MEMORANDUM

DATE: Jun 24, 2020

TO: Larry S. Royster, Clerk of the Michigan Supreme Court

FROM: Mediation Tribunal Association, Board of Directors[1]

SUBJECT: ADM File No. 2020-06, Comments Sought on Proposed Amendments to MCR 2.403, 2.405, and 2.411

The Mediation Tribunal Association, Inc. ("MTA") welcomes the opportunity to provide comments on the proposed amendments to the case evaluation court rule (MCR 2.403). As the catalyst for case evaluation as a statutory rule in Michigan, the MTA has always had a vested interest in the efficacy of case evaluation. The MTA was formed in 1979 as a private not-for-profit agency to "act as an aid to the ... Court and the Federal Courts .... to provide mediation panels to hear lawsuits for the purpose of settlement and thereby remove the cases from further litigation in the courts. This removal of cases relieves the trial docket of the courts and the backlog of cases awaiting trial."[2] Shortly after the creation of the MTA, the Supreme Court, in 1980, adopted GCR 1963, 316, to provide for mediation across the state, which eventually evolved into MCR 2.403, or case evaluation as we know it today.

During this current pandemic, courts have had to balance an access to justice with a need to keep judges, court staff, and litigants safe. Chief Judge Pro Tem Patricia Fresard in conjunction with the Detroit Bar and the MTA, designed a forum to allow for remote case evaluation during the court's closure. Judge Fresard hosted Zoom conferences to that end, advising attorneys that the MTA was poised to evaluate cases remotely. Attorneys on over

[1] The MTA Board is currently comprised of Chief Judge Timothy M. Kenny, Chief Judge Pro Tem Patricia Fresard, Judge Kathleen Macdonald (ret.), Judge Edward Ewell, Jr., Timothy Brady, Gerald Acker, Judge Kathleen McCarthy, and Judge Laurie J. Michelson.

[2] Article II of the Articles of Incorporation, Mediation Tribunal Association, November 16, 1979

eighty-five (85) cases contacted the MTA to opt-in for voluntary case evaluation and were able to evaluate their cases remotely. This service helped litigants resolve cases, helped the court move its docket, and evidences the need for case evaluation as a valuable tool for the disposition of civil cases.

As to the proposed changes to MCR 2.403, that would allow parties to stipulate to an ADR process other than case evaluation, the MTA asserts that case evaluation should remain mandatory and that sanctions should remain in place for the following reasons:

I. Wayne County is unique in its case management needs.

The MTA is the largest provider of case evaluation services in the state. Evaluating 6,540 cases in 2018, our county experiences scheduling and administrative challenges that are not likely experienced in smaller counties and district courts. Making case evaluation a voluntary process would disproportionately impact the largest circuit courts.

Anecdotally, Sheldon L. Miller, one of the three founders of the MTA, reports that in 1971 the backlog of Wayne county cases was five years to trial, and after the formation of the MTA that backlog was shortened to 3 years. In its 2018 Annual Report to the State Court Administrative Office (SCAO), Third Circuit reported a 728-day disposition rate of 98% of cases which is above SCAO guidelines. In large counties, such as Wayne County, case evaluation is not only an effective docket management tool, but also a necessity. Attorneys frequently report that outside of discovery, preparing the case evaluation summary is the first time they "touch" the case. Additionally, the case evaluation hearing itself presents a valuable time to meet with opposing counsel and negotiate. MTA case evaluators report that a large number of parties come in with what has been called "a number" or a settlement amount to which they have agreed.

Whether or not the case is ultimately settled at case evaluation is not as relevant as the process of negotiating sparked by the coming together of the parties.

Accordingly, the uniqueness of Wayne County lends itself to the idea of preserving sanctions. Sanctions should be at the discretion of the judiciary. Our Wayne County judges express that their familiarity and knowledge of the case make them best suited to decide on the issue of sanctions and/or costs.

II. The emphasis on the success of case evaluation within the parameters of the 28-day accept/reject period is misplaced.

The term "continuum of ADR services" is frequently used to describe the range of Alternative Dispute Resolution (ADR) processes (from the least to the most directed) that parties can use to resolve their cases. However, these services are not and should not be viewed as mutually exclusive. The barometer for success for any given ADR procedure is often touted as the time from the date that the case is filed to settlement; however, this is an oversimplification and a mischaracterization. Under the current case management framework in Third Circuit Court, mandatory case evaluation typically occurs *before* another ADR process is implemented, which may include mediation. Indeed, once the parties have an amount at which the case has evaluated, the case evaluation award becomes a strong indicator of each party's level of risk or exposure to the imposition of monetary damages. Case evaluation is really "case valuation" as it offers the parties insight from three practitioners who view the case from three distinct perspectives: (1) plaintiff, (2) defendant, and (3) neutral. The placement of "a number," particularly with respect to cases that involve PIP and auto negligence claims is critical and invaluable. Parties need early, expert, and objective opinions as to the relative strengths and weaknesses of their positions translated into a monetary value. For civil cases that do not involve complex statutory schemes or are not based on the interpretation of multiple, detailed automotive

and health insurance policies, or that dictate the amount, the nature, the type of damages that are recoverable, and from whom they are recoverable; mediation may be an appropriate first-line ADR process. However, cases that implicate Michigan's No-Fault Act and negligence law, by way of illustration and not limitation, are simply too nuanced, specialized, and driven by money damages to be exempted from case evaluation. Further, reasonable minds often differ on the significance and meaning of various facts and law in such cases making the diversity of perspectives uniquely provided by case evaluators even more indispensable.

Although the use of ADR and the implementation of ADR processes have been included within local and state court rules for decades, some common misunderstandings of ADR remain. One of the most common misconceptions, which is particularly relevant to this discussion, is that ADR processes have a specific order and that the same ADR process cannot be used more than once in a single case. The inherent flexibility and versatility of ADR is, in large part, a feature that has led to its widespread adoption of ADR as a fluid process. ADR is meant to initiate and effectuate meaningful discussion between the parties notwithstanding the issue(s) in dispute or the stage of the case. The kinds of protracted negotiations that occur in an ADR process would backlog a court of law and, often, the issues at play are not of a consequential, dispositive, or novel nature such that they must be reserved for a judge. Therein lies the strength of case evaluation as an evaluative process, to provide parties with a structure and framework for negotiations toward settlement.

Additionally, the audience to which case evaluation is directed cannot be over emphasized. The majority of parties to case evaluation are represented by counsel. This is a reality that underscores the need for a panel of competent and experienced evaluators such that attorneys will have faith in the accuracy, credibility, and reliability in the evaluations of their

cases. A panel of three evaluators can provide a balanced opinion and is an inherent deterrent against "forum-shopping" than the selection of a single arbiter, which lends itself to a selection of a facilitator, who is either in fact or perceived to be, more likely to reach a desired outcome. In fact, notwithstanding the fact that the MTA's case evaluators are required to be experienced litigators, there are attorneys that still question the knowledge or the preparation of some case evaluators, especially if they do not receive a desired result. This often-unfair critique would be exacerbated and could have a detrimental effect on the fair and equitable administration of justice if attorneys had the choice of a single mediator or arbiter. Moreover, case evaluators can bear witness to the conduct and discussions between one another and between the parties themselves, not to mention that case evaluation does not have the strict confidentiality requirements of mediation. Parties are less likely to challenge an outcome by making allegations of improprieties in the process with these checks and balances in place.

III. Case evaluation provides the most efficient access to justice.

Case evaluation is the most cost-effective and accessible form of ADR available. Judges frequently consider access to justice for parties and case evaluation allows parties to glean wisdom and feedback from three litigators, and often a retired judge as a panelist. Case evaluation is scheduled for the parties, with a date certain absent an adjournment. With the increase in mediation, some mediators are now scheduling cases six months out, making mediation a less accessible tool for resolution. Making case evaluation voluntary would ultimately make two tiers of justice—one reserved for sophisticated parties represented by counsel, and another for pro se litigants trying their best to navigate the legal system.

The MTA remains committed to providing case evaluation and firmly asserts that keeping the process mandatory and with sanctions, provides the most reliable, accessible, and

cost-efficient form of ADR available to parties in Wayne County. Moreover, we support our judges' right to manage their dockets with the judicial discretion to order the form of ADR best suited to the administration of justice for their dockets.

Thank you for the opportunity to provide feedback on the proposed rule changes. The MTA Board welcomes the opportunity to provide additional feedback as needed throughout the court rule review process.