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Danielle Hessell

*Michigan State University College of Law*

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# **MICHIGAN'S CASE EVALUATION RULES: A STUDY IN THE EFFICACY OF MANDATORY, EVALUATIVE, AND NARROW ALTERNATIVE DISPUTE RESOLUTION**

**Danielle Hessell<sup>1</sup>**

## **I. INTRODUCTION**

Michigan is one of many states that offers litigants a hybrid form of alternative dispute resolution, referred to as evaluative mediation. However, Michigan's system is somewhat unique in that, for certain types of cases, it chiefly utilizes a purely evaluative process called case evaluation. Case evaluation is mandatory for all tort cases filed in circuit court and available for all other civil cases where money or division of property is in issue.<sup>2</sup> Under Michigan's case evaluation system, a panel of three evaluators reviews each party's case and determines what the likely outcome of the case will be. The result is a dollar figure on which the panel believes the parties should settle. If a party does not agree to accept the evaluation, he faces the possibility of having to pay the other party's costs after trial.

Until recently, Michigan never collected data on the settlement rates attributable to case evaluation.<sup>3</sup> However, in 2004 and 2005, the Office of Dispute Resolution (ODR)<sup>4</sup> collected

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<sup>1</sup> Student, Michigan State University College of Law. Submitted for fulfillment of King Scholars Thesis and Upper Level Writing Requirements. Special thanks to Professor Mary Bedikian.

<sup>2</sup> MCR 2.403.

<sup>3</sup> Interestingly, one official report stated, without empirical support, that "[t]here was skepticism and resistance to MCR 2.403 case evaluation when it was introduced to the state. Over time that dispute resolution mechanism has become accepted as an effective tool for case resolution." MICH. SUP. CT. DISPUTE RESOLUTION TASK FORCE, REPORT TO THE MICHIGAN SUPREME COURT, ADDENDUM REPORT AT 33 (2000).

<sup>4</sup> The Office of Dispute Resolution is a branch of the Michigan State Court Administrative Office, or SCAO. "The Office of Dispute Resolution (ODR) coordinates alternative dispute resolution services of the State Court Administrative Office. The office's primary purposes include: increasing the awareness of dispute resolution options among the legal system's many constituents, assisting judicial stakeholders to integrate dispute resolution processes within the traditional litigation system, administering the Community Dispute Resolution Program, and identifying and developing specialized dispute resolution programs and services.

"ODR is responsible for developing dispute resolution practices and protocols for the trial courts, providing technical assistance to the trial courts, implementing dispute resolution practices mandated or permitted by court rule or statute, evaluating dispute resolution systems, and providing recommendations to the state court

various data from trial courts across the state. The ODR is expected to release a report on these data in summer 2005.<sup>5</sup> In anticipation of the ODR report, this writer attempts to analyze the case evaluation system's efficacy in two alternative ways: first, by analyzing the case evaluation system in the context of generally accepted ADR theory, specifically by analyzing three characteristics of various forms of ADR—voluntary versus mandatory, facilitation versus evaluation, and narrow positions versus broad interests; and second, by extrapolating from data collected by the United States District Courts of the Western District of Michigan, which have collected data on their use of Michigan's case evaluation system. Based on several commentators' observations about the efficacy of ADR with these varying characteristics, and on statistics collected by the United States District Courts of the Western District of Michigan,<sup>6</sup> this writer proposes that case evaluation results in relatively low settlement rates when compared to other forms of ADR. Therefore, courts should primarily refer or recommend cases to other types of ADR, many of which are already available under the Michigan Court Rules. Case evaluation should be used as a last resort, or for cases which would most likely benefit from the narrow, evaluative structure of the process.

## **II. CASE EVALUATION AND MEDIATION: THE RULES AND THE GOALS**

Alternative dispute resolution, commonly referred to as ADR, is an extrajudicial alternative to litigation for resolving disputes. The Michigan Court Rules (MCR) define ADR as “any process designed to resolve a legal dispute in the place of court adjudication.”<sup>7</sup> Michigan

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administrator for improving dispute resolution services for Michigan citizens. The office provides technical assistance to other divisions of the SCAO in designing collaborative dispute resolution systems and in designing and presenting training programs.” At <http://courts.michigan.gov/scao/dispute/odr.htm> (last visited May 20, 2005).

<sup>5</sup> Telephone Interview with Doug Van Epps, Director, Michigan Office of Dispute Resolution (Mar. 24, 2005).

<sup>6</sup> DISPUTE RESOLUTION TASK FORCE ADDENDUM REPORT at 35 (2000), *supra* note 3.

<sup>7</sup> MCR 2.410(A)(2) (2005).

has several court-annexed forms of ADR available to parties which can be either ordered<sup>8</sup> or recommended by the courts.<sup>9</sup> While some of the most commonly used forms of ADR continue to be case evaluation and traditional mediation, the Court Rules address several forms, including settlement conferences ordered by a judge,<sup>10</sup> traditional mediation,<sup>11</sup> domestic relations mediation,<sup>12</sup> case evaluation,<sup>13</sup> and “any other procedures provided by local court rule or ordered on stipulation of the parties.”<sup>14</sup>

#### A. Description of the Case Evaluation Process

The process of case evaluation is governed by MCR 2.403, while the selection of Case Evaluators is controlled by MCR 2.404. The Michigan Supreme Court amended these rules in 2000 in response to recommendations by the Supreme Court’s Dispute Resolution Task Force.<sup>15</sup> However, the only substantial changes made to these rules served to change the name of the process involved from “mediation” to “case evaluation.”<sup>16,17</sup> The text of the rules, and therefore the substance of the process, remained unchanged.<sup>18</sup> “A court may submit to case evaluation any

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<sup>8</sup> MCR 2.410(C)(1) states: “[a]t any time, after consultation with the parties, the court may order that a case be submitted to an appropriate ADR process.”

<sup>9</sup> *See, e.g.*, MCR 2.410 (2005).

<sup>10</sup> MCR 2.401 (2005).

<sup>11</sup> MCR 2.411 (2005).

<sup>12</sup> MCR 3.216 (2005).

<sup>13</sup> MCR 2.403 (2005).

<sup>14</sup> MCR 2.410(A)(2) (2005).

<sup>15</sup> MICH. SUP. CT. DISPUTE RESOLUTION TASK FORCE, REPORT TO THE MICHIGAN SUPREME COURT (1999).

<sup>16</sup> “Outside of the Michigan legal culture, the process outlined in MCR 2.403 whereby attorneys independently provide a settlement evaluation to disputing parties is known as case evaluation. The term ‘mediation’—outside of the Michigan legal culture—is universally understood to refer to a process in which a neutral mediator without decision-making authority assists the parties in reaching a resolution of their matter. Changing the name would eliminate confusion over terminology and bring Michigan’s legal culture into conformity with the common usages of this terminology among the public and throughout the national and international legal and dispute resolution community.” *Id.* at 6.

<sup>17</sup> Despite the fact that the Task Force recognized several differences between case evaluation and mediation, it did not address one principal difference: case evaluation is mandatory, while mediation is generally accepted as being voluntary. In fact, the 2000 amendments that resulted from the Task Force Report included amending MCR 2.410 to allow a court, on its own initiative, to order the parties to utilize a non-binding ADR process, such as mediation.

<sup>18</sup> MCR 2.403 was originally codified in 1985.

civil action in which the relief sought is primarily money damages or division of property.”<sup>19</sup> Importantly, “[c]ase evaluation of tort cases filed in circuit court is mandatory. . .” unless the court grants an exception on motion for good cause shown.<sup>20</sup> Case evaluation is also available for civil cases filed in District Courts,<sup>21</sup> and for the United States District Courts in Michigan’s Eastern and Western Districts.<sup>22</sup>

Case evaluation panels are made up of three people, each of whom, to be eligible to become a case evaluator, must meet the following criteria: he or she “must have been a practicing lawyer for at least 5 years and be a member in good standing of the State Bar of Michigan;”<sup>23</sup> “must reside, maintain an office, or have an active practice in the jurisdiction;”<sup>24</sup> and “must demonstrate that a substantial portion of [his or her] practice for the last 5 years has been devoted to civil litigation matters, including investigation, discovery, motion practice, case evaluation, settlement, trial preparation, and/or trial.”<sup>25</sup> Evaluators are assigned to panels randomly, but may be assigned based on sublists compiled by local ADR offices, such as sublists of attorneys who practice plaintiff’s work, defense work, etc.<sup>26</sup> In fact, it is common for a panel to consist of “a plaintiffs’ attorney, a defense attorney, and an attorney whose practice includes both plaintiffs’ and defense work.”<sup>27</sup>

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<sup>19</sup> MCR 2.403(A)(1).

<sup>20</sup> MCR 2.403(A)(2).

<sup>21</sup> MCR 2.403(A)(3).

<sup>22</sup> See Dispute Resolution Task Force Addendum Report, *supra* note 3, at 35; see also ALTERNATIVE DISPUTE RESOLUTION WITH FORMS, APP. F (2004 Supp.), GUIDE TO JUDICIAL MANAGEMENT OF CASES IN ADR.

<sup>23</sup> MCR 2.404(B)(2)(a).

<sup>24</sup> MCR 2.404(B)(2)(b).

<sup>25</sup> MCR 2.404(B)(2)(c).

<sup>26</sup> MCR 2.404(C).

<sup>27</sup> RONALD S. LONGHOFFER, MICH. COURT RULES PRACTICE Text § 2403.7 (5<sup>th</sup> Ed.).

Once case evaluation has been ordered in a matter, the parties must pay \$75 each for the benefit of the evaluators.<sup>28</sup> They must also submit, at least 14 days before the hearing, a case evaluation summary, which is “a concise summary setting forth that party’s factual and legal position on issues presented by the action,” along with documents relating to the issues to be evaluated.<sup>29</sup> Parties may attend the hearing but are not required to do so. In fact, they are not allowed to give any testimony, but may be allowed to demonstrate scars or other injuries.<sup>30</sup> The rules of evidence do not apply at the hearing<sup>31</sup> and oral presentation is limited to fifteen minutes per side, absent unique circumstances.<sup>32</sup> Upon request of the panel, the parties must disclose information relating to applicable insurance policy limits and/or settlement negotiations.<sup>33</sup>

The panel must notify the parties of its evaluation within 14 days of the hearing.<sup>34</sup> In tort cases, if the panel unanimously finds an action or defense to be frivolous, it must so indicate on the evaluation.<sup>35</sup> Within 28 days of receipt of the panel’s evaluation, each party must file a written acceptance or rejection of the evaluation with the court.<sup>36</sup> The ADR clerk, or the person in each county designated to handle such matters, must place the case evaluation and the parties’ acceptances or rejections in a sealed envelope to be filed with the court clerk. In a non-jury action the envelope may not be opened until after the verdict is rendered.<sup>37</sup>

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<sup>28</sup> MCR 2.403(H)(1). However, if one of the case evaluators is a judge, as permitted by MCR 2.404, the fee is only \$50 per party.

<sup>29</sup> MCR 2.403(I)(1).

<sup>30</sup> MCR 2.403(J)(1).

<sup>31</sup> MCR 2.403(J)(2).

<sup>32</sup> MCR 2.403(J)(3).

<sup>33</sup> *Id.* Several commentators have noted that this rule likely prevents much negotiation between the parties before the case evaluation hearing, for lawyers legitimately fear that the requirement of disclosing prior negotiations will dictate the settlement boundaries adopted by the case evaluators.

<sup>34</sup> MCR 2.403(K)(1).

<sup>35</sup> MCR 2.403(K)(4).

<sup>36</sup> MCR 2.403(L)(1).

<sup>37</sup> RONALD S. LONGHOFFER, MICH. COURT RULES PRACTICE Text R. 2.403, Author’s Commentary (5<sup>th</sup> Ed.).

If all of the parties accept the case evaluation, it is treated as a settlement and judgment is entered in accordance with the evaluation.<sup>38</sup> However, if either party rejects the evaluation, the case proceeds to trial.<sup>39</sup> If the panel determines a party's claim or defense to be frivolous, that party may appeal that decision to the judge using only the materials submitted to the case evaluators in support of its position.<sup>40</sup> If the party whose claim or defense was found to be frivolous by the case evaluators fails to appeal to the judge, or if the judge upholds the panel's finding, then the party challenging the finding must submit a cash or surety bond for \$5,000 in order to proceed to trial, or else the court shall dismiss the frivolous claim or defense and enter judgment accordingly.<sup>41</sup>

If one or both parties reject the evaluation, then either rejecting party risks having to pay the opposing party's costs after a verdict unless the verdict is more favorable to the rejecting party than the case evaluation.<sup>42</sup> Here, a verdict includes a jury verdict, a bench verdict, or a judgment entered as a result of a ruling on a motion.<sup>43</sup> But, the verdict "must be adjusted by adding to it assessable costs and interest on the amount of the verdict from the filing of the complaint to the date of the case evaluation, and, if applicable, by making the adjustment of future damages."<sup>44</sup> "After this adjustment, the verdict is considered more favorable to a defendant if it is more than 10 percent below the evaluation, and is considered more favorable to the plaintiff if it is more than 10 percent above evaluation. If the evaluation was zero, a verdict finding that a defendant is not liable to the plaintiff shall be deemed more favorable to the

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<sup>38</sup> MCR 2.403(M)(1).

<sup>39</sup> MCR 2.403(N)(1).

<sup>40</sup> MCR 2.403(N)(2).

<sup>41</sup> MCR 2.403(N)(3).

<sup>42</sup> MCR 2.403(O)(1).

<sup>43</sup> MCR 2.403(O)(2).

<sup>44</sup> MCR 2.403(O)(3).

defendant.”<sup>45</sup> Under this rule, actual costs are defined as “(a) those costs taxable in any civil action, and (b) a reasonable attorney fee based on a reasonable hourly or daily rate as determined by the trial judge for services necessitated by the rejection of the case evaluation.”<sup>46</sup> However, costs cannot be awarded in a case when the case evaluation was not unanimous.<sup>47</sup>

## B. Traditional Mediation

As discussed above, case evaluation is a type of ADR that is very specific and highly rule-based. Mediation, on the other hand, is more loosely defined by Michigan’s Court Rules, and, consequently, has a much broader application than case evaluation. Within the umbrella of the various ADR methods and techniques available to disputants, mediation is probably the most malleable—it can be molded to fit different perceptions, contexts, and goals.

Michigan courts have at their disposal many different forms of ADR, but the Michigan Court Rules offer helpful definitions of the various court-annexed forms of ADR commonly used in the state courts. “[A]lternative dispute resolution (ADR) means any process designed to resolve a legal dispute in the place of court adjudication.”<sup>48</sup> Included within this umbrella definition are settlement conferences, case evaluation, mediation, domestic relations mediation, and “other procedures provided by local court rule or ordered on stipulation of the parties.”<sup>49</sup> Case evaluation, discussed in detail above, has been defined as “the process . . . whereby attorneys independently provide a settlement evaluation to disputing parties.”<sup>50</sup>

“Mediation,” on the other hand, is a purely consensual process, in which the parties direct the outcome. The mediator simply serves as a catalyst. The Court Rules define mediation as “a

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<sup>45</sup> *Id.*

<sup>46</sup> MCR 2.403(O)(6).

<sup>47</sup> MCR 2.403(O)(7). This portion of the rule may place extreme pressure on the case evaluators to reach a unanimous evaluation, even when there is reasonable dispute as to the probable outcome of the case at trial.

<sup>48</sup> MCR 2.410(A)(2).

<sup>49</sup> *Id.*

<sup>50</sup> DISPUTE RESOLUTION TASK FORCE REPORT, *supra* note 15 at 6.

process in which a neutral third party facilitates communication between parties, assists in identifying issues, and helps explore solutions to promote a mutually acceptable settlement. A mediator has no authoritative decision-making power.”<sup>51</sup> The “traditional” definition of mediation can also be stated as follows:

Mediation . . . is a form of assisted negotiations in which the parties agree to enlist the help of a neutral third party, whose task is to assist the parties in their quest for a voluntary settlement. Mediation is a process in which a neutral intervenor assists negotiation parties in reaching mutually acceptable terms of settlement, but where the mediator is not authorized to impose a decision on the parties if they do not reach agreement through mutual consensus.<sup>52</sup>

Although these definitions are helpful, they do not necessarily encompass every technique that is used in a dispute resolution that could be classified as “mediation.” “Nearly everyone would agree that mediation is a process in which an impartial third party helps others resolve a dispute or plan a transaction. Yet in real mediations, goals and methods vary so greatly that generalization becomes misleading.”<sup>53</sup> For the purposes of this thesis, it is not necessary to try to pin down an exact definition of mediation—in fact, the idea that mediation is flexible, and can be molded and varied to best fit the needs of a particular dispute, is the characteristic of traditional mediation that contrasts so sharply from case evaluation. Unlike mediation, case evaluation is a rigid, formulaic process. This leads many practitioners whose cases have been ordered into case evaluation to feel as though they are trying to fit a square peg into a round hole—often, case evaluation may just not suit the needs of a particular case or particular parties to a dispute. Evaluating the success or efficacy of a particular form of ADR should involve an understanding of the various goals of case evaluation and mediation, and whether those goals coincide with the goals of a particular dispute.

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<sup>51</sup> MCR 2.411(A)(2).

<sup>52</sup> 4 Am. Jur. 2d Alternative Dispute Resolution § 16 (2004).

<sup>53</sup> Leonard L. Riskin, *Understanding Mediators’ Orientations, Strategies, and Techniques: A Grid for the Perplexed*, 1 Harvard Neg. Law Rev. 7, 11 (1996).

C. What are the Goals of ADR in General, and Case Evaluation and Mediation in Particular?

Much thoughtful literature has been published about the general purposes and goals of all types of dispute resolution, especially since U.S. Supreme Court Chief Justice Warren Burger called for the institutionalization of ADR within the U.S. legal system in 1976.<sup>54</sup> ADR, in general, is a means of conflict resolution. When asked to name the goals of conflict resolution, the simplest answer is “Why, to resolve conflicts, of course!” Even this simplistic response, however, has been criticized by some theorists as being fundamentally incorrect.

A predominant American cultural bias is to see conflict in pathological terms, as a source of social and personal ill health. This ‘negative’ view of conflict underlies the instinct of many practitioners of ADR to seek to harmonize disputants, often only superficially, in order to dampen deeper conflicts between them that may be difficult to process so that at least some semblance of order can be achieved.<sup>55</sup>

The more generally-accepted theories of conflict resolution, though, see conflict in terms of a set of problems that the disputants wish to solve. This “negative” view of conflict is addressed by mediators through various “positive” methods of reaching resolution. However, most mediators see “resolution” not as a mere conclusion of the particular conflict between the particular parties to the dispute, but in broader terms, serving broader goals. A report issued by the Society of Professionals in Dispute Resolution noted the presence in various forms of dispute resolution of:

several conflicting values and goals, including: . . . increased disputant participation and control of the process and outcome, . . . restoration of relationships, . . . increased efficiency of the judicial system and lowered costs, . . . preservation of social order and stability, . . . maximization of joint gains, . . . fair process, . . . fair and stable outcomes, and . . . social justice.<sup>56</sup>

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<sup>54</sup> Warren E. Burger, *Agenda for 2000 A.D.—A Need for Systematic Anticipation*, 70 F.R.D. 83 (1976).

<sup>55</sup> Valerie A. Sanchez, *Back to the Future of ADR: Negotiating Justice and Human Needs*, 18 Ohio St. J. on Disp. Resol. 669, 722 (2003).

<sup>56</sup> Society of Professionals in Dispute Resolution, *Ensuring Competence and Quality in Dispute Resolution Practice*, Report 2 of the SPIDR Commission on Qualifications 5 (1995).

Case evaluation, because of its rule-based and highly structured nature, should have more clearly defined goals than other forms of ADR. However, the Court Rules themselves do not outline any specific goals of the case evaluation process. Several goals of the case evaluation process may be inferred from the rules, though, including increased judicial economy, accurate predictions of trial results, and settlement. One official report, issued by a committee of the Michigan Supreme Court prior to the 2000 amendments, stated that “[t]he primary goal of [case evaluation] is to settle cases, not to predict the outcome of trial.”<sup>57</sup>

On first glance, this may appear to be similar to the broadest purpose of ADR in general, resolution of disputes. However, on further examination, the goal of settling cases is actually very narrow. The process does not address many of the proposed goals of ADR outlined by the Society of Professionals in Dispute Resolution.<sup>58</sup> Case evaluation, then, is much more aligned, at least in terms of its purpose, with litigation, than it is with other forms of ADR. Litigation does not allow the disputants to have any control over the process or the outcome of the dispute. It does not maximize possible joint gains or emphasize fair or stable outcomes—it merely applies the law to the facts and determines which party prevails, generally an all-or-nothing proposition where one party wins and the other loses. Case evaluation shares these characteristics.

Case evaluation arguably addresses at least one of the recognized goals of ADR, though: the increased efficiency of the judicial system and lowered costs. Proponents of the system argue that, by channeling cases into case evaluation prior to trial, parties are forced to closely examine their own positions. In tort cases, especially, it is argued that parties may often have unrealistic expectations of the probable outcome of a trial. For example, tort plaintiffs may be conditioned by lawyer advertising and “puffing” to believe that every automobile accident case

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<sup>57</sup> Report of the Supreme Court Mediation Rule Committee, 451 Mich. 1205, 1208 (1995).

<sup>58</sup> *Supra*, note 56.

is worth millions of dollars, despite the relative fault of the parties or the extent of the plaintiff's injuries. On the other side, insurance companies may employ cost-benefit analyses to determine that it is more cost efficient to challenge most claims, rather than settle. The cost of a few large verdicts could be outweighed by the savings in settlements paid to the number of plaintiffs who tire of the litigation process and drop their lawsuits or otherwise "give in." Case evaluation, then, might be an effective way to force the parties to be realistic about each others' positions and likelihood of success at trial, resulting in greater settlement rates and the avoidance of many of the costs associated with litigation.

Those who disapprove of the case evaluation process believe, however, that case evaluation fails to meet the goal of judicial economy and reducing costs. Case evaluation, they argue, often wastes time and resources, using bully tactics to force settlements on parties who may not be ready to settle. By increasing the number of hoops that parties must jump through during the litigation process, judicial resources may actually be wasted in the case evaluation process. Additionally, case evaluation generally occurs relatively late in the litigation process, because parties must have undertaken sufficient research and discovery to state the legal and factual bases of their cases. This means that much of the cost associated with litigation (attorney hours, depositions, retaining expert witnesses, document review, etc.), will have already been incurred before case evaluation occurs. Unfortunately, the lack of statistical evidence on settlement rates attributable to case evaluation allows only speculation and anecdotal evidence about whether the goals of case evaluation are actually being met.

Similarly, there is not much evidence about the settlement rates of court-annexed mediation in Michigan, either. However, the goals of traditional mediation are much broader

than those of case evaluation, and address many other “levels” of issues.<sup>59</sup> One source notes that:

The purpose of mediation is to bring the dispute to a mutually acceptable resolution as early as possible. This generally requires that the parties become involved early in the mediation process and remain involved until the mediation is concluded. Therefore, a mediator’s primary function is to help the parties reach agreement by identifying issues, exploring possible bases for agreement and the consequences of not settling, and encouraging each party to accommodate the interests of other parties.<sup>60</sup>

Riskin notes that the goals of mediation can vary widely, depending on the type of dispute and the mediator’s particular orientations.<sup>61</sup> In order to analyze the effectiveness of a particular type of ADR, this writer proposes that the strategies and goals of the type of ADR being utilized should match as closely as possible with the goals and needs of the parties to a dispute. This analysis requires a categorization of the approaches to ADR--here, case evaluation and traditional mediation.<sup>62</sup>

Three major distinctions differentiate case evaluation from mediation, in terms of the elements, techniques and goals particular to each: first, case evaluation is mandatory<sup>63</sup> while mediation is voluntary;<sup>64</sup> second, case evaluation is evaluative<sup>65</sup> while mediation is facilitative;<sup>66</sup> and third, case evaluation addresses narrow positions while mediation focuses on broader

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<sup>59</sup> Riskin, *supra*, note 53 at 19-20.

<sup>60</sup> 4 Am. Jur. 2d Alternative Dispute Resolution § 16 (2004).

<sup>61</sup> Riskin, *supra* note 53 at 17.

<sup>62</sup> Despite the necessity of categorization, this writer shares the sentiment of Leonard Riskin on this point: “I am aware that, although systems of categorization help us understand reality, they also distort it. I am humbled by Robert Benchly’s pronouncement that ‘[t]here may be said to be two classes of people in the world: those who constantly divide the people of the world into two classes, and those who do not.’” Riskin, *supra* note 53 at n.33 (quoting Paul Dickson, *The Official Rules*, *The Washingtonian*, Nov. 1978, at 152).

<sup>63</sup> See *supra* note 20.

<sup>64</sup> But the 2000 amendments may have significantly altered this aspect of mediation. See MCR 2.410(3). However, even though courts now have the power to order parties to submit to facilitative mediation, there are still no consequences attached to non-settlement, which this writer believes is an important aspect of whether an ADR proceeding is perceived as voluntary by the participants.

<sup>65</sup> While the name of the process is certainly indicative of this aspect of it, the text of the rule also describes the evaluative nature of the process. See MCR 2.403(K).

<sup>66</sup> See *supra* note 52.

underlying interests.<sup>67</sup> This writer proposes that comparison of case evaluation and mediation using these three factors as guidelines tends to show that case evaluation is less effective in most circumstances than traditional mediation.

### **III. IS CASE EVALUATION EFFECTIVE?**

#### **A. Analysis of Case Evaluation Based on General ADR Theory**

##### **1. Mandatory vs. Voluntary**

As discussed above, case evaluation is a mandatory process in most civil cases in Michigan. However, the 2000 amendments to the ADR Court Rules included changes to Rule 2.410, allowing courts to order parties in a civil case to participate in any non-binding ADR process.<sup>68</sup> This is contradictory to the traditional view that mediation is voluntary, not mandatory. However, even though courts have the option to order parties into mandatory mediation, it is unclear whether they have done so under the new Rule 2.410. Because mandated mediation would not carry any potential consequences for failing to reach agreement, it may be viewed as being less “severely” mandatory than case evaluation.

One respected theorist stated that the difference between voluntary and mandatory ADR is the most important distinction between the different types of ADR.

The most important distinction between the various conventional and alternative methods of dispute resolution is whether the terms of the dispute’s resolution are arrived at through the consent of the interested parties or are imposed through a directive issued by an authoritative third party without a personal stake in the dispute. In negotiation, agreements are reached, if at all, by the consent of all principal parties, each of whom have presumably decided that the agreed-upon terms are more desirable than the outcome they could achieve by pursuing their BATNAs [best alternatives to negotiated agreement]. In formal adjudication, in contrast, agreements are imposed on the parties by a court, which can call on the

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<sup>67</sup> See *supra* note 53.

<sup>68</sup> MCR 2.410(3).

coercive power of the state to enforce its determinations. The voluntary consent of the parties to the court's directive is neither required nor requested.<sup>69</sup>

One reason that voluntariness is so important to the efficacy of ADR is that it gives the parties a level of control over their circumstances. Some evidence suggests that litigants view as fair those procedures which give them control over the litigation process, because high process control is seen as leading to fairer outcomes.<sup>70</sup> One recent study suggested that "the relationship between control of the process and the outcome and the satisfaction of the . . . subjects was significant. . . . [T]o the extent that ADR systems can be designed or altered to include processes that offer greater control prior to steps that provide for a final and binding decision, the better actual users may feel about them."<sup>71</sup>

One might infer from these statements that mandatory ADR processes such as case evaluation will tend to be less effective because parties have little control, and therefore little satisfaction with outcomes almost certain to be perceived as unfair. On the other hand, proponents of case evaluation and other mandatory ADR processes are quick to point out the advantages of a mandatory system.

We have all had the experience of sensing that a particular dispute surely could be resolved if only the parties would agree to sit down together. How many disputes go unresolved because that threshold was not able to be crossed? One of the benefits of mandatory court programs is that they eliminate this risk by requiring certain cases to go through prescribed processes as defined by the court rules. The process might not be perfectly tailored to the particular case, but at least the parties have an opportunity to address their dispute in a non-binding setting with a neutral facilitator.<sup>72</sup>

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<sup>69</sup> RUSSELL KOROBKIN, *NEGOTIATION THEORY AND STRATEGY* 343 (Aspen Publ'rs, Inc., 2002).

<sup>70</sup> John Thibaut and Laurens Walker, *A Theory of Procedure*, 66 *California Law Review* 541 (1978); see also E. Allan Lind, Robert J. Maccoun, Patricia A. Ebener, William L. F. Felstiner, Deborah R. Hensler, Judith Resnik, and Tom R. Tyler, *In the Eye of the Beholder: Tort Litigants' Evaluations of Their Experiences in the Civil Justice System*, 24 *Law & Society Review* 953 (1990).

<sup>71</sup> Cynthia F. Cohen and Murray E. Cohen, *Relative Satisfaction with ADR: Some Empirical Evidence*, 57 *Dispute Resolution Journal* 37, 41 (2003).

<sup>72</sup> Richard Chernick, "Process Mediation": *Deciding How to Resolve Your Dispute*, SB41 ALI-ABA 501, 503 (1996).

Further, “the existence of a binding last step in a dispute resolution protocol usually motivates parties to be constructive in earlier non-binding steps.”<sup>73</sup>

While there are undoubtedly positive aspects of having a mandatory form of ADR in certain cases, the fact that all tort cases, and almost all other civil cases, are ordered into case evaluation in Michigan tends to support the argument that case evaluation, as currently used by the courts, is ineffective. Because every party must go through case evaluation before trial, and because the process carries severe consequences for non-settlement, it is more closely aligned with a trial than with an alternative dispute resolution process. Therefore, as just another hoop that litigants must jump through on the frustrating path to trial, case evaluation may contribute more to the parties’ dissatisfaction with the litigation process than to the alternative path of settlement.

## 2. Evaluative vs. Facilitative

To begin this analysis, a framework for analyzing the various ADR processes should be established. Leonard Riskin, a prominent theorist in the area of ADR, has argued toward a classification approach based on two separate continuums, one of which describes the types of activities and orientations of the mediator.

[One] continuum concerns the mediator’s activities. It measures the strategies and techniques that the mediator employs in attempting to address or resolve the problems that comprise the subject matter of the mediation. One end of this continuum contains strategies and techniques that facilitate the parties’ negotiation; at the other end lie strategies and techniques intended to evaluate matters that are important to the mediation.<sup>74</sup>

Applying Riskin’s continuum to Michigan’s ADR system is fairly quick work: case evaluation, by definition, is evaluative, and falls at the far evaluative end of the continuum.

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<sup>73</sup> *Id.* at 505.

<sup>74</sup> Riskin, *supra* note 53 at 17.

Mediation, traditionally defined as facilitative negotiation, falls at the opposite end of the continuum, where the “strategies and techniques” are designed to “facilitate the parties’ negotiation.” But, the analysis does not end by merely placing the techniques within a continuum. Riskin elaborates further on the techniques of mediators who engage in either evaluative or facilitative techniques.

The mediator who evaluates assumes that the participants want and need her to provide some guidance as to the appropriate grounds for settlement—based on law, industry practice or technology—and that she is qualified to give such guidance by virtue of her training, experience, and objectivity. The mediator who facilitates assumes that the parties are intelligent, able to work with their counterparts, and capable of understanding their situations better than the mediator and, perhaps, better than their lawyers. Accordingly, the parties can develop better solutions than any the mediator might create.<sup>75</sup>

Riskin’s analysis illustrates key differences in the processes of case evaluation and traditional mediation. It begs the question, however, of whether evaluative or facilitative techniques are more effective in reaching resolution of a dispute. Arguments exist for both views.

Perhaps no issue in the field of ADR has been as hotly contested as whether mediation, at is traditionally defined, can ever be “evaluative.”<sup>76</sup> Some commentators have suggested that mediation can only be defined in the way Michigan has defined it, as “facilitated negotiation.”<sup>77</sup>

A few have railed against any inclusion of evaluative techniques in the mediation process:

“Evaluative” mediation is an oxymoron. It jeopardizes neutrality because a mediator’s assessment invariably favors one side over the other. Additionally, evaluative activities discourage understanding between and problem-solving by the parties. Instead, mediator evaluation tends to perpetuate or create an adversarial climate.<sup>78</sup>

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<sup>75</sup> *Id.* at 24.

<sup>76</sup> *See, e.g., Id.* at 9. Riskin states that “[t]he largest cloud of confusion and contention surrounds the issue of whether a mediator may evaluate.”

<sup>77</sup> MCR 2.411; Kimberlee K. Kovach and Lela P. Love, “*Evaluative*” *Mediation is an Oxymoron*, 14 *Alternatives to High Cost Litigation* 31 (1996).

<sup>78</sup> Kovach, *supra* note 77.

While some ADR practitioners have treated evaluative techniques harshly, others have taken a more accepting view of evaluative techniques used in ADR.

Evaluative mediation has been defined as a process in which a neutral expresses an opinion as to the likely outcome or value of a legal claim or defense were it to be adjudicated. Its advocates suggest that the technique is merely an extension of the more commonly accepted technique of reality testing and that it can legitimately be used break an impasse over the merits of a case, as a way for disputants to save face in accepting less than what they initially wanted, and as a vehicle through which disputants can let go of their anger in exchange for logic.<sup>79</sup>

Despite the dispute over the use of evaluative techniques in ADR, some commentators believe that mediation “is a flexible process which should fit the context of the dispute and the culture of the participants. While pure facilitative mediation may work in certain contexts, parties often want—and expect—a mediator to explore strengths and weaknesses of the case.”<sup>80</sup>

ADR is, at its core, a series of conflict resolution techniques. In the latter half of the twentieth century, social psychologists like Morton Deutsch set forth many of the underlying, if unexpressed, principles of ADR. Deutch concluded that “competitive processes tend to lead toward conflict escalation and cooperative processes tend to have a de-escalating effect.”<sup>81</sup>

According to Deutsch, cooperative processes are generally ones which encourage the division of labor in a joint search for truth, stimulate interest and curiosity in learning and understanding, increase attentiveness and recognition of other participants, motivate creativity, and reinforce trusting behavior. Competitive processes are those which seek to satisfy personal interests at the expense of joint interests, inhibit the expression of disagreement, lean toward overconformity and rigidity rather than flexibility and creativity, and overemphasize differences while ignoring commonalities. They typically lead to poor communication, misperception, misjudgment, and an over valuing of self-consistency.<sup>82</sup>

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<sup>79</sup> Cris M. Currie, *Opinion Wanted: A Theoretical Construct for Mediation Practice*, 53 *Dispute Resolution Journal* 70, 71 (1998).

<sup>80</sup> John Bickerman, *Evaluative Mediator Responds*, 14 *Alternatives to High Cost Litigation* 70 (1996).

<sup>81</sup> Currie, *supra* note 79 at 73.

<sup>82</sup> *Id.*

These concepts seem to fit well within the facilitative-versus-evaluative argument, if one associates evaluative processes like case evaluation with competitive processes and facilitative processes like mediation with cooperative ones. Arguably, then, because evaluative processes are by their nature competitive, they are no better at resolving conflicts than the ultimate trial would be. While they lead to a final judgment, they do not necessarily “increase . . . recognition of other participants” or “reinforce trusting behavior.” Instead, competitive/evaluative processes largely ignore “joint interests” and “lead to poor communication.”

Several drawbacks are associated with an evaluative approach to mediation, but there are some benefits, as well.

The evaluative mediator, by providing assessments, predictions, or direction, removes some of the decision-making burden from the parties and their lawyers. In some cases, this makes it easier for the parties to reach an agreement. Evaluations by the mediator can give a participant a better understanding of his “Best Alternative to a Negotiated Agreement” (BATNA), a feeling of vindication, or an enhanced ability to deal with his constituency.

...  
Yet, in some situations an assessment, prediction, or recommendation can make it more difficult for the parties to reach agreement by impairing a party’s faith in the mediator’s neutrality or restricting a party’s flexibility.<sup>83</sup>

Most ADR theorists recognize that both of the extremes, competition/evaluation and cooperation/facilitation, are present in many forms of ADR, and often are used in conjunction with each other depending on the particular situation.

In representing parties to a dispute, lawyers may incline toward either of two poles: the confrontational or the cooperative. Most lawyers mix these styles in varying proportions as the dynamics of particular cases may warrant, and there is no behavioral recipe for assuring effective representation of the client in all cases.<sup>84</sup>

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<sup>83</sup> Riskin, *supra* note 53 at 44. “Parties often feel an evaluation is what they want, until they get it. Once the ‘opinion’ is given, the parties often feel that the mediator betrayed them. They will feel that the mediator’s decision on the merits may have been influenced by perceptions of what they would be willing to swallow, not on the ‘merits’ of the case. . . . Moreover, these evaluative techniques decrease the extent of the parties participation, and thereby may lower the participants’ satisfaction with both the process and the outcome.”

<sup>84</sup> Edward I. Selig, *Mediation Principles: An Environmental Case History*, 57 APR Disp. Resol. J. 73, 73 (2002).

While Deutsch and many of his followers have contended that competitive processes, like evaluative mediation techniques, have very few saving graces, others believe just the opposite. “A predominant American cultural bias is to see conflict in pathological terms, as a source of social and personal ill health. This ‘negative’ view of conflict underlies the instinct of many practitioners of ADR to seek to harmonize disputants, often only superficially, in order to dampen deeper conflicts between them that may be difficult to process so that at least some semblance of superficial order can be achieved.”<sup>85</sup>

Whether one tends to believe that evaluative/competitive ADR processes are inherently ineffective and even harmful to the conflict resolution process, or that conflict is inherent in human nature and therefore any attempts to eliminate it are superficial, one thing is clear: “[d]irect research concerning the effectiveness of evaluative mediation is practically non-existent.”<sup>86</sup> General consensus, if one can be found, seems to be that facilitative mediation tends to be more successful than evaluative.

Michigan’s case evaluation system sets up the evaluators to provide only strict assessments of the parties’ relative strengths and weaknesses and a prediction of the likely outcome at trial. This system clearly does not lend itself to flexibility of the parties, or even to the neutrality of the system. However, one very substantial benefit of the evaluative nature of case evaluation may be to give parties (and their insurance carriers) realistic senses of their BATNA’s, so that they will be able to move from unreasonable positions and toward settlement.

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<sup>85</sup> Valerie A. Sanchez, *Back to the Future of ADR: Negotiating Justice and Human Needs*, 18 Ohio St. J. on Disp. Resol. 669, 722 (2003).

<sup>86</sup> Currie, *supra* note 79 at 7.

### 3. Narrow vs. Broad

The third major difference between case evaluation and traditional mediation deals with the goals of each. Riskin's continuum analysis, discussed above, contains a second continuum which describes the various goals which ADR (referred to in his article specifically as mediation) seeks to achieve.

One continuum concerns the goals of the mediation. In other words, it measures the scope of the problem or problems that the mediation seeks to address or resolve. At one end of this continuum sit narrow problems, such as how much one party should pay the other. At the other end lie very broad problems, such as how to improve the conditions in a given community or industry.<sup>87</sup>

Riskin's second continuum analyzes "the focus of a mediation—its subject matter and the problems or issues it seeks to address. . . ."<sup>88</sup> Further:

In very narrow mediations, the primary goal is to settle the matter in dispute through an agreement that approximates the result that would be produced by the likely alternative process, such as a trial, without the delay or expense of using that alternative process. The most important issue tends to be the likely outcome of litigation.<sup>89</sup>

This very nearly describes Michigan's case evaluation process. Clearly, the primary goal of case evaluation is to settle the dispute through a process that approximates the result that would occur at trial.

The broader goals of mediation on the narrow—broad continuum are "business interests," "personal/professional/relational issues," and "community interests." Because the traditional mediation process in Michigan is loosely defined, it could address any and all of these interests. Some of the benefits of considering broader issues in a mediation include addressing "the

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<sup>87</sup> Riskin, *supra* note 53, at 17.

<sup>88</sup> *Id.* at 18.

<sup>89</sup> *Id.* at 19.

relational and emotional aspects of their interactions in order to pave the way for settlement of the narrower economic issues.”<sup>90</sup>

Again, the classification of ADR along this continuum begs the question: which is more effective, a narrow approach or a broad one? Each approach, of course, has both positive and negative aspects. First, the narrow approach:

A narrow problem-definition can increase the chances of resolution and reduce the time needed for the mediation. The focus on a small number of issues limits the range of relevant information, thus keeping the proceeding relatively simple. In addition, a narrow focus can avoid a danger inherent in broader approaches—that personal relations or other “extraneous issues” might exacerbate the conflict and make it more difficult to settle. On the other hand, in some cases the narrow approach can increase the chance of impasse because it allows little room for creative option-generation or other means of addressing underlying interests, which, if unsatisfied, could block agreement. Also, a narrow approach to mediation might preclude the parties from addressing other long-term mutual interest that could lead to long-lasting, mutually beneficial arrangements.<sup>91</sup>

By keeping the ADR process more simple and straightforward, the narrow approach of addressing issues in a dispute can keep the parties focused and get them through the process fairly quickly. This is certainly true of case evaluation—the process allows virtually no room for discussion of any issues outside the litigation, and attorneys representing the parties are given only fifteen minutes each to set forth their cases. Whether or not these characteristics tend to make case evaluation more or less successful is debatable.

The broad approach could be considered more “touchy-feely” by some who prefer the narrow approach, or more “open minded” by those who do not. A broad problem-definition can produce an agreement that accommodates the parties’ underlying interests, as well as the interests of other affected individuals or groups. Such an agreement is substantively superior. Broadening the problem-definition also can both increase the likelihood of settlement and reduce the time necessary for mediation; when such a process addresses the parties’ needs and allows room for creativity, it reduces the likelihood of impasse. In addition it can provide opportunities for personal change. In some situations, however, a broad problem-definition can have the opposite effect: it can increase both the

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<sup>90</sup> *Id.* at 20.

<sup>91</sup> *Id.* at 42-43.

probability of an impasse and the time and expense required for mediation by focusing the parties on issues that are unnecessary to the resolution of the narrow issues and that might exacerbate conflict. In addition, broad problem-definition can make parties and lawyers uncomfortable with the process. They may fear the expression of strong emotions and doubt their own abilities to collaborate with the other side and still protect their own interests.<sup>92</sup>

In applying the narrow versus broad and evaluative versus facilitative continuums to Michigan's case evaluation and mediation systems, it is helpful to examine Riskin's descriptions of the interactions of the two continuums. Case evaluation clearly falls in the intersection of the evaluative and narrow areas, as illustrated by Riskin's description of that area.

A principal strategy of the evaluative-narrow approach is to help the parties understand the strengths and weaknesses of their positions and the likely outcome of litigation or whatever other process they will use if they do not reach a solution in mediation. . . . Before the mediation starts, the evaluative-narrow mediator will study relevant documents, such as pleadings, depositions, reports, and mediation briefs. At the outset of the mediation, the mediator typically will ask the parties to present their cases, which normally means arguing their positions, in a joint session.<sup>93</sup>

The four most common evaluative techniques used by an evaluative-narrow mediator are: assessing the strengths and weaknesses of each side's case, predicting outcomes of court or other processes, proposing position-based compromise agreements, and urging or pushing the parties to settle or to accept a particular settlement proposal or range.<sup>94</sup> These techniques are also characteristic of Michigan's case evaluation process. The only major difference between Riskin's evaluative-narrow analysis and the case evaluation system is that case evaluation is mandatory, as discussed above. If anything, that aspect only enhances the drawbacks of the evaluative-narrow approach, by giving the parties even less flexibility to fashion creative, win-win outcomes. But, the mandatory nature of the proceeding may encourage some unrealistically optimistic parties to settle when they are confronted with an evaluation which is far afield from

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<sup>92</sup> *Id.* at 43.

<sup>93</sup> Riskin, *supra* note 53, at 26-27.

<sup>94</sup> *Id.* at 27-28.

their expectations AND they face the added threat of having to pay their opponents' legal costs. Of course, this benefit would occur only in cases where the parties were hostile toward each other and the likelihood of negotiated or facilitated agreement was very small. On the contrary, in cases where the parties could address broad, underlying interests and reach win-win agreements, the narrow-evaluative nature of case evaluation is likely to lead to more contentiousness and a lesser chance of reaching settlement.

B. Statistics Gathered in the U.S. District Court for the Western District of Michigan

Despite the wealth of theoretical analysis about the efficacy of various forms of ADR, it can never be as persuasive as actual statistics. Michigan state courts have not yet analyzed actual data from the case evaluation system<sup>95</sup> to determine relevant statistics, such as the number of cases ordered into case evaluation, settlement rates, etc. However, United States District Courts in the Eastern and Western Districts of Michigan can, and do, utilize Michigan's case evaluation system under MCR 2.403. In 2000, as part of the Dispute Resolution Task Force's Addendum Report, several Task Force members issued a "Minority Statement on the Topic of Court-Ordered Referral to Non-Binding Mediation."<sup>96</sup> Among these task force members were two distinguished members of the United States District Court for the Western District of Michigan: the Honorable David W. McKeague, United States District Court Judge for the Western District, and Mary Jo Schumacher, ADR Administrator for the United States District Court for the Western District of Michigan.<sup>97</sup>

The Addendum Report discussed statistics gathered by the Western District on the success of various ADR programs it offered and/or ordered.

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<sup>95</sup> See *supra* note 5.

<sup>96</sup> DISPUTE RESOLUTION TASK FORCE ADDENDUM REPORT, *supra* note 3 at 35-38.

<sup>97</sup> *Id.* at 38.

Since January 1, 1996, the United States District Court for the Western District of Michigan has offered voluntary facilitative mediation. The Court's experience over the past three years tells us that facilitative mediation works and works very well, settling approximately 70% of all cases referred. On the other hand, mandatory case evaluation (Michigan mediation) has never in the 16 years of use in the Western District resulted in more than a 28% settlement rate. Likewise, the Western District was part of a national pilot program utilizing mandatory arbitration. During the five years when this program was mandatory, settlement rates averaged 20% to 30%. As soon as the court made the arbitration program voluntary, the rate of use dropped while the settlement rate increased significantly. Further, in the Western District's facilitative mediation program the Court has surveyed every party, attorney and mediator in each case in which a mediation has occurred to determine [sic] program satisfaction. The responses to these surveys tell us that when participants approach facilitative mediation with a lukewarm or negative attitude, the case is not likely to settle and the participants are not enthusiastic about using the process again. Facilitative mediation works, but it works because it is voluntary.<sup>98</sup>

These statistics are somewhat startling in their possible correlation to Michigan state court settlement rates. There are certainly many other factors which undoubtedly account for many differences between the Federal courts and state courts in Michigan, such as the fact that tort cases are much more likely to be filed in state courts than in federal courts. It is therefore likely that the United States District Courts in Michigan's Western District have seen a lower percentage of tort cases than Michigan's state courts have, which could account for a higher settlement rate of civil cases. This assumes, of course, that tort cases are less likely to end in settlement than other types of civil cases. Such an assumption is undoubtedly the reason for the mandatory nature of case evaluation for tort cases filed in circuit courts. But, it is much less clear that this underlying assumption is valid—again, further statistical analysis of settlement rates in the state courts is required.

However, it is reasonable to assume that the statistics from state courts will at least resemble those seen in the federal courts. If so, then Michigan policy makers should reexamine the mandatory nature of case evaluation for tort cases, and trial courts must re-think the often

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<sup>98</sup> *Id.* at 35.

automatic ordering of so many other types of civil cases into case evaluation. Absent a direct correlation between case evaluation and settlement rates, it becomes difficult to argue in support of the current widespread use of case evaluation by Michigan's trial courts, in light of the District Court for the Western District of Michigan's findings.

I therefore propose a close examination of the Michigan Office of Dispute Resolution's report, expected in 2005, to determine how successful case evaluation has actually been in the Michigan Courts. If, as I expect, settlement rates attributable to case evaluations are similar to those found by the United States District Court for the Western District of Michigan, they will not be significant enough to justify the costs of the system to both parties and courts.

#### **IV. CONCLUSION**

Michigan's long history of using case evaluation as major means of ADR may come into question after the state Office of Dispute Resolution releases, for the first time, statistics on the efficacy of the case evaluation system in Michigan's trial courts. If statistics from Federal District Courts in Michigan serve as an indicator, voluntary, facilitative mediation will prove to result in much higher settlement rates than mandatory case evaluation. Application of general ADR theory to the dilemma suggests that voluntary, facilitative, broad types of ADR, such as traditional mediation, tend to be more effective on many levels than mandatory, evaluative, narrow types, such as case evaluation. A complete abandonment of Michigan's case evaluation system, even if statistics support this author's theoretical postulations, is highly unlikely. Instead, if statistics show case evaluation as currently used in Michigan to be mainly ineffective, this author argues that it should be used more sparingly by Michigan's courts and reserved for individual cases or types of cases which would benefit the most from case evaluation's unique system. This author proposes that those types of cases could include tort cases, or litigation

where parties are unwilling to move from unreasonable positions in light of the facts and the law. Case evaluation should not be used, however, in cases where a zero-sum situation is undesirable or counter-productive. Michigan's courts must recognize that mandatory, evaluative types of ADR, like case evaluation, have certain inherent benefits, but should not constitute the sole, or even predominant, tool in the courts' toolbox of dispute resolution options.

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