Michigan Judges Guide to ADR Practice and Procedure

Michigan Supreme Court
State Court Administrative Office
Office of Dispute Resolution

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Acknowledgements and Invitation

This Michigan Judges Guide to ADR Practice and Procedure is derived in large part from "A Taxonomy of ADR," authored by Michigan attorneys and ADR practitioners Tracy L. Allen and Richard L. Hurford as a project of the Macomb County Bar Association ADR Committee. Their goals were to: (a) identify the increasing range of ADR processes available to litigants in the trial courts; (b) illustrate how the processes can be tailored, staged, and "right sized" to meet the particular needs of the parties in resolving all or a portion of their dispute; (c) suggest the settings in which they might be most effective; and, (d) encourage judges, attorneys, and parties to creatively experiment with the ADR processes to best tailor them to meet parties' needs.

This Guide preserves these goals and much of the content of the original Taxonomy but has been edited and expanded, chiefly to familiarize judges and court staff with emerging ADR practices and procedures.

The State Court Administrative Office extends its gratitude to the authors and the Macomb County Bar Association for permission to adapt their materials for this Guide.

The processes outlined in this Guide are not meant to be exhaustive of the growing array of flexible dispute resolution processes attorneys, parties, and ADR practitioners are designing to meet the needs of particular disputes.

Judges, court administrators, attorneys, and ADR practitioners are invited to share with the SCAO any novel ADR processes that are not discussed in this Guide for potential inclusion in subsequent updates.

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Note: Whether any of these processes are appropriate for a case can be discussed at any convening of the parties.

Process	Description/Case profile	Timing
Early Intervention Conference	Typically facilitated by a volunteer attorney trained in the mediation process, this conference helps parties sharpen the focus of the litigation by developing a litigation plan that may include proportional (i.e., staged) discovery, which allows parties to identify and meet various case milestones before conducting additional discovery. The process is designed to maximize the potential of an early resolution.	Very early in the litigation; typically the first court-ordered event after the response. May be conducted in preparation for the first, or in lieu of, an initial Case Management Conference with the court. Litigation can be preliminarily "triaged" by the court and staff to determine if the matter is appropriate for an Early Intervention Conference.
Early Case Management Conference	Parties could benefit from meeting with the judge or judicial officer to discuss the trajectory and management of the case, including a scheduling order that addresses motion practice, proportional discovery, and the timing of ADR processes.	Very early in the litigation; typically the first court-ordered event after the response.
Private Dispute Resolution Advisor	Parties could use help identifying which ADR process(es) might be most effective in "right sizing" the dispute resolution process(es) to achieve an economically appropriate and speedy resolution.	Typically employed at the outset of litigation, however can be useful throughout when parties need help evaluating ADR processes and their timing.
Mediation	Frequently used where the parties' interests in the dispute include: developing a creative solution; maintaining confidentiality; preserving an	Mediation can take place as soon as the parties have sufficient information to assess their risks in moving forward and the benefits of attempting an early resolution of all or a portion of the dispute.

	ongoing relationship; narrowing the issues in dispute; or high emotions are present. Mediation can also be effective in resolving or narrowing sub-disputes involving discovery, standstill agreements, protective orders, etc.	At the Early Case Management Conference, consider asking parties to mutually select a mediator who can be available as needed throughout the litigation. Unless the parties request otherwise, mediation should almost always be conducted before case evaluation.
Expert Hearing	Case involves a "battle of the experts." The process is helpful in disputes over business valuations, assessing economic damages, professional malpractice, products liability, and other disputes involving experts. The parties, with the assistance of the neutral, establish the ground rules for the hearing.	Typically used after sufficient document and information exchange for experts to formulate their preliminary opinions. Can be used to streamline discovery by narrowing the issues in dispute. The hearing can also immediately precede mediation, or substitute for the parties' opening statements. It can also be used in the course of mediation to address impasses arising from conflicting expert opinions.
Mini-trial to Party Representatives	Decision makers require significant education on the realistic risks, benefits, and potential costs of ongoing litigation, or to evaluate opposing counsel and the potential jury appeal of their claims and defenses. The parties, with the assistance of the neutral, establish the ground rules for the mini-trial.	Can be a stand-alone process, but is effectively used prior to mediation taking place. If used prior to mediation, the outcome often takes the place of the opening statement or is used to deal with an impasse that arises during mediation.
Early Neutral Fact Finding	Used primarily when hotly contested threshold legal and/or factual issues have a significant impact on the litigation. Can be used to narrow or focus issues, for example claims involving insurance	As early as possible in the litigation. A mutually respected subject matter expert voluntarily selected by the parties implements agreed upon ground rules, the voluntary exchange of information, and other functions determined by the parties.

	coverage, construction defects, alleged code or contract violations, applicable standards of care in malpractice claims, and appropriateness of class action certification.	Often helpful in setting the stage for a subsequent mediation. The neutral is generally not a mediator who may have already been selected by the parties.
Early Neutral Evaluation	Counsel would benefit from the "evaluation" of a mutually respected neutral with significant experience in the type of litigation at issue. Very helpful in assisting counsel to focus their discovery and legal theories. Can be helpful to narrow the issues in dispute and set the stage for a later mediation.	At the outset of litigation where the litigation might be streamlined by an evaluation of the case by a mutually respected evaluator. Different than the mediator selected by the parties at the Case Management Conference. A neutral can often assist the parties in the selection of a mutually acceptable Evaluator, implementing agreed upon ground rules, the voluntary exchange of information and the timely performance of the Evaluator's task. Often helpful in setting the stage for a subsequent mediation.
Mini-trial with Mock Jury (Advisory Jury Trial)	Parties strongly disagree over exposure and risks of litigation; interest in evaluating a jury's reaction to a case; desire to "test drive" theories to a mock jury; or interest in shaping voir dire and determining optimal juror profile. The parties with the assistance of a neutral establish the ground rules for the proceeding with the neutral typically serving as the presiding "judge."	Can be used as a stand-alone process or when used in conjunction with mediation, where it takes the place of opening statements. The parties may choose to keep the jury's decision confidential to avoid premature "anchoring" at a subsequent mediation unless the parties reach an impasse. Typically held post-discovery after less expensive ADR processes have failed.
Case Evaluation	Parties who believe their cases are "all about the money" may want an independent assessment of the monetary value of their case from a panel of randomly assigned lawyers. MCR 2.403 provides for a three-member panel to	Typically conducted after discovery and motion practice has been completed. Many attorneys believe the process is not helpful because panelists do not necessarily practice in the area of law of their case. Consider either a specialized panel, or asking whether one of the other "expert" forms of evaluation would be more helpful.

	provide an evaluation to which sanctions for non-acceptance may apply.	Should almost always take place after mediation. If scheduled before mediation, it can significantly lengthen case age and litigation costs.
Moderated Settlement Conference	Parties could benefit from a judge's helping assess whether any common ground can be found to reduce the issues to be tried, or to avoid trial altogether. Another opportunity to explore with the parties the appropriateness of ADR options and strategies.	Historically, convened as the last event before trial, however can be convened after any significant case milestone to evaluate a resolution or explore ADR options.
Med/Arb	If mediation is unsuccessful, the parties want to obtain a ruling immediately after the mediation. On request of the parties, the same neutral can act as the mediator and then as the arbitrator. See also Arbitration, below.	Typically used after most or all discovery and motion practice has been completed.
Arbitration	May be helpful where the parties desire to select their own decision maker and achieve greater confidentiality than available at trial; little concern with preserving appellate rights; may be quicker and less expensive than a trial. An effective dispute resolution tool where the parties desire a "high-low" agreement to minimize upside exposure and yet guarantee some level of recovery for a party.	Under the Revised Uniform Arbitration Act, parties can agree to engage in arbitration at any time during the litigation process.
Summary Jury Trial	Attorneys typically present evidence to a jury in a single day with binding results.	Often follows a ruling on a dispositive motion or when parties want a jury determination in

	Most often used when the cost of a full trial is not warranted and preserving appellate rights is not important. The parties want a decision from a jury rather than a single arbitrator or panel of arbitrators.	lieu of a ruling on a pending dispositive motion. Can be used instead of a mediation-arbitration hybrid or in conjunction with a high-low agreement.

I. Introduction: The Trial Judge as Dispute Resolution Advisor

ADR processes are an integral component of trial courts' case management systems, and litigants are increasingly exploring how ADR techniques beyond case evaluation and mediation can help achieve more timely, cost effective, and mutually satisfactory settlements earlier in the litigation life cycle.

Just as judges have added new skills in the areas of technology, problem solving courts, and performance measurement, to name but a few, judges should be familiar with a greater number of ADR tools to help litigants select the best ADR process for their dispute. Put differently, in addition to serving as the trial judge, judges are increasingly called upon to be *de facto* dispute resolution advisors.

In performing the function of a dispute resolution advisor, the judge helps the parties select and pursue a speedy, economical dispute resolution strategy that is most likely to result in a durable resolution that is in the litigants' best interests. In some disputes the best strategy may well be a trial, but in the vast majority of disputes, the best strategy may be: (1) timely resolving preliminary and summary disposition motions (either in whole or in part); (2) ordering parties to engage in early neutral fact-finding or early neutral evaluation; (3) ordering the parties to engage in a strategically timed mediation; and (4) in medical malpractice and tort cases, ordering case evaluation by specialty panels if mediation was not successful in resolving the dispute. The judge may recommend or order any number of alternative dispute resolution mechanisms.

The differences between the traditional role of a trial judge and the added function of serving as a "dispute resolution advisor" are illustrated in the following chart.

Traditional Trial Judge	Trial Judge and Dispute Resolution Advisor
Short-term and long-term goals: Focuses the parties on a trial date and prepares the parties for a trial (that in 98.6% of the cases will not take place).	Short-term and long-term goals: Assists the parties to voluntarily resolve the dispute if possible (short-term) and prepares for trial as necessary (long-term).
Typically relies on a computer generated scheduling order.	Conducts an early case conference with counsel to establish a differentiated case management plan and triage cases for effective ADR strategies.
Presides over discovery disputes and motion	Stages "proportional" discovery and motion

practice.	practice to support the agreed upon ADR strategies.
Orders case evaluation just prior to the trial date as the only ADR activity in the case.	Explores multiple and early ADR strategies throughout the life of the case.
Determining legal rights and remedies are the sole focus.	In addition to determining legal rights and remedies, judges and neutrals explore the parties' interests and needs-based solutions.

There is a growing body of evidence (evidence-based practices ["EBP"]) that to be most effective from a cost and time standpoint, ADR should be introduced early in the case, and it should be strategically timed based upon the nuances of each case. As underscored in the SCAO's Caseflow Management Guide:

> [t]he two often cited goals of alternative dispute resolution (ADR) are to reduce cost and to expedite disposition. These goals can only be achieved, however, in a case management system which promotes the timely referral of cases to ADR and screens cases to ensure that the referral is appropriate in light of existing rules, statutes, and case type. Timely and appropriate referrals can best be achieved through early court intervention and case screening. Given the focus of ADR and diversion on expediting disposition, the referral of cases to these options should be considered at appropriate points throughout the court process. Integrating these procedures at each stage, from case screening to the pretrial conference, is an essential component of an effective case management program.[1]

Earlier attempted ADR efforts should not necessarily be solely evaluated by whether or not they achieve a full settlement on the day of an ADR event. Strategically employed early ADR processes can be particularly successful if they:

(1) Simply narrow or focus the parties' attention on the legal and factual issues truly in dispute.

(2) Assist the parties in litigating "proportionately." For example, is there really a cost benefit in obtaining E-discovery that encompasses 75 search terms rather than being limited to 15 search terms?

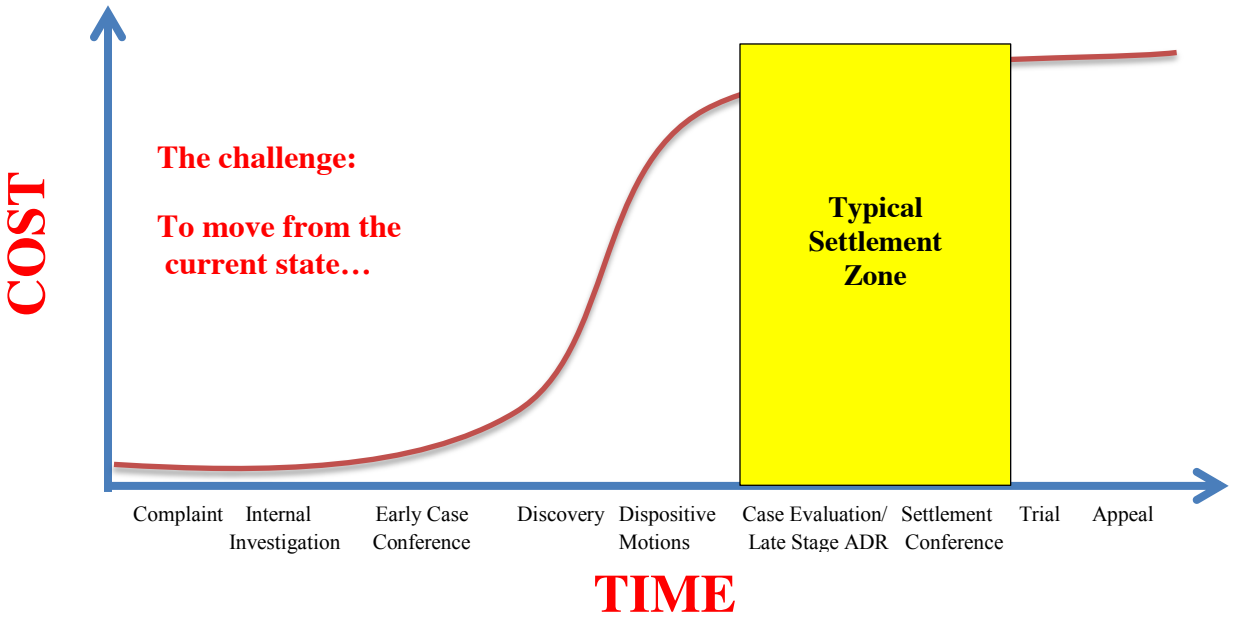
(3) Provide the parties with an early appreciation of the "risks" of continued litigation that sets the stage for continued settlement discussions and other ADR processes.

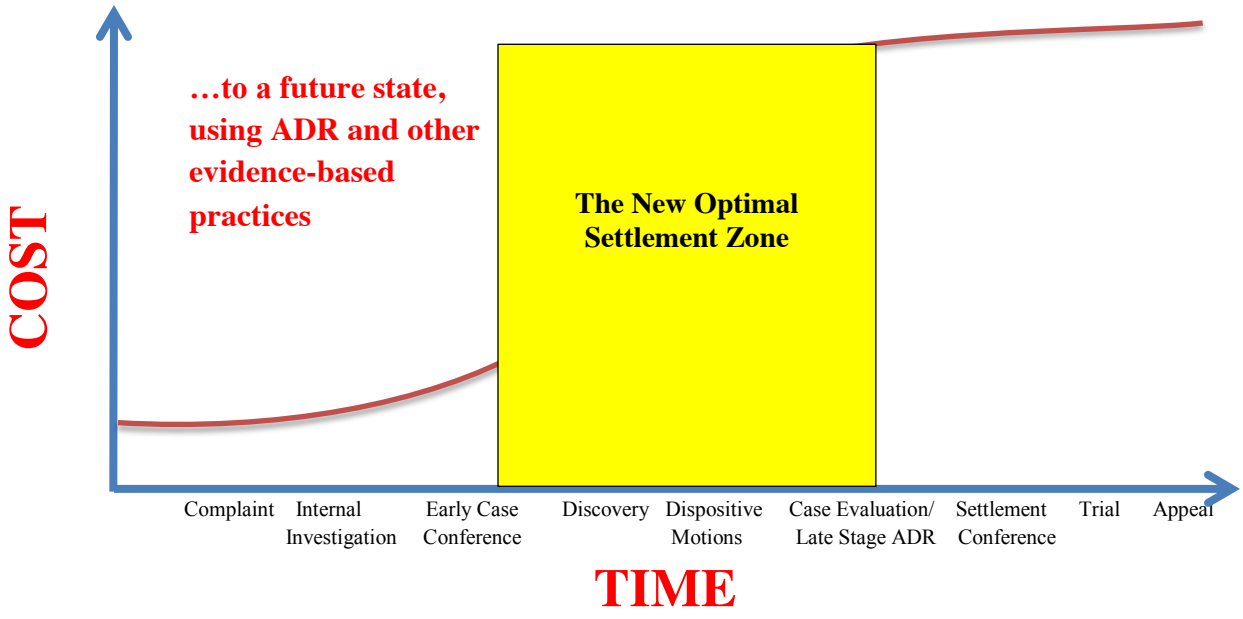
(4) Initiate an exploration of an interest-based resolution, refine the areas of agreement and disagreement between experts in disputes that involve a classic "battle of the experts," and narrow the focus of the dispute with the assistance of early neutral fact finding and early neutral evaluation.

[1] State Court Administrative Office, Caseflow Management Guide (2013), Chapter 7, page 41. http://courts.mi.gov/Administration/SCAO/Resources/Documents/Publications/Manuals/cfmg.pdf

(5) Foster a discussion of potentially more cost effective, speedier, and just adjudicative models that may be more appropriate for the parties than traditional litigation.

The primary goal of the trial court assuming the role of a dispute resolution advisor, the adoption of court performance measures, and the statutory underpinnings for the creation of business courts, involve the desire to wring "waste" out of the traditional litigation process through the use of various evidence-based practices, including early ADR. Throughout the judicial system, there is a growing interest to minimize the potentially wasteful practices (from the viewpoints of the judiciary and the litigants) in the traditional litigation-cost time line:





The traditional litigation model of parties' completing all motion practice and discovery, and then participating in case evaluation as the first and sometimes only ADR process, often gives rise to litigation waste. A 2012 study by the Michigan Supreme Court State Court Administrative Office seriously questioned the efficacy of case evaluation in not only achieving timely dispositions for courts, but also in meeting the needs of the parties in all cases.[2] The evidence-based practice recommended by this study calls for case evaluation being limited to those situations for which it is mandatory--torts and medical malpractice--but if used in any cases, mediation should generally take place prior to case evaluation.

The notion of earlier judicial involvement in helping parties identify the type and timing for participation in ADR was a key recommendation of participants in an "Early ADR Summit" convened by the State Court Administrative Office to assess how parties could reach earlier, more cost effective and satisfactory resolutions.[3] Key recommendations from this dialogue included:

(1) Judges should meet lawyers, clients, and pro se litigants in a scheduling conference. Early involvement helps identify issues and focuses resources. Judges can use discretion to tailor a scheduling order to a case.

(2) Judges, lawyers, and parties should consider using a broader array of ADR procedures, not just familiar "stand by" options.

(3) Differentiated case management should be adopted. This practice recognizes a number of individualized tracks for various kinds of cases, and offers a filtering mechanism like the Federal Rule 16 process.

(4) Judges should be more actively involved in determining the scope and amount of discovery.

(5) If case evaluation is ordered at all, it should take place after mediation.

(6) Courts should track and share ADR metrics of what works and what does not work; this would be especially effective for the business courts. Parties should be surveyed regarding their experience with the ADR processes.

(7) Parties should engage a knowledgeable, neutral third party who is respected by all parties early in the case to help resolve contested issues throughout the litigation.

In short, the recommendation for trial courts to perform the function of dispute resolution advisors and actively explore earlier ADR interventions is not just issuing from national organizations like the National Center for State Courts, but it is also percolating up from

[2] The full report of the study, "The Effectiveness of Case Evaluation and Mediation in Michigan Courts," appears at: http://courts.mi.gov/Administration/SCAO/Resources/Documents/Publications/Reports/The%20Effectiveness%20of%20Case%20Evaluation%20and%20Mediation%20in%20MI%20Circuit%20Courts.pdf

[3] The full report of the "Early ADR Summit" appears at: http://courts.mi.gov/Administration/SCAO/Resources/Documents/standards/odr/ADR%20Summit%20Report%20September%204,%202013.pdf

sophisticated users who say earlier ADR activities could help achieve speedier, less costly, and more satisfactory case dispositions.

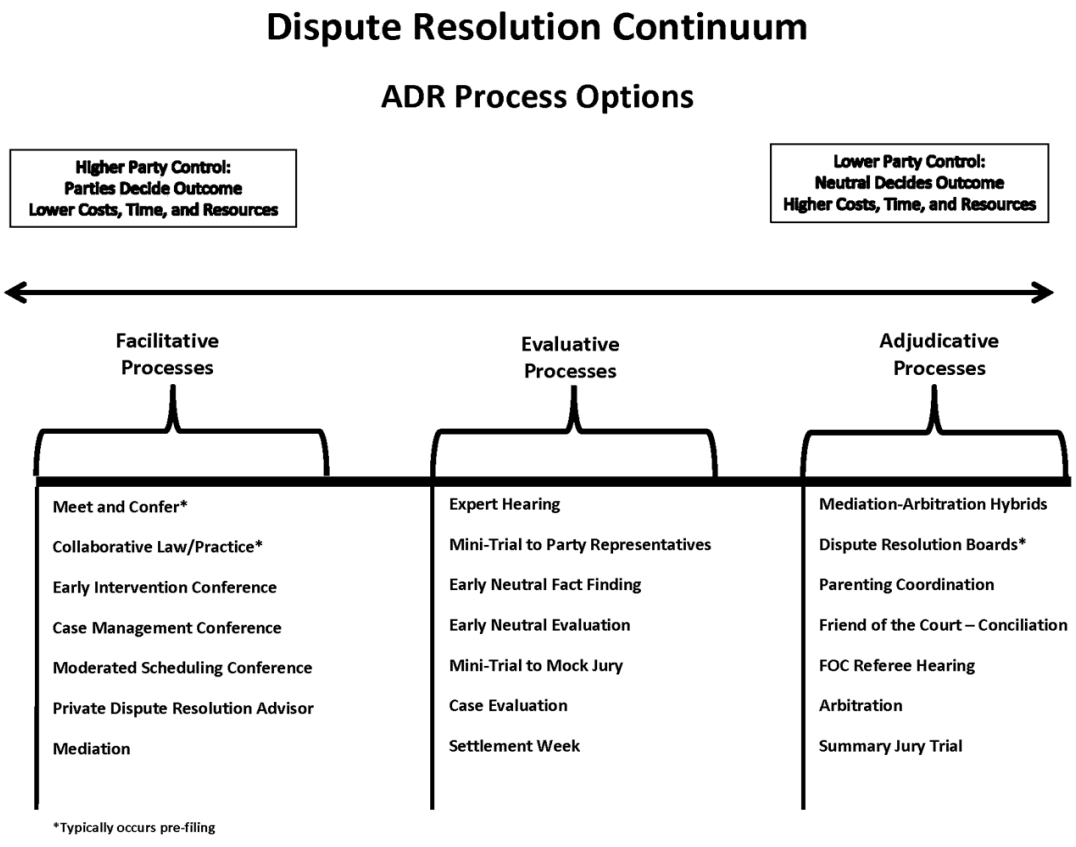
II. ADR Continuum

Two key questions that judges can ask that will help the parties select the most appropriate ADR process and its timing:

(1) What are the litigants' goals in the ADR process(es) being considered?

(2) How much control do the disputants desire to maintain over the processes and outcomes?

To underscore, the selection of an ADR process should be driven *primarily* by the goals and objectives of the disputants. "Primarily" is emphasized because the court also has a compelling interest in having ADR serve an important role in achieving court performance objectives and metrics.



Once parties explore the degree of control over the outcome and the cost/benefit of each process, they can more easily select the most appropriate ADR strategy and the most effective timing of ADR events. ADR processes can be plotted along a "Dispute Resolution Continuum" in which there are three main variables: the level of control over the outcome, the level of control over the process, and the cost.

Two additional considerations include the formality of the process and the extent to which the process is private or public. As parties move from informal to formal processes, they generally incur higher costs, their dispute becomes more public, and their control over the outcome diminishes. The above graphic shows the connection between the variables and places a variety of dispute resolution processes into "facilitative," "evaluative," and "adjudicative" categories that also reflect the organization of this Guide.

While early intervention conferences, scheduling conferences, moderated settlement conferences, and settlement weeks appear in the graphic, technically, they are less "ADR processes" than opportunities for ADR discussions and described in a separate section. They appear in the graphic, however, to show where they might be placed along the continuum.

"Facilitative" ADR processes include: early intervention conferences, scheduling conferences, mediation; mini-trial to party representatives; collaborative practices; and, the use of a dispute resolution advisors and settlement counsel. Additional facilitative processes include "meet and confer obligations," and demand letters; however, because these processes are typically used prior to filing, their descriptions are outlined in Appendix 1.

Facilitative processes are the least costly and most private processes and can be completed in the least amount of time. Importantly, unlike the evaluative or adjudicative ADR processes, facilitative processes maximize the parties' opportunities to maintain control of the process and the outcome, and to actively fashion creative resolutions that otherwise could not be obtained through a verdict, arbitration, or other adjudicative techniques.

At the opposite end of the continuum, "adjudicative" processes include: arbitration; multiple mediation-arbitration hybrids; parenting coordination; summary jury trials; and dispute resolution boards. In these processes, party control over the outcome is increasingly limited (if not altogether forfeited to a decision-maker), significant litigation expense has been incurred, and the processes are more formalized. The processes typically result in a binding (or highly persuasive) decision with varying ability to appeal that decision.

The "evaluative" middle ground provides many opportunities for combining aspects of mediation and arbitration or other fact finding into hybrid highly evaluative but nonbinding processes, including: mini-trial with mock jury; case evaluation; moderated settlement conference; neutral fact finding; early neutral evaluation; and "expert hearing" (a term used for a hearing conducted with experts in the presence of the key decision-makers).

These processes are considered "evaluative" because the outcome is an "evaluation" or advisory opinion regarding the likely outcome of the dispute if it was adjudicated through trial. These methods, which provide the parties greater control than adjudicative processes, can be effective in obtaining an independent impression of the entire matter and the strengths and weaknesses of the case. They also frequently cause the parties to modify settlement positions

and make dramatic shifts in litigation strategy. Where a subject matter expert is used as a neutral in the evaluative process, the weight of the expert's opinion can be very effective in influencing a party's position and expectations. If the opinions are negative, these processes can lead to the implementation of other ADR processes and result in a relatively swift settlement.

The process descriptions that appear below follow the continuum in moving from the left (maximum control) to the right (completely relinquishing control).

A decision-making grid, found at Appendix II, outlines considerations that parties and the court might use to identify the optimal ADR technique and its timing for their dispute. The key feature of ADR is the multiplicity of tools that can be employed to serve the particular needs of the parties in a wide variety of contexts. To the extent that judges become aware of the advantages of various tools, they can more effectively assume the role of a dispute resolution advisor and help parties identify which process(es) can be right sized and staged to cost-effectively streamline or otherwise resolve their dispute.

III. Early Judicial Involvement and Proportionate Discovery

Integral to an effective court ADR system are the practices of early judicial involvement and proportionate discovery. Early judicial involvement, as an "evidence-based practice," originally was framed as "differentiated case management," where cases were put on different case processing "tracks." Merely placing cases on various tracks by case code type did not reflect the diversity or complexity of cases that may fall within a single case code, however, and generally did not prove to be an effective case management strategy.

Instead, a preferred evidence-based practice includes the notion of triaging individual cases during a scheduling or early case management conference, where key litigation milestones are tailored to the unique case characteristics.

This practice is premised on the assumption that all cases are not alike and, therefore, should not be subject to the same processing events and timetables. Some cases can be disposed of promptly with little or no time needed for discovery and few intermediate court events. Others require extensive court supervision. The traditional "first-in, first-out" rule for case scheduling and disposition has been replaced by a case management system that accommodates the diversity of case processing events and timeframes appropriate to the individual cases filed.

The practice of proportionate discovery responds to the following question: if less than two percent of all cases result in trial, is it wasteful for the parties to engage in **all** discovery necessary to prepare for a trial before engaging in meaningful milestones that will take place prior to trial, for example, ADR events or dispositive motion practice?

In addition to the Early ADR Summit recommendation that judges should be more actively involved in determining the scope and amount of discover, the rationale and a methodology for the implementing proportionate discovery is addressed in the Caseflow Management Guide[4]:

[4] Caseflow Management Guide, SCAO, Chapter 4, page 22.

Discovery is a significant portion of litigation time and expense; therefore, management of discovery is essential if a case management system is to be effective and efficient. The court should limit the nature and scope of discovery according to the management needs of the case. Each of the following approaches is aimed at minimizing the time and expense devoted to discovery while promoting nontrial dispositions at the earliest point in the process:

a) Designing a discovery plan for each case in consultation with counsel, generally as part of the case management plan under MCR 2.401(B), Early Scheduling Conference and Order.

b) Limiting the nature and scope of discovery by category of cases. For example, under a differentiated case management system complex cases have longer discovery periods, using the full range of discovery techniques, and expedited cases have shorter time periods with limits on interrogatories and depositions.

c) Providing informal methods for resolving discovery disputes such as teleconferencing before the filing of a motion.

d) Developing a process where initial discovery focuses on the information needed for settlement with discovery for trial provided only in cases that are likely to be tried.

e) Monitoring the close of discovery.

While subsection (d) above refers to focusing discovery in cases that are not likely to be tried, the fact that less than two percent of cases reach trial strongly suggests that early focusing of discovery should be an integral component of managing virtually all cases.

IV. Court-Convened Opportunities to Discuss ADR and Settlement

Discussions with counsel and parties about which ADR process may be most helpful, and when it should be held, can take place at any time in the litigation, but "earlier is better." If these discussions do not take place until the final settlement conference, nearly all the benefits associated with ADR, e.g., cost and time savings, the parties' ability to design an interest-based solution, the minimization of litigation "waste," etc., are lost. And not insignificantly, the ability of ADR to help achieve court performance objectives and any potential cost savings to the court are lost as well.

The SCAO Caseflow Management Guide cites reduced cost and expedited disposition as key goals of ADR. The goals can only be achieved, however, in a case management system that timely refers appropriate cases to ADR.

Although judges can use the opportunity of any convening of the attorneys and parties to discuss ADR, the following are several event types courts have either implemented as standard practice, or may wish to experiment with:

1. Early Intervention Conferences

Best Practice: Consider establishing early intervention conferences at which local neutrals help parties develop ADR and other case management plans that focus their litigation strategy toward the earliest practicable resolution.

Less a process than an event, early intervention conferences typically involve attorneys and parties meeting with an assigned neutral (usually a trained mediator) shortly after the complaint and answer have been filed to explore a litigation plan, the staged exchange of discovery, and the timing and use of ADR processes. The agreements reached by the parties during the early intervention conference are then reviewed and adopted by the court either during a subsequent case management conference or in a scheduling order.

The decision whether or not to use an early intervention conference may well be a function of available judicial resources. While holding a case management conference with the parties has clearly been identified as an evidence-based practice, some courts may conclude they do not have the available time or court personnel to engage in a case management conference on each and every case.

To the extent that not all cases are equal, and some require more court management than others, courts may want to "triage" cases at the outset and determine which cases might be effectively managed by using an early intervention conference in lieu of a case management conference or by scheduling an early intervention conference before the more formal case management conference. During these early intervention conferences the neutral asks many of the same questions a judge would ask about the posture of the dispute and the direction of the litigation. Based on their familiarity with the case and the parties, the neutral may subsequently be selected by the parties to serve as a mediator or asked to perform other neutral roles.

Early intervention programs typically are coordinated by courts using volunteer neutrals (e.g. trained mediators) and focus on certain case types, e.g., routine auto negligence and premise liability cases that typically do not require significant court management. Although some cases are disposed as a result of the process, the key objective is to help parties focus the trajectory of the litigation toward an early resolution.

2. Scheduling Conference/Case Management Conference

Best practice: Meet with attorneys and parties early in (and throughout) the litigation to tailor the scheduling order to the particular dispute, identify which ADR process may be most appropriate for the dispute and its timing, and engage in proportionate discovery.

While very similar in purpose to the early intervention conference, the early Scheduling or Case Management Conference is conducted personally with the trial court. The purpose is to help focus on which judicial resources the parties need and when to posture the case toward eventual resolution, rather than toward an unlikely trial.

In Michigan's business courts, judges are meeting face-to-face with the attorneys (and sometimes the parties) approximately 45-90 days after the filing of an action, and tailoring scheduling orders to the needs of the disputants with the goal of achieving the earliest possible case disposition. In addition to addressing the scope of discovery, and how much should be completed before engaging in an ADR process, judges are also able to encourage the early selection of an ADR provider to help remove obstacles to settlement that would otherwise consume significant judicial time through discovery and other motions.

3. Moderated Settlement Conference

Best Practice: Depending upon the needs of a case, moderated settlement conferences should take place throughout the life of the case rather than just prior to the scheduled trial date.

Traditionally, most scheduling orders include a pretrial settlement conference to be attended by all counsel and parties with settlement authority. The trial judge or a designee moderates the conference.

While judicial practices vary, these conferences often occur very late in the litigations, yet are also often the first and only occasion for the attorneys and parties to assess the trial judge's temperament, reactions, and attitudes toward the parties, counsel, expert witnesses, the merits of the case, and its jury appeal. The conferences are generally highly evaluative and the judge, while reserving judgment and having an open mind, may send certain signals leaving little doubt as to any number of issues that may be addressed or ruled upon.

While traditional late-stage moderated settlement conferences can be an effective tool in resolving cases, the event has many of the same drawbacks as MCR 2.403 case evaluation. Most importantly, the potential for a creative, interest-based resolution is more limited in comparison to what might have been achieved for the client during earlier-convened ADR processes.

Current thinking in evidence-based practices suggests that settlement should not be the focus of this late-held conference, but rather to convene parties to ensure that counsel are prepared for trial and that the trial judge is prepared to preside. Ideally, the conference should be held 10 to 20 days before the trial commences. In order to ensure a meaningful conference, counsel should also be required to confer before the conference to resolve any outstanding issues regarding the exchange of information needed to prepare for trial.

If settlement isn't the focal point of the traditionally held late-litigation conference, when would a judge hold a "settlement conference"? Moderated settlement conferences should be convened throughout the life of the case and should focus on a discussion of resolution strategies tailored to the dispute and the sophistication of the parties and their counsel. A settlement conference is a "meaningful event" according to the SCAO's Caseflow Management Guide, since it is designed to resolve a case or move it to disposition. [5] Conferences could be convened

[5] "Meaningful events" are those activities scheduled or initiated by the court that either move a case to disposition or dispose of it. Examples are case management conferences, settlement conferences, alternative dispute resolution techniques, or the submission of case management information by counsel. Events that are not designed to resolve a case or move it to resolution are unproductive and are inconsistent with an efficient and effective caseflow

following unsuccessful ADR events, after a hearing on a motion, etc., to determine what obstacles lie in way of settlement and how best those obstacles might be removed. The parties and counsel could also discuss the merits of engaging in additional dispute resolution processes.

A clear benefit of convening periodic settlement conferences, rather than holding a single discussion late in the litigation, is the elimination, if not the reduction, of adjournments since attorneys would be discussing their preparedness to move toward ADR events, file motions, or other case management issues. Reducing adjournments also has the effect of achieving trial date certainty, which is a hallmark of effective court administration and performance measurement.

4. Settlement Week

Best Practice: Consider convening a settlement week to dispose of cases nearing and exceeding caseflow time guideline recommendations.

Settlement week involves attorneys and clients meeting with a volunteer attorney/mediator to discuss the status of settlement discussions, and to identify how any remaining obstacles to settlement can be overcome. Cases not resolved during these discussions are generally given an immediate trial date, and if parties have not already engaged in mediation, the attorneys and parties may decide to continue settlement discussions with the attorney/mediator who facilitated settlement week discussions.

Courts convene a "settlement week" chiefly to focus on disposing cases nearing or exceeding the target disposition dates in the Michigan Supreme Court Administrative Order 2013-12, "Caseflow Management Guidelines."

In light of the above events and processes, courts can use any opportunity of convening the attorneys and parties to discuss whether any of the following ADR techniques would be appropriate for their cases, when a neutral might be selected, and when the ADR event should take place.

V. Facilitative ADR Processes

The following processes typically occur postfiling; however, parties are increasingly attempting nonbinding dispute resolution processes before filing suit. Due to the proliferation of prefiling ADR activities, it is almost always beneficial at the early intervention conference or the case management conference to inquire what prior ADR techniques have been pursued in developing the case management and ADR plan appropriate to the litigation.

1. In General

Mediation can begin (and occasionally end) before litigation is commenced, or can take place throughout the life of the litigation, including during appeal. While mediation was originally thought to be of greatest value to parties who had a continuing relationship (e.g., in business disputes with customers, suppliers and employees; probate disputes; divorce disputes where children are involved; etc.) mediation has proven to be a very effective ADR process in virtually

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management program.[5] "Caseflow Management Guide," State Court Administrative Office, Chapter 4, page 18.

all case types, even when the parties have no prior relationship or will not have a continuing relationship after the dispute at hand.

The hallmarks of mediation are now well known. Mediation is a confidential process in which parties select a trained neutral mediator to help them generate options that lead to finding the one option that all parties can mutually accept.

Mediation inherently provides for flexibility and creativity to a degree not associated with other ADR techniques. Mediators speak in terms of maximizing parties' "self-determination," in that the parties actively design their mediation process and have maximum control over the outcome of the process. There are very few hard and fixed rules; the parties, counsel, and the mediator, will tailor the process to meet the needs of the parties.

Mediation focuses more on "solutions" rather than determining who might be at fault. In earlier years, mediators spoke of helping parties find "win-win" solutions. That was perceived by some as setting the bar too high in terms of everyone leaving mediation a "winner." A more common objective is to help parties reach a "solution they can live with," meaning reaching a solution that, while arguably not optimal, avoids the risks and uncertainty of trial and allows the parties to put the matter behind them so that they can move on.

Court ordered mediation communications are confidential under MCR 2.412. Because mediation is confidential, the mediator and parties can frankly discuss all of the pertinent facts in the case, explore the parties' interests, candidly examine the strengths and weaknesses of each party's case, and help generate creative solutions that would not be found in a jury verdict or an arbitrator's decision.

Despite the noncoercive nature of the process, it has proven to be a very persuasive, powerful, and effective ADR tool. Two recent Michigan State Court Administrative Office studies showed that approximately 50 percent of mediated cases settle "at the table," while another 20 to 25 percent settled without any subsequent court event taking place.[6]

Mediator selection is also important because parties have any number of interests in selecting their mediator, including:

(1) The level of expertise in the subject area of the dispute the mediator should have.

(2) Whether the mediator's process expertise is more important than subject matter expertise.

[6] "The Effectiveness of Case Evaluation and Mediation in Michigan Circuit Courts," Report to the State Court Administrative Office, Michigan Supreme Court, 2011. Also, "Mediation After Case Evaluation: A Caseflow Study of Mediating Cases Evaluated Under $25,000," State Court Administrative Office, 2011. These studies showed that mediation achieved a significantly higher resolution rate resolution than case evaluation and also significantly reduced the life of a case. In the cases studied, a case evaluation followed by mediation actually lengthened the life of a case by almost 200 days.

(3) Which mediator style, e.g., evaluative, directive, facilitative, or analytical, may be most appropriate for the dispute.

A typical mediation begins with a "joint" or "general" session. The scope of confidentiality and the ground rules agreed upon during a premediation conference call are discussed, followed by the parties and/or their counsel identifying the strengths of their respective cases and the believed weaknesses in the opposing party's case. Clients are often encouraged to supplement these presentations and to share their concerns and interests. Potential solutions can also be generated during the joint session. It is an opportunity for the parties and counsel to address each other in a confidential setting and to hear (and hopefully understand, although not necessarily agree with) their respective positions and interests. The mediator's role is to facilitate a robust discussion, to ask thought-provoking and clarifying questions, to help the parties narrow the issues, and to identify the parties' underlying interests.

The initial joint session is often followed by private sessions (the "caucus") for confidential discussions about potential settlement options. The mediator may review exhibits, further explore damage theories, the anticipated witness testimony, and other aspects of the trial that will follow should the parties be unable to mutually resolve the matter at the conclusion of the mediation. For example, in an employment case, if not addressed during the joint session, the mediator may explore potential options, such as reinstatement, a change in job duties or a transfer, the efficacy of job placement services, suspension, providing an apology or letter of reference, and further training or education.

Whether through the joint session or the caucus, settlement proposals are exchanged in a series of offers and counteroffers until a full and final resolution is achieved. Sometimes these offers are exchanged in joint session; in other cases the mediator works with each party and counsel on the offer and counteroffers in a series of separate caucuses.

If a settlement is reached, a binding memorandum of understanding may be signed by the parties pending preparation and signature of a formal settlement agreement or the parties will prepare a full settlement agreement immediately after a resolution is reached.

If no agreement is reached, mediators typically encourage the parties to continue discussing settlement options. Many mediators continue working with the parties after their face-to-face meeting and even during trial to discuss settlement proposals or other ADR options that may help the parties break the impasse.

2. Court Rule Mediation: MCR 2.411, 2.412 and 3.216

The Michigan Court Rules offer judges tools to help parties effectively participate in ADR process, and in particular, mediation. The following discussion outlines a number of "best practices" that can optimize parties' chances of resolving their dispute through mediation.

Parties may be ordered into ADR processes under MCR 2.410(C). General civil mediation procedures are spelled out in MCR 2.411; domestic relations mediation procedures are addressed in MCR 3.216. MCR 2.412 addresses confidentiality in both settings.

(a) Best Practice: Allow the parties ample opportunity to select their own neutral mediator by a certain date, making clear that if parties do not notify the court of their selection by that time, a mediator will be selected and assigned pursuant to MCR 2.411.

The parties' ability to select their own mediator is a critical first step in in the process because the parties need to be able to trust and respect their mediator. Just as people prefer to identify their own doctor, accountant, or other professional, the notion of trust-building has been found to be key in a mediator's ability to help parties identify solutions to their problem.

Additionally, a judge's unilaterally assigning or recommending a mediator to a case is prohibited under MCR 2.411(B)(4) and MCR 3.216(E)(4):

> The court shall not appoint, recommend, direct, or otherwise influence a party's or attorney's selection of a mediator excepts 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.

While a judge may be tempted to select or strongly recommend a specific mediator that the judge feels could "get the job done," a judge's prompting to use a specific mediator actually works against parties' ability to find the most satisfactory solutions to resolve their dispute. The parties' agreement in selecting a mediator is a critical first step to their taking the mediation process seriously. To successfully engage in mediation, parties need to establish trust and confidence in the mediator, neither of which may apply to a mediator one or more parties would not have preferred.

If the parties are unable to identify their own mediator, the ADR clerk should make a random assignment of a mediator from the court-approved roster. MCR 2.411 details the process for selecting a mediator.

(b) Best Practice: Experiment with identifying and engaging a mediator during the case management conference who can work with the parties to address discovery and other case management activities. Even if parties are unable to resolve all of their issues, the mediator can help narrow the issues that would otherwise require the court's attention.

Until recently, court orders essentially parachuted mediators into the litigation at a very late stage, frequently after unsuccessful case evaluation. At that point, parties have already expended considerable resources and time to get to a point where statistics demonstrate that 98 percent of civil cases will be disposed prior to trial. From a court administration standpoint, it bears asking why courts would order mediation at this late stage since there are virtually no cost savings to the parties or the court and there is a near certainty that all but two percent of the cases will be disposed.

Newer evidence-based practices involve judges—again as dispute resolution advisors—helping parties assess mediation options far earlier in the litigation, for example to help resolve early discovery disputes. Instead of a mediator parachuting in during the last hours of litigation, an earlier identified mediator could help parties remove obstacles in the litigation that ultimately leads to an earlier omnibus settlement of the dispute.

(c) Best Practice: Establish a realistic date by which mediation should be completed.

Establishing firm dates for the conclusion of mediation helps mediators focus the parties on preparing for and attending a mediation session. In general, the court should not adjourn previously scheduled court dates and events for mediation to take place.

(d) Best Practice: Orders to mediate should address key mediation components.

Key mediation components include:

(1) Who will be required to attend and be physically present during the entire course of the mediation (MCR 2.411 contemplates the attendance of trial counsel and not just another lawyer in the firm).

(2) Whether party participation may be by electronic means or must be in person.

(3) Whether confidential mediation summaries will be exchanged.

(4) Whether the attendees must have full settlement authority.

(5) How the mediation fee will be allocated among the parties and when payment is due.

(e) Best Practice: Require mediators to report to the court on the status of the mediation using SCAO-approved form MC280.

The form was developed to standardize the terms of the report a mediator provides to the courts and to ensure the mediator does not disclose confidential information. Judges should not seek any additional information from the mediator or the parties beyond the information appearing on the SCAO form.

(f) Best practice: Develop case referral protocols with Community Dispute Resolution Program centers.

MCR 2.410(B)(3) permits courts, through their ADR Plans, to develop referral relationships with Community Dispute Resolution Program centers. The centers provide mediation in a wide variety of case types, and services are either low cost or free. An outline of centers' services appears in Appendix III.

3. Domestic Relations Mediation (MCR 3.216)

"Mediation" under this rule is essentially the same process as outlined above, however, MCR 3.216 also provides for "evaluative mediation," which offers parties the option of having a willing mediator recommend proposed settlement terms for any issues that the parties cannot resolve on their own. The court cannot order parties to evaluative mediation. Parties must voluntarily participate in this process and they are not bound by any recommended terms provided by the mediator. The mediator's proposed settlement terms are not revealed to the court and there are no sanctions for rejecting the mediator's proposals.

Evaluative mediation can be a useful tool where parties are unable to generate options and would like the mediator to offer recommendations. However, once the recommendations are provided, the mediator risks losing effectiveness as a mediator in facilitating further settlement discussions because the mediator may be perceived as exhibiting favoritism or as no longer being neutral. For this reason, evaluative mediation generally takes place toward the end of the parties' negotiations and after they have truly failed to reach consensus.

The "best practices" identified for general civil mediation also apply in the divorce context, with several additions.

(a) Best Practice: At a minimum, courts should check for active personal protection orders and open child abuse and neglect cases, and if found, should not order the parties to mediation without first conducting a hearing.

Under MCR 3.216(C)(3) parties who are subject to a PPO or who are involved in a child abuse and neglect proceeding may not be referred to mediation without a hearing to determine whether mediation is appropriate. Additionally, under MCR 3.216(D)(3) additional cases that may be exempt from mediation include:

(1) Child abuse or neglect.

(2) Domestic abuse, unless attorneys for both parties will be present at mediation sessions.

(3) Inability of one or both parties to negotiate for themselves at the mediation, unless attorneys for both parties will be present at the mediation sessions.

(4) Reason to believe that one or both parties' health or safety would be endangered by mediation.

(5) For other good cause shown.

Careful attention to domestic violence screening will help ensure that parties are not inappropriately brought together. Additional information and guidance for courts on domestic violence appears in the SCAO publication, "Domestic Violence Screening Protocol for

Mediators."[7]

(b) Best Practice: Experiment with identifying and engaging a mediator during the case management conference who can work with the parties to address discovery and other case management activities. Even if parties are unable to resolve all of their issues, the mediator can help narrow the issues that require the court's attention.

A growing number of courts are experimenting with ordering parties to mediation early in the litigation, chiefly to create a pattern of "problem solving" in the divorce process. The traditional adversarial approach to divorce is viewed by many as only contributing to an escalation of conflict that may continue for many years after parties obtain their judgment of divorce. Unaddressed prejudgment issues frequently result in the "frequent filers" submitting complaints to the friend of the court (FOC) office, where, not surprisingly, the adversarial process has resulted in a pattern of complaints and hearings.

4. Friend of the Court Mediation (MCL 552.513)

In all Michigan jurisdictions, the friend of the court offers mediation services either directly or by contract through a third-party provider (oftentimes Community Dispute Resolution Program (CDRP) centers). The mediation process is much like that described above: parties are encouraged to share options and preferences, ideally with the result that they find an option that best works for everyone. Unlike mediation conducted by private mediators or through CDRP centers, in FOC mediation:

(1) Staff mediators are usually constrained by time, for example, to be able to work with parties for between one and three hours.

(2) The parties do not have an opportunity to select their own mediator; the mediator is assigned by the friend of the court.

(3) Mediation frequently does not resolve all of the issues in the divorce, just those related to the children. This means that parties may nevertheless need to work with a private mediator as to the financial issues, which essentially bifurcates their dispute resolution processes.

If the dispute is resolved, a consent order is prepared. If no agreement is reached, the case proceeds to investigation or hearing.

[7] http://courts.mi.gov/Administration/SCAO/OfficesPrograms/ODR/Documents/Domestic%20Violence%20Screening%20Protocol.pdf

5. Mini-Trial to Party Representatives

Best Practice: Inquire whether a nonbinding mini-trial may help parties assess the strengths and weaknesses of their positions either as a stand-alone process, or as a component of mediation.

Mini-trials can be a very useful ADR process in complex litigation where important business interests are at stake, or the potential damages are high. Typically, a neutral facilitator and high-level representatives of the parties with full settlement authority on behalf of each party serve on a panel that hears presentations from each party's counsel.

The goal of the mini-trial is to simulate a trial event that underscores to the party representatives the risks and uncertainties of litigation, the potential weaknesses in their respective cases, and to provide each panel member the opportunity to form an impression of the case that can then lead to facilitated settlement negotiations.

Each party's counsel makes an abbreviated best-case presentation to the panel and, depending on the ground rules established for the mini-trial, the panel members may ask questions or seek clarification of issues during the course of the presentation. Settlement discussions then take place at the conclusion of the presentation.

Depending on the interests of the party representatives, the ensuing discussion might be "meet and confer" conversations where counsel and the mediator are not present, or the party representatives might meet with counsel and the mediator and move immediately into mediation. The neutral, if requested, may also give an opinion (typically during a private confidential caucus) on the presentation of the parties, the extent or allocation of liability, and the likelihood of success of each party's case.

A mini-trial is useful when the parties want to retain control of the outcome of the case, but prefer either a more formal legalistic procedure to reach that outcome or an opportunity to educate the decision-makers on the risks of the litigation and the strengths and weaknesses of their positions. Like the summary jury trial, it also has the benefit of providing a party with a "day in court" without the cost of a formal trial on the merits.

The mini-trial is typically held after the parties have completed most or all discovery and preliminary settlement discussions have come to an impasse. For example, a standard mediation might be suspended by the parties to conduct a mini-trial when one or all of the parties do not believe the opposing party has a full appreciation of the risks of litigation or a party representative desires additional information and input about the strengths and weaknesses of her/his case or the quality of the opposing party's case. In this situation the mediator will typically act as the neutral panel member at the time of the mini-trial and enforce the ground rules established by the parties for the mini-trial.

Although considered a less expensive process than conducting a jury trial, a summary jury trial, a mock jury trial, or a complete mediation-arbitration (med-arb) process, the mini-trial can be expensive and may not be warranted when the amount or issues in dispute does not justify the

cost. It may not be effective where all the parties to the dispute have a realistic picture of each other's case or where one side is not motivated to alter its settlement position regardless of the presentations made during the course of a mini-trial. If, however, the decision-makers have an open mind, and are willing to modify settlement positions, it can be a very useful technique to reinvigorate discussions that have come to an impasse or to commence settlement discussions after all the appropriate discovery has been completed.

6. Private Dispute Resolution Advisors

Best Practice: In potentially complex or contentious litigation, inquire whether engaging with a private dispute resolution advisor could help tailor a dispute resolution plan best suited to the issues in the case and the interests of the parties.

The private dispute resolution advisor (DRA) is a neutral person who meets with the parties once a dispute has arisen and helps tailor a dispute resolution plan that is best suited to resolving the specific dispute in a cost-effective manner and achieving the interests of the parties.

Although originating in the construction industry, its efficacy is not confined to that industry. The DRA can be selected by the parties postdispute to assist in creating an appropriate ADR methodology at any time after a dispute arises. Two scenarios illustrate how engaging a DRA may be helpful.

Scenario A: The dispute involves whether ABC Company has used its "best efforts" in marketing a particular product manufactured by XYZ Company. The amount in controversy involves approximately $100,000.00.

Scenario B: There is a dispute between the parties over whether or not parts supplied to Buyer meet the contract specifications and, if not, whether Supplier will incur the costs of a potential recall and indemnify Buyer. The damages that will potentially be sustained by Buyer are in the range of $10,000,000.00 to $15,000,000.00. Any litigation between Buyer and Seller has all the earmarks of being a classic "battle of experts."

In both scenarios the parties' selected a neutral DRA. The DRA met with the parties and their attorneys and developed an agreed-upon dispute resolution methodology specifically tailored to resolve these vastly different disputes. In Scenario A the parties agreed to the following graduated or "layered" dispute resolution steps:

(1) The voluntary exchange of specified information.

(2) A hybrid facilitative mediation – arbitration last offer opt-out process within two weeks of the exchange of information.

(3) If the mediation is unsuccessful the mediator will become an arbitrator.

(4) The arbitration will be governed by the following agreed-upon rules: the parties will stipulate to those facts that are not in dispute at the outset of the arbitration, there will

be no formal discovery, no more than four arbitration witnesses will be presented by each side, the arbitrator's award must be the last demand made by ABC at the conclusion of the mediation or the last offer made by XYZ.

(5) The arbitration proceedings and award will be confidential and the fact of and results of the arbitration will not be disclosed to any party except as necessary to enforce the arbitration award.

Highlighting the creativity a DRA brings to the process, the dispute resolution mechanism established in Scenario B is entirely different:

(1) The principals will meet and confer.

(2) If no agreement is reached there will be an expert hearing and representatives with settlement authority must be present.

(3) Immediately following the expert hearing, the representatives will meet and confer.

(4) If a settlement is not achieved the parties will participate in a nonbinding neutral expert evaluation who will issue an opinion.

(5) If the parties do not accept the decision of the neutral expert the parties will participate in a mediation.

(6) If the mediation is unsuccessful, the parties will have the option of proceeding to litigation or arbitration.

(7) The parties agree that during any litigation or arbitration they will be governed by the following: the litigation budget will not exceed $500,000 by either party; an agreed-upon protective order will be presented to the court; an agreement to voluntarily exchange specified information before any scheduling conference; the number of depositions that will be taken will be limited to 10 for each party; an agreement to engage in another mediation no later than 20 days after the discovery cut-off date or such earlier date as the parties might agree; and, the "losing party" will pay the costs of litigation incurred by the prevailing party but in no event will the costs so awarded exceed $500,000.00.

The scenarios underscore the significant flexibility that a private dispute resolution advisor may bring to the dispute resolution process. Rather than using boilerplate dispute resolution provisions that can be a "one size fits all" approach, DRAs can be as flexible and innovative as the parties desire.

VI. Evaluative ADR Processes

1. Mini-trial to a Mock Jury

Best Practice: Consider raising whether a mini-trial would be helpful when the amount in dispute is substantial and it appears that a party desires its "day in court" without being subject to the risks and finality of an actual trial.

The "mini-trial to a mock jury" is typically a one- or two-day confidential process where "mock" jurors will hear a brief presentation by the attorneys representing the disputants and then rendering an advisory verdict. The parties establish the groundrules for the mini-trial that may include the jury's decision not being disclosed immediately to allow the parties to engage in mediation until an impasse is reached. In the alternative, the jury's verdict may be announced immediately, which often becomes the starting point for settlement discussions between the parties or a catalyst for further settlement discussions.

Mini-trials are typically a later stage ADR technique after all or most discovery and preliminary motion practice has been completed and can be designed in any number of ways. It can involve:

(1) Formal presentations by all the parties.

(2) A formal presentation by one or more of the parties and a surrogate presentation for any "absent" party.

(3) Live but truncated testimony of witnesses or "simulated" testimony (i.e., reading of depositions, etc.).

(4) Viewing and discussion of demonstrative evidence and exhibits.

(5) Confidentially viewing the deliberations of the mock jury.

Typically, the mock jury selected by the parties reflects the demographics of an actual jury pool in the jurisdiction involved. The process is presided over by a neutral, who, like the hearing officer in a summary jury trial, may be called upon to make evidentiary rulings, ensure the format agreed to by the parties is followed, and instruct the jury on the applicable law. Following the jury rendering a verdict, the attorneys may pose questions to the jurors to assess the strengths and weaknesses of their case and to identify the most persuasive (or unpersuasive) arguments in their presentation.

This process is useful when the parties would like a neutral opinion of typical jurors. For example, it may become apparent during the mediation process the parties view potential liability and the scope of recoverable damages in a very different way that causes the mediation to come to an impasse. Or, during the course of the litigation it may become apparent to the parties that commencing mediation may be futile until one or the other of the parties becomes more "realistic" on the issues of liability and exposure. In these examples, mediation may be

adjourned to provide for a mini-trial; in the alternative, it might be pursued before mediation is commenced.

In addition to fostering further settlement discussions, the mini-trial is also viewed as an excellent trial preparation device. The neutral who presides over the mini-trial will often be asked to mediate the remaining contested issues.

In short, the mini-trial has the potential of being an effective "icebreaker" for opening settlement negotiations or reinvigorating stalled settlement discussions. It also gives clients a sense of having had their day in court, which is particularly helpful when the real trial would be very lengthy or costly.

The process itself can be costly, however, because the mock jurors and the neutral receive compensation. Counsel also spends considerable time in trial preparation but, should the matter proceed to a trial, the time in preparation is well spent.

Although less expensive than a standard jury or bench trial, if the amount of potential exposure is not significant, or a case does not involve important principles and issues that have the potential of a significant or long-term economic impact, the cost and expense associated with a mini-trial may not be warranted. That is particularly true if a party will not be influenced by a nonbinding verdict. In these situations the parties may want to consider other ADR techniques such as a mini-trial or a med-arb hybrid.

A critical component of the process is the parties' establishing the procedure it will follow. If all sides to a dispute intend to participate, all counsel must agree on an acceptable procedure.

2. Early Neutral Fact Finding

Best Practice: Inquire whether the parties would benefit from early "fact finding" by a mutually agreed upon expert.

Disputants have effectively used early neutral fact finding when confronted with highly technical and complex litigation involving scientific, business accounting, intellectual property, medical care, insurance coverage, class action certification, and similar issues.[8] In this process, the parties retain a subject matter expert to investigate and evaluate the technical, scientific, and factual issues involved and to prepare a nonbinding written report.

The parties will often submit the necessary materials and arguments to the neutral expert and cooperate with the neutral expert's request for information and data. Counsel may also confidentially meet with the neutral expert, often supplemented with the input of the party's retained expert, to explain the bases for their respective positions. The parties may agree that the neutral's report will be kept confidential and used only for settlement purposes. Alternatively, the parties may agree to use all or a portion of the written report at trial or in another ADR event as the baseline or expert opinion to which all parties will be bound.

[8] See e.g., Mark Cooper and Hal Carroll, Business Courts, Insurance Coverage and Indemnity Disputes and Early Expert Evaluation, 6 Journal of Insurance and Indemnity Law 1 (Jan. 2013).

Use of the neutral's report as binding, particularly in a highly technical case, may be of great use to the judge or jury because it removes or narrows the issues from their decision-making authority. This eliminates the inherent risk of allowing laypersons with no subject matter expertise to decide a technical or scientific issue critical to the parties' case and often streamlines the trial by reducing the time and resources necessary to "educate" the jury on all the technical issues involved.

The expert neutral's report may not give rise to a dispositive opinion on the ultimate issue(s) in dispute, but it can be very helpful in narrowing the areas of disagreement between the parties.

Even if the matter is not immediately resolved, issues can be narrowed, and the discovery process streamlined to more effectively manage the case.

Although typically less expensive than a jury or bench trial, the costs associated with retaining the services of an expert neutral may not be appropriate for all cases, particularly where the process will not lead to a resolution and the amount in dispute is not significant. Such experts are also not particularly helpful where the primary concerns involve intangible issues such as emotional distress, pain and suffering, loss of reputation, etc.

3. Expert Hearing

Best Practice: Inquire about the potential usefulness of an expert hearing with the parties when:

(a) The parties indicate they each have multiple experts who will forcefully testify as to their positions, e.g., the case is postured as a "battle of the experts";

(b) Significant complex or technical issues could be clarified, narrowed, or resolved either to result in a settlement, or as a precursor to mediation or trial; or

(c) Parties could benefit from evaluating the credibility and persuasiveness of the various experts.

The process involves a confidential expert witness presentation convened and facilitated by a neutral person. The neutral will typically review the reports of the opposing experts and, after consultation with the experts and opposing counsel, identify the areas of agreement and clarify the areas of disagreement. The opposing experts then give a presentation to the decision-makers and their counsel who primarily addresses the areas of disagreement in accordance with ground rules established by the neutral and the attorneys. The neutral presides over the presentation to ensure that parties comply with the agreed upon rules.

During the presentation, the opposing experts are often called upon to answer questions that will be posed by the other expert, opposing counsel, and the decision makers. The process is intended to underscore the risks and uncertainties of the litigation, narrow and focus the key issues in dispute, and is often immediately followed by a mediation using the same neutral who presided over the experts' presentations. The expert presentation will often last in the range of

two to three hours and can supplant the need of counsel's presentation during the joint session that typically initiates a standard mediation.

Even if not successful in resolving the matter, the process and subsequent mediation can achieve significant cost savings by narrowing the key issues, focusing on any remaining discovery, and developing a more efficient litigation plan that leads to subsequent negotiations.

Like early neutral evaluation, this technique has a number of benefits:

(1) Potentially limits and refines the issues that will be involved in the ultimate resolution of the dispute, streamlining the discovery process to address only those issues.

(2) Permits the parties to the dispute to identify the potential risks of ongoing litigation or arbitration.

(3) Typically less expensive than a nonbinding early neutral evaluation, although the parties will not have the benefit of a truly "independent" evaluation.

(4) Allows the parties to evaluate the effectiveness of the presentations opposing experts will make to a finder of fact.

(5) It can be an effective mechanism to modify the settlement positions of the parties.

(6) Fosters the productivity of more "facilitative" ADR techniques where the parties require or need an "evaluation" of the merits of their case prior to the mediation event and the parties do not require or desire a highly evaluative mediation process.

(7) Typically requires maturity of the dispute and the prior exchange of information and discovery.

Like other ADR processes that involve paid neutrals and experts, this process can be expensive and may not be appropriate for smaller disputes.

4. Early Neutral Evaluation

Best Practice: Consider raising this process in complex litigation when one or more parties are having difficulty in proportionately litigating their case or focusing their litigation plans on relevant legal theories and factual issues.

Early neutral evaluation provides parties, who may or may not be represented by experienced litigators and trial attorneys, with an assessment of the strengths and weaknesses of their case, typically from an experienced litigator with subject matter expertise. This happens very early, before significant discovery has taken place. It is an informal, confidential, nonbinding process where the parties select the neutral to evaluate the issues and submit a report. Each side presents the factual and legal support for its position, which the neutral then discusses with the parties. The primary purpose of the discussion is to identify the areas of agreement and disagreement and

to identify the key factual and legal issues that will bear upon the ultimate question of liability and potential damages. The evaluation can be a potent tool that helps the parties devise a focused discovery and motion strategy reducing the costs and delay in reaching a disposition of the case.

For example, in a potential class action, the early neutral evaluation may result in the parties agreeing the only issues are whether the class meets the requirements of MCR 3.501(c) and (d). The parties can then agree to focus their preliminary discovery efforts on addressing these two preconditions to class certification and the timing of the motion practice to determine whether class certification will be granted.

At any time during the process, the neutral may be requested to explore settlement possibilities with the parties. However, because the neutral is retained very early in the case, the matter may not be ripe for resolution because one or both parties need time for discovery. In this case, the neutral may suggest that initial discovery be limited to that which each party believes is necessary for a meaningful mediation or an evaluation of issues that require resolution before mediation takes place. The parties then focus their discovery on those matters and then engage in the mediation. If unsuccessful in resolving all the issues at the mediation, the parties will engage in further discovery, motion practice, and otherwise prepare for a trial.

The neutral plays two primary roles: to play the "devil's advocate" with both parties, and to provide a vehicle for aggressive case management. The process results in parties' identifying the strengths and weaknesses of their cases and the risks the litigation poses. It can also educate a recalcitrant litigant who may have an unrealistic expectation of the outcome of the litigation.

VII. Case Evaluation

1. Private Case Evaluation

Case evaluation is a process where the parties typically work with three neutrals, at least two of whom have subject matter expertise in the nature of the dispute. If the parties cannot agree on the three neutrals to be selected, it is not unusual for each party to select a neutral whose opinion they respect and then ask those neutrals to agree on the selection of the third neutral. The parties then make a presentation to the neutrals as to the merits of their case and the neutrals will place a value on the case based upon their expertise and experience. It is most helpful if the neutrals agree on the value of the case but there is always the possibility the three neutrals will not agree.

Considerations relevant to selecting this technique include the following:

(1) There is significant disagreement between the parties on the value of the case and such an independent evaluation will be helpful to the parties in reassessing their settlement positions.

(2) The significant issues dividing the parties involve liability or economic damage issues and not equity or nonmonetary issues.

(3) There is a desire to educate a party or client on the realistic value of the case.

(4) This process might be avoided if the parties select a mediator who is a subject matter expert and willing, if requested, to provide a confidential evaluation during the course of the mediation or who is willing to break an impasse during the mediation by providing, if requested, a "mediator's recommendation."

(5) The parties are not comfortable with the constraints of traditional case evaluation pursuant to MCR 2.403 and desire to select their own case evaluators and design the ground rules for the case evaluation event.

(6) In tort or other cases that may be subject to mandatory case evaluation pursuant to MCR 2.403, the parties may believe the expense involved in a private case evaluation provides no significant cost benefit.

Once the neutrals provide a dollar value at the conclusion of the case evaluation their involvement in the matter ends and the parties might pursue other ADR techniques through other providers.

One downside to using this process is that if a party has a very "favorable" case evaluation, the settlement position of that party may become entrenched, making resolution through mediation far more challenging. It may be strategically more appropriate to pursue this option only after mediation has been attempted.

2. Court Rule Case Evaluation; MCR 2.403

Best Practice: Explore with parties whether earlier ADR processes may be more suitable to their specific case. If case evaluation is used at all, it should generally take place after mediation.

Most case evaluations in Michigan are conducted pursuant to MCR 2.403, and by statute, the process is mandatory for all tort cases. MCR 2.403 case evaluation is the only Michigan ADR process through which penalties may automatically attach for not accepting the outcome of the process. Failure to receive a more favorable trial verdict than the evaluation award may result in penalties being assessed to the party rejecting the evaluation. MCR 2.403(O).

The evaluation panel is comprised of three attorneys selected by the court through a blind rotation system, although there is the opportunity for the parties to select a special panel of attorneys who are experienced in the type of dispute involved (MCR 2.204(C)[2]) if the jurisdiction maintains such a sub-list. In the alternative, the parties may stipulate to a special panel (MCR 2.204(C)[3]).

There are significant limitations to the benefits of this process:

(1) The panel of evaluators, although required to meet certain minimal qualifications as established in each county, are not selected by the parties and the parties may not

attach the same significance to the evaluation as when the parties select the evaluators. For example, the evaluators may or may not have any subject matter expertise.

(2) The presentations made to the evaluators by counsel are generally not permitted to exceed 15 minutes by each party unless there are unusual circumstances. If dealing with a complex case, the concern is that such a limitation will not provide the opportunity for a truly meaningful evaluation.

(3) While parties may attend the case evaluation presentation, they are generally not notified of their ability to attend or participate.

In determining whether or not to accept the case evaluation award, the parties have a limited opportunity to explore noneconomic terms and conditions that might prove beneficial. For example, even if one party "rejects" the case evaluation, and the opposing party "accepts" the evaluation, a resolution can still be achieved if the parties are willing to continue the negotiation process. Frequently, the rejecting party will later settle the matter at or near the amount of the case evaluation with the inclusion of noneconomic conditions. At this point, however, the rejecting party's negotiation position is typically far weaker than had mediation been conducted prior to the case evaluation. Moreover, even if a party is "satisfied" with the evaluation amount, if this is the only ADR strategy relied upon, then the opportunity to obtain an earlier, more favorable or "interests-based" and creative resolution for a client was squandered.

A recent study conducted by the SCAO questioned the effectiveness of the MCR 2.403 case evaluation process.[9] As a result, some courts either do not routinely schedule case evaluation unless and until other ADR options have been attempted, or routinely grant waivers of the process where both parties agree that the process, given other ADR options that are being pursued, will not be cost effective.

Some judges believe that the "minimal" cost of obtaining a value through case evaluation merits ordering a substantial component of their docket to the process, particularly in comparison to ordering parties to mediation where parties would generally retain a mediator at an hourly or per diem rate.

The total costs of case evaluation exceed the $75 per party fee, however. The additional costs include research and brief writing time, as well as time spent at the case evaluation hearing. Also, in the SCAO study referred to in note 9, cases in which mediation was the sole ADR process resolved 200 days sooner on average than cases that involved case evaluation followed by mediation. The additional transactional costs incurred by the parties during this 200-day period, ostensibly would far outweigh the costs of having completed mediation prior to case evaluation.

On the court side, because case evaluation typically results in low disposition rates (in the largest jurisdictions, approximately 15 percent within 28 days of the process), court staff spend

[9] "The Effectiveness of Case Evaluation and Mediation in Michigan Circuit Courts," Report to the State Court Administrative Office, Michigan Supreme Court (October 31, 2011). See note 9.

considerable time noticing hearings, convening and managing the panels, processing adjournments, and in some jurisdictions, managing fees and brief exchanges.

In contrast, mediation can generally be expected to result in 50 percent "at the table" settlement rates, with another 20 percent of cases being settled prior to subsequently scheduled court events. Other than issuing an order to mediation, courts have no additional role in administering the process.

This is leading a growing number of courts to conclude that if case evaluation is to be held at all, it should take place only after mediation has been attempted.

VIII. Adjudicative ADR Processes

Best Practice: Arbitration-related processes are party-driven decisions that can be explored with or without the court's involvement. The court may never order a med-arb process absent a voluntary stipulation by the parties.

1. Mediation-Arbitration Hybrids

The mediation-arbitration hybrid process (typically referred to as "med-arb") begins with traditional mediation. If the parties reach an impasse on some or all of the issues, the mediator becomes the arbitrator, conducts a hearing on the issues not resolved during the mediation, and renders an award on the open issues. Alternatively, the parties may select a neutral different than the mediator to act as the arbitrator (med-arb different).

Med-arb was developed to provide an opportunity for a mediated resolution of some or all of the issues with the assurance of a final, timely, and cost-effective resolution on the open issues through arbitration. Even if a global resolution is not achieved, the effective use of this process frequently results in a narrowing of the items subject to arbitration as the parties often reach agreements on a variety of substantive as well as procedural matters during the mediation process. It also tends to expedite the arbitration hearing and testimony because of the reduction in contested issues and/or the familiarity of the arbitrator with the case. Because a mediator turned arbitrator has familiarity with the facts and context of the dispute, many of the facts introduced at the arbitration can be accomplished by stipulation. The result is a cost saving, simplification of the items subject to arbitration. [10]

Alternatively, the parties might proceed through arbitration where, after the hearing is conducted, the arbitrator prepares a written award but does not immediately disclose the decision to the parties. Rather, the arbitrator or other neutral becomes a mediator and engages the parties in a traditional mediation to determine if a resolution can be achieved (arb-med). If a resolution is not achieved, the arbitration award is issued on the unresolved issues.

The hybrid med-arb process is controversial in that some mediators believe it negatively impacts the dynamics of traditional mediation. For example, the mediator is often told highly

[10] Martin Weisman, Med-Arb: A Time and Cost Effective Combination for Dispute Resolution, 3 Dispute Resolution Magazine, Vol. 9 (Spring 2013).

confidential information in private meetings (the caucus) that is not shared with the other party. If the mediator then becomes the arbitrator and the confidential information is not presented at the arbitration, some maintain there is a conflict for the mediator turned arbitrator. Some believe this conflict also has a "chilling effect" on the willingness of the parties to make confidential disclosures in mediation, thus making settlement at mediation more difficult. Where arbitration occurs first, some question the ability of the arbitrator to maintain neutrality in the subsequent mediation.[11]

Other mediators believe that if the parties are fully informed, the confidentiality issues can be effectively managed, and that med-arb can be an effective ADR tool. These mediators believe that if the mediation takes place first, the parties will be highly motivated to resolve the matter to avoid the costs and expenses of the arbitration that will take place following an unsuccessful mediation. If the arbitration takes place first, these mediators believe the mediation can be enhanced since there are no "surprises" and the parties have had the opportunity to fully evaluate the strengths and weaknesses of their respective cases.[12]

The parties who have selected the med-arb process with the same neutral believe it achieves significant cost savings and efficiencies, chiefly because they do not have to spend time educating a different arbitrator and mediator as to the factual and legal aspects of the dispute. While there remain legitimate concerns about the practice, med-arb has been an effective and widely used ADR technique by many disputants. In a survey of the ADR practices of Fortune 1000 corporations, it was revealed that 40 percent of the respondents had actually participated in some form of med-arb procedures.[13]

Numerous hybrids of the med-arb process include:

(1) **Med-Arb Same or Same Neutral Med-Arb** This is a mediation followed by arbitration, if necessary, to resolve any issues remaining in dispute. The same person serves as mediator and arbitrator at the request of the parties.

(2) **Med-Arb Different** Here, the mediator and arbitrator are different persons. Both neutrals are selected before the process begins and if mediation does not successfully resolve all the issues, the mediator shares with the arbitrator what agreements, if any, were reached in the mediation. Settlement terms achieved in the mediation phase are adopted by the arbitrator, who then determines the unresolved issues. The process is selected to avoid even the potential of conflicts discussed above.

(3) **Med-Arb Different/Recommendation** This process is identical to "med-arb different" except that if the participants do not reach a voluntary agreement during the mediation the mediator submits a "mediator's recommendation" to the arbitrator who may choose at the conclusion of the arbitration hearing to adopt, follow, or not follow

[11] Brian A. Pappas, "Med-Arb: The Best of Both Worlds May Be Too Good to Be True*,"* 3 Dispute Resolution Magazine Vol. 9 (Spring 2013); Barry C. Bartel, "Med-Arb as a Distinct Method of Dispute Resolution: History, Analysis and Potential," 27 Willamette L. Rev. 661 (1991).
[12] Edna Sussman, "Developing an Effective Med-Arb/Arb-Med Process*,"* New York Dispute Resolution Lawyer, Vol.2, No.1 (Spring 2009) at 71-74; Weisman, supra.
[13] Thomas J. Brewer and Laurence R. Mills, "Combining Mediation and Arbitration," 54 Disp. Resol. J. 32, 34 (1999)

the mediator's recommendation. Typically, in an effort to break the impasse that has stalled the mediation, the parties receive the "mediator's recommendation" before the arbitration.

(4) **Co-Med-Arb** In this format, the mediator and the arbitrator are different but jointly conduct a fact-finding hearing that is followed by mediation without the arbitrator. If the mediation does not resolve all the issues, the arbitrator takes over and ultimately issues an award on the unresolved issues.

(5) **Med-Arb Opt Out** This is a modification of the original med-arb process. Once mediation is completed, and before arbitration begins, each party is entitled to independently determine if a different neutral should be appointed as the arbitrator. Although this may involve a delay in beginning the arbitration, some parties are more comfortable with this option.

(6) **Arb-Med** This process reverses the sequence of med-arb so that mediation follows the arbitration. Typically, the arbitrator will conclude the arbitration hearing and then "seal" the award so the parties do not know the decision. The arbitrator then becomes a mediator of the dispute. A variation of this process is when the mediator is a different person than the arbitrator, arb-med different.

(7) **Med-Arb LO (Last Offer)** This process resembles med-arb except that in the arbitration, if the parties have not reached a voluntary settlement through mediation, each party submits a last offer to the arbitrator at the conclusion of the arbitration hearing, and the arbitrator must choose between one of the two final offers.

Another variation of this approach is the "baseball" arbitration process. The parties make their last best offer at the conclusion of the mediation and the arbitrator, after the hearing, is required to select which of the last best offers made at the mediation is the most appropriate that then becomes the arbitrator's award as to those issues that are unresolved during the mediation phase. Regardless of the timing in which the last best offer is made, the arbitrator's authority is specifically limited in that one or the other last best offer must become the award.

(8) **Med-Arb Hi-Low** In this process, during mediation, the parties agree that whatever the decision of the arbitrator may be, the amount the defendant will pay will not exceed a certain amount (the high) and even if the arbitrator finds entirely in the favor of the defendant and "no faults" the plaintiff, the plaintiff will receive a guaranteed minimum amount (the low). If the arbitration award is between the high and the low, then the decision is binding.

Typically, the arbitrator is not aware of the high-low agreement and issues an award independent of the high-low agreement of the parties. This arrangement is often utilized to minimize the risk to the respective parties and as an inducement to reach an agreement to arbitrate.

(9) **Mediation Windows in Arbitration** This process includes opportunities for mediation to take place during an ongoing arbitration. Mediation can take place at any time during the arbitration, between the hearings, and on more than one occasion. This makes the med-arb process very flexible and creative especially when the same neutral is used throughout the process.

This list of the various mediation/arbitration hybrids reflects the significant opportunity the two ADR processes present for the parties to creativity design a process that bests meets their goals and objectives. The med-arb hybrids also underscore that ADR is not necessarily a single event but can be strategically "staged" in any number of variations.

2. Arbitration in General Civil Cases

Courts generally do not manage cases involving arbitration, except to enter a judgment based on an arbitrator's award. As noted above, however, the parties may wish to create a hybrid ADR process that includes both mediation and arbitration.

3. Arbitration in Domestic Relations Cases[14]

Under the Domestic Relations Arbitration Act (DRAA), divorce litigants may stipulate to binding arbitration conducted by an attorney following an acknowledgment on the record that the parties have been informed that arbitration is voluntary, the award is binding, and the right of appeal is limited. A court may not order this process without the parties having agreed to submit their matter to binding arbitration through a written agreement to arbitrate. Unlike domestic relations mediation, in which the parties themselves generate options for resolving differences, an arbitrator renders an award governing the matters predetermined by the parties in their arbitration agreement.

The award is subject to an independent review by the court to ensure the interests of any minors are protected.[15]

4. Summary Jury Trial

Best Practice: Consider raising this process when the cost of conducting a standard trial is disproportionate to the amount in controversy.

Note: By Administrative Order No. 2015-1, the Michigan Supreme Court authorized the 16th Circuit Court and other courts to engage in pilot projects testing the effectiveness of the summary jury process.[16]

[14] MCL 600.5070 *et seq*.
[15] MCL 600.5080 (1)
[16] The Order appears here: http://courts.mi.gov/Courts/MichiganSupremeCourt/rules/court-rules-admin-matters/Court%20Rules/2014-24_2015-03-25_formatted%20order_AO%202015-1_Summary%20Jury%20Trial.pdf

A summary jury trial is an abbreviated trial in which parties voluntarily select a mutually agreeable hearing officer who presides over a jury drawn from the court's standard jury pool. [17] Typically, the jury will consist of no more than six individuals and each side is limited to two peremptory challenges. The voir dire is limited and is usually conducted by the hearing officer.

The process has been successfully used in other states in cases where the amount in controversy is not sufficiently large to justify the cost and expense of a full, traditional trial, but where the parties prefer a binding decision from a jury rather than an arbitrator.[18]

Parties have considerable latitude in agreeing on the procedures that will govern the process and the presentation of the evidence. Typically, parties agree on the following considerations:

(1) Number of witnesses to be called.

(2) Admissibility of depositions and affidavits.

(3) Right to issue subpoenas.

(4) Records (such as medical records and test results) that will be admitted without the usual requirements of authentication and other limiting rules of evidence.
(5) Jury instructions.

(6) Waiver of the right for a directed verdict, motion to set aside the verdict, or the filing of motions for additur or remittitur.

The role of the hearing officer is to ensure that procedures are followed as agreed to by the parties, make any necessary evidentiary rulings, and instruct the jury. The jury's verdict is binding and not appealable.

Although the summary jury trial can be a stand-alone ADR technique, it may also be incorporated into multistaged ADR agreements very similar to med-arb hybrid processes. For example, parties could agree that, following mediation, the mediator will become the hearing officer to preside over the summary jury trial (unless the parties desire a different hearing officer than the agreed upon mediator) to decide those issues that were not resolved at the mediation. Similarly, if the parties agree to a high-low arrangement, then, just like in the med-arb high-low hybrid, the parties will be bound by that agreement should the jury's verdict be higher than the agreed upon "high" or the verdict is below the agreed upon "low." If the jury's verdict falls between the agreed upon high-low, then that verdict will be binding on the parties.

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[17] The summary jury trial process used in the Charleston County, South Carolina courts is one of the best known examples of a court's institutionalizing the process. See Steven Croley, "Summary Jury Trials in Charleston County, South Carolina," 41 Loyola of Los Angeles Law Rev. 1585 (Summer 2008).
[18] "Short, Summary & Expedited, The Evolution of Civil Jury Trials," National Center for State Courts, http://www.ncsc.org/~/media/files/pdf/information%20and%20resources/civil%20cover%20sheets/shortsummaryexpedited-online%20rev.ashx

Using the summary jury trial as the final dispute resolution step avoids many of the various concerns previously discussed that some parties and neutrals may have with the hybrid med-arb process when the mediator becomes the arbitrator. This process may also appeal to parties who want to avoid the costs of a traditional jury trial but are more comfortable with a jury making the binding determination rather than a single arbitrator or an arbitration panel.

5. Friend of the Court (FOC) Referee Hearing

In divorce actions, a referral to the FOC for a referee hearing can be made by a stipulation of the parties or by court order. Referees typically submit recommendations on the issues of custody, support, parenting time, health care, and child care in divorce cases involving minor children, prior to the entry of a final judgment of divorce. However, the court may refer other issues for a referee hearing.

The hearing is private and not held in public, which has appeal to many parties. The process is formal in that Michigan Rules of Evidence are followed, testimony is taken from both lay and expert witnesses as relevant, and a record is made. If the parties are represented, attorneys will serve as advocates and present the client's case.

The private, evaluative, and preliminary determination(s) of the referee may be an impetus to further settlement discussions or may reinvigorate settlement discussions that have come to an impasse.

6. Parenting Coordination

Parenting coordination is a nonconfidential, child-centered process designed to help conflicted divorced and divorcing parents while also helping courts determine the best interest of the children. This approach can be considered when parties are in high conflict and are unable to productively communicate between themselves, making mediation an ineffective option.

A parenting coordinator is a person appointed by the court for a specific term to help parties implement parenting time orders and to help resolve parenting disputes that fall within the scope of issues identified in the court's order. Parenting coordinators make temporary decisions regarding matters that appear in the order of appointment, including: transportation, child transfers, vacation schedules, child discipline, health care management, child care, and school-related matters.

A parenting coordinator can only be engaged by stipulation of the parties. The parenting coordinator's recommended resolution of issues is binding only upon stipulation of the parties; otherwise, the recommendations may be reviewed by a judge and adopted by court order.

IX. Forms

The following forms, related to arbitration and mediation, can be accessed at: http://courts.mi.gov/Administration/SCAO/Forms/Pages/Alternative-Dispute-Resolution.aspx:

(1) Binding Arbitration Award (mc284)

(2) Civil Mediator Application (mc2841a)
(3) Domestic Relations Mediator Application (mc281b)
(4) Domestic Violence Screening for Referral to Mediation (mc282)
(5) Judgment Regarding Arbitration Award (mc285)
(6) Mediation Status Report (mc280)
(7) Motion to Modify Order for Mediation (mc278)
(8) Motion to Remove Case from Mediation (mc276)
(9) Notice Regarding Court Selected Mediator (mc275)
(10) Order for Mediation (mc274)
(11) Order on Motion to Remove Case from Mediation (mc277)
(12) Stipulation for Mediation (mc279)

X. Additional Resources

A host of ADR-related resources appear on the internet. A short selection of items chiefly related to Michigan practice appears here.

Agencies:

1. Michigan Supreme Court Office of Dispute Resolution

http://courts.mi.gov/Administration/SCAO/OfficesPrograms/ODR/Pages/default.aspx

2. Michigan Community Dispute Resolution Program Centers

http://courts.mi.gov/administration/scao/officesprograms/odr/pages/community-dispute-resolution-program.aspx

3. State Bar of Michigan ADR Section

http://www.michbar.org/adr/

4. Michigan Association of Court Mediators

http://zwebdesign.us/macm/

5. Michigan Family Mediation Council

http://www.familymediation.com/

6. Association for Conflict Resolution-Southeast Michigan Chapter

http://www.acrmichigan.com/

7. Collaborative Practice Institute of Michigan Supreme Court

http://www.collaborativepracticemi.org/

Michigan Reports:

1. "Early ADR Summit Meeting Summary," State Court Administrative Office

http://courts.mi.gov/Administration/SCAO/Resources/Documents/standards/odr/ADR%20Summit%20Report%20September%204,%202013.pdf

2. "The Effectiveness of Case Evaluation and Mediation in Michigan Circuit Courts," State Court Administrative Office

http://courts.mi.gov/Administration/SCAO/Resources/Documents/Publications/Reports/The%20Effectiveness%20of%20Case%20Evaluation%20and%20Mediation%20in%20MI%20Circuit%20Courts.pdf

3. "Alternative Dispute Resolution Compendium Demonstrating Cost-Effective and Efficient Resolution of Conflicts," State Bar of Michigan

http://www.michbar.org/adr/pdfs/compendium.pdf

4. "Mediation after Case Evaluation: A Caseflow Study of Mediating Cases Evaluated under $25,000," State Court Administrative Office

http://courts.mi.gov/Administration/SCAO/Resources/Documents/Publications/Reports/Mediation%20After%20Case%20Evaluation.pdf

Appendix I

Pre-Filing Facilitative Processes

The following processes typically take place prior to filing suit, however they may also be used throughout litigation. They are included in this Guide because increasingly, litigants may have attempted one or more process and may try to persuade a judge that because early efforts were attempted and failed, they should not be required to participate in an ADR process post-filing. None of these efforts should prevent a judge from ordering an ADR process despite parties' early attempts to resolve their dispute.

1. Meet and Confer

A "meet and confer" obligation is typically triggered by a contract provision identifying it as the first step in resolving a dispute. The usual meet and confer provision requires representatives (with full authority to resolve the conflict) to meet and exchange opinions and information in a "good faith" attempt to resolve the conflict. Attorneys are typically not present during these informal meetings. If the parties are unable to resolve the dispute at the "meet and confer" stage, the parties might next engage in mediation or the dispute may move to the next step of the dispute resolution mechanism identified in a contract. If no next steps are provided for in the contract, absent a resolution, the parties may proceed directly to litigation.

Even in the absence of a contract, the parties to a dispute with settlement authority can always voluntarily agree to meet and confer, with or without counsel present, in an attempt to resolve the dispute. Although one party is well advised not to directly contact another party represented by counsel for the purpose of discussing a resolution without the consent of the attorney representing that party, as long as permission is obtained, the parties may opt to schedule a meeting and establish their own ground rules for conducting the meeting. One important ground rule is to make sure that the discussions to take place are protected by confidentiality and are not subject to disclosure.

Although these types of informal discussions may take place at any time during the course of the litigation, meet and confer processes are frequently undertaken very early during the life of a dispute, often even before a complaint is filed, before significant litigation costs have been incurred, and before the parties are entrenched in their positions. These meetings can and do provide the parties the opportunity to engage in interest-based bargaining in contrast to positional bargaining. Because parties are communicating directly, and not through third parties, the meetings also reduce the opportunity for misunderstandings that might otherwise arise during the "fog of litigation." Where the parties are motivated to settle, and there is a prior relationship between the parties, meet and confer mechanisms can result in an early resolution that avoids the cost, delay, and risks of further litigation.

"Meet and confer" is not without its risk. One or all parties may not have engaged in all the necessary discovery or have access to all the pertinent facts to reach a fully informed resolution. If the parties are in an unequal bargaining position, do not have comparable bargaining skills, or one party is subject to being unduly influenced or intimidated by the other party, the process may be inappropriate. Some or all of these issues are of particular concern in divorce cases.

However, where these concerns do not exist, and if there is the opportunity to prepare for the conference with counsel and other advisors as appropriate, parties can achieve a mutually beneficial resolution very early in the life of the dispute.

2. Demand Letters

Many sophisticated plaintiffs' counsel, particularly those who specialize in business, tort, malpractice, and employment matters, send the defendant(s) a demand letter inviting parties to meet and confer prior to filing suit. Along with outlining the potential causes of action that will be asserted if a satisfactory response is not received within a specified period of time, these letters typically allude to the risks posed to the defendant if the matter is not quickly and confidentially resolved.

It is not unusual for demand letters to include a copy of the complaint that will be filed as well as a request for information and documents. Most defendants immediately refer these letters to counsel so that a dialogue can take place before a complaint is filed. In addition to direct settlement discussions, these communications also have the potential to lead to an early agreement to mediate or to employ other early ADR techniques before significant litigation costs are incurred.

In the past, both sending and responding to a demand letter were thought to signal a "weakness" on the part of the plaintiff or defendant. Today, attorneys and clients better understand if a party's position is weak, that party typically wants to deal with that fact sooner than later, and if a party's position is strong, then that position will be maintained throughout any early settlement discussions and reflected in any offers and demands that may be exchanged.

3. Settlement Counsel

Many business entities, particularly when managing consumer tort claims, retain "settlement counsel" to affirmatively reach out to potential plaintiffs even before counsel is retained by the injured party or a demand letter is transmitted. The goal of the outreach is to determine if any potential claim the party might have can be resolved quickly. Typically the party who is contacted will retain counsel to obtain advice and assist in responding to the overtures made by settlement counsel. In fact, the injured party may be encouraged to retain counsel. If the injured party does not retain counsel, there is a concern that the relative imbalance of sophistication of the negotiating parties could pose a significant problem.

After the preliminary introduction by settlement counsel, the "meet and confer" process will commence as settlement counsel has the prior authorization to negotiate a resolution on behalf of the potential defendant. These preliminary meet and confer opportunities often lead to an early resolution or the staging of early precomplaint ADR events such as mediation.

Although the practices of companies differ, if settlement counsel is unable to resolve the matter, responsibility for the dispute is typically transferred to a trial attorney who will defend the company in litigation. Often the transfer is accompanied with the assertion that the last best

offer made by settlement counsel is "off the table" and that trial counsel will not make a better offer during the course of the litigation.

4. Collaborative Law/Collaborative Practice

The Michigan Legislature has adopted the Uniform Collaborative Law Act (159 PA 2014). The terms "collaborative law" and "collaborative practice" are used interchangeably, however because the process involves more than attorneys and the practice of law, the term "collaborative practice" is increasingly used.

Collaborative practice is a consensual process in which parties choose to reach a resolution of their dispute outside of the adversarial court process, in a team setting, involving attorneys and others trained in the process to resolve their differences. Although having emerged from use in, and is still primarily used in domestic relations cases, a growing number of parties are experimenting with its use in general civil cases. Unlike mediation and case evaluation, it cannot be ordered by the courts and can only be engaged in voluntarily. Since its primary purpose is to permit parties to reach a proposed consent judgment *prior* to the filing of a lawsuit, chances are that most judges will not know that consent judgments they are reviewing were derived through collaborative practice.

Prefiling collaborative practice agreements includes a contract between all the participants not to initiate formal divorce proceedings unless and until certain preconditions are met. The parties are represented by counsel who are specially trained in collaborative practices who also agree they (nor attorneys in their respective firms) will not be involved in the representation of any party in the event the collaboration fails and a formal contested divorce proceeding is commenced.

The collaborative attorneys meet with their clients prior to engaging in negotiations and screen for any impediments to the parties engaging in direct negotiations with each other. They will arrange for the exchange of information and provide legal guidance. Negotiations are conducted periodically rather than continuously, with the attorneys and parties in the same room, and may also include other "team members" such as child specialists, financial specialists, etc. Information sharing is open, voluntary, and informally accomplished as a part of the process. The goal is to assemble a *de facto* "team" that is committed to resolving the divorce with problem solving techniques without recourse to a formal contested divorce proceeding.

If a resolution is achieved as a result of the collaborative process, a proposed judgment of divorce and other necessary document is filed with the complaint. Because the parties have already spent months negotiating their consent judgment, they will also typically seek a waiver of the six month waiting requirement for the entry of a judgment and opt-out of friend of the court services and oversight. Although the practices of individual judges vary, these waivers are typically granted and the entry of a judgment of divorce can be entered in 60 days.

5. Dispute Resolution Boards

Dispute resolution boards originated in the commercial construction setting and have a long history of use. The effectiveness of dispute resolution boards, however, can extend well beyond the construction setting. The main purposes of the dispute resolution board are to ensure that performance under an ongoing contract was not halted and to provide the disputants with an early neutral expert evaluation of the merits of their dispute.

The construction industry has long been plagued with disputes between owners, design professionals, general contractors, and subcontractors that had the potential of interfering with continued performance of a contract.

At the outset of a construction project, the construction contract sets forth any number of staged and progressive dispute resolution provisions that often include a dispute resolution board (i.e., meet and confer obligations, then a dispute resolution board, then mediation followed by arbitration or litigation). Such a board is comprised of designated subject matter experts who, following a very truncated presentation of the dispute (typically during the course of the performance of the contract), issues a determination that will be binding on the parties to the dispute unless one of the parties decides to appeal that decision to the next level of the dispute resolution process.

The presentation to the board is typically very truncated and does not call for any significant discovery and relies primarily on the information exchanged during "meet and confer" meetings held earlier during the life of the dispute. While a dispute resolution board typically consists of three members (to avoid a "deadlock'), depending upon the nature and significance of the contractual relationship, the dispute resolution board might be a single individual. In determining the composition of the dispute resolution board the parties often desire to have subject matter experts who are familiar with the customs and practices in the industry involved.

Even after the filing of a lawsuit, the parties may contractually agree to use a dispute resolution board to evaluate the merits of the dispute. In this setting, parties desiring an "early expert evaluation" of the merits of their dispute, in a very truncated proceeding and without extensive discovery, can obtain a very cost effective evaluation and even agree to be bound by the evaluation of the experts selected pending an appeal of that decision.

Parties needing significant discovery and who want more due process protections (even at an early stage in the litigation) than is provided through the dispute resolution board process may opt for arbitration or traditional litigation. They may also believe that a more appropriate process would be to file a complaint, engage in the discovery believed necessary, and then request a nonbinding expert evaluation, case evaluation, or mediation. However, this approach may not be as effective in reducing the cost and delay of traditional litigation or preserving important relationships.

Appendix II

ADR Process Decisional Chart

The chart appearing below may help litigants analyze their ADR process options by considering characteristics of each process in light of their particular case. The list of processes can be expanded or restricted depending upon the needs of the litigants and the particularities of the case. For example, expert hearing, early neutral fact finding, early neutral evaluation, mini-trial, etc. can be added to the chart and evaluated for their appropriateness in helping to resolve the dispute.

The evaluation of "Less Likely," "Somewhat Likely," and "Very Likely" is necessarily subjective, but the table can help litigants evaluate the characteristics and potential benefits and limitations associated with each ADR process.

Enhance Party Satisfaction	Arbitration	Case Evaluation	Mediation	Settlement Conference
Help settle all or part of the dispute	Less Likely[19]	Less Likely	Very Likely	Somewhat Likely
Permit creative/business-driven solutions	Less Likely	Less Likely	Very Likely	Less Likely
Preserve personal or business relationships	Less Likely	Less Likely	Very Likely	Less Likely
Improve satisfaction and lasting solutions	Less Likely	Less Likely	Very Likely	Less Likely
Flexibility, Control, and Participation				
Control over outcome is not important; the parties need a legal decision	Very Likely	Less Likely	Less Likely	Less Likely
Broadens the interests of the parties that are taken into consideration	Less Likely	Less Likely	Very Likely	Somewhat Likely
Protects confidentiality	Somewhat Likely	Somewhat Likely	Very Likely	Very Likely
Maximize "due process" protections	Very Likely	Somewhat Likely	Somewhat Likely	Somewhat Likely
Improve Case Management				
Help parties agree on future conduct/procedures during the life of the case	Less Likely	Less Likely	Very Likely	Less Likely
Streamline discovery and motions	Less Likely	Less Likely	Very Likely	Less Likely
Narrow issues and identify areas of agreement	Less Likely	Less Likely	Very Likely	Less Likely
Decrease costs	Less Likely	Less Likely	Very Likely	Less Likely

Depending on the needs and interests of the litigants, additional potential characteristics to consider in selecting an appropriate ADR process might include whether the process(es):

- Improve and/or provide for an early understanding of the dispute
- Reduce hostility
- Respond to the parties' interests in having a highly evaluative process to educate the parties
- Educate the client on the risks of the litigation
- Result in a strategic ADR plan that may encompass multiple ADR events during the course of the case
- Help evaluate the potential trial presentation of the opposing parties/experts
- Maximize the potential of a positive continuing relationship (business or otherwise)
- Bring finality to a narrow legal issue as early as possible and the right of appeal is not important
- Narrow the issues in dispute

Appendix III

Community Dispute Resolution Program (CDRP) Centers

The Community Dispute Resolution Program was created by 260 PA 1988 to establish a statewide program to offer Michigan citizens alternatives to the traditional judicial process. Courts are encouraged to utilize centers' services to provide litigants with mediation services.

The centers are funded through the Michigan Supreme Court, State Court Administrative Office, which also oversees auditing, program fidelity, advanced training, and overall policy and procedural effectiveness. Mediators are volunteers who meet MCR 2.411 and MCR 3.216 training requirements to serve on court rosters.

Under MCR 2.410(B), a court's ADR plan may "provide for referral relationships with local dispute resolution centers, including those affiliated with the Community Dispute Resolution Program."

Center contact information appears here:
http://courts.mi.gov/administration/scao/officesprograms/odr/pages/find-a-mediation-center.aspx

Courts have developed a variety of referral relationships with the centers, examples of which appear on the following table.

Types of Court Cases Mediated[20]

CIRCUIT COURT CASE TYPE	GOAL	EXAMPLE	OUTCOMES
Family division: unrepresented litigant divorce	Geared toward unrepresented low/no income parties, reduce contested pre- and post-judgment motions; posture parties toward collaborative problem-solving to resolve future issues; responds to Access to Justice considerations.	Parties unable to afford attorneys are referred by courts, legal assistance centers, and local bar associations. Memoranda of Agreements reached in mediation are converted to judgments by court staff. This new service was developed with initial financial support of the Michigan State Bar Foundation.	In 2014, centers managed 609 divorce actions. Specific outcomes on unrepresented cases are not kept, however 72 percent of these family division cases in which settlement was attempted, reached an agreement. An FY2013-2014 study will assess the long-term impact on courts and parties of mediating divorce cases.

[20] Not all services are available at every CDRP center. Please contact a center to learn about locally available services.

Family division: limited issue pre- and post-judgment domestic relations matters	Improve parenting time circumstances; increased rates of child support payments; reduce number of contested hearings; improve communications between parties.	In 2014, 12 CDRP centers managed 573 cases related to parenting disputes and developing parenting plans and visitation agreements. Of these cases, 527 cases were referred by friends of the court.	Agreements were reached in 72 percent of these cases in which a settlement was attempted.
Family division: truancy	Increased school attendance, higher graduation rates, decreased suspension and expulsion rates.	Parents, students, guardians, relatives, school officials, etc., use mediation to find solutions to truancy problems that result in the students' return to, and staying in, school.	In a 2012 study of three Wayne County schools, improvements were recorded in 66 percent, 52 percent, and 55 percent of participating students with recorded absences.
Family division: child protection	Reduction in times to permanent dispositions.	Mediation is used at any point in child protection proceeding to developing plans that ideally result in a return to home, but if not, an alternative permanent disposition, e.g., guardianship.	A 2004 study by the MSU School of Social Work found that mediation reduced the time to achieving a permanent disposition by 12.5 months. Authors identify cost savings in reduced adversarial hearings.
General civil claims case-evaluated at less than $25,000	Shorter case disposition times; fewer post-judgment activities; higher user satisfaction rates; improved access to justice.	Courts using the case evaluation process typically have cases evaluated at the district court jurisdictional level. Because mediation results in nearly a 75 percent disposition rate, a significant number of settlement conferences and setting cases for trials are avoided.	A 2011 SCAO study of cases ordered to CDRP centers following case evaluation awards under $25,000 found that 67 percent of the cases were disposed prior to or at mediation. An additional six percent were disposed after mediation with no subsequent court events taking place. Mediated cases disposed on average 203 days earlier than cases not mediated.

DISTRICT COURT CASE TYPE	GOAL	EXAMPLE	OUTCOMES
General civil claims	Shorter case disposition times; fewer post-judgment activities; higher user satisfaction; improved access to justice, particularly by one or more unrepresented party in a case.	Mediation can help parties, and particularly unrepresented parties, either resolve all the issues in their dispute, or limit the number of issues requiring trial.	Because district court jurisdiction is the same amount in controversy in the 2011 study of circuit court case evaluation, similar positive outcomes of near 75 percent disposition rates can be expected.
Landlord/tenant cases	Eviction prevention; improved housing relations.	Landlords and tenants use mediation to address timing and amount of rental payments, condition of property, noise, and other issues.	1,995 cases managed by CDRP centers in 2014 involved landlord/tenant issues. Of the cases in which a settlement was attempted, 72 percent reached an agreement.
Small claims division	Party-stipulated agreements; fewer post-judgment collection cases; higher user satisfaction; improved access to justice for unrepresented parties, particularly as jurisdiction incrementally increases to $7,000 in 2024.	Many courts offer mediation prior to hearings; some courts order parties to try mediation prior to a hearing.	A 2004 MSU study found that 79 percent of plaintiffs using mediation received full or partial payment on a judgment derived through mediation, compared to 52 percent of plaintiffs in nonmediation cases. The mediation group also received payment earlier.
PROBATE COURT CASE TYPE	**GOAL**	**EXAMPLE**	**OUTCOMES**
Guardianship	Shorter case disposition times; fewer contested hearings; fewer subsequent adversarial hearings; higher user satisfaction.	One sibling files a guardianship petition; other siblings do not believe the parent requires a guardianship. While the court ultimately determines whether a guardian should be appointed; in mediation, parties reach agreements as to the scope of the guardianship, access to information, communications, care, etc.	CDRP centers managed 106 cases involving adult or child guardianship in 2014. Of the cases in which a settlement was attempted, 63 percent reached an agreement.

Conservatorships, trusts, and testamentary matters.	Shorter case disposition times; fewer contested hearings; higher user satisfaction.	Persons challenging the accountings of conservators and trustees, and persons challenging wills can use mediation as an alternative to contested hearings.	These case types are small components of centers' services, but are expected to increase as the population ages.

School Conflict Management Services

	GOAL	EXAMPLE	OUTCOMES
Restorative practices	Reducing suspensions and expulsions; improving the school climate; teaching conflict resolution skills to prevent future conflicts between students.	One girl accused another of posting comments on the Internet slandering her character, and accusing her of stealing her boyfriend. Through mediation, the girls resolved to remove the Internet postings and discontinue slanderous comments about each other to friends.	Suspensions avoided, expulsions, assaults, and discipline referrals reduced. Improved school climate. Decrease dropout rate and increase graduation rate.
Peer mediation	Effectively managing minor conflicts between students.	Several boys of different ethnic backgrounds were routinely seen threatening each other on school grounds, although no assaults had been committed. Student mediators were able to help the boys identify the cultural differences in their speaking with each other and to help find a way to resolve differences in the future.	Reduction in the escalation of conflict that may lead to suspension or expulsion, less adult intervention in minor conflicts, less aggressive behavior, and reduction in expulsions, assaults, and discipline referrals. Improved school climate.
Truancy prevention; restorative conferencing	Reducing truancy in situations not yet petitioned in court.	Parents, students, guardians, relatives, school officials, etc., use mediation to find solutions to truancy problems that result in the students' return to, and staying in, school.	Increases the number of in school days, reduces the likelihood of dropouts, reduces classroom disruption, and increases parental involvement.

Bullying prevention	Reducing incidences of bullying; SCAO is working with Dept. of Education and Dept. of Civil Rights to coordinate how centers may provide bullying prevention training.	One boy repeatedly called another boy, who had a hard time defending himself, derogatory names. A fellow student told the boy to stop and told his teacher. The teacher has implemented consequences, met separately with the boys, and is increasing their supervision.	Training programs reduce existing bullying behavior, prevent the development of new bullying behavior, and improve peer relations at school. Published research reports average reductions of 20 to 70 percent in student reports of being bullied and bullying others.
Michigan Special Education Mediation Program	Reducing the contentiousness of Individualized Educational Plan (IEP) meetings; reducing the need for contested administrative hearings before administrative law judges.	Parents of a child with Asperger's syndrome felt that their child should have services supported by an out of state provider. Parties agreed to a specialized curriculum provided at the local ISD and a full-time teaching assistant.	Results in better management of IEP meetings and collaboratively derived service agreements; reduces the number of contested hearings.