

# Order

Michigan Supreme Court  
Lansing, Michigan

March 19, 2020

Bridget M. McCormack,  
Chief Justice

ADM File No. 2020-06

David F. Viviano,  
Chief Justice Pro Tem

Proposed Amendments of  
Rules 2.403, 2.404, and 2.405  
of the Michigan Court Rules

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Stephen J. Markman  
Brian K. Zahra  
Richard H. Bernstein  
Elizabeth T. Clement  
Megan K. Cavanagh,  
Justices

On order of the Court, this is to advise that the Court is considering amendments of Rules 2.403, 2.404 and 2.405 of the Michigan Court Rules. Before determining whether the proposal should be adopted, changed before adoption, or rejected, this notice is given to afford interested persons the opportunity to comment on the form or the merits of the proposal or to suggest alternatives. The Court welcomes the views of all. This matter also will be considered at a public hearing. The notices and agendas for public hearings are posted at [Administrative Matters & Court Rules](#) page.

Publication of this proposal does not mean that the Court will issue an order on the subject, nor does it imply probable adoption of the proposal in its present form.

[Additions to the text are indicated in underlining  
and deleted text is shown by strikeover.]

## 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 unless the parties stipulate to an ADR process as outlined in subsections (A)(2)-(3) of this rule. Parties who participate in a stipulated ADR process approved by the court may not subsequently be ordered to participate in case evaluation without their written consent.
- (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.~~ In a case in which a discovery plan has been filed with the court under MCR 2.401(C), an included stipulation to use an ADR process other than case evaluation must:
  - (a) identify the ADR process to be used;
  - (b) describe its timing in relation to other discovery provisions; and,

(c) be completed no later than 60 days after the close of discovery.

(3) In a case in which no discovery plan has been filed with the court, a stipulated order to use an ADR process other than case evaluation must:

(a) be submitted to the court within 120 days of the first responsive pleading;

(b) identify the ADR process to be used and its timing in relationship to the deadlines for completion of disclosure and discovery; and,

(c) be completed no later than 60 days after the close of discovery.

(3)-(4) [Renumbered (4)-(5) but otherwise unchanged.]

(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 after the filing of the answer

(a)-(b) [Unchanged.]

(c) if the parties have not submitted an ADR plan under subsection (A) on the judge's own initiative.

(2) [Unchanged.]

(C)-(H) [Unchanged.]

(I) Submission of Summary and Supporting Documents.

(1) Unless otherwise provided in the notice of hearing, at least ~~7~~14 days before the hearing, each party shall

(a)-(b) [Unchanged.]

(2) Each failure to timely file and serve the materials identified in subrule (1) and each subsequent filing of supplemental materials within ~~7~~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. Filing and serving the materials identified in subrule (1) within 24 hours of the hearing subjects the offending attorney or party to an additional \$150

~~penalty~~An offending attorney shall not charge the penalty to the client, unless the client agreed in writing to be responsible for the penalty.

(3) [Unchanged.]

(J) [Unchanged.]

(K) Decision.

(1) Within ~~7~~14 days after the hearing, the panel will make an evaluation and submit the evaluation to the ADR clerk. If an evaluation is made immediately following the hearing, the panel will provide a copy to the attorney for each party of its evaluation in writing. If an evaluation is not made immediately following the hearing, the evaluation must be served by the ADR clerk on each party within 14 days after the hearing. If an award is not unanimous, the evaluation must so indicate.

(2)-(5) [Unchanged.]

(L)-(N) [Unchanged.]

~~(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, 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, 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, which may include legal services provided by attorneys representing themselves or the entity for whom they work, including the time and labor of any legal assistant as defined by MCR 2.626.~~

~~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. 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 processes, at the expense of the parties, pursuant to MCR 2.410(C)(1).~~
- (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
 
  - (i) ~~for a new trial,~~
  - (ii) ~~to set aside the judgment, or~~
  - (iii) ~~for rehearing or reconsideration.~~~~
- (9) ~~In an action under MCL 436.1801, 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 436.1801(5).~~
- (10) ~~For the purpose of subrule (O)(1), in an action filed on or after March 28, 1996, and based on tort or another legal theory seeking damages for personal injury, property damage, or wrongful death, a verdict awarding damages 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.~~

#### Rule 2.404 Selection of Case Evaluation Panels

- (A) [Unchanged.]
- (B) Lists of Case Evaluators.
  - (1)-(3) [Unchanged.]
  - (4) Specialized Lists. If the number and qualifications of available case evaluators makes it practicable to do so, the ADR clerk shall maintain
    - (a) [Unchanged.]
    - (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. Neutral evaluators may be selected on the basis of the applicant's representing both plaintiffs and defendants, or having served as a neutral alternative dispute resolution provider, for a period of up to 15 years prior to an application to serve as a case evaluator.
  - (5)-(8) [Unchanged.]
- (C)-(D) [Unchanged.]

#### Rule 2.405 Offers to Stipulate to Entry of Judgment

- (A) Definitions. As used in this rule:
  - (1)-(3) [Unchanged.]
  - (4) "Verdict" includes,
    - (a)-(b) [Unchanged.]
    - (c) a judgment entered as a result of a ruling on a motion after rejection of the offer of judgment, including a motion entering judgment on an arbitration award.
  - (5) [Unchanged.]

- (6) “Actual costs” means the costs and fees taxable in a civil action and a reasonable attorney fee, dating to the rejection of the prevailing party’s last offer or counteroffer, for services necessitated by the failure to stipulate to the entry of judgment.

(B)-(C) [Unchanged.]

- (D) Imposition of Costs Following Rejection of Offer. If an offer is rejected, costs are payable as follows:

(1)-(2) [Unchanged.]

- (3) The court shall determine the actual costs incurred. The court may, in the interest of justice, refuse to award an attorney fee under this rule. Interest of justice exceptions may apply, but are not limited to:

- (i) cases involving offers that are token or de minimis in the context of the case; or
- (ii) cases involving an issue of first impression or an issue of public interest.

(4)-(6) [Unchanged.]

- (E) This rule does not apply to class action cases filed under MCR 3.501.~~Relationship to Case Evaluation. Costs may not be awarded under this rule in a case that has been submitted to case evaluation under MCR 2.403 unless the case evaluation award was not unanimous.~~

*Staff Comment:* The proposed amendments were in large part produced by a workgroup convened by the State Court Administrative Office to review and offer recommendations about case evaluation.

The staff comment is not an authoritative construction by the Court. In addition, adoption of a new rule or amendment in no way reflects a substantive determination by this Court.

A copy of this order will be given to the Secretary of the State Bar and to the State Court Administrator so that they can make the notifications specified in MCR 1.201. Comments on the amendment may be sent to the Supreme Court Clerk in writing or electronically by July 1, 2020, at P.O. Box 30052, Lansing, MI 48909, or [ADMcomment@courts.mi.gov](mailto:ADMcomment@courts.mi.gov). When filing a comment, please refer to ADM File No. 2020-06. Your comments and the comments of others will be posted under the chapter affected by this proposal at [Proposed & Recently Adopted Orders on Admin Matters page](#).



I, Larry S. Royster, Clerk of the Michigan Supreme Court, certify that the foregoing is a true and complete copy of the order entered at the direction of the Court.

March 19, 2020

A handwritten signature in black ink, appearing to read "Larry S. Royster", is written over a horizontal line.

Clerk