon receipt of the court's order, the ADR provider shall promptly work with the attorneys and parties to schedule the ADR process in accordance with the order. Factors that may be considered in arranging the process may include the need for limited discovery prior to the process, the number of parties and issues, and the necessity for multiple sessions.

(H) **Final Disposition.** If the case is settled through an ADR process, the attorneys shall complete the appropriate court documents to conclude the case (i.e., stipulation and order to dismiss, consent judgment, or other documents). Within ten (10) days of the completion of the ADR process, the ADR provider shall advise the court, stating only who participated in the process, whether settlement was reached, and whether further ADR proceedings are contemplated.

(I) **Attendance at ADR Proceedings.**

(1) Appearance of Counsel. The attorneys attending an ADR proceeding shall be thoroughly familiar with the case and have the authority necessary to fully participate in the proceeding. The court may direct that the attorneys who intend to try the case attend ADR proceedings.

(2) Presence of Parties. The court may direct that persons with authority to settle a case, including the parties to the action, agents of parties, representatives of lien holders, or representatives of insurance carriers:

(a) be present at the ADR proceeding;

(b) be immediately available at the time of the proceeding. The court's order may specify whether the availability is to be in person or by telephone.

(3) Failure to Attend; Default; Dismissal.

(a) Failure of a party or the party's attorney to attend a scheduled ADR proceeding, as directed by the court, constitutes a default to which MCR 2.603 is applicable or grounds for dismissal under MCR 2.504(B).

(b) The court shall excuse the failure of a party or the party's attorney to attend an ADR proceeding, and enter an order other than one of default or dismissal, if the court finds that

(i) entry of an order of default or dismissal would cause manifest injustice; or
(ii) the failure to attend was not due to the culpable negligence of the party or the attorney.

The court may condition the order on the payment by the offending party or attorney of reasonable expenses as provided in MCR 2.313(B)(2).

(J) **Fees.**

(1) An ADR provider is entitled to reasonable compensation based on an hourly rate commensurate with the ADR provider's experience and usual charges for services performed. ADR providers shall disclose their hourly rate on any lists of ADR providers made available to the public by courts or the State Court Administrative Office.

(2) The parties shall divide the costs of an ADR process on a pro rata basis unless otherwise agreed by the parties. The ADR provider's fee shall be paid no later than

(a) 45 days after the ADR process is concluded, or
(b) the entry of judgment, or

(c) the dismissal of the action, whichever occurs first.

(3) If acceptable to the ADR provider, the court may order an arrangement for the payment of the ADR provider's fee other than that provided in subrule (J)(2).

(4) If a party qualifies for waiver of filing fees under MCR 2.002 or the court determines on other grounds that the party is unable to pay for an ADR provider's services, and free or low-cost dispute resolution services are not available, the court shall not order that party to participate in an ADR process.

(5) The ADR provider's fee is deemed a cost of the action, and the court may make an appropriate judgment to enforce the payment of the fee.

(6) In the event either party objects to the total fee of the ADR provider, the matter may be scheduled before the trial judge for determination of the reasonableness of the fee.

(K) **Confidentiality.** Statements made during the ADR process, including statements made in briefs or other written submissions, may not be used in any other proceedings, including trial, unless the statement was quoting admissible evidence.

* * *

SUBCHAPTER 2.400 PRETRIAL PROCEDURE; ALTERNATIVE DISPUTE RESOLUTION; ~~MEDIATION~~; CASE EVALUATION; OFFERS OF JUDGMENT; SETTLEMENTS

Rule 2.411 QUALIFICATION OF ADR PROVIDERS; STANDARDS OF CONDUCT (New)

(A) **Approval and Retention of ADR Providers.**

(1) Requirement. Each trial court that submits cases to ADR processes under MCR 2.410 shall adopt by local administrative order an ADR plan to maintain a list of persons available to serve as ADR providers and to assign ADR providers from the list.

(a) Plans incorporating the selection of ADR providers not serving as mediators must include provisions governing the qualifications of non-mediator ADR providers.

(b) The plan must be in writing and available to the public in the ADR clerk's office.

(c) The selection of ADR providers serving as case evaluators pursuant to MCR 2.403 is governed by MCR 2.404. The selection of ADR providers serving as domestic relations mediators is governed by MCR 3.216.

(2) ADR Provider Application. An eligible person desiring to serve as an ADR provider may apply to the ADR clerk to be placed on the list of ADR providers. Application forms shall be available in the office of the ADR clerk. The form shall include an optional section identifying the applicant's gender and racial/ethnic background. The form shall include a certification that

(a) the ADR provider meets the requirements for service under the court's selection plan, and

(b) the ADR provider will not discriminate against parties or attorneys on the basis of race, ethnic origin, gender, or other protected personal characteristic.

(3) Review of ADR provider Applications. The plan shall provide for a person or committee to review applications annually, or more frequently if appropriate and compile a list of qualified ADR providers.

(a) Persons meeting the qualifications specified in this rule shall be placed on the list of approved ADR providers. Selections shall be made without regard to race, ethnic origin, or gender. Residency or principal place of business may not be a

qualification. Applications of approved ADR providers shall be available to the public in the office of the ADR clerk.

(b) Applicants who are not placed on the ADR provider list shall be notified of that decision. Within 21 days of notification of the decision to reject an application, the applicant may seek reconsideration of the ADR clerk's decision by the Chief Judge. The court does not need to provide a hearing. Documents considered in the initial review process shall be retained for at least the period of time during which the applicant can seek reconsideration of the original decision.

(4) Reapplication. Persons shall be placed on the list of ADR providers for a fixed period of time, not to exceed 5 years, and must reapply at the end of that time in the same manner as persons seeking to be added to the list.

(5) Removal from List. The ADR clerk shall remove from the list any ADR providers who have demonstrated incompetency, bias, made themselves consistently unavailable to serve as an ADR provider, or for other just cause. Within 21 days of notification of the decision to remove an ADR provider from the list, the ADR provider may seek reconsideration of the ADR clerk's decision by the Chief Judge. The court does not need to provide a hearing.

(B) **Supervision of the ADR Provider Selection Process**.

(1) The chief judge shall exercise general supervision over the implementation of this rule and shall review the operation of the court's ADR plan at least annually to assure compliance with this rule. In the event of non-compliance, the court shall take such action as is needed. This action may include recruiting persons to serve as ADR providers or changing the court's ADR plan.

(2) In implementing the ADR provider plan, the court, court employees, and attorneys involved in the procedure shall take all steps necessary to assure that as far as reasonably possible the list of ADR providers fairly reflects the racial, ethnic, and gender diversity of the members of the state bar in the jurisdiction for which the list is compiled who are eligible to serve as ADR providers.

(C) **Qualification of Mediators**.

(1) Small Claims Mediation. District courts may develop individual plans to establish qualifications for persons serving as mediators in small claims cases.

(2) General Civil Mediation. To be eligible to serve as general civil mediator, a person must meet the following minimum qualifications:

(a) Complete a training program approved by the State Court Administrator that contains the following components of mediation skills:

(i) information gathering
(ii) mediator relationship skills
(iii) communication skills
(iv) problem solving skills
(v) conflict management skills
(vi) ethics
(vii) professional skills
(viii) working with lawyers in mediation

(b) Have one or more of the following:

(i) Juris doctor degree or graduate degree in conflict resolution; or
(ii) 40 hours of mediation experience over two years, including mediation, co-mediation, observation, and role-playing in the context of mediation.

(c) Observe two general civil mediation proceedings conducted by an approved mediator, and conduct one general civil mediation to conclusion under the supervision and observation of an approved mediator.

(3) Approved mediators are required to obtain eight (8) hours of advanced mediation training during each two (2) year period.

(4) If an applicant has specialized experience or training but does not specifically meet the requirements set forth above, the applicant may apply to the ADR clerk for special approval. The ADR clerk shall make a determination based on criteria provided by the State Court Administrator. Service as a case evaluator pursuant to MCR 2.403 shall not count as meeting qualifications to serve as a mediator under this section.

(5) Additional qualifications may not be imposed upon mediators.

(D) **Party Stipulation to Mediators and Other ADR Providers.** The parties may stipulate to use any mediator or other ADR provider, whether or not they are deemed qualified under MCR 2.411.

(E) **Qualification of Other ADR Providers.** The State Court Administrative Office may establish qualifications for ADR providers not serving as mediators.

(F) **Standards of Conduct for Mediators**.

(1) Introduction. These Standards of Conduct apply to all persons who act as a

mediator pursuant to the dispute resolution programs of the court. They are designed to promote honesty, integrity and impartiality in providing court-connected dispute resolution services. These Standards shall be made a part of all training and educational requirements for court-connected programs, shall be provided to all mediators involved in court-connected programs and shall be available to the public.

(2) Self-Determination. A mediator shall recognize that mediation is based upon the principle of self-determination by the parties. This principle requires that the mediation process rely upon the ability of the parties to reach a voluntary, uncoerced agreement.

(3) Impartiality. A mediator shall conduct the mediation in an impartial manner. The concept of mediator impartiality is central to the mediation process. A mediator shall mediate only those matters in which he or she can remain impartial and even-handed. If at any time the mediator is unable to conduct the process in an impartial manner, the mediator is obligated to withdraw.

(4) Conflict of Interest.

(a) A conflict of interest is a dealing or relationship that might create an impression of possible bias or could reasonably be seen as raising a question about impartiality. A mediator shall disclose all actual and potential conflicts of interest reasonably known to the mediator. After disclosure, the mediator shall decline to mediate unless all parties choose to retain the mediator. If all parties agree to mediate after being informed of conflicts, the mediator may proceed with the mediation unless the conflict of interest casts serious doubts on the integrity of the process, in which case the mediator shall decline to proceed.

(b) The need to protect against conflicts of interest also governs conduct that occurs during and after the mediation. A mediator must avoid the appearance of conflict of interest both during and after the mediation. Without the consent of all parties, a mediator shall not subsequently establish a professional relationship with one of the parties in a related matter, or in an unrelated matter under circumstances which would raise legitimate questions about the integrity of the mediation process. A mediator shall not establish a personal or intimate relationship with any of the parties which would raise legitimate questions about the integrity of the mediation process.

(5) Competence. A mediator shall mediate only when the mediator has the necessary qualifications to satisfy the reasonable expectations of the parties. Mediators appointed or recommended by the court are required to have the training and experience specified by the court.

(6) Confidentiality. A mediator shall maintain the reasonable expectations of the parties with regard to confidentiality. Any information relating to a mediation obtained by the mediator, whether such communication or materials is oral or

written, is privileged and confidential and shall not be publicly disclosed without the written consent of all parties. The mediator, the parties and their counsel each has a qualified privilege during and after these proceedings to refuse to disclose and to prevent the mediator from disclosing materials and communications made during the mediation proceeding, whether or not the dispute was successfully resolved, except for the following:

(a) public information or information available through other legitimate sources;
(b) information concerning any conduct of the mediator alleged to constitute a violation of these Standards, or the conduct of any counsel alleged to constitute a violation of the Rules of Professional Conduct, which may be reported to the appropriate disciplinary body;
(c) a report by the mediator to the court limited to identifying who participated in the ADR process, whether settlement was reached, and whether further ADR proceedings are contemplated; and
(d) data for use by court personnel reasonably required to administer and evaluate the dispute resolution program.

(7) Quality of the Process. A mediator shall conduct the mediation fairly and diligently. A mediator shall work to ensure a quality process and to encourage mutual respect among the parties. A quality process requires a commitment by the mediator to diligence and procedural fairness. There should be adequate opportunity for each party in the mediation to participate in the discussions. The parties decide when and under what conditions they will reach an agreement or terminate a mediation.

(8) Advertising and Solicitation. A mediator shall be truthful in advertising and solicitation for mediation. Advertising or any other communication with the public concerning services offered or regarding the education training and expertise of the mediator shall be truthful. Mediators shall refrain from promises and guarantees of results.

(9) Fees. A mediator shall fully disclose and explain the basis of compensation, fees, and charges to the parties. The parties should be provided sufficient information about fees at the outset of a mediation to determine if they wish to retain the services of a mediator or to object to mediation. Any fees charged by a mediator shall be reasonable, considering, among other things, the mediation services, the type and complexity of the matter, the expertise of the mediator, the time required, and the rates customary to the community. The mediator's fee arrangement shall be reduced to writing prior to proceeding with the mediation.

(10) Obligations to the Mediation Process. Mediators have a duty to improve the practice of mediation by helping educate the public about mediation, making mediation accessible to those who would like to use it, correcting abuses, and improving their professional skills and abilities.

(G) **Qualification of Other ADR Providers.** The State Court Administrative Office may adopt Standards of Conduct for ADR providers not serving as mediators.

* * *

Proposed Amendments to Current Michigan Court Rules

MCR 2.401 (Pretrial Procedures...)
MCR 2.403 (Mediation)
MCR 2.404 (Selection of Mediator Panels)
MCR 3.216 (Domestic Relations Mediation-Rewritten)
MCR 3.216 (Domestic Relations Mediation-Current)
MCR 5.403 (Mediation, Probate Court)

RULE 2.401 PRETRIAL PROCEDURES; CONFERENCES; SCHEDULING ORDERS

(A) **Time; Discretion of Court.** At any time after the commencement of the action, on its own initiative or the request of a party, the court may direct that the attorneys for the parties, alone or with the parties, to appear for a conference. The court shall give reasonable notice of the scheduling of a conference. More than one conference may be held in an action.

(B) **Early Scheduling Conference and Order.**

(1) Early Scheduling Conference. The court may direct that an early scheduling conference be held. In addition to those considerations enumerated in subrule (C)(1), during this conference the court should:
(a) consider whether jurisdiction and venue are proper or whether the case is frivolous, and
(b) refer the case to alternative dispute resolution if appropriate, either by agreement of the parties or, in the case of non-binding alternative dispute resolution, pursuant to court order
(c)~~(b)~~ determine the complexity of a particular case and enter a scheduling order setting time-limitations for the processing of the case and establishing dates when future actions should begin or be completed in the case.

(2) Scheduling Order.
(a) At an early scheduling conference under subrule (B)(1), a pretrial conference under subrule (C), or at such other time as the court concludes that such an order would facilitate the progress of the case, the court shall establish times for
(i) the initiation or completion of an ADR process,
(ii) ~~(i)~~ the completion of discovery,
(iii) ~~(ii)~~ the exchange of witness lists under subrule (I), and
(iv) ~~(iii)~~ any other matters that the court may deem appropriate, including the amendment of pleadings, the adding of parties, the filing of motions, or the scheduling of mediation, case evaluation, or other ADR process, a pretrial conference, a settlement conference, or trial.
More than one such order may be entered in a case.
(b) The scheduling of events under this subrule shall take into consideration the nature and complexity of the case, including the issues involved, the number and location of parties and potential witnesses, including experts, the extent of expected and necessary discovery, and the availability of reasonably certain trial dates.
(c) Whenever reasonably practical, the scheduling of events under this subrule shall be made after meaningful consultation with all counsel of record.
(i) If a scheduling order is entered under this subrule in a manner that does not permit meaningful advance consultation with counsel, within 14 days after entry of the order, a party may file and serve a written request for

amendment of the order detailing the reasons why the order should be amended.

(ii) Upon receiving such a written request, the court shall reconsider the order in light of the objections raised by the parties. Whether the reconsideration occurs at a conference or in some other manner the court must either enter a new scheduling order, or notify the parties in writing that the court declines to amend the order. The court must schedule a conference, enter the new order, or send the written notice, within 14 days after receiving the request.

(iii) The submission of a request pursuant to: this subrule, or the: failure to submit such a request, does not preclude a party from filing a motion to modify rescheduling order.

(C) **Pretrial Conference; Scope.**

(1) At a conference under this subrule, in addition to the matters listed Subrule (B)(1), the court and the attorneys for the parties may consider any matters that will facilitate the fair and expeditious disposition of the action, Including:

(a) the simplification of the issues;

(b) the amount of time necessary for discovery;

(c) the necessity or desirability of amendments to the pleadings;

(d) the possibility of obtaining admissions of fact and of documents to avoid unnecessary proof;

(e) the limitation of the number of expert witnesses;

(f) the consolidation of actions for trial, the separation of issues, and the order of trial when some issues are to be tried by a jury and some by the court;

(g) the possibility of settlement;

(h) whether mediation, case evaluation, or some other form of alternative dispute resolution would be appropriate for the case;

(i) the identity of the witnesses to testify at trial;

(j) the estimated length of trial;

(k) whether all claims arising out of the transaction or occurrence that is the subject matter of the action have been joined as required by MCR 2.203(A);

(l) other matters that may aid in the disposition of the action.

(2) Conference Order. If appropriate, the court shall enter an order incorporating agreements reached and decisions made at the conference.

(D) **Order for Trial Briefs**. The court may direct the attorneys to furnish trial briefs as to any or all of the issues involved in the action.

(E) **Appearance of Counsel**. The attorneys attending the conference shall be thoroughly familiar with the case and have the authority necessary to fully participate in the conference. The court may direct that the attorneys who intend to try the case attend the conference.

(F) **Presence of Parties at Conference**. In the case of a conference at which meaningful discussion of settlement is anticipated, the court may direct that persons with authority to settle the case, including the parties to the action, agents of parties, representatives of lien holders, or representatives of insurance carriers:

(1) be present at the conference; or

(2) be immediately available at the time of the conference. The court's order may specify whether the availability is to be in person or by telephone.

This subrule does not apply to an early scheduling conference held pursuant to subrule (B).

(G) **Failure To Attend; Default; Dismissal.**

(1) Failure of a party or the party's attorney to attend a scheduled conference, as directed by the court, constitutes a default to which MCR 2.603 is applicable or grounds for dismissal under MCR 2.504(B).

(2) The court shall excuse the failure of a party or the party's attorney to attend a conference, and enter an order other than one of default or dismissal, if the court finds that

(a) entry of an order of default or dismissal would cause manifest injustice; or
(b) the failure to attend was not due to the culpable negligence of the party or the attorney.

The court may condition the order on the payment by the offending party or attorney of reasonable expenses as provided in MCR 2.313(B)(2).

(H) **Conference After Discovery.** If the court finds at a pretrial conference held after the completion of discovery that due to a lack of reasonable diligence by a party the action is not ready for trial, the court may enter an appropriate order to facilitate preparation of the action for trial and may require the offending party to pay the reasonable expenses, including attorney fees, caused by the lack of diligence.

(I) **Witness Lists**.

(1) No later than the time directed by the court under subrule (B)(2)(a), the parties shall file and serve witness lists. The witness list must include:

(a) the name of each witness, and the witness's address, if known; however, records custodians whose testimony would be limited to providing the foundation for the admission of records may be identified generally;

(b) whether the witness is an expert, and the field of expertise.

(2) The court may order that any witness not listed in accordance with this rule will be prohibited from testifying at trial except upon good cause shown.

(3) This subrule does not prevent a party from obtaining an earlier disclosure of witness information by other discovery means as provided in these rules.

*** * ***

SUBCHAPTER 2.400 PRETRIAL PROCEDURE; ALTERNATIVE DISPUTE RESOLUTION; ~~MEDIATION~~; OFFERS OF JUDGMENT; SETTLEMENTS

RULE 2.403 ~~MEDIATION~~ CASE EVALUATION

(A) **Scope and Applicability of Rule**

(1) A court may submit to ~~mediation~~ case evaluation any civil action in which the relief sought is primarily money damages or division of property. However, MCR 3.216 governs ~~mediation~~ case evaluation of domestic relations actions.

(2) ~~Mediation~~ 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; however, the court may except an action from ~~mediation~~ case evaluation on motion for good cause shown if it finds that ~~mediation~~ case evaluation of that action would be inappropriate.

(3) Cases filed in district court may be submitted to ~~mediation~~ 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 ~~mediation~~ case evaluation by written order no earlier than 91 days 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 ~~mediation~~ case evaluation has no effect on the normal progress of the action toward trial.

(C) **Objections to ~~Mediation~~ Case Evaluation.**

(1) To object to ~~mediation~~ case evaluation, a party must file a written motion to remove from ~~mediation~~ case evaluation and a notice of hearing of the motion and serve a copy on the attorneys of record and the ~~mediation~~ ADR clerk within 14 days after notice of the order assigning the action to ~~mediation~~ 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 ~~mediation~~ case evaluation.

(D) **~~Mediation~~ Case Evaluation Panel.**

(1) ~~Mediation~~ Case evaluation panels shall be composed of 3 persons.

(2) The procedure for selecting ~~mediation~~ case evaluation panels is as provided in MCR 2.404.

(3) A judge may be selected as a member of a ~~mediation~~ case evaluation panel, but may not preside at the trial of any action in which he or she served as a ~~mediator~~ case evaluator.

(4) A ~~mediator~~ case evaluator may not be called as a witness at trial.

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

(F) **~~Mediation~~ ADR Clerk.** The court shall designate the clerk of the court, the court administrator, the assignment clerk, or some other person to serve as the ~~mediation~~ ADR clerk.

(G) **Scheduling ~~Mediation~~ Case Evaluation Hearing.**

(1) The ~~mediation~~ ADR clerk shall set a time and place for the hearing and send notice to the ~~mediation~~ 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) Within 14 days after the mailing of the notice of the ~~mediation~~ case evaluation hearing, unless otherwise ordered by the court, each party must send to the ~~mediation~~ ADR clerk a check for $75 made payable in the manner specified in the notice of the ~~mediation~~ case evaluation hearing. However, if a judge is a member of the panel, the fee is $50. The ~~mediation~~ ADR clerk shall arrange payment to the ~~mediation~~ case

evaluators. Except by stipulation and court order, the parties may not make any other payment of fees or expenses to the ~~mediators~~ 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.

(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 ~~mediators~~ case evaluators.

(4) In the case of multiple injuries to members of a single family, the plaintiffs may elect to treat the action as involving one claim, with the payment of one fee and the rendering of one lump sum award to be accepted or rejected. If no such election is made, a separate fee must be paid for each plaintiff, and the ~~mediation~~ case evaluation panel will then make separate awards for each claim, which may be individually accepted or rejected.

(5) Fees paid pursuant to subrule (h) shall be refunded to the parties
(a) if the court sets aside the order submitting the case to ~~mediation~~ case evaluation or on its own initiative adjourns the ~~mediation~~ case evaluation hearing, or
(b) the parties notify the ~~mediation~~ ADR clerk in writing at least 14 days before the ~~mediation~~ 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.

In the case of an adjournment, the fees shall not be refunded if the adjournment order sets a new date for ~~mediation~~ case evaluation. If ~~mediation~~ case evaluation is rescheduled at a later time, the fee provisions of subrule (h) apply regardless of whether previously paid fees have been refunded. Penalties for late filing of papers under subrule (I)(2) are not to be refunded.

(I) **Submission of Documents**.

(1) At least 14 days before the hearing, each party shall file with the ~~mediation~~ ADR clerk 3 copies of documents pertaining to the issues to be mediated and 3 copies of a concise summary setting forth that party's factual and legal position on issues presented by the action, and shall serve one copy of the documents and summary on each attorney of record. A copy of a proof of service must be attached to the copies filed with the ~~mediation~~ ADR clerk.

(2) Failure to file the required materials with the ~~mediation~~ ADR clerk or to serve copies on each attorney of record by the required date subjects the offending attorney

or party to a $150 penalty to be paid in the manner specified in the notice of the ~~mediation~~ 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.

(J) **Conduct of Hearing.**

(1) A party has the right, but is not required, to attend a ~~mediation~~ 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 ~~mediation~~ 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 applicable insurance policy limits and settlement negotiations shall be disclosed at the request of the ~~mediation~~ 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 parse communications with the ~~mediators~~ case evaluators concerning the action prior to the hearing. After the evaluation, the ~~mediators~~ 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) The evaluation must include a separate award as to the 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); MSA 27A.4915(2) or MCL 600.4963(2); MSA 27A.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; MSA 27A.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 ~~mediation~~ 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 ~~mediation~~ ADR clerk shall send a notice indicating each party's acceptance or rejection of the panel's evaluation.

(3) In ~~mediations~~ 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 faction 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.

(2) 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 ~~mediation~~ 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 ~~mediation~~ ADR clerk sends notice of the rejection of the ~~mediation~~ case evaluation award.

(a) The motion shall be submitted to the court on the ~~mediation~~ case evaluation summaries and documents that were considered by the ~~mediation~~ 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 ~~mediation~~ 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 tire court under any applicable law or court rule. MCR 3.604 applies to proceedings to enforce the bond.

(4) The ~~mediation~~ ADR clerk shall place a copy of the ~~mediation~~ 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 ~~mediation~~ 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 ~~mediation~~ 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 ~~mediation~~ 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 ~~mediation~~ case evaluation, and, if applicable, by making the adjustment of future damages as provided by MCL 600.6306; MSA 27A.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 ~~mediation~~ 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 ~~mediation~~ case evaluation as to those defendants, and a defendant may not recover costs unless the verdict is more favorable to that defendant than the ~~mediation~~ 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); MSA 27A.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 [0][3]) and equitable relief, the verdict is not more favorable to the rejecting party than the 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 ~~mediation~~ case evaluation.

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 ~~mediation~~ case evaluation award was not unanimous.

(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 for a new trial or to set aside the judgment.

(9) In an action under MCL 436.22; MSA 18.993, 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 436.22(6); MSA 18.993(6).

(10) In an action filed on or after March 28, 1996, for the purpose of subrule (O)(1), a verdict awarding damages for personal injury, property damage or wrongful death shall be adjusted for relative fault as provided by MCL 600.6304; MSA 27A.6304.

(11) If the "verdict" is the result of-a motion as provided by subrule (0)(2)(c), the court may, in the interest of justice, refuse to award actual costs.

* * *

Rule 2.404 Selection of ~~Mediation~~ Case Evaluation Panels

(A) **~~Mediator~~ Case Evaluator Selection Plans.**

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

(2) Alternative Plans.

(a) A plan adopted by a district or probate court may use the list of ~~mediators~~ 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 ~~mediation~~ 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 ~~mediators~~ case evaluators, the court may enter into an agreement with a neighboring court to refer cases for ~~mediation~~ case evaluation under the other court's system. The agreement may provide for payment by the referring court to cover the cost of administering ~~mediation~~ case evaluation. However, fees and costs may not be assessed against the parties to actions ~~mediated~~ case evaluated except as provided by MCR 2.403.

(d) Other alternative plans must be submitted as local court rules under MCR 8.112(A).

(B) **Lists of ~~Mediators~~ Case Evaluators.**

(1) Application. An eligible person desiring to serve as a ~~mediator~~ case evaluator may apply to the ~~mediation~~ ADR clerk to be placed on the list of ~~mediators~~ case evaluators. Application forms shall be available in the office of the ~~mediation~~ ADR clerk. The form shall include an optional section identifying the applicant's gender and racial/ethnic background. The form shall include a certification that

(a) the ~~mediator~~ case evaluator meets the requirements for service under the court's selection plan, and

(b) the ~~mediator~~ case evaluator will not discriminate against parties, attorneys, or other ~~mediators~~ case evaluator on the basis of race, ethnic origin, gender, or other protected personal characteristic.

(2) Eligibility. To be eligible to serve as a ~~mediator~~ case evaluator, a person must meet the qualifications provided by this subrule.

(a) The applicant must have been a practicing lawyer for at least 5 years and be a member in good standing of the State Bar of Michigan. The plan may not require

membership in any other organization as a qualification for service as a ~~mediator~~ case evaluator.

(b) An applicant must reside, maintain an office, or have an active practice in the jurisdiction for which the list of ~~mediators~~ case evaluator is compiled.

(c) An applicant must demonstrate that a substantial portion of the applicant's practice for the last 5 years has been devoted to civil litigation matters, including investigation, discovery, motion practice, ~~mediation~~ case evaluation, settlement, trial preparation, and/or trial.

(d) If separate sublists are maintained for specific types of cases, the applicant must have had an active practice in the practice area for which the ~~mediator~~ case evaluator is listed for at least the last 3 years.

If there are insufficient numbers of potential ~~mediators~~ case evaluators meeting the qualifications stated in this rule, the plan may provide for consideration of alternative qualifications.

(3) Review of Applications. The plan shall provide for a person or committee to review applications annually, or more frequently if appropriate, and compile one or more lists of qualified ~~mediators~~ case evaluators. Persons meeting the qualifications specified in this rule shall be placed on the list of approved ~~mediators~~ case evaluators. Selections shall be made without regard to race, ethnic origin, or gender.

(a) If an individual performs this review function, the person must be an employee of the court.

(b) If a committee performs this review function, the following provisions apply.

(i) The committee must have at least three members.

(ii) The selection of committee members shall be designed to assure that the goals stated in subrule (D)(2) will be met.

(iii) A person may not serve on the committee more than 3 years in any 9 year period.

(c) Applicants who are not placed on the ~~mediator~~ case evaluator list or lists shall be notified of that decision. The plan shall provide a procedure by which such an applicant may seek reconsideration of the decision by some other person or committee. The plan need not provide for a hearing of any kind as part of the reconsideration process. Documents considered in the initial review process shall be retained for at least the period of time during which the applicant can seek reconsideration of the original decision.

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

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

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

(5) Reapplication. Persons shall be placed on the list of ~~mediators~~ case evaluators for a fixed period of time, not to exceed 5 years, and must reapply at the end of that time in the same manner as persons seeking to be added to the list.

(6) Availability of Lists. The list of ~~mediators~~ case evaluators must be available to the public in the ~~mediation~~ ADR clerk's office.

(7) Removal from List. The plan must include a procedure for removal from the list of ~~mediators~~ case evaluators who have demonstrated incompetency, bias, made themselves consistently unavailable to serve as a ~~mediator~~ case evaluator or for other just cause.

(8) The court may require ~~mediators~~ case evaluators to attend orientation or training sessions or provide written materials explaining the ~~mediation~~ case evaluation process and the operation of the court's ~~mediation~~ case evaluation program. However, ~~mediators~~ case evaluators may not be charged any fees or costs for such programs or materials.

(C) **Assignments to Panels.**

(1) Method of Assignment. The ~~mediation~~ ADR clerk shall assign ~~mediators~~ case evaluators to panels in a random or rotating manner that assures as nearly as possible that each ~~mediator~~ case evaluator on a list or sublist is assigned approximately the same number of cases over a period of time. If a substitute ~~mediator~~ case evaluator must be assigned, the same or similar assignment procedure shall be used to select the substitute. The ~~mediation~~ ADR clerk shall maintain records of service of ~~mediators~~ case evaluators on panels and shall make those records available on request.

(2) Assignment from Sublists. If sublists of plaintiff, defense, and neutral ~~mediators~~ case evaluators are maintained for a particular type of case, the panel shall include one ~~mediator~~ case evaluator who primarily represents plaintiffs, one ~~mediator~~ case evaluator who primarily represents defendants, and one neutral ~~mediator~~ case evaluator. If a judge is assigned to a panel as permitted by MCR 2.403(D)(3), the judge shall serve as the neutral ~~mediator~~ case evaluator if sublists are maintained for that class of cases.

(3) Special Panels. On stipulation of the parties, the court may appoint a panel selected by the parties. In such a case, the qualification requirements of subrule (B)(2) do not apply, and the parties may agree to modification of the procedures for conduct of ~~mediation~~ case evaluation. Nothing in this rule or MCR 2.403 precludes parties from stipulating to other ADR procedures ~~similar to mediation~~ that may aid in resolution of the case.

(D) **Supervision of Selection Process**.

(1) The chief judge shall exercise general supervision over the implementation of this rule and shall review the operation of the court's ~~mediation~~ case evaluation plan at least annually to assure compliance with this rule. In the event of non-compliance, the court shall take such action as is needed. This action may include recruiting persons to serve as ~~mediators~~ case evaluators or changing the court's ~~mediation~~ case evaluation plan. The court shall submit an annual report to the State Court Administrator on the operation of the court's ~~mediation~~ case evaluation program on a form provided by the State Court Administrator.

(2) In implementing the selection plan, the court, court employees, and attorneys involved in the procedure shall take all steps necessary to assure that as far as reasonably possible the list of ~~mediators~~ case evaluators fairly reflects the racial, ethnic, and gender diversity of the members of the state bar in the jurisdiction for which the list is compiled who are eligible to serve as ~~mediators~~ case evaluators.

* * *

SUBCHAPTER 3.200 DOMESTIC RELATIONS ACTIONS

MCR 3.216 DOMESTIC RELATIONS MEDIATION [Rewritten]

[Note: This rule is completely rewritten; the current text of MCR 3.216 appears on page 48 of this report.]

(A) **Definitions, Scope and Applicability of Rule.**

(1) Mediation is a non-binding process in which a neutral third party facilitates communication between parties to promote communication and settlement. The process is referred to as evaluative mediation if the mediator is asked to submit a written recommendation for settlement of any issues which remain unresolved at the conclusion of a mediation proceeding. Except for subsections (H) and (I) which relate exclusively to evaluative mediation, the use of the term "mediation" includes both processes.

(2) A court may submit to mediation any contested issue in a domestic relations case as defined in the friend of the court act (MCL 552.502(g)), including post judgment matters.

(3) This rule does not restrict the Friend of the Court from enforcing custody, parenting time, and support orders.

(4) The court may order, on stipulation of the parties, the use of other settlement procedures.

(B) **Referral to Mediation.** On written stipulation of the parties, on written motion of a party, or on the court's initiative, contested issues in a domestic relations case may be referred to mediation under this rule by written order.

(C) **Objections to Referral to Mediation.**

(1) To object to mediation, a party must file a written motion to remove the case from mediation and a notice of hearing of the motion, and serve a copy on the attorneys of record within 14 days after receiving notice of the order assigning the action to mediation. The motion must be set for hearing within 14 days after it is filed, unless the hearing is adjourned by agreement of counsel or unless the court orders otherwise.

(2) A timely motion must be heard before the case is submitted to mediation.
(3) Cases may be exempted from mediation based on the following:

(a) child abuse or neglect;

(b) domestic abuse, unless attorneys are present;

(c) inability of one or both parties to negotiate for themselves at the mediation, unless attorneys are present;

(d) reason to believe that one or both parties' health or safety would be endangered by mediation; or

(e) for other good cause shown.

(D) **Selection of Mediator.**

(1) Domestic relations mediation will be conducted by a mediator selected as provided in this subrule.

(2) Parties may stipulate to the selection of a mediator. A mediator selected by agreement of the parties need not meet the qualifications set forth in subrule (E). The court must appoint a mediator stipulated to by the parties, provided the mediator is willing to serve within a period of time that would not interfere with the court's scheduling of the case for trial.

(3) If the parties have not stipulated to a mediator, the parties must indicate a preference of mediation processes: mediation or evaluative mediation. If the parties have not stipulated to a mediator, the judge may recommend, but not appoint one. If the court's recommendation is not accepted by both parties, a mediator will be selected from a list of qualified mediators maintained by the ADR clerk. From the list of qualified mediators the ADR clerk shall on a random or rotational basis assign a mediator to the case offering the process selected by the parties. The ADR clerk shall at least annually update the list of qualified mediators and make available the approved list of mediators to the public. The parties shall advise the mediator prior to the commencement of the mediation their preference as to mediation or evaluative mediation. If the parties do not agree on the type of mediation processes, the mediator will select the type of mediation.

(E) **Lists of Mediators.**

(1) A person eligible to serve as a mediator may apply to the ADR clerk to be placed on the list of mediators. Application forms shall be available in the office of the ADR clerk. A mediator shall designate on the form the ADR process(es) he or she offers: mediation, and/or evaluative mediation. The form shall include an optional section identifying the applicant’s gender and racial/ethnic background, however this

section shall not be made available to the public. The form shall include a certification that the mediator meets the requirements for service under this court rule.

(2) To be eligible to serve as a domestic relations mediator under this court rule, a person must meet the qualifications provided by this subrule.

(a) The applicant must have a juris doctor degree or be a licensed attorney; be a licensed or limited licensed psychologist; be a licensed professional counselor; have a masters degree in counseling, social work, or marriage and family counseling; have a graduate degree in a behavioral science; or have 5 years experience in family counseling.

(b) The applicant must demonstrate completion of the minimum training program approved by the State Court Administrator that contains the following components, of which at least 30% involve the practice of mediation skills, including:

(i) experience of divorce for adults and children;
(ii) family law and family economics;
(iii) mediation, negotiation and conflict management theory and skills;
(iv) information-gathering skills and knowledge;
(v) relationship skills and knowledge;
(vi) communication skills and knowledge;
(vii) problem-solving skills and knowledge;
(viii) ethical decision-making and values skills and knowledge;
(ix) professional skills and knowledge; and
(x) domestic violence

(3) Approved mediators are required to obtain eight (8) hours of advanced mediation training during each two (2) year period.

(F) **Review of Applications.**

(1) The ADR clerk shall review applications at least annually, or more frequently, if appropriate, and compile a list of qualified mediators. Persons meeting the qualifications specified in this rule shall be placed on the list of approved mediators. Selections shall be made without regard to race, ethnic origin, or gender. Applications of approved mediators shall be available to the public in the office of the ADR clerk.

(2) Applicants who are not placed on the mediator list shall be notified of that decision and the reasons for it. Within 21 days of notification of the decision to reject an application, the applicant may seek reconsideration of the ADR clerk's

decision by the presiding judge of the family division. The court does not need to provide a hearing. Documents considered in the initial review process shall be retained for at least the period of time during which the applicant can seek reconsideration of the original decision.

(3) The ADR clerk shall remove from the list any mediators who have made themselves consistently unavailable to serve as a mediator, or for other just cause. Applicants who are not placed on the mediator list shall be notified of that decision. Within 21 days of notification of the decision to remove a mediator from the list, the mediator may seek reconsideration of the ADR clerk's decision by the presiding judge of the family division. The court does not need to provide a hearing.

(G) **Mediation Procedure.**

(1) A letter may be sent from the presiding judge of the family division to the parties explaining mediation in the family division, enclosing a copy of the list of court-approved mediators.

(2) A matter may be ordered to mediation as soon as reasonably practical. The mediator must schedule a mediation session within a reasonable time at a location accessible by the parties.

(3) A mediator may require that no later than 3 business days prior to the mediation session, each party submit to the mediator, and serve on opposing counsel, a mediation summary which provides the following information where relevant:

(a) the facts and circumstances of the case;

(b) the issues in dispute;

(c) a description of the marital assets and their estimated value, where such information is appropriate and reasonably ascertainable;

(d) the income and expenses of the parties (if relevant);

(e) a proposed settlement; and

(f) such documentary evidence as may be available to substantiate information contained in the summary.

Failure to submit these materials to the mediator within the above-designated time may subject the offending party to sanctions imposed by the court.

(4) The parties must attend the mediation session in person.

(5) Except for legal counsel, the parties may not bring other persons to the mediation session, whether expert or lay witnesses, unless permission is first obtained from the mediator, after notice to opposing counsel. If the mediator believes it would be helpful to the settlement of the case, the mediator may request information or assistance from third persons at the time of the mediation session.

(6) The mediator shall discuss with the parties and counsel, if any, the facts and issues involved. The mediation will continue until a settlement is reached, the mediator determines that a settlement is not likely to be reached, or the parties agree to resume mediation at a subsequent date.

(7) Statements made during the ADR process, including statements made in briefs or other written submissions, may not be used in any other proceedings, including trial, unless the statement was quoting admissible evidence.

(8) If a settlement is reached as a result of the mediation, to be binding, the terms of that settlement must be reduced to a signed writing by the parties or acknowledged by the parties on an audio or video recording. After a settlement has been reached the parties shall take steps necessary to enter judgment as in the case of other settlements.

(9) In the evaluative mediation process, if a settlement is not reached during mediation, the mediator, within a reasonable period after the conclusion of mediation, at the request of either party, shall prepare a written report to the parties setting forth the mediator's proposed 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.

(H) **Acceptance or Rejection of Mediator's Report and Recommendation.**

(1) In the evaluative mediation process, if both parties accept the mediator's recommendation in full the attorneys shall proceed to have a judgment entered in conformity with the recommendation.

(2) 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 case shall proceed to trial.

(3) There will be no 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.

(I) **Court Consideration of Mediation Report and Recommendation.** The mediator's

report and 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.

(J) **Fees.**

(1) A mediator is entitled to reasonable compensation based on an hourly rate commensurate with the mediator's experience and usual charges for services performed.

(2) Prior to mediation the parties shall agree in writing to pay the mediator's fee no later than

(a) 45 days after the mediation process is concluded or the service of the mediator's report and recommendation under subrule (F)(8), or

(b) the entry of judgment, or

(c) the dismissal of the action, whichever occurs first. If the court finds that some other allocation of fees is appropriate, given the economic circumstances of the parties, the court may order that one of the parties pay more than one-half of the fee.

(3) If acceptable to the mediator, the court may order an arrangement for the payment of the mediator's fee other than that provided in subrule (J) (2).

(4) The mediator's fee is deemed a cost of the action, and the court may make an appropriate judgment under MCL 552.13(l); MSA 25.93(l) to enforce the payment of the fee.

(5) In the event either party objects to the total fee of the mediator, the matter may be scheduled before the trial judge for determination of the reasonableness of the fee.

* * *

Rule 3.216 Domestic Relations Mediation [Current Text]

[Note: The text of current MCR 3.216 appears here to facilitate comparison with the text of the proposed rewritten MCR 3.216 appearing at page 42 of this report.]

(A) **Scope and Applicability of Rule**. A court may submit any pending divorce, separate maintenance, or annulment proceeding, including postjudgment matters, to mediation under this rule for the purpose of attempting to settle contested issues. Nothing in this rule

(1) prohibits or limits the submission of custody and visitation issues to mediation under MCL 552.513; MSA 25.176(13),

(2) restricts the authority of the friend of the court to take steps to enforce custody, visitation, and support orders, or

(3) prohibits the court from ordering, on stipulation of the parties, the use of modified mediation or other settlement procedures.

(B) **Referral to Mediation**.

(1) On written stipulation of the parties, on written motion of a party, or on the judge's own initiative, the judge to whom a case is assigned or the chief judge may refer the contested issues to mediation under this rule by written order, if the judge finds that

(a) discovery is complete,

(b) the value of the marital estate and the income of the parties are sufficient to justify the expense of mediation, and

(c) mediation under this rule would be helpful in achieving settlement of the action.

(2) If there is a dispute regarding the custody of a minor, the court may not submit the case to mediation under this rule before decision on the custody issue under MCR 3.210(C).

(3) A dispute regarding visitation with a minor must be referred to the friend of the court for action under MCR 3.208(B) and MCL 552.641 et seq.; MSA 25.164(41) et seq. rather than to mediation under this rule.

(4) Selection of an action for mediation has no effect on the normal progress of the action toward trial.

(C) **Objections to Mediation**.

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

(2) The court may modify or rescind the order of referral to mediation if it appears to the court that

(a) the value of the marital estate or the income of the parties does not justify the expense of mediation,

(b) discovery has not been substantially completed and mediation is not likely to be productive at that time,

(c) there is a contest regarding the custody of a minor that has not been resolved by the court under MCR 3.210(C), or

(d) other good cause is shown that mediation would not be appropriate under the circumstances of the case.

(D) **Mediation Clerk**. The court must designate the clerk of the court, the court administrator, the assignment clerk, or some other person to serve as the mediation clerk.

(E) **Selection of Mediator**.

(1) Divorce mediation will be conducted by one mediator, who must be selected as provided in this subrule.

(2) The court must appoint as mediator any person requested by the parties in a timely written stipulation, provided the person so nominated is willing to act as mediator within a period of time that would not interfere with the court's scheduling of the case for trial. A mediator selected by agreement of the parties need not meet the qualifications set forth in subrule (F). The parties may file such a stipulation at any time before completion of the selection process provided in subrule (E)(3). Thereafter, court approval of the stipulated selection is required.

(3) If the parties have not stipulated to a mediator, the mediator must be appointed from a list of mediators compiled and maintained by the mediation clerk in the manner provided in subrule (F).

(a) The mediation clerk must submit to the parties a list of three mediators, using a system designed to appoint mediators on a rotating basis. The notice to the parties must specify the times within which they may exercise their rights under subrules (E)(3)(b) and (c).

(b) Within 14 days after the mediation clerk sends the list of potential mediators, a party may object to a mediator for good cause.

(c) Within 14 days after the mediation clerk sends the list of potential mediators, each party may send the mediation clerk a notice that the party exercises the right to strike the name of one mediator. If an objection is filed under subrule (E)(3)(b), the time runs from the ruling on the objection, or as the court otherwise directs in ruling on the objection. This notice need not be served on the other party. The mediation clerk must randomly assign as mediator one of the persons whose name has not been struck by either party. The mediation clerk may not reveal the exercise of the right to strike a mediator.

(F) **Qualifications for Mediators**.

(1) To be eligible to be appointed as mediator under subrule (E)(3), a person must

(a) be a member in good standing of the State Bar of Michigan,

(b) have been a practicing lawyer for at least 5 years,

(c) have had an active practice in the area of domestic relations during 3 of the last 5 years. In a circuit having a population of more than 250,000 (according to the latest census conducted by the United States government), a person must have worked in the area of domestic relations at least one-fourth of the time during 3 of the last 5 years. A year in which a person was a circuit judge is deemed a year in which that person met the requirements of this subrule.

(2) A lawyer who wishes to serve as a mediator must submit a signed certificate of eligibility to the mediation clerk. The certificate must comply with MCR 2.404(B)(1), and must state that the lawyer agrees to fulfill the mediator's responsibilities in an impartial manner consistent with the rules and practices of the court. The certificate must include an estimate of the proportion of the lawyer's practice that has been devoted to domestic relations work and of the number of trials and hearings conducted, and may include information such as the professional associations relating to domestic relations law and practice of which the lawyer is a member. The certificate must also state the fee that the lawyer will charge or the basis on which the lawyer agrees to have the fee determined.

(3) If there are not sufficient qualified persons in the circuit to comply with the selection procedure, the court may supplement its list with names from lists compiled in neighboring circuits.

(G) **Mediation Procedure**.

(1) The mediator must schedule a mediation session within a reasonable time at the office of the mediator or at some other location within the circuit where the case is pending.

(2) No later than 4 days prior to the mediation session, each party must submit to the mediator, and serve on opposing counsel, a summary setting forth the following:

(a) the facts and circumstances of the case;
(b) the issues in dispute;
(c) a description of the marital assets and their estimated value, where such information is appropriate and reasonably ascertainable;
(d) the income and expenses of the parties;
(e) a proposed settlement; and
(f) such documentary evidence as may substantiate information contained in the summary.

Failure to submit these materials to the mediator within the above-designated time subjects the offending party to a $60 penalty to be paid to the mediator at the time of the mediation hearing.

(3) The parties must attend the mediation session in person, unless the mediator, for good cause shown, excuses the presence of one or both of the parties. No mediation may take place without the attorneys of record being present.

(4) Except for legal counsel, the parties may not bring other persons to the mediation session, whether expert or lay witnesses, unless permission is first obtained from the mediator, after notice to opposing counsel. If the mediator believes it would be helpful to the settlement of the case, the mediator may request information or assistance from third persons at the time of the mediation session.

(5) The mediator must meet with the parties and counsel, if any, to discuss the facts and issues involved. The mediation session will continue until a settlement is reached or the mediator or either of the parties states that an impasse exists or that a settlement is not likely to be reached, in which case the session will be adjourned, subject to resumption at an agreed time. Unless the parties agree otherwise, if mediation is not resumed within 14 days, the mediation will be deemed to have failed to achieve a settlement, and the mediator must prepare a report as provided in subrule (G)(8).

(6) Any information brought to the attention of the mediator during the mediation process is privileged, and the mediator may not disclose such information during future discovery proceedings or at trial. This provision does not prohibit the mediator from testifying regarding the interpretation of a written settlement agreement prepared under subrule (G)(7), if the mediator's testimony is otherwise admissible under the Michigan Rules of Evidence or other applicable rules or law.

(7) If a settlement is reached as a result of the mediation, the terms of that settlement must be reduced to writing, signed by the parties and their attorneys, and acknowledged by the parties. The parties must deliver the written settlement agreement to the mediator within 14 days after the session at which the agreement was reached, and the mediator must file it with the mediation clerk within 7 days after receiving it. The parties must take the steps necessary to enter judgment as in the case of other settlements. Unless the parties have agreed otherwise and have so informed the mediator, the mediation will be deemed to have failed to achieve a settlement, and the mediator must prepare a report as provided in subrule (G)(8), if the written settlement agreement has not been delivered to the mediator within 14 days.

(8) If a settlement is not reached during mediation, the mediator, within 21 days after the conclusion of mediation, must prepare a written report to the parties. The report must set forth a summary of the essential facts; an itemization of the assets and liabilities of the parties, including the value or amount of each; the employment, earnings, and other income of the parties; the issues in dispute; and the mediator's recommendation as to each issue. The mediator may not recommend a resolution of an issue regarding the custody of a minor different from that in effect at the time of the mediation unless the parties have agreed to that resolution during the mediation session. The mediator must send a copy of the report to the attorneys for the parties, and a notice that the report has been served to the mediation clerk.

(H) **Acceptance or Rejection of Mediator's Report and Recommendation**.

(1) A party may accept all or part of the mediator's recommendation made under subrule (G)(8) by sending a written acceptance to the mediator within 28 days after the report and recommendation are served. Failure to accept the recommendation is a rejection.

(2) If both parties accept the recommendation in its entirety, the mediator must notify the mediation clerk of the acceptance, and the parties must incorporate the terms of the recommendation into a proposed judgment and take the steps necessary to enter judgment, as with other settlements.

(3) If the mediator's recommendation is not accepted by both parties in its entirety, the case will proceed to trial. Even if portions of the recommendation have been accepted by both parties, either party may demand a trial on all issues.

(4) There will be no sanctions against either party for accepting or 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.

(I) **Court Consideration of Mediation Report and Recommendation**. The mediator's report and 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.

(J) **Fees**.

(1) A mediator is entitled to reasonable compensation based on an hourly rate commensurate with the mediator's experience and usual charges for services performed. If selected by stipulation under subrule (E)(2), the mediator may charge any fee acceptable to both sides. If selected under subrule (E)(3), the mediator's hourly rate must be in accordance with the fees stated in the certificate filed with the mediation clerk under subrule (F)(1), and made known to the parties at the time the mediation clerk sends the list of mediators under subrule (E)(3).

(2) Each party must agree in writing prior to the first mediation session to pay one-half of the mediator's fee no later than

(a) 45 days after the service of the mediator's report and recommendation under subrule (G)(8) or the filing of the written settlement agreement under subrule (G)(7), or

(b) the entry of judgment, or

(c) the dismissal of the action,

whichever occurs first. If the court finds that some other allocation of fees is appropriate, given the economic circumstances of the parties, the court may order that one of the parties pay more than one-half of the fee.

(3) If acceptable to the mediator, the court may order an arrangement for the payment of the mediator's fee other than that provided in subrule (J)(2).

(4) The mediator's fee is deemed a cost of the action, and the court may make an appropriate order under MCL 552.13(1); MSA 25.93(1) to enforce the payment of the fee.

(5) In the event either party objects to the total fee of the mediator, the matter may be scheduled before the trial judge for determination of the reasonableness of the fee.

* * *

SUBCHAPTER 5.400 [PROBATE COURT] PRETRIAL PROCEDURES

Rule 5.403 Mediation

"The court may submit to mediation, case evaluation, or other alternative dispute resolution process one or more requests for relief in any contested proceeding. ~~Procedures of MCR 2.403 shall apply to the extent feasible, except~~ In case evaluation conducted pursuant to MCR 2.403, sanctions must not be awarded unless the subject matter of the ~~mediation~~ case evaluation involves money damages or division of property."

* * *