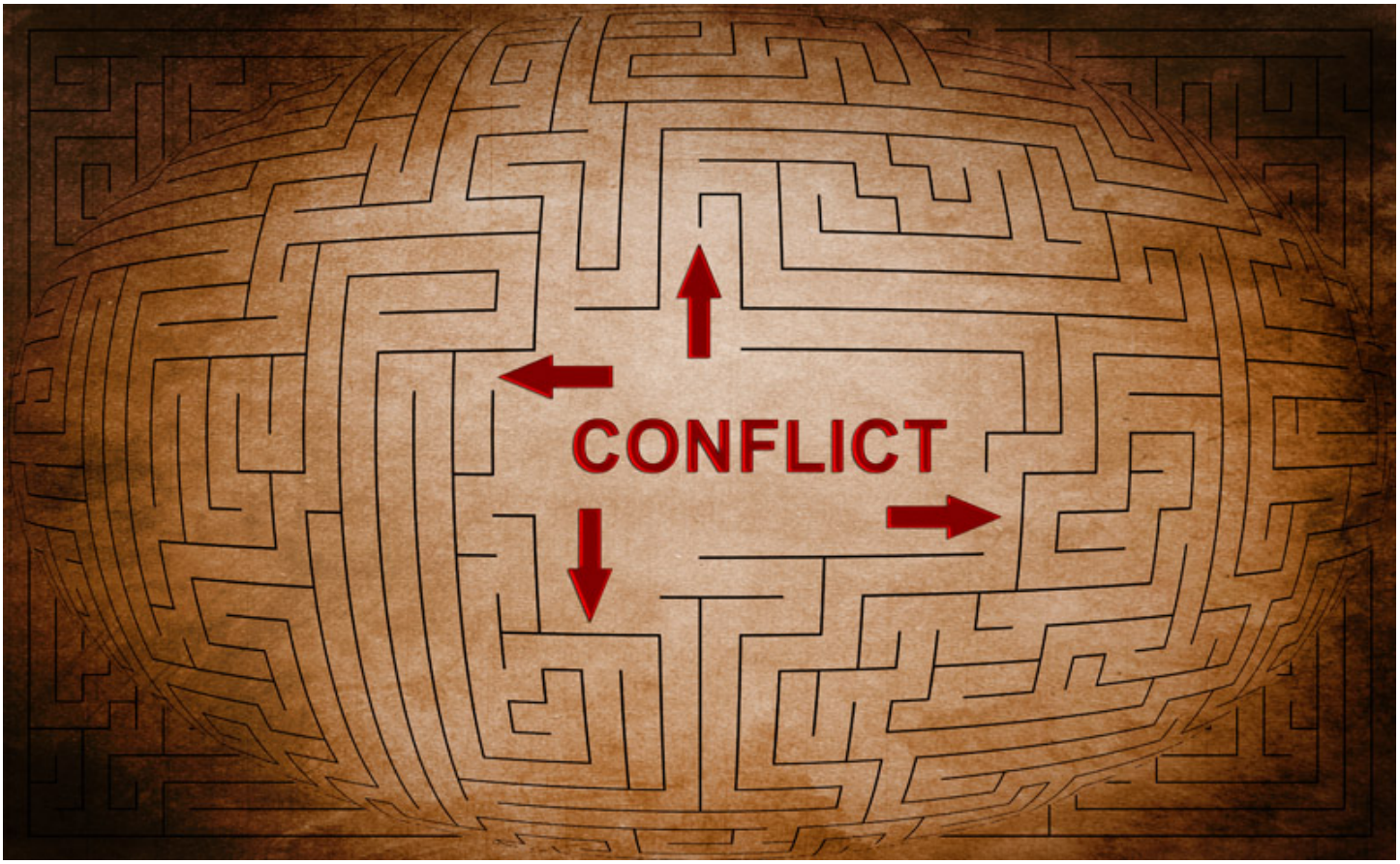

A TAXONOMY OF ADR

A Guide to ADR Practices & Processes for Counsel

Revised 2015 (originally published 2013)

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Exhibits and Sample Forms

I. Introduction – The Objectives of this Revised Taxonomy

A taxonomy is a "classification; especially: an orderly classification of objects and entities according to their presumed natural relationships" and this revised *Taxonomy of ADR* does just that. The initial *Taxonomy of ADR* published in 2013 by the ADR Committee of the Macomb County Bar Association had a number of purposes: identify and classify the rich diversity of ADR techniques that can be tailored, staged, and "right sized" to meet the particular needs of the parties in resolving all or a portion of their dispute; briefly describe these ADR techniques and suggest the settings (including thoughts on the selection of a neutral) in which they might be most effective; and, encourage creativity by the bar, the bench, litigants and neutrals to explore and experiment with ADR techniques that might be mutually shaped by the parties to address their unique interests. This revision continues in that tradition by providing updated information and a discussion of additional ADR processes important to counsel in evaluating strategic decisions. To assist in the accomplishment of its goals, the original *Taxonomy* provided a number of samples, drafting checklists and references for consideration by counsel that have been updated and expanded in this revision.

Used during numerous judicial and professional training sessions throughout Michigan and the United State the original *Taxonomy* achieved its objectives. Hundreds of copies provided to the judiciary and attorneys engendered very favorable comments. In fact, the Michigan Supreme Court, State Court Administrative Office (SCAO), Office of Dispute Resolution edited the original *Taxonomy* for use by trial court judges. SCAO's recently published *Michigan Judges Guide to ADR Practice and Procedure*[1] is a valuable resource for the judiciary and used in seminars sponsored by the Michigan Judicial Institute.

The caveat contained in the original *Taxonomy* proved very true:

> …in many regards developing a *Taxonomy of ADR* is virtually impossible. The field is ever growing and evolving and as soon as a *Taxonomy* is prepared it is outdated as new ADR techniques and methodologies are developed.

In the two years since the publication of the original *Taxonomy* significant changes in ADR techniques available to litigants and counsel have proliferated. Just to name a few:

- A number of innovative ADR processes and case management practices employed in Michigan's new Business Courts;[2]
- New and revised ADR plans in many Michigan Circuit Courts and in the Federal Court for the Eastern District of Michigan (*see, e.g.,* Eastern District of Michigan's newly adopted LR 16.3 through 16.7 and Macomb County's recently modified LAO 2014-15 In re: Adoption of ADR Plan and LAO 2014-16 In re: Selection of Case Evaluators and Case Evaluation Panels);
- Michigan's recent enactment of the Uniform Collaborative Law Act, MCL §§ 691.1331 - 691.1354;
- On March 25, 2015, the Supreme Court issued an Administrative Order authorizing the use of summary jury trials in pilot jurisdictions;

[1] http://courts.mi.gov/education/mji/New%20Judges%202015/ADR%20Recent%20Developments.pdf#search="Michigan Judges Guide to ADR Practice"

[2] *See, e.g.*, Hon. John C. Foster and Richard L. Hurford, *ADR Within ADR: The Business Courts -- a Laboratory for Litigation Process Improvement*, Michigan Bar Journal (January 2015).

- The expanded potential to use receiverships with the Supreme Court's recent amendments of MCR 2.621 and 2.622;
- Public Act 382 of 2014 amended Section 13 of the Friend of the Court Act requiring FOC offices to have ADR Plans approved by the Chief Judge and SCAO. These plans include ADR services that can be court ordered or voluntary and must include voluntary mediation services; and,
- Novel ADR approaches developed in a number of courts such as Washtenaw County Circuit Court's use of peacekeeping and Wayne County's exploration of restorative justice in criminal auto theft cases.

The authors of this *Taxonomy*, Richard L. Hurford and Tracy L. Allen, would like to thank the Chief Judge of the Macomb County Circuit Court, Judge John C. Foster, for his continued leadership in embracing ADR. Judge Foster recently announced his intent to retire from the judiciary and his grace, thoughtfulness, professionalism and leadership will be missed. Judge Foster was the inspiration for the preparation of this *Taxonomy* and we owe him our sincere gratitude. Also, Doug Van Epps, the Director of the Office of Dispute Resolution at the Supreme Court Administrative Office, generously shared his thoughts and insights on ADR and effective case management. A thought leader in ADR and case management, Mr. Van Epps' significant contributions were welcomed and appreciated. Others who provided invaluable input include: Susan Butterwick (restorative and peacekeeping practices); Laura Athens (special education processes), Zena Zumeta and Timothy Cole (domestic relations, parenting coordination, and Friend of the Court processes), and Anthony Caputo (receiverships).

II. An Overview – Why ADR is So Important

There are a number of independent but converging forces giving rise to an ADR explosion in the State of Michigan.

1. The Courts Are Increasingly Mandating ADR

The Michigan Court Rules have long provided the judiciary with the authority to order parties to engage in various forms of ADR.

> All civil cases are subject to alternative dispute resolution processes…[and] ADR means any process designed to resolve a legal dispute…and includes settlement conferences…, case evaluation…, mediation…, domestic relations mediation…, **and other procedures provided by local court rule or ordered on stipulation of the parties…. At any time, after consultation with the parties, the court may order that a case be submitted to an appropriate ADR process. More than one such order may be entered in a case** (emphasis added).[3]

[3] MCR 2.401; *see also* MCR 5.143.

This long standing authority is increasingly important as courts face unprecedented pressures to do more with less. Strained judicial resources, however, will not exempt the trial courts from judicial "dashboards"[4] and compliance with standards SCAO has developed that focus on judicial performance in the effective processing and management of a case load.[5] The Supreme Court's Administrative Order underscores the importance of these judicial metrics:

> Implementation of Trial Court Performance Measures
>
> Performance measurement is a critical means to assess the services provided to the public and the processes used to deliver those services. Performance measurement can assist in assessing and recognizing areas within courts that are working well, and those that require attention and improvement… [All] trial courts should embrace performance measures as an opportunity to provide high-quality public service in the most efficient way.[6]

With the emphasis on judicial dashboard measurements of "clearance rates," "case age," and the use of "evidence based practices,"[7] all trial courts are increasingly looking to early ADR and other effective litigation management techniques to achieve SCAO's metrics.[8]

The Business Courts, as well as the proliferation of other specialty and problem solving courts throughout the state,[9] provide further impetus to the development of ADR practices. For example, the Business Courts resulted from a legislative desire to deliver justice in a speedier and more economical fashion. The Business Courts are literally a legal process improvement endeavor that challenges the Michigan judiciary to develop and refine those evidence based practices that will assist in meeting the goal of delivering 21st century justice in the most cost effective, fair, efficient, and speedy fashion practicable.[10] As stated by the Honorable Christopher Yates, the Circuit Court Judge appointed to preside over the Specialized Business Docket (SBD) in Kent County:

> [T]he SBD pilot projects should benefit all litigants in Michigan by spawning innovations such as electronic case filing and proactive judicial intervention that

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[4] A staple of business enterprises, **"dashboards"** provide real time, visual feedback to the organization, department, and/or individual employees whether and to what extent management objectives deemed important are being achieved. Richard L. Hurford*, Is that a Judicial Dashboard Coming Down the Litigation Highway?*, ADR Quarterly (September 2013).

[5] *See* http://courts.mi.gov/education/ stats/dashboards/pages/default.aspx.

[6] Administrative Order No. 2012-5, http://courts.mi.gov/education/stats/dashboards/Documents/2012-15_2012-12-05_formatted%20order_AO%20No%202012-5_1.pdf#search="Administrative Order 2012-5"

[7] Litigation **"evidence based practices"** has been defined as: "The conscientious, explicit and judicious use of current best evidence in making decisions about the management of a dispute. It means integrating individual judicial and legal expertise with the best available external evidence from systematic research." *See* David C. Steelman, *Caseflow Management: The Heart of Court Management in the New Millennium*, National Center for State Courts (2004) http://www.yourhonor.com/pdfs/PDP10/Caseflow.pdf. Evidence based practices have long been used by business organizations to enhance efficiency and customer satisfaction through such process improvement techniques as Six Sigma, Lean Manufacturing, etc.

[8] S*ee* http://courts.mi.gov/education/stats/dashboards/Pages/Dashboard-Performance-Metrics-Why.aspx

[9] Frank Weir, *Michigan's Specialty Courts Highly Effective*, Legal News (Feb. 23, 2009) http://www.legalnews.com/flintgenesee/607557)

[10] *See* Hon. John C. Foster and Richard L. Hurford, *ADR Within ADR: The Business Courts -- a Laboratory for Litigation Process Improvement*, Michigan Bar Journal (Jan. 2015).

> can be incorporated into all litigation, regardless of its complexity. In other words, the SBD pilot projects will not only assist the business community, but also enhance the State of Michigan as a whole by creating a more efficient, responsive court system. For this, we should all be grateful.[11]

Clearly, one evidence based practice required in the Business Courts is increased reliance upon various forms of ADR. The Michigan Supreme Court promulgated standards for the Business Courts that emphasized the importance of early ADR as a case management technique:

> Courts shall establish specific case management practices for business court matters. These practices…will typically include provisions relating to…alternative dispute resolution (with an emphasis on mediation scheduled early in the proceeding)…[12]

Similarly, SCAO recommended each Business Court set forth "how the business court will utilize early alternative dispute resolution."[13]

In accordance with these directives, like other Business Courts, the Macomb County Business Court Administrative Order (*see* Exhibit 1) calls for the mandatory early exchange of certain designated categories of information, conducting a case conference with counsel **very early** in the life of the litigation, and the filing of a joint pretrial statement that sets forth the "proposed settlement discussions and current status; existence of arbitration and mediation agreements, if any; ADR possibilities considered and proposed; and barriers to resolution financial and otherwise." *See also* The Oakland County Business Court Administrative Order (Exhibit 2).[14] Underscoring the importance of ADR and evidence based practices to the Business Courts, the Oakland County Business Court has compiled a grid of various ADR options the court recommends for consideration by counsel in the resolution of business disputes (*Some Effective ADR Options for Business Courts*, Exhibit 3) as well as a model Business Court protective order for use by litigants.[15]

The commendation for early ADR is not directed solely to the Business Courts. SCAO's *Caseflow Management Guide*, a resource provided to all trial judges throughout the state, also emphasizes the importance of early ADR and the evidence based practice of early judicial involvement:

> The 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…. Timely and appropriate referrals can best be achieved through early court intervention and

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[11] *Specialized Business Dockets: An Experiment in Efficiency* https://www.accesskent.com/Courts/17thcc/pdfs/Experiment_Efficiency.pdf

[12] http://courts.mi.gov/Courts/MichiganSupremeCourt/rules/court-rules-admin-matters/Court%20Rules/2012-36_2013-02-06_formatted%20AO%202013-X.pdf#search="AO on the Business Courts"

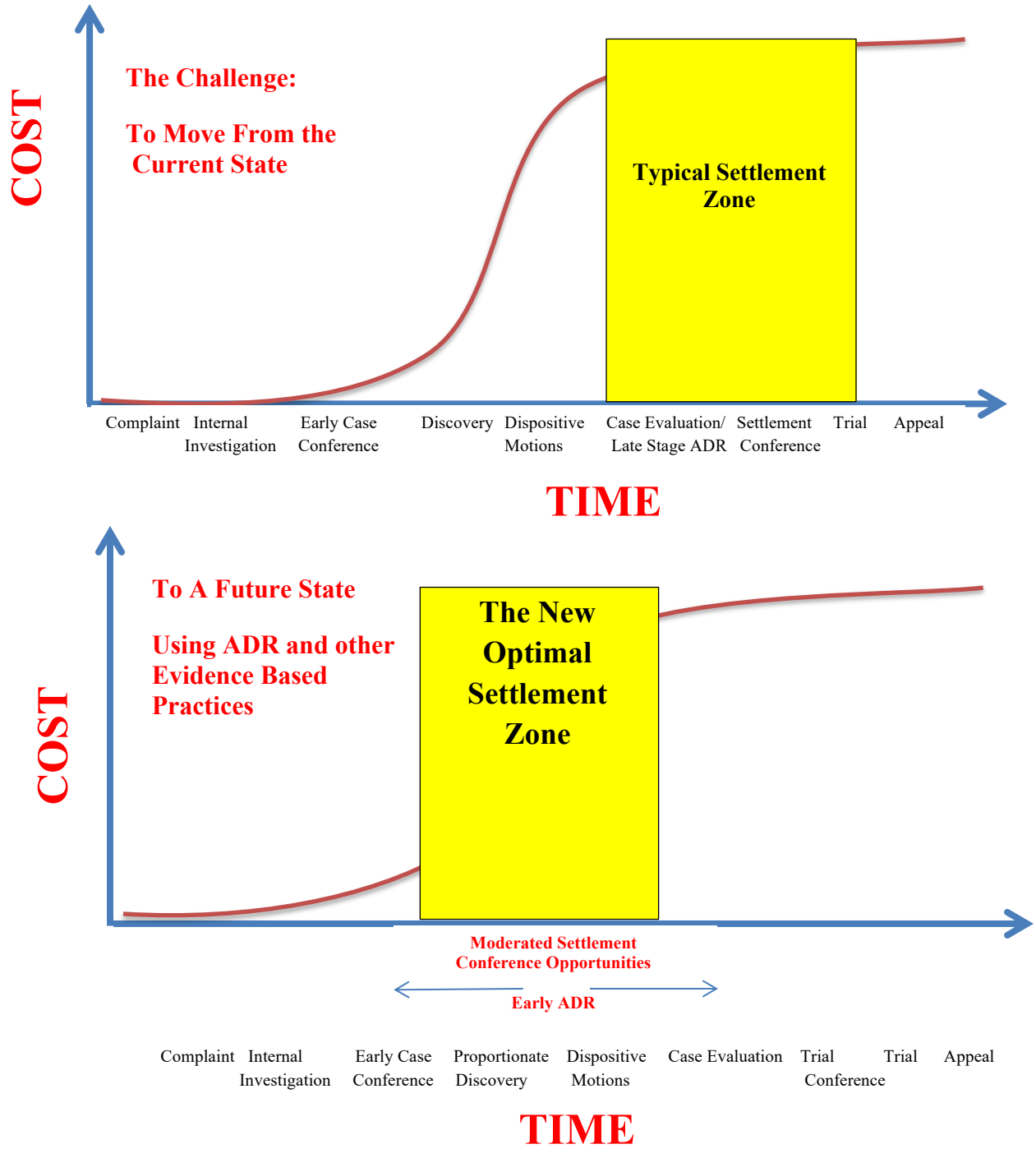
[13] *See Supreme Court Administrative Office, Model Local Administrative Order 40 (Creation of a Specialized Business Court)* http://courts.mi.gov/administration/admin/op/business-courts/pages/business-courts.aspx

[14] *See* http://courts.mi.gov/search/ pages/results.aspx?k=Business%20court%20administrative%20orders (for the text of all the local Administrative Orders in each of the 17 Michigan Business Courts).

[15] http://www.oakgov.com/courts/ businesscourt/Documents/mod-bc-pro_ord.pdf

case screening.[16]

During seminars provided to the Michigan judiciary and practitioners in 2014 and into 2015, the importance of early ADR and other evidence based practices in moving to a new litigation paradigm was graphically depicted as follows:



[16] http://courts.mi.gov/Administration/SCAO/Resources/Documents/Publications/Manuals/cfmg.pdf

The second graph presents an enhanced opportunity to avoid litigation waste and preserve limited judicial resources. Early ADR and other evidence based practices (such as convening an early case conference that establishes an ADR plan for the case and other case milestones, the early appointment of a neutral whose services can be utilized throughout the course of the litigation, the use of proportionate discovery principles, periodic moderated settlement conferences, etc.) provide the pathways for achieving a resolution in "The New Optimal Settlement Zone" before the majority of litigation costs and judicial resources are incurred; thus, the emphasis on judicial performance and dashboards.

The increased importance of ADR to the courts is not confined to the Michigan trial courts. The Federal Court for the Eastern District of Michigan adopted a new ADR plan effective February 1, 2015,[17] and the Western District of Michigan has implemented an ADR Plan specifically providing for a number of ADR processes: facilitative mediation, case evaluation, early neutral evaluation, and summary jury trials.[18]

a. **Eastern District of Michigan Local ADR Rule**

The new local rules of the Eastern District of Michigan highlight the increasing reliance on ADR by the courts and why Michigan practitioners must thoroughly familiarize themselves with the ADR plans in each trial court and adapt their litigation practices and strategy accordingly.

The E.D. of Michigan's former ADR plan, LR 16.3, solely provided for case evaluation incorporating the provisions of MCR 2.403. Effective February 1, 2015, the court implemented new local rules that address:

LR 16.3	Alternative Dispute Resolution
LR 16.4	Facilitative Mediation
LR 16.5	Case Evaluation
LR 16.6	Settlement Conferences
LR 16.7	Other ADR Procedures

The Eastern District now affirmatively asserts "judges of this district favor ADR methods in cases where the court determines, after consultation with the parties, that ADR may help resolve the case."[19] As a practical matter, after consultation with the parties, the district court will likely determine virtually all civil cases appropriate for some form of ADR. The only civil actions exempted from any ADR process "are cases in which the United States is a party are not subject to case evaluation."[20]

A party's due diligence prior to the Rule 26(f) conference will now involve determining the individual practice of each trial judge as to the timing of the mandatory ADR discussions for the case, as well as the court's practices regarding the selection of a neutral and how early in the litigation the court will require the implementation of the ADR strategy developed by the parties and ordered by the court (*e.g.*, will ADR take place before the completion of all discovery and motion practice, will the court require mediation before any case evaluation, and will the trial court entertain any early dispositive motions before ordering ADR).

Undoubtedly the district courts will continue to explore other evidence based practices long pioneered by the court such as: the early mandatory exchange of information; the identification of an agreed upon neutral at the Rule 26(f) conference who, in addition to facilitating settlement of the entire dispute, might

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[17] *See* http://www.mied.uscourts.gov/PDFFIles/jan2015NoticeOfAdrRules.pdf
[18] *See* http://www.miwd.uscourts.gov/alternative-dispute-resolution
[19] LR 16.3(a)
[20] LR 16.5(b)

assist the parties in resolving discovery and other sub-disputes that arise during the course of the litigation; and, ordering proportional discovery that focuses initial discovery on the informational needs of the parties necessary to engage in a meaningful early ADR event and defers other discovery until it appears the case will likely proceed to trial.[21]

LR 16.3 outlines a general limited confidentiality provision for all ADR processes and LR 16.4 (e) (1) further specifies in cases of "Facilitative Mediation" the "mediator may require the parties to sign an agreement consistent with this rule regarding confidentiality of the proceedings…." If the parties desire to protect the confidentiality of any ADR proceeding (i.e., facilitative mediation, neutral fact finding, neutral evaluation, mini trial, etc.) to the greatest extent permitted by law, they might consider entering into an independent agreement with the neutral that contractually provides more expansive confidentiality protections than those provided in the LR. *See* Exhibit 4 (sample Mediation Agreement with Confidentiality Provisions).

The standards for the disqualification of a neutral cites 18 U.S.C. § 455 and are fairly specific and not as broad as the requirements imposed upon mediators in the *Mediator Standards of Conduct* (Exhibit 5) that govern mediator disclosures and conflict of interest issues in all Michigan state court ordered mediations.[22] Counsel might request the federal court to consider incorporating the *Mediator Standards of Conduct* into any court ordered mediation or other ADR process. In the alternative, when entering into a written mediation agreement with the court appointed neutral, litigators may call for the provisions of the *Mediator Standards of Conduct* to govern the process. *See* Exhibit 4. Any neutral who engages in Michigan court ordered mediations is familiar and comfortable with these standards.

Another difference between LR 16.4 and MCR 2.411 concerns the selection of the mediator. MCR 2.411 encourages the parties to select the mediator and, if unable to do so, a mediator will be assigned at random from a list maintained by the county court's ADR Clerk.[23] A Michigan trial court is prohibited from "appoint[ing], recommend[ing], direct[ing], or otherwise influenc[ing] a party's or attorney's selection of a mediator" unless specific, limited conditions are met.[24] Under the new LR the "parties may select a mediator" but also states "the court may disapprove the selection…and

- Appoint a mediator from the parties' nominations
- Appoint a mediator from the judge's qualified mediator list, or
- Appoint another federal judicial officer, including a magistrate judge."[25]

While the comment to the LR indicates the "parties' choice of a mediator will generally be honored and disapproval is expected to be exceedingly rare," a best practice may involve mutual agreement in advance of the Rule 26 conference to a specific mediator as well as a potential second choice in the event the court disapproves the first choice. In the alternative, if the parties are unable to agree on the single "best" mediator, but agree that any of two or three mediators will be "satisfactory," counsel might nominate those mediators for the court's consideration and request the district court to select one of the nominees.

Unlike the practice in Michigan where the state courts maintain one list of qualified mediators for all judges in the judicial circuit, each federal judge is authorized to compile a list of mediators who may be appointed by that judge in the event the court disapproves the parties' selection or the parties are unable to

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[21] *See, also*, Hon. John C. Foster and Richard L. Hurford, *ADR Within ADR: The Business Courts -- a Laboratory for Litigation Process Improvement*, Michigan Bar Journal (Jan. 2015).
[22] *Compare* Standards II and III *with* 18 U.S.C. § 455.
[23] *See* MCR 2.411 (B) (3).
[24] MCR 2.411 (B) (4).
[25] LR 16.4(c)

agree upon a mediator or mediators to nominate for the court's consideration.[26] In the event parties are having difficulty agreeing to a mediator, rather than simply asking the district court to select a mediator from the court's list, the attorneys might review the district court's list of qualified, experienced mediators and determine if they can agree in advance to one or more mediators on that list to either select or nominate for the court's consideration.

It is noteworthy that unlike MCR 2.411 entitled "Mediation," LR 16.4 is entitled "Facilitative Mediation" and may suggest a collective determination by the district court the "facilitative" model of mediation is preferable to the "evaluative" or other techniques.[27] LR 16.4 defines Facilitative Mediation as:

> Facilitative mediation (mediation) is a flexible, nonbinding dispute resolution process in which a neutral third party – the mediator – facilitates negotiations among the parties to help them reach settlement**. Mediation seeks to expand traditional settlement discussions and broaden resolution options, often by going beyond the issues in controversy.** The mediator who may meet separately or jointly with the parties, serves as a facilitator only and does not decide issues or make findings of fact (emphasis added).

Using Riskin's grid (that provides an effective framework for counsel in the selection of the appropriate mediator style for a dispute), this definition arguably suggests a preference for a facilitative-broad based approach as opposed to an evaluative-narrow focus.[28] Those litigants who believe a narrow, evaluative approach is preferable to their dispute, might be well advised to mutually agree as early as possible upon a mediator who employs that style. In the alternative, if the parties cannot agree on the mediator whose style is preferable (facilitative-broad v. evaluative-narrow), a litigant might consider using the text of LR 16.4 to urge the court's selection of the optimal mediator whose style is preferred.[29]

Rule 16.5 mirrors the former LR 16.3 but is entitled "Case Evaluation" instead of "Mediation." Clearly the court desires to preserve the option of ordering parties to case evaluation. Two significant issues, however, are whether the court will be inclined to order case evaluation only after there has been an unsuccessful mediation or order case evaluation over the objections of the parties. A recent study conducted for SCAO seriously questioned whether standard case evaluation pursuant to M.C.R 2.403 is an effective ADR technique.[30] Additionally, the study determined that case evaluation followed by mediation significantly contributed to the length of a case and a delay in the ultimate resolution. *See* discussion at pp. 43-45. When called upon to discuss and consider an ADR plan with the federal district court, if the parties believe staging a facilitative mediation before case evaluation would be beneficial (or desire to avoid case evaluation entirely) this study provides significant empirical data (i.e., an evidence based practice) to support those positions and the avoidance of potential litigation waste.

Unlike MCR 2.411, the court's new ADR plan specifically addresses a number of process issues:

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[26] LR 16.4(b)

[27] *See generally*, Zena Zumeta, *Styles of Mediation: Facilitative, Evaluative, and Transformative Mediation*, http://www.mediate. com/articles/zumeta.cfm.

[28] Leonard L. Riskin, *Mediator Orientations, Strategies and Techniques*, 12 Alt. to High Cost Litig. 111 (1994).

[29] Additional factors to consider in selecting a neutral are more fully discussed at pp. 63-66.

[30] *The Effectiveness of Case Evaluation and Mediation in Michigan Courts*, http://courts.mi.gov/Administration/SCAO/Resources/Documents/Publications/Reports/The%20Effectiveness%20of%20Case%20Evaluation%20and%20Mediation%20in%20MI%20Circuit%20Courts

a. The mediator may require the parties to "sign an agreement consistent with this rule regarding…discovery for the proceedings, and other procedural matters."[31] The mediator is now specifically authorized to address the exchange of information the parties believe is necessary for a meaningful mediation. Particularly if the court orders mediation early in the life of the case, and a party believes additional information is required for an effective mediation, the party should make that known to the mediator so the information exchange can be meaningfully addressed well in advance of the parties meeting. In addition, if there are process issues (*i.e.,* whether or not to have a joint session, the benefits or problems that might be encountered if opening statements are given, the length of the mediation, the mandatory exchange of mediation summaries, the order of issues to be mediated, who must be physically present at the mediation, whether the mediation may be conducted by telephone or other electronic means, etc.) the parties should consider a mediator whose practices include conducting a robust pre-mediation conference call when all such process issues can be addressed and satisfactorily resolved.

b. As LR 16.4 (e) provides significant latitude to the appointed mediator to determine unilaterally a number of process issues, litigators might address another matter. While some mediators desire to "own" the mediation process, such ownership may prove problematic given the nature of the dispute. In an ABA study, *Task Force on Improving Mediation Quality* (2008),[32] experienced litigators catalogued a number of criticisms of mediator practices. One of the major criticisms of mediator practices included the belief that some mediators are insufficiently flexible in customizing the mediation process in consultation with the parties.

> Some mediators and some parties and counsel may, almost by rote, rely upon essentially identical approaches to every case. In most cases, however, mediators would be best advised to make an effort to evaluate each case on its own, and develop a process in coordination with the parties and counsel, that is best suited for that particular case.[33]

Mediators and counsel should take note of the admonition contained in the ABA Study and at least discuss during a pre-mediation conference call how the process might be tailored to meet best the needs of the particular dispute. If process design input is important to counsel, consideration might be given to incorporating the *Mediator Standards of Conduct* into the mediation agreement (*see* Exhibit 4) (Standard I requires party self-determination in a number of areas including process issues) as well as selecting a mediator who is receptive to party input on process customization. *See* note 29.

c. Similar to the requirements of MCR 2.411 and the *Mediator Standards of Conduct*, LR 16.4 significantly limits the extent of communications between the court and the mediator concerning the mediation.

> The mediator must advise the court of completion of mediation within seven days of completion, **stating only the date of completion, who participated, whether settlement was reached, and whether further ADR proceedings are contemplated** (emphasis added).

This closing report is similar to the practice in Michigan state courts as provided in SCAO form mc 280.[34]

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[31] LR 16.4 (e) (1)

[32] http://www.americanbar.org/content/dam/aba/migrated/dispute/documents/FinalTaskForceMediation.authcheckdam.pdf

[33] *Id*. at pp. 12-13

[34] http://courts.mi.gov/Administration/SCAO/Forms/courtforms/alternativedisputeresolution/mc280.pdf

The new ADR Plan places direct responsibility on the attorney and law firms to pay the fees of the selected neutral:

> The attorney or law firm representing a party participating in ADR is directly responsible for fees payable to the court, mediators, or arbitrators.[35]

And, in the case of facilitative mediation, the LR 16.4 (d) prescribes the allocation of those fees:

> The mediator must be paid his or her standard hourly rate, assessed in as many equal parts as there are separately represented parties, unless the parties agree in writing or the court orders otherwise.

If a different allocation or payment method is agreed upon, that fact should either be placed in the court's ADR order, the written agreement with the neutral, or documented in the written settlement agreement.

LR 16.7 specifically invites the use of ADR processes beyond facilitative mediation and case evaluation:

> A judge may use other methods of alternative dispute resolution, including summary jury trials, summary bench trials and (with the parties' consent) arbitration, or recommend or facilitate the use of any extrajudicial procedures for dispute resolution not otherwise provided by these rules.

In sum, the new LR invites the district court and parties to explore and experiment with timing and staging any ADR process(es) appropriate for the dispute. Given this invitation, it will benefit the litigator to become familiar with, seriously consider and evaluate the panoply of ADR processes discussed in this *Taxonomy*.

2. What's in ADR for Counsel and Law Firms?

As more and more clients are maintaining performance measurements and dashboards on counsel's performance, the use of ADR can help **you** achieve a competitive advantage and attracting more clients!! Early engagement in ADR and other evidence based practices are being driven by more than the judiciary. Over the past two decades business clients in general have become increasingly frustrated with the cost and delay of traditional litigation and arbitration and have used ADR processes to either reduce or avoid the cost of litigation while achieving important corporate objectives. The entire premise of the Association of Corporate Counsel's (ACC) Value Challenge[36] involves the desire to drive a greater alignment between costs and the value of legal services. The former chair of the ACC Value Challenge candidly stated the organization's frustration with the status quo:

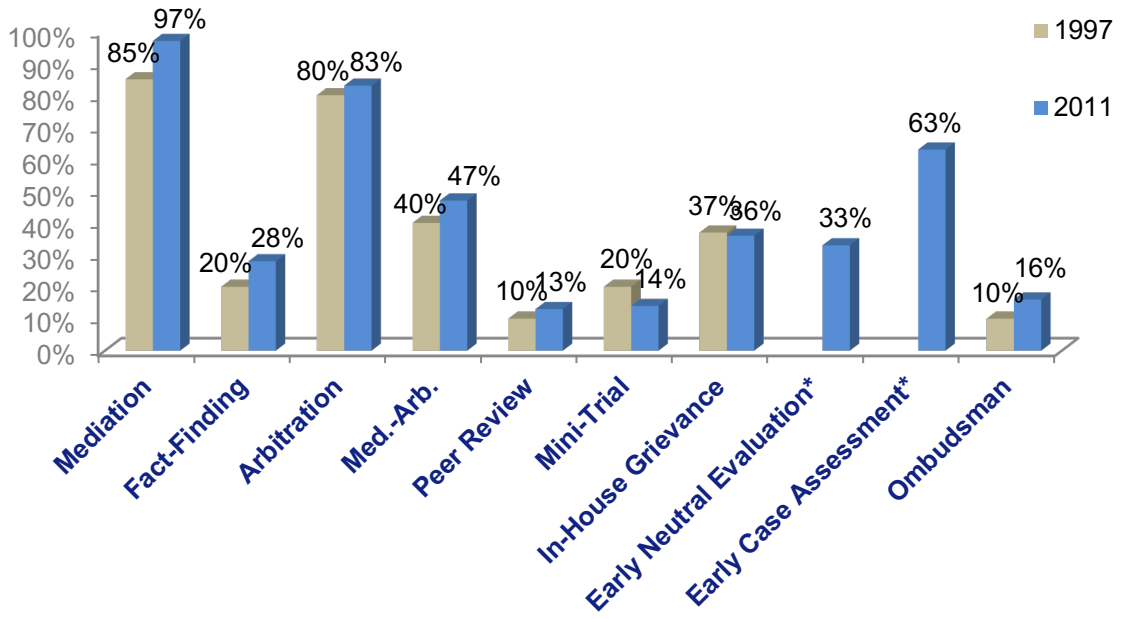
> Even before the economic meltdown, corporate counsel had started pushing back more on rising legal costs and voicing their frustrations. Costs keep rising, but with no noticeable improvement in efficiencies and outcomes… The system is

[35] LR 16.3 (h)
[36] www.acc.com/valuechallenge/

broken… **Better alignment is needed between costs and value (**emphasis added).

Counsel who regularly represent business clients will verify that timely, creative ADR strategies, including contractual provisions[37] and cost effective case management practices, are an essential and valued part of the counseling process in the client's desire to avoid litigation and to bring litigation costs under control. Counsel who avoid litigation waste are routinely rewarded for achieving greater alignment with the business client's litigation cost control objectives.[38]

Businesses are increasingly using an array of ADR techniques to either avoid or resolve disputes quickly and efficiently. A study by Thomas Stipanowich summarized this undisputable trend by Fortune 1000 companies.[39]



In comparing the ADR practices of companies between 1997 and 2011 in resolving disputes, sophisticated business clients have and will continue to deploy a multiplicity of ADR processes. As documented in the Stipanowich study the two primary drivers for the increased use of all forms of ADR are to save time and money. Let there be no doubt -- many business clients also keep "dashboards" on outside counsel just like dashboards maintained on the trial courts.[40] Those law firms and attorneys who score better on their clients' dashboards (by reducing case age, reducing average case costs, etc.) have a definite competitive advantage;

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[37] Numerous samples of contractual ADR provisions are attached for consideration, adaptation and use for counsel in serving the disparate dispute resolution needs of their clients. Other ADR forms can be accessed at the websites of PREMi (Professional Resolution Experts of Michigan) (premiadr.com/), the American Arbitration Association (https://adr.org/), and similar dispute resolution organizations.

[38] *See, e.g.,* Richard L. Hurford, *SMART Dispute Resolution Processes*, Michigan Bar Journal (June 2010).

[39] Thomas J. Stipanowich, *Living with ADR: Evolving Perception and Use of Mediation, Arbitration and Conflict Management in Fortune 1,000 Companies* (2013), ww.courts.state.md.us/macro/pdfs/reports/cornellstudy2013.pdf.

[40] *See, e.g.*, Association of Corporate Counsel, *Managing Value-Based Relationships with Outside Counsel*, http://www.acc.com/advocacy/valuechallenge/toolkit/loader.cfm?csModule=security/getfile&pageid=19673.

they are **aligned** with their clients. Seyfarth Shaw, and the *SeyfarthLean* initiative,[41] is only one of any number of law firms that has established a dedicated marketing strategy on the use of cost effective, evidence based practices intended to appeal to business clients in search of alignment with outside counsel. If business clients have already decided various forms of ADR are critically important in meeting corporate goals, lawyers and law firms would be well served to adapt and selectively recommend all appropriate ADR strategies discussed in this *Taxonomy*.

Sophisticated and successful counsel have already leveraged ADR and other evidence based practices to align litigation costs and value for their clients as further illustrated by the Early ADR Summit. This Summit, convened by SCAO in 2013, called upon respected judges, litigators who regularly represent business clients and the plaintiffs' bar, and neutrals to identify and make recommendations of evidence based practices that would improve the litigation process and assist in the elimination of litigation waste.[42] Key recommendations from this dialogue included:

(1) Judges should meet lawyers, client, 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 [of mediation and case evaluation].

(3) Differentiated case management should be adopted. This practice recognizes a number of 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.

Law firms and attorneys, such as those participants in the Early ADR Summit, who effectively encourage the use of strategic evidence based practices and early forms of ADR, will attain the alignment sought in the ACC Value Challenge as well as assist the courts in achieving those metrics called for by judicial dashboards. They have and will continue to enjoy a competitive advantage and score well on the dashboards maintained by their business clients. Moreover, counsel, who at one time solely relied upon the facts and

[41] *See* http://www.seyfarth.com/SeyfarthLean.

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

the law in the representation of their clients, must now consider whether they can strategically further the cause of their clients by appealing to the court's desire to employ various evidence based practices that will be of benefit to their client.

3. Ethical Obligations

The ethical standards required of counsel and the independent *Mediator Standards of Conduct* (Exhibit 5) also recommend the use knowledge of ADR and evaluating the potential efficacy of the various forms of ADR explored in this *Taxonomy*.

As indicated in the ADR plan of the Macomb County Circuit Court (Exhibit 6), lawyers are ethically obligated and expected to recommend alternatives to litigation when ADR is a reasonable course of action to further the client's interests or the lawyer believes the client would find such alternatives desirable.[43] In light of ethical obligations, the ADR court rules, the ADR plans developed by each circuit and the federal courts, and the practices in the Business Courts, very early in the litigation process counsel must now affirmatively consider whether ADR is a reasonable course of action, whether the client would find ADR desirable, and, if so, the most appropriate ADR strategy to pursue. Ideally, many ADR processes can and should be considered even before or shortly after the filing of a formal cause of action. *See* Exhibit 7 (a sample Agreement for an Early Mediation). Moreover, it has become increasingly important for the attorney to be familiar with all ADR methodologies before the court enters an ADR order providing for a process(es) the lawyer believes may not be appropriate to the case or the client's needs. It behooves counsel and the parties to assess the possibilities and promote those ADR plans at the early case conference that will best serve the client. It is hoped this revised *Taxonomy* will assist counsel in an evaluation of the rich diversity of possibilities that can be most effectively shaped, timed and urged for adoption by the court.

The *Mediator Standards of Conduct* also place greater importance on mediators, litigants and counsel to have a robust understanding and discussion of the most appropriate ADR process. Standard I, Self-Determination, provides:

> A mediator shall conduct mediation based on the principle of party self-determination. Self-determination is the act of coming to a voluntary, uncoerced decision in which each party makes free and informed choices as to **process** and … **process design**... (emphasis added).

As the parties are entitled to have input into the specific ADR process that will be pursued, unless counsel and ADR providers have an understanding of the rich diversity of potential processes, the right of self-determination may be frustrated.

The uncertainly, costs and delay associated with civil litigation have contributed to the phenomenon known as the "Vanishing Jury Trial."[44] As documented by SCAO's most recent statistics, only 1.4% of the entire civil case load closed by all Michigan courts in 2014 was disposed of by a jury or bench trial.[45] To the extent that 98.6% of all civil cases filed in Michigan do not result in a bench or jury trial, the issue most

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[43] *See* Ethical Opinion RI-262 (May 7, 1996), http://www.michbar.org/ opinions/ethics/ numbered_opinions/ri-262.cfm.
[44] *See* American College of Trial Attorneys, *The "Vanishing Trial", the College, the Profession* (2004)
[45] *See 2014 Civil Cases Disposed by Jury and Bench Verdict, State Court Administrative Office, 2014*

litigants and their counsel must realistically face before or shortly after the filing of a lawsuit is how to resolve the litigation in the most cost effective and timely manner consistent with reaching the client's most important objectives. If summary judgment and other early dismissal of the case are not realistic, achieving these objectives is perfectly suited to the judicious consideration of the full range of appropriate ADR techniques.

III. Organization of this Taxonomy

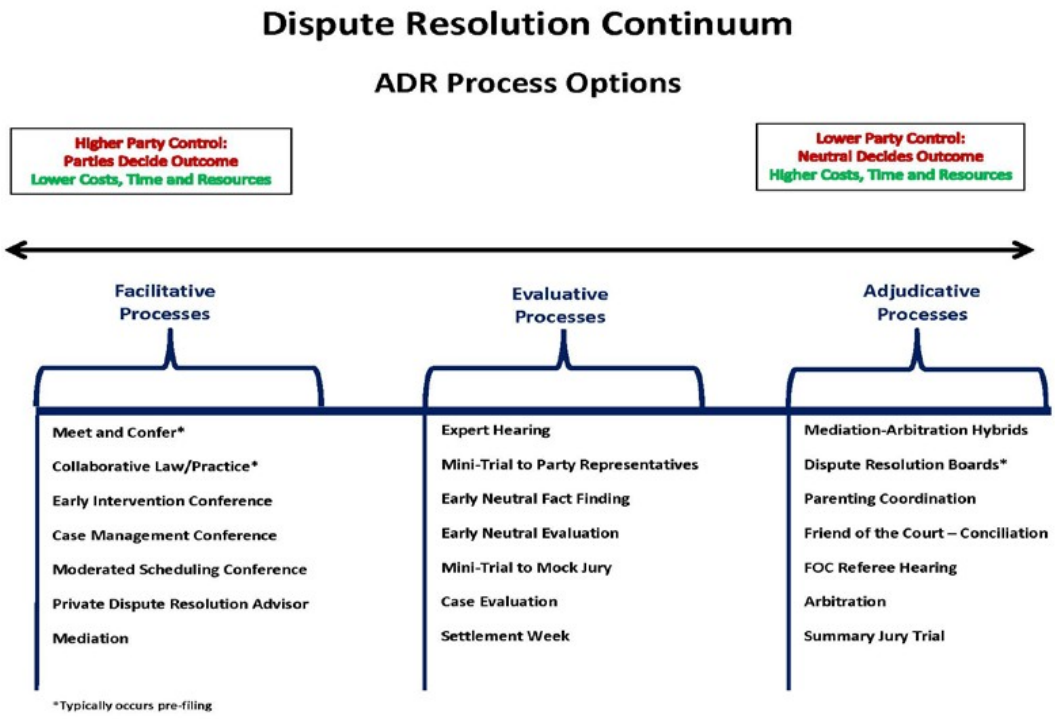
In general ADR is less expensive, less public and more expeditious and flexible than traditional litigation. ADR can be one or more of a number of processes or a combination of processes that are strategically staged and sequenced. Many of these processes may be incorporated into contractual pre-dispute arrangements that must be exhausted as a condition precedent to the filing of an action, agreed to post-dispute before the filing of a lawsuit or a demand for arbitration, stipulated to by the parties at any time during the course of litigation, ordered by the trial court, or agreed to post trial during an appeal. The incredible flexibility and dynamism of ADR allows counsel to shape and mold the process or combination of processes that are "right sized" and sequenced to best serve their clients' dispute resolution needs.

With very limited exceptions, virtually all civil, family and probate disputes are appropriate for ADR consideration. Some believe that "public policy" litigation, where the parties' only desire a judge's or jury's decision in a public forum, is not an optimal candidate for ADR. However, even in these cases certain ADR processes can be a cost effective manner to narrow the scope of issues in dispute, reach agreement on troublesome discovery issues, obtain a neutral expert evaluation of certain legal and factual issues involved in the dispute, and many other matters that will result in significant cost savings and efficiencies even though the immediate short or long term objective of the ADR event may not be a global resolution.

Choosing an ADR method is dependent upon several factors, but the seminal and primary considerations are to determine: (1) What is the client's goal of the ADR process being selected? and (2) How much control do the disputants desire to maintain over process and outcome? As discussed in this *Taxonomy*, the ADR process selected is driven by the goals and objectives of the disputants. Once the goals and objectives are determined, the degree of control over the outcome and process desired, and the cost-benefit of the process fully explored, it is much easier to select the correct ADR strategy and the most effective timing of ADR events. *See* Exhibit 8.

ADR can be viewed as presenting counsel with various options on what has been characterized as the "Dispute Resolution Continuum" in which there are three main variables: the control over the outcome, the control over the process, and the cost.[46] All of the processes discussed in this Taxonomy can be placed along this continuum.

[46] *See* Kimberly Fauss, *The Dispute Resolution Continuum*, Virginia ADR pp. 3-5 (Fall 2006); American Arbitration Association, *A Guide to Early Dispute Resolution Options*, www.adr.org/csi/ids.



This *Taxonomy* begins with a discussion of the processes that most closely resemble the courtroom or traditional adjudication and are binding in nature. These processes, where party control over the outcome and processes is most limited, include arbitration, multiple mediation-arbitration hybrids, summary jury trials, receivers, and dispute resolution boards. These "adjudicative" processes typically culminate in a binding (or highly persuasive) decision with varying ability to appeal that decision.

On the ADR continuum, a second collection of processes involve a number of evaluative, non-binding techniques including: mini-trials to an advisory jury, case evaluation, moderated settlement conference, neutral fact finding, early neutral evaluation and an expert hearing. These processes are deemed evaluative because the outcome is an "evaluation" or advisory opinion regarding the likely outcome of the dispute if allowed to progress through trial. These methods, which provide the parties greater control than adjudicative processes, can be very effective in obtaining an independent first impression of the entire matter, the strengths and weaknesses of the case, and causing the parties to modify settlement positions and make a dramatic shift in litigation strategy. Where a subject matter expert is used as a neutral in the evaluative process, for example, 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 often lead to a relatively swift resolution or the use of other ADR processes.

The third category of processes is facilitative and includes meet and confer obligations, mediation, mini-trials to party representatives, collaborative law, and the use of a dispute resolution advisor. Like all ADR techniques, these processes call for the client's active involvement. Unlike other methods, facilitative ADR enables the parties to maintain maximum control of the process and outcome and actively fashion creative resolutions that otherwise could not be obtained through a jury verdict, arbitration or other

adjudicative techniques. Facilitative processes also tend to be the least expensive dispute resolution techniques on the ADR continuum.

This *Taxonomy* is organized in a fashion that increasingly provides for party control of the process and outcome. The decision making grid, attached as Exhibit 8, provides a potential template for any number of considerations that might be evaluated by counsel and their clients in identifying the optimal ADR technique. The incredible power of ADR is the multiplicity and flexibility of tools that can be employed by counsel to serve the particular needs of the parties in a myriad of contexts. Counsel and ADR neutrals are encouraged to be creative by exploiting and staging all of the available tools to cost effectively serve their clients.

IV. Forms and Checklists

In addition to the materials attached to this *Taxonomy*, SCAO developed a number of excellent forms involving ADR that litigants may desire to evaluate and become familiar with. Those forms include:

- Binding Arbitration Award (mc284)
- Domestic Violence Screening for Referral to Mediation (mc282)
- Judgment Regarding Arbitration Award (mc285)
- Mediation Status Report (mc280)
- Motion to Modify Order for Mediation (mc278)
- Motion to Remove Case from Mediation (mc276)
- Notice Regarding Court Selected Mediator (mc275)
- Order for Mediation (mc274)
- Order on Motion to Remove Case from Mediation (mc277)
- Stipulation for Mediation (mc279)

All of these forms can be accessed at courts.mi.gov/Administration/SCAO/Forms/Pages/Alternative-Dispute-Resolution.aspx.

V. Dispelling Some ADR Myths

One of the most common misconceptions concerning ADR is the belief it is **only** effective if the ADR event achieves a complete resolution of a pending dispute. There are many reasons parties consider ADR other than the resolution of all aspects of a dispute. If the parties desire methods to streamline the litigation process or focus discovery and motion practice on the most critical issues, early neutral evaluations, the use of a dispute resolution advisor or a mini-trial may be most appropriate. An early expert evaluation or early neutral fact finding may be most helpful in resolving or narrowing such preliminary sub-issues as insurance coverage disputes, whether class action certification may be appropriate, etc. Similarly, the use of a neutral may be the most cost effective manner to resolve or narrow discovery disputes

and the development of a targeted proportional discovery plan. An expert hearing process, a mini-trial with an advisory jury or a mini-trial to party representatives, assuming they do not ultimately achieve a voluntary resolution of the entire dispute, may be perfect devices to prepare for a trial. In sum, consider all of the client's potential goals of ADR and select the one that is best designed to achieve the desired objectives. *See* Exhibit 8.

Some counsel may believe they cannot adequately and professionally serve their clients unless and until all discovery necessary to prepare for trial is completed; that is, effective resolution decision making is hampered unless all discovery and information necessary for a trial is obtained. A California study has cast significant doubt on this belief.[47] In this study the authors evaluated the settlement decision making in over 2,000 California cases that proceeded to trial after settlement discussions came to an impasse. When comparing jury verdicts with rejected settlement offers and demands after the completion of discovery this study established:

> Plaintiffs erred more frequently than defendants (61% of the time) and the average error was approximately $43K (that is, in 61% of the cases the plaintiff recovered on average $43,000 less than the defendant's last offer);
>
> Although defendants erred less frequently (21% of the time), the average error was $1.1M (that is, in 21% of the cases the plaintiff's last demand was on average $1,100,000.00 less than the ultimate jury verdict).

There are no known studies suggesting the completion of all discovery results in better settlement decision making and, in fact, the case management techniques recommended to Michigan trial courts call for the adoption of proportionate discovery principles that may no longer permit counsel to complete all discovery before engaging in ADR. In the *Caseflow Management Gu*ide published by SCAO, the following discovery practices are suggested to the trial courts of Michigan:

> 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**…
>
> c) **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** (emphasis added).[48]

[47] Randall L. Kiser, Martin A. Asher and Blakely B. McShane, *Let's Not Make a Deal: An Empirical Study of Decision Making in Unsuccessful Settlement Negotiations*, 5 Journal of Empirical Legal Studies 3, 551-591 (Sept. 2008).

[48] *Caseflow Management Guide*, SCAO, Chapter 4, page 22, http://courts.mi.gov/Administration/SCAO/Resources/Documents/Publications/Manuals/ cfmg.pdf

The desire to complete all discovery may not be of significant assistance in making quality settlement decisions and may also fly in the face of evidence based practices urged for consideration by the Michigan trial courts.

Another myth is the courts and ADR providers desire to do away with traditional trials. There is no such goal. Trials have and will continue to play a critical role as a societal safety valve and the evolving jurisprudence of Michigan.[49] In fact, ADR and other evidence based practices may actually foster the increased use of traditional or summary jury trials as dispute resolution techniques. ADR can assist counsel and the courts in identifying those disputes, at the earliest practicable stage in the litigation process, that are likely to proceed to a trial. In that way, the parties and the court can focus their time and energies on preparing for the trial as expeditiously as possible. The effective use of ADR and other evidence based practices may actually reduce the economic and other barriers to the use of trials and summary jury trials as viable, affordable dispute resolution techniques.

VI. Adjudicative ADR Processes

1. Arbitration

a. General

Arbitration is a creature of written contractual agreements, case law constraints, and in some instances statutory directives. *See* Exhibit 9 (sample Arbitration Agreement). Generally, arbitration is a private, voluntary process in which a neutral third party (or a panel of two or more neutrals), who may or may not have specialized subject matter expertise of the issues in dispute, is selected by the parties to render a binding decision. Depending on the terms of the written agreement to arbitrate, the parties may have the right to outline the qualifications of any arbitrator(s) or specifically select a mutually acceptable arbitrator, engage in discovery or limit the scope of discovery, file dispositive motions, and engage in other activities typically associated with standard litigation. Each party has the opportunity to present proofs and arguments at the arbitration hearing. The arbitrator's decision is reduced to writing known as the "award." An arbitration award may be perfunctory and only designate the "winner" and the relief awarded, or it may be a "reasoned" award containing findings of fact and conclusions of law. Traditionally, arbitration has been viewed as a speedier and a less costly dispute resolution alternative to traditional litigation although many commentators have increasingly bemoaned that arbitration has become just as costly and as expensive as traditional litigation and a trial.[50] Because of the increasing costs associated with arbitrations (particularly if a three member panel is used) care should be taken in drafting the arbitration agreement to ensure the cost effective dispute resolution objectives of the client are being protected.

Arbitration provisions are prevalent. Many companies are turning to pre-dispute arbitration provisions in contracts as the exclusive method for resolving disputes that might arise during the course of

[49] *See* Hon. James E. Gritzner, *In Defense of the Jury Trial: ADR Has its Place, But It is Not the Only Place*, 60 Drake Law Review 2 (Winter 2012).
[50] *See* Thomas Stipanowich, *Arbitration the New Litigation,* 1 U. of Ill. Law Review Vol. 2010, p. 1 (2010).

the parties' relationship. It has been estimated that approximately 25% of the non-unionized work force in the United States is a party to a mandatory pre-dispute arbitration agreement as a condition of employment.[51] The attractiveness of such agreements to employers and businesses has been enhanced by the ability to curtail the use of class actions in arbitration agreements.[52] Employees who sign such agreements agree they will forego filing any claim (except for a few legally mandated exceptions) against the employer in court and will redress any and all rights exclusively through arbitration. Similarly, many companies that offer customer-related services (*i.e.*, credit card companies, telephone service providers, on-line purchasers) have turned to arbitration agreements to provide for the resolution of disputes. Most construction and design professional contracts contain mandatory arbitration provisions in accordance with the rules and regulations of an ADR service provider such as the American Arbitration Association or the National Center for Dispute Settlement. Similar provisions exist in new account application forms filled out by customers of stock brokerage or securities firms. Patients admitted to many hospitals in Michigan are provided, along with the admission package, arbitration agreements by which they are asked to agree voluntarily to waive their right to a jury trial and submit any medical malpractice case to resolution through binding arbitration.

In drafting such agreements, particularly in the employee and consumer context, practitioners must be knowledgeable of applicable state and federal statutes, substantive and procedural due process requirements expressed in case law, and the due process protocols required by any selected third party administrator (AAA, NCDS, JAMS, etc.) that may pose a bar to the enforcement of arbitration agreements.[53] Assuming the applicable barriers have been successfully addressed, such instruments can play a fair, vital and effective role in the layered and progressive dispute resolution strategy of the organizations involved and significantly reduce the costs, delay and unpredictability of traditional litigation.[54] The Business Courts in Michigan, which have jurisdiction over disputes that involve many of these arbitration agreements, will undoubtedly lead to greater predictability and clarity in the enforcement of arbitration agreements. As the Michigan Business Courts continue to make their decisions available on line, it is incumbent upon the practitioner to periodically review these decisions prior to the drafting of arbitration agreements that incorporate Michigan law in the choice of law provision.[55]

Where parties have not entered into a written pre-dispute agreement to arbitrate, they can still enter into such an agreement post-dispute or may agree to move the conflict to arbitration. Agreements to arbitrate post-dispute do not involve many of the pre-dispute due process concerns and the drafting issues confronted are typically strategic involving: who will be the arbitrator(s); what limitations, if any, will be placed on discovery and pre-hearing motion practice; how quickly will the arbitration hearing be scheduled;

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[51] *Id.*

[52] *See Am. Express Co. v. Italian Colors Rest.*, 133 S. Ct. 2304, 2309 (2013).

[53] For a summary of literally hundreds of state and federal cases that discuss substantive and procedural due process requirements in written arbitration agreements, see 29 A.L.R. Fed. 2d 253. *See, e.g.*, *Lowry v. J.P. Morgan Chase Bank, N.A.*, No. 12-4222 (6th Cir. June 11, 2013) (validity of a class action waiver is to be determined by the arbitrator); *Boaz v. FedEx Customer Information Services*, No. 12-5319 (6th Cir. August 6, 2013) (shortened statute of limitations for FLSA claims in arbitration agreement not enforceable).

[54] *See* Richard Boothman and Margo Hoyler, *The University of Michigan's Early Disclosure and Offer Program,* American College of Surgeons Bulletin (March 2, 2013); Richard L. Hurford, *SMART Dispute Resolution Processes*, Michigan Bar Journal (June 2010).

[55] *See* http://courts.mi.gov/opinions_orders/businesscourtssearch/pages/default.aspx.

will the agreement call for cost shifting provisions for the "prevailing party;" the scope of appellate review, etc. Although the case law is somewhat unsettled, counsel will need to consider and evaluate the scope of appellate review. One of the advantages typically associated with arbitration is that appellate review is significantly limited and the award is binding and final. There may be parties who view this benefit as a detriment in the arbitration process particularly if significant legal and business issues are involved. As a result, some counsel have attempted to contractually expand the scope of appellate review in agreements to arbitrate. Many of these attempts have been unsuccessful and it is a factor to consider in deciding whether and how to use arbitration as a viable ADR option.[56]

Certain third party providers do offer supplemental appellate procedure options for parties who so agree in their contractual arbitration provisions.[57]

b. Revised Uniform Arbitration Act

The Michigan Legislature enacted the Revised Uniform Arbitration Act[58] effective July 1, 2013 ("RUAA"), that provides terms for enforceability of arbitration agreements, procedures for the arbitration of disputes, remedies, immunity from civil liability, and testimonial privileges. The Act is intended to preserve the efficiency of arbitration, incorporate pertinent law, and offer some predictability in the process. The Michigan Arbitration Act (MAA)[59] was repealed effective July 1, 2013. Many practitioners and arbitrators welcomed the new law as it clarified many uncertainties that existed under prior law and affords contracting parties more flexibility in designing their contractual arbitration clauses.[60] Key features of the RUAA include limitations on the parties' rights to vary the terms of their arbitration agreement before a dispute arises as well as after they are in conflict. Such topics as enforceability of the agreement to arbitrate, certain maters addressing judicial relief, subpoena power, arbitral jurisdiction and enforcement of awards are just some of the items now codified in the RUAA and must be reviewed carefully by counsel before drafting and enforcing agreements governed by the RUAA.[61]

c. Domestic Relations Arbitration

Under the Domestic Relations Arbitration Act (DRAA)[62] divorce litigants may stipulate to binding arbitration conducted by an attorney following an acknowledgment on the record the parties have been informed the arbitration is voluntary, the award is binding, and the right of appeal is limited. A court may

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[56] *See Hall St. Assocs., L.L.C.* v. *Mattel, Inc.*, 128 S. Ct. 1396, 1404 (2008). *See also*, Phillip DeRosier, *Judicial Review of Arbitration Awards Under Federal and Michigan Law,* Michigan Bar Journal (February 2013); Brian T. Burns, *Freedom, Finality, and Federal Preemption: Seeking Expanded Judicial Review of Arbitration Awards Under State Law After Hall Street*, 78 Fordham L. Rev. 1813 (2010).

[57] AAA, http://go.adr.org/AppellateRules; JAMS, http://www.jamsadr.com/appeal/

[58] MCL §§ 691.1681–691.1713

[59] MCL §§ 600.5001–600.5035

[60] *See e.g., ADR Section Enjoys a Major Success with the Passage of Revised Uniform Arbitration Act!*, The ADR Quarterly (January 2013).

[61] *See* Mary A. Bedikian, *What Michigan Attorneys and Arbitrators Must Know About the New Revised Uniform Arbitration Act*, Michigan Bar Journal (May 2013).

[62] MCL §§ 600.5070 *et seq.*

not order this process in the absence of a written agreement by the parties to submit their matter to binding arbitration. Also, the arbitrator is strictly bound by the provisions in the agreement to arbitrate.[63]

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. Arbitrators must be attorneys with five years of experience in domestic relations; the only explicit training requirement is for training in the dynamics of domestic violence and how to handle such cases.[64]

While arbitration of a domestic dispute may be more expedient, counsel must remain well informed of the case law and statutory pitfalls that impact the validity of an arbitrator's decision. Further, the award is subject to an independent review by the court to ensure the interests of any minors are protected.[65]

2. Mediation-Arbitration Hybrids

The mediation-arbitration hybrid process (typically referred to as "med-arb") commences with traditional mediation. If the parties reach an impasse on some or all of the issues at the conclusion of the mediation, the mediator becomes the arbitrator, conducts a hearing on the unresolved issues, and renders an enforceable award on the open issues. The predominant reason for the development of med-arb was that it gave an opportunity for a mediated resolution of some or all of the issues with the assurance of a final, timely and cost effective resolution of 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.[66]

Alternatively, the parties might proceed through arbitration and, after the hearing is conducted, the arbitrator prepares a written award. The award is not immediately disclosed 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 not without controversy. It can pose ethical conundrums and some highly respected mediators believe it has the potential of negatively impacting the dynamics of traditional mediation. The mediator is often told highly confidential information in private meetings (the caucus) that

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[63] *See* Mark A. Snover, *Recent Case Law's Impact on Family Law Arbitration*, Mich. Bar Journal (February 2006); Lee Hornberger, *Michigan Family Law Arbitration and Mediation Case Law Update,* http://www.leehornberger.com/UserFiles/File/Update-FAMILY-March-2010.pdf; *Visier v. Visier,* Mich. Ct. of Appeals Case No. 314185 (July 15, 2014) (unpublished) (arbitrator's failure to comply with the requirements of the agreement to arbitrate resulted in a reversal and remand).

[64] MCL § 600.5073

[65] MCL § 600.5080 (1)

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

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.[67]

Other highly respected mediators believe if the parties are fully informed, the confidentiality issues can be effectively handled and med-arb is a very potent ADR tool. It is their belief that if the mediation takes place first, the parties will be highly motivated to resolve the matter to avoid the costs and expenses of a certain arbitration that will immediately follow any unsuccessful mediation. If the arbitration takes place first, these mediators believe the mediation can be enhanced as there are no "surprises" and the parties have had the opportunity to fully evaluate the strengths and weaknesses of their respective cases.[68]

Parties who have selected the med-arb process with the same neutral believe it has the potential to achieve significant cost savings and efficiencies as the parties do not have to spend the time educating a different arbitrator and mediator as to the nuances (both factual and legal) of the dispute. While there are some who have not embraced this process and have raised concerns, it is has been an effective and widely used ADR technique by many disputants. In a survey of the ADR practices of Fortune 1000 corporations, 40% of the respondents had actually participated in some form of med-arb procedures.[69]

As some ADR providers may not be comfortable with being the neutral during both the mediation and the arbitration, these issues should be fully explored and discussed with the selected ADR provider. These hybrid processes involve ethical issues for the neutral and are addressed in the *Mediator Standards of Conduct.* Standard I requires the mediator to ensure the parties are fully advised and informed of the nuances of the hybrid process and voluntarily selected the appropriate hybrid. The ADR provider will typically engage in a conference with the parties to fully explain the process and prepare an agreement fully describing the selected process to ensure there is clarity. *See* Exhibit 10. Also, under the Standards the ADR provider must be very clear in the role being performed at any point in time; the neutral cannot cavalierly switch roles between that of a mediator and arbitrator during the course of the process. *See* Exhibit 5 (Standard VII). Parties who enter into a med-arb agreement should seriously consider incorporating these standards into the agreement with the neutral. *See* Exhibit 10. As a result, when acting as the mediator during this hybrid process, the mediator may be far more facilitative and avoid evaluative techniques that sometimes are brought to bear during mediation. However, as suggested in the study below, the med-arb process may lead to a different impact upon the mediator's style.

A study undertaken to evaluate participant and mediator behavior in med-arb same, med-arb different, and straight mediation did give rise to a number of interesting findings.[70] That study concluded:

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[67] *See* 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).

[68] Edna Sussman, *Developing an Effective Med-Arb/Arb-Med Process,* New York Dispute Resolution Lawyer, Vol.2, No.1 (Spring 2009) at pp. 71-74; Weisman, *supra*.

[69] *See* Thomas J. Brewer and Laurence R. Mills, *Combining Mediation and Arbitration,* 54 Disp. Resol. J. 32, 34 (1999).

[70] Neil B. McGillicuddy, Gary L. Welton, Dean G. Pruitt, *Third-Party Intervention: A Field Experiment Comparing Three Different Models,* Journal of Personality and Social Psychology, Vol 52, No. 1 (1987).

> The results of this study mostly favor the med-arb (same) procedure in contrast to straight mediation. Under med-arb (same), disputants showed less hostile behavior and were less likely to make invidious comparisons between themselves and the adversary…. Disputants were also more conciliatory under the med-arb (same) than under straight mediation, making more new proposals and exhibiting a trend toward more concession making….
>
> There was one finding that might be viewed as casting doubt on the value of med-arb (same) in comparison with straight mediation. The mediators used heavier tactics in med-arb (same), more often threatening to terminate the session or arguing for a particular proposal.[71]

Various med-arb hybrid processes include:

a. **Med-Arb Same or Same Neutral Med-Arb**. This is a mediation followed by arbitration, if necessary, to resolve the issues not agreed upon. The same person serves as mediator and arbitrator at the request of the parties. This is a pure form of med-arb. The parties, in advance, stipulate in writing their desire to utilize this hybrid and waive any objections to the procedure.

b. **Med-Arb Different**. As the name implies, in this model the mediator and arbitrator are different persons. Both neutrals are selected before the process begins and the arbitration phase typically follows immediately after the mediation phase. The mediator conveys to the arbitrator what agreements, if any, were reached in the mediation but does not disclose any confidential information obtained. Any settlement on issues achieved in the mediation phase is adopted by the arbitrator who then proceeds to hear and determine the remaining unresolved issues. The process is selected to avoid even the potential conflicts discussed above.

c. **Med-Arb Different/Recommendation**. Identical to med-arb different except 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 the recommendation of the mediator. Typically, the "mediator's recommendation" will

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[71] *Id.* at p. 110. *See also*, William H. Ross and Donald E. Conlon, *Hybrid Forms of Third-Party Dispute Resolution: Theoretical Implications of Combining Mediation and Arbitration*, 25 ACAD Manage. Rev. 2 (2000) (suggesting med-arb leads to greater participant satisfaction than arb-med); D. E. Conlon, H. Moon, K. Y. Ng, *Putting the Cart Before the Horse: The Benefits of Arbitrating before Mediating*, 87 Journal of Applied Psychology 5. (2002) (party satisfaction with the arb-med process); W. H. Ross, C. Brantmeier, T. Ciriacks, *The Impact of Hybrid Dispute-Resolution Procedures on Constituent Fairness Judgments*, Journal of Applied Social Psychology (2002) (the med-arb processes gave rise to high participant satisfaction).

first be presented to the parties prior to the arbitration for their consideration in an attempt to break the impasse that has stalled the mediation.

d. **Co-Med-Arb**. The mediator and the arbitrator are different but jointly conduct a fact-finding hearing that is followed by mediation without the arbitrator. This approach is believed to avoid duplicating the education of two different neutrals on the applicable facts and the law. If the mediation does not resolve all the issues, the arbitrator takes over and ultimately issues an award on the unresolved issues.

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

f. **Arb-Med**. The Arb-Med process reverses the sequence of med-arb as the 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.

g. **Med-Arb LO (Last Offer)**. A hybrid process very much like med-arb except in the arbitration stage 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. A variation of this approach is the so-called "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 and that then becomes the arbitrator's award as to those issues that are unresolved during the mediation. 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.

h. **Med-Arb High-Low**. Very much like med-arb except in the mediation stage the parties have agreed whatever the decision of the arbitrator, 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 that is the binding decision imposed upon the parties. 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 is

often used as an inducement to reach an agreement to arbitrate.

i. **Mediation Windows in Arbitration**. This provides the opportunity to conduct a separate mediation during an ongoing arbitration. This can happen 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 listing of the various hybrid processes reflects the incredible flexibility and creativity that can be employed by counsel to meet the goals and objectives of their clients. The med-arb hybrids also underscore ADR is not necessarily a single event but can be strategically staged in any number of potential permutations. Such flexibility, creativity, and staging should be considered by counsel with all the ADR processes discussed throughout this *Taxonomy.*

3. Summary Jury Trials

A number of courts outside Michigan have explored the efficacy of utilizing binding "summary jury trials" as a form of alternative dispute resolution when the amount in controversy is not sufficiently large to justify the cost and expense of a full, traditional trial and the parties desire a binding decision from a jury rather than an arbitrator.[72] Perhaps the best known example of this particular dispute resolution mechanism is that provided in the Charleston, South Carolina County Courts.[73] This process involves the voluntary agreement of both parties to be bound by the decision of the summary jury and selecting a mutually agreeable hearing officer to preside over the proceeding. On the day scheduled for the trial, the parties empanel a jury drawn from the court's standard jury pool. Typically the jury will consist of no more than 6 individuals and each side is limited to two peremptory challenges. The *voir dire* is limited and usually conducted by the hearing officer.

Summary jury and bench trials have been utilized in the Federal District Court for the Western District of Michigan as a settlement device and authorized by a specific local rule:

> 16.7 Summary jury trials; summary bench trials
>
> (a) Summary jury trial - The summary jury trial is an abbreviated proceeding during which the parties' attorneys summarize their case before a six-person jury. Unless the parties stipulate otherwise, the verdict is advisory only.
>
> (b) Summary bench trial - A summary bench trial is an abbreviated proceeding during which the parties' attorneys summarize their case before a judge or magistrate judge. Unless the

[72] *See Short, Summary & Expedited, The Evolution of Civil Jury Trials,* National Center for State Courts, www.ncsc.org.

[73] *See* Steven Croley, *Summary Jury Trials in Charleston County, South Carolina,* 41 Loyola of Los Angeles Law Rev. 1585 (Summer 2008).

parties stipulate otherwise, the verdict is advisory only.[74]

Unlike the practice in North Carolina, however, the summary jury trial's decision in the Western District is advisory only unless the parties otherwise stipulate. The use of summary jury trials as a settlement device in the Eastern District of Michigan, where the jury's decision is solely advisory, has not thus far garnered significant support from the judiciary in the Eastern District.[75]

The Michigan Supreme Court convened a working committee consisting of judges, representatives of the plaintiffs' and defense bars, and neutrals to evaluate the wisdom of establishing a summary jury trial process in Michigan. This committee endorsed the concept and submitted a proposed recommendation for consideration to the Michigan Supreme Court that was adopted by the Court on March 25, 2015. *See* Exhibit 11.

The essential features of the process include:

- It will be piloted in Macomb County Circuit Court and other jurisdictions to be determined;
- Each pilot court will establish guidelines for eligible cases;
- The process is voluntary and if the parties stipulate to the summary jury trial they will not be ordered by the court to engage in other ADR such as mediation and case evaluation;
- Parties who so stipulate are bound to use the summary jury trial process unless the case is settled;
- The parties mutually select the hearing officer who will preside over the summary jury trial and the trial court is prohibited from appointing, recommending, directing or otherwise influencing a party's or attorney's selection of the hearing officer;
- The hearing officer will meet with the parties to tailor the procedures for the summary jury trial with reference to the general guidelines set forth in the administrative order;
- It is anticipated the summary jury trials will be completed in one day;
- The hearing officer ensures the procedures are followed as agreed to by the parties, makes any necessary evidentiary rulings, and instructs the jury;
- The summary jury is selected from the standard jury pool in

[74] *See also*, LR 16.7 Federal District Court for the Eastern District of Michigan (specifically identifies the summary jury trial as an approved ADR process).
[75] *See* Hon. Avern Cohn, *Summary Jury Trial – A Caution*, 2 Journal of Dispute Resolution (1995).

the circuit and the summary jury trial will be conducted in a courtroom at the county courthouse;

- A jury of 6 will be empaneled by the following procedure: 10 will be seated and each party will have the opportunity to exercise 2 peremptory challenges and there are no challenges for cause;
- If the parties enter into a high-low agreement, that fact will not be communicated to the summary jury; and,
- The verdict is binding and there are extremely limited grounds for appealing the summary jury's decision.

Although a summary jury trial can be a stand-alone ADR technique, it may also be incorporated into multi-staged ADR agreements very similar to the med-arb hybrid processes previously discussed. For example, the parties might voluntarily agee to mediate the dispute and select a mediator who will act as the hearing officer should the mediation not resolve the entire case. Following the 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.

Utilizing the summary jury trial as the ultimate 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. The use of a summary jury trial 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. As observed by the National Center for State Courts in its study:

> Several of the programs examined in this study were initiated in response to broad dissatisfaction by both the plaintiff and defense bars with the fairness of mandatory arbitration decisions.[76]

4. Special Master

The use of special masters in the federal court has long been authorized.[77] In federal court, if the parties or the court are interested in expediting the dispute resolution process, the use of a special master is often a viable alternative particularly in complex or multi-party litigation. The opportunity to select the special master, or at least have input into the selection, is often very attractive to the parties. The special master typically has a limited, defined task. The special master may be appointed to conduct a hearing to determine if a receiver should be appointed; whether preliminary equitable relief will be awarded; evaluate whether the requirements for class certification have been satisfied; manage discovery disputes and/or case management issues; make preliminary evidentiary rulings; review documents for the applicability of the

[76] *Short, Summary & Expedited, supra*
[77] Fed. Rule Civ. Pro. 53

attorney-client or work product privileges; or, engage in certain fact finding on tangential issues that will expedite the ultimate trial of the matter. The immediate objective of the appointment of the special master is not to achieve an immediate resolution of the dispute but to streamline and expedite the litigation process. The potential secondary objective may be the special master's evaluative determination(s) will lead to other ADR events focused on a resolution of the litigation as early as practicable.

Use of a special master under Michigan law has been the subject of significant debate.[78] As a result, state court judges may be reluctant to consider such an appointment even if stipulated to by the parties. MCR 2.410 (A) (2) does provide that "[f]or purposes of this rule, alternative dispute resolution (ADR) means any process designed to resolve a legal dispute in the place of court adjudication, and includes…**other procedures provided by local court rule or ordered on stipulation of the parties.**" If the parties voluntarily stipulate to the use of a special master to address certain issues of the dispute (i.e., discovery, class certification issues, the applicability of a privilege, etc.) and the special master's recommendation is subject to *de novo* review and consideration by the court, there would not appear to be any impediment to a court ordering the use of a special master.[79] In *Mitan*, the Michigan Supreme Court did not explicitly authorize the use of special masters, but did hold it is improper to reverse the appointment on appeal where the parties requested a special master.[80] However, where trial courts have attempted to grant specific judicial powers to special masters without the stipulation of the parties, the Michigan Court of Appeals has not sanctioned the appointment. For example, in *Carson Fischer Potts & Hyman v. Hyman*, the Michigan Court of Appeals struck down a trial court order that appointed a special master where the order conferred the power to make recommendations of findings of fact and conclusions of law to the court.[81] The court reasoned that Michigan Rule of Evidence 706, which was the trial court's basis for appointing the special master, does not expressly authorize such powers. Similarly, in *Oakland Co Pros v. Beckwith-Evans Co.*, the Michigan Court of Appeals reversed the appointment of a special master who was granted the authority to make recommendations to the trial court pertaining to factual findings and legal conclusions.[82] In *Beckwith*, the trial court relied on MCR 1.105 instead of MRE 706 in its order, but the Michigan Court of Appeals found this rule did not expressly authorize the delegation of such judicial functions to a special master. In a more recent case, *Caudill v. State Farm Mutual Ins. Co.*, both the Michigan Court of Appeals and the Michigan Supreme Court declined, without comment, to review the trial court's appointment of a special master under terms similar to that in *Carson* and *Beckwith*.[83] While the declination itself is not instructive, the dissent in *Caudill* implicated the Michigan Court Rule that provides for alternative dispute resolution as one legally permissible avenue for appointing a special master. Per MCR 2.410, after consultation with the parties, a trial court may order that a case be submitted to an "appropriate ADR process," which is defined as "any process designed to resolve a legal dispute in the place of court adjudication."[84] Further, MCR 2.410(C) provides authority for the court to "specify, or make provision for selection of, the ADR provider" as well as "make provision for the payment of the ADR provider."

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[78] *See* Michigan Lawyer's Weekly (Sept. 14, 2014) http://milawyersweekly.com/news/2014/09/29/no-money-back-guarantees-2/.
[79] *See Mitan v. New World Television*, 469 Mich. 898 (2003)
[80] *Id*. at 898.
[81] 220 Mich. App. 116, 124 (1996)
[82] 242 Mich. App. 579, 590 (2000)
[83] 485 Mich. 1107 (2010)
[84] MCR 2.410(A)(1), (A)(2), (C).

In summary, a trial court's appointment of a special master where all parties have consented and select the special master has not been disturbed when the recommendations are subject to a *de novo* review. Absent such a stipulation, the legal ground for the appointment is problematic in Michigan courts as an inappropriate delegation of judicial authority.

Should the courts desire to avail themselves of this particular ADR technique, the courts may consider modifying their local ADR plans to provide specifically for the appointment of a special master if certain conditions are met (*i.e.,* the parties must stipulate to the use of the special master as to certain specified issues, the parties must agree as to who will be the special master, and the decision of the special master is subject to *de novo* review by the trial court), then the authority of the courts to order the use of a special master would appear to be available. *See* Exhibit 12 (sample Order Appointing a Special Master). Even in the absence of an ADR plan that specifically calls for the use of a special master, if the parties or the court believe the case may be in danger of becoming needlessly complex, or the parties require more time from a "judge" than the assigned judge can provide, or if the parties or the court believe any number of preliminary determinations (whether procedural, discovery, evidentiary, or otherwise) will materially expedite and streamline the litigation, this option should be considered and explored.

The special master, based upon a knowledge of the case, may also be subsequently invited by the parties to perform the role of a mediator in assisting the parties to resolve some or all of the issues presented in the litigation. If this option is being considered, the parties may be well served to select a special master who can potentially perform the role of a mediator and, at the appropriate time, enter into a specific written agreement to mediate with the special master. In mediating the case, the former special master can be very effective in assisting the parties in shaping a mutually beneficial and creative resolution of the litigation. However, if mediation is used prior to invoking the evaluative role of the special master (or before the special master re-assumes an evaluative role), similar to the med-arb same process care must be exercised. There may be a concern by parties sharing certain information with the mediator, particularly if following an unsuccessful mediation the neutral will continue performing the role of a special master.

The special master may add to the initial cost of the litigation as the special master's fee is typically borne *pro rata* by the parties. The cost-benefit decision the litigants are called upon to make is whether the cost of the special master will materially reduce the overall cost of the litigation, reduce the delay of the litigation, and/or increase the potential of achieving a mutually beneficial resolution early in the life of the litigation as opposed to remaining in the traditional litigation cycle without the special master.

Even when a special master is appointed, however, the courts will be unwilling to permit the litigation to descend into a "black hole" and will continue to monitor the progress of the case to ensure that important litigation dates and milestones are being achieved. The use of a special master (or any other ADR technique) should not be a litigation tactic by any party to cause delay.

5. Receivers

Although receiverships are not necessarily thought of as a form of ADR, consideration should be given to exploiting this potential tool in appropriate cases. MCL § 600.2926 provides **"**Circuit court judges in

the exercise of their equitable powers, may appoint receivers in all cases pending where appointment is allowed by law. This authority may be exercised in vacation, in chambers, and during sessions of the court…"

Much of the case law involving the appointment and activities of receivers emanates from cases where a creditor is seeking recovery from a debtor. The recent 2014 amendments to MCR 2.621 and MCR 2.622 set forth certain new rules relative to appointment and qualification of receivers that were initially drafted by the State Bar of Michigan Business Law Section Debtor/Creditor Committee.

The benefit of the appointment of a receiver in debtor/creditor context is well understood; however, receivers can be appointed to assist a court in the resolution of a myriad of other disputes. For example, a receiver may be appointed to:

- Manage the affairs of a business as a going concern;
- Implement/monitor stand-still agreements in shareholder business disputes;
- Prepare an accounting or perform an investigation;
- Carry out orders of the court (including discovery orders) when other approaches have failed to secure compliance; or
- Identify and marshal assets in a divorce and perhaps even manage the assets of the parties or a party.

The circumstances in which a receiver may be utilized to assist the court and streamline the litigation in a way that protects the interests of all parties are without limit, and are only subject to the legal exercise of the court's equitable power as set forth in the order appointing the receiver.

The receiver is an officer of the court who reports to the judge who appointed the receiver. As a matter of law a receiver is a neutral and a fiduciary for the benefit of all persons appearing in the action or proceeding if the receiver takes control of monies or other assets that are the property of one or more of the litigants.

The order of appointment of a receiver (*see* samples attached as Exhibit 13) often provides for the resolution of issues that would otherwise be the subject of a continuing stream of motions seeking orders of the court. An example of the dispute resolution authority vested in a receiver involves the decision making authority with respect to the management of the affairs of an operating business. Depending on the order of the appointing court, a receiver may hire or terminate employees, purchase assets necessary to operations, file suit to collect debts or take any other action appropriate or necessary to managing the enterprise.

A neutral receiver who has the trust of the parties and their counsel may be uniquely positioned to explore with the parties a creative resolution of the underlying dispute. That opportunity may present itself in a joint meeting of the parties and their counsel, or the judge may suggest the parties explore a potential resolution with the receiver.

6. Friend of the Court (FOC) Referee Hearing

Similar in function to the special master, in divorce actions a referral to the FOC for a Referee Hearing can be entered by a stipulation of the parties or by court Order. The Macomb County Circuit Court requires that the FOC submit recommendations on the issues of custody, support, parenting time, health care and child care in all divorce cases involving minor children prior to the entry of a final judgment of divorce. However, depending upon the applicable local administrative order, the court may refer other issues for a Referee Hearing.

The Macomb County Circuit Court outlines the Referee Hearing process as follows:

> A Referee is an attorney [selected and hired by the Court] who hears motions, holds hearings, examines witnesses, and makes recommendations to the Court…. The Family Court Bench may direct a Referee to hear any domestic relations action, except an increase or decrease in spousal support (alimony). A Referee hearing is different than a Court hearing. The findings of a Referee are recommendations to the Court and are not final. However, a Referee's recommendation may become a court order if neither party files objections. Parties may stipulate to a binding Referee Hearing or Arbitration.[85]

The hearing is private and not held in public which thus has appeal to many parties. The process is formal in that 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 also be an impetus to further settlement discussions or re-invigorate settlement discussions that have come to an impasse.

7. Dispute Resolution Boards

Dispute resolution boards have been a very powerful ADR technique particularly in the commercial construction setting where it has a long history of use. The effectiveness of dispute resolution boards, however, can extend well beyond the construction setting. *See* Exhibit 14 (sample Dispute Resolution Board provision). As initially developed, the main purposes of the dispute resolution board were 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 the dispute.

The construction industry has long been plagued with disputes between owners, design professionals, general contractors, and subcontractors during the performance of the construction contract which have the potential of interfering with continued performance of the contract. To avoid delays or interruptions in contract performance, many parties in the construction industry embrace dispute resolution boards.

At the outset of a construction project, the contract sets forth any number of staged and progressive

[85] http://www.macombcountymi.gov/circuitcourt/pdf/fochandbook.pdf

dispute resolution provisions may often include a dispute resolution board (i.e., meet and confer obligations, then mediation, then a dispute resolution board followed by arbitration or litigation if a party decides to appeal the decision of the dispute resolution board). Such a board is comprised of contractually 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 until one of the parties decides to appeal that decision to the next level of the dispute resolution process. Depending upon the terms of the agreement, any appeal is typically *de novo* and the decision of the dispute resolution board has no binding affect upon the court or arbitrator who subsequently hears the case.

The presentation made to the board is typically much shortened and does not call for any significant discovery. Much of the information comes primarily from that exchanged during "meet and confer" meetings held earlier during the life of the dispute, the exhibits that will be relied upon by the parties at the board hearing, and the information and documents that might be requested by the board.

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. Unless the parties desire, it is not necessary that any members of the dispute resolution board have legal training although such expertise may be of assistance to the board. Significantly, the rulings of dispute resolution boards are appealed in less than 50% of disputes in the construction setting. Such boards have been very successful in preserving important relationships and the early, cost effective resolution of disputes. As summarized below, the use of dispute resolution boards have yielded significant, tangible results in the construction industry:

> According to the DRB Foundation (that maintains a database of over 1200 projects since 1975):
>
> - 60% of projects with a dispute resolution board had no disputes (this statistic suggests there exists a "dispute prevention" benefit that accompanies any standing neutral process).
> - 98% of disputes that have been referred to a dispute resolution board for hearing result in no subsequent litigation or arbitration.
> - The worldwide use of dispute resolution boards is growing in excess of 15% per year, and through the end of 2006 it was estimated that over 2000 projects with a total value in excess of $100 billion had used some form of dispute resolution boards.[86]

Dr. Ralph Ellis, a University of Florida civil engineering professor, has studied the use of dispute resolution boards by the Florida Department of Transportation involving over $10 billion of that agency's

[86] http://www.drb.org/

construction projects. He concluded that use of dispute resolution boards resulted in:

- Net cost growth savings equal to 2.7% of construction costs; and
- Net time growth savings of 15.1%.[87]

The American Society of Civil Engineers conducted a study in the mid 1990s and found that dispute resolution boards heard a total of 225 disputes on 166 projects worth $10.5 billion. The boards resolved 208 of the 225 disputes and the only one that actually proceeded to litigation eventually settled.[88]

Contracting parties, both within and outside of the construction setting, should seriously consider the selective use of an appropriately tailored dispute resolution board in a contractual graduated progressive dispute resolution strategy particularly if resolving disputes during the course of performance of the contract is an important client interest. Even in the absence of a contractual obligation, the parties can agree, whether before or shortly after the filing of a lawsuit, to use a dispute resolution board to engage in an early evaluation of the merits of the dispute and/or recommend the terms and conditions of a potential resolution. This technique can be very effective in preserving important business relationships and provide "breathing room" for the parties to craft their own long term resolution during a subsequent mediation.

Parties desirous of engaging in significant discovery and who may want more due process protections (even at an early stage in the litigation) than provided by a dispute resolution board may opt for arbitration or traditional litigation. They may believe a more appropriate process would be to file a complaint, engage in the discovery believed necessary, and then request a non-binding expert evaluation, case evaluation, or mediation. However, such a process may not be as effective in reducing the cost and delay of traditional litigation, ensuring the ongoing performance of a contract, or preserving important relationships.

VII. Evaluative ADR Processes

1. Mini-Trial to an Advisory Jury

This form of mini-trial is typically concluded in one day or less before a "mock" jury that believes its decision is binding on the parties. The manner in which the process is structured can vary, but typically the jury will hear a brief presentation by the attorneys representing the disputants and render an advisory verdict. The advisory jury can be used to set the stage for a subsequent mediation, in lieu of opening statements at the outset of a mediation, break an impasse during the course of a mediation, or used post mediation to foster further settlement discussions. Depending upon the timing of the mini-trial, the parties can be advised of the mock jury's decision immediately, or the verdict can be kept confidential and only disclosed to the parties by the mediator to break an impasse during subsequent settlement discussions. The deliberations of the mock jury can be videotaped and accessed by counsel to evaluate the strengths and weaknesses of their presentations and possibly to prepare for a formal trial as well as potentially determine

[87] www.dot.state.fl.us/.../2b-RoleOfDRBs
[88] http://www.cpradr.org/About/NewsandArticles/tabid/265/ID/640/Construction-Briefing-Dispute-Resolution-Boards-and-Other-Standing-Neutrals.aspx

the optimal juror profile should the matter not resolve.

The mini-trial can be constructed in any number of ways. It can involve formal presentations by all the parties; live but shortened testimony of witnesses or "simulated" testimony (i.e., reading of depositions, etc.); and the viewing and discussion of demonstrative evidence and exhibits.[89] Typically, the parties will desire the seating of a "mock jury" that is similar in demographics to the jury pool that will be available in the jurisdiction involved. The mini-trial is presided over by a neutral who, similar to the hearing officer in a summary jury trial, plays the role of a judge, may be called upon to make evidentiary rulings, ensure the format agreed to by the parties is followed, and to instruct the jury on the applicable law.

If the mini-trial precedes a mediation session, the neutral who presides over the mini-trial will often be asked to immediately assume the role of a mediator to further settlement discussions among the litigants until a settlement is achieved or the trial date arrives. If this process is followed, the parties may opt for the mediator to be the only person who knows the jury's advisory verdict and only discloses the verdict to break an impasse in settlement discussions. When used in this fashion, the disclosure of the advisory jury's verdict is akin to the technique of a "mediator's recommendation" to break an impasse at the mediation without many of the concerns associated with the mediator's recommendation tactic.[90]

A mini-trial by an advisory jury is useful when the parties need the neutral opinion of typical jurors. 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. Also, parties may become so enamored with their case they don't view the strengths and weaknesses of the case in an objective manner. 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 the mini-trial; in the alternative it might be pursued even before the mediation is commenced**.** In essence it has the potential of being an extremely effective "icebreaker" for opening settlement negotiations or re-invigorating stalled settlement discussions. It also gives clients who are committed to hearing a very persuasive argument presented to a jury the satisfaction of having had their day in court, which is particularly helpful when the real trial would be very lengthy or costly.

Mini-trials are not an inexpensive proposition as the services of an organization to select a mock jury is required, appropriate facilities must be secured, and the mock jurors and the neutral receive compensation. Mini-trials are typically a later stage ADR technique after substantial discovery and preliminary motion practice have been completed. This technique (or other evaluative ADR options) may even be suggested by the trial court before ruling on a difficult dispositive motion that will likely be appealed by the losing party.

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[89] Many litigators use mock jury trials solely to prepare for a trial. In those instances the role of opposing counsel is played by a surrogate to "simulate" the anticipated arguments, presentation and proofs of opposing counsel. Some counsel may be reluctant to engage in a mini-trial to an advisory jury as an ADR technique for any number of reasons: they don't want to "overly educate" opposing counsel on the strengths and weaknesses of the case; they desire to preserve certain "surprises" should the case proceed to trial; etc. Notwithstanding these concerns, it is an extremely potent ADR process that, if appropriate, should be seriously evaluated and considered.

[90] Tracy L. Allen, *The Mediator's Proposal: Substantive and Ethical Dilemmas?,* Macomb County Bar Briefs (Feb. 2015)

Considerable time can be expended by counsel in preparing for a mini-trail. Although far less expensive than a jury or bench trial, if the amount of potential exposure is not significant, does not involve important principles and issues that have the potential of a significant or long term economic impact, or fails to achieve important client objectives, the cost and expense associated with even an abbreviated mini-trial to an advisory jury may not be warranted. This is particularly true if a party will not be influenced by a non-binding verdict. In these situations the parties may consider other ADR techniques such as a mini-trial to party representatives followed by mediation or another ADR event.

Establishing the procedure and ground rules to be used during a mini-trial is critical. If all sides to a dispute intend to participate, it requires negotiation between counsel (often assisted by a mediator) to reach an acceptable procedure. Exhibit 15 provides a number of the issues that should be considered in negotiating the process.

2. Early Neutral Fact Finding

When confronted with highly technical and complex litigation involving scientific, business accounting, intellectual property, medical care, insurance coverage, riparian rights and similar issues, disputants have effectively leveraged the use of early neutral fact finding.[91] The use of a neutral fact finder can be an intermediate step in a contractual dispute resolution provision,[92] a stand-alone process early in the litigation, staged before a mediation session, or used during the course of a mediation to address an impasse.

Often the parties retain the services of an agreed upon subject matter expert to investigate and evaluate the technical or scientific issues involved and to prepare a written, non-binding report or to identify that information and discovery, if any, that is necessary to render a final report. Often the parties will submit the necessary materials and arguments to the neutral and otherwise cooperate with the neutral's request for information and data preliminary to the issuance of any report. Counsel may also confidentially meet with the neutral, often supplemented with the input of the party's retained expert, to explain the bases for their respective positions. The parties may be in agreement that the neutral's report is confidential and may not be used at trial, or, in the alternative, the parties may agree to use the written report (or portions) at a trial or other ADR event as the base line or expert opinion to which everyone will be bound.

Use of the neutral's report (or portions) 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 deciding 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 aspects of the technical issues involved. Use of a neutral fact-finder, whether binding or not, may also promote a resolution of the case without the

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[91] *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)

[92] In buy-sell agreements, for example, it is not unusual in the event of a valuation dispute for parties to select a CPA or other expert to make preliminary advisory or binding valuation calculations in accordance with the terms of the contract.

obfuscation of issues or litigation posturing. It is not unusual to commission such a report preliminary to convening a mediation and confidentially provide the report to the mediator along with the parties' mediation summaries. In the alternative, like many of the other ADR techniques described in this *Taxonomy,* it can be a very effective tool to deal with an impasse during the course of a mediation. In those situations, the mediation is adjourned to allow for the generation of a neutral's report before re-convening the mediation.

The expert neutral's report may not give rise to a dispositive opinion on the ultimate issue(s) in dispute, but can be very helpful in narrowing the areas of disagreement between the parties. Even if the matter does not immediately resolve, the narrowing of issues can be very helpful in streamlining the discovery process and the management of the case.

Although far 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.

If the decision is made to use a neutral expert with the intent of obtaining an advisory opinion only, care must be taken to ensure the report will not be admissible at any subsequent trial if that is not the intent of the parties. The manner in which the expert is retained, and who retains the expert, are among the issues that should be thoroughly reviewed by counsel.

3. Expert Hearing (formerly known as "Hot Tubbing")

An ADR technique that can result in many of the benefits of a neutral expert evaluation without as much cost is an expert hearing. This practice was first employed in the Australian courts as a method for streamlining trials on highly technical issues.[93] As originally conceived, the opposing experts give testimony while answering questions posed by the opposing expert, the attorneys, and in some instances the jury. However, the expert hearing can be a technique used in any number of settings that involve a "battle of experts." The objective is to provide clarity and definition of the factual, technical and legal issues involved in the dispute.

In the ADR context, typically a third party neutral assists in the orchestration and presides over the expert hearing event to narrow the issues in dispute to the extent practicable between the opposing experts. The neutral may review any preliminary reports issued by the opposing experts and confer with the experts to determine those technical and factual issues, if any, about which there is no dispute. Subject to a review and the approval of counsel, the neutral will outline the legal and factual issues where there is agreement and disagreement and generates an agenda outlining the areas of agreement and disagreement so the experts simply focus on those matters that are in dispute and why. The opposing experts then engage in a confidential hearing with representatives of the parties having settlement authority present, and, depending

[93] *Using the "Hot Tub"* (Oct. 2013) http://www.fedcourt.gov.au/publications/judges-speeches/justice-rares/rares-j-20131012

upon the ground rules, may respond to questions posed by the neutral, opposing counsel, the party representatives, and the opposing expert. It is not unusual that immediately following or shortly after the expert hearing exercise the neutral will then act as a mediator and conduct a mediation with the parties who were present during the expert hearing. It can also be used during a pause in the mediation to re-invigorate stalled negotiations.

Like the early neutral evaluation and fact finding this technique has a number of benefits, issues and features:

- It has the potential of limiting or refining the issues that will be involved in the ultimate resolution of the dispute and streamlining the discovery process to address only those issues;
- Permits the parties to the dispute to identify the potential risks of ongoing litigation or arbitration;
- Typically less expensive than an early neutral evaluation and fact finding although the parties will not have the benefit of a truly "independent" evaluation;
- It allows the parties to evaluate the effectiveness of the presentations opposing experts will have on the finder of fact;
- It can be an effective mechanism to modify the settlement positions of the parties;
- Fosters the productivity of more "facilitative" ADR techniques where the parties require or need an "evaluation" of the merits of their case and the parties do not require or desire a highly evaluative mediator style;
- Typically requires maturity of the dispute and the prior exchange of information and discovery; and,
- It can be an expensive proposition that is not necessarily appropriate for smaller disputes.

4. Early Neutral Evaluation

Early neutral evaluation is an ADR process in which the parties obtain an assessment of the strengths and weaknesses of their case, typically from a mutually respected, seasoned and experienced litigator with subject matter expertise, very early during the life of the case and before significant discovery has commenced.[94] It is an informal, non-binding process where the parties select the neutral to evaluate the issues. Each side presents the factual and legal support for its position that is then discussed 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 allows the neutral to assist the parties in devising a discovery and motion strategy that will be focused and reduce the costs and delay in the disposition of the case. For example, in a potential class action the early neutral evaluation may result in the parties agreeing the only

[94] Wayne D. Brazil, *Early Neutral Evaluation*, ABA Section of Dispute Resolution (December 2013).

issues are whether the putative 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. Because the neutral is retained very early in the case, the matter may not be ripe for resolution because there is discovery that one or both parties may need. In such a situation 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 a mediation takes place. The parties will 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: that of a "devil's advocate" with both parties and to provide a vehicle for aggressive case management. Like other evaluative processes it can be quite enlightening for the parties in identifying the strengths and weaknesses of their cases and the risks the litigation poses. It can also be a very effective in the education process of the recalcitrant client who may have an unrealistic expectation of the benefits that might be obtained from the litigation. When confronted with very aggressive opposing counsel, who may be prepared to expend more resources in the "lawyering" of a case than potentially warranted by the realistic exposure, it can also be of assistance in the "right sizing" and the staging of a cost effective case management plan.

5. Case Evaluation

a. In General

Case evaluation is a voluntary 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[95] 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:

- There is significant disagreement between the parties on the value of the case and such an independent evaluation will be helpful to the

[95] In all case evaluations clarity is important as to the role of the panel. Some panels may place a value on the case to encourage further settlement discussions; others believe its role is to place an independent, objective value on the case regardless of prior settlement discussions. The different perspectives may be significant to counsel and, if a private evaluation, the panel should be given the appropriate instructions as to its role.

parties in re-assessing their settlement positions;

- The significant issues dividing the parties involve liability or economic damage issues and not equity or nonmonetary issues;
- There is a desire to educate a party or client on the realistic value of the case;
- The parties have complete latitude on the length of the presentation and who may attend;
- 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";
- If a party has a very "favorable" case evaluation, there is always the potential the settlement position of that party may become entrenched and it may be strategically more appropriate to pursue this option only after a mediation has failed to achieve a resolution; and,
- 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 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 (other than to individually discuss the panel's decisional rationale with counsel) and the parties might pursue other ADR techniques through other providers.

b. Court Rule Case Evaluation; MCR 2.403

Most case evaluations in Michigan are conducted pursuant to MCR 2.403 that is mandatory for all tort cases. Unlike any other evaluative process, penalties may automatically attach for not accepting the outcome of this process.[96] Failure to receive a more favorable trial verdict than the evaluation, as defined in the Court Rule, results in penalties to the party rejecting the evaluation.[97]

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[98] if the jurisdiction maintains such a sub list such as in the Macomb County Circuit Court.[99] In the alternative, the parties may request by stipulation a special panel.[100]

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[96] *See, e.g.*, *Kusmierz v Schmitt*, 288 Mich App 731, 708 NW2d 151 (2005), *rev'd on other grounds*, 477 Mich 934, 732 NW2d 833 (2006).
[97] MCR 2.403 (O)
[98] MCR 2.204 (C) (2)
[99] *See* 2014-16 In re: Selection of Case Evaluators and Case Evaluation Panels http://circuitcourt.macombgov.org/sites/default/files/content/pdfs/2014-16%20Signed%20LAO%20re%20Selection%20of%20Case %20Evaluators%20and%20Case%20Evaluation%20Panels.pdf
[100] MCR 2.204 (C) (3)

Case evaluation has been used in almost all circuit court cases involving money damages as well as in most district court disputes. Unless a special panel is selected pursuant to MCR 2.404 (C) (3), the panel's fee is set by local administrative court rule and is typically in the range of $100 for each evaluator, which fee is paid to the court. At the conclusion of the case evaluation, the evaluators will have no further involvement in the dispute. However, some evaluators may be willing to discuss the rationale of the evaluation formulated by the panel in a subsequent discussion.

There are significant limitations to the benefits of evaluations conducted pursuant to MCR 2.403. In some jurisdictions the presentations made to the evaluators by counsel are not permitted to exceed 15 to 30 minutes by each party unless there are unusual circumstances. If dealing with a complex case, the concern is such a limitation will not provide the opportunity for a truly meaningful evaluation. While the parties may attend the case evaluation presentation, they are not permitted to participate. 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. To address these concerns some courts have developed special case evaluation processes such as Macomb County Circuit Court's 2014-16 In re: Selection of Case Evaluators and Case Evaluation Panels, *supra*. Under this Administrative Order, panels are comprised of subject matter experts depending upon the nature of the case assigned and may meet with counsel and the parties for several hours. Parties who wish to avail themselves of this Administrative Order, or similar Orders in other counties, should make that fact known to the trial court as soon as possible.

In making a determination of whether or not to accept the case evaluation, the parties have a limited opportunity to explore non-economic terms and conditions that might prove beneficial. 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. It is not uncommon for the rejecting party to settle the matter in the amount of the case evaluation (or at a level fairly close to the case evaluation) by entering into a settlement agreement provided that certain non-economic conditions requested by the rejecting party are incorporated into any settlement. When this occurs, the rejecting party's negotiation position is not optimal and typically far weaker than positions and interests that might have been explored in mediation 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 has been squandered.

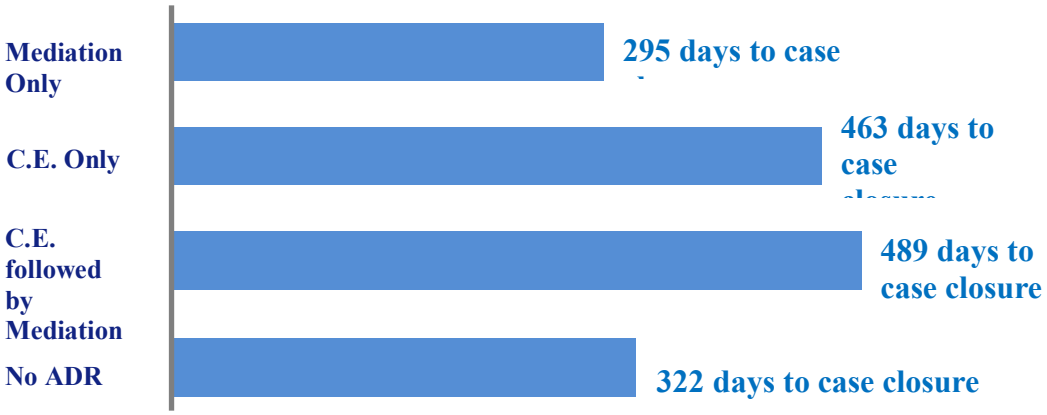
As previously discussed, the cost-benefit and effectiveness of the case evaluation process required by MCR 2.403 has been questioned.[101] The study demonstrates that case evaluation as the only ADR strategy, or ordering mediation after an unsuccessful case evaluation, can actually lengthen case age, costs, and the additional consumption of judicial and litigant resources. As reflected in the study:

- If no ADR was ordered, approximately 3% of the cases ended in a trial
- If only case evaluation was ordered, approximately 7% of the cases ended in a trial

[101] *See The Effectiveness of Case Evaluation and Mediation in Michigan Circuit Courts*, Report to the State Court Administrative Office, Michigan Supreme Court (2011), http://courts.mi.gov/Administration/SCAO/Resources/Documents/Publications/Reports/The%20Effectiveness%20of%20Case%20Evaluation%20and%20Mediation%20in%20MI%20Circuit%20Courts.pdf.

- If court-ordered case evaluation was followed by mediation, approximately 10% of the cases ended in a trial
- If only mediation was ordered, approximately 0% ended in a trial

The study also evaluated the impact on "case age" depending upon the sequencing and timing of ADR strategies.



As a result, some courts, including most Business Courts, do not routinely order case evaluation. Other courts will not order case evaluation unless and until other ADR options have been attempted Some courts may routinely grant objections to case evaluation filed pursuant to MCR 2.403 (C) where both parties agree that case evaluation, given other ADR options that are being pursued, will not be a cost-benefit. Practitioners need to review each circuit's ADR plan and the practices of each judge.

Reliance on this process as the sole ADR methodology for a dispute may be misplaced as this process will typically not occur until all discovery has been completed and the trial date scheduled. Thus, the opportunity to avoid or minimize significant litigation costs has been lost. Moreover, at such a late date in the litigation process, the positions of the parties have potentially become entrenched reducing the likelihood of a settlement. The potential exposure to sanctions may not be a significant inducement to modify the entrenched position of the parties necessary for a resolution of the case. While a potential settlement tool, the experienced litigator will rarely if ever rely upon case evaluation pursuant to MCR 2.403 as the first or sole ADR strategy. In fact, the typical practices of most courts, in addition to moving away from case evaluation, will require more of the litigants and the parties in pursuing ADR.

6. Moderated Settlement Conference

Late stage settlement conferences immediately before a trial continues to be a practice in many courts although some have questioned the efficacy of trial courts confining the scheduling of settlement discussions with the parties immediately prior to a trial. Current thinking in evidence based practices suggests that settlement should **not** be the focus of this late-stage conference held just prior to trial, but rather confined to determining whether or not counsel and the trial judge are prepared for the trial.

The purpose of the conference is to ensure that counsel is prepared and that the

> trial judge is prepared to preside…. It is important to note that this conference is not a settlement conference, but rather, is focused on preparing for trial. Ideally, the conference should be held 10 to 20 days before the trial commences.[102]

If settlement isn't the focal point of the traditionally held conference just prior to trial, when would it be appropriate for counsel to suggest to the judge, or for the judge to determine, the time is ripe for a "moderated settlement conference"? Counsel may be well served in strategically requesting a moderated settlement conference (where the clients may or may not be present) at various times throughout the life of the case and focus on a discussion of resolution strategies with the trial judge tailored to the dispute and the sophistication of the parties and their counsel. As stated in the *Caseflow Management Guide*, the moderated settlement conference should be a "meaningful event" since it is designed to resolve a case or move it to disposition.[103] Such conferences could be convened following unsuccessful ADR events, after a hearing on a motion, just prior to the completion of discovery, etc., to determine what obstacles lie in the 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 reduction of litigation waste. As such, one evidence based practice for counsel and the court might be to look for strategic opportunities to request a moderated settlement conference. If a party believes that requesting such a conference may be construed as a "weakness" by opposing counsel, the court's staff can be advised the time may be appropriate for the court to initiate the moderated settlement conference.

The training provided Michigan judges throughout 2014 and into 2015 recommended that the judges consider the difference between the courts as traditional trial judges and the courts as dispute resolution advisors **and** trial judges. Literature on effective case management suggests the trial judge and the dispute resolution advisor model may be more effective in the effective management of a docket and meeting the metrics established by SCAO. The distinction between the two roles has been described to the judges as set forth in the following table:

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 practice.	Stages proportional discovery and motion practice to support the agreed upon ADR strategies.

[102] *Caseflow Management Guide*, at p. 23.
[103] http://courts.mi.gov/Administration/SCAO/Resources/Documents/Publications/ Manuals/cfmg.pdf, p. 18.

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 and conducts periodic status updates and moderated settlement conferences on ADR possibilities and explores
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.

Strategically counsel would be well served to determine as early in the litigation process as possible whether the trial court assigned to their case has adopted the case management philosophy of a dispute resolution advisor and tailor their approach to a case management and ADR strategy accordingly.

Many courts do schedule late stage settlement conferences with all counsel that require the attendance of parties with authority to settle the matter. The trial judge or designee will moderate this late stage settlement conference.

Judicial practices in conducting late stage moderated settlement conferences differ markedly and the practices of each judge (both state and federal) will usually be posted on the court's web site. When conducted, the late stage moderated settlement conference allows the parties, on many occasions for the first time, to assess the court's temperament, reactions and attitudes toward the parties, counsel, expert witnesses and the merits of the case. These conferences are often highly evaluative and the court, while always reserving judgment and having an open mind, may send certain signals thus leaving very little doubt as to any number of issues that may be addressed or ruled upon including pending motions in limine, jury selection issues, and the trial. Extremely valuable information relevant to the trial and trial risks of the case can be gleaned by counsel and the client who listen carefully.

While a very effective tool in resolving cases, there are significant concerns should the parties not have exhausted and explored other ADR techniques prior to the late stage moderated settlement conference. Like case evaluation, such conferences takes place very late in the litigation process and suffers from the same detriments as case evaluation pursuant to MCR 2.403. The potential for a creative, interests based resolution is certainly more limited in comparison to what might have been achieved for the client during, for example, mediation. Similarly, the opportunity to limit the issues that will be tried has passed. Typically, the decision maker is present during the moderated settlement conference (and the court may request meeting with the decision makers alone outside the presence of counsel). While the process may educate the client on the court's perspective of the case, a highly evaluative conference may also result in undue pressure that negatively impacts the quality of a party's decision making. Counsel will be well served after determining the practices of the trial judge to prepare the decision maker appropriately.

VIII. Facilitative ADR Processes

1. Meet and Confer

Many contracts contain dispute resolution provisions that prescribe a progressive methodology for resolving conflicts that might arise between the parties to the contract. Typically, the first step in the contractually provided dispute resolution methodology is a "meet and confer" obligation. *See* Exhibit 16 (sample Meet and Confer provision). The usual meet and confer provision typically 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. During such meetings, which are very informal, counsel for the parties may or may not be present. If the parties are unable to resolve the dispute at the "meet and confer" stage, the parties might engage in "real time" mediation to facilitate their settlement discussion or the dispute may move to the next step of the dispute resolution mechanism set forth in the contract (*i.e.*, mediation, the use of a dispute resolution advisor, etc.). If there is no next step provided in the contract, absent a resolution, the parties may proceed directly to litigation or arbitration.

Even in the absence of a contract, the parties to a dispute with settlement authority may 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 such permission is obtained the parties may opt to schedule such a meeting and establish their own ground rules that will apply during the course of the meeting. One important ground rule is to make certain the discussions that take place are protected by a written confidentiality agreement (Exhibit 16).

Although such 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 before a complaint is filed, and before significant litigation costs have been incurred and before the positions of the parties are entrenched. These meetings can and do provide the parties the opportunity to engage in interest based bargaining as opposed to positional bargaining. In that the parties are communicating directly, it also reduces the opportunity for misunderstandings that might otherwise arise during the "fog of litigation." Where the parties are motivated to resolve, 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.

Such meetings are most appropriate when the parties are relatively sophisticated and fully apprised of their legal rights and all the issues that need to be addressed. The risks are that one party may not have engaged in all the necessary due diligence 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 of concern in divorce disputes. Where these concerns do not exist, and if there is the opportunity to prepare for the meet and confer with counsel and other advisors as appropriate, there can be success in achieving mutually beneficial resolutions very early in the life of the dispute.

a. CPR Pledge

The International Institute for Conflict Prevention & Resolution, Inc. (CPR) is an organization that encourages its business members to sign two pledges. The 21st Century pledge provides:

> Our company pledges to commit its resources to manage and resolve disputes through negotiation, mediation and other ADR processes when appropriate, with a view to establishing and practicing global, sustainable dispute management and resolution processes.[104]

The original CPR pledge is:

> In the event of a business dispute between our company and another company which has made or will then make a similar statement, we are prepared to explore with that other party resolution of the dispute through negotiation or ADR techniques before pursuing full-scale litigation. If either party believes that the dispute is not suitable for ADR techniques, or if such techniques do not produce results satisfactory to the disputants, either party may proceed with litigation.[105]

Signatories are encouraged to explore alternatives to litigation in an attempt to resolve a dispute that might arise with other signatories. The alternative typically involves a meet and confer opportunity at a minimum. Before or immediately after a lawsuit is filed, counsel should determine whether the plaintiff and defendant are signatories to the pledge and proceed accordingly.

While there are other organizations, local and regional, that provide members with the opportunity to sign similar pledges, the CPR pledge is the best known and has over 4,000 signatories. In addition to evaluating whether there is a mutual CPR pledge, counsel might also explore whether the parties are signatories to similar pledges with other organizations. At the very least these pledges have been successful in using moral suasion to initiate a meet and confer opportunity before or very early in the litigation process.

b. Demand Letters

Many sophisticated plaintiffs' counsel, particularly those who specialize in business, tort, malpractice, and employment matters, send the defendant a demand letter prior to the formal initiation of litigation that invites a meet and confer opportunity. 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 such letters to also include a copy of the complaint that will be filed as well as requesting certain information and documents. Most defendants will immediately refer such demands to counsel so that a dialogue can be established before the filing of a complaint. In addition to direct settlement discussions, these communications also have the potential to lead to an early agreement to mediate or employ other early ADR techniques before significant litigation costs are incurred. *See e.g.*, Exhibit 7. There is a litigation adage that many business defendants have embraced: "Unlike fine wine litigation does not get better with time." Many defendants are highly motivated to resolve the dispute as soon in the process as possible assuming the demand or offer is deemed reasonable and appropriate.

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[104] http://www.cpradr.org/PracticeAreas/ADRPledges/21stCenturyPledge.aspx
[105] http://www.cpradr.org/PracticeAreas/ADRPledges/CorporatePledgeSigners.aspx

This best practice should not be ignored by counsel where appropriate.[106] At one time it was thought that sending such a letter may signal a "weakness" or any response by the potential defendant might be viewed as being "weak." Most seasoned litigators and sophisticated clients know better. If a party's position is weak, that party typically wants to deal with that fact sooner than later; 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.

c. Settlement Counsel

Another potential best practice that is used by many business entities, particularly when dealing with consumer tort claims, is to retain settlement counsel who will 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. The injured party may actually be encouraged to retain counsel. If the injured party does not retain counsel, there is a concern 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 pre-complaint 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 then transferred to trial counsel who will defend the company in litigation. Often the transfer is accompanied with the assertion the last best offer made by settlement counsel is "off the table" and the selected trial counsel will not make a better offer during the course of the litigation.

d. Statutory "Meet and Confer" Obligations – Individuals with Disabilities Education Act Example

An example of a statutory "meet and confer" provision is contained in the Individuals with Disabilities Education Act (IDEA).[107] IDEA mandates that school personnel and parents participate in a "resolution session" within 15 days after the school receives the parents' request for an administrative due process hearing to address a special education dispute. A school district representative with decision-making authority must attend the resolution session. Legal counsel for the school districts is not permitted to attend unless the parent is accompanied by an attorney.[108]

The resolution session provides the parties with an early, informal opportunity to engage in a face-to-face negotiation that may effectively resolve the dispute and prevent the conflict from escalating. The

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[106] Some counsel may be reluctant to send demand letters in situations where forum shopping is a concern or preliminary injunctive relief is contemplated. Even in those situations the use of a demand letter should not be automatically rejected when transmitted with a filed but not yet served complaint or the service of the underlying temporary restraining order and other pleadings preceding a hearing on a motion for preliminary injunctive relief.

[107] 20 U.S.C. § 1415(f)(1)(B)

[108] 20 U.S.C. § 1415(f)(1)(B)(iv)

resolution session is mandatory unless the parents and the district agree, in writing, to waive the meeting or agree to participate in mediation in lieu of the resolution session. Under the statute, an agreement reached through a resolution session is voidable by either party within three business days of its execution so the parties might consult with legal counsel.[109]

When resolution sessions were added to IDEA in 2004, Congress specifically found that parents and schools should have "expanded opportunities to resolve their disagreements in positive and constructive ways."[110] The legislative history indicates that Congress broadened ADR opportunities in an effort to restore trust and foster cooperation between parents and schools, encourage expeditious resolution of disputes and prevent disagreements from escalating into costly litigation.

An important caveat is to note that the IDEA and its regulations are silent as to whether confidentiality applies to resolution sessions. Some administrative law judges and courts have ruled they are not confidential and have permitted resolution session discussions and offers admitted into evidence.[111] It is unclear whether Congress' failure to include confidentiality in the resolution session provisions was an intentional or inadvertent omission. Parties who engage in resolution sessions should attempt to agree upon confidentiality ahead of time or proceed with caution.[112] *See* Exhibit 17 (sample Confidentiality Agreement).

Counsel would be well advised, particularly when dealing with alleged statutory violations involving agencies of government, to determine whether the legislature has imposed similar dispute resolution mechanisms such as meet and confer provisions. Care should be exercised in all such instances to protect any meet and confer discussions with an appropriate confidentiality agreement.

2. Collaborative Practices

The resolution of disputes in the least adversarial manner possible is the goal and basis of collaborative law. The parties strive to maintain total control of the dispute resolution process through negotiations. In collaborative law the parties working with each other, with the advice and participation of their respective lawyers, strive to reach an agreement that addresses all matters in dispute. These efforts may be supplemented by the services of an independent mediator. In addition, the parties may retain the services of other experts to assist in the quantification, analysis and evaluation of the dispute.[113]

The parties with their attorneys initially decide if they desire to resolve their issues using collaborative law. At this initial meeting the parties and attorneys outline what they view as the major issues, discuss what decisions need to be made, whether they may need the assistance of other professionals,

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[109] 20 U.S.C. § 1415(f)(1)(B)(iv)
[110] 20 U.S.C. §1400(c)(8)
[111] *See* L. Athens, *Confidentiality Does Not Automatically Extend to Pre-Mediation Resolutions Sessions*, Laches (May 2010), http://www.lathenslaw.com/201005cs.pdf
[112] *Preparing for Special Education Mediation and Resolution Sessions: A Guide for Families and Advocates*, The Children's Law Clinic Duke University School of Law (November 2009) w.advocacyinstitute.org/resources/ Preparing.for.SpEd.Mediation. Resolution.Sessions.pdf.
[113] See, e.g., Cheryl A. Fletcher, Judith Judge and Veronique Liem, *Collaborative Practice: Divorce Without Litigation,* Mich. Bar Journal (February 2006), https://www.michbar.org/journal/pdf/pdf4article972.pdf.

and what documents and information they need to review in order to reach a resolution. Once the parties have met, the attorneys and their clients then decide whether to enter into a formal collaborative law participation agreement.

The formal participation agreement contains guidelines, including the potential use of neutral experts, civility to each other, and cooperation in producing necessary documents. They agree to work together in good faith. If they need an accountant, valuation expert, or other professional, they may mutually choose one. They may also agree on any number of "stand-still" or other matters necessary to permit the parties to fully explore a collaborative resolution. The participation agreement also states that if either party seeks court intervention to resolve their issues, both parties must secure new attorneys to represent them in the litigation. *See* Exhibit 18 (sample Collaborative Practices Agreement).

Although collaborative law can be utilized to resolve a broad range of disputes,[114] its use is most closely associated with divorce proceedings.

a. Collaborative Law Act

On June 12, 2014, Michigan became the 10th jurisdiction to enact the Uniform Collaborative Law Act that became effective on December 8, 2014.[115] With the new Uniform Collaborative Law Act taking effect in Michigan, there are now established requirements and procedures for a collaborative law participation agreement used in family law disputes. There are also requirements related to disclosure of information and privileged communications related to and arising out of the collaborative process. MCL § 691.332(e) provides the Act applies to proceedings "arising under the family or domestic relations law of the state, including: (i) marriage, divorce, dissolution, annulment, and property distribution; (ii) child custody, visitation and parenting time; (iii) alimony, maintenance, and child support; (iv) adoption; (v) parentage; and, (vi) premarital, marital, and postmarital agreements."

Below is a summary of a number of the provisions of the Act.

Section 2 sets forth definitions of the terms used in the Act.

Section 3 provides the Act is applicable to a collaborative law participation agreement that meets the requirements of the Act and signed after the effective date of the Act.

Section 4 establishes minimum requirements for a collaborative law participation agreement -- the agreement that parties sign to initiate the collaborative law process. The agreement must be in writing, state the parties' intention to resolve the matter (the issue for resolution) through collaborative law, contain a description of the matter, and identify and confirm the engagement of the collaborative lawyers. The

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[114] S*ee e.g.*, Marilyn J. Endriss, *Using Collaborative Law in Employment Disputes* (2005) http://kingcountycollab.org/downl/ EndrissArticle111305.pdf; R. Paul Faxon and Michael Zeytoonian, *Prescription for Sanity in Resolving Business Disputes: Civil Collaborative Practice in a Business Dispute Restructuring Case*, Collaborative Law Journal (Fall 2007) http://www.collaborativelaw.us/articles/Prescription_For_Sanity.pdf; Susan Daicoff, *Collaborative Law: A New Tool for the Lawyer's Toolkit*, J.L. & Pub. Pol'y 113 (2009).

[115] MCL §§ 691.1331-691.1354

section further provides that the parties may include other provisions not inconsistent with the Act. *See* Exhibit 19 (sample Domestic Relations Collaborative Participation Agreement).

Section 5 emphasizes that a tribunal (defined as a "court, arbitrator, administrative agency, or other body acting in an adjudicative capacity that…has jurisdiction to render a decision affecting a party's interests in a matter") cannot order a party to participate in the collaborative law process over that party's objection. It also specifies when and how the collaborative law process begins and how the process is concluded or terminated. Any party may unilaterally terminate the process at any time without specifying a reason. The process is concluded by a negotiated, signed agreement resolving the matter, or a portion of the matter, and the parties' agreement that the remaining portions of the matter will not be resolved in the process.

Section 6 indicates that parties may opt to pursue a collaborative law process even after a matter is pending in a tribunal. This section provides for an automatic application for a stay of proceedings before a tribunal once the parties file a notice of collaborative law with the tribunal. *See* Exhibit 20. A tribunal may require status reports while the proceeding is stayed; however, the scope of the information that can be requested is limited to insure confidentiality of the collaborative law process.

Section 7 creates an exception to the stay of proceedings by authorizing a tribunal to issue emergency orders to protect the health, safety, welfare or interests of a party or family or household member; or, to protect financial or other interests of a party.

Section 8 authorizes a tribunal to approve an agreement resulting from a collaborative law process.

Section 9 sets forth a core element and the fundamental defining characteristic of the collaborative law process. Should the collaborative law process terminate without the matter being settled, the collaborative lawyer and lawyers in a law firm with which the collaborative lawyer is associated are disqualified from representing a party in a proceeding before a tribunal in the collaborative matter, except to seek emergency orders (Section 7) or to approve an agreement resulting from the collaborative law process (Section 8). The disqualification requirement is further modified regarding collaborative lawyers representing low-income parties (Section 10) and governmental entities (Section 11).

Section 12 sets forth another core element of collaborative law. Parties in the process must make timely, full, candid, and informal disclosure of information substantially related to the collaborative matter without formal discovery, and promptly update information that has materially changed. Parties are free to define the scope of disclosure in the collaborative process, so long as they do not violate another law, such as an open records act.

Section 13 acknowledges that standards of professional responsibility of lawyers and abuse reporting obligations of lawyers and all licensed professionals are not changed by their participation in the collaborative law process.

Section 14 addresses the appropriateness of the collaborative law process. Prior to the parties signing a participation agreement, a collaborative lawyer is required to discuss with a prospective client factors which the collaborative lawyer reasonably believe relate to the appropriateness of the prospective client's

matter for the collaborative process, and provide sufficient information for a prospective client to make an informed decision about the material benefits and risks of the process as compared to the material benefit and risks of other reasonably available processes such as litigation, arbitration, mediation, or expert evaluation. Further, a prospective party must be informed of the events that will terminate the process and the effect of the disqualification requirement.

Section 15 obligates a collaborative lawyer to make a reasonable effort to determine if a prospective client has a history of a coercive or violent relationship with another prospective party, and if such circumstances exist, establishes criteria for beginning and continuing the process and providing safeguards.

Section 16 provides that oral and written communications developed in the collaborative process are confidential to the extent agreed upon by the parties or as provided by state law other than the Act.

Section 17 creates a broad privilege prohibiting disclosure of communications developed during the process in legal proceedings. The provisions are similar to those in the Uniform Mediation Act and apply to party and non-party participants in the process.

Sections 18 and 19 provide for the possibility of waiver of privilege by all parties, and certain exceptions to the privilege based on important countervailing public policies such as preventing threats to commit bodily harm or a crime, abuse or neglect of a child or adult, or information available under an open records act, or to prove or disprove professional misconduct or malpractice. Parties may agree that all or part of the process is not privileged.

Section 20 addresses the enforcement of an agreement made in a collaborative process that fails to meet the mandatory requirement for a participation agreement (Section 4), or a collaborative lawyer who has not fully complied with the disclosure requirements (Section 14). When the interests of justice so require, a tribunal is given discretion to enforce an agreement resulting from a flawed participation agreement if the tribunal finds that the parties intended to enter into a participation agreement, and reasonably believed that they were participating in the collaborative process.

Section 21 emphasizes the need to promote uniformity in applying and construing the Act among states that adopt it thereby giving rise to the citation of cases from other jurisdictions in the interpretation and application of the Act.

Section 22 provides that the Act may modify, limit, or supersede certain provisions of the Federal Electronic Signatures in Global and National Commerce Act.[116]

b. *Pro Se* Plaintiffs and Defendants

[116] *See also*, *Uniform Collaborative Law Act*, National Conference of Commissioners of Uniform State Laws (2009) http://law.hofstra.edu/pdf/academics/journals/lawreview/lrv_issues_v38n02_cc1_ucla_final.pdf; Nancy Ver Steegh, *The Uniform Collaborative Law Act and Intimate Partner Violence: A Roadmap for Collaborative (and Non-Collaborative) Lawyers*, 38 Hofstra Law Review 699 (2009) http://open.wmitchell.edu/cgi/viewcontent.cgi?article=1211&context=facsch.

In some courts where complaints are filed by parties unrepresented by counsel (or where both the plaintiff and defendant are unrepresented), there are programs available for the case to be referred by the courts, after securing the agreement of the *pro se* party, to counsel who will perform a function akin to a "collaborative" lawyer. *See, e.g.*, *Special Assistance Program for Pro Se Litigants*, U.S. Dist. Ct. for the N.D. Ill., www:iInd.us.courts.gov. Upon the assignment of the case there is typically a written agreement that the attorney is representing the *pro se* plaintiff for the sole purpose of determining whether a resolution can be achieved. If a resolution is reached then the attorney representing the plaintiff may be compensated an agreed upon portion of the settlement. If the attorney is representing the *pro se* defendant during this court referral process, the attorney typically agrees to a flat fee, an hourly rate at a significantly reduced level, or pro bono. If the matter is not resolved, then the attorney's representation of the party comes to an end and the party must either proceed *pro se* or secure the services of another attorney to litigate the matter. This practice has been developed for some cases as an alternative to the early referral of the matter to Community Dispute Resolution Centers by the courts. If this process does not resolve the matter, the services of Community Dispute Resolution Centers are often used to engage in a mediation of the dispute.

3. Restorative Practices

As a definitional matter, "restorative practice" covers a continuum that includes, on one end, "community building" circles among school/educational, spiritual, workplace, neighborhood, governmental, religious, or other communities, where there is no dispute, but rather a goal to build community and understanding among members of the group. Along the spectrum are several restorative behavior modification supports that are used in schools, including affective language, and other methods of supportive communication as a substitute for traditional discipline that so often results in escalating conflict and exclusionary discipline for students. At the other end of the continuum is "restorative conferencing," which is designed to address a dispute or a conflict where harm has been done to a person or object that affects the victim and often the victim's and/or offender's "community." There is a scripted discussion that takes place in restorative conferencing that asks all the following questions of the offender, and many of the following questions are posed to the entire group.

a. What happened?
b. What were you thinking at the time?
c. What have you thought about since?
d. How have you been affected by what was done? In what way?
e. What needs to happen to repair the harm that was done or make things right?

Schools are using this method in Michigan and around the country. They are seeing significant improvements in school climate and safety and a reduction in behavioral incidents, including suspension and expulsion rates. Restorative practices have been recommended for use in Michigan's schools by the Michigan Department of Education (MDE).[117] Several community dispute resolution centers around the state were awarded grants by the MDE to facilitate restorative practices in the schools, as a hopeful antidote

[117] Michigan Department of Education Message # 126, *Restorative Justice and the Achievement Gap* http://www.michigan. gov/ documents/mde/Research_Brief_6_-_Restorative_Justice_416599_7.pdf

to the "school to prison pipeline" research, which indicates high numbers of students subjected to exclusionary discipline eventually wind up in Michigan's prisons. Its use is also encouraged by the Federal Department of Education for schools in all states.[118]

Restorative Justice (RJ) is found at the far end of the restorative practice continuum and is used for offenders and victims involved in the justice system. Restorative justice utilizes a similar dialogue to the scripted questions of restorative conferencing and has been very effective in reduction of recidivism and re-offending for both adults and juveniles involved with the justice system. RJ often involves community members, attorneys, law enforcement, probation officers, and others who are impacted by the offense that has occurred or who needs to be part of the solution. RJ has been credited for improving community safety and reducing crime. While RJ is similar in philosophy to Victim-Offender Mediation (VOM), it differs somewhat in the circular structure, participants, and dialogue. Like VOM, RJ must be voluntary in order to bring a victim and offender together and both must be willing to meet. RJ also requires significant pre-meeting preparation work with the facilitator and the parties in order to assure effective participation that won't re-victimize a victim. RJ usually occurs after sentencing, although some RJ processes are used for sentencing itself. The offender must have already taken responsibility for his or her actions in court and must be willing to continue to take responsibility in the RJ meeting.

In its use of the restorative dialogue and structure, RJ affords an opportunity for the offender to understand the impact of his or her act on another, and often on a whole community, with the intent of decreasing the likelihood of re-offending. It also provides the victim an opportunity to tell the offender what his or her act meant on a personal level, and for the victim to obtain answers to nagging questions that often go unanswered in the court process. Most victims who choose to participate say they feel relief, closure, and safe (often for the first time since the incident) after meeting with the offender. Most offenders are grateful for the opportunity to show remorse to the victims, to be listened to, and to better understand the real effect of their actions on others.

Restorative Community Impact Panels are being implemented in Muskegon County, under the auspices of the local CDRP Mediation and Restorative Services Center.

A few courts in Michigan are beginning to refer cases to RJ. For example, the Wayne Mediation Center and the ACLU have begun an RJ program with the 3rd Circuit Court in Wayne County for the use of RJ in adult auto theft cases.

4. Peacemaking

Peacemaking is a form of restorative practice directly rooted in tribal peacemaking traditions where tribal elders brought the community together to resolve conflict or deal with a crime.

Like all forms of restorative practices, peacemaking uses traditional circles for seating participants

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[118] U.S. Department of Education, *Guiding Principles A Resource Guide for Improving School Climate and Discipline*, http://www2.ed.gov/policy/gen/guid/school-discipline/guiding-principles.pdf; U. S. Department of Justice, *Supportive School Discipline Initiative*, http://www2.ed.gov/policy/gen/guid/school-discipline/appendix-3-overview.pdf

without the barrier of traditional conference tables situated between them and without the implied hierarchy inherent in seating at rectangular conference tables. And like other restorative practices, circle participants sometimes include support people and members from the disputants' family or community. A "talking piece" is usually used in the circle process as an "equalizer" to eliminate interruptions, allows the speaker to feel heard and respected, and increase understanding by the other participants. It provides time for the parties to listen and think before immediately responding and the talking stick assures that everyone speaks not just those who are verbally quick and strong. Restorative practice peacemaking models often use a ceremonial opening and closing. Refreshments are also an important feature at either the beginning or the end of the meeting that tends to bring participants closer together.

Of all the ADR processes mentioned in this *Taxonomy*, peacemaking is closest to restorative practices, or the more mainstream process of facilitative mediation. Peacemaking differs from mediation in that its purpose extends beyond settlement of a case; it differs from restorative practices in that it goes beyond taking responsibility and repairing harm to an individual or community. It has the additional goal of healing relationships and restoring one's place in the family or community. Peacemaking is not as scripted as RJ and thus allows the peacemaker facilitator to ask more tailored questions of the parties to address the conflict.

Community plays an important role in many peacemaking cases, which may involve additional participants from the "communities" of the disputants – family members, work associates, school students or staff, or neighborhood residents – who have been affected in some way by the conflict. Rooted in ancient traditions, peacemaking differs from other ADR processes in that its foundational principle is humans are profoundly connected to one another and to their community. As renowned author and trainer, Kay Pranis, explains, "Community, that is, connection with others, is essential to our survival as a species and, therefore, an inclination to be in good relationship with others is embedded in our genes."[119] In peacemaking, conflict provides the opportunity to build community and human relationships.

Peacemaking and facilitative mediation share some similarities. The role of the facilitative mediator and the peacemaker is to be non-directive and neutral as to the outcome. Both ask questions designed to encourage the parties to address their issues in a calm, understanding way, although the questions a peacemaker asks may differ from those of a mediator. Like some mediators, peacemakers engage in substantial pre-session work with the participants to determine how best to structure the session and to screen for issues that would preclude safety or meaningful engagement by the parties. The parties and the peacemaker together determine the values or ground rules for the discussion. Many of the questions at the beginning of peacemaking concern what the parties need from one another to feel safe and comfortable in the discussion, and guidelines for how they want to talk with one another are created from these questions and answers.

The philosophical approach to mediation and peacemaking differs somewhat with regard to the role of the facilitator. Mediators are in search of a solution and may take an active process role to guide the parties to that point. Peacemaking allows even more party ownership of the conflict and the process with

[119] Kay Pranis, *Restorative Justice in Minnesota and the USA: Implementation and Outcomes*, http://www.unafei.or.jp/english/pdf/RS_No63/No63_18VE_Pranis2.pdf.

the belief that the wisdom for meaningful solutions and healing resides with those in the circle. On the theory that separation neither facilitates understanding between the parties, nor does it enhance the healing of relationships, parties are not separated into different rooms to negotiate through the neutral. The theory that "we know more together than we do individually" is central to the peacemaking circle model.[120]

a. Peacemaking Courts

With the award of a SCAO Court Innovations grant and with the support of the Michigan Supreme Court, the Washtenaw County Trial Court and Judge Timothy Connors initiated the first state "Peacemaking Court" in the nation in 2013 to test the premise that tribal court peacemaking ADR principles could be successfully applied within a state court system. The authority for the local court to refer cases to peacemaking comes from a local administrative order by the county's commissioners. *See* Exhibit 21. The court's local administrative order dated March 16, 2015, provides that all peacekeeping cases will be assigned to Judge Connors.[121] The court is developing a replicable model for other jurisdictions to adopt. In its first year, the Washtenaw County Peacemaking Court program was grant funded. Subsequently, it is being administrated through the use of county resources and additional grants for training and special pilot programs. The program has trained and availed itself of the efforts of both private practitioners as well as the local dispute resolution center volunteers as peacemaker facilitators.

Confidentiality/privilege for peacemaking court sessions substantially mirrors MCR 2.412, the confidentiality rule for court-ordered mediation. Confidentiality provisions and exclusions are agreed upon by contract in the pre-session consent form. Like mediation, final peacemaking settlement agreements are written, signed by the parties, and are enforceable in court as a contract between the parties.

Peacemaking can be used in a wide variety of cases that include criminal, as well as civil, family, probate, and juvenile court cases. Additionally, peacemaking is used in all types of community cases, such as school, neighbor, and workplace disputes. A goal of the peacemaking court in Washtenaw County is to not only use peacemaking in the court system, but to further its use throughout the community through its partnership with the local dispute resolution center.

Peacemaking is voluntary for the participants in court, on the philosophy that a sincere desire to attend is the first step toward achieving its goals. Depending on the issues, attorneys may or may not be present for part or all of a session.

As of this writing, unless there is a compelling reason not to refer a case, the Washtenaw County Trial Court Juvenile Division is moving toward a goal of referring every case on the Juvenile Court's abuse and neglect docket to peacemaking for cases whose goal is family reunification. However, actual participation by the individual parties is voluntary.

Given that the current court system remains available to anyone who chooses, or for cases determined inappropriate by peacemakers (due to similar factors for excluding mediation cases – domestic violence,

[120] Kay Pranis, *Circle Keeper's Handbook*, https://ardhs.sharepointsite.net/
[121] LAO C22 2015-02J; P81-2015-02J

mental health issues, etc.), or for those whose case did not settle in peacemaking, parties in Washtenaw County may also be exposed to peacemaking principles when the court hears their case. Court staff, including Judge Connors, his referee in the juvenile division, several juvenile probation officers, detention center staff and Friend of Court staff have been trained in peacemaking, so that cases can be handled by the court in a manner that honors peacemaking principles by de-emphasizing punishment of the negative and emphasizing affirmation of positive behavior. Even the court's Juvenile Division staff meetings are conducted in a circle.

Both peacemaking and restorative justice philosophy is built on the belief our legal system may undermine basic human compassion and moral commitment. It is therefore not surprising that studies have found stark contrasts between the rates at which parties uphold and honor their peacemaking agreements vs. parties that are ordered into compliance by courts. One Alaskan study found that a tribal peacemaking court had a 97.5% sentence fulfillment rate as compared to the Alaska State Court system's rate of 22%.[122]

Among the paradigm shifts that peacemaking invites us to consider is that of moving from the concept of justice as "getting even" to justice as "getting well."[123]

5. Friend of the Court (FOC) – Conciliation

Depending upon the jurisdiction and the practice of judges within a circuit court, upon the filing of a complaint for divorce the matter will be immediately referred to the FOC for a conciliation meeting with qualified Friend of the Court personnel.

FOC conciliation should be distinguished from FOC Mediation. Many FOC Offices offer conciliation at the beginning of a divorce case to resolve temporary issues of custody, parenting time, and support. Conciliation, unlike mediation, is not confidential. The conciliator may report to the court about the contents of the conciliation. At the conclusion of the conciliation, if the parties do not have an agreement on custody, parenting time and support, the conciliator may make a recommendation. In some courts, this recommendation is written up as an Order of the court, to be signed by the Family Division judge. A number of courts do not allow attorneys in the conciliation meetings. The Friend of the Court Bureau is currently contemplating training requirements for conciliators.

The practice of convening the conciliation conferences developed to avoid inequities that might arise should the court enter child custody and child support Orders for the first party to file a divorce or custody case. When such Orders were entered without allowing the other party to have his or her position heard on these issues it was believed that, on occasion, the results were perceived as unfair or may have had the effect of polarizing the parties.

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[122] *See* Harvard Kennedy School, Ash Center, *Kake Circle Peacemaking*, http://www.innovations.harvard.edu/kake-circle-peacemaking; *see also* Ryan Fortson and Jacom Carbaugh, *Survey of Tribal Court Effectiveness Studies*, Alaska Justice Forum (Fall 2014/Winter 2015), http://justice.uaa.alaska.edu/forum/31/3-4fall2014winter2015/b_tribal_courts_studies.html.

[123] Pranis, Stuart, Wedge, *Peacemaking Circles from Crime to Community*, Living Justice Press (2003).

The conciliation conference is akin to a facilitated meet and confer at the outset of the litigation that addresses matters that will be binding upon the parties during the course of the divorce action unless modified by further Order of the court.

6. Joint Meetings (MCL § 552.642a)

The Support and Parenting Time Enforcement Act allows the FOC to use joint meetings to assist parties in resolving custody and parenting-time disputes, and establish support recommendations.

Joint meetings are similar to conciliation, but they occur after an Order is entered to resolve a custody or parenting-time complaint (usually when a parent is denied access to a child). Training requirements for employees holding joint meetings are provided in MCL § 552.519(3)(b). Following a joint meeting, the FOC employee may record the agreement of the parties or prepare a recommended Order, which the court may enter if neither party objects within 21 days of receiving the recommended Order.

7. Parenting Coordinator (MCL § 722.27c)

Parent coordination is a method of helping parents, both pre and post-divorce decree, with day to day disputes involving children. Effective January 14, 2015, Michigan passed a new law[124] that allows the court "to enter an order appointing a parenting coordinator if the parties and the parenting coordinator agree to the appointment and its scope." In addition to the scope of the coordinator's duties, the parties must agree on the duration of the appointment, which should be reflected in the order for parenting coordination. *See* sample Order (Exhibit 22).

The parenting coordinator is neutral, and is appointed for a specific period of time. The expectation is that when the parents have problems with issues such as transportation, vacation and holiday schedules, school and health related issues, and children's activities, they will consult with the parenting coordinator to help resolve these issues.

The parenting coordinator has access to the children, their therapists, the school, and anyone else deemed relevant to the resolution of the dispute. Unlike mediation, the communications with the coordinator are not privileged or confidential unless the "disclosure will compromise the safety of a party or a child."[125] Similar to mediation, the coordinator may assist the parties in mutually resolving the dispute. However, absent a mutually acceptable resolution, the coordinator is statutorily authorized to make written recommendations to the parties to resolve the dispute.[126] "The parties may agree that on specific types of issues they must follow a parenting coordinator's recommendations until modified by the court."[127] Otherwise, a party may make a motion to the court to order the substance of the coordinator's recommendation.

If a party attaches the recommendations to a motion or other filing, the court may read

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[124] MCL § 722.27c
[125] MCL § 722.27c (9)
[126] MCL § 722.27c (3)(b)
[127] MCL § 722.27c (3)(g)

and consider the recommendation, but the recommendation is not evidence unless the parties stipulate that it is.[128]

The parenting coordinator and the court are required to make a reasonable inquiry into whether there is a history of a coercive or violent relationship in order to put appropriate protections in place. A reasonable inquiry includes use of the mediation domestic violence screening protocol published by SCAO.[129] The parenting coordinator is a mandatory reporter of child abuse and neglect.

The court can dismiss the parenting coordinator, and the parenting coordinator can resign. Otherwise, the parenting coordinator will serve for the duration of the appointment.

8. Mini-Trial To Party Representatives

Mini-trials to party representatives are less formal and preparation intensive than summary jury trials or mini-trials to an advisory jury and can be a very useful ADR technique in complex litigation where important business interests are at stake, or the potential damages are high. Although the manner in which these mini-trials are conducted can vary, typically a neutral facilitator and high-level representatives with full settlement authority on behalf of each party will serve on a panel. The goal of the mini-trial is to simulate the risks of litigation, underscore to the party representatives the potential weaknesses in their respective cases, and provide each panel member the opportunity to form an impression of the case that can 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 be permitted to ask questions or seek clarification of issues during the course of the presentation. At the conclusion of the presentation, settlement discussions take place. Depending upon the sophistication of the party representatives, the discussion that takes place might be "meet and confer" conversations where counsel is not present and with or without the presence of the neutral who, if present, facilitates settlement discussions. Or, the representatives might meet with counsel and the neutral and move immediately into mediation. Again, depending upon the ground rules established and the manner in which the parties tailor the process, the neutral (who may be a subject matter expert), if requested, may also provide an evaluation of the presentation (typically during a private, confidential caucus), the extent or allocation of liability, and the likelihood of success of each party's case.

Like other ADR processes, the objective is to provide the panel and party representatives with a realistic trial simulation of the legal and factual strengths of the position of the parties and the risks each party faces should the matter not resolve. The process is not "evaluative" as a neutral third party does not render an advisory opinion or verdict. However, counsel educate the panel on the applicable law, summarize the specific testimony that is anticipated at trial, including anticipated trial exhibits, and emphasize the strengths of their respective cases and the weaknesses of the opposing party's case.

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[128] MCL § 722.27c (10)

[129] Office of Dispute Resolution State Court Administrative Office Michigan Supreme Court, Domestic Violence Screening Protocols for Mediators of Domestic Relations Conflict, http://courts.mi.gov/Administration/SCAO/Resources/documents/standards/odr/Domestic%20Violence%20Screening%20Protocol.pdf

A mini-trial is useful when the parties are desirous of retaining control of the outcome of the case but prefer a more formal legalistic procedure to reach that outcome or where there is a desire to educate the decision-makers on the risks of the litigation and the strengths and weaknesses of their positions. It also has the benefit of providing a party with a more formalistic "day in court" without the cost of a full trial on the merits.

The mini-trial is often a later stage ADR technique that takes place after the parties have completed significant discovery but can be conducted at any stage of the litigation after sufficient information has been exchanged. It can also be most helpful when settlement discussions have come to an impasse. 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 is desirous of additional information and input as to the strengths and weaknesses of its case or the quality of the opposing party's case. In such a situation the mediator will typically act as the neutral panel member at the time of the mini-trial. In the alternative, the mini-trial can be the precursor to a traditional mediation or used in lieu of opening statements. The panel members might immediately move to a meet and confer discussion, with or without facilitation. Should the panel members be unable to agree on the terms of a resolution at the meet and confer the parties can then immediately move to a standard mediation. Again, flexibility and the customization of the appropriate process should be considered, evaluated and explored with all the techniques discussed in this *Taxonomy*.

Although a less expensive process than mini-trial to an advisory jury it does not provide the "evaluation" of a mock jury. 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 re-invigorate discussions that have come to an impasse or to commence settlement discussions.

9. Mediation

a. Selection of A Mediator

Mediator selection is the critical first step in meeting the needs of the attorneys and their clients. Selecting the right mediator and the right process has a profound impact upon a successful ADR event. *See* Exhibit 23 (*How to Maximize the Potential for a Successful Mediation*). There is not one mediation style or one mediation process that fits all disputes or the needs of counsel and the litigants. A number of competent and effective mediators eschew caucuses and meet with parties almost exclusively in joint sessions; others do not use joint sessions at all; some use pre-mediation conferences to discuss and agree on process, others do not; some are more "evaluative" while others prefer a "facilitative" model and yet others gravitate to an "analytical" or "transformative" model. The process that maximizes the potential for success depends upon the particular needs of counsel and the parties and the nature of the dispute. Like other forms of alternative dispute resolution processes, the neutral's flexibility, training and experience in meeting the needs of the litigants, and customizing the mediation, is critically important. Two studies underscore these points.

In the Stipanowich study,[130] corporate counsel determined the following factors were most important in the selection of a mediator (1 being the most important):

Score	Criterion
2.36	Mediator subject matter experience
2.86	Mediator reputation
2.89	Mediation experience
3.73	Acceptability to all parties
3.94	Mediation style
4.88	Mediator's legal expertise
5.71	Expense of mediator

All or a number of these factors are certainly worthy of consideration and suggest the benefits of conducting the necessary due diligence to select the neutral who might be best suited to resolve the dispute.

The discussion of another study may also prove helpful in the identification of those traits that may be important to counsel in the selection of a mediator. The American Bar Association commissioned a Task Force to evaluate mediator practices and quality.[131] The Task Force undertook numerous surveys and personal interviews of users of mediation and neutrals. The results of these surveys found the following four factors consistently scored highest by counsel in evaluating the "quality" of the services provided by the neutral:

- Preparation for the mediation;
- Case-by-case customization of the mediation process;
- "Analytical" assistance from the mediator; and,
- "Persistence" by the mediator.

i. Mediator Preparation

Attorneys and users who responded to the Task Forces' written surveys indicated more than 96% thought pre-mediation preparation by a mediator was "important," "very important" or "essential," and less than 4% thought it only "somewhat important." Survey participants evenly divided between preferring private, individual calls with a mediator as opposed to joint pre-mediation conference calls. While eighty-five percent (85%) approved of private calls at least for procedural matters, and 76% for substantive matters, **the vast majority believed that pre-mediation conference calls to discuss procedural and substantive matters were important**. Most of the users and mediators believed that it is appropriate for mediators to be paid for their work before mediation sessions, generally at normal hourly rates. In addition, all the survey respondents felt it was important, very important, or essential for mediators to know the file and read the documents (100% users, 100% mediators), to encourage a constructive approach in the mediation (90% users, 88% mediators), and to discuss who will attend the mediation session (81% users, 96%

[130] Thomas J. Stipanowich, *Living with ADR: Evolving Perception and Use of Mediation, Arbitration and Conflict Management in Fortune 1,000 Companies* (2013), ww.courts.state.md.us/macro/pdfs/reports/cornellstudy2013.pdf.
[131] *Task Force on Improving Mediation Quality* (2008) http://www.americanbar.org/content/dam/aba/migrated/dispute/documents/FinalTaskForce Mediation.authcheckdam.pdf.

mediators). All of the parties the Task Force interviewed reported that mediator preparation was essential. As expressed by one party interviewee, "The mediator is being paid so they should act like a professional and prepare." The majority of respondents also indicated they would not re-select a mediator who at a previous mediation failed to sufficiently prepare.

ii. Process Input

The Task Force determined that sophisticated repeat mediation users want substantive input into the mediation process itself. Although as discussed earlier the *Mediator Standards* requires party input into the customization of the mediation process, some mediators may continue to believe the mediator controls the mediation process and the outcome is controlled by the parties. However, many of the users surveyed wanted input into: whether opening statements would be useful in a particular case; which issues in the case would best be handled in joint sessions and which in caucuses; the sharing of mediation statements; who should be present during the mediation; the timing of the mediation including whether there should be additional discovery; and a number of other important process matters. *See* the discussion at p. 13, *infra*.

iii. Analytical Assistance

The survey did not put to rest the age old debate on whether a purely "facilitative" or "evaluative" model is preferred by counsel. Rather, the study underscores the need for the mediator to be circumspect and respectful of the needs of the parties in determining whether and when to pursue more "evaluative" techniques during the course of the mediation.

A substantial majority of survey participants (80%) believe some analytical input by a mediator is appropriate. Other survey questions focused more specifically on user attitudes about specific kinds of input by the mediator. The following percentages of users surveyed rated the following characteristics important, very important or essential:

95%—making suggestions;
70%—giving opinions.

In addition, survey participants indicated the proportion of cases in which a particular activity would be helpful. The choices included: (1) in all or almost all; (2) most; (3) about half; (4) significant minority; or (5) very few or no cases. The following percentages of users thought the listed activities would be helpful in about half or more of their cases:

95%—ask pointed questions that raise issues;
95%—give analysis of case, including strengths and weaknesses;
60%—make prediction about likely court results;
100%—suggest possible ways to resolve issues;
84%—recommend a specific settlement; and
74%—apply some pressure to accept a specific solution.

On the other hand, nearly half of the users surveyed indicated that there are times when it is not appropriate

for a mediator to give an assessment of strengths and weaknesses, and nearly half also indicated that it is sometimes not appropriate to recommend a specific settlement. User reservations on these issues should give pause to mediators who routinely offer such analysis and opinions without first carefully assessing the matter or discussing the desirability of this approach with counsel in a confidential setting.

Users had a wide disparity of opinions on how various factors might affect their view of whether it was appropriate for a mediator to provide an assessment of strengths and weaknesses. Anywhere from 25% to 60% of users indicated that the following factors would impact that decision:

- Whether assessment is explicitly requested;
- Extent of mediator's knowledge and expertise;
- Degree of confidence mediator expresses in assessment;
- Degree of pressure mediator exerts to accept assessment;
- Whether assessment is given in joint session or caucus;
- How early or late in the process an assessment is given;
- Whether the assessment is given before apparent impasse or only after impasse;
- Nature of issues (e.g., legal, financial, emotional);
- Whether all counsel seem competent; and
- Whether the mediator seems impartial.

There is an interesting contrast between user survey responses and mediator survey responses when asked about recommending a specific settlement. Eighty-four percent (84%) of users thought it would be helpful in half or more cases and 75% in most or all or almost all cases; only 18% of mediators thought it would be helpful in most or all or almost all cases, and only 38% thought it would be helpful in half or more. Similarly, when asked about applying some pressure to accept a specific solution, 64% of the users responded favorably for most or all or almost all cases and 75% for half or more cases. Among mediators, however, only 24% responded favorably for most or all or almost all cases, while only 30% responded favorably for half or more of their cases. The opinions of the parties who were interviewed differed from those of the focus group users, who were largely lawyers, on the issue of whether mediators should state their opinions about settlement terms. While only a minority of lawyers objected to this, six parties out of twelve stated that mediator comments such as "I think this is the best offer you're going to get," are inappropriate. An even higher percentage, eight out of eleven parties, objected to mediators telling them what to do, as in, "You should accept this offer," or "If I were you, I'd offer $70,000 and be done with it."

iv. Mediator Persistence

Over 98% of mediation users thought persistence an important, very important or essential quality in a mediator, and 93% identified patience in the same way. Users expressed dissatisfaction with mediators who threw in the towel when negotiations became difficult. They want mediators who are consistently engaged in the process and willing to work hard to help the parties meet their needs and settle their case. Ninety-three percent (93%) of users thought that if a mediation session ends without agreement but has some potential to reach one, then the mediator should follow-up with each side. Participants in interview groups generally spoke favorably of mediation follow-up in an effort to resolve a matter that was not resolved at the mediation session and some participants criticized mediators who did not do so. Eighty-two

percent (82%) of users thought "exerting some pressure" was an important trait, very important or essential for a mediator to be effective.

Given the diversity in mediator practices and the preferences of the parties, all of these issues are worthy of exploration in selecting the appropriate mediator and style for the dispute.

b. Mediation in General

Of all the ADR methods described, mediation is probably the best known ADR process among the bench and the bar other than case evaluation. It can begin (and end) before formal litigation is commenced or can continue throughout the life of the litigation including appeal. It is sometimes believed that mediation has greatest appeal to parties who will have a continuing relationship (e.g., in business disputes with customers, suppliers and employees; probate disputes; divorce disputes where children are involved; etc.) but mediation has proven to be a very effective ADR process even when the parties have no prior relationship or will not have a continuing relationship.

In mediation a neutral assists the parties and their counsel in considering and reaching a mutually acceptable agreement. A hallmark of the mediation process is the right to self-determination thus allowing the parties to retain control of their desired outcome. If court ordered, the process is also protected by strict rules of confidentiality as provided in MCR 2.412 and in some statutes. In part, because of the confidential nature of the process, negotiations encompass a frank discussion of all the pertinent facts, exploring the interests of the parties, conducting a candid examination of the strengths and weaknesses of a party's case, and generating creative solutions that would not be available through a jury verdict or an arbitrator's decision. Ultimately the mediation process focuses more on "solutions" rather than a determination of who might be at fault for the dispute. Mediation inherently provides for flexibility and creativity to a degree not typically associated with other ADR techniques.

As most seasoned practitioners know, the advocacy skills necessary for a successful mediation event are quite different than the advocacy skills utilized during a trial. A successful mediation requires the parties to agree to a resolution that is acceptable to all. The "hard" advocacy skills and attacks that might be suitable at trial or arbitration are not particularly helpful or strategic in the mediation setting where the goal is to find a mutually acceptable solution. While forceful and persuasive advocacy is clearly a component of the mediation process, it is an advocacy that differs from that employed at trial as the purpose of the two types of advocacy are entirely different. *See* Exhibit 23.

In mediation, the mediator does not impose a decision or opinion on the parties. Consequently, the advocates do not need to persuade the mediator of the "righteousness" of their legal positions. Rather, the advocates use their talents to persuade the true decision makers in the dialogue, i.e., the clients. A passionate yet diplomatic discussion is far more productive than one filled with accusations and contempt. The role of the advocate in mediation is to be a joint problem solver and a counselor to the client. Settlement is reached by the parties through their active participation in problem-solving. The case is resolved on terms and conditions agreed to by all the parties. Despite the non-coercive nature of the process, it has proven to be a very persuasive, powerful and effective ADR tool. The vast majority of cases voluntarily

submitted to mediation are resolved either at the mediation or shortly thereafter.[132]

The *Mediator Standards of Conduct* technically apply only to mediations conducted under the Michigan Court Rules. However, most mediators will comply with those standards whether the mediation is private or conducted under the Michigan Court Rules. If there is any confusion during a private mediation as to whether the mediator is adhering to these Standards, that confusion should be resolved well before the mediation takes place by reviewing and knowing the mediator's practice in advance.

In anticipation of the mediation the mediator may convene a pre-mediation conference call with counsel for the parties. If the parties are not represented by counsel the call will involve the parties. A goal of the conference call is to review the type of mediation process that will be agreed upon and other procedural issues. The topics discussed and reviewed can be quite extensive to ensure that all participants (including the mediator) are fully prepared for a productive mediation.

In mediation there are very few hard and fixed rules. Rather, the parties, counsel and the mediator will tailor the process to meet the needs of the parties (which usually takes place during the pre-mediation conference call). When the parties with full settlement authority appear for the mediation, the mediation may begin with a "joint" or "general" session. During the joint session the mediator typically reviews the mediation agreement, rules of confidentiality, and any other ground rules established by the mediator and the parties. There is usually a re-iteration of "ground rules" agreed upon during a pre-mediation conference call 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 vent their concerns and interests. Brainstorming of potential solutions may also commence during the joint session. The meeting during the joint session is not intended to be overly confrontational or argumentative. 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 during the joint session, to ask thought-provoking and clarifying questions, to aid the parties in narrowing the issues, and to develop an understanding of the underlying interests of the respective parties.

Depending upon the procedural agreement, the joint session will conclude and the parties may adjourn to private sessions (the "caucus"). During the caucus the mediator meets independently with each party and counsel for confidential discussions and to explore any number of issues including 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 re-instatement, a change in job duties or a transfer, the efficacy of job placement services, suspension, an apology, a letter of reference, further training or education. All of these discussions during the caucus are generally confidential and cannot be disclosed to the opposing party by the mediator absent an agreement by the party making the disclosure. Some mediators place the burden of "caucus confidentiality" on the parties and, therefore, the parties must clearly and explicitly declare to the mediator the information shared in caucus that must be

[132] *See The Effectiveness of Case Evaluation and Mediation in Michigan Circuit Courts, supra*.

held in confidence. The particular practice of the mediator regarding caucus confidentiality should always be determined in advance.

The benefits of confidentiality are fostering a candid and robust problem solving sessions and an exploration of a party's "best alternative to a negotiated agreement" (BATNA).[133] Although the parties are encouraged to fully explore their BATNA, WATNA ("worst alternative to a negotiated agreement") and LATNA ("likely alternative to a negotiated agreement') prior to the mediation, the mediation process provides the parties with an excellent opportunity to re-evaluate their positions in light of the presentation made by the opposing party and the discussions that take place during the joint session and the caucus. *See* Exhibit 23.

During the caucus there will typically be a narrowing of the issues and the opportunity to discuss matters that were not addressed or raised during the joint session. Underlying concerns and interests the parties may not be comfortable discussing in the presence of the opposing party can be freely disclosed confidentially to the mediator during the caucus as the mediator meets individually with the parties.

Whether through the joint session or the caucus, settlement proposals are often 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. Offers can be crafted by the parties with or without suggestions or input of the mediator. The object of the exercise is to assist each party in a neutral and unbiased manner to objectively re-evaluate their positions, reality test and explore the benefits of various offers, and make informed and un-coerced decisions regarding settlement.

Mediations may take several hours or extend over days and months depending upon the complexity of the case. 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. In this regard, one note of caution is warranted as discussed in a two part study that discussed litigation issues arising out of mediations. *In Mediation Litigation Trends: 1999-2003* the authors undertook an initial study of mediation litigation trends from 1999 through 2003 and subsequently supplemented that study based on decisions from 2004 through 2007.[134] The reported data commends the development of at least one "best practice" during mediation: to the extent practicable the parties should be requested to draft and execute a formal settlement agreement before the conclusion of the mediation. The adoption of that "best practice" had the potential of avoiding almost one-half of the over 2100 post-mediation disputes evaluated by the authors. As stated by one court in enforcing a post-mediation settlement agreement never formally executed by both parties:

> We are mindful that the practical implications of this opinion may be that parties and mediators end up working harder and longer to make sure they have reached a full and final settlement agreement by the end of mediation. Of course, the settlement memorandum could state that, if the parties do not reach agreement

[133] *See* Roger Fisher and William Ury, *Getting to Yes, Negotiating Agreement Without Giving In,* Second Edition, Penguin Books (1991)

[134] *See* James R. Coben and Peter N. Thompson, *Disputing Irony: A Systematic Look at Litigation About Mediation*, 11 Harv. Negot. L. Rev. 43 (2006) and James R. Coben and Peter N. Thompson, *Mediation Litigation Trends: 1999-2007*, 1 World Arbitration & Mediation Review 395 (2007)

> on additional documentation within a stated period of time, then any party shall be entitled to have the case resolved solely on the terms in the settlement memorandum. In contrast to either of these approaches, however, is the practice of leaving for another day additional terms to be negotiated, which, ironically, invites the potential for further litigation rather than ending it. This dispute is a case in point.[135]

If no agreement is reached as the result of the mediation, the parties are encouraged and often do discuss settlement options further that may be assisted and facilitated by the mediator. It is not unusual for the mediator to continue working with the parties to discuss settlement proposals or other ADR options that may be of assistance to the parties to break the impasse even during the trial of the matter, *i.e.,* mediator persistence.

Mediation has proven to be an effective ADR process in resolving a wide range of disputes. Where confidentiality is important, the parties are having difficulty communicating, there is a desire to preserve an ongoing relationship, or there is a benefit to exploring underlying interests and creative solutions, mediation is often the ADR procedure of choice. It provides a forum for risk-adverse parties to eliminate the uncertainties and risks of trial and potentially achieve their interests and objectives in a cost effective fashion. It is often very useful in highly emotional cases in which parties need to express emotions or when communications have broken down. It is also appropriate to use with clients who need reality testing. In sum, it offers many of the benefits of other ADR methodologies at a very reasonable cost.

Where a party is unwilling to compromise, or has an unquenchable thirst for victory at trial, effective settlement discussions will typically not take place during any ADR process, including mediation. However, even if the parties do not reach a global resolution of the case, mediation is still a very effective tool in narrowing the triable issues, expediting the discovery process or successfully addressing any number of procedural and substantive issues that will expedite the litigation so a trial can be conducted as quickly and economically as possible. It can also assist parties to identify the areas of the case that may need more attention as well as those arguments that are not as strong as perceived. It also may lead to the determination that a "surprise" one party wants to spring at trial is not truly a "surprise" or as persuasive as believed by a party. Mediation is also a tool that can be used in assessing the opponent and counsel. In sum, mediation can be a very effective tool to achieve short term objectives independent of the immediate settlement of the dispute. In those situations it is often very strategic to schedule the mediation event as early in the litigation as practicable.

c. Private Mediation

In private mediation a neutral mediator is selected and retained by agreement of the parties or pursuant to a dispute resolution provision contained in a contract between the parties. If contained in a contract between the parties, it is typically a condition precedent to the filing of a lawsuit or demand for arbitration and the mediator will typically be selected pursuant to the procedures set forth in the contract. If the parties do not find the procedures set forth in the contract for the selection of a mediator satisfactory

[135] *Yaekle v. Andrews*, 195 P.3d 1101 (Colo. 2008).

or the contract is silent, it is not unusual for the parties to select a mediator on an agreed upon basis.

It is typical in private mediations for the parties and mediator to execute an agreement to mediate that contains a confidentiality agreement as a condition precedent to conducting the mediation. The agreement to mediate will typically provide scheduling information, the parties who will be present at the mediation, the terms and allocation of the mediator's fees, limitations a mediator might have with any court assigned to the matter, and other procedural details that might take place before and during the mediation. A typical agreement to mediate is attached as Exhibit 4.

It is also extremely important for all the parties who attend the mediation to execute an agreement that incorporates rules of confidentiality. In non-court ordered mediations, without such an agreement, there are only a limited number of circumstances to which confidentiality will apply as Michigan lacks a general statutory provision that cloaks all private mediations with confidentiality. Without a written agreement signed by all the participants in the mediation, that includes a requirement of confidentiality consistent with MCR 2.412, confidentiality may not apply to the process, the participants or the mediator. The practitioner should require the execution of a confidentiality agreement as a condition precedent to participation in any private mediation.

d. Court Rule Mediation MCR 2.411 and 2.412

Parties may be ordered into mediation by the court under MCR 2.410 (C). The procedure for court-referenced mediation is set forth in MCR 2.411 and 2.412.

The procedure for court-ordered mediation is not significantly different from the process used in private mediations. However, the mediator may be required to report to the court on the status of the mediation and can do so on a SCAO approved form. Mediation Status Report (mc280). The form was developed to standardize the terms of the report a mediator provides to the courts and ensure the mediator does not disclose confidential information. The judiciary is not encouraged and should not seek more information from the mediator or the parties concerning the mediation than called for in the Mediation Status Report and the Mediator Standards place significant limitations on what the mediator can ethically discuss with the court. Counsel should not accept any mediator practices that violate the restrictions that circumscribe the appropriate communications a mediator is permitted to have with any court.

When the case is ordered to mediation, the parties are encouraged to discuss the contents of the order with the ordering judge. Only where the parties are unable to agree on the mediator should the court become involved in the selection of the mediator, and even then on a very limited basis. Absent agreement on a mediator, the ordering judge is required to refer the matter to the court's ADR clerk for the random assignment of a mediator from the court-approved roster. MCR 2.411 details the process for selecting a mediator. As set forth in 2.411(4) it is not within the judge's authority, or an "evidence based practice," to make the selection or even suggests a particular mediator except as specifically the Court Rules:

> 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.[136]

The parties are encouraged to agree upon the mediator who will be used. A mediator who is agreed to by the parties does not have to meet the qualification requirements set forth in MCR 2.411 (F), which applies only to those individuals who wish to appear on the court-approved roster of mediators. By maintaining control, the parties will be in a far better position to match the mediator and mediation process with the needs of the parties and be most effective in achieving a resolution of the matter.

Counsel should not hesitate to contact a potential mediator to conduct an interview before retention. This contact may be done with or without all counsel present. Most mediators will welcome the inquiry and provide, without breaching confidentiality of prior clients, sufficient information to assist in the selection process. Once the selection is made, the specific process agreed to will be addressed by counsel and the mediator.

In addition to identifying the mediator who is acceptable to the parties, and the date the mediation must be completed, the following should also be considered in the order to mediate:

- 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);
- Whether participation may be by phone or must be in person;
- Whether confidential mediation summaries will be exchanged;
- Whether the attendees must have full settlement authority; and,
- Who will pay for the mediation and when payment is due?

See Exhibit 24 (sample Order for Mediation).

As the Court's order typically specifies the time within which the mediation is to be completed, as soon as the mediator is selected, the mediator usually contacts the parties to schedule the mediation in accordance with the terms of the order. The mediator may also take into consideration the need for limited discovery or the exchange of information, the number of parties and issues, and the need for multiple sessions in scheduling the mediation. The mediator may also request the parties submit and possibly exchange documents providing information about the case.

Within 7 days of the completion of the court ordered mediation the mediator will advise the court of the outcome by filing a mediator's report on the form provide by SCAO. If the matter is settled through mediation, the attorneys must prepare and submit appropriate documents to conclude the case within 21 days of the settlement.[137]

e. Domestic Relations Mediation MCR 3.216

[136] MCR 2.411(4)
[137] MCR 2.411 (C) (4)

Most Circuit Courts have adopted an ADR plan that permits the courts to refer cases to mediation under MCR 3.216. When domestic relations cases are being considered for divorce mediation, under the ADR plan judges must "screen for cases which are not appropriate for mediation pursuant to MCR 3.216(D)(3) prior to referral. Mediators shall screen cases under this rule as part of the mediation process." The *Mediator Standards of Conduct* requires domestic relations mediators to screen using the Domestic Violence Screening Protocol published by SCAO.[138]

Parties may be ordered to attempt mediation, and mediators appearing on domestic court rosters must have completed specialized mediation training requirements established by SCAO. MCR 3.216 offers divorce litigants two processes: mediation and evaluative mediation. Mediation under this rule is essentially the same as mediations discussed above. Evaluative mediation offers parties the option of having a willing mediator recommend proposed settlement terms for any issues that have remained unresolved at the conclusion of the mediation. Parties must specifically request 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 proposal.

Just like the "mediator's recommendation" that can be requested by the parties to break an impasse during non-divorce mediations, the evaluative mediation can be a useful tool to influence decision making. However, once the opinion is given, the mediator risks losing mediator capital and effectiveness as a mediator in facilitating further settlement discussions. Disputants generally lose some trust in the mediator if there is a perception (whether real or imagined) by the litigants that the mediator is not neutral or exhibiting favoritism. For these reasons reliance upon the technique of a "mediator's recommendation" might only come toward the end of the parties' negotiations and only after the parties have reached a true impasse.[139]

f. Friend of the Court Mediation (MCL § 552.513)

In all jurisdictions, the Friend of the Court must offer voluntary mediation and may offer other ADR services either directly or by contract through a third party provider (oftentimes Community Dispute Resolution Centers) on issues of custody and parenting time. Like other mediations, the assigned FOC mediator will meet with the parties during a session that will last one to three hours in an attempt to resolve all or a portion of the issues involved in child custody or parenting time disputes. If the dispute is resolved, a consent order is prepared. If no agreement is reached, the parties are responsible for having their dispute brought before the court. Mediation under MCL § 552.513 is confidential and is governed by Michigan Court Rule 2.412 and no report is issued to the judge. However, FOC employees are mandatory reporters of child abuse and neglect. If an agreement is reached by the parties through FOC alternative dispute resolution, a consent order incorporating the agreement is prepared and the consent order is provided to and entered by the court.

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[138] http://courts.mi.gov/Administration/SCAO/ Resources/Documents/standards/odr/Domestic%20Violence%20Screening%20Protocol.pdf.

[139] Tracy L. Allen, *The Mediator's Proposal: Substantive and Ethical Dilemmas?,* Macomb County Bar Briefs (February 2015).

In most FOC mediation meetings, the parties attend without attorneys present. Requirements for becoming an FOC mediator are listed in MCL § 552.513, and include qualifications prescribed by the chief judge and the State Court Administrative Office. An employee of the office who provides domestic relations mediation in a FOC case involving a particular party may not perform referee, investigation recommendation, or enforcement functions as to any domestic relations matter involving that party.

g. Probate Court Mediation

Mediation processes provide an excellent alternative for resolution of many probate court cases including the elderly and vulnerable adults. Mediation is particularly useful when the claims are not simple legal disputes, but involve sustaining or augmenting ongoing relationships between the parties. Most cases in probate court involve family members or others who have long-term relationships. Unlike divorce cases, people enter the probate court as family members and leave the courtroom as family members. However, what occurs between entering and leaving the courtroom in a contested probate hearing may polarize and damage the very relationships that may be critically important to a desired resolution or outcome. Often, if the parties in a contested matter cannot achieve a satisfactory resolution, and a third party makes the decision based solely (and appropriately) on the legal merits of the case, at least one side harbors unhappiness, anger and resentment. For this reason, Michigan requires the Guardian Ad Litem (G.A.L.) appointed by the court on adult guardianship and conservatorship cases to consider "[w]hether a disagreement or dispute related to the guardianship petition might be resolved through court ordered mediation."[140]

Issues appropriate for mediation can arise in almost any kind of case in the probate jurisdiction: decedent's estates (testamentary and non-testamentary), disputes arising from trusts (e.g. between trustee and beneficiary), guardianships over minors or adults, conservatorships, other protective proceedings, and Mental Health Code cases. It is important to note that in guardianship and mental health cases, the question of capacity remains an issue for the court to decide. The primary issue in guardianship cases, if the court determines that a guardianship is appropriate, is who should be the guardian(s). In guardianship and mental health cases there are often a multitude of other issues regarding care and planning that may be better suited to collaborative decision making rather than a court imposed ruling.

As in the case of mediation in civil cases, even in cases in which agreements are not reached, parties will have gained insight about their own goals and expectations about the case, which in many circumstances set the stage for reaching a settlement through further negotiations.

All probate courts may order mediation if the court has an ADR plan under MCR 2.410. Roster requirements for neutrals may differ among jurisdictions as to whether the civil (MCR 2.411) mediation training or the domestic (MCR 3.216) mediation training is required. No additional training is required for roster mediators, however experienced adult guardianship mediators and the ACR Elder Mediation and Decision Making Section's Training Standards Committee strongly recommend advanced training in elder and adult guardianship mediation. Complex family dynamics and unresolved family histories, multiple parties, cognitive and/or physical limitations of an alleged incapacitated individual, a complex mix of

[140] MCL § 700.5305 (1)(C)(ii)

legal/medical/psycho-social/ spiritual issues, emotional decisions about the care of a family member, disputes over a decedent's estate, legal issues involving a person's autonomy, and allegations of abuse or neglect of a vulnerable adult, are but a few of the challenges to the mediator, and such foundational principles of mediation as self-determination, informed decision making, confidentiality, impartiality and neutrality come into play alongside these challenging issues. In addition, guardianship matters can involve the potential for serious deprivation of personal rights for the respondent in the case. Interest-based mediation of these matters necessarily takes place in the shadow of a rights-based court process. Mediators who do not have experience or training in these and other issues may find themselves unprepared for the problems and ethical issues that arise.

Michigan's Confidentiality Rule, MCR 2.412, applies to probate cases and includes specific exceptions to confidentiality for vulnerable adults that require the mediator to report any allegations of abuse or neglect of an older person or disabled young adult. Many private practitioners, as well as several dispute resolution centers around the state, are trained to mediate these cases. The Association for Conflict Resolution (ACR) has endorsed and posted on its website the document *Elder Care and Elder Family Decision-Making Mediation: Training Objectives and Commentary*, developed by an international (U.S. and Canada) committee of elder mediation practitioners and trainers.[141],

h. Juvenile / Child Protection Mediation

The presence of an outside neutral facilitator has served as a positive influence in child welfare (abuse and neglect) cases in the juvenile court. These disputes have the potential for conflict and power imbalance between families and the state. Child protection mediation provides an alternative to a process that can become delayed by adversarial relationships between biological parents, other family members, foster parents, and child welfare agencies. On a national scale, child protection mediation has emerged as a promising strategy for resolving permanency. Studies of child welfare mediation have demonstrated positive results, documenting impressive settlement rates, quick resolution of problems, and high rates of compliance when mediation is used.[142]

Results of a Michigan pilot program at 7 mediation sites and 19 courts from 1999-2001, mirror the national experience. The final evaluation report by MSU School of Social Work found that child protection cases mediated in the pilot program reached permanency on average 12.5 months sooner than similar cases that were referred to mediation, but were not mediated.[143]

Qualitative studies of the mediation process in child welfare mediation have found mediation particularly useful in bringing all interested parties together to facilitate communication, problem-solving, developing supportive relationships, providing neutrality as a guiding principle, and offering opportunity

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[141] http://acreldersection.weebly.com/uploads/3/0/1/0/30102619/eldercareobjectives_7_30_2012

[142] *See* Nancy Thoennes, *An Evaluation of Child Protection Mediation*, Family Court Review, Volume 35, Issue 2, pages 184–195, April 1997; Hon. Leonard Edwards, *Child Protection Mediation: A 25 Year Perspective*, Family Court Review, Volume 47, Issue 1, pages 69–80 (January 2009)

[143] Michigan Child Welfare Law Journal, Spring 2007; Gary R. Anderson and Peg Whalen, *Permanency Planning Mediation Pilot Program: Evaluation Final Report*, MSW, MSU School of Social Work (June 2004)

to offset power imbalances between the parties involved.[144]

Typical issues advanced by the use of mediation in Michigan have included those involving relative placement, guardianship, visitation, service plan compliance issues, monitoring of service plans, updating or making changes to service plans, parent/worker/attorney/foster parent interpersonal or communication problems, transition issues between biological and foster homes when the plan is reunification, reaching consensus on a permanent plan for the child, empowerment for parents wishing to release unconditionally, facilitating and accelerating the adoption process, and competing petitions for adoption. Unlike other areas of mediation, cases are never removed from the court docket if a mediated settlement occurs; rather, cases are mediated between hearings and agreements reached are court approved. The goal is to remove barriers and help cases reach a permanent outcome in a more timely and expeditious manner. Issues of harm or risk to a child or whether risk occurred are not subject to mediation and any new allegations of harm or risk are exceptions to the mediator's confidentiality.

As with elder mediation, Michigan's Confidentiality Rule, MCR 2.412, applies to child protection cases and includes specific exceptions to confidentiality to enable the mediator to report any allegations of abuse or neglect of a child. Child protection mediation is usually supported by grants or contracts with courts or child welfare agencies and, in Michigan, is rarely provided by private practitioners, due to the fact that the parties often cannot afford the expense of a private mediator. Most child protection mediation services are provided by dispute resolution centers around the state, by mediators specially trained by SCAO to mediate these cases. The cases are usually high conflict, multi-party cases frequently involving child welfare service providers, therapists, parents and family members, attorneys, guardian's ad litem, and children. The power imbalance between parents and the State that has removed their children is significant. These factors alone warrant additional training for mediators.

The Association for Family and Conciliation Courts (AFCC) has endorsed and published a set of *Guidelines for Child Protection Mediation*, developed by an international (U.S. and Canada) committee of child protection mediators and program directors.[145] .

i. Special Education Mediation

The Individuals with Disabilities Education Act (IDEA) and its regulations contain elaborate provisions regarding mediation.[146] To receive federal IDEA funding, state and local educational agencies must make mediation available as a means for resolving special education disputes. Participation in mediation is "voluntary," and may not be used to delay or deny an administrative due process hearing.

Mediation must be conducted by a "qualified and impartial mediator who is trained in effective mediation techniques," and is not an employee of the school district involved. The state is required to maintain a list of qualified mediators and bear the cost of mediation. The mediation must be scheduled in a timely fashion at a location that is convenient to both parties. The regulations contain an explicit

[144] Allan Barsky and Nico Trocme, *The Essential Aspects of Mediation in Child Protection Cases*, Children and Youth Services Review, Volume 20, Issue 7, 629 (August 1998)
[145] https://www.afccnet.org/Portals/0/Guidelines%20for%20Child%20Protection%20Mediation.pdf
[146] 20 U.S.C. §1415(e); 34CFR § 300.506

requirement that all mediation discussions must be kept confidential and may not be used as evidence in any subsequent due process or civil proceeding.

Pursuant to IDEA, any agreement reached through mediation must contain the following three elements: (1) a provision that all discussions during mediation shall be kept confidential; (2) signatures by the parent and a representative of the school district that has authority to bind the district; and (3) a statement that the agreement is enforceable in any state court of competent jurisdiction or federal district court.

IDEA 2004 makes clear that mediation is not just for resolving requests for a due process hearing, but may be requested at any time to resolve special education disputes. Early use of mediation often resolves disagreements and obviates the need for a due process hearing.[147] .

j. Victim Offender Mediation (VOM)

A number of jurisdictions in Michigan operate victim-offender mediation programs—referred to in some communities as "victim offender reconciliation programs" or "victim offender dialog programs." In 2000 there existed almost 300 victim-offender mediation programs in the United States. Several programs in the United States receive nearly 2,000 case referrals annually from local courts. Although the greatest proportion of cases involved less serious property crimes committed by juveniles, the process is used increasingly in response to serious and violent crimes committed by both juveniles and adults.[148]

The victim-offender mediation process offers victims an opportunity to meet offenders in a safe, structured setting and engage in a mediated discussion of the crime. With the assistance of a trained mediator, the victim is able to tell the offender about the crime's physical, emotional, and financial impact; receive answers to lingering questions about the crime and the offender; and be directly involved in developing a restitution plan for the offender to pay back any financial debt to the victim. The process is different from mediation as practiced in civil or commercial disputes, because the involved parties are in agreement about their respective roles in the crime. Also, the process should not be primarily focused on reaching a settlement, although most sessions do, in fact, result in a signed restitution agreement. Because of these fundamental differences, the terms "victim-offender meeting," "conferencing," and "dialog" are becoming increasingly popular to describe variations from standard mediation practices.

The goals of victim-offender mediation include the following:

- Supporting the healing process of victims by providing a safe, controlled setting for them to meet and speak with offenders on a strictly voluntary basis.

- Allowing offenders to learn about the impact of their crimes on the victims and take direct responsibility for their behavior.

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[147] *See* L. Athens, *Alternative Dispute Resolution in Special Education*, Laches (May 2005), http://www.lathenslaw.com/200505ad.pdf

[148] *National Survey of Victim Offender Mediation Programs* (April 2000) https://www.ncjrs.gov/ovc _archives/reports/restorative_justice/restorative_justice_ascii_pdf/ncj176350.pdf

- Providing an opportunity for the victim and offender to develop a mutually acceptable plan that addresses the harm caused by the crime.

A large multisite study of victim-offender mediation programs with juvenile offenders found the following:

- In cases referred to the four study-site programs during a 2-year period, 95 percent of mediation sessions resulted in a successfully negotiated restitution agreement to restore the victim's financial losses.

- Victims who met with offenders in the presence of a trained mediator were more likely to be satisfied with the justice system than were similar victims who went through the standard court process (79 percent versus 57 percent).

- After meeting offenders, victims were significantly less fearful of being re-victimized.

- Offenders who met with victims were far more likely to successfully complete their restitution obligation than were similar offenders who did not participate in mediation (81 percent versus 58 percent).

- Recidivism rates were lower among offenders who participated in mediation than among offenders who did not participate (18 percent versus 27 percent); furthermore, participating offenders' subsequent crimes tended to be less serious**.**

Multisite studies also found that although restitution was an important motivator for victim participation in mediation sessions, victims consistently viewed actual receipt of restitution as secondary to the opportunity to talk about the impact of the crime, meet the offender, and learn the offender's circumstances. The studies also found that offenders appreciated the opportunity to talk to the victim and felt better after doing so.

The American Bar Association endorsed victim-offender mediation and recommends its use throughout the United States.

As describe by SCAO, juvenile offenders meet with victims in a hybrid mediation process which permits the victim to share with the offender any feelings about the criminal act. "Victim offender mediation" is frequently cited as a means to humanize the judicial response to a criminal act by having the offender meet with the juvenile to discuss the incident and to participate in restitution and community service discussions. Mediation may be offered either as a part of diversion or post-adjudication. In some counties, mediation of juvenile offender matters is a part of a local FIA-coordinated Balanced and Restorative Justice initiative. Mediation will soon be tested in adult offender cases, for example in

embezzlement cases, to determine the level of restitution and any repayment period.[149]

10. Dispute Resolution Advisors

Adding to the panoply of ADR measures used in the construction industry there is now the Dispute Resolution Advisor ("DRA"). When parties to a contract question whether it is appropriate to use a dispute resolution provision that provides a "one size" strategy for the resolution of all disputes regardless of size and complexity, or parties post dispute are searching for strategies to "right size" a strategic and cost effective dispute resolution process, the use of a dispute resolution advisor is worthy of consideration. In its simplest terms the DRA is a neutral who meets with the parties once a dispute has arisen and assists in tailoring a dispute resolution mechanism that is best suited to resolving the specific dispute and achieving the interests of the parties. *See* Exhibit 25 (Sample Dispute Resolution Advisor provision). Although a creature of the construction industry, its efficacy is not confined to that industry as explored by two different scenarios and can be selected by the parties post-dispute to assist in creating an appropriate ADR methodology at any time after a dispute arises.

In 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. In 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 4 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; and (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.

In light of the flexibility the DRA brings to the process, the dispute resolution mechanism established in Scenario B is entirely different: (1) after an agreed exchange of specified information, the principals will meet and confer; (2) if no agreement is reached the parties will agree, with the assistance of a mediator, to exchange additional information that will be followed by a mediation; (3) if the mediation is unsuccessful the parties will have the option of proceeding to litigation or arbitration; and (4) the parties agree that during

[149] http://courts.mi.gov/Administration/SCAO/Resources/Documents/other/InnovativePractices.pdf

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/arbitrator; 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 not to exceed $500,000.00.

The scenarios only underscore the incredible flexibility that a contractual DRA provision, or the post-dispute agreement to utilize the services of a DRA, may bring to the dispute resolution process. Rather than using boiler plate dispute resolution provisions that can be a one size fits all approach, DRAs can be as flexible, innovative and proportionate as the parties' desire. In Australian and Hong Kong construction projects the use of DRAs has been extremely positive and the State of California and the U.S. Government require DRA provisions in certain contractual arrangements. Depending upon the nature of the relationships between the parties, it is not a dispute resolution option that counsel should ignore or fail to explore with their clients. There are some who believe the newly established Business Court Judges, after consultation with the parties, may assume the role akin to a DRA in assisting the parties' development of an appropriate dispute resolution strategy. *See* discussion at p. 46-47, *supra*.

11. Early Intervention Conferences

The early intervention conference, just like the early scheduling conference conducted with the court, can be viewed as a form of ADR to the extent it generates the scheduling order for the case, which will include the formulation and timing of the ADR strategy as well as the potential selection of a neutral agreed to by the parties. The early selection of a neutral can be most beneficial to effective case management as the neutral can assist the parties in resolving a whole range of disputes prior to a mediation. *See* Early ADR Summit discussion at pp. 16 and 17.

In conducing these early intervention conferences, the courts will rely upon neutrals to meet with the parties shortly after the complaint and answer have been filed, typically in anticipation and preparation of the first meeting with the court, to explore a litigation plan, the staged exchange of discovery, and the timing and use of alternative dispute resolution procedures and processes. The agreements reached by the parties during the early intervention conference are then explored and adopted by the court during the early scheduling conference. These neutrals will often simulate the role of a dispute resolution advisor and assist the parties to develop strategies and procedures to streamline the case in a cost effective and expeditious manner. Evidence based practices indicate that these conferences, whether conducted by the neutral or the court, should take place at the earliest practicable date:

> A scheduling plan sets forth the key events and deadlines for a case. It is generally issued early in the life of a case in the form of a court order. **Such orders should be prepared at an early scheduling conference.** MCR 2.401(B)(2)(a)….
>
> A scheduling order, also known as a case management plan, is generally the product of case screening. **The most effective scheduling plans are issued at the earliest point**

> **possible in the process**, provide a reasonable framework for case processing, and are completed in consultation with counsel whenever reasonably practical. MCR 2.401(B)(2)(c) (emphasis added).[150]

Those neutrals who preside over the initial case conference for the courts, based upon their familiarity with the case and the parties, may subsequently be called upon to be special masters or mediators as agreed to by the parties.

IX. Community Dispute Resolution Centers

Any *Taxonomy of ADR* requires a discussion of the incredibly beneficial resources provided by Community Dispute Resolution Centers (CDRC). The Community Dispute Resolution Program was derived from Michigan Public Act 260 in 1988 to establish a statewide program to offer conciliation, mediation, and other forms and techniques of dispute resolution as an alternative to traditional judicial processes. Each CDRC may offer different types of programs and the services offered by each CDRC in the applicable community requires evaluation.[151]

CDRCs are funded through the Michigan Supreme Court and overseen by the State Court Administrative Office (in terms of auditing, program fidelity, and overall policy and procedural effectiveness). As a program managed by the Judiciary, the 18 centers around the state are encouraged and measured by the number of cases handled as a result of direct court referrals (district and circuit courts). Like other CDRPs, all of the mediators at the Macomb County CDRP (the "Resolution Center") are qualified under MCR 2.411 (F).

The Resolution Center, through trained volunteers, provides resolution assistance at most affordable prices without the need to retain the services of an attorney. As stated on the web site of the Macomb County Resolution Center:

> Alternative Dispute Resolution and Conflict Resolution are terms that are being used more and more in every facet of today's business, education, medical and legal professions. Living in a democratic society, people understand the need to be able to trust their neighbor, contractor, attorney, landlord, consumer, accountant, doctor and local merchant. We depend on these trusting relationships to accomplish our goals and improve our place in life. Every so often, these relationships are tested through conflict.
>
> The Resolution Center believes that conflict is a naturally occurring phenomenon and that it should be viewed as something positive. Conflict provides an opportunity

[150] *Caseflow Management Guide* at p. 21.

[151] As an example, in addition to traditional civil and domestic mediation services and mediator training, the Macomb County Resolution Center offers a number of services for youths including peer peacemaking, school truancy programs, juvenile victim offender programs, restorative justice, and special education services.

> for change. It is up to those involved in the conflict to make the change positive or negative.
>
> Restoring and maintaining relationships is a positive event that helps to build community rather than fracture and destroy. The Resolution Center provides the non-adversarial dispute resolution process of mediation that offers people the chance to seize the opportunity of conflict and create something positive… to help build community. In this way, The Resolution Center is a catalyst for peace.

The ADR Plan for Macomb County recognizes the valuable services provided by Community Dispute Resolution Centers like the Resolution Center in the mediation of disputes. *See* Exhibit 16. Small claims disputes and district court conflicts are common sources of referrals by the courts to the Community Dispute Resolution Centers for resolution negotiations. The mediators at these Centers are trained to work with *pro se* parties and facilitate a wide variety of commercial and domestic disputes. For additional information on The Resolution Center its web site is http://www.theresolutioncenter.com.

X. Conclusion

The field of ADR is very dynamic and flexible. Notwithstanding the substantive and due process protocols associated with a number of the adjudicative processes, ADR allows the disputants to creatively shape and stage the mechanism(s) that are best suited to achieve a resolution in a far more cost effective and efficient manner than traditional litigation. As stated by the President of one leading ADR provider:

> We don't have hardbound rules. Think about the rules we do have today. The rules by and large say it has to be a fair process. In the interest of fairness and justice, the arbitrator or mediator can do X or do Y. Many of the rules are very open-ended. They invite, they absolutely invite creativity. We are going to make the process continually more responsive to the needs of the users. And, again, for individuals, for industries and professionals that means they can help shape a process, they can take a piece of this and a part of that and develop remedies and opportunities that we cannot fathom today.
>
> 51 Disp. Resol. J. 29 (1966).