



THE EFFECTIVENESS OF CASE EVALUATION AND
MEDIATION IN MICHIGAN CIRCUIT COURTS

The Effectiveness of Case Evaluation and Mediation in Michigan Circuit Courts

**Report to the State Court Administrative Office,
Michigan Supreme Court**

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Executive Summary

Study Purpose and Methods

Michigan's circuit courts currently employ two primary means of alternative dispute resolution (ADR)—case evaluation and mediation—to resolve civil claims involving money damages and reduce the need for trials in many of these cases. As part of its deliberation of a number of proposed court rule amendments to MCR.2.403 (Case Evaluation) and MCR 2.411 (Mediation), the Michigan Supreme Court directed the State Court Administrative Office (SCAO) to conduct a study of the efficacy of case evaluation. In September 2010, the SCAO contracted with Courtland Consulting (Courtland) to evaluate the comparative effectiveness of non-domestic civil case resolution in Michigan's circuit courts. Because many courts also order mediation in civil actions, the SCAO directed Courtland to include an assessment of mediation practices in the study.

The focus of this study was on the use of case evaluation and mediation in civil cases seeking awards of more than \$25,000—which puts them under the jurisdiction of the circuit courts. Courtland worked closely and collaboratively with the SCAO's Office of Dispute Resolution to determine the scope of the study and to ensure that it incorporated multiple data sources and perspectives regarding the use of case evaluation and mediation in such cases.

The SCAO and Courtland collaborated to design the current evaluation study, which utilized several research methods and data sources to assess the process and outcomes of civil cases (including torts and other civil cases) handled by the following categories of ADR:

- Case evaluation only
- Mediation only
- Case evaluation and mediation
- Neither

The study used multiple methods of data collection to obtain as complete a picture as possible of the effectiveness of case evaluation and mediation in Michigan circuit courts' civil cases. Quantitative and qualitative data were obtained from several sources, including:

- Statewide web-based survey of attorneys (3,096 respondents)
- Focus groups with 47 attorneys in several locations throughout the state
- Statewide web-based survey of circuit court judges (44 respondents)
- Case file review at six circuit courts (data from 396 cases)
- Interview/survey of the court administrators at those six circuit courts

Major Findings

Based on analysis of the multiple data sources used in this study, a large number of results were obtained (see Chapter 3: Findings). Among the many results, a list of 33 major findings was developed:

1. Michigan circuit courts are using case evaluation and mediation—the two types of alternative dispute resolution (ADR) examined in this study—to dispose most tort claims. Case evaluation is statutorily required by MCR 2.403 for tort claims, but mediation is not. Although not required to do so by statute, the courts are also using case evaluation and mediation to help dispose most of the non-tort civil cases filed in Michigan.
2. While case evaluation is currently widely used in Michigan, some courts are moving away from case evaluation toward a greater use of mediation. In addition, judges have observed an increasing willingness by attorneys to participate in mediation.
3. The use of one or both of these ADR processes greatly increased the percentage of cases in which a settlement or consent judgment was achieved. The effect was particularly strong for cases that used only mediation. Increasing the percentage of cases disposed through settlement/consent judgment effectively reduced the percentage of cases disposed through other means, such as dismissal/default, summary disposition, or court verdict.
4. The case evaluation award amount was accepted in 22% of the cases examined in this study. Very few awards (2%) were accepted within 28 days.
5. Where mediation was held, nearly half of the cases (47%) were settled “at the table.” Ultimately 72% of cases that went to mediation were disposed through a settlement or consent judgment and without later using case evaluation or going to trial.
6. The use of case evaluation—whether alone or in combination with mediation—significantly increased the length of time a case was open. Using mediation alone had no significant effect on time to disposition compared to cases that used neither of these ADR processes.
7. Mediation was faster than case evaluation for disposing cases because it was implemented sooner and because cases closed more quickly following mediation.
8. Rescheduling a case evaluation panel hearing one time did not significantly increase the time needed to dispose a case, but multiple adjournments increased time to disposition significantly.
9. Most judges and attorneys agreed that case evaluation is most effective if it occurs after discovery. For mediation, many judges and attorneys saw the value of using this form of ADR during discovery as well. Relatively few in each group thought that either case evaluation or mediation was effective when used prior to discovery.
10. Using mediation to resolve civil cases generally reduces costs to the court. The impact of case evaluation on court costs is less clear.
11. The study found little evidence that case evaluation either reduces or increases costs substantially for litigants in civil cases.
12. Although mediation initially is a more expensive option for litigants, the study found evidence that it can ultimately reduce their overall costs.

13. The use of one or both of the ADR processes tended to increase the percentage of tort cases in which a settlement or consent judgment was achieved. The effect was particularly strong for cases that used only mediation.
14. For tort claims, the use of mediation significantly reduces the number of days a case is open when compared to cases that do not use any ADR process. On the other hand, using case evaluation significantly increases the length of time a case is open.
15. For non-tort civil cases, the use of one or both of the ADR processes significantly increased the percentage of cases in which a settlement or consent judgment was achieved. The effect was strongest for cases that used only mediation.
16. For non-tort civil cases, the use of only mediation did not reduce the average number of days a case was open when compared to cases that did not use either ADR process. On the other hand, using case evaluation significantly increased the average length of time a case was open.
17. Case evaluation, which under MCR 2.403 is required to be ordered for torts, was widely used for these cases (72%). In contrast, less than half of the non-tort cases (45%) used case evaluation even though it was ordered for most of these cases.
18. Although mediation was ordered to be used in over a third of both the tort and non-tort cases, it was held significantly more often for torts (38%) than non-torts (27%).
19. The higher use of case evaluation and mediation in the tort cases probably accounts for the significantly higher rate of cases disposed through settlement/consent judgment for torts (69%) than non-tort cases (56%).
20. Limited available data suggests that a panel usually arrived at an award that was less than the amount of relief sought by the plaintiff; however, if the panel award was not accepted, the plaintiff had about an equal chance of receiving either more or less than the award amount.
21. Judges assigned high ratings to the quality of case evaluators, while attorneys expressed more mixed views of the panels' expertise.
22. Judges and attorneys considered the primary purpose of case evaluation to be arriving at a number the parties can accept rather than providing a fair valuation.
23. According to the attorney survey results, case evaluation is not often achieving its intended outcomes.
24. While circuit court judges in Michigan generally have a high opinion of case evaluation as a means to resolve civil cases, attorneys are less convinced of its effectiveness.
25. Judges were much more likely to order case evaluation when it is not mandated than attorneys would be to use case evaluation if it were not court ordered.

26. Circuit court judges indicated very high ratings for the quality of mediators available in their jurisdiction.
27. According to attorney survey results, mediation frequently achieves its intended outcomes.
28. Judges and attorneys both give high marks to mediation as a means for resolving civil cases.
29. Mediation more often produces the key outcomes that attorneys seek when using an ADR process than does case evaluation.
30. Mediation was seen by attorneys to have several advantages over case evaluation, including having the participants present and having more time with the case.
31. According to attorneys, litigants often feel frustrated by case evaluation because they don't get heard and don't know how the panel determined the award amount.
32. Circuit court judges gave higher ratings to mediation than to case evaluation and expressed a willingness to order mediation in place of or prior to case evaluation if it is shown to be more effective. However, there was also support for the continued use of case evaluation.
33. Court administrators in the six circuit courts studied expressed mixed views of case evaluation and mediation but strong support for flexibility in the use of ADR.

Conclusions and Recommendations

This study found evidence of the effectiveness of both case evaluation and mediation. However, mediation appears to be more effective than case evaluation in disposing cases more quickly and achieving settlements. Mediation (unlike case evaluation) was also considered to reduce costs for both the court and the litigants. Judges and attorneys expressed a more favorable view of mediation, but there was support for continuing case evaluation, particularly among judges. Flexibility regarding the method and timing of ADR was deemed important.

The evaluators developed several recommendations, based on the findings of the study. They include:

1. Given the evidence that mediation is generally more effective and preferred over case evaluation, Michigan circuit courts should be encouraged to make mediation available and not require case evaluation for case types for which it is not required by statute.
2. Michigan circuit courts should continue to offer both forms of ADR (case evaluation and mediation) but provide more flexibility in choosing the most suitable method and timing for the specific case.
3. Several suggested improvements to the case evaluation process are offered:
 - The penalty for late submission of the summary should be increased to discourage late submissions and allow more time for panel members to review the material.
 - A reasonable page limit should be imposed for the summary and attachments.

- Circuit courts should ensure that specialty panels are made available and that attorneys are aware of the options for specialty panels and paying for additional time with the panel.
 - Panels should be required to share how they arrived at the award amount.
 - The Michigan Supreme Court or SCAO should clarify the 28-day rule to ensure that all circuit courts and attorneys have the same understanding.
 - The Michigan Supreme Court or SCAO should issue guidelines for case evaluators to ensure that panels clearly understand their role and what is expected of them.
 - ADR clerks should obtain litigators' feedback about the case evaluators in order to eliminate the ones who are not considered competent, prepared or fair.
4. Several suggested improvements to the mediation process are offered:
- Balance the general preference that mediation be voluntary with the need for some ADR to be mandatory for most cases.
 - Give parties a say in the selection of mediators.
 - Allow cases to opt out if the size of the claim is too small or if there is no chance of settling.
 - Offering case evaluation as an alternative to mediation if the parties object to mediation.
 - Make sure the right people are at the mediation table—those with authority to settle—including the use of a show cause order if a party attends mediation without the necessary authority.
 - Strengthen the confidentiality rule in mediation to be certain that one can't disclose the numbers that are discussed in negotiations.
 - ADR clerks should get feedback about mediators in order to eliminate those who are not considered effective.
5. Courts could benefit from some guidance from SCAO regarding the maintenance of ADR records and the confidentiality of such information.
6. Whatever changes are made to either case evaluation or mediation or to the approach to ADR in Michigan's circuit courts, these changes should be clearly explained and communicated to court staff, attorneys and the public.
7. It is recommended that SCAO reach out to circuit courts throughout the state to discuss with them the implications of the present study and any resulting changes that are being considered.
8. Follow-up research will be helpful to study the impact of any changes in the use of case evaluation and mediation in Michigan.

1. Introduction

Michigan’s circuit courts currently employ two primary means of alternative dispute resolution (ADR)—case evaluation and mediation—to resolve civil claims involving money damages and reduce the need for trials in many of these cases. As part of its deliberation of a number of proposed court rule amendments to MCR.2.403 (Case Evaluation) and MCR 2.411 (Mediation), the Michigan Supreme Court directed the State Court Administrative Office (SCAO) to conduct a study of the efficacy of case evaluation. In September 2010, the SCAO contracted with Courtland Consulting (Courtland) to evaluate the comparative effectiveness of non-domestic civil case resolution in Michigan’s circuit courts. Because many courts also order mediation in civil actions, the SCAO directed Courtland to include an assessment of mediation practices in the study.

The focus of the study was on the use of case evaluation and mediation in civil cases seeking awards of more than \$25,000—which puts them under the jurisdiction of the circuit courts. Courtland worked closely and collaboratively with the SCAO’s Office of Dispute Resolution to determine the scope of the study and to ensure that it incorporated multiple data sources and perspectives regarding the use of case evaluation and mediation in such cases.

1.1 Process Definitions

Case evaluation is a process through which a panel of three attorneys, appointed by a court and not involved in the dispute, hears issues specified by the parties and then renders a monetary evaluation of the case. The administration of the process is finely detailed by court rule, which includes provisions for supplying briefs to panelists, timing of various events, payment of fees, conduct of the hearing, and the effect of accepting and rejecting awards. Penalties may be attached for not accepting the award if the rejecting party does not improve upon a trial verdict by 10 percent over the award, and the other party(ies) accepted the award. With the exception of the case evaluation award, which is sealed for a period of time, the court rules do not specifically address the confidentiality of the case evaluation process.

MCL 600.4901-600.4969 mandates only referral of tort and medical malpractice cases to this process. MCR 2.403(A)(1) expands the potential scope of case types to “any civil action in which the relief sought is primarily money damages or division of property.” Courts vary considerably in their use of this process, from referring virtually all general civil cases to referring none, except upon request of the parties.

Additional information regarding the evolution of the case evaluation court rule can be found in Appendix A.

Mediation is defined by court rule as “a process in which a neutral third party facilitates communication between parties, assists in identifying issues, and helps explore solutions to

promote a mutually acceptable settlement. A mediator has no authoritative decision-making power.”¹

Judges may order any civil case to mediation “at any time.”² Unlike case evaluation, the administration of the process, including requirements for briefs, style of mediation (e.g., face-to-face or caucus style, and facilitative or evaluative) is left to the parties and the mediator to determine. Notably, again unlike case evaluation where panelists are selected by the court, in mediation, parties are afforded an opportunity to select their own mediator. Only if parties do not select their own mediator does the court appoint one from a roster of persons who have met the training and experiential requirements. With some exceptions, outlined in MCR 2.412, the mediation process is confidential.

Additional information regarding mediation, and a comparison of differences between case evaluation and mediation, can be found in Appendix A.

1.2 The Use of Case Evaluation and Mediation

Case evaluation and mediation can be used in combination as well as separately. Circuit courts may include both processes in the scheduling order or determine that a second process is needed if the first does not result in a settlement. There is variation among courts in the sequence of these processes, with many ordering case evaluation first but some ordering mediation first.

The following diagram (Figure 1-1) illustrates the possible routes that cases can follow, the decision points along the way involving case evaluation and/or mediation, and the various points at which cases can be disposed prior to trial. Cases ordered to case evaluation first may settle prior to case evaluation or be resolved by the parties accepting the case evaluation panel’s award. If the award is not accepted by both parties, the case may be ordered to mediation. Some cases ordered to mediation will settle prior to mediation being held. If not ordered to mediation, the parties may voluntarily choose to participate in mediation. If mediation occurs (either voluntarily or by court order), the parties may reach an agreement at the mediation table or settle later. Those cases that are not settled or otherwise disposed will proceed toward trial.

¹ MCR 2.411(A)(2)

² MCR 2.410(A)(1); MCR 2.411(C)(1)

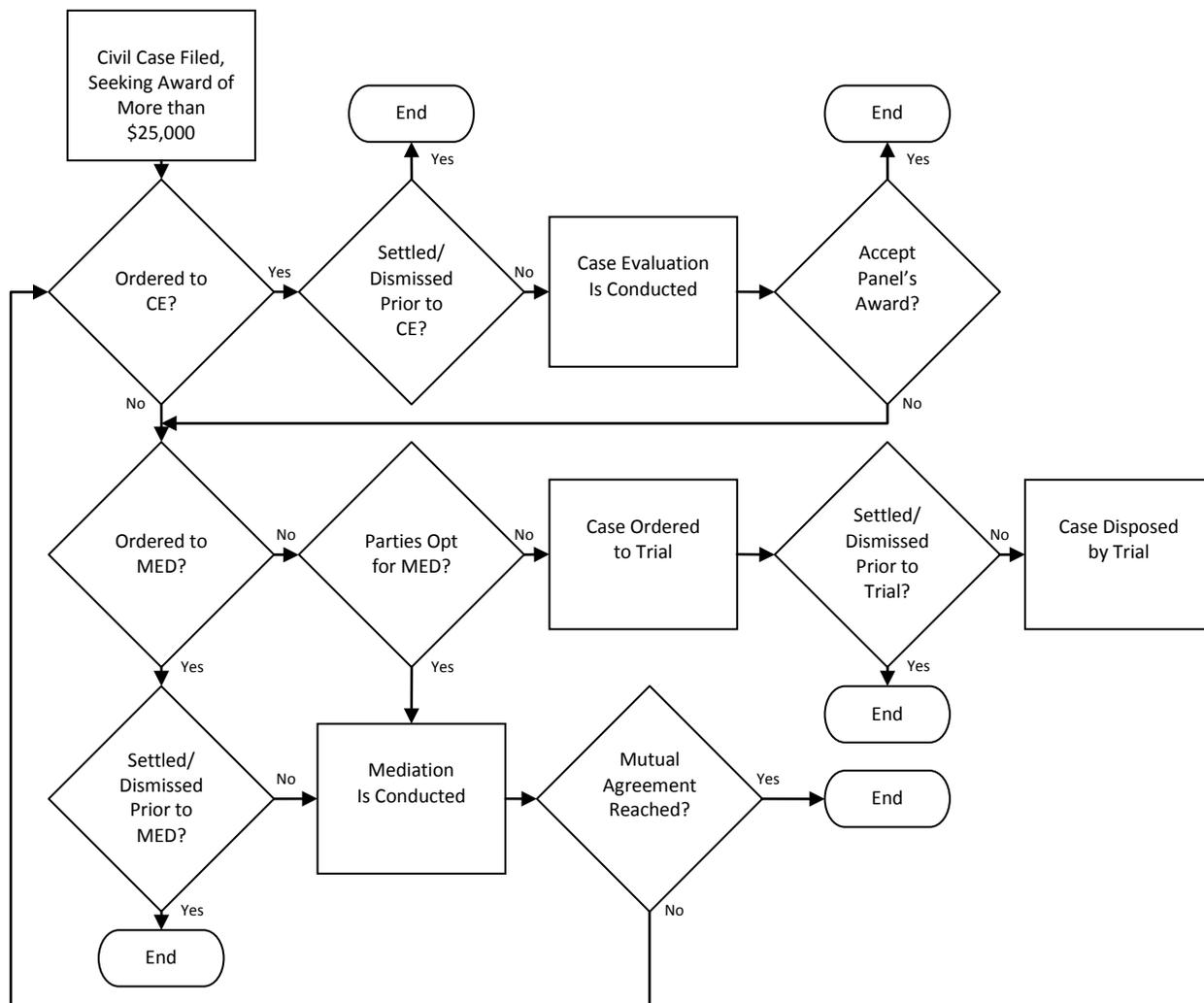


Figure 1-1 Use of Case Evaluation and Mediation in Case Disposition

1.3 Comparison with Other States

A review by the SCAO of the literature on state court systems indicated that no state other than Michigan has statutorily mandated case evaluation for tort claims and medical malpractice claims. Michigan’s case evaluation process appears to have no direct counterpart elsewhere.

The most similar ADR process is non-binding arbitration, which appears in the statutes and court rules of at least 17 states, the District of Columbia, and federal district courts. Practices vary across states on several dimensions: statewide or local, mandatory or voluntary, jurisdictional amounts, types of cases included, and the application of sanctions. No state appears to have as sweeping a sanction-based ADR process as Michigan’s case evaluation, which includes a wide range of case types and a limitless award amount.

The SCAO’s summary of state court arbitration programs can be found in Appendix B. It provides additional information about states’ programs and provides links to the relevant statutes or court rules. The summary points out that evaluative studies of such programs are sparse and it

is difficult to generalize from other programs that are not comparable to Michigan's case evaluation.

1.4 Purpose and Scope of the Current Study

This study was designed to evaluate the effectiveness of case evaluation and/or mediation in torts and other civil cases where the relief sought is over \$25,000. Although only torts are required by statute to have case evaluation, many other case types are being ordered to case evaluation as well. The SCAO was also aware of a growing use of mediation in civil cases, sometimes in combination with case evaluation and sometimes without case evaluation. At least one circuit court was in the process of discontinuing the use of case evaluation and was using mediation alone at the time of this study.

The SCAO and Courtland collaborated to design the current evaluation study, which utilized several research methods and data sources to assess the process and outcomes of civil cases handled by the following categories of ADR:

- Case evaluation only
- Mediation only
- Case evaluation and mediation
- Neither

The central evaluation questions guiding the study included:

- Do case evaluation and/or mediation reduce disposition times?
- Do case evaluation and/or mediation increase the likelihood that cases will be disposed through a settlement or consent judgment?
- Do case evaluation and/or mediation reduce litigation costs for parties or courts?
- What is the impact of these ADR processes on the courts?
- How satisfied are attorneys and judges with these processes?

Additional research questions were addressed as the available data allowed, with further analyses conducted where appropriate. Multiple data sources were used, including:

- Statewide web-based survey of attorneys
- Focus groups with attorneys in several locations throughout the state
- Statewide web-based survey of circuit court judges
- Case file review at six circuit courts
- Interview/survey of the court administrators at those six circuit courts

The various data sources were well integrated and comparable questions were used with different audiences in order to allow comparisons between respondent categories. The timing of the data collection also enabled Courtland to use the responses from the survey of attorneys to help develop the focus group questions and then to use the responses from attorneys to develop the questions for the survey of judges. A full description of the data sources is provided in Chapter 2: Methods and Data Sources.

2. Methods and Data Sources

The study used multiple methods of data collection to obtain as complete a picture as possible of the effectiveness of case evaluation and mediation in Michigan circuit courts’ civil cases (including torts and other civil cases). Quantitative and qualitative data were obtained from several sources, which are described in this chapter.

2.1 Statewide Survey of Attorneys

An online survey of attorneys was conducted by the SCAO from early January to mid-February 2011. The SCAO sent the link to members of the Michigan State Bar Association and sought the participation of attorneys who litigate general civil cases and who have experience with case evaluation and/or mediation in Michigan circuit courts. Responses were anonymous. The survey included a series of questions about case evaluation and mediation and also asked if the respondent would be willing to participate in a focus group.

Surveys were completed by 3,096 attorneys from all areas of the state; 66% had most of their case evaluation or mediation experience in the southeast region (where most of the state’s cases are filed). The following graphic shows their geographic distribution.

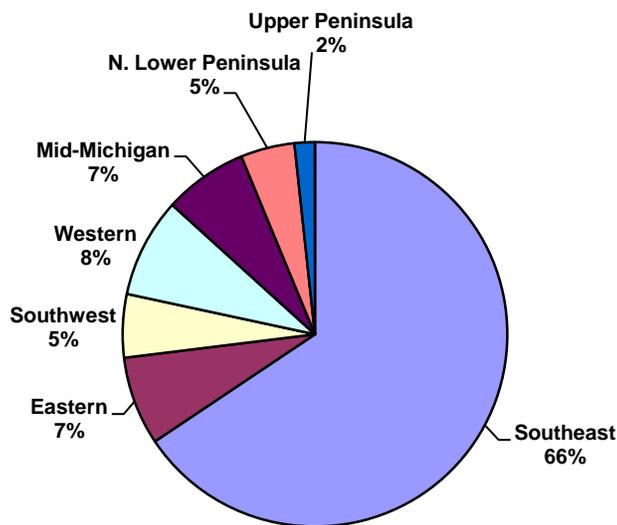


Figure 2-1. Attorney Survey Respondents by Region

Courtland was responsible for analyzing the survey data. Assistance with the content analysis of responses to open-ended questions was provided by the SCAO. Results from the attorney survey are provided in Appendix C (along with the survey questions) and incorporated into the study findings that are presented in Chapter 3: Findings.

2.2 Focus Groups with Attorneys

Six focus groups with attorneys were conducted by Courtland to enable the evaluators to obtain a fuller understanding of some of the results from the attorney survey and to ask follow-up questions. The focus group discussions also provided attorneys the opportunity to share various perspectives on the relative value of case evaluation and mediation. The six locations were selected to be as convenient as possible for attorneys from various areas of the state.

Attorneys who completed the online survey, indicated a willingness to participate in a focus group to discuss case evaluation and/or mediation, and provided contact information were invited to participate in a focus group. Due to the large number of eligible attorneys in the southeast region, a random sample of 50 percent of that group was selected to receive invitations. The SCAO issued invitations via e-mail to 366 attorneys in early April 2011 and provided them with the locations and dates for the six focus groups to allow them to select the one that would be most convenient for them.

Acceptances were limited to a maximum of 15-20 participants per focus group, in an effort to obtain an optimum number of 8-12 participants per focus group. All focus groups were conducted during the first week of May 2011.

A total of 47 attorneys attended the focus groups. The following topics were covered: selected survey results regarding case evaluation; relative merits of case evaluation and mediation; the cost of both processes; litigants' point of view regarding both processes; and suggestions for improvements to case evaluation, mediation, and other ADR processes. The combined findings from the six attorney focus groups can be found in Appendix D.

2.3 Statewide Survey of Circuit Court Judges

After completing the attorney focus groups, Courtland developed a statewide online survey of Michigan circuit court judges to obtain their perspectives and opinions about case evaluation and mediation. The SCAO provided feedback regarding the survey questions and secured the cooperation of six current or former judges to pilot-test the survey. Their suggestions were incorporated into the final version of the survey that was launched on June 23, 2011.

The SCAO sent a memo to judges from all circuit courts inviting those who adjudicate non-domestic civil cases to complete the survey and providing them the URL for Courtland's online survey. To accommodate holiday schedules, the survey deadline was extended to July 15 and SCAO sent out a notice and a reminder. Survey responses were anonymous. A total of 44 completed surveys were received. In one court, the court administrator indicated that the survey was submitted on behalf of all their judges, so the number of judges participating in the survey is greater than the number of completed surveys received.

The survey questions, along with the results, can be found in Appendix E.

2.4 Review of Case Files from Six Circuit Courts

In 2011, Courtland researchers visited six circuit courts and reviewed the files of more than 400 civil cases that were disposed in 2010. The specific circuit courts were selected for participation in the study with the goal of obtaining an appropriate mix of courts of varying sizes, location, and different approaches to the use of case evaluation and mediation. The six participating courts were:

- Berrien County (Circuit 02 in SCAO region 2)
- Grand Traverse County (Circuit 13 (Grand Traverse only) in SCAO region 4)
- Isabella County (Circuit 21 in SCAO region 3)
- Oakland County (Circuit 06 in SCAO region 1)
- St. Clair County (Circuit 31 in SCAO region 1)
- Wayne County (Circuit 03 in SCAO region 1)

Based on the information provided to Courtland by the court administrators, ADR clerks and other court staff who assisted the researchers during the site visits, the following descriptions of their case evaluation and mediation processes are offered:

Berrien. During the timeframe of cases in the present study, the scheduling orders required a joint settlement plan to be completed by a certain date and included an agreed upon or preferred method of ADR to be taken into consideration when determining which ADR process to order. Berrien has changed its ADR approach in the past year. Currently, the judge does an initial review of the case and mediation is ordered first. If there is no settlement three weeks before the trial, then case evaluation is ordered.

Grand Traverse. For the cases in our study (disposed in 2010) both case evaluation and mediation were used (either separately or in combination) with mediation the most common process. The scheduling order included a date by which mediation should be completed. The plaintiff and defendant were required to complete a pre-trial statement. Grand Traverse is no longer ordering case evaluation—only mediation, as of November 2010. All cases are now ordered to mediation via the civil scheduling conference order. The parties/attorneys confer and select a mediator or mediation service within 12 days of the scheduling order. If they do not notify the ADR clerk of their selection within the 14 days allowed, the ADR clerk will randomly select a mediator and advise the parties/attorneys.

Isabella. Case evaluation is scheduled at the end of discovery. Mediation (called “facilitation”) is only conducted if the parties request it.

Oakland. This court issues computer-generated scheduling orders for civil cases 67-75 days after the filing of the complaint. All “N” (tort) and “C” (contract) cases are ordered into case evaluation. Cases that reject an evaluation award at or under \$25,000 are ordered into mediation. Throughout the life of a case, the court also encourages parties/attorneys to utilize ADR tools through the use of discovery masters for motions and by ratifying requests to refer cases to mediation and arbitration. A pilot program of civil early intervention conferences (EIC) began in 2010. It consists of parties and their attorneys meeting with a voluntary attorney facilitator to discuss the

issues in and progress of selected cases. They also investigate whether ADR is appropriate for the case and what the most effective and efficient ADR process would be. A small number of the cases included in this study had evidence of participation in EIC. Oakland's case management process is currently under internal review resulting from budgetary staffing changes; it is anticipated that the EIC process will be reinstated.

St. Clair. This court orders or recommends all civil cases to ADR, which is not scheduled until after discovery. Case evaluation is generally first. Mediation is conducted if the case is not settled by case evaluation.

Wayne. The court mandates case evaluation for all cases involving a request for a monetary award. Case evaluation occurs after the close of discovery. The scheduling order allows a month for case evaluation to occur. A settlement conference is scheduled 42 days after case evaluation if the case has not settled. Mediation is used only upon agreement of the parties or by order of a judge in an individual case.

Courtland, with input and feedback from the SCAO, developed a data extraction tool to gather relevant and available information from selected case files. The tool was pilot-tested with 15 cases in one court (Oakland). Based on the pilot-test, adjustments were made before it was used for case file reviews in all six courts. The data extraction tool can be found in Appendix F. It facilitated data collection regarding the scheduling order, case evaluation dates and outcomes, mediation dates and outcomes, trial dates and outcomes, disposition code and closure date, as well as other ADR-related information. These data were entered into Courtland's online database for analysis.

The SCAO contacted the court administrators and obtained their cooperation in providing Courtland with a stratified sample of cases (by case type and ADR category) that were disposed during 2010. Generally the registers of action (ROAs) were provided to Courtland for a larger number of cases than needed so the Courtland team could identify the cases eligible for detailed file review for their site visits in 2011. The objective was to obtain sufficient numbers of torts and other civil cases, as well as sufficient numbers of cases receiving the different variations of these two ADR processes: case evaluation, mediation, both, or neither. A minimum target was established to support the statistical analyses to be conducted: 300 eligible cases overall and at least 50 in each of the four ADR categories.

Using the data extraction tool, detailed information was collected from a total of 396 cases. Of these cases, 181 (46%) were torts (type "N" cases, which are civil damage suits); 215 cases (54%) were other civil cases. The latter included both type "C" cases (contracts and other civil matters) and "P" cases (less common types of proceedings). The following table shows the number of useable cases obtained from each of the six courts and the ADR categories of those cases for the purpose of this study.

**Table 2-1
Cases and ADR Categories by Court**

Court	ADR Process Conducted				Total
	CE Only	Mediation Only	Both	Neither	
Berrien	27	10	2	25	64 (16%)
Grand Traverse	5	36	10	9	60 (15%)
Isabella	21	0	0	25	46 (12%)
Oakland	28	8	58	14	108 (27%)
St. Clair	37	0	2	15	54 (14%)
Wayne	38	1	0	25	64 (16%)
Total	156	55	72	113	396 (100%)

2.5 Interview/Survey of Court Administrators in the Six Courts

A set of interview questions for court administrators was developed by Courtland, with guidance provided by the SCAO. The purpose was to obtain a better understanding of how each of the six courts uses case evaluation and mediation and to solicit the court administrator’s opinion about how well those processes work. The interview questions located in Appendix G were e-mailed to the court administrator after the initial conference call with the SCAO and Courtland, prior to the site visit. The court administrator was given the option of being interviewed by telephone, in person during the site visit, or to answer the questions and e-mail or fax the responses to Courtland. All six court administrators chose to provide their responses in written form. Their responses have been incorporated into the descriptions above and into the study findings in Chapter 3: Findings.

2.6 Case Evaluation and Mediation Study Advisory Committee

In addition to the data sources described above, Courtland also obtained valuable feedback from the Case Evaluation and Mediation Study Advisory Committee that was convened by SCAO. A meeting held in Lansing on June 30, 2011 provided Courtland the opportunity to present the draft preliminary findings from this study and facilitate discussion with the committee members. The advisory committee offered some valuable suggestions regarding interpretation of results and additional analyses that could be conducted.

The SCAO met with this same advisory committee prior to Courtland’s engagement to develop the methodology and scope of the project. That meeting was held on June 28, 2010. The following individuals are listed on the SCAO roster as members of the advisory committee:

<p style="text-align: center;">Case Evaluation and Mediation Study Advisory Committee</p>		
<p>Mr. Timothy Casey Collins, Einhorn, Farrell, & Ulanoff PC Southfield</p>	<p>Dr. Larry Hembroff Office for Survey Research - MSU East Lansing</p>	<p>Mr. Jason Shinn Lipson, Neilson, Cole, Seltzer, & Garin PC Bloomfield Hills</p>
<p>Ms. Victoria Courterier 46th Circuit Trial Court Gaylord</p>	<p>Honorable Paula G. Humphries 36th District Court Detroit</p>	<p>Honorable Jeanne Stempien 3rd Circuit Court - Civil Division Detroit</p>
<p>Mr. Bernard Dempsey Wayne Mediation Center Dearborn</p>	<p>Ms. Laura Hutzel State Court Administrative Office Lansing</p>	<p>Honorable Lisa Sullivan Clinton County Probate Court Saint Johns</p>
<p>Mr. Jeffrey Donahue White, Schneider, Young, & Chiodini, PC Okemos</p>	<p>Mr. Jim Inloes State Court Administrative Office Lansing</p>	<p>Ms. Lisa Timmons Mediation Tribunal Association Detroit</p>
<p>Mr. Clifford Flood State Bar of Michigan Lansing</p>	<p>Ms. Dani Liblang Liblang & Associates, PC Birmingham</p>	<p>Mr. James Vlasic Bodman LLP Troy</p>
<p>Honorable Michelle Friedman Appel 45B District Court Oak Park</p>	<p>Honorable Pamela L. Lightvoet 9th Circuit Court Kalamazoo</p>	<p>Mr. Thomas Waun Waun & Parillo PLLC Grand Blanc</p>
<p>Honorable Nanci Grant 6th Circuit Court Pontiac</p>	<p>Mr. Sheldon Miller Law Offices of Sheldon L. Miller Farmington Hills</p>	<p>Mr. Bob Wright Miller, Canfield, Paddock, & Stone PLC Grand Rapids</p>
<p>Ms. Elaine Harding Hom, Killeen, Seifer, Arene, & Hoehn Detroit</p>	<p>Mr. Kevin Oeffner 6th Circuit Court Pontiac</p>	
<p>Honorable Pamela Harwood Law Offices of Pamela R. Harwood PLLC Troy</p>	<p>Ms. Bonnie Sawusch Halpert, Weston, Wuori, & Sawusch PC Kalamazoo</p>	

3. Findings

This chapter presents the findings from the case file review and incorporates results from the other data sources to address the evaluation questions in this study. Complete results from the statewide survey of attorneys can be found in Appendix C. A summary of the attorney focus groups can be found in Appendix D. The complete results from the statewide survey of circuit court judges can be found in Appendix E.

Note: The major findings of the study are presented throughout this chapter in bold.

3.1 Use of Case Evaluation and Mediation for Torts and Other Civil Cases in Michigan

3.1.1 Extent to which Case Evaluation and Mediation Are Used

- 1. Michigan circuit courts are using case evaluation and mediation—the two types of alternative dispute resolution (ADR) examined in this study—to dispose most tort claims. Case evaluation is statutorily required by MCR 2.403 for tort claims, but mediation is not. Although not required to do so by statute, the courts are also using case evaluation and mediation to help dispose most of the non-tort civil cases filed in Michigan.**

In the statewide judicial survey, judges reported ordering or referring 90% of tort claims into case evaluation under MCR 2.403. Mediation is also widely used under MCR 2.411, but less frequently than case evaluation: 36% of torts are ordered or referred to mediation.

The judges reported ordering or referring 70% of non-tort civil cases to case evaluation and 30% of them to mediation.

3.1.2 Trends in the Use of Case Evaluation and Mediation

- 2. While case evaluation is currently widely used in Michigan, some courts are moving away from case evaluation toward a greater use of mediation. In addition, judges have observed an increasing willingness by attorneys to participate in mediation.**

Attorneys who participated in the focus groups indicated considerable variation in the use of case evaluation and mediation from court to court, with some offering flexibility regarding the specific ADR process and others showing little or no flexibility. The Early Intervention Conference (EIC) ADR method that was piloted in the Oakland County circuit court was viewed as a good model. The EIC involves parties and their attorneys meeting with a volunteer attorney facilitator to discuss the issues in and progress of selected cases. They also investigate whether ADR is appropriate for the case and what the most effective and efficient ADR process would be.

Some circuit courts have been moving away from case evaluation toward a greater use of mediation. This was most evident in Grand Traverse, one of the six circuit courts that

participated in the case file review. Grand Traverse has not ordered case evaluation since fall 2010 and mediation is currently ordered for all civil cases (torts and non-torts). Another of the six circuit courts, Berrien, has also changed its approach to ADR in the past year. They have moved toward a greater reliance on early mediation, ordering case evaluation only if mediation has not resulted in a settlement.

Circuit court judges who completed the statewide survey were asked about attorneys' willingness to participate in mediation without the court ordering it. Sixty-seven percent of the judges had observed an increase in attorneys' willingness to participate in mediation without a court order over the past five years.

3.2 Overview of Cases Examined in the Current Study

This section presents summary descriptive statistics for the 396 civil cases examined in this study. Sections 3.3 and 3.4 provide statistical analyses of these data examining the effects of case evaluation and mediation on variables of interest such as settlement rates and time to disposition. Section 3.7 uses case data to map the sequence of events for cases ordered to either case evaluation or mediation and indicates where in the process each case was disposed and how it was disposed. Case data are used again in Sections 3.8 through 3.10 to examine the use and relative effectiveness of these two types of ADR for torts and non-tort civil cases.

3.2.1 Use of Case Evaluation and Mediation

Table 3-1 summarizes the extent to which case evaluation and mediation were ordered and/or conducted for all 396 civil cases (torts and non-torts) that were examined in this study through case file reviews. Of the 181 cases involving torts, judges ordered one or both forms of ADR to be used in all but one of these cases. The case records revealed that case evaluation and/or mediation was conducted for 86% of the torts and in 24% of these cases both methods were used.

Table 3-1
Use of Case Evaluation and Mediation for Torts and Other Civil Cases

	Torts (n = 181)		Other (n = 215)		Total (n = 396)	
	N	Percent	n	Percent	N	Percent
Court Order for:						
CE Only	112	62%	120	56%	232	59%
Both CE & Mediation	65	36%	59	27%	124	31%
Mediation Only	3	2%	13	6%	16	4%
Neither	1	<1%	23	11%	24	6%
Held or Conducted:						
CE Only	88	48%	68	32%	156	39%
Both CE & Mediation	43	24%	29	13%	72	18%
Mediation Only	25	14%	30	14%	55	14%
Neither	25	14%	88	41%	113	29%

Source: Case file review

Records for the 215 non-tort cases examined in this study indicated that judges ordered one or both processes for 89% of these cases and that case evaluation and/or mediation was held in 59% of these cases. In 13% of the cases, both case evaluation and mediation were held.

3.2.2 Disposition of Torts and Other Civil Cases

Table 3-2 shows that of the 396 cases examined in this study, the most frequent type of disposition—62% of the cases—was a settlement or consent judgment. Another 28% of the cases were disposed either through dismissal or default. Six percent of the cases went to trial and 5% were disposed through a court verdict.

Table 3-2
Disposition of Torts and Other Civil Cases

	Torts (n = 181)		Other (n = 215)		Total (n = 396)	
	N	Percent	n	Percent	N	Percent
Trial Held	14	8%	10	5%	24	6%
Type of Final Disposition						
Settlement/Consent Judgment	124	69%	120	56%	244	62%
Dismissed/Default	41	23%	68	32%	109	28%
Court Verdict	12	7%	9	4%	21	5%
Summary Disposition	4	2%	18	8%	22	5%

Source: Case file review

3.3 The Effect of Case Evaluation and Mediation on Rates of Settlement/Consent Judgment

- 3. The use of one or both of these ADR processes greatly increased the percentage of cases in which a settlement or consent judgment was achieved. The effect was particularly strong for cases that used only mediation. Increasing the percentage of cases disposed through settlement/consent judgment effectively reduced the percentage of cases disposed through other means, such as dismissal/default, summary disposition, or court verdict.**

Examination of all 396 civil cases revealed that when neither case evaluation nor mediation was held, a settlement or consent judgment was reached in less than half (45%) of the cases, (see Figure 3-1). If case evaluation alone was held, the percentage of cases disposed through settlement/consent judgment was higher at 62%. If a combination of case evaluation and mediation was used, the percentage of cases disposed through settlement/consent judgment increased to 69%. The highest percentage of cases disposed through settlement/consent judgment (84%) was for cases in which mediation alone was held.

Statistical analyses³ performed on these data indicated that using case evaluation (alone or in combination with mediation) resulted in a significant increase in the percentage of cases disposed through settlement/consent judgment. Cases that used only mediation had a significantly higher rate of settlement/consent judgment than the others. As can be seen in Figure 3-1, when the percentage of cases disposed through settlement/consent judgment increases, there are fewer cases that can be disposed through other means, such as dismissal/default, summary disposition, or court verdict.

³ Statistical pair-wise comparisons were made between each of the ADR groups. These analyses found that the percentage difference between the CE Only group (62% settlement/consent rate) and the Neither group (45%) was statistically significant (chi-square = 7.70, df = 1, p = .004); however the difference between the CE Only group and the Both group (69%) was not (chi-square = 1.14, df = 1, p = .18). The 84% for the Mediation Only group was significantly higher than the 69% for the Both group (chi-square = 3.24, df = 1, p = .05), and thus significantly higher than for the other groups as well.

All Civil Cases

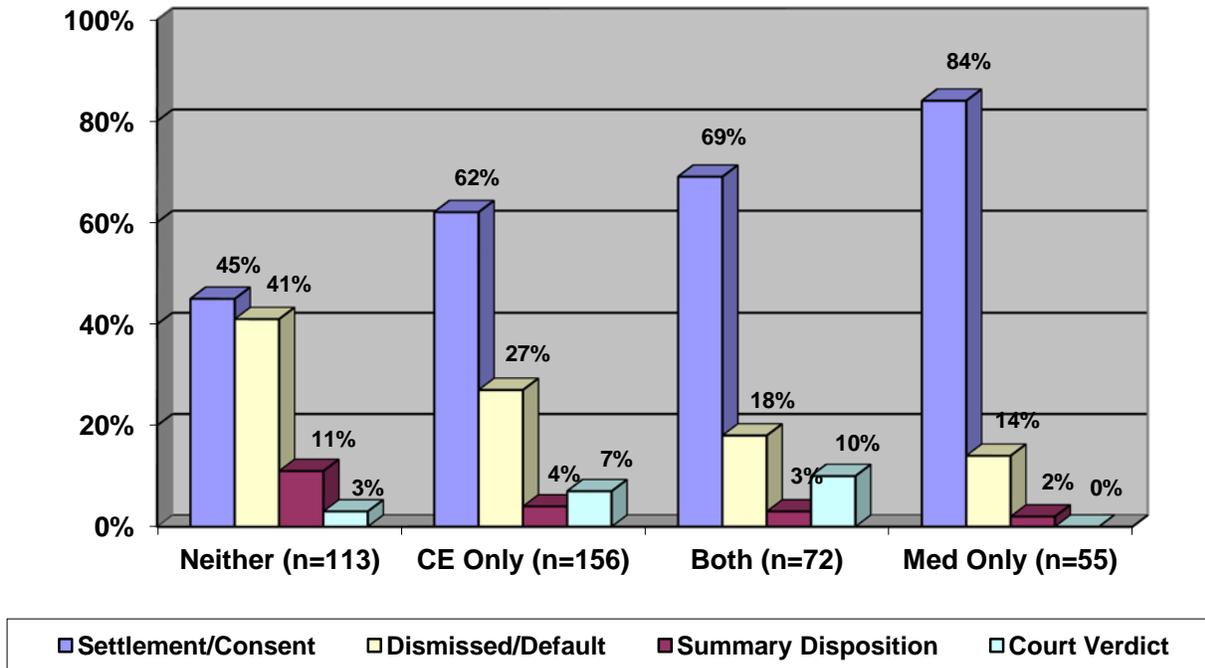


Figure 3-1 Percentage of cases disposed through settlement/consent judgment and other means by type of ADR used

Although it appears in Figure 3-1 that cases where case evaluation was held (either alone or in combination with mediation) had higher rates of disposition through trial verdicts than other cases, the statistical significance of these differences could not be tested due to the small number of cases disposed in this manner.⁴

3.3.1 Acceptance of Case Evaluation Panel Award

- 4. The case evaluation award amount was accepted in 22% of the cases examined in this study. Very few awards (2%) were accepted within 28 days.**

Of the 228 cases in which case evaluation was held, the panel award amount was accepted by all parties within 28 days in only 5 (2%) of the cases. Award amounts were accepted in an additional 46 cases (20%) beyond the 28 day period. As shown in Figure 3-2, 50 of the cases in which the award was not accepted were later disposed following mediation; 107 were disposed without the use of mediation; and 20 were disposed after the case went to trial.

⁴Of the 21 court verdicts, there were 3 in the Neither group, 11 in the CE Only group, 7 in the Both group, and 0 in the Mediation Only group.

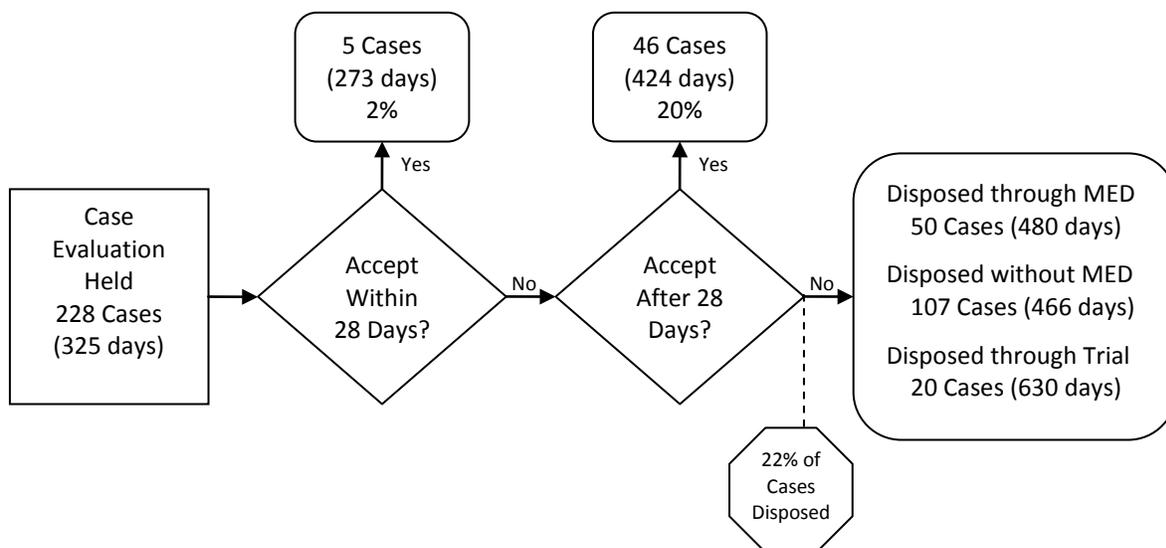


Figure 3-2 Acceptance of case evaluation panel award: Cases disposed and average (mean) age of case at each point in the process

Figure 3-2 displays the case award acceptance outcome and the court action disposing the case if the case evaluation award was not accepted for the cases in which case evaluation was held. This figure includes all 228 cases in which case evaluation was held.

Attorneys participating in the focus groups shared some reasons why awards are not accepted during the 28 days but may be accepted later. One reason is that if a party accepts, it “shows your cards.” It was suggested that the defense will sometimes reject the award initially but if the plaintiff accepts it, the defense will then decide to accept it. Another attorney noted that it is very rare for plaintiffs to accept within 28 days and that the defense is more likely to accept. Others suggested that the attorneys may want to test a motion for summary disposition first. Generally, the focus group participants indicated they were not surprised that the panel awards were not being accepted within 28 days, particularly when sanctions are unevenly imposed. Several pointed out that the threat of sanctions weighs more heavily on individual plaintiffs than on large organizations. It’s seen as being very tough on “the shallow pocket” even though collecting the sanction may not be easy.

3.3.2 Settlement at or Following the Mediation Event

- 5. Where mediation was held, nearly half of the cases (47%) were settled “at the table.” Ultimately 72% of cases that went to mediation were disposed through a settlement or consent judgment and without later using case evaluation or going to trial.**

Of the 127 cases in which mediation was held, 60 cases (47%) were settled at the mediation event. Thirty-one of the cases (24%) were later disposed through settlement/consent judgment. As shown in Figure 3-3, 13 of the remaining cases were later disposed following case evaluation, 15 were disposed via dismissal/default (13) or summary disposition (2), and 8 were disposed through trial.

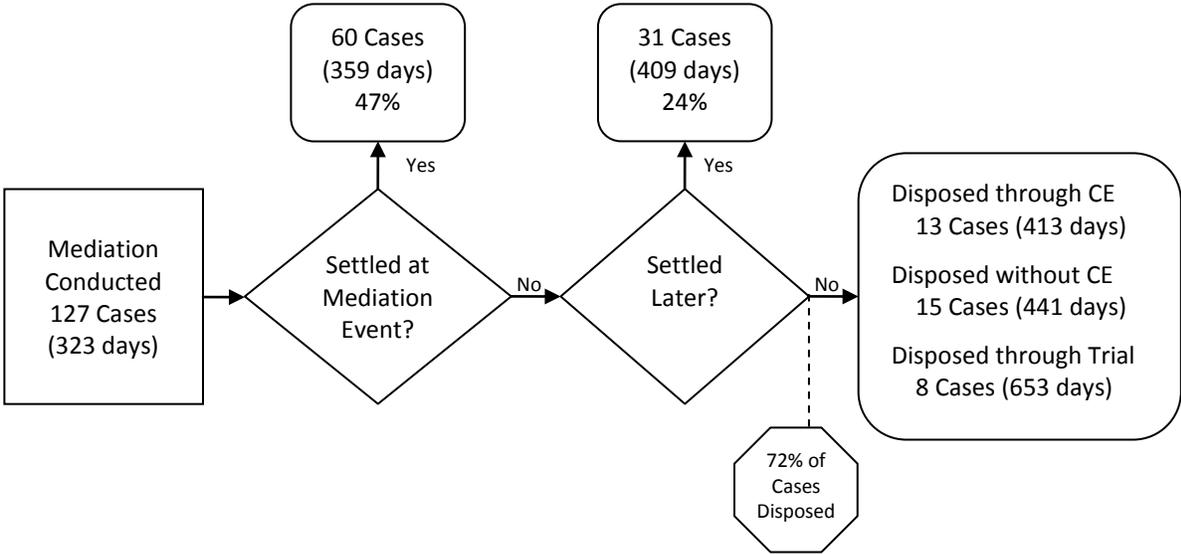


Figure 3-3 Cases settled through mediation: Cases disposed and average (mean) age of case at each point in the process

Figure 3-3 displays the mediation outcome and the court action disposing the case if a mediated agreement was not reached for the cases in which mediation was held. This figure includes all cases in which mediation was conducted, whether ordered or not. There is partial overlap with cases included in Figure 3-2, since 72 cases included both processes.

The finding that 72% of the mediated cases were disposed through settlement/consent judgment is consistent with the results from the attorney survey and comments made by attorneys participating in the focus groups. A majority of attorneys viewed mediation as being effective in prompting cases to settle. Fifty-nine percent of the surveyed attorneys estimated that mediation prompts clients to settle often or more. Similarly, the surveyed judges estimated that 54% of the cases that go through mediation settle as a direct result of the process.

3.4 The Effect of Case Evaluation and Mediation on Time to Disposition

- 6. The use of case evaluation—whether alone or in combination with mediation—significantly increased the length of time a case was open. Using mediation alone had no significant effect on time to disposition compared to cases that used neither of these ADR processes.**

A key evaluation question for this study was whether either case evaluation or mediation reduces the length of time needed to dispose a civil case. Time to disposition was calculated for each case by determining the length of time from the filing date to the date on which the case closed. As shown in Figure 3-4, the average length of time needed to close a case when neither case

evaluation nor mediation was used was 322 days. Although the average time to disposition for cases that used mediation by itself was 295 days, this was not a significant reduction in time.⁵

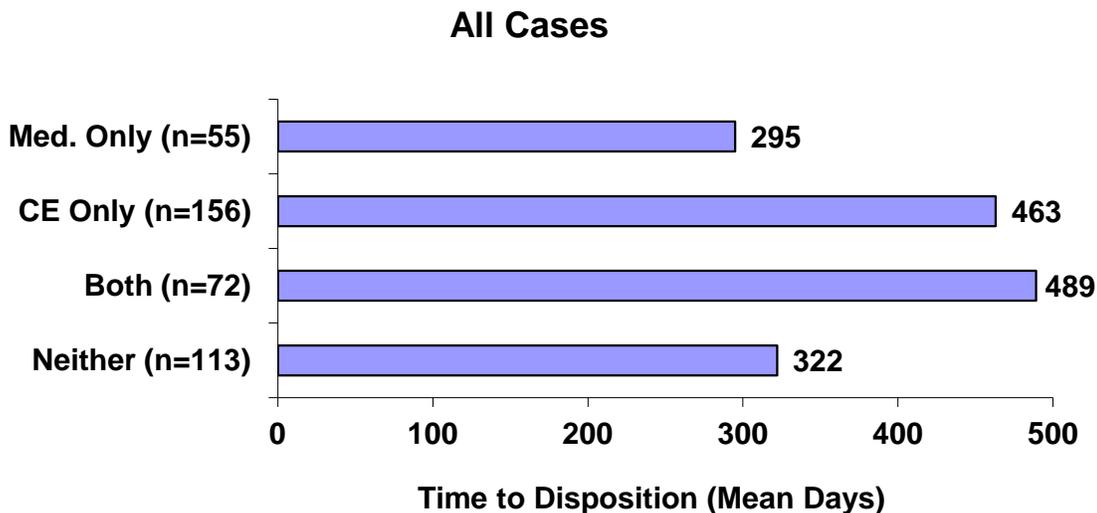


Figure 3-4 Average number of days needed to resolve civil cases by type of ADR used

Time to disposition increased significantly when case evaluation was used. Figure 3-4 indicates that the average increased to 463 days when only case evaluation was used and to 489 days if used in combination with mediation.

3.4.1 Length of Time before and after Case Evaluation/Mediation is Conducted

7. Mediation was faster than case evaluation for disposing cases because it was implemented sooner and because cases closed more quickly following mediation.

In order to understand why cases that used mediation were disposed sooner than those that used case evaluation, the study examined the average length of time from case filing until one or both processes were conducted, and then the average length of time to case closure. Table 3-3 summarizes the results of this analysis.

When mediation was the only process conducted, the mediation session was held on average 242 days from the date of filing and the cases closed about 53 days after mediation so that the whole process took an average of 295 days to complete. In contrast, when only case evaluation was used, it took 331 days on average just to complete this process and then another 132 days to close the case for a total of 463 days. If case evaluation was held first without success followed by mediation, it still took over 300 days on average to complete this first form of ADR and then additional time to conduct the mediation.

⁵ An analysis of variance comparing mean days open for the four ADR groups found that cases closed significantly later for some groups ($F = 27.08, df = 3, 395, p < .001$). Post hoc comparisons between groups using the Tukey-B HSD statistic found the following: no significant differences between the Neither cases and the Mediation Only cases in average time to disposition; a significant increase in time to disposition ($p < .05$) if case evaluation was used either alone or in combination with mediation; and no significant difference between the CE Only group and the Both group in average time to disposition

Table 3-3
Average Number of Days from Filing to ADR to Closure
For 5 Categories of ADR Cases

Type of ADR Case	N	Days from Filing to 1st ADR	Days from 1st ADR to 2nd ADR	Days from Last ADR to Closure	Total Days Case Open
CE Only	156	331	—	132	463
Mediation Only	55	242	—	53	295
Both – Mediation First	16	267	56	122	445
Both – CE First	56	307	111	83	501
Neither	113	—	—	—	322

Source: Case file review

As shown in Table 3-3, when mediation was the last process held, the cases closed on average 53 to 83 days after the mediation event. When case evaluation was the last process held, it took on average an additional 122 to 132 days to close a case.

3.4.2 The Effect of Adjournments on Time to Disposition

8. Rescheduling a case evaluation panel hearing one time did not significantly increase the time needed to dispose a case, but multiple adjournments increased time to disposition significantly.

The study examined the extent to which adjournments during the ADR process affected time to disposition. For those cases in which only case evaluation was ordered, 44% of the time the panel hearing was rescheduled at least once (see Table 3-4). While rescheduling case evaluation one time did not significantly increase the time needed to dispose a case, multiple adjournments did increase time to disposition significantly—to an average of 600 days for two adjournments and 728 days for three or more.⁶

⁶ An analysis of variance comparing mean days open for the four time groupings within the CE Only group found that cases closed significantly later when there were multiple adjournments ($F = 31.21, df = 3, 229, p < .001$). Post hoc comparisons using the Tukey-B HSD statistic found no significant differences between the cases with no adjournments and those with one; however, those with two adjournments were open significantly longer ($p < .05$) than the first two groups and the ones with three or more were disposed significantly later ($p < .05$) than all the others.

Table 3-4
Average Number of Days from Filing to Closure by
Number of Adjournments for 3 Categories of ADR Cases

Times Adjourned by ADR Case Type	n	Percent	Mean Days Case Open
CE Only			
None	128	56%	369
Once	69	30%	460
Twice	21	9%	600
Three Times or More	12	5%	728
Mediation Only			
None	11	79%	313
Once	3	21%	479
Both CE and Mediation			
None	82	66%	327
Once	24	19%	439
Twice	12	10%	561
Three Times or More	6	5%	541

Source: Case file review

Cases in which both case evaluation and mediation were ordered presented more opportunities for adjournments since one or both could possibly be rescheduled; however only about a third (34%) of these cases had at least one adjournment. A single adjournment did not significantly increase the time to disposition but two or more did.⁷

There were not enough cases for which only mediation was ordered to make statistical comparisons between those with one adjournment and those with none.

3.4.3 The Use of Case Evaluation and Mediation Relative to Discovery

9. Most judges and attorneys agreed that case evaluation is most effective if it occurs after discovery. For mediation, many judges and attorneys saw the value of using this form of ADR during discovery as well. Relatively few in each group thought that either case evaluation or mediation was effective when used prior to discovery.

When asked about the timing of case evaluation relative to discovery, 76% of the judges indicated that case evaluation is most effective after discovery, with only 14% choosing during discovery and 10% before discovery. Their responses about the timing of mediation were more mixed: 52% after discovery, 35% during discovery, and 13% before discovery.

⁷ An analysis of variance comparing mean days open for the four time groupings within the Both CE and Mediation group found that cases closed significantly later when there were multiple adjournments ($F = 9.75$, $df = 3, 123$, $p < .001$). Post hoc comparisons using the Tukey-B HSD statistic found no significant differences between the cases with no adjournments and those with one; however, those with two or more adjournments were open significantly longer ($p < .05$) than those with none.

Respondents to the attorney survey had similar preferences regarding the timing of discovery and these ADR processes. Case evaluation was reported to be most effective if it occurred after discovery: 58% after discovery compared to 32% during discovery and 2% before discovery.⁸ For mediation, the responding attorneys' preferences were more mixed: 57% during discovery, 46% after discovery, and 10% before discovery.

3.4.4 Sequence When Both Case Evaluation and Mediation Are Used in a Case

In the statewide survey of circuit court judges respondents from courts where both processes are used were asked which sequence was most common. Thirty-eight percent of the respondents said that mediation was usually held first, 28% said case evaluation was usually held first, and 34% said both sequences were equally common.

The attorney survey asked them which sequence of case evaluation and mediation they preferred. Their responses were mixed and did not convey a clear preference. In the attorney focus groups, however, participants expressed a general preference for mediation to occur early in most cases. The most common sequence suggested by focus group participants was early mediation, then a summary disposition, followed by case evaluation if needed.

3.4.5 Impact of Case Evaluation and Mediation on Court Workload and Costs

10. Using mediation to resolve civil cases generally reduces costs to the court. The impact of case evaluation on court costs is less clear.

The court administrators who participated in this study pointed out that these two forms of ADR (case evaluation or mediation) save money by avoiding the expenses associated with trials. However, they made a distinction between the impacts on trial judges and the impact on administrative staff, since they said it can be time-consuming for staff to manage the summaries and payments for case evaluation.

Grand Traverse had determined that given how few cases were successfully resolved by case evaluation—and the diminishing resources available—“the Court cannot justify the administrative time to set panels, resolve conflicts, replace evaluators, set hearing dates, collect and disburse regular and late fees as well as administer the responses.”⁹ Other courts expressed the view that if case evaluation results in a settlement, it can save costs incurred by the court in the long run. As one court administrator indicated: “[Case evaluation] saves the time of judges or their staffs in participating in settlement conferences where the parties are unfamiliar with each other's position and where the parties have not had objective feedback about the merits of their case.”

⁸ Responses to these items on the attorney survey do not add to 100% because respondents were instructed to choose all that apply and could choose more than one response.

⁹ Memorandum to 13th Circuit Court General Civil and Personal Injury Case Evaluators from Hon. Philip E. Rodgers, Jr., Circuit Court Judge and Hon. Thomas G. Power, Circuit Court Judge. November 23, 2010.

In the statewide judicial survey, circuit court judges were asked about the financial impact to the court of managing the case evaluation and mediation processes. Regarding case evaluation, 50% said it reduces the court costs, 27% said it increases the court's costs, and 23% said it had no impact. Regarding mediation, 63% said it reduces the court costs, 29% said it had no impact, and only 8% said it increases the court costs.

3.5 Relative Costs of Case Evaluation and Mediation for Litigants

11. The study found little evidence that case evaluation either reduces or increases costs substantially for litigants in civil cases.

Among the court administrators from the six circuit courts in the study, ADR was generally seen as helping litigants to save the costs incurred if the case were carried to trial (both pretrial and trial costs). As one court administrator explained: "It may seem like a trial avoidance technique, but earlier case interaction helps parties avoid unnecessary costs that impede case resolution." Regarding direct costs of these processes, one court administrator compared the \$75 per party fee for case evaluation with the \$200 – \$300 per hour that a mediator typically charges and suggested that case evaluation provides a reasonable return for the cost.

Judges were asked about the financial impact to the litigants of participating in case evaluation or mediation. Case evaluation was viewed by 61% of the respondents as having no net impact on litigants' costs; 39% said it increases litigants' costs; and none said it reduces their costs. Mediation, in contrast, was seen by 60% of the respondents as reducing litigants' costs. About a third (35%) said mediation increases litigants' costs and 5% said it had no net impact.

The attorney survey asked about litigation costs subsequent to the particular ADR process being conducted. About a third (36%) indicated that case evaluation frequently (often, very often or always) reduced subsequent litigation costs, compared to 54% that reported that mediation frequently reduced subsequent litigation costs.

12. Although mediation initially is a more expensive option for litigants, the study found evidence that it can ultimately reduce their overall costs.

The attorney focus groups provided participants an opportunity to discuss more fully the costs of case evaluation and mediation and their impact on the litigants' overall costs. They pointed out that mediation is more successful in settling cases than case evaluation, so it saves money in the long run, since more costs are incurred when the case remains open for a longer period of time. When asked about the specific costs, very few focus group participants offered any cost estimates. One attorney estimated that the number of billable hours to prepare the case evaluation summary ranges from 5 to 25 hours. Another suggested that the defense attorney might charge \$3,000 to \$5,000 to prepare for case evaluation while the plaintiff would only pay the \$75 fee for the panel. Compared to the direct cost of case evaluation (\$75 per party for the standard panel), the cost of mediation is higher (estimated at typically \$750 to \$1,000 for each party), although some focus group participants said that the cost would depend on the specific case.

Overall, there was strong agreement among attorney focus group participants that while the direct cost of mediation is higher than that of case evaluation, it usually saves money because it

is a more productive process. It was suggested that early mediation can save money overall by avoiding the costs of discovery. Some attorneys indicated that they typically submit the same documents for both processes and that the same preparation would also be needed to prepare for a trial. The relative cost may depend on when the case goes to ADR. A few participants pointed out that while mediation saves money when the parties settle, the cost of mandatory mediation can be a problem for parties if they don't want to be there and they don't settle. It was suggested that case evaluation is less expensive and "sometimes that is all you need." One participant concluded that whichever process is used, "ADR moves the process faster and saves attorney fees for the litigants."

3.6 Disposition of Cases Following an Order for Case Evaluation and/or Mediation

The case file review revealed that when case evaluation and/or mediation were ordered in a case they did not always occur. Furthermore, when both forms of ADR were ordered, they were not always held in the sequence in which they were ordered. In addition, some parties opted for mediation even when it was not ordered. The following subsections describe how and when cases were disposed when either case evaluation or mediation was supposed to be the first or only form of ADR held.

3.6.1 When Case Evaluation is the First or Only Type of ADR Ordered

Among the 396 civil cases reviewed, 292 were identified in which case evaluation was either the only type of ADR ordered by the court (232 cases) or it was ordered to be conducted first with mediation to be conducted later if needed (60 cases). Figure 3-5 provides an overview of the sequence of events for these cases and indicates where in the process each case was disposed and how it was disposed. The average age of the cases at disposition is indicated in parentheses.

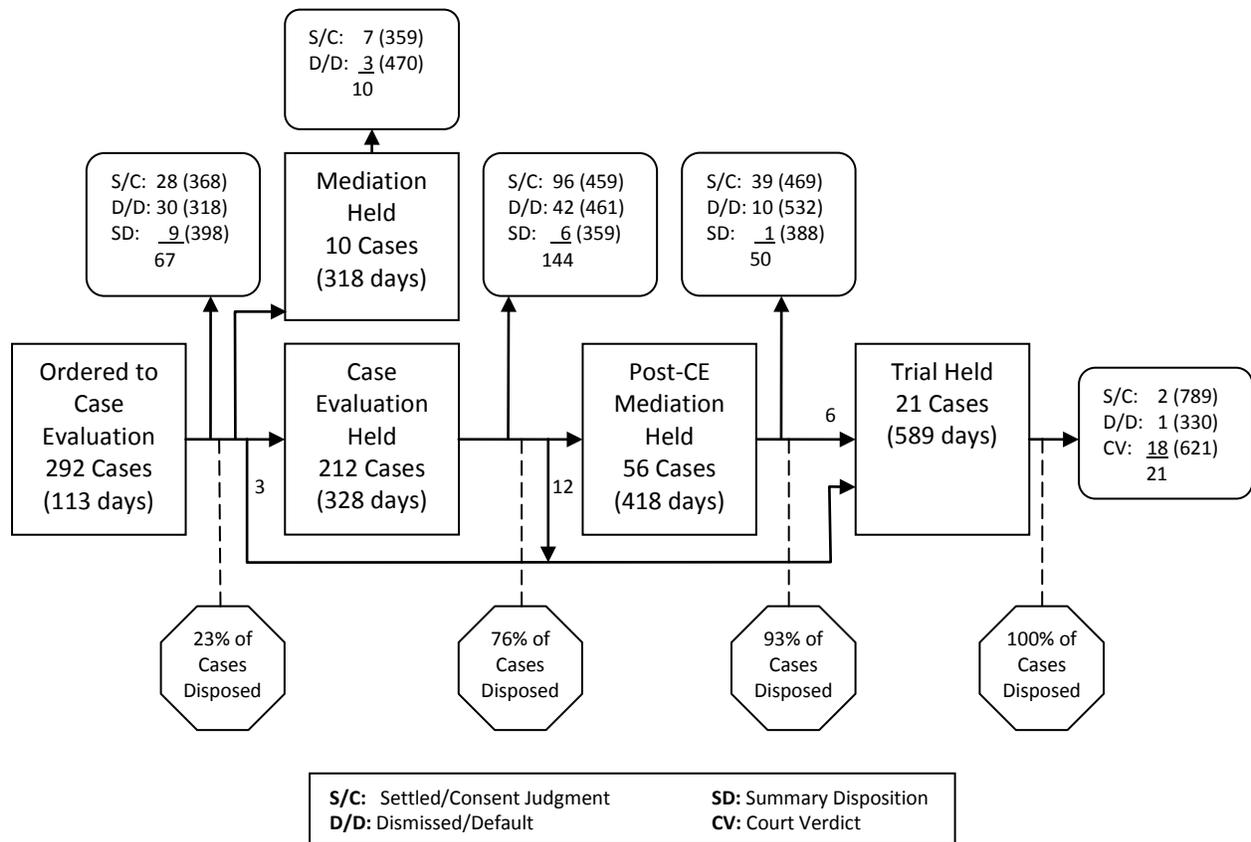


Figure 3-5 Case disposition when case evaluation is the first or only type of ADR ordered: Cases disposed and average (mean) age of cases at specific points in the process

On average the order for case evaluation was issued 113 days after the case was initially filed. As shown in the figure above, 67 of the cases (23%) were disposed without either case evaluation or mediation being conducted. In 10 other instances, the parties opted to use mediation instead of court-ordered case evaluation to resolve their cases.

Of the 212 cases in which case evaluation was held, 144 (68%) were disposed through this process. Twelve cases proceeded to trial without mediation taking place. After case evaluation, 56 cases proceeded to mediation, with all but six cases being disposed without trial. Thus 93% of the cases were disposed without going to trial: 70% by means of case evaluation and/or mediation and 23% without using either process.

3.6.2 When Mediation is the First or Only Type of ADR Ordered

Figure 3-6 shows the process through which 77 cases were disposed in which mediation was either the only type of ADR ordered by the court (16 cases) or it was ordered to be conducted first with case evaluation to be conducted later if needed (61 cases). These cases were ordered to mediation on average 95 days after the case filing date.

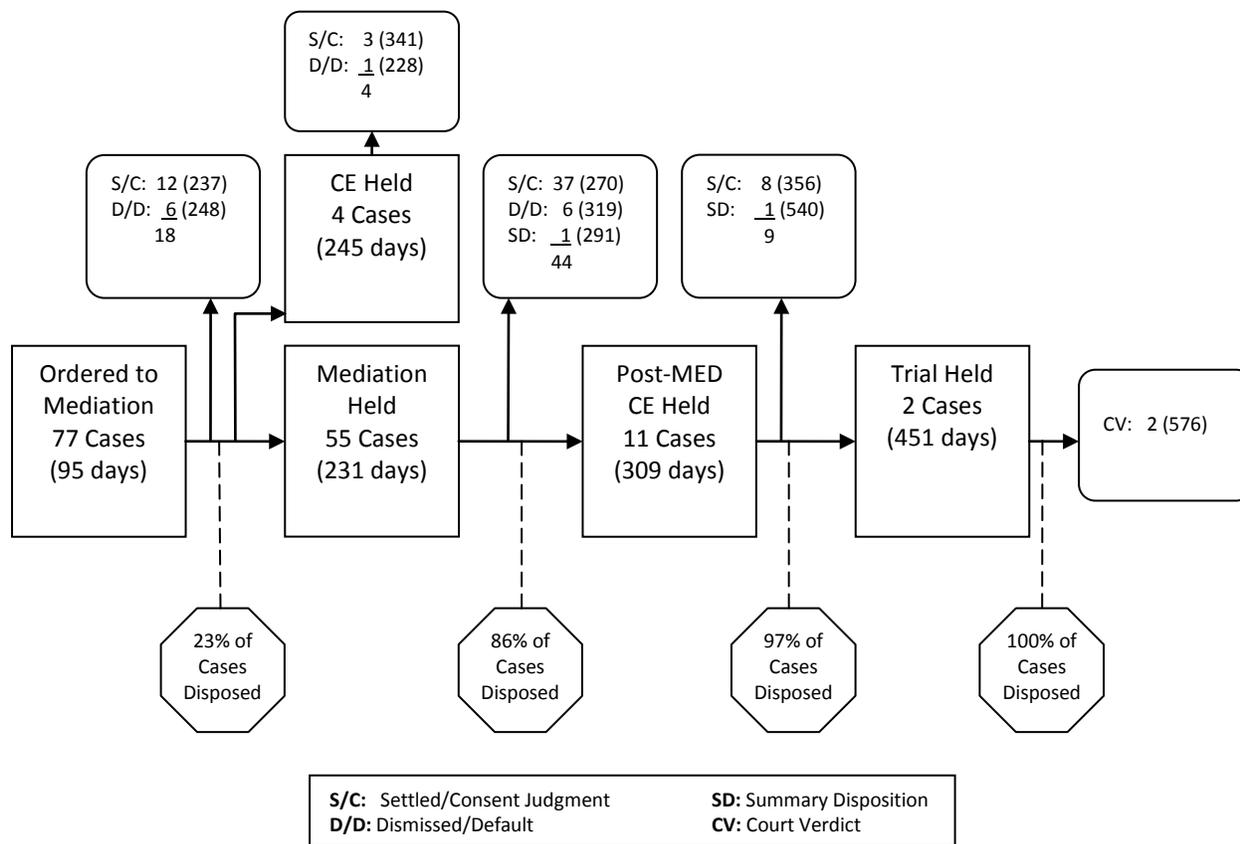


Figure 3-6 Case disposition when mediation is the first or only type of ADR ordered: Cases disposed and average (mean) age of cases at specific points in the process

Eighteen of the 77 cases (23%) were disposed without mediation or case evaluation taking place. Case evaluation, instead of mediation, was used first to dispose four of the cases. Of the 55 cases in which mediation was held, 44 (80%) were disposed through this process and case evaluation was later held for the other 11. Two of the cases for which post-mediation case evaluation was held later went to trial. Thus 97% of the cases were disposed without going to trial: 74% by means of mediation and/or case evaluation and 23% without using either.

3.7 Effectiveness of Case Evaluation and Mediation for Torts

MCR 2.403 requires the use of case evaluation for torts; however, it is also widely used for non-tort civil cases. Mediation is not required for either type of civil case but is frequently used for both (see Table 3-1 in Section 3.2 for statistics on the usage of these two forms of ADR for torts and non-tort cases). This section of the findings examines the effectiveness of case evaluation and mediation—used separately or in combination—in producing settlements and consent judgments for tort cases generally and specifically for three types of torts: no-fault auto, personal injury auto, and other personal injury cases. It also examines the effects of using these two methods of ADR on the length of time needed to dispose tort cases.

A subsequent section of the findings (Section 3.9) provides similar analyses for non-tort civil cases. And another section (Section 3.10) provides statistical analyses comparing the relative

effectiveness of using case evaluation and/or mediation to help dispose torts versus non-tort civil cases.

3.7.1 Case Dispositions for Torts

Examination of the 181 tort cases reviewed for this study (see Table 3-1) revealed that case evaluation was conducted for 72% of the cases, and in a third of these cases mediation was also held. Fourteen percent of the tort cases received only mediation services and an equal percentage of torts were disposed without either process being held. If both processes were conducted, case evaluation was held before mediation in 77% of the cases.

13. The use of one or both of the ADR processes tended to increase the percentage of tort cases in which a settlement or consent judgment was achieved. The effect was particularly strong for cases that used only mediation.

As shown in Figure 3-7, when neither process was held a settlement or consent judgment was achieved for just over half (52%) of the tort cases. If case evaluation was held, the percentage of torts disposed through settlement/consent judgment increased to 65% for case evaluation-only cases and to 72% if mediation was also held. Tort cases that used only mediation were disposed through settlement/consent judgment 92% of the time.

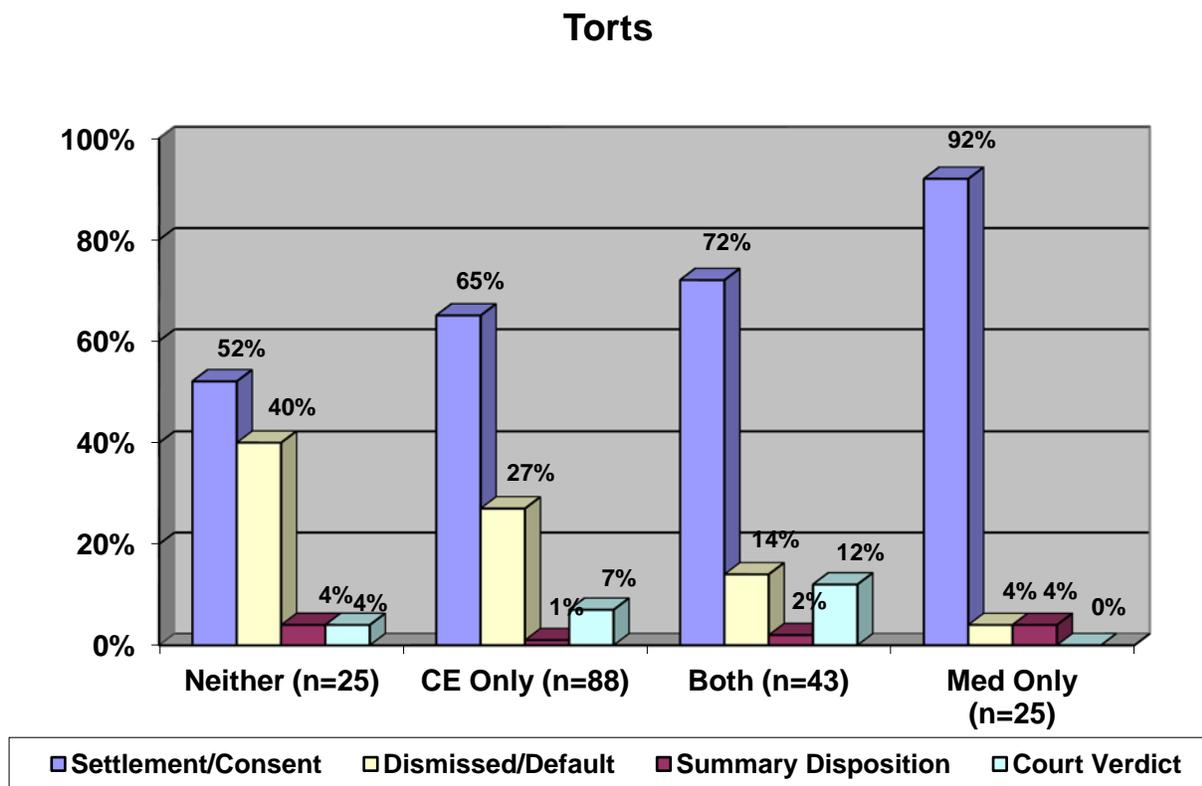


Figure 3-7 Percentage of torts disposed through settlement/consent judgment and other means by ADR process used

Statistical analyses performed on the data in Figure 3-5 indicated that although using case evaluation (alone or in combination with mediation) resulted in an increase in the percentage of cases disposed through settlement/consent judgment, the increase was not statistically significant.¹⁰ However, cases that used only mediation had a significantly higher rate of settlement/consent judgment than the others.

3.7.2 ADR Usage and Case Dispositions for Three Types of Torts

Of the 181 torts examined in this study, 66 were personal injury/automobile negligence cases, 55 were no-fault automobile insurance claims, and 32 were other personal injury claims. The remaining 12 cases were distributed among three other categories of torts. Table 3-5 shows the extent to which case evaluation and/or mediation were ordered and held for the three types of torts for which there were a sufficient number of cases to perform statistical comparisons.

**Table 3-5
Use of Case Evaluation and Mediation for Three Types of Tort Cases**

	No-Fault Auto Insurance (n = 55)		Personal Injury Auto (n = 66)		Other Personal Injury (n = 32)	
	N	Percent	N	Percent	n	Percent
Court Order for:						
CE Only	38	69%	39	59%	17	53%
Both CE & Mediation	16	29%	26	39%	13	41%
Mediation Only	1	2%	0	0%	2	6%
Neither	0	0%	1	2%	0	0%
Held or Conducted:						
CE Only	34	62%	25	38%	12	37%
Both CE & Mediation	6	11%	22	33%	8	25%
Mediation Only	6	11%	11	17%	7	22%
Neither	9	16%	8	12%	5	16%

Source: Case file review

Statistical analyses found no significant differences among the three groups in the extent to which case evaluation and mediation were ordered: in all groups, the majority of cases were ordered to case evaluation only with nearly all others ordered to both case evaluation and mediation. The groups did differ significantly, however, in the extent to which each form of ADR was held (chi-square=12.89, df=6, p=.05). The cases in the no-fault automobile insurance group were much more likely to have used only case evaluation (62%) than the cases in the other groups and much less likely to have used mediation either alone or in combination with case evaluation.

¹⁰ Statistical pair-wise comparisons were made between each of the ADR groups. These analyses found that the percentage difference between the CE Only group (65% settlement/consent rate) and the Neither group (52%) was not statistically significant (chi-square = 1.35, df = 1, p = .18); nor was the difference between the Neither group and the Both group (72%) (chi-square = 2.80, df = 1, p = .08). The 92% for the Mediation Only group was significantly higher than the 72% for the Both group (chi-square = 3.83, df = 1, p = .05), and thus significantly higher than for the other groups as well.

Table 3-6 indicates how cases were disposed for the three types of torts for which there were enough cases to make statistical comparisons. The critical variable for this study was the extent to which cases were disposed through settlement/consent judgment. For all three case types, over 70% of the cases were disposed this way and there were no significant differences among the groups on the type of disposition.

**Table 3-6
Disposition of 3 Types of Tort Cases**

	No-Fault Auto (n = 55)		Pers Injury Auto (n = 66)		Other Pers Injury (n = 32)	
	n	Percent	N	Percent	n	Percent
Trial Held	1	2%	4	6%	4	13%
Type of Final Disposition						
Settlement/Consent Judgment	39	71%	49	74%	23	72%
Dismissed/Default	14	25%	13	20%	5	16%
Court Verdict	1	2%	4	6%	3	9%
Summary Disposition	1	2%	0	0%	1	3%

Source: Case file review

3.7.3 Time to Disposition for Torts

14. For tort claims, the use of mediation significantly reduces the number of days a case is open when compared to cases that do not use any ADR process. On the other hand, using case evaluation significantly increases the length of time a case is open.

For the 181 tort cases examined in this study, the average (mean) number of days needed to resolve a case was 429 (standard deviation = 180, range: 115 to 1,284 days). As shown in Figure 3-8, the average length of time needed to close a case when neither case evaluation nor mediation was used was 365 days. The average time to disposition for cases that used mediation by itself was 271 days, which was a significant reduction in time.¹¹ When case evaluation was held, either alone or in combination with mediation, the average time to disposition (more than 460 days) was significantly longer than if neither process had been used or if mediation had been used alone.

¹¹ An analysis of variance comparing mean days open for the four ADR groups found that cases closed significantly later for some groups (F = 11.53, df = 3, 176, p<.001). Post hoc comparisons between groups using the Tukey-B HSD statistic found the following: a significant difference between the Neither cases and the Mediation Only cases in average time to disposition (p<.05); a significant increase in time to disposition (p<.05) if case evaluation was used either alone or in combination with mediation; and no significant difference between the CE Only group and the Both group in average time to disposition.

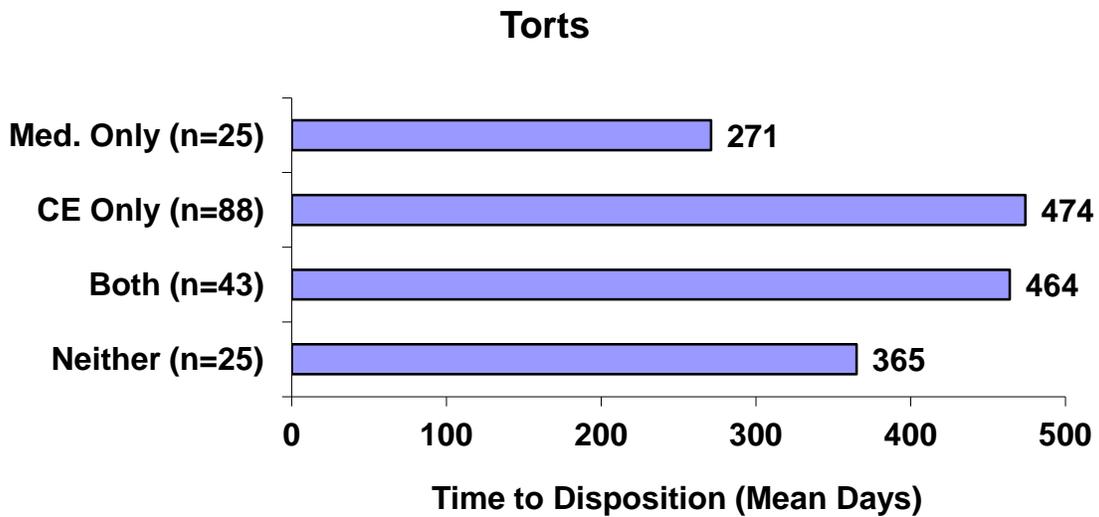


Figure 3-8 Average number of days needed to dispose torts by category of ADR used

3.8 Effectiveness of Case Evaluation and Mediation for Non-Tort Civil Cases

3.8.1 Case Dispositions for Non-Tort Civil Cases

Case evaluation was conducted for less than half (45%) of the 215 non-tort civil cases examined in this study, and mediation was conducted in 27% of the cases (see Table 3-1). Thirteen percent of cases used both processes, while 41% used neither. When both processes were held, case evaluation was performed first in 79% of the cases.

15. For non-tort civil cases, the use of one or both of the ADR processes significantly increased the percentage of cases in which a settlement or consent judgment was achieved. The effect was strongest for cases that used only mediation.

Figure 3-9 shows the percentage of non-tort cases disposed through settlement/consent judgment and by other means by the type of ADR process used. The pattern of results was similar to the one found for torts: compared to cases that did not use either of these forms of ADR, there was a significant increase in the percentage of cases disposed through settlement/consent judgment when case evaluation was used; and when only mediation was held, the percentage of dispositions via settlement/consent judgment was significantly higher than for the other groups.¹²

¹² Statistical pair-wise comparisons were made between each of the ADR groups for non-tort civil cases. These analyses found that the percentage difference between the CE Only group (59% settlement/consent rate) and the Neither group (43%) was statistically significant (chi-square = 3.75, df = 1, p = .04); however the difference between the CE Only group and the Both group (66%) was not (chi-square = 0.38, df = 1, p = .53). The 77% for the Mediation Only group was not significantly higher than the 66% for the Both group (chi-square = 0.89, df = 1, p = .26), and thus significantly higher than for the other groups as well.

Non-Tort Cases

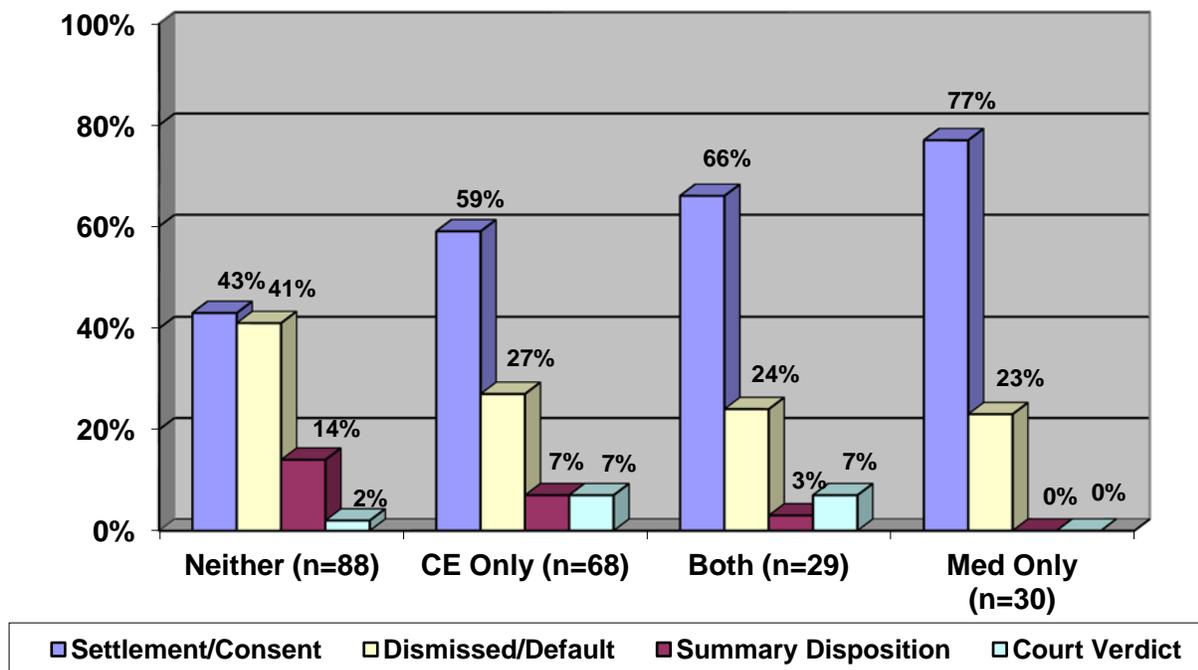


Figure 3-9 Percentage of non-tort civil cases disposed through settlement/consent judgment and other means by ADR process used

3.8.2 ADR Usage and Case Dispositions for Three Types of Non-Tort Cases

Of the 215 non-tort civil cases examined in this study, 78 were cases involving contracts, 46 were housing/real estate cases, and 51 were general civil cases. The remaining 40 cases were distributed among nine other civil case categories. Table 3-7 shows the extent to which case evaluation and/or mediation were ordered and held for the three types of non-tort cases for which there were a sufficient number of cases to perform statistical comparisons.

There were no statistically significant differences among the three groups in the extent to which case evaluation and mediation were ordered. For example, across the three groups 49% to 59% of the cases were ordered to case evaluation only and 4% to 6% were ordered to mediation only. The groups differed significantly, however, in the extent to which one or both forms of ADR were held (chi-square=14.39, df=6, p<.05). Over half of the cases (52%) in the housing/real estate group were disposed without participation in either case evaluation or mediation—this despite the fact that 87% had orders for one or both of these forms of ADR. Also, a greater portion of the contract cases (23%) were disposed using only mediation than in the other two groups (8% to 13%).

Table 3-7
Use of Case Evaluation and Mediation for 3 Types of Non-Tort Cases

	Housing/Real Estate (n = 46)		Contracts (n = 78)		General Civil (n = 51)	
	n	Percent	n	Percent	n	Percent
Court Order for:						
CE Only	27	59%	38	49%	29	57%
Both CE & Mediation	10	22%	30	38%	15	29%
Mediation Only	3	6%	3	4%	2	4%
Neither	6	13%	7	9%	5	10%
Held or Conducted:						
CE Only	13	28%	26	33%	19	37%
Both CE & Mediation	3	7%	13	17%	11	22%
Mediation Only	6	13%	18	23%	4	8%
Neither	24	52%	21	27%	17	33%

Source: Case file review

Table 3-8 indicates how cases were disposed for the three types of non-tort civil cases for which there were enough cases to make statistical comparisons. The critical variable for this study was the extent to which cases were disposed through settlement/consent judgment. Across the three case types, 54% to 63% of the cases were disposed this way and there were no significant differences among the groups on the type of disposition.

Table 3-8
Disposition of 3 Types of Non-Tort Cases

	Housing/Real Estate (n = 46)		Contracts (n = 78)		General Civil (n = 51)	
	n	Percent	n	Percent	n	Percent
Trial Held	1	2%	5	6%	3	6%
Type of Final Disposition						
Settlement/Consent Judgment	25	54%	47	60%	32	63%
Dismissed/Default	15	33%	23	30%	13	25%
Court Verdict	1	2%	5	6%	2	4%
Summary Disposition	5	11%	3	4%	4	8%

Source: Case file review

3.8.3 Time to Disposition for Non-Tort Civil Cases

16. For non-tort civil cases, the use of only mediation did not reduce the average number of days a case was open when compared to cases that did not use either ADR process. On the other hand, using case evaluation significantly increased the average length of time a case was open.

For the 215 non-tort civil cases examined in this study, the average number of days needed to dispose a case was 383 (standard deviation = 197, range: 1 to 1,156 days). Figure 3-10 indicates the average number of days these cases were open when case evaluation, mediation, or both were held and when neither was held.

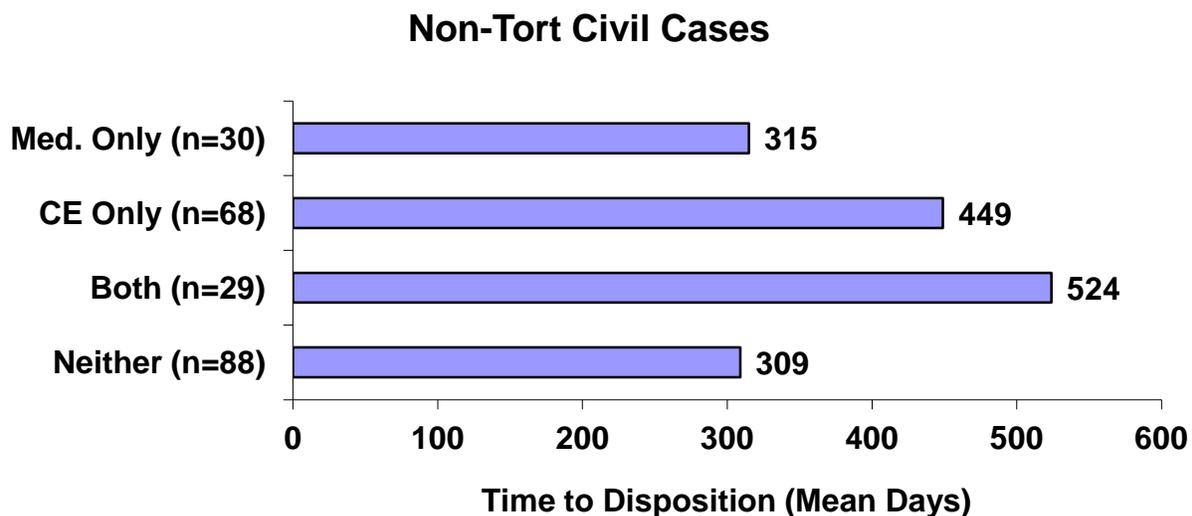


Figure 3-10 Average number of days needed to dispose non-tort civil cases by category of ADR used

Statistical analyses¹³ revealed that there was no significant difference in the average time to disposition for cases that used only mediation compared to cases that did not use either process: both closed on average a little over 300 days from case filing. These two groups of cases, however, closed significantly sooner than cases that used case evaluation only (449 days on average) or case evaluation combined with mediation (524 days). Despite a difference of 75 days, there was no significant difference in the average number of days open between the group that used case evaluation only and the group that used both case evaluation and mediation. The lack of significance was due in part to the high degree of variability within each group on the number of days each case was open.

¹³ An analysis of variance comparing mean days open for the four ADR groups of non-tort civil cases found that cases closed significantly later for some groups ($F = 15.26, df = 3, 1209, p < .001$). Post hoc comparisons between groups using the Tukey-B HSD statistic found the following: no significant difference between the Neither cases and the Mediation Only cases in average time to disposition; a significant increase in time to disposition ($p < .05$) if case evaluation was used either alone or in combination with mediation; and no significant difference between the CE Only group and the Both group in average time to disposition.

3.9 Comparisons on the Use of Case Evaluation and Mediation for Torts and Other Non-Tort Civil Cases

17. Case evaluation, which under MCR 2.403 is required to be ordered for torts, was widely used for these cases (72%). In contrast, less than half of the non-tort cases (45%) used case evaluation even though it was ordered for most of these cases.

Statistical comparisons between the tort and non-tort civil cases on the use of ADR produced the results summarized in Table 3-9.¹⁴ These results show that case evaluation was ordered significantly more often for torts (98% of the cases) than for non-tort cases (83%), which is consistent with the fact that referral to case evaluation is required for the former but not the latter. A more striking difference is in the percentage of cases for which case evaluation was actually held: 72% for torts compared to 45% for non-tort cases. These findings indicate that when case evaluation was ordered for a tort claim it was usually used by the parties to help dispose the case. On the other hand, even though case evaluation was ordered in a high percentage of the non-tort cases, it was used in fewer than half of the cases to dispose the case.

**Table 3-9
Comparisons between Torts and Non-Tort Civil Cases**

	Torts (n = 181)	Non-Torts (n = 215)	Level of Significance
ADR Ordered			
Case Evaluation	98%	83%	p<.001
Mediation	38%	33%	ns
ADR Conducted or Held			
Case Evaluation	72%	45%	p<.001
Mediation	38%	27%	p <.05
Neither	14%	41%	p<.001
Disposition			
Settled/Consent Judgment	69%	56%	p<.001
Dismissed/Default	23%	32%	ns
Court Verdict	7%	4%	—
Summary Disposition	2%	8%	—

Source: Case file review

¹⁴ Chi-square statistics comparing torts and non-tort cases were computed for each of the variables listed in Table 3-9. The probability level (p value) is listed for results that were statistically significant. Non-significant results are indicated by “ns,” and a dash indicates that the small number of cases precluded making meaningful statistical comparisons.

18. Although mediation was ordered to be used in over a third of both the tort and non-tort cases, it was held significantly more often for torts (38%) than non-torts (27%).

As shown in Table 3-9, there was no statistical difference in the percentage of torts and non-tort cases ordered to mediation; however, mediation was held significantly more often for torts (38%) than non-torts (27%). This finding is consistent with the lack of use of case evaluation for many of the non-tort cases after it was ordered.

19. The higher use of case evaluation and mediation in the tort cases probably accounts for the significantly higher rate of cases disposed through settlement/consent judgment for torts (69%) than non-tort cases (56%).

Further evidence of the lack of use of ADR for non-tort civil cases is the finding that 41% of these cases were disposed without either case evaluation or mediation being held compared to just 14% of the torts, a highly significant difference. The higher use of these two forms of ADR in the tort cases probably accounts for the significantly higher rate of cases disposed through settlement/consent judgment for torts (69%) than non-tort cases (56%).

Although a smaller percentage of torts (23%) were dismissed or disposed through a default judgment than non-tort cases (32%), this difference was not statistically significant. The small numbers of cases disposed through court verdict and summary disposition (less than 10 in some instances) precluded making meaningful statistical comparisons between tort and non-tort cases on these dispositions.

3.10 Perspectives on Case Evaluation

3.10.1 Panels and Awards

20. Limited available data suggests that a panel usually arrived at an award that was less than the amount of relief sought by the plaintiff; however, if the panel award was not accepted, the plaintiff had about an equal chance of receiving either more or less than the award amount.

The case files and local ADR databases at the circuit courts usually did not contain specific information on the amount of relief sought by the plaintiff or the final amount received by the plaintiff. Most of the records just indicated that the plaintiff sought relief in excess of \$25,000. Thirty-eight of the 228 files for cases where case evaluation was held recorded the amount sought; the average (mean) amount was \$114,693 and the median was \$43,738. The final amount received was available for 59 of the cases; the average (mean) amount was \$102,057 and the median was \$35,000. Only 18 case files had both the amount sought and the final amount: in one case the amount received equaled the amount sought, in 8 cases it was less, and in 9 it was more.

Most of the files (154 of 228) listed the amount of award determined by the case evaluation panel; the average (mean) award was \$95,079 and the median was \$30,000. Table 3-10 shows that, for the 26 cases where both the amount requested by the plaintiff and the case evaluation panel award were available from the file, in 85% of the cases the award was less than requested.

Table 3-10
Case Evaluation Panel Awards

Panel Award Compared to Plaintiff's Request (n=26)		Plaintiff's Final Dollar Amount Upon Disposition Compared to Panel Award (n=39)	
Average amount sought		Average amount received	
Mean	\$94,351	Mean	\$119,489
Median	\$38,927	Median	\$35,000
Panel Award:		Plaintiff Received:	
More than sought	15%	More than panel award	41%
Same as sought	0%	Same as panel award	23%
Less than sought	85%	Less than panel award	36%
Average difference from amount sought		Average difference from panel award	
Mean	-\$44,260	Mean	-\$14,764
Median	-\$24,610	Median	\$0

Source: Case file review

In the 39 case files that contained both the final amount upon disposition and the panel award, 23% of the plaintiffs received the same amount as the panel award. The number who received more (16 cases) was nearly the same as the number who received less (14 cases). Four of these cases were disposed by a court verdict: in three instances the plaintiffs got less than the panel had recommended and in one case the plaintiff got more.

21. Judges assigned high ratings to the quality of case evaluators, while attorneys expressed more mixed views of the panels' expertise.

Circuit court judges gave high ratings when asked about the quality of case evaluators who serve on panels for cases in their courts: 31% excellent and 48% very good. Attorneys expressed a less favorable view of panels' expertise: 60% of the attorneys who completed the survey indicated that panels had sufficient expertise to evaluate their cases often or more (31% often, 24% very often and 5% always). Thirty percent said sometimes and 10% said rarely or never. Attorneys had mixed feelings about whether the awards approximated their own valuation of the cases: 43% said sometimes, 33% said often or more, and 25% said rarely or never. Some respondents raised concerns about some panels being unprepared or inexperienced, particularly where specialty panels are not common. Attorneys who participated in the focus groups pointed out that in some courts the panels have very little time to review the summaries (which they said can be overly long, with unnecessary attachments) and too little time with the attorneys present (generally 30 minutes, but only 15-20 minutes in some courts).

3.10.2 Non-unanimous Awards

Based on responses to the survey of attorneys, over two-thirds (68%) have never or rarely requested that a panel issue a non-unanimous award. Fewer than 10% have done so often or more. For those who have requested non-unanimous awards, 48% said the panels issued non-unanimous awards often or more. When asked their reasons for requesting a non-unanimous award, the most common reason was the nature of the claim. Many commented that they are requested in no-fault, first party claims involving personal injury protection (PIP) benefits. They expressed concern that a plaintiff accepting the award risks the loss of future PIP benefits, while rejecting the award may result in sanctions. Another reason cited involved equitable relief because the award cannot properly address such relief.

Due to the specific concerns raised by attorneys regarding PIP claims (case type NF), the evaluators examined the patterns and outcomes of the 55 PIP (NF) cases in the case file review compared to 126 other tort claims. There were no statistically significant differences in the ADR methods ordered or conducted. There were 34 PIP cases that had case evaluation only and another 6 with both case evaluation and mediation. Of the non-PIP tort cases, 54 had case evaluation only and another 37 had case evaluation and mediation. No statistically significant differences were found in the settlement rates or days open in comparing the two categories. The case records reviewed did not typically specify whether the award was unanimous or non-unanimous: only 29 cases provided this information. Within that count, 7 of the 13 PIP cases (54%) had panels that resulted in unanimous awards and 15 of the 16 non-PIP cases (94%) had unanimous awards. The direction of this difference is consistent with attorneys' indications; however, given the small number of cases, it was not possible to do reliable tests of statistical significance.

3.10.3 Use of Sanctions

In the statewide survey of judges, 50% of the respondents indicated that sanctions are applied often or more (29% often, 9% very often, 12% always) when the parties do not accept the award within 28 days and the case is ultimately disposed by bench or jury trial. Thirty-one percent said sometimes, 17% rarely and 2% never.

How often have the sanction provisions of MCR 2.403 been the primary incentive for parties to accept the award?

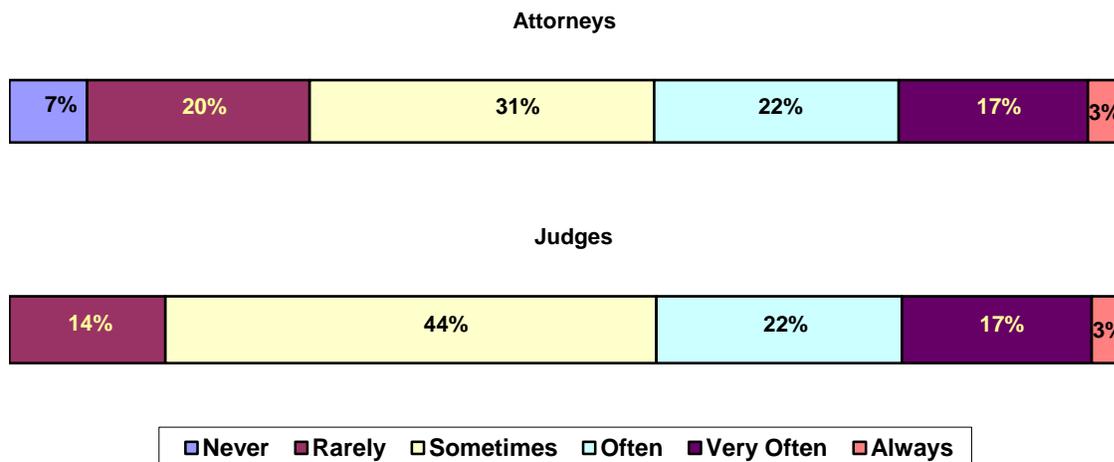


Figure 3-11 The effect of sanction provisions on the acceptance of case evaluation awards

When asked how often the sanction provisions have been the primary incentive for parties to accept the award, 42% of the judges indicated often or more. As shown in the Figure 3-11, respondents to the attorney survey offered very similar estimates. In the focus groups, attorneys pointed out that sanctions are unevenly applied, however, and are a greater concern to individual plaintiffs than to large organizations. They also indicated that despite the threat of sanctions, some case evaluation awards are not being accepted—particularly when there is a concern about future benefits (as with PIP cases).

In the case file review there was insufficient data regarding sanctions for any analysis to be conducted.

3.10.4 Important Outcomes of Case Evaluation

22. Judges and attorneys considered the primary purpose of case evaluation to be arriving at a number the parties can accept rather than providing a fair valuation.

When asked about the primary purpose of case evaluation, 71% of the respondents to the judicial survey indicated that it is to “arrive at a number that the parties can accept (likely to produce a settlement or resolution)” and only 21% chose “provide a fair valuation of the case (close to the value a jury or judge might award).” Attorneys responded similarly to that question in their survey: 78% and 21%.

23. According to the attorney survey results, case evaluation is not often achieving its intended outcomes.

Several potential outcomes of case evaluation were listed in the attorney survey and respondents were asked to rate how important each is and how often case evaluation provided that outcome. The following bar graph shows the ratings for each outcome: the percentage rating it important

or very important and the percentage rating its frequency as often, very often or always. The outcomes are arranged in descending order of importance, as rated by the attorneys.

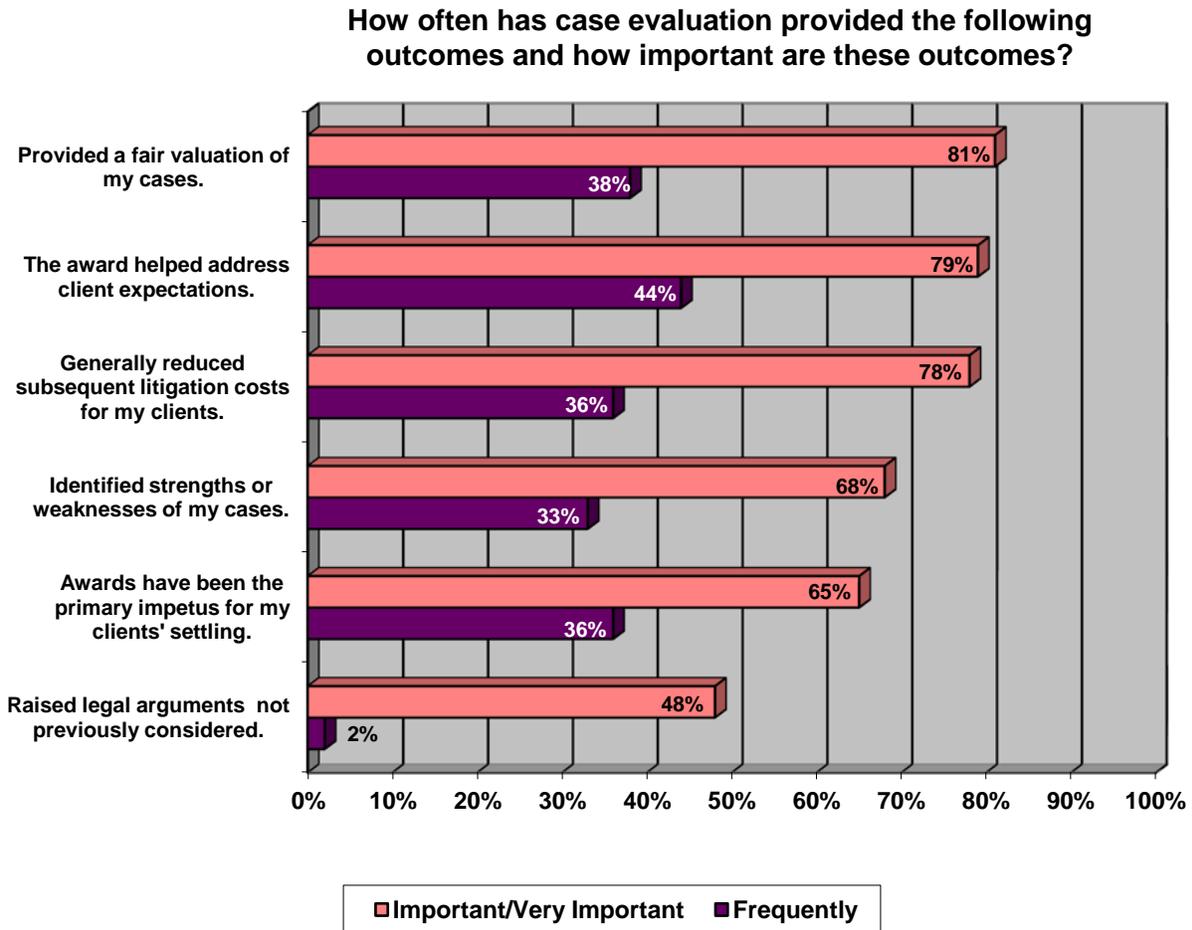


Figure 3-12 Attorneys' ratings of outcomes for case evaluation

The most important outcomes were: 1) provide a fair valuation (81% important or very); 2) help address client expectations (79%); and 3) reduce subsequent litigation costs (78%). All three outcomes were considered important by approximately 80% of the attorneys. Providing a fair valuation was the only outcome where the majority considered it very important: 54%. In regard to the frequency with which those outcomes were achieved, the range was only 33% to 44% often or more, except for raising legal arguments not previously considered: 2%.

An open-ended question on the attorney survey allowed respondents the opportunity to identify additional outcomes. Most of the 3,096 survey respondents did not answer this optional question. Of the 709 responses to this question, the most common category (176) was that case evaluation impedes settlement, generally as a result of an unrealistic award that either hardens or further polarizes the parties' positions. Some added that the award can either confirm or create unrealistic expectations. Another response category (115) was that case evaluation is a waste of time that does not provide any worthwhile outcome. Some respondents added that the panel is ill prepared or too inexperienced to properly evaluate the claim.

Reflecting a more positive view of case evaluation, 136 respondents indicated that it can provide parties with a better understanding of the case, defeat unrealistic expectations, or uncover pertinent facts that had not been identified. Another group of comments noted that case evaluation has served as a vehicle for settlement (106). In some cases it provides a starting point for negotiations or leads the parties to agree to further ADR, whether binding arbitration or facilitative mediation (36). A smaller number of respondents commented that case evaluation led to a forced settlement due to the threat of sanctions (38). Some saw this as unjust, in that it causes the party with fewer financial means to either accept a settlement it otherwise may not have or face the threat of sanctions (20).

Attorneys who participated in the focus groups indicated that the purpose of case evaluation seems to have changed over the years. Attorneys with many years of experience pointed out that panels used to focus more on what the case is really worth, but more recently they seem to look for a number they think both sides can live with. It was suggested that the case evaluation award is “a hammer to encourage settlement rather than a realistic value to the case.”

3.10.5 Overall Opinion about Case Evaluation

24. While circuit court judges in Michigan generally have a high opinion of case evaluation as a means to resolve civil cases, attorneys are less convinced of its effectiveness.

Both the attorney survey and the judicial survey asked respondents to indicate the extent to which they agree or disagree with the following statement: “Overall, case evaluation is an effective method for resolving civil cases.” The judges indicated a more positive view of case evaluation, with 69% of them agreeing or strongly agreeing with that statement. In contrast, only 48% of the attorneys agreed. While 12% of the judges and 21% of the attorneys reflected a neutral view, only 19% of the judges indicated a negative view of case evaluation compared to 31% of the attorneys.¹⁵

¹⁵ Attorneys who had served as case evaluators were less likely to indicate a negative view of case evaluation than those who had not: 20% vs. 39%.

To what extent do you agree or disagree with the following statement?
 "Overall, case evaluation is an effective method for resolving civil cases."

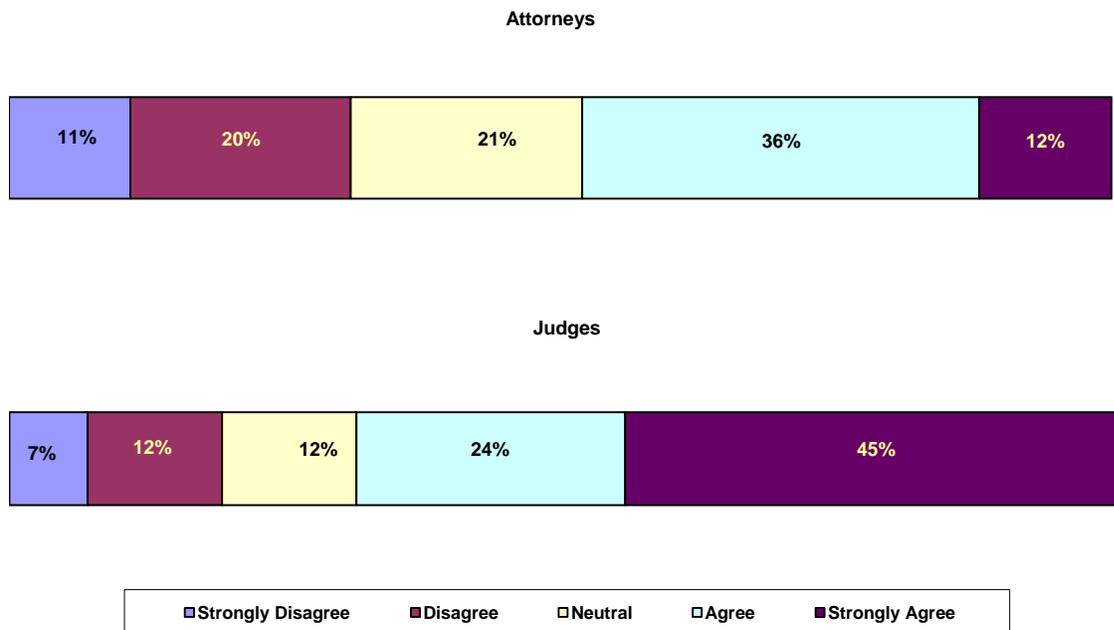


Figure 3-13 Overall assessment of case evaluation by attorneys and judges

25. Judges were much more likely to order case evaluation when it is not mandated than attorneys would be to use case evaluation if it were not court ordered.

Judges expressed a more favorable view of case evaluation than attorneys when they were asked similarly worded questions about using case evaluation when it is not required (see Figure 3-11). Judges were asked how often they would order case evaluation if it was not mandatory for tort claims and 83% indicated often or more. Only 7% indicated they would rarely or never order case evaluation if it were no longer mandatory for tort claims. When asked whether they would have used case evaluation voluntarily if it had not been ordered in their cases, only 35% of the attorney survey respondents indicated they would have done so often or more. A larger number (38%) indicated rarely or never.

How often would you voluntarily use case evaluation if not ordered/mandatory?

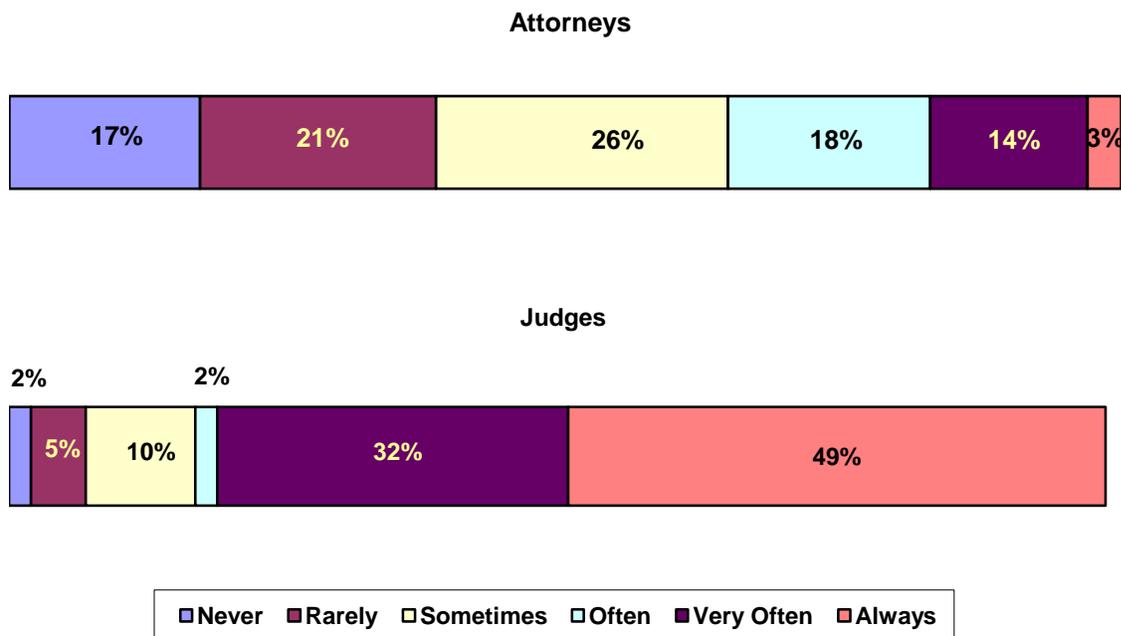


Figure 3-14 Willingness to use case evaluation if not required

3.11 Perspectives on Mediation

3.11.1 Perceived Quality of Mediators

26. Circuit court judges indicated very high ratings for the quality of mediators available in their jurisdiction.

Judges were asked to rate the quality of mediators who are on the approved list for cases in their court. The highest ratings of excellent or very good were chosen by 92% of the judges; only 3% gave ratings of poor or unsatisfactory. The attorney survey did not ask a similar question; however, 12 of the 228 comments (5%) explaining why attorneys sometimes object to mediation related to mediators’ perceived lack of competence.

When asked for ratings of the mediation service provided by the Community Dispute Resolution Program center in the area, the percentages were adjusted to remove those for whom it was not applicable. The adjusted percentages were 83% of the judges rating them excellent or very good and 3% rating them poor or unsatisfactory.

3.11.2 Frequency of Objections to Mediation

When asked how frequently their cases were ordered to mediation, 44% of the attorneys surveyed indicated it was a frequent occurrence (often or more). Most of the attorneys (51%) have never objected to mediation and another third (33%) said they have rarely objected. Those

who have ever objected (49% of attorneys) indicated that the most common reasons were: “One or more parties needed a legal finding by the court first” (63%) and “The amount in controversy did not warrant the cost of mediation” (57%). A much smaller number (13%) indicated that “the clients participated in mediation before filing the lawsuit.” Other reasons offered by attorneys included: it was clear that the parties were not willing to settle; the particular type of claim was not conducive to mediation; involuntary mediation is not conducive to settlement. Of the attorneys who did object, 46% said that judges nevertheless often or more than often ordered their clients to participate in mediation.

Judges estimated that they ordered or referred roughly one-third of the cases to mediation (36% of torts and 30% of other civil cases). The judges also indicated that attorneys seldom object to mediation: 71% said attorneys rarely or never object. The two most common reasons heard by the judges were the cost of mediation and that there was no chance of settling. Judges indicated that when attorneys objected, they frequently ordered their clients to participate in mediation nevertheless: 63% of the judges said often or more.

3.11.3 Important Outcomes of Mediation

27. According to attorney survey results, mediation frequently achieves its intended outcomes.

The attorney survey listed several possible outcomes of mediation and asked respondents to rate them on two scales: how important each outcome is and how often mediation has provided that outcome. The following bar graph shows the ratings for each outcome: the percentage rating it important or very important and the percentage rating its frequency as often, very often or always. The outcomes are arranged in descending order of importance, as rated by the attorneys.

How often has mediation provided the following outcomes and how important are these outcomes?

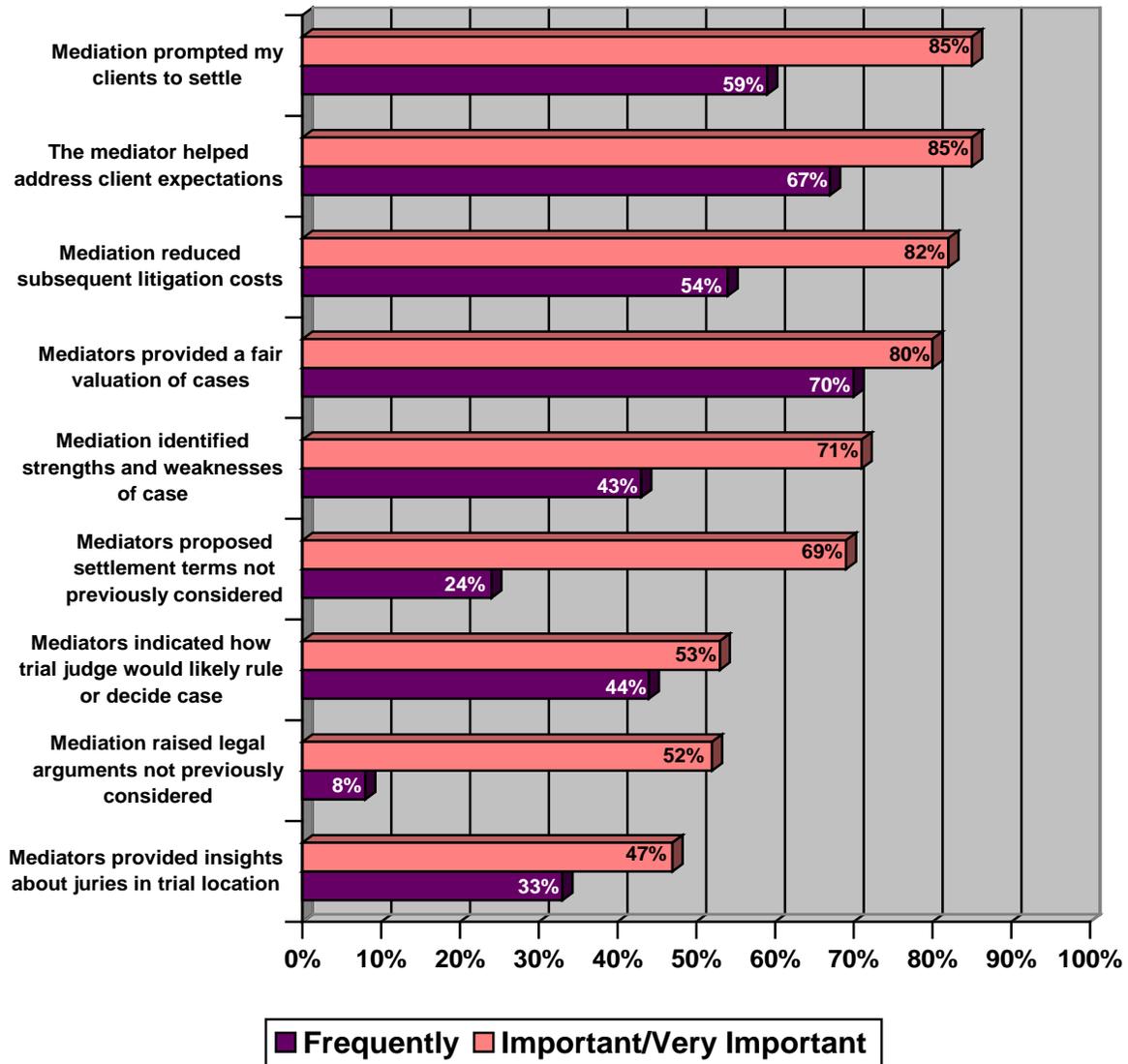


Figure 3-15 Attorneys' ratings of outcomes for mediation

The most important outcomes, according to the respondents, were: 1) prompt clients to settle (85% important or very); 2) help address client expectations (85%); 3) reduce subsequent litigation costs (82%); and 4) provide a fair valuation of the case (80%). Two of these outcomes were considered very important by more than half of the attorneys: prompt clients to settle (53% very important) and reduce subsequent litigation costs (52% very important).

For the four most important outcomes, 54% - 70% of attorneys indicated that they were achieved frequently (often or more). Few attorneys thought that mediation frequently raised legal

arguments not previously considered (8%), proposed settlement terms not previously considered (24%) or provided insights about juries in the trial location (33%). The gaps between importance and frequency on several outcomes are smaller for mediation than they are for case evaluation (see Figure 3-12). Comparisons between case evaluation and mediation on the common outcomes are included in Table 3-11.

The attorney survey included an open-ended question to allow respondents to note any additional outcomes not listed above. Most of the survey respondents did not answer this optional question. Of the 379 responses to this question, the largest category (111) indicated that mediation facilitates settlements. Some attorneys pointed out that the mediator was able to craft a creative solution that would not have been possible in case evaluation or a trial. The second largest category (93) expressed opposition to court-ordered mediation, pointing out that some parties are not willing to settle regardless and the process (and its cost) angers them. Another large group of respondents (71) observed that mediation resulted in the parties acquiring a better understanding of the case. Another 37 commented that mediation provided a mechanism for client participation. A smaller group (21) remarked that mediation resulted in an unjustified additional cost to the parties.

3.11.4 Overall Opinion About Mediation

28. Judges and attorneys both give high marks to mediation as a means for resolving civil cases.

The attorney survey and the judicial survey asked respondents the extent to which they agree or disagree with the following statement: “Overall, mediation is an effective method for resolving civil cases.” Both groups indicated agreement with that statement. The judges were especially positive (89% strongly agree or agree), compared to 77% of the attorneys.¹⁶ There was very little disagreement from either group: only about 6% of each group.

¹⁶ Attorneys who had served as mediators were more likely to indicate a positive view of mediation than those who had not: 85% vs. 75%. The difference was most notable in the percentages of attorneys who strongly agreed: 44% of those who had been mediators and 24% of those who had not.

To what extent do you agree or disagree with the following statement?
 "Overall, mediation is an effective method for resolving civil cases."

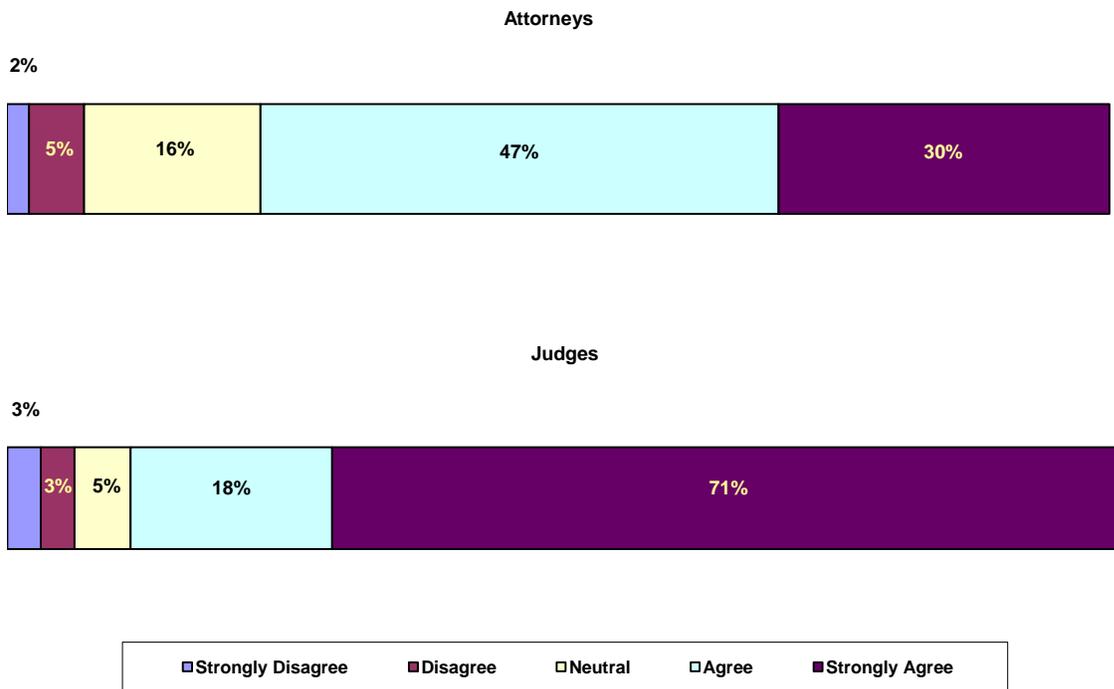


Figure 3-16 Overall assessment of mediation by attorneys and judges

3.12 Perceived Pros and Cons of Case Evaluation and Mediation

3.12.1 Attorneys’ Perspective

29. Mediation more often produces the key outcomes that attorneys seek when using an ADR process than does case evaluation.

Some of the attorney survey questions were nearly identical between the case evaluation section and the mediation section of the survey. This makes it possible to directly compare the attorneys’ opinions regarding case evaluation and mediation on several indicators. The following table includes the percentage of attorneys agreeing or strongly agreeing that case evaluation/mediation is an effective method for resolving civil cases. While 77% of attorneys agreed with that statement regarding mediation, only 48% agreed regarding case evaluation. The other percentages in the table are derived from the questions about specific outcomes of case evaluation/mediation. They represent the attorneys who rated the frequency of that outcome being achieved as often, very often or always. For all outcomes, attorneys indicate that mediation more frequently achieves them than does case evaluation.

Table 3-11
Attorneys’ Assessments of Case Evaluation and Mediation

	Case Evaluation	Mediation
Is an effective method	48%	77%
Provides a fair valuation	38%	60%
Addresses clients’ expectations	44%	67%
Prompts clients to settle	36%	59%
Reduces subsequent litigation costs	36%	54%
Identifies strengths or weaknesses	33%	43%
Raises new legal arguments	2%	8%

Most notable are the outcomes that were ranked highest by attorneys for importance: providing a fair valuation of the case, addressing clients’ expectations, providing an impetus for clients to settle, and reducing clients’ litigation costs. The majority of attorneys said that mediation frequently produced these types of results. For these individual outcomes areas, the percentage of attorneys who frequently obtained positive results using mediation ranged from 54% to 67%. When asked how often they achieved these same results through case evaluation, the percentage who said they frequently did so was much lower for every outcome area—only ranging from 36% to 44%.

30. Mediation was seen by attorneys to have several advantages over case evaluation, including having the participants present and having more time with the case.

In the focus groups, attorneys were asked about these survey findings in which mediation compared favorably with case evaluation on several indicators. There was a strong consensus that mediation benefits from more time spent on each case. Having the parties present—not just the attorneys, as in case evaluation—was also seen to be a major advantage. Parties have the opportunity to be heard; the mediator can speak privately with both parties; and it is possible to arrive at other concessions besides just a settlement amount. As one attorney put it, “The mediator is not imposing something from the top but facilitating the parties to come to an agreement.”

When asked what would happen if neither process were ordered, very few attorney focus group participants indicated any willingness to go to case evaluation voluntarily. Those who did indicated that case evaluation still serves a purpose with some cases, particularly when one or both sides are unrealistic. Many more participants indicated that they would—and do—go to mediation voluntarily.

Flexibility was the common theme heard from all of the attorney focus groups. Attorneys want courts to avoid the “one size fits all” approach that seems to be common where automatic scheduling orders dictate the timing and sequence of ADR.

3.12.2 Litigants' Perspective

31. According to attorneys, litigants often feel frustrated by case evaluation because they don't get heard and don't know how the panel determined the award amount.

When asked about the litigants' perspective on these ADR processes, attorney focus group participants indicated that case evaluation doesn't seem like justice to the litigants. They want to be heard and mediation gives them that opportunity. Litigants often feel frustrated because they accepted something they didn't like or their case was "solved by an economic squeeze rather than their day in court."

Some focus group participants suggested that attorneys need to do a better job of explaining the case evaluation and mediation processes and share the opposing attorney's summary with them. As one put it, "a lot of complaints are because of poor communication between the client and attorney." However, it was added that most lawyers do a good job of explaining the range of options to their clients. Another concluded that "if the process is fair, the number is less important." Still, litigants have expressed frustration with the system overall and why it takes so long to get their case resolved.

3.12.3 Judges' Perspective

32. Circuit court judges gave higher ratings to mediation than to case evaluation and expressed a willingness to order mediation in place of or prior to case evaluation if it is shown to be more effective. However, there was also support for the continued use of case evaluation.

When judges were asked about the cases in their docket that go through these processes, they estimate that 54% of the cases where mediation was conducted settled as a direct result, compared to 42% of the cases where case evaluation was held. The survey also asked judges: "If mediation was demonstrated to be more effective than case evaluation in achieving a disposition sooner after the ADR event, how often would you order mediation in place of or prior to case evaluation?" A high percentage (84%) responded often or more (20% always, 41% very often, 23% often). Only 8% indicated rarely or never.

As noted in sections 3.11 and 3.12, judges gave higher ratings to mediation than to case evaluation. However, their assessment of case evaluation's effectiveness was more positive than the attorneys' assessment. Judges' comments indicated considerable variation between courts regarding the value of case evaluation and/or mediation. While some have a preference for mediation, others expressed support for the continuation of case evaluation. One pointed out that "many insurance companies do not participate in any meaningful ADR without being ordered to do so and without the threat of sanctions. Another "would like to see case evaluation modified and/or replaced with MCR 2.4.11." Reflecting a balanced perspective, one judge stated: "Both processes are of value to the resolution of cases."

3.12.4 Court Administrators' Perspective

33. Court administrators in the six circuit courts studied expressed mixed views of case evaluation and mediation but strong support for flexibility in the use of ADR.

Court administrators who contributed to this study expressed favorable opinions about ADR and added some specific views of case evaluation and mediation. Regarding ADR overall, they indicated that it helps lawyers work out a suitable compromise; enhances communication and identification of issues; and encourages settlements. One court administrator added that:

At times the use of ADR can seem to be a trial avoidance technique. Ideally, through earlier case interaction, courts will encourage attorneys and litigants to break from traditional litigation patterns and explore ADR alternatives before the parties incur unnecessary costs that impede case resolution.”

Favorable opinions about case evaluation from court administrators included:

Case evaluation as opposed to facilitative mediation has the ability to give the parties and an actual figure that they can take away from the table. The award amount may or may not settle or resolve the case, but it is a useful starting point for negotiations for settlement, as it is often the first time a figure is thrown out after the complaints have been filed and answered. Whereas mediation attempts to bring the parties to an agreement which is often a compromise, you don't always come away with a solid figure as you will in case evaluation. Case evaluation is a highly effective tool (even without a settlement) for getting feedback on your brief from other counsel, and a reality check to take back to the client as to what to expect as an award in that jurisdiction.

One viewpoint expressed by a court administrator was that case evaluation may not be suited to every type of case, particularly negligence and no-fault cases:

In each instance, mandated case evaluation and the rules accompanying case evaluation frequently complicate the case process by compelling counsel to defend against case evaluation issues, including the prospect of sanctions while working to resolve the actual dispute.

In other courts there was support expressed for the value of mediation in moving cases toward settlement. One advantage to mediation was that “solutions are created by the parties.” Mediation was seen to result in higher settlement rates with less burden on the court than case evaluation.

One court administrator concluded that having a broad range of ADR alternatives offered by the court allows counsel to select the appropriate process for nearly all cases. In the following chapter (Chapter 4: Conclusions and Recommendations) further discussion of this flexibility is provided, including recommendations derived from analysis of multiple data sources.

4. Conclusions and Recommendations

4.1 Conclusions

In addition to the specific findings presented in the previous chapter (Chapter 3: Findings), the evaluators have drawn some general conclusions. These conclusions are based on analysis of the multiple data sources used in this study.

1. Based on the case file review of 396 civil cases (tort and non-tort) in six circuit courts, both case evaluation and mediation are effective in achieving settlements that help prevent cases from going to trial. However, mediation appears to be more effective than case evaluation in disposing of cases more quickly and in achieving settlements.
2. Judges and attorneys expressed more favorable views of the effectiveness of mediation compared to case evaluation.
3. Judges had a more favorable view of case evaluation than did attorneys. It is clear that some of the circuit courts will want to continue ordering case evaluation for at least some cases.
4. Mediation was considered to reduce the costs for both the court and the litigants. Case evaluation was not viewed as reducing costs.
5. Flexibility in the selection of an appropriate ADR method and in the timing of when in the life of the case it is held received support from attorneys in particular. Judges and court administrators also indicated support for having a range of options available.

4.2 Recommendations

The following recommendations derive from the evaluators' analysis of the study findings. The recommendations are listed in order of importance. Where deemed appropriate, the evaluators have incorporated some of the suggestions put forth by judges and attorneys who participated in the study.

Recommendation 1:

Given the evidence that mediation is generally more effective and preferred over case evaluation, Michigan circuit courts should be encouraged to make mediation available and not require case evaluation for case types for which it is not required by statute.

Although only required by statute for tort claims, case evaluation is being ordered by many courts for other (non-tort) civil cases as well. Courts currently have the flexibility to order mediation for the latter category and should be encouraged to exercise it. The recent shift in Grand Traverse (13th Circuit Court) to ordering only mediation for all civil cases (including torts) may prove to be a useful model for other courts as well.

Recommendation 2:

Michigan circuit courts should continue to offer both forms of ADR (case evaluation and mediation) but provide more flexibility in choosing the most suitable method and timing for the specific case.

While some judges and attorneys would prefer to eliminate case evaluation and only use mediation, others emphasize that there is a continuing need for case evaluation for some cases. Support was expressed for mandatory ADR but with involvement of the judge or ADR clerk early in the case to do “triage” in order to determine which process would be best suited to the case and when it should occur. There should also be a fast track for cases that are ready to settle without either case evaluation or mediation.

Several circuit courts were mentioned by attorneys in the focus groups as already providing some exemplary flexibility. These included Genesee, Jackson and Kent. Some of these courts may be sources of best practices that could be shared with other courts as models. A pilot program of Early Intervention Conferences in Oakland (6th Circuit Court) showed promise and may be worthy of reinstating and expanding to other courts if funds are available.

Recommendation 3:

Make the following improvements to the case evaluation process to make it more effective for the cases in which it is used.

- a) It is recommended that the penalty for late submission of the summary be increased. This should discourage late submissions and allow more time for panel members to review the materials.
- b) Lengthy summaries and unnecessary attachments make it challenging for the panel to be prepared for the case evaluation. It is recommended that a reasonable page limit be imposed for the summary and attachments.
- c) Circuit courts should ensure that specialty panels are made available and that attorneys are aware of the options for specialty panels and additional time with the panel. Attorneys throughout the state can request additional time at an additional cost and specialty panels.
- d) To make the case evaluation process more helpful—whether or not the award is accepted—it is recommended that panels be required to share how they arrived at the amount of the award. Based on information obtained through the attorney focus groups, some panels provide that information, but many do not.
- e) The Michigan Supreme Court or SCAO should clarify the 28-day rule to ensure that all circuit courts and attorneys have the same understanding. The evaluators found that in some courts no one accepts or rejects the award within that timeframe. It appears to be common for both parties to wait to see what the other party’s decision is regarding the panel award, which often means waiting until after the end of the 28-day period.
- f) The Michigan Supreme Court or SCAO should issue guidelines for case evaluators in order to ensure that panels clearly understand their role and what is expected of them. These

guidelines should be made available to attorneys as well, to avoid possible misunderstandings.

g) Based on feedback provided by attorneys and judges, steps should be taken to ensure that the panels are highly qualified. ADR clerks should obtain litigators' feedback about the case evaluators in order to eliminate the ones who are not considered competent, prepared or fair.

Recommendation 4:

Make the following improvements to the mediation process to make it more effective for the cases in which it is used.

Based on the multiple data sources analyzed in this study, the evaluators have fewer suggestions for improvements to the mediation process.

a) A frequent comment from attorneys was that mediation should be voluntary, especially given the cost. However, the general recommendation that some form of ADR be mandatory presents a challenge to the indication that mediation is generally more effective when the parties participate voluntarily. Some possible solutions include giving the parties a say in the selection of mediators, allowing cases to opt out if the size of the claim is too small or if there is no chance of settling, and offering case evaluation as an alternative to mediation if the parties object to mediation.

b) Make sure the right people are at the table—those with authority to settle—including use of a show cause order if a party attends mediation without the necessary authority.

c) Strengthen the confidentiality rule in mediation to be certain that one can't disclose the numbers that are discussed in negotiations;

d) ADR clerks should get feedback about mediators from litigators in order to eliminate those who are not considered effective.

Recommendation 5:

Courts could benefit from some guidance from SCAO regarding the maintenance of ADR records and the confidentiality of such information.

This will help the courts improve their record-keeping practices and make it easier to obtain data in the future. It would be advisable to have some consistency across courts regarding what information should be maintained and for how long. It would be helpful to build in a way to automate the data collection in the future.

Recommendation 6:

Whatever changes are made to either case evaluation or mediation or to the approach to ADR in Michigan's circuit courts, the changes should be clearly explained and communicated to court staff, attorneys and the public.

There needs to be better education of attorneys and information to clients about the ADR processes and how they work, in order to avoid confusion and frustration. This will be particularly important if changes are made to the current rules and procedures and if parties and their counsel are given a voice in determining the type and timing of ADR to be used in their case.

Based on the evaluators' observations, some of the information about current ADR practices is not uniformly understood or conveyed accurately to staff. There were differences observed between courts and inconsistencies between court practices as described by SCAO and what was observed at some courts. For example, the 28 day period for acceptance or rejection of the case evaluation award appears to be interpreted differently in some courts. There are inconsistencies in practices and ADR record-keeping and misinformation about what is allowed versus required.

Recommendation 7:

It is recommended that SCAO work with the circuit courts throughout the state to communicate the implications of the present study and any resulting changes that are being considered.

The present study was limited to case file review and court administrator interviews in six circuit courts, in addition to the statewide surveys of judges and attorneys and attorney focus groups. Given the diversity of courts throughout the state, it will be helpful hear from the courts that did not participate in the study. To that end, SCAO should consider a follow-up study that involves a greater sample of courts. Their perspectives on case evaluation and mediation and their feedback about proposed changes will help the Michigan Supreme Court and SCAO to make the best decisions.

Recommendation 8:

Follow-up research will be helpful to study the impact of any changes in the use of case evaluation and mediation in Michigan.

Additional research is recommended to examine the best practices that are currently underway in some circuit courts. It will also be helpful to examine the impact of any changes that are implemented by the Michigan Supreme Court or SCAO as a result of the current study.

A future study could be expanded to include more courts or focus on courts where specific changes have been implemented. In addition, the inclusion of a larger number of cases would facilitate comparisons by case type to determine which case types are most suitable for each form of ADR. The evaluation instruments from this study could be adapted to the needs of a future study and further automation of case file records by the circuit courts would facilitate more efficient collection of case file data for analysis.

Appendix A: Historical Background of Case Evaluation and Mediation in Michigan

SCAO provided Courtland with the following historical background on case evaluation and mediation in Michigan:

Case Evaluation

The history of MCR 2.403 and 2.404, the case evaluation court rules, can be traced back 40 years to two actions by the Michigan Supreme Court. First, the Court adopted General Court Rule 501.1, applicable only to the Wayne County Circuit Court, which created authority for a “mediation docket.”¹⁷

Rule 501. Assignment of Cases for Trial; General Call of Calendar

.1 Pretrial Assignment and Mediation Docket. The circuit court may provide by rule a pretrial calendar and a mediation docket and shall provide for placing actions upon the pretrial calendar or mediation docket or otherwise assigning a time and place for pretrial hearing or mediation without necessity of a request therefor. [April 2, 1971] 384 Michigan Reports XLiv, 1971

Simultaneously, the Court approved Wayne County Local Court Rule 21 regarding mediation. The Wayne County Circuit Court sought approval of its mediation process to address what was considered a backlog of civil cases.¹⁸ The central features of the process, which remain intact today, included:

- Authority of the court to order parties in certain case types to the process
- Presentation of the case in an abbreviated amount of time and without application of the rules of evidence by counsel to a three-member panel¹⁹
- Process for the disqualification of panel members
- Providing panel members with documentation in advance of the hearing
- Payment of a fee
- Sanctions if one party accepts and the other rejects if upon trial the rejecting party does not improve upon the award by 10 percent

Notably, in this early rule, cases intended for mediation were limited to auto negligence, and then only where matters included complex legal or factual issues:

¹⁷ References to case evaluation in citations appearing before 2000 use the word “mediation.” By adoption of MCR 2.410 and MCR 2.411, and amendment of MCR 2.403 and MCR 2.404 in 2000, the former “mediation” process was renamed “case evaluation.”

¹⁸ “Settling Cases in Detroit: An Examination of Wayne County’s ‘Mediation’ Program,” American Bar Association Action Commission to Reduce Court Costs and Delay, 1984. See also “Description of the Mediation Process,” Third Judicial Circuit, Mediation Tribunal Association, (undated), circa 1986.

¹⁹ Originally, the third member was a judge “agreed on by the two attorney mediators. Rule 21.3

Rule 21²⁰ Mediation

Certain cases may be selected and submitted to mediation. These shall be automobile negligence cases of probable liability and not involving complex legal or factual issues. [284 Michigan Reports LXXXii, April 2, 1971]

Several years later, in 1974, the Court approved Macomb County Circuit Court Rule 17 which was closely patterned after the Wayne County Circuit Court rule. Here again, the mediation process was limited to “automobile negligence cases of probable liability not involving complex legal or factual issues,” but case eligibility was expanded to include “or other cases involving only the question of damages.” 391 Michigan Reports LXiii, 1974. In publishing the local court rule, the Court advised that it is “considering adoption of same or similar provisions as part of the General Court Rules to be applicable to all circuit courts,” and invited comments.

In 1979, Wayne County Circuit Court Local Court Rule 21 was rescinded and replaced by Rule 403 [407 Michigan Reports CXXiv, 1979]. While keeping many of the same provisions of the prior rule, the circuit court deleted the prior reference to automobile negligence cases, stating that “[t]he court may submit any civil case to mediation when the relief sought is exclusively money damages or division of property.” Rule 403.1

The Michigan Supreme Court adopted GCR 316 (Mediation) in 1980, making available statewide a practice previously authorized only through local court rule. [408 Michigan Reports LXX, 1980]. Simultaneously, the Court rescinded local court rules on the topic with the exception of Wayne County Local Court Rule 403, which the Court exempted from GCR 316, permitting it to practice under its local rule. GCR 316.1 further expanded the scope and applicability of the process in stating that “[a] court may submit to mediation any civil case in which the relief sought consists of money damages or division of property.” Notably, the term “consists of” replaces the more limited term “exclusively” money damages or property.

With the adoption of the Michigan Court Rules in 1985, GCR 316 became MCR 2.403 and local court rules were rescinded. Trial courts were allowed to retain local practices by submitting for approval local administrative orders, and the Wayne County Circuit Court mediation practice was continued through this mechanism.

Amendments adopted in 1987 included both those resulting from recommendations of a committee appointed by the Court and those adopted in response to 1986 PA 178 [MCL600.4901-600.4969], so called “tort reform” legislation. Specifically, MCL 600.4903 and 600.4951 required that all tort claims be mediated. In addition, MCL 600.4905 required that all medical malpractice claims be mediated. The mediation process outlined in the legislation closely resembled MCR 2.403, but in addition to mandating mediation in tort and medical malpractice claims, required the participation of health care professionals on the mediation panels and that panels be expanded for the participation of the health care professionals. In adopting language mandating tort and medical malpractice mediation, the Court also provided that a case may be removed from mediation for good cause shown. MCR 2.403(A)(2).

²⁰ The rule was given the number “21” after consideration by the Court.

Amendments adopted in 1987 also further refined the applicability of the mediation process: “A court may submit to mediation any civil action in which the relief sought is primarily money damages or division of property.” MCR 2.403(A)(1). [Emphasis added.]

MCR 2.403 was amended a number of times since, most notably in 1997 when the mediation panel qualification and appointment process was separated out into new MCR 2.404, and in 2000, when the term “mediation” was re-named “case evaluation” to reflect common uses of the terms.

Of the numerous amendments to the structure of the case evaluation process over the past 40 years, perhaps the component most evolved has been the intended target group of cases. In its earliest days, the process was intended to help dispose of “auto negligence cases of probable liability and not involving complex legal or factual issues.” Today, any civil action in which “the relief sought is primarily money damages or division of property” can be ordered to the process.

Mediation

In contrast to the four decades during which the Michigan Supreme Court has considered matters related to case evaluation, mediation has a much shorter history. Until 2000, when the Court adopted MCR 2.410 (Alternative Dispute Resolution) and MCR 2.411 (Mediation), mediation had been regulated by court rule only in domestic relations actions pursuant to MCR 3.216. This rule, originally numbered MCR 3.211 was approved for a one-year period in 1987 and was extended and renumbered effective May 1, 1993.

Mediation, as defined in MCR 2.411, “is a process in which a neutral third party facilitates communication between parties, assists in identifying issues, and helps explore solutions to promote a mutually acceptable settlement. A mediator has no authoritative decision-making power.”²¹

The Michigan Supreme Court Dispute Resolution Task Force issued reports in both 1999 and 2000, recommending that the Court adopt new rules implementing a broad ADR court rule (MCR 2.410) and a court rule pertaining only to mediation (MCR 2.411). The task force also proposed amendments to MCR 2.403 (Case Evaluation) and MCR 3.216 (Domestic Relations Mediation)

The primary differences between the case evaluation and mediation processes are reflected in the following table.

²¹ MCR 2.411(A)(2)

**Table A-1
Comparison of Case Evaluation and Mediation by Feature**

Feature	Case Evaluation	Mediation
Structure of process	Established by court rule	Determined by the parties and the mediator
Scope of discussions	Civil claims involving primarily money damages raised in pleadings	Any topic parties wish to raise
Selection of neutral	Panels are selected by the court	Mediator is selected by the parties
Participants in the process	Attorneys and panel members	Parties, attorneys, other participants identified by the parties and the mediator
Process goal	Two predominant goals: (1) to provide a true valuation of the case; (2) to provide a number around which parties can negotiate.	Disposition of case by agreement of the parties
Sanctions	May apply if a rejecting party does not improve upon an award following trial	Do not apply
Process duration	Established by court rule	Determined by the parties and mediator
Process approach	Adversarial	Collaborative
Process cost	Established by court rule	Negotiated between the parties and the mediator

Courts electing to use the authority to order persons to attempt mediation must have an ADR Plan approved by the State Court Administrator.²² Currently, 52 circuit courts, 26 probate courts, and 36 district courts have approved ADR plans.²³

Many courts' first exposure to mediation has been through affiliations developed with local Community Dispute Resolution Program centers. Through this program, created by 268 PA 1988, the State Court Administrative Office administers grants to non-profit organizations which in turn provide mediation services primarily to courts. The program was initiated in 1990. Currently, 20 organizations provide services to courts across the state.²⁴

²² MCR 2.410(B)

²³ A list of courts with approved ADR plans appears here: <http://courts.michigan.gov/scao/resources/other/localadrlist.pdf>

²⁴ The Community Dispute Resolution Program 2010 Annual Report appears here: <http://courts.michigan.gov/scao/resources/publications/reports/CDRPAnnualReport2010.pdf>

Appendix B: Survey of Other States

Survey of State Court Arbitration Programs

“Case evaluation,” the statutorily mandated alternative dispute resolution process for tort claims and medical malpractice claims, appears to exist only in Michigan.²⁵ A survey of other state court systems’ ADR processes reveals no clear comparison. The ADR process most resembling case evaluation is non-binding arbitration, and this process appears in the statutes and court rules of at least 16 states, the District of Columbia, and federal district courts.

Among these states, practices vary significantly in: (1) whether programs are statewide or local; (2) whether arbitration is mandatory or voluntary; (3) jurisdictional amounts, ranging from \$15,000 to \$150,000; (4) types of cases, ranging from auto negligence and personal injury, to unlimited civil case types; and (5) the application of sanctions, ranging from none to a rejecting party’s paying up to 30 percent of the accepting side’s costs.

No state appears to have as sweeping a sanction-based ADR process, both in terms of the scope of cases arbitrated, and a limitless award amount. With the exception of one state—New Jersey—sanctions appear only in programs that have clear jurisdictional caps on the arbitration award, and these are limited to auto negligence and personal injury cases.²⁶ All states limit non-binding arbitration to money damage claims; no statutes reflect authority for the arbitration of equitable claims.

Evaluation is sparse. The most comprehensive evaluation, a 2007 study of arbitration in Arizona, incorporates limited data from a number of states.²⁷ Arizona’s arbitration system may be one of just several states having features similar to Michigan’s case evaluation practice, however the system was not viewed as particularly effective:

“...the program’s primary goals—providing faster and less expensive resolution of cases, reducing the court’s workload, and maintaining or enhancing the satisfaction of users—were not entirely being met.” Wissler, p. 96.

“...both in Arizona and in other jurisdictions, both in long-standing and in newly implemented programs, and both currently as well as over a decade ago, court-connected arbitration does not appear to have negative consequences, but also does not consistently or substantially improve the effectiveness and efficiency of dispute resolution.” Wissler, p. 97

While federal district courts may include arbitration in their case management plans, an early evaluation (now 25 years old) of five districts courts including arbitration in case management plans, suggested that the early efforts also did not result in significant case management improvements:

²⁵ MCL 600.4901-600.4969 mandates referral of tort cases to this process.

²⁶ Some additional non-personal injury claims may be ordered into arbitration.

²⁷ “Court-Connected Arbitration in the Superior Court of Arizona: A Study of Its Performance and Proposed Rule Changes,” Roselle L. Wissler and Bob Dauber, *Journal of Dispute Resolution*, Vol. 2007 pp. 96-97.

“Our statistical analyses of cases referred to mandatory arbitration detected no major effect of arbitration on time to disposition, lawyer work hours, or lawyer satisfaction.”²⁸

General findings from the state survey include:

1. No other state has mandatory case evaluation of tort or general civil claims
2. The closest ADR process, non-binding arbitration, is mandated in a few states
3. A cap is typically placed on the amount in controversy for cases ordered to arbitration
4. No state included claims for equitable relief in either mandatory or voluntary arbitration programs.

The following chart reflects primarily state court systems that have mandatory or voluntary arbitration programs in the general jurisdiction trial courts.²⁹

State/Court	Process	Cite(s)
Arizona	Mandatory non-binding arbitration of money damage claims under \$65,000. Counties can select whether to mandate arbitration, different jurisdictional limits, and when cases are arbitrated. Rejecting party must improve upon award by 25% in trial de novo or pay opposing side costs.	Ariz. Rev. Stat. Ann. Sec. 12-133 http://www.azleg.state.az.us/ars/12/00133.htm
California	Mandatory arbitration of civil claims with damages under \$50,000 in jurisdictions with 16 or more judges. Courts with under 16 judges can opt in by local order.	Cal. Civ. Proc. Code Sect. 1141.10-28 http://law.justia.com/codes/california/2009/ccp/1141.10-1141.31.html
Connecticut	Court may refer any civil action where the reasonable expectation of damages is below \$50,000.	Conn. Gen. Stat. Sec 52-549u http://law.justia.com/codes/connecticut/2009/title52/chap922b/Sec52-549u.html
Delaware	Courts may order non-binding arbitration or mediation; if parties do not stipulate to a process, mediation is the default. No limit on jurisdictional amount. No sanctions.	Del. Ct. C.P.R. 16 http://courts.delaware.gov/superior/pdf/civil_rule16_rev_mar08.pdf
Florida	Courts may order non-binding arbitration. No limit on jurisdictional amount. No sanctions.	Fla. Stat. Sec. 44.103-108 http://phonl.com/fl_law/rules/frcp/frcp1820.htm http://www.flcourts.org/gen_public/adr/chapter44.shtml

²⁸ “Just, Speedy, and Inexpensive? An Evaluation of Judicial Case Management Under the Civil Justice Reform Act,” Kakalik et al, RAND, The Institute for Civil Justice, 1996, page 18.

²⁹ The states appearing in the following table were originally identified in the study referenced in footnote 27.

Georgia	Local courts may adopt non-binding arbitration as one of several ADR programs. No sanctions.	http://www.godr.org/files/ADR%20Act.pdf http://www.godr.org/files/CURRENT%20ADR%20RULES%20COMPLETE%207-22-2011.pdf
Hawaii	Civil tort actions with probable award of less than \$150,000 may be ordered to non-binding arbitration. Sanctions are discretionary for a party not improving upon the award by 30% following verdict.	<p>Haw. Rev. Stat. Sec 601-20 http://www.courts.state.hi.us/docs/court_rules/rules/har.htm</p> <p>http://codes.lp.findlaw.com/histatutes/4/32/601/601-20</p>
Illinois	<p>Courts may order mandatory non-binding arbitration; jurisdictional amount and sanctions established locally.</p> <p>Cook County (Chicago) has a mandatory arbitration program for claims up to \$30,000.</p>	<p>735 ILCS 5/2-1001A Ill. Sup. Ct. R. 86-95 http://www.cookcountycourt.org/rules/rules/rulespart18.html</p> <p>Court-Annexed Mandatory Arbitration Annual Report—Fiscal Year 2010. http://courtdadr.org/files/ManArbRpt_Cook10.pdf</p>
Minnesota	Courts may order binding or non-binding arbitration only upon stipulation of the parties. Sanctions do not apply.	Minn. Stat. Sec. 484.73-76 http://mncourts.gov/ruledocs/general/GRtitleII.htm#g114
Nevada	Mandatory arbitration of money damage claims not exceeding \$50,000 in jurisdictions of 100,000 population. Program is optional for jurisdictions of less population. Sanctions: for awards under \$20,000, rejecting party must improve upon award by 20%; for awards over \$20,000, rejecting party must improve upon award by 10%.	NRS 38.258 http://www.leg.state.nv.us/courtrules/RGADR.html
New Jersey	Following unsuccessful mediation, auto negligence and PI cases, as well as those stipulated to, may be ordered to arbitration where money damages do not exceed \$20,000. Minor sanctions, limited by court rule, may apply if rejecting party does not improve upon award by 20%.	<p>N.J. Stat. Ann. Sec. 2A:23A-20 http://www.judiciary.state.nj.us/rules/r4-21a.htm</p> <p>http://www.judiciary.state.nj.us/civil/PersonalInjuryArbitrationStatute.pdf</p>
North Carolina	Courts may order money damage claims under \$15,000 to arbitration after consultation with parties.	N.C.Gen.Stat. Sec. 7A-37.1 http://www.ncga.state.nc.us/enactedlegislation/statutes/pdf/bychapter/chapter_7a.pdf

Ohio	Courts may adopt plans for mandatory arbitration. Courts participating have limits on arbitration of claims between \$25,000 and \$100,000. No sanctions, but party appealing from award may be required to pay the arbitrator's fees.	Oh. Sup. R. 15 http://www.sconet.state.oh.us/LegalResources/Rules/civil/CivilProcedure.pdf
Oregon	Mandatory arbitration of claims under \$50,000. Court may not order to arbitration if parties stipulate to mediation. Sanctions: plaintiff must improve upon a verdict by 10%; defendant by 20%	Or. Rev. Stat. Sec. 36.400 http://www.leg.state.or.us/ors/036.html
Pennsylvania	Courts may adopt arbitration programs matters where the amount in controversy is under \$50,000. No sanctions, but bond must be posted for trial de novo.	42 PA. Cons. Stat. Sec. 7361 http://www.pacode.com/secure/data/231/chapter1300/chap1300toc.html
Rhode Island	Courts may adopt mandatory arbitration programs. Sanctions are limited to the payment of accepting party's arbitration filing fee.	R.I. Gen. Laws Sec 8-6-5 http://www.rilin.state.ri.us/Statutes/TITLE8/8-6/8-6-5.HTM
Washington State	Courts may adopt mandatory arbitration programs for money damage claims up to \$50,000. Sanctions may be applied if a rejecting party does not improve its position following trial de novo.	Wash. Rev. Code 7.06.010-080 http://apps.leg.wa.gov/rcw/default.aspx?cite=7.06&full=true
District of Columbia Superior Court	Arbitration is voluntary as one option in the court's "multi-door" approach. Cases are selected at a scheduling conference.	http://www.dccourts.gov/dccourts/superior/multi/arbitration.jsp
Federal District Courts	Courts may order arbitration with parties' consent in cases with damages under \$150,000.	28 USC 654(A)(3) http://law.justia.com/codes/us/title28/28usc654.html

Appendix C: Results of Statewide Survey of Attorneys

1. Introduction

1.1 In what part of the state have you had the most case evaluation or mediation experience?

- 66% **Southeast Michigan** (Lenawee, Livingston, Macomb, Monroe, St. Clair, Oakland, Washtenaw, Wayne)
- 8% **Western Michigan** (Ionia, Kent, Mecosta, Montcalm, Muskegon, Newaygo, Oceana, Ottawa)
- 7% **Eastern Michigan** (Arenac, Bay, Clare, Genesee, Gladwin, Huron, Isabella, Lapeer, Midland, Saginaw, Sanilac, Tuscola)
- 7% **Mid-Michigan** (Clinton, Eaton, Gratiot, Hillsdale, Ingham, Jackson, Shiawassee)
- 5% **Southwest Michigan** (Allegan, Barry, Berrien, Branch, Calhoun, Cass, Kalamazoo, St. Joseph, Van Buren)
- 5% **Northern Lower Peninsula** (Alcona, Alpena, Antrim, Benzie, Charlevoix, Cheboygan, Crawford, Emmet, Grand Traverse, Iosco, Kalkaska, Lake, Leelanau, Manistee, Mason, Missaukee, Montmorency, Ogemaw, Osceola, Oscoda, Otsego, Presque Isle, Roscommon, Wexford)
- 2% **Upper Peninsula**

Approximately two-thirds (66%) of the 3,096 respondents were from the Southeast region. The Upper Peninsula (2%) had the fewest number of respondents.

1.2 What are your primary areas of litigation? Select all that apply.

- 40% Commercial
- 34% Personal Injury
- 33% General Practice
- 25% Real Property
- 18% Insurance
- 17% Other Negligence
- 16% Labor and Employment
- 14% Probate
- 9% Consumer
- 9% Medical Malpractice
- 8% Products Liability
- 3% Environmental
- 3% Health Care
- 2% Intellectual Property
- 9% Other

36% of respondents reported having only one primary area of litigation; 59% reported 2 to 5 areas; and 5% had more than 5 areas.

1.3 Do you primarily represent plaintiffs, defendants, or both equally?

- 25% Plaintiffs
- 31% Defendants
- 44% Both Equally

1.4 Have you served as a case evaluator in the past five years?

40% Yes
60% No

1.5 If yes, how many times have you served as a case evaluator in the past five years?

60% 1-10 times
27% 11-20 times
6% 21-30 times
7% More than 30

1.6 Have you served as a mediator in the past five years?

27% Yes
73% No

1.7 If yes, how many times have you served as a mediator in the past five years?

67% 1-10 times
15% 11-20 times
5% 21-30 times
13% More than 30

40% of respondents (1,228) had served as case evaluators and 27% (817) had served as mediators in the past 5 years. Almost half of the respondents had served as either a case evaluator or mediator in the past 5 years, and 19% had served as both.

2. Case Evaluation

2.1 As a litigator, how many case evaluations have you participated in over the past five years?

38% 1-10 times
23% 11-20 times
13% 21-30 times
26% More than 30

2,607 of the 3,096 respondents (84%) had participated in at least one case evaluation in the past 5 years. The rest of the results presented in the Case Evaluation section of this report are based on the responses of these 2,607 respondents unless otherwise noted.

3. Case Evaluation

3.1 How frequently have you objected to case evaluation?

1% Always
3% Very Often
3% Often
15% Sometimes
37% Rarely
42% Never

Approximately 80% of respondents rarely or never objected to case evaluation.

3.2 If you have objected to case evaluation, how frequently has the judge nevertheless ordered your clients to participate in case evaluation?

22% Always
17% Very Often
12% Often
16% Sometimes
20% Rarely
15% Never

Percentages above are based on the responses of 1,357 attorneys who had objected to case evaluation.

3.3 How often have case evaluation panels had sufficient expertise to evaluate your cases?

5% Always
24% Very Often
31% Often
30% Sometimes
9% Rarely
1% Never

Only 60% of attorneys said that panels had sufficient expertise to evaluate their cases often or more. Ten percent indicated that panels rarely or never had sufficient expertise.

3.4 Generally, the awards have approximated my own valuation of the cases:

1% Always
8% Very Often
23% Often
43% Sometimes
22% Rarely
3% Never

Attorneys had mixed feelings about whether the awards approximated their own valuation of the cases: a quarter said they rarely or never do, while 33% said they do often or more.

3.5 How often have you requested that a panel issue a non-unanimous award?

- 1% Always
- 3% Very Often
- 5% Often
- 23% Sometimes
- 27% Rarely
- 41% Never

Less than 10% of attorneys have often requested a non-unanimous award (rating of often or above). Reasons were provided by 780 survey respondents. The most common reason (334 respondents) was the nature of the claim. Concerns were expressed about PIP benefits in particular (192 respondents). Equitable relief was mentioned by 61 respondents. The second most common category was avoiding the threat of sanctions, mentioned by 150 respondents. The third most common reason (64) was when there is a large disparity between the parties, in terms of their positions or bargaining power.

3.6 If you have requested non-unanimous awards, how often did panels issue a non-unanimous award?

- 18% Always
- 17% Very Often
- 13% Often
- 21% Sometimes
- 23% Rarely
- 8% Never

Percentages above are based on the responses of 1,397 attorneys who had requested a non-unanimous award.

3.7 How often do your clients accept case evaluation awards within 28 days of the case evaluation hearing?

- 3% Always
- 15% Very Often
- 24% Often
- 40% Sometimes
- 15% Rarely
- 2% Never

3.8 In your opinion, the purpose of case evaluation is to provide an award amount... (Select all that apply)

- 21% ...that is close to the value a jury or judge might award
- 78% ...that is likely to produce a settlement or resolution
- 13% ...that responds to unrealistic expectations
- 8% ...that serves other purposes

3.9 How often would you have voluntarily used case evaluation if it had not been ordered in your cases?

3%	Always
14%	Very Often
18%	Often
26%	Sometimes
21%	Rarely
17%	Never

3.10 How often has case evaluation provided the following outcomes and how important are those outcomes?

Case evaluation has identified strengths and weaknesses of my cases.

How Often		How Important	
2%	Always	34%	Very Important
11%	Very Often	34%	Important
20%	Often	16%	Neutral
36%	Sometimes	9%	Unimportant
25%	Rarely	8%	Very Unimportant
6%	Never		

Case evaluation has raised legal arguments that I had not previously considered.

How Often		How Important	
<1%	Always	22%	Very Important
<1%	Very Often	26%	Important
2%	Often	22%	Neutral
22%	Sometimes	14%	Unimportant
52%	Rarely	16%	Very Unimportant
23%	Never		

Case evaluation has provided a fair valuation of my cases.

How Often		How Important	
1%	Always	54%	Very Important
10%	Very Often	27%	Important
27%	Often	13%	Neutral
43%	Sometimes	3%	Unimportant
17%	Rarely	3%	Very Unimportant
2%	Never		

The case evaluation process has generally reduced subsequent litigation costs for my clients.

How Often		How Important	
2%	Always	46%	Very Important
15%	Very Often	32%	Important
19%	Often	14%	Neutral
36%	Sometimes	4%	Unimportant
23%	Rarely	3%	Very Unimportant
6%	Never		

The award has helped address client expectations.

How Often		How Important	
2%	Always	39%	Very Important
16%	Very Often	40%	Important
25%	Often	15%	Neutral
35%	Sometimes	4%	Unimportant
17%	Rarely	2%	Very Unimportant
4%	Never		

Case evaluation awards have been the primary impetus for my clients' settling.

How Often		How Important	
1%	Always	28%	Very Important
14%	Very Often	37%	Important
21%	Often	24%	Neutral
38%	Sometimes	7%	Unimportant
21%	Rarely	4%	Very Unimportant
5%	Never		

3.11 What other outcomes has case evaluation provided? (Open-ended)

A total of 709 respondents wrote in additional outcomes beyond the ones listed above. The most common response (176) remarked that case evaluation impedes settlement, generally as result of an unrealistic award that either hardens or further polarizes the parties' positions. Some added that the award can either confirm or create unrealistic expectations. Another response category (115) was that case evaluation is a waste of time that does not provide any worthwhile outcome. Some respondents added that the panel is ill prepared or too inexperienced to properly evaluate the claim.

Reflecting a more positive view of case evaluation, 136 respondents indicated that it can provide parties with a better understanding of the case, defeat unrealistic expectations, or uncover pertinent facts that had not been identified. Another group of comments noted that case evaluation has served as a vehicle for settlement (106). In some cases it provides a starting point for negotiations or leads the parties to agree to further ADR, whether binding arbitration or facilitative mediation (36). A smaller number of respondents commented that case evaluation led to a forced settlement due to the threat of sanctions (38). Some saw this as unjust in that it causes the party with fewer financial means to either accept a settlement it otherwise may not have or face the threat of sanctions (20).

3.12 Relative to discovery, case evaluation has been most effective when it was held: (Select all that apply)

- 2% Before Discovery
- 4% In Early Discovery
- 8% In Mid-Discovery
- 20% In Late Discovery
- 58% After Discovery
- 10% Rarely/Never

3.13 Relative to mediation, case evaluation has been most effective when it was held: (Select all that apply)

- 36% Before Mediation
- 28% After Mediation
- 15% Rarely/Never

3.14 How often have the sanction provisions of MCR 2.403 been the primary incentive for your clients to accept the award?

- 3% Always
- 17% Very Often
- 22% Often
- 31% Sometimes
- 20% Rarely
- 7% Never

**3.15 To what extent do you agree or disagree with the following statement?
"Overall, case evaluation is an effective method for resolving civil cases."**

- 12% Strongly Agree
- 36% Agree
- 21% Neutral
- 20% Disagree
- 11% Strongly Disagree

Nearly half of the attorneys (48%) agreed that case evaluation is an effective method of resolving civil cases, while 31% disagreed. The percentage of attorneys who strongly disagreed (11%) was nearly equal to the percentage who strongly agreed that it is effective (12%).

3.16 Additional comments about case evaluation (open-ended)

There were a total of 1157 comments written in by attorneys. Respondents included: 358 who agreed with the statement in question 3.15, 220 who were neutral, and 567 who disagreed. The most common category overall (258) and within each subgroup involved problems with the panels—that they were often unprepared or inexperienced and sometimes biased. An additional 129 comments indicated that panels don't address the merits of the case. There were 89 comments that mediation is preferable to case evaluation. There were 78 comments about sanctions and how they operate unfairly and 77 comments suggesting that case evaluation is a waste of time and money. Other comments indicated that it is not suited to all claims (20)—especially PIP cases—or offered various suggestions for improvement. Suggestions included that it be voluntary, that fees be raised, that late filings be discouraged, and that case evaluation not be scheduled too early.

4. Mediation

4.1 As a litigator, how many mediations have you participated in over the past five years?

- 55% 1-10 times
- 21% 11-20 times
- 8% 21-30 times
- 16% More than 30

2,121 of the 3,096 respondents (69%) had participated in at least one mediation in the past 5 years. The percentages above are based on the responses of these 2,121 attorneys, as are the rest of the results presented in the Mediation section of this report, unless otherwise noted

5. Mediation

5.1 How frequently do you use mediation prior to filing lawsuits?

- 1% Always
- 3% Very Often
- 4% Often
- 17% Sometimes
- 34% Rarely
- 41% Never

A quarter of the respondents used mediation at least sometimes prior to filing lawsuits.

5.2 Post-filing, how frequently do you voluntarily (without court order) use mediation in civil cases?

- 2% Always
- 13% Very Often
- 20% Often
- 34% Sometimes
- 22% Rarely
- 9% Never

About a third of the respondents (31%) rarely or never use mediation voluntarily; another third (34%) sometimes use it voluntarily; and the remaining third (35%) use it often or very often without court order.

5.3 How frequently are your cases ordered to mediation?

- 5% Always
- 18% Very Often
- 21% Often
- 36% Sometimes
- 18% Rarely
- 2% Never

5.4 How frequently have you objected to mediation?

- <1% Always
- 1% Very Often
- 3% Often
- 12% Sometimes
- 33% Rarely
- 51% Never

5.5 If you have objected to mediation, how frequently has a judge nevertheless ordered your clients to participate in mediation?

- 13% Always
- 18% Very Often
- 15% Often
- 22% Sometimes
- 20% Rarely
- 11% Never

Percentages above are based on the responses of 944 attorneys who had objected to mediation.

5.6 If you have objected to mediation, what are the most common reasons offered to the court for not participating in mediation? (Select all that apply)

- 13% The clients participated in mediation before filing the lawsuit
- 57% The amount of controversy did not warrant the cost of mediation
- 63% One or more parties needed a legal finding by the court first
- 27% Other reason cited

Percentages above are based on the responses of 944 attorneys who had objected to mediation. Additional reasons were written in by 288 respondents. The most common reason given was that it was clear the parties were not willing to settle (104). The next most common reason was that the particular type of claim was not conducive to mediation (59). There were 38 who remarked that court-ordered mediation is unnecessary, generally suggesting that involuntary mediation is not conducive to settlement. Some attorneys (34) opined that mediation was ordered too early in the process to be successful, as not enough discovery had been conducted to that point. Mediation was seen by 31 as cost-prohibitive for many parties, who are either unwilling or unable to pay for the process. Only a small number of respondents (12) criticized the mediators based on bias, incompetence, or insufficient experience.

5.7 How often has mediation taken place when a summary disposition motion was pending?

- <1% Always
- 5% Very Often
- 14% Often
- 41% Sometimes
- 23% Rarely
- 17% Never

5.8 In cases ordered to mediation, how often have you asked a judge to recommend a mediator?

- 1% Always
- 3% Very Often
- 6% Often
- 25% Sometimes
- 31% Rarely
- 34% Never

5.9 How often has a judge appointed a mediator without allowing you and opposing counsel an opportunity to stipulate to your own mediator?

- 1% Always
- 3% Very Often
- 5% Often
- 21% Sometimes
- 30% Rarely
- 40% Never

5.10 How often has mediation provided the following outcomes and how important are those outcomes?

Mediation helped identify strengths or weaknesses of my cases.

How Often	How Important
5% Always	39% Very Important
18% Very Often	32% Important
19% Often	15% Neutral
35% Sometimes	9% Unimportant
17% Rarely	5% Very Unimportant
5% Never	

Mediation raised legal arguments that I had not previously considered.

How Often	How Important
<1% Always	23% Very Important
3% Very Often	29% Important
5% Often	21% Neutral
31% Sometimes	15% Unimportant
45% Rarely	11% Very Unimportant
16% Never	

Mediators have generally provided a fair valuation of my cases.

How Often	How Important
2% Always	49% Very Important
24% Very Often	31% Important
33% Often	13% Neutral
30% Sometimes	4% Unimportant
8% Rarely	3% Very Unimportant
3% Never	

Mediators have proposed settlement terms that the parties or their attorneys have not considered.

How Often		How Important	
1%	Always	28%	Very Important
7%	Very Often	41%	Important
16%	Often	20%	Neutral
47%	Sometimes	8%	Unimportant
23%	Rarely	3%	Very Unimportant
6%	Never		

Mediation has generally reduced subsequent litigation costs for my clients.

How Often		How Important	
4%	Always	52%	Very Important
24%	Very Often	30%	Important
26%	Often	12%	Neutral
33%	Sometimes	4%	Unimportant
10%	Rarely	2%	Very Unimportant
3%	Never		

Mediators have opined on how the trial judge assigned to my case would likely rule on remaining motions or decide the case in a bench trial.

How Often		How Important	
4%	Always	15%	Very Important
18%	Very Often	37%	Important
22%	Often	27%	Neutral
32%	Sometimes	12%	Unimportant
16%	Rarely	9%	Very Unimportant
8%	Never		

Mediators have provided insights about experience with juries in the location of the trial.

How Often		How Important	
2%	Always	13%	Very Important
12%	Very Often	34%	Important
19%	Often	28%	Neutral
34%	Sometimes	15%	Unimportant
21%	Rarely	9%	Very Unimportant
12%	Never		

The mediator helped address client expectations.

How Often		How Important	
8%	Always	47%	Very Important
30%	Very Often	38%	Important
29%	Often	11%	Neutral
25%	Sometimes	3%	Unimportant
6%	Rarely	1%	Very Unimportant
2%	Never		

Mediation prompted my clients to settle.

How Often	How Important
2% Always	53% Very Important
27% Very Often	32% Important
30% Often	11% Neutral
32% Sometimes	2% Unimportant
7% Rarely	2% Very Unimportant
2% Never	

5.11 What other outcomes has mediation provided? (Open ended)

There were 379 responses to this question. The largest category (111) indicated that mediation facilitates settlements. Some attorneys pointed out that the mediator was able to craft a creative solution that would not have been possible in case evaluation or a trial. The second largest category (93) expressed opposition to court-ordered mediation, pointing out that some parties are not willing to settle regardless and the process (and its cost) angers them. Another large group of respondents (71) observed that mediation resulted in the parties acquiring a better understanding of the case. Another 37 commented that mediation provided a mechanism for client participation. A smaller group (21) remarked that mediation resulted in an unjustified additional cost to the parties.

5.12 Relative to discovery, mediation has been most effective when it was held: (Select all that apply)

10%	Before Discovery
16%	In Early Discovery
18%	In Mid-Discovery
23%	In Late Discovery
46%	After Discovery
13%	Rarely/Never

5.13 Relative to case evaluation, mediation has been most effective when it was held: (Select all that apply)

43%	Before Case Evaluation
41%	After Case Evaluation
5%	Rarely/Never

5.14 How often have the following factors resulted in continued litigation after mediation?

Mediation occurred before CE; client wanted a valuation before discussing settlement.

1%	Always
5%	Very Often
6%	Often
20%	Sometimes
27%	Rarely
41%	Never

The mediator terminated the process too early.

<1% Always
2% Very Often
3% Often
22% Sometimes
41% Rarely
32% Never

The mediator pressed my client too hard toward settlement.

1% Always
2% Very Often
5% Often
28% Sometimes
41% Rarely
23% Never

The mediator did not press my client hard enough toward settlement.

<1% Always
2% Very Often
6% Often
40% Sometimes
35% Rarely
17% Never

Parties appeared ready to settle, but opposing counsel was not.

<1% Always
6% Very Often
15% Often
37% Sometimes
27% Rarely
14% Never

The attorneys appeared ready to settle, but one or more parties were not.

<1% Always
11% Very Often
25% Often
47% Sometimes
12% Rarely
4% Never

Mediation occurred when a dispositive motion was pending.

1% Always
4% Very Often
11% Often
42% Sometimes
24% Rarely
18% Never

Insufficient time was allowed for mediation.

- 1% Always
- 2% Very Often
- 4% Often
- 18% Sometimes
- 47% Rarely
- 28% Never

Persons with full settlement authority were not at the mediation.

- 1% Always
- 5% Very Often
- 8% Often
- 25% Sometimes
- 34% Rarely
- 28% Never

**5.15 To what extent do you agree or disagree with the following statement?
"Overall, mediation is an effective method for resolving civil cases."**

- 30% Strongly Agree
- 48% Agree
- 16% Neutral
- 4% Disagree
- 2% Strongly Disagree

78% of the attorneys agreed with the statement – 30% strongly – that mediation is an effective method for resolving civil cases. Only 6% disagreed.

5.16 Additional comments about mediation (open-ended)

There were 475 comments written in about mediation. The respondents included 324 who agreed or strongly agreed with the statement in question 5.15, 80 who were neutral, and 65 who disagreed or strongly disagreed. The largest category of comments (84) emphasized that mediation is most effective when it is voluntary and when the parties can choose the mediator. Some within that group said it should be voluntary because it is expensive and not appropriate for cases with small damage amounts at stake. Another 53 remarked that mediation is only successful to the extent there is a skilled mediator. The most common category among those who disagreed that mediation is an effective method took the position that court-ordered mediation is unnecessary (28), either because the same result could be obtained in a judicial conference or the parties could reach a settlement without a mediator. Remaining comments generally offered suggestions such as promoting increased awareness of mediation’s benefits, ordering it early in the process to save the costs of discovery, scheduling it after discovery to be more successful, promulgating a stronger ethical code (addressing confidentiality) for mediators, requiring individuals with settlement authority to attend mediation, and lowering the costs associated with mediation.

Appendix D: Findings from Attorney Focus Groups

Introduction

Focus groups with attorneys were planned to enable the evaluators to obtain a fuller understanding of some of the results from the attorney survey and to ask follow-up questions. The focus group discussions also provided attorneys the opportunity to share various perspectives on the relative value of case evaluation (CE) and mediation (MED).

Attorneys who completed the online survey conducted by SCAO in early 2011 and who indicated a willingness to participate in a focus group to discuss CE and/or MED and provided contact information were invited to participate in a focus group. Due to the large number of eligible attorneys in the southeast region, a random sample of 50 percent of that group was selected to receive invitations. SCAO issued invitations via e-mail to 366 attorneys on April 4, 2011 and provided them with the locations and dates for the six focus groups to allow them to select the one that would be most convenient for them. Attorneys who were interested and available were asked to reply by April 11, 2011.

Acceptances were limited to a maximum of 15-20 per focus group, in an effort to obtain an optimum number of 8-12 participants per focus group. Confirmation letters, including a map and directions to the specific location, were sent to those who were accepted. All focus groups were conducted during the first week of May 2011. The following table shows the dates, times, and locations for each focus group as well as the number of attorneys who participated.

Date	Time	Location	Number of Participants
May 2	9:00 – 10:30 AM	Bloomfield Hills	15
May 2	3:00 – 4:30 PM	Detroit	12
May 3	3:00 – 4:30 PM	Gaylord, with videoconference connection to Traverse City	3
May 4	9:00 – 10:30 AM	Flint	6
May 4	3:00 – 4:30 PM	Lansing	4
May 5	9:00 – 10:30 AM	Grand Rapids	7

The number of participants ranged from 3 to 15 for a total of 47 attorneys (including one attorney who e-mailed his responses after missing the Grand Rapids focus group). Courtland Consulting facilitated the discussions, which covered the following topics: selected survey results regarding CE, relative merits of CE and MED, cost of CE and MED, litigants' point of view regarding CE and MED, and suggestions for improvements to CE and MED as well as other ADR processes. The same set of questions was used in each location.

This report combines the results from all six focus groups. The questions posed by the facilitators are shown in italics. Participants generally had experience with multiple courts and most of their responses regarding ADR were not limited to any one court. However, comments that were directed to a particular court specifically are included where appropriate.

Selected Survey Results Regarding Case Evaluation

A1. In the survey, 78% indicated that the purpose of CE is to produce a settlement or resolution. However, only 18% indicated that their clients “very often” or “always” accept CE awards within 28 days of the CE hearing. Are they accepting after 28 days or not at all?

Attorneys shared some reasons why CE awards are not accepted during the 28 days but may be accepted later. One reason given is that if you accept, it “shows your cards.” It was suggested that the defense will sometimes reject the award initially but if the plaintiff accepts it, the defense will then decide to accept it. In another focus group one noted that it is very rare for plaintiffs to accept within 28 days and that the defense is more likely to accept. Experiences varied, possibly due to the various types of cases handled by the participants. Others suggested that the attorneys may want to test the motion for summary disposition first. Generally, the participants indicated they were not surprised that the CE awards were not being accepted within 28 days, particularly when sanctions are unevenly imposed. Several pointed out that the threat of sanctions weighs more heavily on individual plaintiffs than on large organizations. It’s seen as being very tough on “the shallow pocket” although collecting the sanction may not be easy.

There was more discussion and general agreement about why the CE awards are not being accepted at all. A common reason given had to do with the type of case, particularly PIP cases where there is “always an issue of future benefits.” It was suggested that generally defendants don’t want a judgment against them; they would rather have dismissals. Many focus group participants shared their concerns about the numbers the panels come up with and how difficult it is for either side to accept a number that is not seen as reflecting the true value of the case.

A2. In the survey 81% of attorneys said it was important that CE provide a fair evaluation, but only 38% indicated that it did so “often” or more. Do you agree that CE isn’t doing a very good job of providing fair evaluations? Is there a problem with the panels or perhaps the limited time they have reviewing a given case? (Open-ended comments raised concerns about panel preparation and bias.) What about specialty panels? Are those automatically assigned or do you have to request them?

Attorneys with many years of experience pointed out that CE panels used to focus more on what the case is really worth, but more recently they seem to look for a number they think both sides can live with. It was suggested that the CE award is “a hammer to encourage settlement rather than a realistic value to the case.”

There were many criticisms expressed regarding the CE process and the preparation of the panels. Much depends on the panel members and whether they have the necessary expertise. Specialty panels are more available in some courts than in others and some courts (such as Genesee) do a good job of setting up the panels for specific cases. In other courts some attorneys aren’t aware that they can request a specialty panel. The summaries are often quite long, with lengthy attachments, and the panel may only have the weekend to review them (as in Wayne).

Some attorneys file the summary as late as possible in the hope of seeing the opposing attorney's summary first. This type of gamesmanship makes it difficult for the panel, even if the late fee of \$150 is paid. The amount of time the panel spends with each case was seen as a problem; participants pointed out that the standard is 30 minutes, but 15 minutes is typical in Wayne. Some attorneys pay extra for more time with the panel, but not all attorneys are aware they can request that.

Relative Merits of Case Evaluation and Mediation

B1. Of the survey respondents, 77% agreed or strongly agreed that MED is an effective method for resolving civil cases, compared to 48% for CE. MED compared favorably with CE on all comparable outcomes: providing a fair valuation (60% often or more vs. 38%), addressing client expectations (67% vs. 44%), and prompting clients to settle (59% vs. 36%). Why do you think that MED was rated as more effective than CE? Does it depend on the type of case?

There was a strong consensus that MED benefits from more time spent on each case. Having the parties present—not just the attorneys, as in CE—was also seen to be a major advantage. Parties have the opportunity to be heard; the mediator can speak privately with both parties; and it is possible to arrive at other concessions besides just a settlement amount. As one attorney put it, “The mediator is not imposing something from the top but facilitating the parties to come to an agreement.”

B2. CE was viewed as most effective after discovery (58%) rather than before (2%) or during (32%). MED was viewed as most effective during discovery (57%) rather than before (20%) or after (46%). Do you agree with that timing? Why does the preferred timing differ for CE and MED?

Most, but not all, of the participants indicated a preference for early MED, then a summary disposition and then CE if needed. Some pointed out that it depends on the type of case, since more complex cases require more time to take depositions. It was suggested that early MED (before discovery) may generally be better for plaintiffs than defendants. Another suggestion was that early MED is often better because the parties are not yet invested in their positions.

B3. What would increase the efficacy of each ADR process?

Flexibility was the common theme heard from all of the focus groups. Attorneys wanted courts to avoid the “one size fits all” approach that seem to be common where automatic scheduling orders dictate the timing and sequence of ADR. Some attorneys praised the Early Intervention Conference (EIC) pilot that was recently used in Oakland. In that model a volunteer attorney sits with counsel and the parties to determine what would be best for that case. Others mentioned Genesee, where counsel can talk to the judges to discuss what ADR would be best. Jackson was also mentioned as giving choices about which form of ADR and when it should occur.

Suggestions regarding CE specifically included:

- Impose a page limit on the summary and attachments;
- Eliminate non-unanimous awards;

- Impose the sanctions;
- Be allowed to select your own panel and the appropriate timing;
- Would be more effective after the summary disposition.

Suggestions regarding MED specifically included:

- Strengthening the confidentiality rule in MED to be certain that one can't disclose the numbers that are discussed in negotiations;
- Allow excellent mediators to be on the court-approved list without the required training;
- Weed out the mediators who are just in it for the money;
- Some think that MED should always be voluntary (particularly due to the cost).

Cost of Case Evaluation and Mediation

C1. 54% of respondents indicated that MED reduced subsequent litigation costs often, very often or always, compared to only 36% indicating the same about CE. Does that mesh with your perception?

Focus group participants generally concurred with the survey results. They pointed out that MED is more successful in settling cases than CE, so it saves money in the long run since the longer a case is open the more it costs.

C2. What about the overall costs, including the costs of participating in CE and/or MED? How much does CE typically add to the cost of the case for the client? How much does MED typically add to the cost of the case for the client? If it is not possible to assign a dollar range, what about the relative cost of CE vs. MED? Is one more expensive than the other?

Very few focus group participants offered any cost estimates; most limited their responses to the relative costs. One attorney estimated that the number of billable hours to prepare the CE summary ranges from 5 to 25 hours. Another suggested that the defense attorney might charge \$3,000 to \$5,000 to prepare for CE while the plaintiff would only pay the \$75 fee for the panel; the cost for MED would typically be \$750 to \$1,000. Others said the cost depends on the specific case.

Overall, there was strong agreement that while the direct cost of MED is higher than that of CE, it usually saves money because it is a more productive process. It was suggested that early mediation can save money overall by avoiding the costs of discovery. Some attorneys indicated that they typically submit the same documents for CE and MED and that the same preparation would also be needed to prepare for a trial. The relative cost may depend on when the case goes to ADR. A few participants pointed out that while MED saves money when the parties settle, the cost of mandatory MED can be a problem for parties if they don't want to be there and they don't settle. It was suggested that CE is less expensive and "sometimes that is all you need." Whichever process is used, "ADR moves the process faster and saves attorney fees for the litigants."

Litigants' Point of View on Case Evaluation and Mediation

D1. A litigant who has experience with multiple cases has indicated that CE did not result in a favorable outcome. This particular litigant did not feel that the panel gave consideration to the merits of the case and the award only covered his attorney's legal fees. Concerns were expressed about the panel being unprepared and the attorney accepting the award without consulting the client. When sanctions were awarded in the case, the defendant didn't pay and the attorneys didn't follow up to enforce the judgment. How typical do you think these concerns are for litigants in general? Do these types of concerns vary for plaintiffs and defendants?

There was strong agreement among focus group participants that this was not at all typical. This scenario was viewed to be very rare and not reflective of a systemic problem. They indicated that they would never accept or reject an award without consulting the client.

D2. What have you heard from litigants about their perspective on CE and MED? Did they understand the CE and/or MED processes available to them? Did they find the processes to be fair? Did they think that they had adequate opportunity to be heard? Did they think their cases took more or less time to be resolved?

The most common perception is that CE doesn't seem like justice to the litigants. They want to be heard and MED gives them that opportunity. Litigants often feel frustrated because they accepted something they didn't like or their case was "solved by an economic squeeze rather than their day in court." Some focus group participants suggested that attorneys need to do a better job of explaining the CE and MED processes and share the opposing attorney's summary with them. As one put it, "a lot of complaints are because of poor communication between the client and attorney." However, it was added that most lawyers do a good job of explaining the range of options to their clients. Another concluded that "if the process is fair, the number is less important." Still, litigants have expressed frustration with the system overall and why it takes so long to get their case resolved.

Suggestions for Improvements to Case Evaluation and/or Mediation

E1. What changes would you like to see in Michigan's use of these ADR methods in the future? Why?

By far the most common suggestion was for more flexibility regarding the type and timing of ADR to be used. There was a request for more involvement from the judge or the ADR clerk early in the case to do "triage" in order to determine whether CE or MED would be best and when it should occur. They would also like a fast track for cases that are ready to settle without either CE or MED. It was mentioned that in Kent County the attorneys meet to come up with a plan before the scheduling order. There was support for there being "different rules for different types of cases" in contrast to the inflexible, computer-generated scheduling orders being used by the larger courts. The conclusion was that there shouldn't be a default to one specific ADR process.

Although there was a clear preference for greater flexibility, there was much support for some mandatory ADR. It was pointed out that "some attorneys are ignoring the rules and deadlines"

and “you don’t want flexibility to result in a lack of accountability.” A minority view was expressed that ADR is intended to be consensual and that litigants have a right to go to trial if that is their preference.

Regarding CE, some of the specific changes suggested were:

- Increase the CE filing fee and the penalty for late submission of the summary;
- Panels should share how they arrived at the amount of award;
- Need a court rule statement about the purpose of CE;
- Need guidelines from the Supreme Court for case evaluators;
- Greater use of specialty panels and educate attorneys and litigants about the options;
- Limit the number of pages in the summary and the number of attachments;
- Remove CE if parties are in agreement about MED;
- Have option of extension beyond 28 days if there is a good reason;
- ADR clerks should get feedback about case evaluators to weed out the bad ones.

Suggested improvements regarding MED included:

- Pool of mediators should be expanded;
- Make sure parties know they are not limited to the mediators on the court’s list;
- Law schools need to do more training for mediators;
- Make sure the right people are at the table—those with authority to settle;
- Order to show cause if parties don’t show up with the necessary authority.

And finally, there were some suggestions that there be better education of attorneys and information to clients about the ADR processes and how they work. That might help avoid some of the frustration that litigants currently experience.

E2. If neither ADR process was ordered...How would you otherwise settle cases? Would you voluntarily go to CE? Would you voluntarily go to MED? Would more cases go to trial?

Focus group participants indicated that if neither process were ordered they would generally find a way to negotiate and settle without going to trial. Most didn’t think the number of trials would increase but thought that cases might take longer to resolve. One attorney said he would “prepare for trial but leave the door open to negotiation; cases have a way of settling without case evaluation or mediation.” Some concern was expressed that it would overwhelm the courts if there was no ADR, resulting in longer dockets.

Very few participants indicated any willingness to go to CE voluntarily. They indicated that CE still has its purpose with some cases. Many more participants indicated that they would—and do—go to MED voluntarily.

Appendix E: Summary of Results from Statewide Survey of Circuit Court Judges

This survey, developed by Courtland Consulting under the direction of SCAO, was conducted between June 23, 2011 and July 15, 2011. A memo was sent to circuit court judges throughout Michigan by SCAO with the URL to Courtland’s online survey. A total of 44 completed surveys were submitted. In one court, the court administrator indicated that the survey was submitted on behalf of the judges, so the number of judges participating in the survey is greater than the number of completed surveys received.

The following summary shows each question in the survey and the analyzed results for each question. Percentages are based on the number of respondents for each question.

1. In what part of the state is your circuit court located?

<u>N</u>	<u>Percent</u>	
8	(18%)	Eastern Michigan (Arenac, Bay, Clare, Genesee, Gladwin, Huron, Isabella, Lapeer, Midland, Saginaw, Sanilac, Tuscola)
13	(29%)	Southeast Michigan (Lenawee, Livingston, Macomb, Monroe, St. Clair, Oakland, Washtenaw, Wayne)
6	(14%)	Southwest Michigan (Allegan, Barry, Berrien, Branch, Calhoun, Cass, Kalamazoo, St. Joseph, Van Buren)
4	(9%)	Western Michigan (Ionia, Kent, Mecosta, Montcalm, Muskegon, Newaygo, Oceana, Ottawa)
4	(9%)	Mid-Michigan (Clinton, Eaton, Gratiot, Hillsdale, Ingham, Jackson, Shiawassee)
7	(16%)	Northern Lower Peninsula (Alcona, Alpena, Antrim, Benzie, Charlevoix, Cheboygan, Crawford, Emmet, Grand Traverse, Iosco, Kalkaska, Lake, Leelanau, Manistee, Mason, Missaukee, Montmorency, Ogemaw, Osceola, Oscoda, Otsego, Presque Isle, Roscommon, Wexford)
<u>2</u>	<u>(5%)</u>	Upper Peninsula
44	(100%)	

2. What ADR processes do you use? (Please indicate all that apply.)

<u>N</u>	<u>Percent</u>	
42	(96%)	Case evaluation under MCR 2.403
37	(84%)	Mediation under MCR 2.411 (includes what some call facilitation)
4	(9%)	Other (not including pre-trial settlement conference): Arbitration (2); mediation status conference for NH, NM, NP (not asbestos), CB cases only (1); blank (1)

3. Approximately what percentage of tort claims (case type N) in your docket do you order (with a paper order) or refer (without order) to each ADR process?

	Ordered (Mean)	Referred w/out order (Mean)
a. Case evaluation under MCR 2.403	85%	5%
b. Mediation under MCR 2.411	31%	5%
c. Other	0%	<1%

4. Approximately what percentage of non-tort civil cases (case types C and P) in your docket do you order or refer to each ADR process?

	Ordered (Mean)	Referred w/out order (Mean)
a. Case evaluation under MCR 2.403	65%	5%
b. Mediation under MCR 2.411	27%	3%
c. Other	<1%	<1%

5. Of those cases ordered or referred to an ADR process, what percentage actually result in the process occurring?

	Ordered (Mean)	Referred w/out order (Mean)
a. Case evaluation under MCR 2.403	77%	43%
b. Mediation under MCR 2.411	77%	51%
c. Other (<i>specify</i>): Arbitration (n = 2)	90%	0%

6. Are your answers to question # 5 estimates or based on court data?

<u>N</u>	<u>Percent</u>	
39	(93%)	Estimates
3	(7%)	Based on court data
42	(100%)	

7. Of the cases in your docket that go through an ADR process, how many settle as a direct result of participation in:

	<u>N</u>	<u>(Mean)</u>
a. Mediation	25	54% (estimated)
b. Case evaluation	31	42% (estimated)
c. Other ADR	2	100% (estimated) (<i>specify</i>): Arbitration

8. If case evaluation and mediation are both ordered or referred, what sequence is most common in your court?

<u>N</u>	<u>Percent</u>	
9	(24%)	Case evaluation followed by mediation
12	(32%)	Mediation followed by case evaluation
11	(30%)	Both sequences are equally common
<u>5</u>	<u>(14%)</u>	Not applicable; our court does not order or refer both processes in one case
37	(100%)	

Case Evaluation (The following questions pertain to case evaluation only.)

9. When do you order or refer parties to case evaluation?

<u>N</u>	<u>Percent</u>	
35	(83%)	In the scheduling order
0	(0%)	Subsequent to a hearing
4	(10%)	Subsequent to settlement conference or pretrial
<u>3</u>	<u>(7%)</u>	Other
42	(100%)	

10a. Before case evaluation takes place, how often do attorneys in your circuit court object, such as formally by motion or informally as in a settlement conference, to case evaluation? (n = 42)

0%	Always
2%	Very often
7%	Often
17%	Sometimes
67%	Rarely
1%	Never

10b. When attorneys object to case evaluation before it takes place, what are the most common reasons given?

37 responses were provided by 33 respondents. The most common reason (13) was that the case was not appropriate for case evaluation. Another 11 specifically mentioned cases seeking equitable relief. Other reasons included scheduling or timing issues (5), cost (4), and cases that were unlikely to settle (4).

10c. When attorneys object to case evaluation before it takes place, how frequently have you nevertheless ordered their clients to participate in case evaluation? (n = 39)

10%	Always
31%	Very often
5%	Often
31%	Sometimes
18%	Rarely
5%	Never

11a. After case evaluation has taken place, how often do attorneys move to set aside an award? (n =41)

0%	Always
0%	Very often
2%	Often
5%	Sometimes
63%	Rarely
29%	Never

11b. When attorneys move to set aside an award or informally object to the award in a settlement conference, what are the most common reasons given for discounting the award?

19 respondents answered this question, with 20 responses. The common reasons included: improper procedure (7), panel qualifications or bias (5), new evidence (5), and the amount of award (3).

11c. How often do you grant motions to set aside the case evaluation award? (n = 39)

0%	Always
0%	Very often
0%	Often
3%	Sometimes
51%	Rarely
46%	Never

12. How often do the parties accept case evaluation awards within 28 days of the award? (n = 41)

0%	Always
17%	Very often
29%	Often
46%	Sometimes
7%	Rarely
0%	Never

13. When parties do not accept the case evaluation award within 28 days of the award and the case is ultimately disposed by bench or jury trial, how often are sanctions applied? (n = 42)

12%	Always
9%	Very often
29%	Often
31%	Sometimes
17%	Rarely
2%	Never

14. How often have the sanction provisions of MCR 2.403 been the primary incentive for parties to accept the award? (n = 36)

3%	Always
17%	Very often
22%	Often
44%	Sometimes
14%	Rarely
0%	Never

15. Do you use the case evaluation award in settlement discussions w/the parties? (n = 42)

17%	Always
19%	Very often
7%	Often
24%	Sometimes
24%	Rarely
5%	Never

16. In your opinion, which of the following is the primary purpose of case evaluation?

<u>N</u>	<u>Percent</u>	
9	(21%)	Provide a fair valuation of the case (close to the value a jury or judge might award)
30	(71%)	Arrive at a number that the parties can accept (likely to produce a settlement or resolution)
3	(7%)	Other
42	(99%)	(less than 100% due to rounding)

17. What is the financial impact to the court of managing the case evaluation process compared to not using case evaluation?

<u>N</u>	<u>Percent</u>	
11	(27%)	Case evaluation increases the court's costs <i>How?</i> 4 indicated court staff time and 1 indicated that it causes delays
20	(50%)	Case evaluation reduces the court's costs <i>How?</i> 7 indicated that it avoids trials and 6 said it saves time of court staff
9	(23%)	Case evaluation has no net impact on the court's costs
40	(100%)	

18. What is the financial impact of case evaluation for the litigants compared to not having case evaluation at all?

<u>N</u>	<u>Percent</u>	
16	(39%)	Case evaluation increases litigants' costs <i>How?</i> No responses were provided
0	(0%)	Case evaluation reduces litigants' costs <i>How?</i> No responses were provided
25	(61%)	Case evaluation has no net impact on litigants' costs
41	(100%)	

19. When do you think case evaluation is most effectively conducted?

<u>N</u>	<u>Percent</u>	
4	(10%)	Before discovery
6	(14%)	During discovery
<u>32</u>	<u>(76%)</u>	After discovery
42	(100%)	

20. If case evaluation was not mandatory for tort claims (case type N), how often would you nevertheless order the process? (n = 41)

49%	Always
32%	Very often
2%	Often
10%	Sometimes
5%	Rarely
2%	Never

21. Please rate the quality of the case evaluators who are available to serve on panels for cases in your court. (n = 42)

31%	Excellent
48%	Very good
17%	Fair
2%	Poor
2%	Unsatisfactory

22. To what extent do you agree or disagree with the following statement: “Overall, case evaluation is an effective method for resolving civil cases.” (n = 42)

45%	Strongly agree
24%	Agree
12%	Neutral
12%	Disagree
7%	Strongly disagree

23. If your response to the previous question was less than “strongly agree,” how could case evaluation be made more effective?

12 respondents wrote in 16 responses. The most common category of suggestion (5) called for better evaluators on the panels. 3 of the suggestions involved sanctions: expanding them to non-unanimous awards or eliminating dissents to avoid sanctions. 2 suggested using case evaluation selectively as part of ADR. 2 indicated that lawyers need to take the process more seriously or show a willingness to negotiate a settlement. The remaining suggestions (1 respondent each) included: creating pre and post-discovery evaluation; holding parties to stricter timelines; having a mandatory hearing or pretrial if award is rejected; replacing case evaluation with 2.411 (mediation).

Mediation (The following questions pertain to mediation only.)

24. When do you order mediation?

<u>N</u>	<u>Percent</u>	
20	(53%)	In the scheduling order
2	(5%)	Subsequent to a hearing
14	(37%)	Subsequent to settlement conference or pretrial
<u>2</u>	<u>(5%)</u>	Other
38	(100%)	

25. How often do attorneys in your circuit court object, such as formally by motion or informally as in a settlement conference, to mediation? (n =38)

0%	Always
3%	Very often
3%	Often
24%	Sometimes
55%	Rarely
16%	Never

26. When attorneys object to mediation, what are the most common reasons given?

23 responses were provided by 21 respondents. The most common category (12) was there was no chance of settling. 8 respondents mentioned cost as the most common reason. Other reasons (1 respondent each) included: case does not warrant; clients are out of the area and do not want to attend; it is not binding.

27. When attorneys object to mediation, how frequently have you nevertheless ordered their clients to participate in mediation? (n = 37)

14%	Always
38%	Very often
11%	Often
16%	Sometimes
5%	Rarely
16%	Never

28. In cases ordered to mediation, how often do attorneys ask you to recommend a mediator? (n =39)

3%	Always
8%	Very often
13%	Often
36%	Sometimes
28%	Rarely
13%	Never

29. In cases ordered to mediation, how often have you appointed a mediator without allowing the attorneys to stipulate to their own mediator? (n = 38)

- 0% Always
- 0% Very often
- 0% Often
- 13% Sometimes
- 32% Rarely
- 55% Never

30. In cases ordered to mediation, how often have you appointed a mediator but allowed the attorneys to stipulate later to another mediator of their own choosing? (n = 37)

- 13% Always
- 0% Very often
- 3% Often
- 30% Sometimes
- 24% Rarely
- 30% Never

31. Over the past 5 years, have you observed a change in attorneys' willingness to participate in mediation without the court ordering it?

<u>N</u>	<u>Percent</u>	
26	(67%)	Attorneys have become more willing
2	(5%)	Attorneys have become less willing
11	(28%)	I have not observed any change
39	(100%)	

32. What is the financial impact to the court of managing the mediation process compared to not having mediation at all?

<u>N</u>	<u>Percent</u>	
3	(8%)	Mediation increases the court's costs <i>How?</i> 1 mentioned delays; 1 mentioned staff time if they miss deadlines
24	(63%)	Mediation reduces the court's costs <i>How?</i> 5 indicated avoiding trials; 5 said reducing the time for court staff; 1 said they don't need to do case evaluation and cases often settle
11	(29%)	Mediation has no net impact on the court's costs
37	(100%)	

33. What is the financial impact to the litigants of participating in mediation compared to not participating in mediation?

<u>N</u>	<u>Percent</u>	
13	(35%)	Mediation increases the litigants' costs <i>How?</i> 3 indicated mediator's fees (but 2 of them added that parties save money if the case settles); 1 mentioned additional attorney fees
22	(60%)	Mediation reduces litigants' costs <i>How?</i> 6 mentioned avoiding trials; 4 indicated lower attorney fees
<u>2</u>	<u>(5%)</u>	Mediation has no net impact on litigants' costs
37	(100%)	

34. When do you think mediation is most effectively conducted?

<u>N</u>	<u>Percent</u>	
5	(13%)	Before discovery
14	(35%)	During discovery
<u>21</u>	<u>(52%)</u>	After discovery
40	(100%)	

35. Please rate the quality of the mediators who are on the approved list for cases in your court. (n = 36)

42%	Excellent
50%	Very good
5%	Fair
0%	Poor
3%	Unsatisfactory

36. If your court refers cases to a Community Dispute Resolution Program center, please rate the quality of service you believe the center delivers for your court's litigants (n = 36)

22%	Excellent
44%	Very good
11%	Fair
3%	Poor
0%	Unsatisfactory
19%	Not applicable

37. To what extent do you agree or disagree with the following statement: "Overall, mediation is an effective method for resolving civil cases." (n = 38)

71%	Strongly agree
18%	Agree
5%	Neutral
3%	Disagree
3%	Strongly disagree

38. If your response to the previous question was less than “strongly agree,” how could mediation be made more effective?

4 respondents offered suggestions:

“I think it only works well when the attorneys agree that mediation would be helpful.”

“It’s only as effective as the parties are willing to compromise and negotiate a settlement.”

“I don’t know that it can be. The reason I don’t strongly agree is because the cost as well as the need for the parties to buy into the process limits the cases in which it can be used.”

“Insurers, especially in medical malpractice cases, simply refuse to participate in any meaningful way and there are no sanctions for such behavior.”

Overall Assessment of ADR (These questions pertain to both case evaluation and mediation.)

39. If mediation was demonstrated to be more effective than case evaluation in achieving a disposition sooner after the ADR event, how often would you order mediation in place of or prior to case evaluation? (n = 39)

20%	Always
41%	Very often
23%	Often
8%	Sometimes
8%	Rarely
0%	Never

40. Do you have any additional comments or recommendations regarding ADR processes that you would like to share with the Michigan Supreme Court and the State Court Administrative Office?

Additional comments were offered by 6 respondents:

“Do NOT change the case evaluation rule. Many insurance companies do not participate in any meaningful ADR without being ordered to do so and without the threat of sanctions.”

“Increase late fees to encourage filing on time.”

“In this Court case evaluation is very effective on civil cases and mediation is somewhat effective on divorce cases.”

“Would like to see case evaluation modified and/or replaced with M.C.R. 2.411.

“Both processes are of value to the resolution of cases.”

“MSC should require all courts to adopt a LAO allowing for mediation, case evaluation and alternative means of dispute resolution.”

Appendix F: Data Extraction Tool

CIVIL CASE FILE REVIEW DATA EXTRACTION TOOL

Review Date _____

Reviewer _____

CIVIL CASE SUMMARY

1. Court:

Berrien Grand Traverse Isabella Oakland St. Clair Wayne

2. Docket Number: _____

3. Filing Date: _____ (mm/dd/yy)

4. Disposition Date: (JIS Courts) _____ (mm/dd/yy)

5. Case Closure Date: (non-JIS Courts) _____ (mm/dd/yy) (This is the date that the order to close the case was filed. It will later be compared to CE acceptance date or Mediation acceptance date to test 28 day rule.)

6. Final Disposition Filed (court code/description): _____(ABC/abcdef..) and the (Courtland code – see list below) _____(ABC/abcdef..)

- BV – Bench Verdict.
- CJV– Consent Judgment -Voluntary.
- CJE – Consent Judgment –Result of Case Evaluation (within 28 days)
- DC – Dismissed by Court.
- DF – Default Judgment.
- DP – Dismissed by Party – With No Award.
- JV – Jury Verdict.
- SD – Summary Disposition.
- ST – Settlement/Stip & Order

7. Amount of Relief Sought: \$ _____ (if available)

8. Final Award Amount: \$ _____ (if available)

CASE EVALUATION DETAIL

9. Was Case Evaluation Held? No Yes

If Yes:

a. Was an Order Issued for Case Evaluation?

No Yes

b. Date of Order: _____ (mm/dd/yy)

c. Initial Date Set for CE: _____ (mm/dd/yy)

d. Number of Times CE Reset/Rescheduled? _____

e. Date Held: _____ (mm/dd/yy)

f. Did CE result in a mutual agreement disposing of the case (at the table)?

No Yes

g. Unanimous: No Yes

h. Was there an order disposing this case post 28 days from CE that could be attributed to the mutual acceptance of the CE award amount? i.e., no other future events occurred between CE and FINAL DISPOSITION.

No Yes

If No (to #9): Was a motion filed to remove the case from CE? No Yes

a. Was the motion granted? No Yes

b. Date of Order: _____ (mm/dd/yy)

MEDIATION DETAIL

10. Was the Mediation Conducted? (court ordered or not court ordered)
 No Yes

If Yes (to #10): Was Mediation Court-ordered?

No Yes

- a. Date of the Order: _____ (mm/dd/yy)
- b. Date Set for Mediation: _____ (mm/dd/yy)
- c. Number of Times Mediation Reset/Rescheduled: _____
- d. Date Mediation Was Completed: _____ (mm/dd/yy)
- e. MSR (Mediator Status Report Filed?)
 No Yes
- f. Did MED result in a mutual agreement disposing of the case (at the table)?
 No Yes
- g. Was there an order disposing this case post 28 days from MED that could be attributed to the mutual acceptance of Mediation award amount? i.e., no other future events occurred between MED and FINAL DISPOSITION.
 No Yes

If No (to #10): Was a motion filed to remove the case from Mediation? No Yes

- a. Was the motion granted? No Yes
- b. Date of Order: _____ (mm/dd/yy)

TRIAL DETAIL

1. Was a Trial Conducted?

No Yes

If Yes:

a. Was the trial ordered?

b. Bench Jury

c. Date of Order for Trial: _____ (mm/dd/yy)

d. Original Trial Date: _____ (mm/dd/yy)

e. Trial Held on: _____ (mm/dd/yy)

f. Number of Times Trial Reset/Rescheduled _____

g. Date Trial Was Concluded: _____ (mm/dd/yy)

h. Sanction Requested? (only if CE/Trial occurred)

No Yes

i. Was there an order disposing this case based on Trial (aka Verdict) post 28 days from TRIAL that could be attributed to the TRIAL award amount? (i.e., no other future events occurred between TRIAL and FINAL DISPOSITION)

No Yes

Case Types included in this study are:

(4) *Civil Damage Suits (Torts):*

ND – Property Damage, Auto Negligence. All complaints of property damage but not personal injury involving the use of a motor vehicle.

NF – No-Fault Automobile Insurance. All claims for first-party personal protection benefits and first-party property protection benefits under the no-fault automobile insurance act.

NH – Medical Malpractice. All claims involving health care provider malpractice.

NI – Personal Injury, Auto Negligence. All complaints of personal injury, or personal injury and property damage, involving the use of a motor vehicle.

NM – Other Professional Malpractice. All claims involving professional malpractice other than health care provider malpractice.

NO – Other Personal Injury. All other claims involving liability for personal injury not otherwise coded.

NP – Products Liability. All claims involving products liability.

NS – Dramshop Act. All claims involving liability under the liquor control code.

NZ – Other Damage Suits. All other claims for damages.

(5) Other Civil Matters:

CB – Business Claims. All claims involving partnership termination and other business accountings.

CC – Condemnation. All condemnation proceedings.

CD – Employment Discrimination. All complaints of employment discrimination.

CE – Environment. All environmental matters such as zoning, pollution, etc.

CF – Forfeiture Claims. All claims of interest in property seized under the Controlled Substance Act which may be subject to forfeiture.

CH – Housing and Real Estate. All housing, real estate, foreclosure, land contracts, and other property proceedings (except landlord-tenant and land contract summary proceedings).

CK – Contracts. All proceedings involving contractual obligations not otherwise coded.

CL – Labor Relations. All labor-management matters except employment discrimination.

CP – Antitrust, Franchising, and Trade Regulation. All complaints regarding unlawful trade practices including but not limited to pricing and advertising of consumer items, regulation of watercraft, restraint of trade and monopolies, Consumer Protection Act, Farm and Utility Equipment Franchise Act, franchise investment law, motor vehicle dealer agreements, and the Motor Fuel Distribution Act.

CR -- Corporate Receivership. All corporate receivership proceedings.

CZ – General Civil. All other civil actions not otherwise coded.

PC – Proceedings to Restore, Establish, or Correct Records. All proceedings to restore, establish or correct records which are assigned a new case number (not brought under an existing case).

PD – Claim and Delivery. All complaints to recover personal property which are assigned a new case number (not brought under an existing case).

PR – Receivers in Supplemental Proceedings. All proceedings appointing a receiver which are assigned a new case number (not brought under an existing case).

PS – Supplemental Proceedings. All supplemental proceedings which are assigned a new case number (not brought under an existing case).

PZ – Miscellaneous Proceedings. All other matters assigned a new case number (not brought under an existing case), including the following matters: grand jury and multi-county grand jury.

Appendix G: Court Administrator Interview Questions

Court Administrator: _____

Circuit Court: _____ Date: _____

COURT ADMINISTRATOR INTERVIEW QUESTIONS

Courtland Consulting is working under contract with SCAO to evaluate the comparative effectiveness of civil case resolution. As we examine selected case files from six circuit courts, we are interested in learning more from each of the six court administrators about how cases are handled. We also want to obtain your perspective on the ADR processes. These questions were developed to be used as part of an interview to be conducted in person or by telephone. However, you are welcome to prepare your responses in written form and submit them via e-mail if you prefer. We appreciate your assistance and value your input.

1. What ADR processes are used by this court? (Please indicate all that apply.)
 - Case evaluation under MCR 2.403
 - Mediation under MCR 2.411
 - Arbitration
 - Other (explain). Note: if your court uses the word "facilitation" to refer to mediation under MCR 2.411, please identify that for us.

2. Do you have any reports that you use to monitor ADR that you can share with us?

3. How are torts and other civil cases referred to one or another process?
 - Do you know the % of cases that are "ordered" or simply "recommended" by the judge to one or more ADR process?
 - Do attorneys interpret judges' comments/recommendations about going to ADR as an order, even though there is no signed order?
 - Do you know how many cases (or %) ordered or recommended to case evaluation and/or mediation/facilitation actually result in the process occurring?

4. When are key events (e.g., case evaluation, mediation, trial) in a case scheduled (i.e., is there a scheduling order and/or do they occur throughout the case)?
5. Please tell me about your court's adjournment policy and practice.

Case Evaluation

6. How many case evaluators are on the roster?
7. Are there subpanels that specialize in particular types of cases?

If yes, which ones?

8. How are cases assigned to a panel?
9. How many cases per day per panel?
10. How are case evaluators paid?
11. How much time does the panel for each case allot?
 - a. How much time does the panel spend with the parties' attorneys?
12. Does the court track disposition dates within 28 days of award?
13. How frequently are sanctions sought in case evaluation?

Mediation (if applicable)

14. How does the court determine whether or not to recommend/order mediation?
15. How are cases referred to particular mediators?

- a. Does the judge play any role in identifying and/or selecting the mediator?
16. If the court has a roster, how many mediators are on the roster?
- a. How frequently is a mediator assigned?
17. If case evaluation and mediation are both ordered, what sequence is most common?
Why?
- a. Does it vary with the type of case?
 - b. What sequence do you prefer? Why?

Estimated Cost and Workload Impact of ADR

18. What efficiencies do case evaluation and mediation offer the court that may not occur if neither process was used?
19. From a case flow perspective, how do you think either process promotes better docket management?
20. What do you see as the impact on the court workload of the ADR processes?
21. In your opinion, does ADR result in reduced costs for the **court**? (Court costs may include: case screening time, scheduling, noticing, rescheduling, notifying parties of awards, time spent convening and managing panels.)
22. What efficiencies does ADR offer the litigants that may not occur if neither process was used?
23. In your opinion, does ADR result in reduced costs for the **litigants**? (Litigant costs include attorney time spent writing a brief, service on other parties, attendance at case evaluation or mediation, time discussing purpose of processes with parties, time discussing whether to accept award.)

Overall Assessment of ADR

24. What do you see as the pros and cons of the ADR processes offered by your court?

25. Are some case types more amenable to earlier disposition through case evaluation and mediation/facilitation than others?

26. Are there any indirect benefits of ADR for cases not disposed as a direct result of the ADR process?

27. Are there any particular questions that you think that judges should be asked in our online survey of judges?

28. Is there anything about offering and managing these processes that you would like SCAO and the Court to know?

29. Do you have any additional comments or recommendations regarding ADR processes?