SBM STATE BAR OF MICHIGAN

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ALTERNATIVE DISPUTE RESOLUTION SECTION

June 15, 2020

Supreme Court Clerk
P.O. Box 30052
Lansing, MI 48909

ADR Section Comment Regarding the Case Evaluation Court Rules Review Committee Report to the Michigan Supreme Court

Dear Clerk,

On behalf of the Alternative Dispute Resolution Section of the State Bar of Michigan, I am submitting our comment to ADM File No. 2020-06 set forth below.

The ADR Section (”Section”) of the State Bar of Michigan has reviewed the subject report and generally supports the findings and recommendations of the Case Evaluation Court Rules Review Committee (“Committee”) with respect to both Case Evaluation (“CE”) and Offers of Judgement, with a few exceptions summarized herein. Generally, the Section concurs that the proposed revisions to MCR 2.403 and 2.405 will increase the effectiveness of the ADR process, especially those amendments calling for the elimination of mandatory CE in tort cases and sanctions. (Notably, the Committee found that no other state imposes sanctions for not accepting recommended settlement figures) Converting CE to a default option, and coordinating the process with the recently revised Discovery Rules, will provide parties a greater choice among ADR options and enhance the ADR process overall.

Given the findings of the Committee that the original purpose for the creation of CE to reduce certain court caseloads is no longer relevant, that practitioners have lost confidence in the efficacy of CE due to many factors, foremost among which are the questionable qualifications of evaluators and the that CE is in most cases ineffective, especially when compared to mediation, the brevity of hearings, and the fact that abuses are not infrequent, including the last minute filing of summaries and profuse exhibits, it is clear that the system will be improved with insightful changes.

The Section understands that some judges and practitioners prefer to retain CE, rather than abolish it altogether, believing the process to be a useful tool in some cases. The proposals make the selection of an ADR process more a matter of parties’ choice, but allow courts to order CE in the event the parties fail to do so pursuant to the revised discovery provisions. This strikes a meaningful balance between CE “as is,” or not at all, alternatives. Shortening the deadline for filing the parties’ CE materials, and increasing the penalties for late filing should help to reduce abuses.
Although the competency of evaluators remains a serious concern, and the Section would endorse further efforts to address that issue, the expansion of time to 15 years in which the experience of neutral evaluators’ applications can be considered is a step in the right direction. The Section would favor certain other refinements for CE, among which would include a separate consideration of its use in connection with No Fault cases, especially PIP. The Committee seemed inclined to consider that as a possible carve out, in regard to both mandatory CE and retention of sanctions.

The Section also endorses the Committee’s proposed changes in MCR 2.405. In the event that the modifications to MCR 2.403 are effectuated, it is foreseeable that this

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process will become an even more widely employed tool for settlement. It is currently employed extensively in many business courts, and the suggested amendments provide positive clarifications. These include the additional language expanding the definition of "interests of justice," in connection with a court's consideration of awarding attorney fees, expanding the definition of "Verdicts" to include arbitration awards, and defining the time period aspect of "Actual Costs." There is resistance within the section to the proposal exempting class action cases from MCR 3.501.

Finally, in light of the fact that Evaluative Mediation ("EM") is being utilized extensively in civil cases across the state, and it has long been permitted in Domestic Relations Actions pursuant to MCR 3.216 (I), the Section recommends that the Supreme Court consider the addition of a similar court rule for civil cases. The Committee itself recommended such an expansion of the mediation rules, which Section supports in principle, and we would encourage the court to at least give the concept further consideration and study with an eye toward adoption of what is already being employed in practice. Considering the scarcity of civil trials to verdict in Michigan, not to mention the decreased utilization of CE, even without the proposed amendments, lawyers and parties alike will benefit from insightful evaluation of their litigated controversies in the right circumstances. A well-reasoned and appropriate EM process can provide that benefit.

Respectfully,

Scott S. Brinkmeyer, Chair
State Bar of Michigan
Alternative Dispute Resolution Section