Michigan Supreme Court

Dispute Resolution Rules Committee

Report to the Michigan Supreme Court

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Background

In 2007, the State Court Administrative Office (SCAO) appointed a 22-member Dispute Resolution Rules Committee to recommend court rule amendments that would improve current practices under Michigan's civil case alternative dispute resolution (ADR) court rules. The rules included MCR 2.403-2.404 (Case Evaluation) and MCR 2.410-2.411 (Mediation). Additionally, the committee assessed several proposals for amendments of the rules that had been previously submitted to the Michigan Supreme Court.

The committee first met on October 15, 2007, and held three subsequent meetings, concluding its work on April 22, 2008.

Prior to the first meeting, committee members received a manual that included resource materials and a set of study questions. The study questions consisted primarily of proposed topics brought to SCAO's attention over the course of several years. Committee members were also invited to raise any additional issues with the committee. The study questions appear as Appendix 1.

Recommendations

The case evaluation and mediation court rules appear in their entirety in this report. While substantial segments of the rules contain no proposed amendments, the discussion section following each rule reflects the fact that various amendments were considered, but not adopted by the committee.

The committee made several recommendations regarding further study of the rules. In particular, the topics of confidentiality of the mediation process (MCR 2.411[C][5]) and mediator Standards of Conduct (MCR 2.411[G]), which extended beyond the scope of this committee, were identified as best being reviewed by successor committees, differently constituted to include domestic relations and probate mediators, attorneys, family division judges, and court administrators. Additional information regarding these recommendations appears in the discussion section for these two rules.

Proposed Rule Amendments

The following reflects the committee's recommended amendments of the ADR rules. The committee's rationale for proposing amendments, or for retaining current provisions, appears at the conclusion of each rule.

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

RULE 2.403 CASE EVALUATION

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

(1) A court may submit to case evaluation any civil action in which the relief sought is primarily money damages or division of property.

(2) Case evaluation of tort cases filed in circuit court is mandatory beginning with actions filed after the effective dates of Chapters 49 and 49A of the Revised Judicature Act, as added by 1986 PA 178. ~~; however, the court may except an action from case evaluation on motion for good cause shown if it finds that case evaluation of that action would be inappropriate.~~

(3) A court may except all or part of an action from case evaluation for good cause shown on motion or by stipulation of the parties, or by the court with the consent of the parties, if it finds that case evaluation of that action or part thereof would be inappropriate.

(4) ~~(3)~~ Cases filed in district court may be submitted to case evaluation under this rule. The time periods set forth in subrules (B)(1), (G)(1), (L)(1), and (L)(2) may be shortened at the discretion of the district judge to whom the case is assigned.

(B) **Selection of Cases.**

(1) The judge to whom an action is assigned or the chief judge may select it for case evaluation by written order ~~no earlier than 91 days~~ after the filing of the answer

(a) on written stipulation by the parties,
(b) on written motion by a party, or
(c) on the judge's own initiative.

(2) Selection of an action for case evaluation has no effect on the normal progress of the action toward trial.

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

(1) To object to case evaluation, a party must file a written motion to remove from case evaluation and a notice of hearing of the motion and serve a copy on the attorneys of

record and the ADR clerk within 14 days after notice of the order assigning the action to case evaluation. The motion must be set for hearing within 14 days after it is filed, unless the court orders otherwise.

(2) A timely motion must be heard before the case is submitted to case evaluation.

(D) **Case Evaluation Panel.**

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

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

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

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

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

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

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

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

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

(H) **Fees.**

(1) ~~Within 14 days after the mailing of the notice of the case evaluation hearing, unless otherwise ordered by the court, e~~Each party must send ~~to the ADR clerk~~ a check for ~~$75~~ $150 made payable in the manner and within the time specified in the notice of the case evaluation hearing. However, if a judge is a member of the panel, the fee is ~~$50~~ $100. Where the order to case evaluation directs that payment be made to the ADR clerk, ~~T~~the ADR clerk shall arrange payment to the case evaluators. Except by stipulation and court order, the parties may not make any other payment of fees or expenses to the case evaluators than that provided in this subrule.

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

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

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

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

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

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

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

(a) in the case of an adjournment, the adjournment order sets a new date for case evaluation and the fees are applied to the new date, or
(b) the request for and granting of adjournment is made within 14 days of the scheduled case evaluation, unless waived for good cause.

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

(I) **Submission of Summary and Supporting Documents.**

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

(a) serve a copy of the case evaluation summary and supporting documents in accordance with MCR 2.107~~(B)~~; and
(b) file a proof of service and three copies of a case evaluation summary and supporting documents with the ADR clerk.

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

(3) Except as permitted by the court, the summary shall not exceed 20 pages double spaced, exclusive of attachments. Quotations and footnotes may be single spaced. At least one inch margins must be used, and printing shall not be smaller than 12-point font.

(J) **Conduct of Hearing.**

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

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

(3) Oral presentation shall be limited to 15 minutes per side unless multiple parties or unusual circumstances warrant additional time. Information on applicable insurance policy limits and settlement negotiations shall be disclosed at the request of the case evaluation panel.

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

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

(K) **Decision.**

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

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

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

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

(a) The party's primary purpose in initiating the action or asserting the defense was to harass, embarrass, or injure the opposing party.
(b) The party had no reasonable basis to believe that the facts underlying that party's legal position were in fact true.
(c) The party's legal position was devoid of arguable legal merit.

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

(a) there has been a breach of the applicable standard of care,
(b) there has not been a breach of the applicable standard of care, or
(c) reasonable minds could differ as to whether there has been a breach of the applicable standard of care.

(L) **Acceptance or Rejection of Evaluation.**

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

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

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

(a) Each party has the option of accepting all of the awards covering the claims by or against that party or of accepting some and rejecting others. However, as to any particular opposing party, the party must either accept or reject the evaluation in its entirety.

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

(i) all opposing parties accept, and/or

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

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

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

(M) **Effect of Acceptance of Evaluation.**

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

(2) If only a part of an action has been submitted to case evaluation pursuant to Rule 2.403(A)(3) and all of the parties accept the panel's evaluation, the court shall enter an order concluding only those claims.

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

(N) **Proceedings After Rejection.**

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

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

(a) The motion shall be submitted to the court on the case evaluation summaries and documents that were considered by the case evaluation panel. No other exhibits or testimony may be submitted. However, oral argument on the motion shall be permitted.
(b) After reviewing the materials submitted, the court shall determine whether the action or defense is frivolous.

(c) If the court agrees with the panel's determination, the provisions of subrule (N)(3) apply, except that the bond must be filed within 28 days after the entry of the court's order determining the action or defense to be frivolous.
(d) The judge who hears a motion under this subrule may not preside at a nonjury trial of the action.

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

(a) The bond must be posted within 56 days after the case evaluation hearing or at least 14 days before trial, whichever is earlier.
(b) If a surety bond is filed, an insurance company that insures the defendant against a claim made in the action may not act as the surety.
(c) If the bond is not posted as required by this rule, the court shall dismiss a claim found to have been frivolous, and enter the default of a defendant whose defense was found to be frivolous. The action shall proceed to trial as to the remaining claims and parties, and as to the amount of damages against a defendant in default.
(d) If judgment is entered against the party who posted the bond, the bond shall be used to pay any costs awarded against that party by the court under any applicable law or court rule. MCR 3.604 applies to proceedings to enforce the bond.

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

(O) **Rejecting Party's Liability for Costs.**

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

(2) For the purpose of this rule, "verdict" includes,
(a) a jury verdict,
(b) a judgment by the court after a nonjury trial,
(c) a judgment entered as a result of a ruling on a motion after rejection of the case evaluation.

(3) For the purpose of subrule (O)(1), a verdict must be adjusted by adding to it assessable costs and interest on the amount of the verdict from the filing of the complaint to the date of the case evaluation, and, if applicable, by making the adjustment of future damages as provided by MCL 600.6306. After this adjustment, the verdict is considered more

favorable to a defendant if it is more than 10 percent below the evaluation, and is considered more favorable to the plaintiff if it is more than 10 percent above the evaluation. If the evaluation was zero, a verdict finding that a defendant is not liable to the plaintiff shall be deemed more favorable to the defendant.

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

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

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

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

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

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

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

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

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

(b) a reasonable attorney fee based on a reasonable hourly or daily rate as determined by the trial judge for services necessitated by the rejection of the case evaluation.

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

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

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

(9) In an action under MCL 436.22, if the plaintiff rejects the award against the minor or alleged intoxicated person, or is deemed to have rejected such an award under subrule (L)(3)(c), the court shall not award costs against the plaintiff in favor of the minor or alleged intoxicated person unless it finds that the rejection was not motivated by the need to comply with MCL 436.22(6).

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

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

Discussion: The Dispute Resolution Rule Committee considered whether or not subrule (A)(1) should reflect that a case primarily seeking injunctive or equitable relief should be referred to case evaluation. Committee members observed that cases evaluated where injunctive relief alone is sought are rarely assisted by the case evaluation process. Additionally, low income litigants seeking only injunctive relief were considered particularly disadvantaged by paying a fee and having their case evaluated, albeit with little expectation that the case evaluation process would help resolve the case. The committee concluded that courts would not have a ready means of separating claims of economic, injunctive, and equitable relief, and that parties and attorneys should instead file an objection to case evaluation pursuant to MCR 2.403(C) if they believe the case should not be evaluated.

The committee considered whether subrule (A)(1) should identify the goal of case evaluation as either to establish a true case value, or to establish a number likely to prompt parties to accept an award. The difference is evident in the example of rendering an award of zero dollars, where, although a panel may determine that amount to be the true case value, it would not be a number likely to prompt acceptance of the award. Recognizing that parties may seek different goals in case evaluation, the committee recommended against identifying a specific purpose of case evaluation in the rule.

Subrule (A)(3) consists of language that currently appears in subrule (A)(2), but, for emphasis, is both moved to new subrule (A)(3) and is clarified to reflect that a part of an action may be excepted by the court from case evaluation for good cause shown by motion of the parties, by stipulation of the parties, or by the court with the consent of the parties. This clarification, originally proposed by the Third Circuit Court, is intended to encourage the acceptance of awards in cases in which issues inappropriate for case evaluation have been removed from a panel's consideration.

The deletion of the 91-day time period in subrule (B) is intended to reflect the practice in some jurisdictions to order case evaluation in the original scheduling order. In practice, case evaluation takes place just prior to or after the close of discovery. In some jurisdictions, the order to participate in case evaluation appears in the original scheduling order; in other jurisdictions, the order to participate in case evaluation is issued after discovery. Because scheduling orders may issue prior to 91 days after the filing of an answer, the restriction is unnecessary.

The proposed amendment of subrule (H)(1) is intended to provide courts with flexibility in determining when payment should be made. Current practice varies from courts that require litigants to send payment to the court within 14 days of the mailing of the scheduling order (containing the order to case evaluation) to a postdiscovery order to case evaluation (that appears as an order distinct from the scheduling order). The committee did not take a negative view of this variability, noting that smaller courts may refer only a few cases to case evaluation panels each month and have fees sent directly to the panel members, whereas larger courts may convene panels several times per week and pay panel members a per diem fee. The committee determined that courts should have flexibility in determining the timing of the payment, and recommended deleting the 14-day time period to reflect the diversity of practice in the trial courts.

The committee, with little discussion, recommended increasing the current $75 fee to $150 to more fairly compensate case evaluation panel members. In response to a suggestion to examine the rate solely as affected by inflation, an analysis showed that the $75 fee, originating in 1980, would have a present value (as of November 1, 2007) of $188. Nevertheless, the committee recommended limiting the increase to $150.

Given a recommended doubling of the current fee, because of the lower jurisdictional amounts in district court, committee members questioned whether a reduced fee should apply to cases evaluated in district court. The committee concluded that different fees should not apply for district courts, and that a $150 fee for a district court general civil action was reasonable. The fee in cases where a judge is a member of the panel would be increased to $100.

Consistent with the notion of providing courts with greater flexibility in determining the timing of the payment, and noting a variety of payment mechanisms across the state, the committee recommended that the manner of the payment, e.g., whether directly to the case evaluators or to the ADR clerk, be left to local determination. As such, the order or notice to case evaluation would identify the manner in which payment is to be made.

It appeared to the committee that requests for fee waivers were being managed differently across courts. Some courts may grant a filing fee waiver, but disallow a case evaluation fee waiver, noting that since the fee does not accrue to the court, but rather to the panel members, the fee should not be waived. Other courts do waive the fee and advise panel members that they will not be reimbursed for the particular case. Additionally, the committee noted that raising the case evaluation fee placed additional emphasis on the hardship low income litigants may experience in paying a fee where otherwise fees have been waived.

Although arguably MCR 2.002(D) answers the question whether a waiver of fees applies throughout the litigation, the committee recommended adding language to subrule (H)(2) to clarify that fees may be waived under this subrule if a waiver of fees applies under MCR 2.002.

The committee recommended deleting subrule (H)(4) for several reasons: (1) to discontinue preferential treatment of families for purposes of calculating fees; (2) to improve case evaluators' ability to separately assess each claim; and (3) to reduce the likelihood of litigation in courts' defining the term "single family."

Renumbered subrule (H)(5) is intended to clarify circumstances in which fees are not to be refunded. Proposed renumbered subrule (H)(5)(a) appears in the current subrule (H)(5) and is moved to assemble in one place the several instances in which fees are not refunded.

The committee considered whether renumbered subrule (H)(5)(b) should include a requirement that party signatures appear with attorney signatures in notifications to the court. Concluding that judges and clerks should be able to rely on the statements of counsel, the committee recommended against amending this subrule.

The committee considered the problem of attorneys including fee waiver provisions in stipulations to adjourn, and judges signing orders either without seeing or striking the waiver provisions. Subrule (H)(5)(b) is intended to minimize the practice of waiving fees less than 14 days before the scheduled hearing via stipulation, except upon a showing of good cause.

Current subrule(I)(1) can be read to require a party to submit "3 copies of documents pertaining to the issues" and "3 copies of a concise summary setting forth that party's factual and legal position…." In practice, parties submit a single document comprised of whatever factual and legal analysis parties wish the case evaluators to consider. The proposed amendment reflects this practice, and clarifies that only one summary document is required. Its composition, whether presenting factual or legal positions, is left to the discretion of the parties.

Additionally, the committee considered attorneys' practices of late filing of a proof of service, and timely filing a one-page or very brief summary, and thereafter filing additional summary materials after the time for filing has passed. Initially, the committee considered whether to raise the penalty fee in an effort to promote timely filing. This option was not adopted. Instead, the committee recommended applying the current penalty to each failure to file a proof of service and three copies of a case evaluation summary and supporting materials with the ADR clerk within 14 days of the hearing.

This could result in multiple penalties. Failure to file the proof of service and three copies of the case evaluation summary within 14 days would result in a $150 penalty. Filing a proof of service and additional summary materials (e.g., an amended summary) would result in an additional $150 penalty. Each subsequent filing of summary materials within 14 days of the hearing would incur additional penalties. The overall objective is to promote attorneys filing complete and timely summaries, with a proof of service, 14 days prior to the hearing.

The committee concluded that items brought to the case evaluation hearing, e.g., exhibits, documents, and photographs, do not constitute a "filing" and thus the presentation of these materials at the hearing should not incur a penalty.

Proposed subrule (I)(3) is intended to address case evaluators' concerns regarding the filing of unnecessarily lengthy summaries. The provisions of MCR 2.119(A)(2) governing the length and format of briefs accompanying motions are incorporated in the proposed amendment.

The committee discussed questions related to the faxing and e-mailing of documents directly to case evaluators, but concluded that given technological advances and other efforts to test and implement electronic filing of documents, this rule should not at this time address attorneys' use of electronic means of conveying documents.

The committee considered whether to increase or delete the 15-minute time limit for oral presentation identified in subrule (J)(3), however noting that time management appeared not to be a problem among the trial courts, the committee recommended against changing the rule.

The committee also considered whether a provision should be added requiring that all fees be paid prior to the case evaluation hearing. Again, in light of the fact that fee collection practice varies across the state, the committee recommended against adding a provision, but encouraged courts that had fee collection issues to create incentives for paying fees on time.

In subrule (K)(2), the committee recommended substituting "each" for "the" to clarify that awards may be made to more than one plaintiff. The exception of subrule (H)(3), permitting a single award where one claim is derivative of another, is added to this subrule.

Amendments of subrules (M)(1) and (M)(2) are intended to clarify that a judgment based on acceptance of those parts of an action subject to case evaluation disposes only of claims that have accrued as of the date of the case evaluation hearing. The Third Circuit Court originally requested this clarification, noting that several unreported Court of Appeals cases were creating mistaken confusion about the effect of accepting an award. The recommended rule language adopts the holding of Allard v State Farm Ins Co, 271 Mich App 394 (2006) in which the Court of Appeals held that because a claim had not accrued as of the time of case evaluation, the judgment pertaining to the acceptance of the accrued claims that were case evaluated did not dispose of the unaccrued claims.

The Court of Appeals, in Kusmierz v Schmitt, 268 Mich App 731 (2005), recommended that subrule (O)(5)(a) be amended to address the circumstance where, in awards containing equitable relief, all parties reject the award. While committee members generally agreed that the language of subrule (O)(1) is sufficiently clear, the committee adopted the Court of Appeals' recommendation to add the language of subrule (O)(1) pertaining to all parties' rejection of an award to subrule (O)(5)(a).

The committee considered whether to delete subrule (O)(7), which provides that costs shall not be awarded in the event of nonunanimous awards. Anecdotal information suggests

that in some jurisdictions, case evaluation panel members, prior to rendering awards, agree to render nonunanimous case evaluation awards so that parties can avoid sanctions.

Other options for this provision considered by the committee included: (a) deleting the authority for a panel to reach a nonunanimous award; (b) retaining the current language, but emphasizing that parties could be ordered to a subsequent case evaluation or other alternative dispute resolution process; (c) authorizing judges to assess costs in cases of nonunanimous awards; and (d) retaining the current language without modification.

A majority of committee members recommended that the Court retain the current language, but add language emphasizing that parties could be ordered to a subsequent case evaluation hearing or other alternative dispute resolution process at the parties' expense if the panel decision is nonunanimous.

RULE 2.404 SELECTION OF CASE EVALUATION PANELS

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

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

(2) *Alternative Plans.*

(a) A plan adopted by a district or probate court may use the list of case evaluators and appointment procedure of the circuit court for the circuit in which the court is located.
(b) Courts in adjoining circuits or districts may jointly adopt and administer a case evaluation plan.
(c) If it is not feasible for a court to adopt its own plan because of the low volume of cases to be submitted or because of inadequate numbers of available case evaluators, the court may enter into an agreement with a neighboring court to refer cases for case evaluation under the other court's system. The agreement may provide for payment by the referring court to cover the cost of administering case evaluation. However, fees and costs may not be assessed against the parties to actions evaluated except as provided by MCR 2.403.
(d) Other alternative plans must be submitted as local court rules under MCR 8.112(A).

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

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

(a) the case evaluator meets the requirements for service under the court's selection plan, and
(b) the case evaluator will not discriminate against parties, attorneys, or other case evaluators on the basis of race, ethnic origin, gender, or other protected personal characteristic.

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

(a) The applicant must have been a practicing lawyer for at least 5 years and be a member in good standing of the State Bar of Michigan. The plan may not require membership in any other organization as a qualification for service as a case evaluator.
(b) An applicant must reside, maintain an office, or have an active practice in the jurisdiction for which the list of case evaluators is compiled.
(c) An applicant must demonstrate that a substantial portion of the applicant's practice for the last 5 years has been devoted to civil litigation matters, including investigation, discovery, motion practice, case evaluation, settlement, trial preparation, and/or trial.
(d) If separate sublists are maintained for specific types of cases, the applicant must have had an active practice in the practice area for which the case evaluator is listed for at least the last 3 years. If there are insufficient numbers of potential case evaluators meeting the qualifications stated in this rule, the plan may provide for consideration of alternative qualifications.

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

(a) If an individual performs this review function, the person must be an employee of the court.
(b) If a committee performs this review function, the following provisions apply:
(i) The committee must have at least three members.
(ii) The selection of committee members shall be designed to assure that the goals stated in subrule (D)(2) will be met.
(iii) A person may not serve on the committee more than 3 years in any 9 year period.
(c) Applicants who are not placed on the case evaluator list or lists shall be notified of that decision. The plan shall provide a procedure by which such an applicant may seek reconsideration of the decision by some other person or committee. The plan need not provide for a hearing of any kind as part of the reconsideration process. Documents considered in the initial review process shall be retained for at least the period of time during which the applicant can seek reconsideration of the original decision.

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

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

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

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

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

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

(C) **Assignments to Panels.**

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

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

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

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

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

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

Discussion: The committee assessed whether subrule (B)(2) should contain a training requirement for case evaluation panel members as exists for mediators. No clear consensus emerged, with approximately one-third of the members advocating that training be required, and the remaining two-thirds recommending against adding a mandatory training component. Those in favor of training voiced concerns over the ability of attorneys with only five years of practice to provide meaningful case evaluation awards. Those opposing mandatory training expressed overall satisfaction with the case evaluation awards, and that the low acceptance rates of awards (under 20 percent in larger jurisdictions) should not necessarily reflect that the process is not of value. There was consensus that written practice guidelines for case evaluation panel members or a set of Frequently Asked Questions, perhaps developed by one or more sections of the State Bar of Michigan, would lend integrity to the awards, and perhaps result in higher award acceptance rates.

As to subrule (B)(2)(a), the committee also considered whether to increase the current requirement for an applicant to have five years of active practice experience. Again, the committee was divided, with approximately one-half of the members recommending against raising the practice requirement. Committee members recommending against increased experience requirements doubted that additional experience would lead to higher award acceptance rates and, as above, suggested that practice guidelines may be more beneficial than altering experience requirements.

As to subrule (B)(2)(b), the committee was asked whether the term "active practice" should be defined. While members were aware of instances where the meaning of the term "active practice" was questioned in the context of approving case evaluator applications, the breadth of potential definitional elements suggested that interpretation should be left to the local entity(ies) approving the applications.

Also, with respect to (B)(2)(b), the committee considered whether residency should be deleted as a qualification. Several committee members suggested that while an attorney may have an office and an active practice in a jurisdiction, the attorney may not live in the jurisdiction. Alternatively, several members raised the scenario that while an attorney may not have an office or active practice in a jurisdiction, an attorney is nevertheless entitled to

vote and exercise other legal privileges in the county of residence, and therefore should not be precluded from serving as a case evaluator. A majority of committee members recommended against amending this provision.

The committee discussed whether to increase the reapplication time frame from 5 to 10 years. Committee members discussed the burden a 5-year reapplication period places on courts and case evaluators. Determining that 10 years was too long a period, the committee recommended extending the current 5-year period to 7 years. Additionally, the committee determined that the requirement that a reapplication process mirror the original application process was unnecessary because for many case evaluators, very little will have changed. Removing this requirement permits courts to provide an abbreviated reapplication process.

The committee also considered whether to amend subrule (C)(3) to state that judges "shall" appoint a panel selected by the parties. Some committee members believe that if parties assembled their own panel, a judge should be required to appoint it. To maximize judges' discretion in managing the case evaluation process, however, the committee decided to retain the current language reflecting that judges "may" appoint a panel selected by the parties.

Subrule (D)(2) currently contains a provision requiring courts to annually complete a report on the operation of case evaluation programs. However, SCAO has neither developed a reporting form nor required annual reporting. Concluding that such reporting is unnecessary, the committee recommended removal of this provision.

RULE 2.410 ALTERNATIVE DISPUTE RESOLUTION

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

(1) All civil cases are subject to alternative dispute resolution processes unless otherwise provided by statute or court rule.

(2) For the purposes of this rule, alternative dispute resolution (ADR) means any process designed to resolve a legal dispute in the place of court adjudication, and includes settlement conferences ordered under MCR 2.401; case evaluation under MCR 2.403; mediation under MCR 2.411; domestic relations mediation under MCR 3.216; and other procedures provided by local court rule or ordered on stipulation of the parties.

(B) **ADR Plan.**

(1) Each trial court that submits cases to ADR processes under this rule shall adopt an ADR plan by local administrative order. The plan must be in writing and available to the public in the ADR clerk's office.

(2) At a minimum, the ADR plan must:

(a) designate an ADR clerk, who may be the clerk of the court, the court administrator, the assignment clerk, or some other person;
(b) if the court refers cases to mediation under MCR 2.411, specify how the list of persons available to serve as mediators will be maintained and the system by which mediators will be assigned from the list under MCR 2.411(B)(3);
(c) include provisions for disseminating information about the operation of the court's ADR program to litigants and the public; and
(d) specify how access to ADR processes will be provided for indigent persons. If a party qualifies for waiver of filing fees under MCR 2.002 or the court determines on other grounds that the party is unable to pay the full cost of an ADR provider's services, and free or low-cost dispute resolution services are not available, the court shall not order that party to participate in an ADR process.

(3) The plan may also provide for referral relationships with local dispute resolution centers, including those affiliated with the Community Dispute Resolution Program. In establishing a referral relationship with centers or programs, courts, at a minimum, shall take into consideration factors that include whether parties are represented by counsel, the number and complexity of issues in dispute, the jurisdictional amount of the cases to be referred, and the ability of the parties to pay for dispute resolution services. The plan must preserve the right of parties to stipulate to the selection of their own mediator under MCR 2.411(B)(1).

(4) Courts in adjoining circuits or districts may jointly adopt and administer an ADR plan.

(C) **Order for ADR.**

(1) At any time, ~~after consultation with the parties~~, the court may order that a case be submitted to an appropriate ADR process. More than one such order may be entered in a case.

(2) Unless the specific rule under which the case is referred provides otherwise, in addition to other provisions the court considers appropriate, the order shall

(a) specify, or make provision for selection of, the ADR provider;
(b) provide time limits for initiation and completion of the ADR process; and
(c) make provision for the payment of the ADR provider.

(3) The order may require attendance at ADR proceedings as provided in subrule (D).

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

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

(2) *Presence of Parties.* The court may direct that the parties to the action, agents of parties, representatives of lienholders, representatives of insurance carriers, or other persons:

(a) be present at the ADR proceeding or be immediately available at the time of the proceeding; and
(b) have information and authority adequate for responsible and effective participation in the conference for all purposes, including settlement.

The court's order may specify whether the availability is to be in person or by telephone.

(3) *Failure to Attend.*

(a) Failure of a party or the party's attorney or other representative to attend a scheduled ADR proceeding, as directed by the court, may constitute a default to which MCR 2.603 is applicable or a ground for dismissal under MCR 2.504(B).
(b) The court shall excuse a failure to attend an ADR proceeding, and shall enter a just order other than one of default or dismissal, if the court finds that
(i) entry of an order of default or dismissal would cause manifest injustice; or
(ii) the failure to attend was not due to the culpable negligence of the party or the party's attorney.

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

(E) **Objections to ADR.** Within 14 days after entry of an order referring a case to an ADR process, a party may move to set aside or modify the order. A timely motion must be decided before the case is submitted to the ADR process.

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

Discussion: Several times in its deliberations, the committee recognized the increasing role Community Dispute Resolution Program (CDRP) centers have in providing mediation services to litigants. The committee recognized as well that a growing number of trained attorney mediators are willing to receive court referrals. The committee believed that judges should be mindful of several considerations in designing referral relationships with CDRP centers, as not to refer cases that may be more appropriate for handling by private mediators. The considerations recommended for addition to subrule (B)(3) are not intended to be exhaustive, but rather reflect minimum factors the committee believed should be taken into account in referring groups of cases, e.g., small claims and landlord/tenant, to a CDRP center or program. Taken together, the factors are to assist courts in ensuring that cases are managed by the most appropriate service provider, whether by a private mediator or by a CDRP center. The subrule is not intended to create authority for a court to refer or order

parties in a specific case to a specific mediator provider.

A majority of the committee members recommended deleting "after consultation with the parties" in subrule (C)(1). Because many courts issue computerized scheduling orders, the requirement that a judge consult with all parties in all cases that may be appropriate for an ADR process has proven to be impracticable. Further, judges vary considerably in determining which cases are appropriate for ADR. Some, for example, do not order mediation until the final settlement conference. Others include an order to mediate in the original scheduling order so that parties, early in the litigation, begin thinking about how settlement negotiations will be managed. Given the array of practice in courts' identifying cases appropriate for mediation and in the interest in maximizing judicial discretion, a majority of the committee recommended deleting the language requiring a consultation with parties.

A minority segment of the committee preferred to retain the language, to enforce the notion that consulting with the parties is the preferred practice.

The committee considered whether a mediator should have authority to direct who should attend an ADR session under MCR 2.410(D), and concluded that the court should make this determination. If questions arise as to appropriate representation at ADR proceedings, parties should consult with the court.

RULE 2.411 MEDIATION

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

(1) This rule applies to cases that the court refers to mediation as provided in MCR 2.410. MCR 3.216 governs mediation of domestic relations cases.

(2) "Mediation" 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.

(B) **Selection of Mediator.**

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

(2) If the order referring the case to mediation does not specify a mediator, the order shall set the date by which the parties are to have conferred on the selection of a mediator. If the parties do not advise the ADR clerk of the mediator agreed upon by that date, the court shall appoint one as provided in subrule (B)(3).

(3) The procedure for selecting a mediator from the approved list of mediators must be established by the local ADR plan adopted under MCR 2.410(B). The ADR clerk shall assign mediators in a rotational manner that assures as nearly as possible that each

mediator on the list is assigned approximately the same number of cases over a period of time. If a substitute mediator must be assigned, the same or similar assignment procedure shall be used to select the substitute.

(4) The court shall not appoint, recommend, direct, or otherwise influence a party's or attorney's selection of a mediator except as provided pursuant to this rule. The court may recommend or advise parties on the selection of a mediator only upon request of all parties by stipulation in writing or orally on the record.

(5) ~~(4)~~The rule for disqualification of a mediator is the same as that provided in MCR 2.003 for the disqualification of a judge. The mediator must promptly disclose any potential basis for disqualification.

(C) **Scheduling and Conduct of Mediation.**

(1) *Scheduling.* The order referring the case for mediation shall specify the time within which the mediation is to be completed. The ADR clerk shall send a copy of the order to each party and the mediator selected. Upon receipt of the court's order, the mediator shall promptly confer with the parties to schedule mediation in accordance with the order. Factors that may be considered in arranging the process may include the need for limited discovery before mediation, the number of parties and issues, and the necessity for multiple sessions. The mediator may direct the parties to submit in advance, or bring to the mediation, documents or summaries providing information about the case.

(2) *Conduct of Mediation.* The mediator shall meet with counsel and the parties, explain the mediation process, and then proceed with the process. The mediator shall discuss with the parties and counsel, if any, the facts and issues involved. The mediation will continue until a settlement is reached, the mediator determines that a settlement is not likely to be reached, the end of the first mediation session, or until a time agreed to by the parties. Additional sessions may be held as long as it appears that the process may result in settlement of the case.

(3) *Completion of Mediation.* Within 7 days after the completion of the ADR process, the mediator shall so advise the court, stating only the date of completion of the process, who participated in the mediation, whether settlement was reached, and whether further ADR proceedings are contemplated.

(4) *Settlement.* If the case is settled through mediation, within 21 days the attorneys shall prepare and submit to the court the appropriate documents to conclude the case.

(5) *Confidentiality.* Statements made during the mediation, including statements made in written submissions, may not be used in any other proceedings, including trial. Any communications between the parties or counsel and the mediator relating to a mediation are confidential and shall not be disclosed without the written consent of all parties. This prohibition does not apply to

(a) the report of the mediator under subrule (C)(3),
(b) information reasonably required by court personnel to administer and evaluate the mediation program,
(c) information necessary for the court to resolve disputes regarding the mediator's fee, or
(d) information necessary for the court to consider issues raised under MCR 2.410(D)(3).

(D) **Fees.**

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

(2) The costs of mediation shall be divided between the parties on a pro-rata basis unless otherwise agreed by the parties or ordered by the court. The mediator's fee shall be paid no later than

(a) 42 days after the mediation process is concluded,
(b) entry of judgment, or
(c) the dismissal of the action, whichever occurs first.

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

(4) The mediator's fee is deemed a cost of the action, and the court may make an appropriate order to enforce the payment of the fee.

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

(E) **List of Mediators.**

(1) *Application.* ~~An eligible person desiring~~ ~~t~~To appear on a roster ~~serve as a mediator~~, an applicant may apply to the ADR clerk to be placed on the court's list of mediators. Application forms shall be available in the office of the ADR clerk.

(a) The form shall include a certification that
(i) the applicant meets the requirements for service under the court's selection plan;
(ii) the applicant will not discriminate against parties or attorneys on the basis of race, ethnic origin, gender, or other protected personal characteristic; and
(iii) the applicant ~~mediator~~ will comply with the court's ADR plan, orders of the court regarding cases submitted to mediation, and the standards of conduct adopted by the State Court Administrator under subrule (G).
(b) On the form the applicant shall indicate the applicant's ~~hourly~~ rate for providing mediation services.
(c) The form shall include an optional section identifying the applicant's gender and racial/ethnic background.

(2) *Review of Applications.* The court's ADR plan shall provide for a person or committee to review applications annually, or more frequently if appropriate, and compile a list of qualified mediators.

(a) ~~Persons~~ Applicants meeting the qualifications specified in this rule shall be placed on the list of approved mediators. Approved mediators shall be placed on the list for a fixed period, not to exceed ~~5~~ seven years, and must reapply at the end of that time in the ~~same~~ manner ~~as persons seeking to be added to the list~~ directed by the court.
(b) Selections shall be made without regard to race, ethnic origin, or gender. Residency or principal place of business may not be a qualification.
(c) The approved list and the applications of approved mediators, except for the optional section identifying the applicant's gender and racial/ethnic background, shall be available to the public in the office of the ADR clerk.
(d) Applicants may provide a résumé or biographical information to the ADR clerk, to be attached to their application.

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

(4) *Removal from List.* The ADR clerk may remove from the list mediators who have demonstrated incompetence, bias, made themselves consistently unavailable to serve as a mediator, or for other just cause. Within 21 days of notification of the decision to remove a mediator from the list, the mediator may seek reconsideration of the ADR clerk's decision by the chief judge. The court does not need to provide a hearing.

(F) **Qualification of Mediators.**

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

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

(a) Complete a training program approved by the State Court Administrator providing the generally accepted components of mediation skills;
(b) Have one or more of the following:
(i) Juris doctor degree or graduate degree in conflict resolution; or
(ii) 40 hours of mediation experience over two years, including mediation, co-mediation, observation, and role-playing in the context of mediation.
(c) Upon completion of the training required under subrule (F)(2)(a), ~~O~~observe two general civil mediation proceedings conducted by an approved mediator, and conduct one general civil mediation to conclusion under the supervision and observation of an approved mediator.

(3) An applicant who has specialized experience or training, but does not meet the specific requirements of subrule (F)(2), may apply to the ADR clerk for special approval. The ADR clerk shall make the determination on the basis of criteria provided by the State Court Administrator. Service as a case evaluator under MCR 2.403 does not constitute a qualification for serving as a mediator under this section.

(4) Approved mediators are required to obtain 8 hours of advanced mediation training during each 2-year period. Failure to submit documentation establishing compliance is ground for removal from the list under subrule(E)(4).

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

(6) The State Court Administrator may adopt alternative qualifications for persons serving as mediators through Community Dispute Resolution Program centers.

(G) **Standards of Conduct for Mediators.** The State Court Administrator shall develop and approve standards of conduct for mediators designed to promote honesty, integrity, and impartiality in providing court-connected dispute resolution services. These standards shall be made a part of all training and educational requirements for court-connected programs, shall be provided to all mediators involved in court-connected programs, and shall be available to the public.

Discussion: The purpose of proposed subrule (B)(4) is to emphasize that selection of the mediator must be established by the parties, while allowing the courts to advise parties on, or recommend mediators in exceptional circumstances when parties request assistance. A minority of committee members would not include language allowing the court to recommend or advise parties on the selection of mediators, because it unnecessarily formalizes the participation of the judge in recommending potential mediators for the case. In response, a majority of members asserted that in lieu of judicial recommendations, the judge should simply note that unless attorneys select their own mediator, the court will appoint a mediator from the roster.

A subcommittee was convened to assess whether any provisions of the Uniform Mediation Act (UMA) should be adopted as amendments to MCR 2.411(C)(5) regarding confidentiality. The subcommittee issued a preliminary draft of proposed amendments on January 31, 2008, but following further consideration, recommended to the full committee that a separate work group be convened by SCAO to study issues related to confidentiality. Observing that the currently convened committee was not constituted to consider confidentiality in the context of domestic relations cases, and noting that the subcommittee lacked consensus on a number of key points, e.g., the scope and applicability of confidentiality in current and future actions, the subcommittee felt that a successor committee specifically convened to address confidentiality questions would be a more appropriate vehicle for considering confidentiality questions.

The full committee adopted the subcommittee recommendation and recommended that SCAO convene a successor committee to consider whether provisions of the UMA, or alternative confidentiality provisions, should be adopted as court rule provisions.

The committee recommended amending MCR 2.411(D)(1) to reflect that not all mediators assess fees on an hourly basis, but rather on a one-half day or per diem basis. This change is also reflected in MCR 2.411(E)(1)(b). Responding to a question whether payment to mediators included payment to volunteer-based agencies, the committee concluded that the current language was sufficient to incorporate the notion of payment to individuals and agencies.

An issue chiefly affecting CDRP center arises from the operation of subrules (E)(1) and (B)(1). Under subrule (B)(1), parties who do not stipulate to their own mediator receive a mediator appointed from a roster. Under subrule (E)(1), "[a]n eligible person desiring to serve as a mediator may apply to the ADR clerk to be placed on the court's list of mediators." Most volunteers of CDRP centers do not wish their name to appear on a court roster, however, because they do not privately mediate, and only mediate CDRP-administered cases ordered by the court. Committee members agreed that whether or not privately mediating, any mediator mediating a court-ordered case should meet the court rule qualifications. In practice, CDRP center staff assign only mediators who meet the court rule qualifications to mediate court-ordered cases.

Following the adoption of the ADR court rules in 2000, most courts ordering cases to CDRP centers included the name of the center on the roster, and CDRP centers have assigned mediators meeting court rule qualifications to court-ordered cases. The rule speaks in terms of eligible "persons" serving on rosters, not agencies that assign qualifiable persons. To address this, a proposed amendment of MCR 2.411(E)(1) would delete the word "mediator" to provide for the inclusion on the roster of an agency, for example, a Community Dispute Resolution Program center.

Another practice begun by some courts has been to permit mediators on the court roster to have biographical information on file with the court, for access by interested parties. While not currently required, proposed MCR 2.411(E)(2)(d) provides an option for mediators to append a résumé or biographical information to their application.

Proposed amendments of MCR 2.411(E)(2) would extend the period of roster qualification to seven years, and permit reapplication in a manner determined by the local court. Both provisions are consistent with the recommended amendments of MCR 2.404(B)(5).

The committee recommended amending MCR 2.404(F)(2)(c) to reflect that observation of two general civil mediations should occur only after the training program is completed.

In light of the fact that SCAO is assessing how the roster qualification function may be moved to the state level, committee members deferred other questions regarding the application and application review process to a successor committee convened by SCAO.

The committee considered the current Standards of Conduct for Mediators, mandated under MCR 2.404(G), and recommended that SCAO assess whether the recently revised Standards of Conduct for mediators approved by the American Bar Association (ABA), American Arbitration Association (AAA), and Association of Conflict Resolution (ACR) replace Michigan's currently-adopted standards. Because the standards affect mediation practitioners in civil, domestic relations, probate, and criminal actions, a successor committee was recommended to review whether the revised AAA/ABA/ACR standards should replace the current standards.

Reflecting that volunteer mediators providing service through CDRP centers are currently required to participate in specialized training programs prior to mediating specialized cases, e.g., guardianship, child protection, post-judgment domestic relations, proposed subrule MCR 2.411(F)(6) clarifies that SCAO is authorized to develop mediator qualifications for mediators volunteering through the CDRP centers.

(End of Rule Proposals)

Appendix 1

Dispute Resolution Rule Committee Study Questions

MCR 2.403(A)

Should the rule establish a goal of case evaluation, e.g, to achieve settlement, or to establish a true value of the case?

MCR 2.403(A)(2)

To underscore that a part of an action may be excepted from case evaluation, should the second clause of this subsection be made subrule (3): "A court may except all or part of an action from case evaluation on motion for good cause shown it if finds that case evaluation of that action or part thereof would be inappropriate"?

MCR 2.403(B)(1)

Should the provision "no earlier than 91 days after the filing of the answer" be deleted?

MCR 2.403(G)

Should a provision be added reflecting that in the case of adjournments requested and granted within 14 days of the scheduled case evaluation, the case evaluation fee and any applicable late fee is forfeited and cannot be waived by stipulation and order?

MCR 2.403(H)(1)

Should the language requiring payment of a fee "within 14 days after the mailing of the notice of the case evaluation hearing" be amended to reflect that payment of fees should be made in accord with the court order of case evaluation, but at least 14 days prior to the hearing?

Should the $75 fee be increased? If so, should there be a distinction between circuit court and district court fees?

Should the payment of the fee be tied to the time required for the filing of the summary?

MCR 2.403(H)(1)

Should adjournment of case evaluation (including a waiver of forfeit of fees) by stipulation and order within 14 days of the hearing be specifically prohibited?

MCR 2.403(H)(4)

Should "single family" be clarified? For example, does it mean blood relation or members of an immediate family living in a single household? A definition would also affect subsection (O)(4). [See *Kusmierz v Schmitt*, 268 Mich App 731 (2005).]

MCR 2.403(H)(5)(b)

Should party signatures be required on the notification or court order indicating that a case has been settled?

MCR 2.403(I)

Should this section be amended to clarify whether the late fee applies to both (a) failure to provide proof of service (subsection 1) and (b) failure to provide the ADR clerk or counsel with the required materials (subsection 2)?

Should this section be amended to clarify that the $150 late fee for submission of documents (a) is forfeited if the case is adjourned within 14 days of the hearing; or (b) is to be refunded or applied to a subsequently scheduled hearing if the hearing is adjourned prior to 14 days before the hearing?

Should this section be amended to address the practice of submitting a one-page summary, which is followed by a comprehensive "supplemental" document at a later time?

Should the rule address the faxing and e-mailing of documents to ADR clerks and counsel as permissible or prohibited forms of delivery? If documents were sent directly to counsel, would this constitute an impermissible *ex parte* communication pursuant to MCR 2.403(J)(5)?

Should the rule address a preferred length of summaries, for example the 20-page limit established for motions in MCR 2.119(2)?

MCR 2.403(J)(3)

Should the 15-minute time limit be increased or eliminated?

MCR 2.403(K)(2)

Should the rule be amended as follows: "The evaluation must include a separate award as to ~~the~~ each plaintiff's claim against each defendant and as to each cross-claim, counterclaim, or third-party claim that has been filed in the action. For the purpose of this subrule, all such claims filed by any one party against any other party shall be treated as a single claim."

MCR 2.403(M)(1)

Should the rule be amended to reflect that the judgment or dismissal shall not be deemed to dispose of claims that have not accrued as of the date of the case evaluation hearing, including cases involving rights to personal protection benefits under MCL 500.3101, *et seq*? [See *Allard v State Farm Ins Co*, 271 Mich App 394 (2006)] Supreme Court Administrative File 2006-20.

Should a new subrule (2) reflect that: "If only a part of an action has been submitted to case evaluation pursuant to Rule 2.403(A)(3) and all of the parties accept the panel's evaluation, the court shall enter an order concluding only those claims?" Supreme Court Administrative File 2006-20.

MCR 2.403(O)1 and (O)5

Should an apparent inconsistency between these subrules be addressed? Subrule (O)1 addresses costs in cases where both parties have rejected an award and where equitable relief is not in issue. Subrule (O)5 does not address costs where equitable relief has been granted and both parties have rejected an award. [See *Kusmierz v Schmitt*, 268 Mich App 731 (2005).]

MCR 2.403(O)(4)(a)

Should the rule clarify how a single-family plaintiff is treated for purposes of evaluating whether sanctions are appropriate? [See *Kusmierz v Schmitt*, 268 Mich App 731 (2005).] If this is appropriate, should 2.403(K)(2) be clarified as well? What happens if one of the plaintiff family members drops out of the case after the case evaluation?

MCR 2.403(O)(7)

Should this provision, stating that costs shall not be awarded if the award is not unanimous, be deleted?

MCR 2.404(B)(2)

Should case evaluator training be required?

MCR 2.404(B)(2)(a)

Should the five-year eligibility requirement be increased?

MCR 2.404(B)(2)(b)

Should "active practice" be defined?

MCR 2.410(B)

Should the rule be amended to provide more flexibility in establishing mediation services in district courts and in courts' adopting ADR Plans that accommodate CDRP centers' receiving court referrals? Note the interaction of this subrule with MCR 2.411(B)(3). [See also the Sixth Circuit Court Local Administrative Order for Cases Evaluated for an Amount not to Exceed $25,000.]

MCR 2.410(C)(1)

Should the phrase "after consultation with the parties" be deleted?

MCR 2.411(B)

Should the rule be clarified to expressly prohibit a judge's assigning a mediator to a case without the operation of the roster?

MCR 2.411(C)(5)

Should this subrule be clarified to identify to whom confidentiality applies?

MCR 2.411(D)(1)

Should this subrule include a provision for payment to an agency of volunteer mediators?

MCR 2.411(E)

Should the mediator qualification function currently placed within the circuit courts be removed to the state level, e.g., SCAO?

MCR 2.411(E)(1)

Should this rule be amended to permit agencies to appear on lists of ADR practitioners, e.g., CDRP centers?

MCR 2.411(F)

Should the rule clarify when the eligibility requirements should be met relative to applying to serve on a roster, e.g., can a person complete a training five years prior to making application?

Should the rule reflect that SCAO may create alternative qualifications for specialized services that are offered through CDRP centers, e.g., post-judgment FOC cases, child abuse and neglect cases?

MCR 2.411(F)(2)(C)

Should the term "general civil" be clarified to identify whether small claims, district court general jurisdiction, or circuit court civil cases are required for qualification purposes?

Should the subrule be clarified to reflect that the observations should follow, rather than precede, the training?

MCR 2.411(F)(4)

Should this subrule clarify when the two-year period begins, e.g., upon completion of training, or upon acceptance onto a court roster?

SCAO
October 3, 2007