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# Evaluating Mediation's Future

Erin R. Archerd\*

## I. INTRODUCTION

Case evaluation as we currently know it in Michigan may soon be a thing of the past. This Article is a reflection on what case evaluation's evolution says about the current state of dispute resolution both in Michigan and throughout the United States. Ultimately, it is a call for stakeholders to think carefully about mediation's role in assisting parties in resolving disputes. As court-annexed alternative dispute resolution ("ADR") has become more and more popular in the United States, jurisdictions have made a wide variety of ADR options available to litigants, but people's visions for those processes, especially mediation, have evolved in ways that give many of the ADR field's founders pause. Is Michigan going to diminish the role of one evaluative process (case evaluation) only to make its more facilitative process (mediation) explicitly evaluative? Are there ways that courts could support evaluative processes and still promote a model of mediation in which mediators do not sit in judgment?

One of the difficulties parties have always faced in considering alternatives to litigation is the shadow of the possible legal outcome of their dispute.<sup>1</sup> In particular, parties settling cases involving monetary claims often believe they would benefit from having some idea of the value of their case.<sup>2</sup> In the 1970s, Michigan courts thought they had hit upon a process that would provide this information for parties: case evaluation.<sup>3</sup> Michigan is the only state that refers much of its civil docket to case evaluation—a process in which a panel of three neutral evaluators places a dollar value on a case, and parties are penalized if they decline to accept the evaluators' award and subsequently fail to better that award at trial.<sup>4</sup> In addition, Michigan also now encourages the use of mediation in civil cases, either in lieu of or after case evaluation.<sup>5</sup>

Court commissioned studies in 2011 and 2018 showed growing dissatisfaction with case evaluation, especially among attorneys. These study results led to

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\* Associate Professor of Law, University of Detroit Mercy. Many of the proposals discussed herein are reflected in a report recently released by the Michigan Supreme Court. See MICH. SUPREME COURT, CASE EVALUATION COURT RULES REVIEW COMMITTEE (2019). Although Professor Archerd is a member of the Executive Committee of the State Bar of Michigan's Dispute Resolution Section, all opinions expressed in this article are her own. They do not reflect the opinions or positions of the State Bar of Michigan, its Dispute Resolution Section, or any other body.

1. Carrie Menkel-Meadow, *Toward Another View of Legal Negotiation: The Structure of Problem Solving*, 31 UCLA L. REV. 754, 765–66 (1984) (citing Robert H. Mnookin & Lewis Kornhauser, *Bargaining in the Shadow of the Law: The Case of Divorce*, 88 YALE L.J. 950 (1979)).

2. As will be discussed below in Sections II and III, there is an open question about what value parties are really looking for. Is it the value the claim is likely to be awarded at trial? Is it a settlement value, some point at which it becomes statistically better to settle the case than to continue to pursue it?

3. Jennifer Greig, *An Assessment of the Case Evaluation Process in Michigan Circuit Courts: Best Practices and Recommendations for the Future*, MACOMB CTY. COURTS (Apr. 20, 2016), <https://www.oakland.edu/Assets/Oakland/polisci/files-and-documents/MPA/MPA-Sample-Projects/Greig,%20Jennifer-%2016th%20Circuit%20Ct-%20Program%20Eval.pdf>.

4. MICH. CT. R. 2.403.

5. MICH. CT. R. 2.411.

discussions organized by the Michigan State Court Administrative Office (“SCAO”) in 2018 and a State Court rules committee formed in 2019 to consider, among other things, changes to the case evaluation rules, notably whether to remove sanctions for rejecting case evaluation awards.<sup>6</sup> This Article supports changes to the case evaluation rules but cautions against throwing out the good with the bad, particularly with regard to what processes might replace case evaluation. Changes to court-connected ADR should not simply remove the threat of case evaluation sanctions, replacing case evaluation with case evaluation-lite. They also should not establish a process that takes case evaluation’s place: “evaluative mediation,” a scheme that places non-evaluative forms of mediation in jeopardy.

Further, this Article urges deliberation as to what, if anything, should be used as an alternative to case evaluation. Courts should find ways to assist parties in valuing their cases, both independently and mutually (including by using a neutral), that do not require that parties face penalties or give up their decision-making authority. What parties need to make these processes most effective is access to data to give them an informed view of what a reasonable settlement value for their case actually is. Mediation—in many forms, including non-evaluative mediation—may be one of those processes, but courts in Michigan should not rush to make mediation the “new case evaluation.” Perhaps, even, Michigan should embrace its unique process and continue to use case evaluation in a targeted fashion. The choices Michigan makes will influence other court systems throughout the country, either by serving as a model for how more facilitative styles of mediation can thrive in the Twenty-First Century or as a model for increasingly evaluative mediation systems.

Section II of this Article will provide background on the use of mediation and case evaluation in the state of Michigan. Mediation saw widespread growth through the 1990s and adoption statewide at the turn of the Twenty-First Century, but case evaluation has been a long-standing procedure in Michigan for nearly four decades. Section III explores the growing dissatisfaction with case evaluation and movement toward greater use of mediation throughout the state. Section IV examines the many dispute resolution options currently available in Michigan courts and considers how they might be used as alternatives to case evaluation. Section V cautions against making mediation an explicitly evaluative process, and Section VI serves as a call to dispute resolution practitioners throughout the United States to support efforts to keep mediation an inherently facilitative process.

## II. MEDIATION AND CASE EVALUATION IN MICHIGAN COURTS

The growth of mediation in Michigan has mirrored that of many jurisdictions throughout the country. What is most interesting about Michigan, however, is that mediation grew in the shadow of another non-binding, but much more evaluative process, which the state now refers to as “case evaluation.”<sup>7</sup> That process appears to be unique in its statewide and mandatory usage. While some other jurisdictions have “case evaluation” processes on the books, they do not seem to be used with

6. The rules committee is still meeting and, as of September 2019, has not yet released rules for notice and comment by the public. Accordingly, the actual content of proposed rule changes is currently speculative. It is possible (though, in the author’s opinion, not likely) that the proposed rules might not include the removal of sanctions for failure to accept case evaluators’ awards.

7. See Section II(B), *infra*, regarding nomenclature.

the same frequency, and none seem to carry similar sanctions for failing to adopt evaluators' awards.<sup>8</sup> The most useful analogue for case evaluation in other states is court-annexed, non-binding arbitration. Only a few states<sup>9</sup> have these kinds of programs, and of those, only a few feature sanctions for failure to accept arbitrators' recommendations.<sup>10</sup>

### *A. Michigan's Tort Environment and its Impact on ADR*

It is impossible to fully examine the historical and current use of ADR in Michigan without a brief digression into tort law in the state, particularly personal injury protection ("PIP") claims. PIP claims are a type of no-fault insurance claim that individuals injured in an auto accident can bring against their own insurance company. In other words, insurance holders' own insurance covers items like medical expenses, whether or not the injured party caused the accident. Michigan requires no-fault insurance, and the state will not give car owners license plates without proof of such insurance.<sup>11</sup> These policies must cover medical expenses, wage loss, replacement services, and damage to others' property.<sup>12</sup> Until very recently, PIP claims covered medical costs for the life of the injured claimant.<sup>13</sup> This potential for life-long medical coverage has led to many disputes between injured first-person claimants and their insurers.<sup>14</sup>

These coverage requirements are widely blamed for Michigan's infamously high auto insurance rates, and in May 2019, Governor Gretchen Whitmer signed

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8. See, e.g., *Civil Mediation*, D.C. COURTS, <https://www.dccourts.gov/services/mediation-matters/civil> (last visited Dec. 12, 2019) (describing a non-binding "case evaluation" process that sounds like evaluative mediation); DOUGLAS H. YARN & GREGORY TODD JONES, *GEORGIA ALTERNATIVE DISPUTE RESOLUTION: PRACTICE AND PROCEDURE IN GEORGIA* § 12:5 (2014 ed., 2014) ("Case evaluation may be similar to [early neutral evaluation (ENE)] but not occur as "early" in the life of the litigation. In some programs, case evaluation involves a more direct evaluative component, while the version of ENE in the same program may involve evaluation only when both parties request the neutral to do so. . . . The Georgia Dispute Resolution Rules recognize case evaluation and early neutral evaluation; however, very few courts have adopted a program that specifically encourages use of these processes.").

9. See Theresa G. Campbell & Sharon L. Pizzuti, *Survey of Other States*, Appendix B to *The Effectiveness of Case Evaluation and Mediation in Michigan Circuit Courts*, MICH. SUPREME COURT 65-68 (Oct. 31, 2011) (listing Arizona, California, Connecticut, Delaware, Florida, Georgia, Hawaii, Illinois, Minnesota, Nevada, New Jersey, North Carolina, Ohio, Oregon, Pennsylvania, Rhode Island, Washington, and the District of Columbia) [hereinafter *2011 Case Evaluation Study*].

10. *Id.* (Arizona: rejecting party must improve on award by 25% or pay opposing side's costs; Hawaii: discretionary sanctions for party not improving award by 30%; Illinois: sanctions established locally; Nevada: sanctions for not improving by 20% or 10% depending on amount of award; New Jersey: sanctions if rejecting party does not improve upon award by 20%; Oregon: plaintiff must improve upon award 10%, defendant 20% to receive sanctions against other party; and Washington: sanctions may be applied if rejecting party does not improve its position at trial).

11. See Mich. Dep't of Ins. & Fin. Serv., *Brief Explanation of Michigan No-Fault Insurance* (2019), [https://www.michigan.gov/documents/cis\\_ofis\\_ip202\\_25083\\_7.pdf](https://www.michigan.gov/documents/cis_ofis_ip202_25083_7.pdf). Of course, many people do not maintain their insurance, which is infamously costly, particularly in the city of Detroit.

12. See MICH. COMP. LAWS ANN. §§ 500.3107-500.3121 (West 2019).

13. See MICH. COMP. LAWS ANN. § 500.3107(c) (West 2019); 2019 Mich. Pub. Acts 1, 19 (effective July 1, 2020); see also Aaron Mondry, *Whitmer, Republicans Reach Deal on Auto Insurance Reform*, CURBED DETROIT, <https://detroit.curbed.com/2019/5/24/18638931/michigan-auto-insurance-reform-whitmer-republicans-deal> (last updated June 3, 2019, 4:49 PM).

14. See, e.g., *Vandercook v. Auto-Owners Ins. Co.*, 923 N.W.2d 921 (Mich. Ct. App. 2018) (wherein plaintiff sought to recover PIP benefits for expenses related to injuries sustained in automobile accident).

no-fault auto insurance reform legislation that will place caps on medical benefits.<sup>15</sup> Although this reform will not end disputes over coverage, it may diminish some of the benefit of bringing such cases against insurers. On the other hand, insurance companies point to an increase in the default minimum liability coverage required under the new law as a potential driver for increased claim disputes (and higher premiums).<sup>16</sup>

PIP claims are most numerous in counties with the largest populations, and they take up a significant amount of the civil court dockets in Southeast Michigan, the area around Detroit. In 2017, no-fault automobile insurance claims made up 32% of the civil cases in Wayne County's Third Circuit Court,<sup>17</sup> 30.5% of the civil cases in Macomb County's Sixteenth Circuit Court,<sup>18</sup> and 18% of civil cases in Oakland County's Sixth Circuit Court,<sup>19</sup> the three main counties in the Detroit Metro area.

Michigan also has a significant caseload of third-party automobile negligence tort lawsuits, which can be brought in cases of death, serious impairment of body function, or serious, permanent disfigurement.<sup>20</sup> Like PIP claims, these third-party cases comprise a large percentage of cases in Wayne (20.6%),<sup>21</sup> Macomb (27.1%),<sup>22</sup> and Oakland Counties (20.5%).<sup>23</sup> For Wayne and Macomb Counties, automobile-related cases make up well over half of circuit court civil dockets. These circuit courts have come to rely on case evaluation, in particular, as a means of triaging

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15. H.B. 4397, 100th Reg. Sess. (Mich. 2019). Michigan has the highest state average for car insurance in the country: \$2,693, versus a national average of \$1,470. Detroit has the highest car insurance in the state, with an average of \$5,464/year. Aaron Mondry, *Michigan Auto Insurance Reform Explained*, CURBED DETROIT (May 24, 2019), <https://detroit.curbed.com/2019/5/14/18623153/michigan-auto-insurance-reform-bill-explained>.

16. Paul Egan, *Insurance Official: No Guaranteed Savings Under New Michigan Auto Law*, DETROIT FREE PRESS (June 11, 2019, 11:12 AM), <https://www.freep.com/story/news/local/michigan/2019/06/11/no-guaranteed-savings-under-new-michigan-auto-law/1369364001/> (“The new law calls for a dramatic, and somewhat surprising, increase in mandated liability limits . . . and allows personal injury attorneys to push for larger and more frequent lawsuits.”).

17. See *2015–2018 Wayne Circuit Court Civil Clearance Rates*, MICH. COURTS, <https://courts.michigan.gov/education/stats/performance-measures/Documents/Wayne/C03WayneCircuitDetail.pdf> (last visited Dec. 12, 2019) (no-fault automobile claims were 6,018 of the 18,672 total incoming civil claims in Wayne County in 2017). Michigan organizes its trial courts into district courts (civil claims up to \$25,000 and criminal misdemeanor) and circuit courts (civil claims over \$25,000 and felony criminal). *Mich. Trial Courts*, MICH. COURTS, <https://courts.michigan.gov/courts/trialcourts/pages/default.aspx> (last visited Dec. 12, 2019).

18. See *2015–2018 Macomb Circuit Court Civil Clearance Rates*, MICH. COURTS, <https://courts.michigan.gov/education/stats/performance-measures/Documents/Macomb/C16MacombCircuitDetail.pdf> (last visited Dec. 12, 2019) (no-fault automobile claims were 1,362 of the 4,461 total incoming civil claims in Macomb County in 2017).

19. See *2015–2018 Oakland Circuit Court Civil Clearance Rates*, MICH. COURTS, <https://courts.michigan.gov/education/stats/performance-measures/Documents/Oakland/C06OaklandCircuitDetail.pdf> (last visited Dec. 12, 2019) (no-fault automobile claims were 1,146 of the 6,357 total incoming civil claims in Oakland County in 2017).

20. MICH. COMP. LAWS ANN. § 500.3135 (West 2019).

21. See *2015–2018 Wayne Circuit Court Civil Clearance Rates*, *supra* note 17 (personal injury/automobile negligence claims were 3,842 of the 18,672 total incoming civil claims in Wayne County in 2017).

22. See *2015–2018 Macomb Circuit Court Civil Clearance Rates*, *supra* note 18 (personal injury/automobile negligence claims were 1,209 of the 4,461 total incoming civil claims in Macomb County in 2017).

23. See *2015–2018 Oakland Circuit Court Civil Clearance Rates*, *supra* note 19 (personal injury/automobile negligence claims were 1,304 of the 6,357 total incoming civil claims in Oakland County in 2017).

such cases, either to encourage cases to settle or to filter cases through additional ADR processes that will ideally lead to settlement. For example, the Third Circuit Court in Wayne County (Detroit) automatically refers to mediation any claim that receives less than twenty-five-thousand dollars in case evaluation in an effort to further encourage settlement before trial.<sup>24</sup>

This context is important to the arguments posed in this Article because the mass of automobile-related cases, and the courts' heavy reliance on case evaluation to help resolve them, has bolstered an impression that most of Michigan's civil cases are "just money cases" to be settled with a dollar figure and little more.<sup>25</sup> Many lawyers and judges believe that these types of cases are best settled using some type of evaluative process, be it trial or a trial alternative. Many courts view case evaluation as critical to address these kinds of tort and insurance disputes.

### *B. Case Evaluation*

Some version of case evaluation has been in place in Michigan, primarily to address tort claims, for nearly fifty years.<sup>26</sup> In that time, the state has seen huge growth in ADR in the courts, though not without some confusion as to nomenclature for ADR practitioners from out of state. For many years, "case evaluation" was referred to in Michigan as "mediation," and mediation was called "facilitation" in many Michigan courts. The confusion between the terms "case evaluation" and "mediation" was clarified by updates to the Michigan Court Rules in 2000, but the specter of "Michigan Mediation" lingers.<sup>27</sup> Moreover, many in the legal community in Michigan still use the term "facilitation" to refer to mediation, and this use reflects the long-standing definition of civil mediation as a facilitative process.<sup>28</sup>

Currently, case evaluation is mandatory for tort claims and discretionary for other civil claims.<sup>29</sup> In case evaluation, a panel of three court-appointed attorneys renders a monetary evaluation of the case that parties must either accept or reject.<sup>30</sup>

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24. Third Judicial Circuit of Mich., Local Admin. Order 2016-04 (July 26, 2016), [https://www.3rdcc.org/Documents/Administration/Orders/2016-04%5EMediation%20Plan%20for%20Cases%20Evaluated%20for%20an%20Amount%20of%20\\$25,000%20or%20Less%5E%5E.pdf](https://www.3rdcc.org/Documents/Administration/Orders/2016-04%5EMediation%20Plan%20for%20Cases%20Evaluated%20for%20an%20Amount%20of%20$25,000%20or%20Less%5E%5E.pdf).

25. See, e.g., John Lande, *Toward a More Sophisticated Mediation Theory*, 2000 J. DISP. RESOL. 321, 327 (2000).

26. See Mich. Supreme Court, *Trial Courts Appendix A: Courts and Judges*, Appendix A to *Michigan Supreme Court Annual Report 2011* (2011), <https://courts.michigan.gov/Administration/SCAO/Resourcs/Documents/Publications/Statistics/2011/2011%20Michigan%20Supreme%20Court%20Annual%20Report.pdf>.

27. See, e.g., Symposium, *The State of the States: Dispute Resolution in the Courts*, 1 CARDOZO J. CONFLICT RESOL. 4, 31-32 (1999) (Mr. Doug Van Epps explaining that Michigan has "non-binding case evaluation with penalties; it's called Michigan Mediation."); MICH. CT. R. 2.403 amend. Staff Comments (noting "[t]he amendments . . . are mainly to change terminology, replacing 'mediation,' as used in current MICH. CT. R. 2.403, with the term 'case evaluation.' 'Mediation' will be used to describe the facilitative process established in MICH. CT. R. 2.411, in keeping with the generally accepted usage of the term."). On behalf of the mediators of Michigan, the author would like to affirm that we have been using non-binding mediation throughout the state for many years and that we do know the difference between case evaluation, mediation, and arbitration.

28. In MICH. CT. R. 2.411(A)(2) ("[D]efining mediation as a process in which a neutral third party facilitates communication between parties, assists in identifying issues, and helps explore solutions to promote a mutually acceptable settlement. A mediator has no authoritative decision-making power.").

29. MICH. CT. R. 2.403(B)(1).

30. Local courts can create their own plans for case evaluator selection. The court rules provide that applicants must be in practice for at least five years with a substantial amount of their practice devoted to civil litigation and in good standing of the State Bar of Michigan. MICH. CT. R. 2.402(2).

Each party prepares a case summary of no more than twenty double-spaced pages and sends it to the opposing party and the court's ADR clerk. Late filings, including the submission of many pages of supporting documentation the night before a case evaluation hearing, are a common problem, and court clerks can charge late fees to encourage timely submissions.<sup>31</sup> Attorneys are then given fifteen minutes for oral presentations before the evaluation panel.<sup>32</sup> Parties are allowed to attend the case evaluation hearing, but they are not allowed to testify.<sup>33</sup>

Within fourteen days of the hearing, the panel must issue a written award that includes a separate dollar amount for each claim or counterclaim. The panel *does not* have to issue a reasoned opinion in setting its dollar figure, and it cannot make equitable rulings, but panelists can consider equitable claims in their monetary awards.<sup>34</sup> Each party must then accept or reject the award in its entirety within twenty-eight days, with silence constituting a rejection.<sup>35</sup> If the parties all accept the award, judgment is entered in the award amount (or a party may pay the award amount within twenty-eight days and have the case dismissed with prejudice).<sup>36</sup>

If a party rejects the case evaluators' award and ultimately fails to improve that award by more than ten percent at trial, the opposing party may seek sanctions,<sup>37</sup> including costs and reasonable attorney fees.<sup>38</sup> If both parties reject the case evaluation, then the opposing party is entitled to costs only if the verdict is more favorable to that party than the case evaluation award.<sup>39</sup> For example, say a case evaluation panel awards a plaintiff \$100,000, and the plaintiff rejects the award while the defendant accepts it. If the case goes to trial and the plaintiff is awarded

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31. MICH. CT. R. 2.403(I)(2).

32. MICH. CT. R. 2.403(J)(3).

33. However, "[i]f scars, disfigurement, or other unusual conditions exist, they may be demonstrated to the panel by a personal appearance." MICH. CT. R. 2.403(J)(1).

34. MICH. CT. R. 2.403(K).

35. MICH. CT. R. 2.403(L). Failure to respond constitutes a rejection. If there are multiple parties involved in the case evaluation, a party must accept or reject all awards with respect to any particular opposing party and can make their acceptance contingent on the opposing party accepting. *Id.* at 2.403(L)(3).

36. MICH. CT. R. 2.403(M).

37. MICH. CT. R. 2.403(O)(1). "If a party has rejected an evaluation and the action proceeds to verdict, that party must pay the opposing party's actual costs unless the verdict is more favorable to the rejecting party than the case evaluation. However, if the opposing party has also rejected the evaluation, a party is entitled to costs only if the verdict is more favorable to that party than the case evaluation." *Id.* at 2.403(O)(3) (noting that a verdict is considered more favorable to a defendant if it is more than ten percent below the case evaluation after adjusting for costs and interest and, if applicable adjusting future damages accordingly, or if the defendant is found not liable. A verdict is considered more favorable to the plaintiff if it is more than ten percent above the case evaluation).

38. MICH. CT. R. 2.403(O)(6) (noting that actual costs are "those costs taxable in any civil action" and "a reasonable attorney fee based on a reasonable hourly or daily rate as determined by the trial judge for services necessitated by the rejection of the case evaluation, which may include legal services provided by attorneys representing themselves or the entity for whom they work, including the time and labor of any legal assistant"); *Haliw v. City of Sterling Heights*, 691 N.W.2d 753, 706 (Mich. 2005) (holding appellate attorney fees and costs are not recoverable as case evaluation sanctions). In determining reasonable attorney fees, Michigan courts are generally guided by Rule 1.5(a) of the Michigan Rules of Professional Conduct, listing factors a lawyer should consider in determining fee. *Wood v. Detroit Automobile Inter-Ins. Exch.*, 321 N.W.2d 653 (Mich. 1982) (adopting reasonableness guidelines); *Smith v. Khouri*, 751 N.W.2d 472, 475 (Mich. 2008) (holding that courts should begin by determining "the reasonable hourly or daily rate customarily charged in the locality for similar legal services, using reliable surveys or other credible evidence.").

39. MICH. CT. R. 2.403(O)(1). Noting a "verdict" includes a jury verdict, a court judgment after a nonjury trial, or a judgment entered on a motion). *Id.* at 2.403(O)(2).

\$100,000, then the defendant (who accepted the case evaluation award) could seek sanctions against the plaintiff. Say, however, that both the plaintiff *and* the defendant rejected the case evaluation award, and the plaintiff wins \$100,000 at trial. In that case, the defendant cannot seek sanctions against the plaintiff because the defendant also rejected the case evaluation award and did not improve on the award at trial. Cost sanctions are only granted if the case evaluation award was unanimous.<sup>40</sup>

Another example may be helpful to visualize how case evaluation works.

Say that Paula slips and falls on a puddle of water in Sally's Salon. Paula sues Sally for \$100,000 in a Michigan circuit court, and Sally's insurer is representing the salon as the defendant in the case evaluation. Paula's attorney can easily prove \$40,000 in damages via medical bills Paula incurred after the accident and is hoping to garner some sympathy at trial since Paula also has three children and was their primary caregiver prior to the accident. Sally's insurer offered Paula \$50,000 before the case evaluation to settle the case. Paula refused the settlement offer.

During the case evaluation, the insurer centers its oral presentation on the \$50,000 offer it had already made, justifying its fairness before the panel. Paula's attorney points out that Paula is still unable to care for her children, all of whom are now in day care or afterschool care at a cost of nearly \$3,000 per month. Paula's attorney also tries to protest that prior settlement offers should not be considered by the panel but is reminded that the rules of evidence do not apply in case evaluations.<sup>41</sup>

The panel unanimously decides on an award of \$65,000. There is no reasoned opinion, but each panelist internally justified the award a bit differently. One panelist felt that \$65,000 would be a good settlement value. If the insurer was willing to pay \$50,000, what was another \$15,000 compared to the cost of trial or protracted settlement negotiations? Another panelist felt like Paula had a weak case for proving much more than \$40,000 at trial, so anything more than that was a gift that her attorney should graciously accept. The third panelist was inclined to award Paula more, but the panel had 11 other cases to evaluate that day and he did not feel like debating the award with the other two panelists.

Sally's insurer accepted the case evaluation award. Paula rejected it. Paula later won at trial and was awarded \$55,000 by the jury. Despite her victory, Paula did not improve on the evaluation award by more than ten percent, so the insurer sought and was awarded its actual costs, which totaled \$30,000. Paula's attorney was being paid on a thirty percent contingency, so Paula ended up with just \$8,500 for her trouble: the

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40. *Id.* at 2.403(O)(7). Anecdotally, several Michigan attorneys have mentioned concerns about panels deliberately issuing non-unanimous decisions, arguably as a way for panelists to maintain their credibility as plaintiff or defense side attorneys.

41. *Id.* at 2.403(J)(2).



\$55,000 award minus \$30,000 in defendant's actual costs minus \$16,500 to her attorney.<sup>42</sup>

Case evaluation sanctions like the ones levied against Paula have, understandably, led to widespread discontent among plaintiffs on whom these sanctions are often more punishing. The lack of acceptance of case evaluation awards, in turn, frustrates defense counsel, who view the process as one more hoop they have to jump through on the way to trial or, more likely, settlement.

### C. Mediation

In 2000, Michigan adopted comprehensive court rules around the use of ADR.<sup>43</sup> The court rules for mediation have a facilitative focus, defining civil mediation as “a process in which a neutral third party facilitates communication between parties, assists in identifying issues, and helps explore solutions to promote a mutually acceptable settlement. A mediator has no authoritative decision-making power.”<sup>44</sup> As will be discussed below, the SCAO requires mediation training for the court rosters have a facilitative focus.

Michigan does not require formal state certification to call oneself a mediator, but to serve on court rosters, mediators must complete a forty-hour training approved by SCAO, observe two civil mediations, and be observed conducting a mediation.<sup>45</sup> Court mediators must also have a J.D. or graduate degree in conflict resolution or, alternatively, forty hours or eighteen cases of mediation experience.<sup>46</sup> More rigorous training requirements apply to domestic relations mediators, including forty-eight hours of training and eighty hours of mediation experience for those who do not meet the degree requirement.<sup>47</sup>

The actual administration of court mediation programs varies widely by jurisdiction. In some district courts, almost all cases are referred to mediation,<sup>48</sup> while in other courts most civil cases first participate in case evaluation.<sup>49</sup> Some courts, particularly smaller ones, coordinate with a local Community Dispute Resolution Program for almost all of their mediation needs.<sup>50</sup> Courts with larger dockets have their own dedicated ADR programs, such as Wayne County's

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42. *Id.* at 2.403(O)(3) (noting that in the case presented here, Defendant insurer would also be entitled to costs if it had rejected the case evaluation award here, because the verdict is more favorable to the defendant than the evaluation); *Tevis v. Amex Assurance Co.*, 770 N.W.2d 16, 22 (Mich. Ct. App. 2009) (finding that joint stipulation by the parties as to damages can still be considered in determining whether a verdict is more favorable to a party).

43. MICH. CT. R. 2.411.

44. *Id.* at 2.411(A)(2).

45. *Id.* at 2.411(F)(2)(c).

46. The experiential component can be spread out over two years. *Id.* at 2.411(F)(2)(b)(ii). Small claims mediator qualifications are left to the discretion of the district courts. *Id.* at 2.411(F)(1).

47. MICH. CT. R. 3.216.

48. For example, Grand Traverse County.

49. See discussion of Oakland, Macomb, and Wayne Counties, *supra* Section II(A).

50. *Community Dispute Resolution Program*, MICH. COURTS, <https://courts.michigan.gov/administration/scao/officesprograms/odr/pages/community-dispute-resolution-program.aspx> (last visited Oct. 12, 2019).

Mediation Tribunal Association, that maintain the list of civil and domestic mediators for the circuit court and coordinate case evaluations.<sup>51</sup>

### III. GROWING CRITIQUE OF CASE EVALUATION

Over the past decade, the Michigan SCAO has commissioned two studies—an initial 2011 study and a follow-up in 2018—looking at the use of case evaluation and mediation in the state's circuit courts.<sup>52</sup> These studies sought to gauge the effect of case evaluation and mediation on case disposition (both the time from filing to disposition and the percentage of cases reaching a settlement or consent judgment), as well as to survey attorneys', judges', and court administrators' perceptions of the use and effectiveness of case evaluation and mediation.

The studies found that settlement rates were similar for cases that used either case evaluation or mediation: about eighty percent or higher. The key difference was in time to settlement. On average, cases that used case evaluation took three to four months longer to dispose of than cases that solely used mediation (a difference likely due to mediations being held sooner and settlements being reached more often during mediations).<sup>53</sup> In contrast, cases that went to case evaluation rarely resulted in parties accepting the award. Both parties accepted the evaluation panel's award in only fifteen percent of cases in the 2018 study.<sup>54</sup> Although most of the cases that went to case evaluation did ultimately settle before trial, it is hard to gauge the effect that case evaluation had on those settlements, as many of those cases were also mediated after the parties rejected the case evaluators' award.<sup>55</sup>

Stakeholder perceptions of the two processes also reflected a preference for mediation over case evaluation. More judges than attorneys felt that mediation helped dispose of cases within time guidelines<sup>56</sup> and that more cases settled as a direct result of mediation.<sup>57</sup> On the whole, judges in the 2018 study showed much more support for case evaluation than attorneys, but compared to the 2011 study, judges' support of case evaluation appears to be dropping. The percentage of Michigan judges who said case evaluation was effective fell from sixty-nine percent in 2011 to fifty-three percent in 2018, and the percentage who said they would voluntarily use case evaluation fell from eighty-three percent to sixty-six percent.<sup>58</sup>

Intriguingly, although the case-evaluation process seems to have arisen as a tort-reform mechanism meant to keep cases out of court, the studies articulated the two predominant goals of case evaluation as "(1) to provide a true valuation of the

51. MEDIATION TRIBUNAL ASS'N, <https://www.mediationtribunal.org/> (last visited Oct. 12, 2019). Wayne County also has a CDRP that handles some court-referred cases, and much of the school-based ADR in the county. *Wayne County Dispute Resolution Center*, WAYNE CTY. DISPUTE RESOLUTION CTR., <https://wcdrc.org/> (last visited Oct. 12, 2019).

52. Michael D. Campbell & Sharon L. Pizzuti, *Case Evaluation and Mediation in Michigan Circuit Courts: A Follow Up Study*, COURTLAND CONSULTING (2018), <https://courts.michigan.gov/Administration/SCAO/OfficesPrograms/ODR/Documents/2018%20Mediation%20and%20Case%20Evaluation%20Study.pdf> [hereinafter *2018 Case Evaluation Study*].

53. *Id.* at 4.

54. *Id.*

55. *Id.* at 8.

56. Eighty-three percent of judges felt this for mediation versus forty-five percent for case evaluation. *Id.* at 5.

57. Fifty-nine percent for mediation versus forty-one percent for case evaluation. *Id.* at 5.

58. *2018 Case Evaluation Study*, *supra* note 52, at 8.

case” and “(2) to provide a number around which parties can negotiate.”<sup>59</sup> These goals may be a post hoc reevaluation of the process, which at one time appeared to better serve as a means of ultimately disposing of cases.<sup>60</sup> If, indeed, these are the goals of case evaluation, then their purposes could be accomplished through any number of other processes, such as early neutral evaluation or, as discussed in more detail below, potentially mediation. In contrast, the studies described the goal of mediation as, “[d]isposition of the case by agreement of the parties.”<sup>61</sup> It seems odd that mediation’s goal would be the one explicitly focusing on disposing of the case, while case evaluation’s does not, though the definition does reflect mediation’s greater settlement rate. At a minimum, it seems to show that courts do not expect cases to settle by parties accepting their case evaluation award.

Both judges and attorneys rated mediators’ expertise more highly than that of case evaluation panelists.<sup>62</sup> In many ways, this is not a fair comparison. Case evaluators are meant to be subject matter experts, while mediators may be, but need not be, experts in the topic of the mediation.<sup>63</sup> In fact, many mediators like to say that they are “process experts” rather than subject matter experts. It can be problematic—and in some cases even illegal—for mediators to give legal advice during a mediation, though mediators often do showcase their subject matter expertise in other ways through interactions with parties during the mediation.<sup>64</sup> Case evaluators, on the other hand, have very little opportunity to demonstrate expertise of any kind during their proceedings; they conduct thirty to sixty minute hearings with parties and then issue an award of a dollar figure. Thus, even if the evaluators are experts in their area of law, they are given no real opportunity to display their expertise other than by giving a dollar figure, which is likely to displease all the parties in the case. Defendants may think the dollar amount too high and plaintiffs too low, and both parties can attribute it to lack of sound reasoning by case evaluators who do not have to provide a reasoned opinion for their awards.

Partly in response to the initial 2011 case evaluation study, ADR practitioners in Michigan began advocating for a greater use of mediation in civil disputes in Michigan’s circuit courts, culminating in a push for automatic mediation of civil disputes.<sup>65</sup> In a 2017 white paper to the State Bar Dispute Resolution Section, Professor Mary Bedikian set forth reasons why Michigan should adopt an automatic mediation program, including that such a program would: give clients an opportunity to address issues beyond the legal claim; provide superior outcomes

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59. *Id.* at 9.

60. *Id.*; *2011 Case Evaluation Study*, *supra* note 9, at 22. In the 2011 study, the case evaluation acceptance rate was twenty-two percent. *Id.*

61. *2018 Case Evaluation Study*, *supra* note 52, at 9.

62. *Id.* at 5.

63. As the court rules for case evaluator qualifications suggest, it may be difficult to find enough qualified attorneys to serve. MICH. CT. R. 2.404(2) (“If there are insufficient numbers of potential case evaluators meeting the qualifications stated in this rule, the plan may provide for consideration of alternative qualifications.”).

64. There is long-standing debate about whether mediators can, or should, give legal advice or bring their legal knowledge to bear on a dispute. *See, e.g.*, Carrie Menkel-Meadow, *When Dispute Resolution Begets Disputes of Its Own: Conflicts Among Dispute Professionals*, 44 UCLA L. REV. 1871 (1997); Jacqueline M. Nolan, *Lawyers, Non-Lawyers and Mediation: Rethinking the Professional Monopoly from a Problem-Solving Perspective*, 7 HARV. NEGOT. L. REV. 235 (2002).

65. *See, e.g.*, Mary A. Bedikian, *White Paper on Automatic Mediation Prepared for the SBM Section Council*, 26 MICH. DISP. RESOL. J. 1, 8 (2018).

that can attend to interpersonal dynamics; lead to results that parties view as more fair; resolve matters more quickly and cheaply; increase the likelihood of settlement; avoid multiple court proceedings; preserve party self-determination; and remove the discretionary factor from case referral by judges who are not used to ADR.<sup>66</sup> Bedikian pointed to the differences between case evaluation and mediation reported in the 2011 case evaluation study in arguing that mediation would be an overall better ADR process, particularly if made automatic.<sup>67</sup>

In the summer of 2018, shortly after the release of the 2018 follow-up study, the SCAO convened a summit of ADR providers and users from throughout the state. Generally, the views of the summit participants aligned with the data from the study, showing a preference for mediation over case evaluation. The majority of these practitioners and administrators believed that case evaluation should be made voluntary or amended to remove sanctions and that panels should provide litigants with a settlement range rather than a single award figure.<sup>68</sup> Participants also pointed out a perceived inconsistency in the numbers that case evaluation panels were offering—were the panels giving the *actual* value of the case as they saw it or a recommended settlement number to the litigants?<sup>69</sup> They recommended that the court rules specify what kind of number was being offered by case evaluators. Similarly to the 2018 Case Evaluation Study, the participants in the summit had an especially positive view about the use of mediation in resolving civil disputes, noting that it worked with many different types of disputes, had high rates of participation and compliance, and helped shorten the duration of cases even if settlement was not reached.<sup>70</sup>

The growing critique of case evaluation in Michigan led the SCAO Dispute Resolution Office to convene a rules committee in 2019 to look at the current case evaluation rules and make proposed changes to the state Supreme Court. In keeping with the recommendations from the ADR Summit, it seems likely that there will be a proposal to remove sanctions for refusing to accept the evaluators' award.<sup>71</sup> The removal of sanctions will lead to greater emphasis on Michigan's Offer of Judgement rule, which has more teeth than the federal rule in that it allows for costs and reasonable attorney fees.<sup>72</sup> The changes are also likely to lead to an uptick in mediation referrals, and there is currently discussion about whether to incorporate evaluative mediation expressly within the civil mediation rules. A form of

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66. *Id.* at 9–10.

67. *Id.* (the State Bar Dispute Resolution Section proposed an automatic mediation statute, but after discussion among various stakeholders, especially judges, decided to explore changes to court rules instead. Currently, there is no statewide court rule requiring mediation in civil cases).

68. Mich. Supreme Court, State Court Admin. Office, & Office of Dispute Resolution, *2018 ADR Summit Meeting Summary*, MICH. COURTS (Aug. 2018), <https://courts.michigan.gov/Administration/SCAO/OfficesPrograms/ODR/Documents/2018ADRSummitReportFINAL.pdf>.

69. *Id.* at 3. This same issue comes up when mediators are asked to give mediator proposals. Is the number that a mediator gives what the mediator believes a jury would award at the end of trial, or is it a figure that the mediator, based on what has been learned from the parties, believes parties would settle for in order to avoid trial. While many mediators are wary of giving the parties proposed dollar figures (or proposing other solutions to the dispute), most will do so in at least some situations. Many mediators are careful to specify what kind of figure they are offering to parties.

70. *2018 ADR Summit Meeting Summary*, *supra* note 68, at 2.

71. *2018 Case Study Evaluation*, *supra* note 52, at 59. The rules committee has released its recommendations to a few stakeholder groups over the summer of 2019, but a full set of proposed rule changes has yet to have been agreed upon by the committee. Those proposals, if any are made, are likely to be released toward the end of 2019.

72. MICH. CT. R. 2.405; *cf.* FED. R. CIV. P. 68.

evaluative mediation already exists within the domestic mediation rules, and a current proposal being discussed would incorporate some of that language into the existing civil mediation rule. While there has not been a proposal to make evaluative mediation the default form of mediation, adding evaluative mediation to the civil mediation rule will certainly call into question whether facilitative mediation, which is the form currently in place under the court rule, is the default. For reasons discussed below, this is likely to encourage more requests for and orders to evaluative mediation and, ultimately, weaken mediation as a unique ADR tool.

There is a final caveat to this discussion of potential changes to the case evaluation rules. Even if changes to the case evaluation rules are proposed by a state court rules committee, there is still a lengthy process before any proposed changes are adopted by the Michigan State Supreme Court, which has the final say on changes to the court rules. Before amending a court rule, the Supreme Court notifies the State Bar and posts a notice on the court website, allowing time for public comment electronically and setting up a public hearing on the rule changes.<sup>73</sup> Moreover, to the extent any rules are impacted by state statutes, such statutes must also be considered so that court rules do not conflict with substantive state laws.

Case evaluation is mandatory in tort cases pursuant to Michigan's Revised Judicature Act.<sup>74</sup> While the statute does not lay out the exact form under which case evaluation must be conducted, the statute itself calls for sanctioning parties who reject evaluation awards. It is possible that justices on the state supreme court might feel that removing sanctions for failure to accept case evaluators' awards is straying too far from the substance of case evaluation as set forth in the statute. In that case, proposed changes to the case evaluation rules might not be adopted by the court, and case evaluation may continue in its current form, pending revision of the statute by the state legislature.

#### IV. ALTERNATIVES TO CASE EVALUATION

As Michigan anticipates a greater use of mediation in lieu of case evaluation, it is worth pausing to consider what other processes could take the place of case evaluation and whether those processes might be better replacements than defaulting to mediation—particularly the evaluative mediation currently being contemplated. Two of the best candidates to replace the valuation component and the sanction component of case evaluation are early neutral evaluation and offers of judgment, both of which currently exist under the Michigan court rules.

##### A. Early Neutral Evaluation

One case evaluation substitute that seems largely missing from current discussions, but that warrants more serious consideration, is early neutral

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73. MICH. CT. R. 1.201; *Michigan Courts: Proposed Rules, Rules Amendments, Administrative Orders, and Appointments*, MICH. COURTS, <https://courts.michigan.gov/courts/michigansupremecourt/rules/court-rules-admin-matters/pages/default.aspx> (last visited Sept. 29, 2019).

74. The court rules for case evaluation specifically reference Chapter 49 (Medical Malpractice Mediation) and Chapter 49A (Tort Action Mediation). MICH. COMP. LAWS ANN. § 600.4901 (West 1986). Both the medical malpractice and tort evaluations call for sanctions against parties who have rejected evaluations. MICH. COMP. LAWS ANN. §§ 600.4921, 600.4969 (West 1986).

evaluation.<sup>75</sup> Unlike case evaluation, early neutral evaluation is often conducted by just one neutral. Given the already existing pool of case evaluators in Michigan, it should be relatively easy to transition many of the cases that currently are ordered to case evaluation to some form of early neutral evaluation instead. In its current form, parties are typically responsible for selecting a neutral.<sup>76</sup> Early neutral evaluation is also recommended for complex litigation, in which the neutral can be used to clarify key issues at trial and narrow the scope of discovery.<sup>77</sup> However, it would not be hard to focus neutrals more narrowly on providing evaluations similar to those currently being offered in case evaluation.

The SCAO already recommends that judges in Michigan consider ordering parties to use early neutral evaluation to help narrow the focus of the dispute.<sup>78</sup> It categorizes early neutral evaluation as evaluative, along with other processes like mini-trials with mock juries and case evaluation, pointing out that these kinds of processes can help parties identify the strengths and weaknesses of their case, modify their settlement positions, and adjust their expectations.<sup>79</sup> According to the SCAO, the neutral in early neutral evaluation has two primary roles:

[T]o play the “devil’s advocate” with both parties, and to provide a vehicle for aggressive case management. The process results in parties’ identifying the strengths and weaknesses of their cases and the risks the litigation poses. It can also educate a recalcitrant litigant who may have an unrealistic expectation of the outcome of the litigation.<sup>80</sup>

The SCAO is already recommending that parties use mediation prior to court-ordered case evaluation, but many judges and parties are still using case evaluation first.<sup>81</sup> Use of early neutral evaluation at a point that is actually early in the litigation process could serve many of the same roles that an early mediation would, especially a more evaluative mediation, while still preserving the option of mediation for cases that are unable to settle after early neutral evaluation.

### *B. Offers of Judgment*

Like many jurisdictions, Michigan has a rule for “Offers to Stipulate to Entry of Judgment” (“Offer of Judgment rule”).<sup>82</sup> The Michigan Offer of Judgment rule calls for sanctions if a written offer is not accepted by the offeree, and it allows either side to make an offer, not just the defendant.<sup>83</sup> The rule sets an “average

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75. See, e.g., *Early Neutral Evaluation*, A.B.A., [https://www.americanbar.org/groups/dispute\\_resolution/resources/DisputeResolutionProcesses/early\\_neutral\\_evaluation/](https://www.americanbar.org/groups/dispute_resolution/resources/DisputeResolutionProcesses/early_neutral_evaluation/) (last visited Oct. 11, 2018).

76. Mich. Supreme Court, State Court Admin. Office, & Office of Dispute Resolution, *Michigan Judges Guide to ADR Practice and Procedure Version 1.0*, 32–33 (2015), <https://courts.michigan.gov/Administration/SCAO/OfficesPrograms/ODR/Documents/ADR%20Guide%2004092015.pdf> [hereinafter *Judges Guide to ADR Version 1.0*].

77. *Id.* at 32–33.

78. *Id.* at 9–10.

79. *Id.* at 14.

80. *Id.* at 33.

81. *Id.* See *2018 Case Evaluation Study*, *supra* note 52.

82. See, e.g., 2 A.L.R. 279 (2005).

83. MICH. CT. R. 2.405. The definition of an offer under the rule is “a written notification to an adverse party of the offeror’s willingness to stipulate to the entry of a judgment in a sum certain, which

offer,” the average of the initial written offer and any counter-offer made by the offeree, that parties must improve upon at trial.<sup>84</sup> The party receiving the offer (or counter-offer) may accept it, expressly reject it, or reject it by allowing it to lapse.<sup>85</sup> If the verdict, plus interests and costs from filing through the date of the offer, is more favorable to the offeror than the offer, then the offeree must pay the offeror’s costs and reasonable attorney fees for the entire case.<sup>86</sup> Either party can make an offer and thus create the possibility of sanctions if the opposing side does not improve upon the average of the offers at trial. There is some incentive to encourage early settlement offers since an offeree who has not made a counteroffer is not entitled to costs “unless the offer was made less than 42 days before trial.”<sup>87</sup> Here is how an offer of judgment might have operated in Paula’s case with Sally:

The attorney for Sally’s Salon, the defendant in the slip and fall case, makes a written offer of judgment to plaintiff Paula in the amount of \$50,000. Paula’s attorney makes a written counteroffer of \$70,000, setting an “average offer” of \$60,000. At trial, Paula is awarded \$55,000, which does not improve upon the average set by offer and counteroffer. Paula is now liable for costs and fees under the Offer of Judgment Rule even though she won at trial.

At present, there is a carve-out in the Offer of Judgment rule for cases that have been submitted for case evaluation.<sup>88</sup> Costs are not awarded under the Offer of Judgment rule for cases that have received unanimous case evaluation awards.<sup>89</sup> If the case evaluation rules are changed to remove case evaluation sanctions, then this carve out will likely be removed from the Offer of Judgment rule.

The Offer of Judgment rule does allow some judicial discretion as to whether to award attorney fees. The court may refuse to award them “in the interest of justice.”<sup>90</sup> Michigan courts use an abuse of discretion standard when reviewing a denial of attorney fees under the interest-of-justice exception.<sup>91</sup> A recent, unpublished Michigan Court of Appeals opinion found that a trial court did not

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is deemed to include all costs and interest then accrued.” Parties sometimes debate whether an offer of judgment can be used for claims that call for a mix of equitable and monetary relief. So long as the offer does not require any action by the offeree (other than accepting the offer and stipulating to the judgment), meaning, it covers only monetary damages and seeks the dismissal of equitable claims, then it is likely a “sum certain” under Michigan’s Offer of Judgment rule. *McManus v. Toler*, 810 N.W.2d 38, 41 (Mich. Ct. App. 2010).

84. MICH. CT. R. 2.405(A)(3).

85. MICH. CT. R. 2.405(C).

86. MICH. CT. R. 2.405(D)(1)–(2). Allowing attorney fees is notable. Rule 68 of the Federal Rules of Civil Procedure, on which many states’ offer-of-judgment statutes are modeled, only allows for costs and does not include reasonable attorney fees. The lack of costs available under Rule 68 means it is very rarely used. *See, e.g., William P. Lynch, Rule 68 Offers of Judgment: Lessons from the New Mexico Experience*, 39 N.M. L. REV. 349, 352 (2009).

87. MICH. CT. R. 2.405(D)(2).

88. MICH. CT. R. 2.405(E).

89. Theoretically, an attorney could follow a split panel decision in case evaluation with a written settlement offer under the Offer of Judgment rule as a means of trying to hedge bets on potential routes to requesting costs and fees, but this does not appear to be common in the state.

90. MICH. CT. R. 2.405(D)(3).

91. *AFP Specialties Inc. v. Vereyken*, 844 N.W.2d 470, 483 (Mich. Ct. App. 2014) (quoting *Smith v. Khouri*, 751 N.W.2d 472, 477 (Mich. 2008) (holding it is an abuse of discretion when the trial court’s decision is outside the range of reasonable and principled outcomes) (internal quotations omitted)).

abuse its discretion in concluding that a defendant's offer of one dollar to settle a claim was strategic, rather than meaningful, thus denying the defendant its attorney fees.<sup>92</sup> Michigan courts caution that the exception should not be applied "absent unusual circumstances," though attempts at "gamesmanship" and lack of sincere effort at negotiation may allow the exception.<sup>93</sup>

If offers of judgement increase in use throughout Michigan, there will likely be a push to revisit the mechanics of the court rule. Comparisons with Ontario, Canada's Rule 49 regarding offers to settle might be helpful.<sup>94</sup> Notably, under Rule 49, the punishment for failure to accept a settlement offer falls more heavily on defendants than on plaintiffs. If a plaintiff makes an offer that is refused by the defendant and the plaintiff receives a judgment that is as favorable or more favorable at trial, then the plaintiff is entitled to "partial indemnity" up to the date of the offer and "substantial indemnity" from the date of the offer.<sup>95</sup> If the defendant's offer is refused and the plaintiff receives a judgment equally or less favorable at trial, then the plaintiff is still entitled to the plaintiff's costs up to the date of the offer and only pays the defendant's indemnity costs from the date of the defendant's settlement offer.<sup>96</sup> This incentivizes early (and later, improved) settlement offers on the part of the defendant—at least in cases where the plaintiff has a colorable claim as to the defendant's liability—since the cost-shifting only works in the defendant's favor after the offer to settle is made. Parties can also make non-Rule 49 settlement offers at any time.<sup>97</sup>

If case evaluation is modified to take away the threat of sanctions for refusing the evaluators' award, the Michigan Offer of Judgment rule will likely see increased use as attorneys attempt to pressure the other side to settle. In particular, it might be used in conjunction with ADR processes like early neutral evaluation or mediation. For example, it could be combined with early neutral evaluation such that a party could use the evaluator's award as a basis for a written offer to the other side, who would then face sanctions if it did not accept the offer. Similarly, if the parties went to mediation and came close to a settlement but were not able to settle, then a written offer could be made based on the outcome at mediation.

### *C. Arbitration Variants*

Case evaluation is akin to non-binding arbitration, and courts could consider promoting arbitration as an alternative to case evaluation. They could also consider

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92. 31341 Van Born Rd, LLC v. McPherson Oil Co., No. 342740, 2019 WL 2146507, at \*3 (Mich. Ct. App. May 16, 2019).

93. *Vereyken*, 844 N.W.2d at 518–19.

94. ONT. R. CIV. P., R.R.O. 1990, R. 49.02(1) (Can.).

95. ONT. R. CIV. P., R.R.O. 1990, R. 49.10(1) (Can.). "Substantial indemnity" costs essentially take what the court would have awarded and applies a 1.5 multiplier. See ONT. R. CIV. P., R.R.O. 1990, R. 1.03(1)(f) (Can.). As with case evaluation awards or offers of judgment in Michigan, there may be some debate whether the result obtained at trial is more favorable. For monetary damages, courts take into account both the amount awarded at trial and prejudgment interest in comparing settlement offers and trial awards. For non-monetary relief, it is harder to compare Rule 49 offers and trial awards, but courts seem likely to err on the side of awarding Rule 49 costs for reasonable offers. See generally ONT. R. CIV. P., R.R.O. 1990, R. 49 (Can.).

96. ONT. R. CIV. P., R.R.O. 1990, R. 49.07(2) (Can.).

97. See ONT. R. CIV. P., R.R.O. 1990, R. 49.13 (Can.). Of course, this means that practitioners in Ontario need to be careful when making offers to settle in writing that they clearly mark written offers that are not meant to fall under Rule 49.



mediation–arbitration, or “med–arb,” in which the same neutral serves both as a mediator and, if the parties fail to settle in mediation, becomes the arbitrator for the case.<sup>98</sup> These processes are likely to have similar drawbacks to case evaluation and evaluative mediation, respectively. Finding panels of arbitrators with sufficient expertise may prove difficult, and parties are likely to engage in the same delayed briefing tactics as in case evaluation. Further, making mediation more evaluative may diminish some of the features that make mediation a valuable alternative process. Moreover, unique structural and ethical issues arise when the same neutral is being used for both the mediation and arbitration processes. These include concerns about the value of mediation’s confidentiality when the arbitrator learns information in mediation that might affect the arbitrator’s award, including information learned *ex parte* through caucusing with parties.<sup>99</sup>

#### D. Mini Trials

Another process that could at least partially replace case evaluation is the mini–trial, which Michigan already encourages judges to consider in cases with a substantial amount in dispute and a party that “desires its ‘day in court.’”<sup>100</sup> A mini–trial empanels a mock jury that hears an abbreviated one to two–day trial and then renders an advisory verdict. This would seem to address the goal of case evaluation: putting a value on the dispute. The parties can establish their own rules for the trial, which can also be combined with mediation to allow the mock jury’s decision to be heard by the parties if there is an impasse or as a starting point for negotiations. Unfortunately, mini trials are expensive, and the parties foot the bill for the mock jurors, not the state, so parties are only likely to agree to this process when there is a large amount at stake.<sup>101</sup>

#### E. Data Analytics

Modern data analytics could be applied both in negotiation and other more formal ADR settings. Scholars have long counseled parties to incorporate data about similarly situated litigants into the decision–making around settlement, but neutrals frequently perceive that parties have not done their homework or are engaging in wishful thinking. Indeed, many, if not all, of the forms of dispute resolution discussed in this Article are meant to address the inability of parties to

98. Jennifer Allison, *Med–Arb/Arb–Med*, HARV. LAW SCH. LIBRARY (Sept. 7, 2018), <https://guides.library.harvard.edu/c.php?g=310591&p=2078484> (Med–arb could be set up so that the arbitration component is also non–binding. This is what an expressly evaluative mediation process in which the mediator makes a mediator’s proposal at the end amounts to).

99. Ellen Deason, *Combinations of Mediation and Arbitration with the Same Neutral: A Framework for Judicial Review*, 5 ARB L. REV. 219, 243–44 (2013) (arguing for two separate processes). For a general discussion of med–arb, see Brian Pappas, *Med–Arb and the Legalization of Alternative Dispute Resolution*, 20 HARV. NEGOT. L. REV. 157 (2015).

100. *Judges Guide to ADR Version 1.0*, *supra* note 76, at 29. Note that sometimes the term mini trial is used to refer to presentations made by attorneys to high–profile representatives of disputing parties who have the authority to negotiate a settlement. These mini–trials are presided over by a neutral advisor who may question the party representative during the process. STEPHEN B. GOLDBERG ET AL., *DISPUTE RESOLUTION: NEGOTIATION, MEDIATION, ARBITRATION, AND OTHER PROCESSES* 430–32 (6th ed., 2012).

101. *Id.* at 30.

come up with a reasonable settlement figure, either due to lack of data or lack of will. Certainly, overcoming this wishful thinking on the part of parties is a big part of case evaluation's value and appeal.

Case evaluation is diminishing in effectiveness because the evaluators themselves are no longer significantly more knowledgeable as to what will happen at trial than the parties and their counsel. Nowadays, the combination of the vanishing jury trial (and with it the vanishing trial lawyer) and increased access to databases that aid parties in setting an expected dollar value for their case make parties less likely to place much stock in the awards given by attorney case evaluators.

Perhaps the biggest hurdle might be the one that case evaluation was ostensibly put in place to address: how do parties put a value on their case in a way that is compelling enough to both parties that it convinces them to settle? Is this something that parties can do on their own? Is this something that can be addressed in a non-binding process?

Procedures to address data asymmetries are especially necessary in an era in which access to data is expensive and proprietary. There is a plethora of products currently available on the market to help negotiating parties.<sup>102</sup> These include databases like Lex Machina, Litigation Analytics and Case Evaluator (Westlaw), LexisNexis Verdict & Settlement Analyzer, Premonition, and VerdictSearch (ALM). To give an idea of the cost for these services, VerdictSearch offers subscriptions for solo attorneys from \$99 per month or day passes for \$395.<sup>103</sup> VerdictSearch also has print versions, e.g., VerdictSearch Michigan, with monthly issues that list cases and give details like fact summaries, allegations, damages, verdict amount, amount of demand, and party experts.<sup>104</sup>

There are also platforms more expressly aimed at negotiations and decision analysis, like Picture It Settled, Litigation Risk Analysis, and Win Before Trial.<sup>105</sup> Win Before Trial offers a product called The Mediator's Assistant designed to help mediators walk parties through a litigation analysis.<sup>106</sup> These sorts of tools may be particularly valuable right now, though costly, because many lawyers have yet to incorporate them into their decision-making.<sup>107</sup> Litigation analytics can be used solely by the litigants themselves, but as tools like The Mediator's Assistant suggest, they can also be used by mediators (or other neutrals) to help the parties explore settlement options. Facilitative approaches do not need to eschew technology, which can be used not just online but also during in-person meetings.

102. See Detroit Mercy Law Students, *ADR Section Co-Hosts Panel on Case Valuation*, 26 DISP. RESOL. J. 6 (2018), <https://higherlogicdownload.s3.amazonaws.com/MICHBAR/2b10c098-e406-4777-a199-33b9d3e7c568/UploadedImages/pdfs/Fall18.pdf>.

103. LAW.COM, <https://verdictsearch.com/plans-pricing/> (last visited Nov. 10, 2019).

104. See *id.* (paper copies of these may be available at law libraries for parties and attorneys with access).

105. See PICTURE IT SETTLED, <http://www.pictureitsettled.com/> (last visited Nov. 10, 2019); LITIG. RISK ANALYSIS, [www.litigationrisk.com](http://www.litigationrisk.com/) (last visited Nov. 10, 2019); LEGAL RISK MGMT., <http://www.winbeforetrial.com/> (last visited Nov. 10, 2019).

106. *The Mediator's Assistant*, LEGAL RISK MGMT., <http://www.winbeforetrial.com/the-mediators-assistant.html> (last visited Nov. 10, 2019).

107. See, e.g., Heather Heavin & Michaela Keet, *Litigation Risk Analysis: Using Rigorous Projections to Encourage and Inform Settlement*, SSRN (Mar. 29, 2018), [https://papers.ssrn.com/sol3/papers.cfm?aabstract\\_id=3148676](https://papers.ssrn.com/sol3/papers.cfm?aabstract_id=3148676). See generally MARJORIE CORMAN AARON, *RISK & RIGOR: A LAWYER'S GUIDE TO DECISION TREES FOR ASSESSING CASES AND ADVISING CLIENTS* (2019) (for lawyers and parties who want to learn more about the mechanics of litigation risk analysis).

Alyson Carrel and Noam Ebner highlight a few factors to consider about the mediation clients of the future: they will expect information to be easily available and intuitive, they will rely on peers rather than experts in making decisions, and they will expect service providers to be visible, particularly online.<sup>108</sup> One of the ways that mediators will be able to provide value to their future clients is by helping them sort through and understand the data that can inform their decision-making.<sup>109</sup>

It is here that court systems—and the multi-door courthouses of the Twenty-First Century—can do the most good. The parties most likely to have access to large data sets are those with the deepest pockets. The information asymmetries that have long concerned those cautious about mediation and other private settlement processes will only become greater as the pool of available data about actual jury awards shrinks. Proponents of data sharing call for regulations that require reporting of settlement data.<sup>110</sup> State courts could start to provide this service at a state level for civil cases being disposed of through court-connected programs like case evaluation or mediation.

Indeed, providing more litigants with access to this type of information may be one of the biggest services courts could provide, since defendants in the main body of cases currently using case evaluation (tort) are likely to be insured. These defendants likely have much more data on potential settlement values than they are revealing to case evaluators, and they currently have few incentives to do so. For similar reasons, private settlements are probably much more attractive to them. For example, one negligence attorney pointed out that few insurance carriers will accept a case evaluation award if there is the possibility of a non-confidential judgment being entered against the defendant.<sup>111</sup>

### F. Mediation

Finally, the most likely existing ADR process that courts will turn to in order to fill the case evaluation gap is mediation. Returning to earlier calls for automatic mediation, there is support to increase the use of mediation throughout the state. These proposed changes to case evaluation provide an excellent opportunity to expand mediation's reach.

As attorneys transition away from the use of case evaluation—an involuntary, evaluative procedure—and toward mediation, dispute resolution coordinators and mediators must be wary of “evaluation creep,” the likelihood that Michigan's facilitative mediators will be pulled by state encouragement and market demand to become more and more evaluative in their mediations.<sup>112</sup> In fact, in the 2018 Case

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108. Alyson Carrel & Noam Ebner, *Mind the Gap: Bringing Technology to the Mediation Table*, 2019 J. DISP. RESOL. 1, 20–21 (2019).

109. *Id.* at 32–33.

110. See Dodd–Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111–203, § 1001–1100H, 124 Stat. 1376 (2010) (for example, the CFPB Arbitration regulations—which Congress subsequently revoked—would have required some aggregated reporting of arbitration awards).

111. Robert F. Riley, *Is There a Future for Case Evaluation in Negligence Litigation?*, 97 MICH. B. J. 26, 29 (2018).

112. Office of Dispute Resolution, *Mediator Training Standards & Procedures*, MICH. COURTS 6 (Jan. 1, 2016), <https://courts.michigan.gov/Administration/SCAO/Resources/Documents/standards/odr/Mediator%20Training%20Standards%20and%20Procedures.pdf> (the current mediator training guidelines for Michigan do not prohibit teaching evaluative techniques but do call for “emphasis on facilitative

Evaluation Study, seventy-four percent of attorneys said they sometimes or often ask mediators to suggest or propose a settlement amount in their cases.<sup>113</sup> The likelihood of evaluation creep seems greatest when trying to make mediation the one-stop shop for all civil litigation.

This shift toward more legalistic forms of mediation is, of course, happening widely, far beyond Michigan's borders.<sup>114</sup> Whereas a generation ago "being evaluative" was one of the graver epithets leveled at mediator, the field has become more and more open to mediators placing actual dollar figures and values on parties' cases. Mediator education programs now instruct mediators on how to craft a "mediator's proposal."<sup>115</sup> Commercial mediation providers allow for mediator proposals in their rules.<sup>116</sup>

Mediation can be a very good fit for many of the cases that are referred to case evaluation, but given the likelihood of evaluation creep, this is a good time to pause and think about what mediation has been and can be in a court-connected setting.

## V. WHAT MEDIATION IS AND MAY BECOME

Ultimately, this Article is arguing for policy choices that preserve a more facilitative style of mediation. Definitions of what exactly constitutes facilitative or evaluative mediation vary widely. Returning to the first generation of debates over mediation styles, John Lande provides a succinct definition, saying mediators who use "a facilitative style focus on eliciting the principals' opinions and refrain from pressing their own opinions about preferable settlement options," while mediators who use "an evaluative style develop their own opinions about preferable settlement options and may try to influence the principals to accept them."<sup>117</sup> His definition nicely captures the core of the debate about whether mediators should express opinions as to preferred settlement options.

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mediation"). Michigan Court Rules also state that training as a case evaluator is not qualification to serve as a mediator in state courts. MICH. CT. R. 2.411(F)(3).

113. *2018 Case Evaluation Study*, *supra* note 52, at 46.

114. Whether one considers evaluative or facilitative mediation styles, philosophies, or something stronger, is a long-standing debate. *See, e.g.*, Jeffrey W. Stempel, *The Inevitability of the Eclectic: Liberating ADR from Ideology*, 2000 J. DISP. RESOL. 247 (2000). For a Michigan-based mediator's characterization of mediation styles, see Zena Zumeta, *Styles of Mediation: Facilitative, Evaluative, and Transformative Mediation*, MEDIATE.COM, <https://www.mediate.com/articles/zumeta.cfm> (last visited Nov. 15, 2019) (because the likely comparison points in Michigan are facilitative versus evaluative, this Article does not speak much about Folger and Bush's transformative mediation model).

115. *See, e.g.*, Jeff Kichaven & Paul Van Osselaer, *The "Mediator's Proposal"*, A.B.A. (Dec. 28, 2017), <https://www.americanbar.org/groups/litigation/committees/insurance-coverage/practice/2017/mmediators-proposal/>.

116. *Mediation Procedure*, CPR INT'L INST. FOR CONFLICT PREVENTION & RESOLUTION, <https://www.cpradr.org/resource-center/rules/mediation/cpr-meditation-procedure> (last visited Dec. 12, 2019) ("Finally, if the parties fail to develop mutually acceptable settlement terms, before terminating the procedure, and only with the consent of the parties, (a) the mediator may submit to the parties a final settlement proposal; and (b) if the mediator believes he/she is qualified to do so, the mediator may give the parties an evaluation (which if all parties choose, and the mediator agrees, may be in writing) of the likely outcome of the case if it were tried to final judgment, subject to any limitations under any applicable mediation statutes/ rules, court rules or ethical codes. Thereupon, the mediator may suggest further discussions to explore whether the mediator's evaluation or proposal may lead to a resolution.").

117. John Lande, *Toward More Sophisticated Mediation Theory*, 2000 J. DISP. RESOL. 321, 322–23 (2000).

### A. Michigan Currently Defines Mediation as Facilitative

In its Michigan Judges Guide to ADR, the Michigan Supreme Court categorizes all of its mediation options as “Facilitative ADR Processes.”<sup>118</sup> On the other hand, Michigan’s court rules already provide for “evaluative mediation” in domestic relations mediations, which the Judges Guide acknowledges.<sup>119</sup> In domestic relations cases, parties must voluntarily participate in evaluative mediation and, unlike other jurisdictions where the mediator’s proposal or recommendation is reported to the court, the domestic relations mediator’s proposed settlement is not reported to the court.<sup>120</sup> However, adding evaluative mediation to the court rules for general civil mediation seems unnecessary—and potentially misguided—for a couple of reasons.

First, adding evaluative mediation into the court rule will likely disincentivize the use of facilitative mediation. Given the data suggesting that attorneys prefer more evaluative processes, it seems likely that explicitly providing evaluative mediation within the civil mediation rule as a process distinct from facilitative mediation will lead to more market pressure on mediators to provide evaluations, even if those mediators would prefer not to.

But why shouldn’t mediators provide what the market wants? One may argue that it is paternalistic to discourage parties from asking for the process that best fits their preferred approach to resolving the case. Yes, and no. If parties want to hire someone to give them a number, they can do that. But court-ordered mediation is not a purely private enterprise; it is operating with the imprimatur of the state, often using state funding as well. The state should, therefore, be able to weigh in on its preferred process and the features it would like that process to have. The state does not have to take an about-face on its approach to mediation just because it may be diminishing the use of case evaluation, one of many evaluative ADR options currently offered.

Second, there is nothing explicitly within the current court rule that says that mediators cannot use more evaluative techniques like a mediator’s proposal. This may sound like a counter-intuitive critique in light of the first point that the current state definition of mediation has a facilitative focus. However, many mediators use a range of techniques from facilitative to more evaluative. Mediators may choose, for practical and philosophical reasons, not to use certain techniques. Adding evaluative mediation to the court rules may result in more pressure on mediators to use evaluative techniques. The point is that mediators who want to use evaluative techniques like a mediator’s proposal are not forbidden from doing so under the existing rules, but the rules also do not encourage or call for the use of such techniques.

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118. *Judges Guide to ADR Version 1.0*, *supra* note 76, at 19.

119. *Id.* at 24.

120. MICH. CT. R. 3.216(A)(2), 3.216(I). At the parties’ request, the mediator may provide a written report to the parties with “the mediator’s proposed recommendation for settlement purposes only,” and the recommendation “may not be submitted or made available to the court.” *Id.* at 3.216(I)(2). The rule makes very clear that court officials cannot pressure the mediator or parties into discussing the recommendation and that the court cannot ask who accepted or rejected the mediator’s recommendation, read the recommendation, or admit the recommendation into evidence (unless both parties consent and the court “shall not request the parties’ consent to read the mediator’s recommendation”). *Id.* at 3.216(I)(5)–(6).

Potential benefits for formalizing an evaluative mediation process would be the ability to maintain a clear distinction between more facilitative and more evaluative models of mediation. Parties will need to be educated and informed by ADR providers about the type of mediation in which they are going to participate. Having these models specifically defined may also allow training programs to more directly address the pros and cons of more facilitative and more evaluative techniques. Since many general civil mediation trainings embrace a facilitative model of mediation, either by choice or because the local courts call for facilitative methods, scant attention is usually paid to evaluative techniques, and yet many mediators use proposals and other evaluative techniques in their sessions.

The Judges Guide is forthright about the potential downsides to using a more evaluative process, particularly the risks to the mediator's perceived neutrality:

Evaluative mediation can be a useful tool where parties are unable to generate options and would like the mediator to offer recommendations. However, once the recommendations are provided, the mediator risks losing effectiveness as a mediator in facilitating further settlement discussions because the mediator may be perceived as exhibiting favoritism or as no longer being neutral. For this reason, evaluative mediation generally takes place toward the end of the parties' negotiations and after they have truly failed to reach consensus.<sup>121</sup>

The debate about the utility of continuing to use a facilitative/evaluative framework for mediation is longstanding and unresolved.<sup>122</sup> There is real value in being deliberative about the methods that mediators are using to resolve disputes and requiring mediators to obtain parties' authorization up-front for the use of techniques like a mediator's proposal. Maybe this does not make much of a difference in the end. Maybe the parties who are sophisticated enough to understand what a mediator's proposal is and what they are agreeing to are the parties most likely to welcome the mediator's proposal or be in a position to give a firm "no thank you" in advance, while the parties who are less knowledgeable will simply nod their heads and acquiesce to whatever the mediator, the person with seeming authority, says the process will be. Regardless of which model is chosen, it is still useful for the mediator to outwardly declare—and inwardly embrace—which model the mediator will be using in advance of the mediation.

### *B. Evaluative Mediation Models*

Rather than suggesting that all evaluative mediation is bad, this Article argues that the model expressly called for by courts should remain on the facilitative end of the spectrum. However, since this Article also predicts that parties in a post-case-evaluation sanctions world will increasingly request evaluative mediation, it is worth considering how evaluative mediation *should* be done. In particular, it is

121. *Judges Guide to ADR Version 1.0*, *supra* note 76, at 24.

122. For a thoroughly footnoted, poetic take on the controversy, see Len Riskin, *Mediation Quandaries*, 24 FLA. ST. U. L. REV., 1007 (1997). For an article making similar points that mediation is replacing arbitration, see Jacqueline Nolan-Haley, *Mediation: The "New Arbitration"*, 17 HARV. NEGOT. L. REV. 61, 64 (2012) ("Lawyers generally control the mediation process, often preferring evaluative rather than facilitative models.").

important to make sure that both clients and counsel agree in advance to more evaluative techniques like mediator proposals. The danger is that mediators will progress from authoritative to authoritarian as more evaluative techniques become more commonly used.

If mediators are going to embrace and consider a more deliberate approach to using evaluative mediation techniques, then it is worth looking at the advice of mediators who expressly promote their use. In Michigan, for example, the State Bar Dispute Resolution Section hosts a yearly advanced mediation summit in which trainers are brought in for a day-long training session. The 2019 trainer, Dwight Golann, spent much of his training looking at the use of evaluative techniques and counseling mediators on how to use them effectively. Golann warned mediators to avoid their own “judgmental overconfidence”: people’s tendency to be unrealistically confident in their ability to predict uncertain outcomes.<sup>123</sup> He suggested that mediators be very clear about what kinds of opinions they are giving to parties, and that mediator proposals should be based on an assessment of what might lead to settlement in the given situation, rather than what the mediator thinks is “fair” or “the value of the case in court.”<sup>124</sup>

One of the most detailed treatments of an evaluative approach to mediation is James C. Freund’s book *Anatomy of Mediation*.<sup>125</sup> Freund posits that while there are oftentimes opportunities to expand the pie à la *Getting to Yes*, there are also some disputes that are simply “one-shot dollar disputes” that call for a more “activist and judgmental” approach by the mediator.<sup>126</sup> Freund requires that parties agree in advance of the mediation to allow him to make a Proposed Resolution of Dispute (the “PROD”) if they do not reach a settlement during their mediation. He bases his PROD on his perceived settlement value.<sup>127</sup> In delivering his PROD, Freund takes a week or two after a mediation has failed to settle and then gives the same written proposal to both parties. However, he calls both sides separately and offers reasoning specifically designed to persuade each side, starting with the merits of that side’s case and then moving on to the numbers, selling that side on his number and explaining how he will sell the number to the other side.<sup>128</sup> Freund’s is a well-thought-out system that has some quirks relative to typical mediation practice—he does not carry numbers back and forth during the mediation, for example—but he provides an excellent explanation of how an evaluative mediator comes to a number and attempts to convince parties to agree to it.<sup>129</sup>

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123. Erin R. Archerd, *Professor Dwight Golann Tackles Evaluation and Disappointment in Mediation*, 27 MICH. DISP. RESOL. J. 10 (2019).

124. *Id.* at 11 (stating that the mediator should give the same assessment to both sides “and hold the parties to making a firm yes/no answer on the mediator’s proposal in private . . . [f]inally, mediators should give clear deadlines for responding to a mediator’s proposal.”).

125. JAMES C. FREUND, *ANATOMY OF A MEDIATION: A DEALMAKER’S DISTINCTIVE APPROACH TO RESOLVING DOLLAR DISPUTES AND OTHER COMMERCIAL CONFLICTS* (2012).

126. *Id.* at 51–63. He continues his critique of *Getting to Yes* later in the book: “I find that in most dollar disputes, when you look beneath the monetary positions a party makes, all you find are other, somewhat more reasonable amounts of dollars. What the *Getting to Yes* people sometimes seem to ignore is that these dollars are the real interests for most businesspeople. Money forms the principal measuring stick of success or failure in the world of commerce—it’s how the players keep score.” *Id.* at 135.

127. *Id.* at 71–73, 170 (“My method of arriving at this non-binding determination is not as an arbitrator might make an award, but on a compromise basis appropriate to a mediation.”).

128. *Id.* at 176–77.

129. *Id.* at 119.

As the legal system's embrace of evaluative mediation widens, a look at a recently proposed model from Israel, "authority-based mediation," might be eye-opening and provide a view of evaluative mediation taken to its most legalistic extreme. The authors of *Authority-Based Mediation* view their approach as re-establishing mediation in the legal sphere and increasing its appeal to lawyers.<sup>130</sup> They describe authority-based mediation as an expressly court-connected process in which difficult cases with represented parties are referred by a court to mediation that uses "authoritarian elements that correspond with the dynamic that typifies many courtroom encounters where a judge aims to bring the parties to an agreement, even though he has no authority to make a judgment."<sup>131</sup> The authors seem to feel that mediators are unnecessarily critical of lawyers and have lost sight of the fact that "the main goal of this mediation process is to reach an agreement."<sup>132</sup> At the same time, the authors emphasize that mediators must take great care to preserve party autonomy and suggest that holding the mediations in the presence of lawyers, "who could reflect to the parties the suggested reality and the legal analysis provided by the mediator," sufficiently protects autonomous decision-making by parties.<sup>133</sup>

Perhaps in response to anticipated critiques that this model will raise the threat of private disregard for the rights of social minorities, the authors note that because the mediator can lead parties in a normative dialogue that addresses issues of law and justice rather than the parties' personal interests, the authority-based mediation model is better equipped to incorporate social values.<sup>134</sup>

Beyond the fact that this model would seem to run afoul of the requirement in many U.S. jurisdictions that the mediator not give legal advice, it is unsettling to see a mediation process that so fully embraces the mediator as private judge. At what point does an appropriate use of authority cross the line into authoritarianism? While mediated settlement agreements have somewhat greater scope for appeal than an arbitration award, they are still far from easy to overturn. This feels like the very sort of practice Delgado and other critical theorists decried and warned about early in the adoption of mediation by courts; it takes what should be the formal process itself, court, and privatizes it without necessarily providing safeguards for bullying by the mediator.<sup>135</sup>

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130. Amos Gabrieli, Nourit Zimerman, & Michal Alberstein, *Authority-Based Mediation*, 20 CARDOZO J. CONFLICT RESOL. 1, 8 (2018) (describing the model as "more adaptable to the legal, normative, adversarial sphere").

131. *Id.* at 13. The authors describe its use in "cases that were at the appeal stage, cases that involved many parties, where any decision may lead to additional claims toward new parties, [and] cases that were conducted in courts for many years but have not yet reached a final decision." *Id.* at 20.

132. *Id.* at 11; Menkel-Meadow, *supra* note 64 (the authors seem to be contrasting the views of Nancy Welsh and Carrie Menkel-Meadow on the utility of lawyers in dispute resolution, but the articles they cite are from very different time periods and contexts in each of Welsh's and Menkel-Meadow's careers).

133. Gabrieli, Zimerman, & Alberstein, *supra* note 130, at 16. The approach seems to be: first convince the lawyers that the mediator's legal analysis is correct, and then the lawyers become "the mediator's long arm" to convince parties to settle. *Id.* at 17.

134. *Id.* at 30, 45-46. The authors also seem to acknowledge that many mediators would not consider this approach mediation at all. *Id.* at 39.

135. *See, e.g.*, Richard Delgado, *Fairness and Formality: Minimizing the Risk of Prejudice in Alternative Dispute Resolution*, 1985 WIS. L. REV. 1359 (1985). The same line of critique was the subject of a 2017 SMU Symposium, which can be found in Volume 70, Issues 3 and 4 of the SMU Law Review (2017).



Mediators have struggled, and will continue to struggle, to convince lawyers that mediation is about more than getting parties to pick a dollar figure in the middle.<sup>136</sup> Yet, that is the mediator's job: to bring a different approach to resolving a conflict than what parties can expect from the litigation path. Mediator Jerry Weiss cautions mediators not to ignore the intimate, human elements of mediation because "[t]he 'fighters' in the contest, usually lawyers, are trained to battle and thereby run the risk of losing sight of those elements."<sup>137</sup> As mediator Brigit Sambeth Glasner puts it, "it needs some courage on the part of the mediator to lead the parties and their attorneys through a creative process whether the discussion about money is only its very final act."<sup>138</sup>

Comments such as these suggest a reason for the increasing emphasis on evaluative mediation in Michigan and elsewhere. The stakeholders choosing mediation and making decisions about what style of mediation to use—whether they are representing clients or serving as judge over the lawsuit as a whole—are most often lawyers, themselves "trained to battle" and comfortable in a system based on argument and evaluation, rather than consensus-building and collaborative solutions.<sup>139</sup> Of course, these stakeholders are likely to prefer evaluative processes unless they can be educated about and become more familiar with the benefits that facilitative processes can have (benefits that often bring little to their bottom lines in a given case).

Michigan's effort to get rid of case evaluation thus presents a defining question to the ADR community. Two generations into the widespread use of mediation in the United States, are we throwing in the towel on the project of persuading the legal system that less-authoritarian models are possible, even within the court systems? Are trends toward the privatization of justice leading us to greater comfort with, and desire for, mediators that act as private judges? More importantly, do we have the will to do anything about that?

Mediators may say that their responsibility is to give the clients what they want. A more nuanced articulation might be, "Parties hire me to help them settle their dispute, and so long as all the parties are on board for what I'm doing as a mediator and the ultimate decision whether to settle is voluntary, then I'm being the best mediator I can be for the parties." This brings us back to fundamental definitions of mediation. Should Michigan and other jurisdictions experiencing a rise in evaluative mediation split mediation into facilitation (as mediation is still called in some Michigan courts) and early neutral case evaluation rather than lump more and more into mediation? This would allow for more clarity in what process a neutral is using with parties, and it might even allow for better study of the differences in the methods being used with parties, along the lines of the case evaluation and mediation studies that have already been done in Michigan. This might also be achieved by preserving facilitation/facilitative mediation and encouraging greater use of mini-trials, at least for more complex legal disputes.

But is it too late? With so many mediators consciously or unconsciously using evaluative techniques in mediation, are attempts to more clearly delineate between a facilitative mediation process and an evaluation process doomed to failure?

136. See, e.g., Hal Abramson et al., *Are Legal Disputes Just About the Money? Answers from Mediators on the Front Line*, 19 CARDOZO J. CONFLICT RESOL. 1, 12 (2017).

137. *Id.* at 6.

138. *Id.* at 9.

139. Nolan-Haley, *supra* note 122, at 82–83.

Mediation is the core of the ADR movement.<sup>140</sup> If we do not take the opportunity to preserve non-evaluative styles of mediation, those styles may be lost.

C. “*Good Mediation?*”: *Empirical Data is Still Inconclusive*

Court-annexed ADR is now in its second or third generation in U.S. courts. Twenty years ago, around the same time that mediation was added to the court rules in Michigan, researchers and courts were taking a serious look at ADR programs and trying to tease apart the various goals and methods of ADR procedures.<sup>141</sup> The Riskin Grid ignited controversy in the field for its suggestion that more evaluative styles of mediation were part of the typical mediator's practice.<sup>142</sup> Scores of researchers pushed back on the notion that evaluative mediation even *was* mediation.<sup>143</sup> While there had not been much empirical research comparing mediation styles or techniques, what research did exist suggested that court-connected mediation, regardless of the model espoused, was generally evaluative, that litigants had less of a role in the mediation than attorneys, and that attorneys' satisfaction with the process was linked to settlement, regardless of what means were used to reach it.<sup>144</sup>

The data today is still unclear as to whether evaluative techniques lead to better results. There is also still debate about how to gauge “better” in the context of a mediation. Generally speaking, studies of mediation effectiveness look at some combination of parties' satisfaction with the process (procedural measures) and, if possible, the results the parties receive (substantive measures).<sup>145</sup> A 2017 American Bar Association (“ABA”) meta-study on mediator techniques looked at forty-seven articles and research reports that the ABA task force deemed to “have sufficient findings regarding the action-outcome link.”<sup>146</sup> Its results about mediator techniques and their outcomes tended to support a more facilitative approach, though only modestly. The ABA study grouped mediation outcomes into three categories:

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140. See, e.g., Deborah R. Hensler, *In Search of “Good” Mediation: Rhetoric, Practice, and Empiricism*, in HANDBOOK OF JUSTICE RESEARCH IN LAW 231 (Joseph Sanders & V. Lee Hamilton eds., 2001) (“At the core of the ADR movement is the promise of *mediation*.”).

141. *Id.*

142. Stempel, *supra* note 114. For those reading about this controversy for the first time, in his “Grid for the Perplexed,” Len Riskin laid out an X-axis of “problem-definition” from narrow to broad and a Y-axis of the mediator's role from facilitative to evaluative. Leonard L. Riskin, *Understanding Mediators' Orientations, Strategies, and Techniques: A Grid for the Perplexed*, 1 HARV. NEGOT. L. REV. 7, 7 (1996). The Y-axis inspired the most controversy and led to a number of conferences organized around whether evaluative techniques could even be considered proper mediation. See, e.g., Stempel, *supra* note 114; Lande, *supra* note 25; Carrie Menkel-Meadow, *When Dispute Resolution Begets Disputes of its Own: Conflicts Among Dispute Resolution Professionals*, 44 UCLA L. REV. 1871 (1997); Lela P. Love, *The Top Ten Reasons Why Mediators Should Not Evaluate*, 24 FLA. ST. U. L. REV. 937, 946 (1997).

143. Love, *supra* note 142, at 939.

144. Hensler, *supra* note 141, at 255.

145. Results are not just numbers, but represent whether or not the parties reach a mediated settlement and the durability of the agreement, meaning whether or not the parties actually follow through on the commitments made in the mediated settlement.

146. A.B.A. Section of Dispute Resolution, *Report of the Task Force on Research on Mediation Techniques*, A.B.A. 9 (June 12, 2017), [https://www.americanbar.org/content/dam/aba/administrative/dispute\\_resolution/med\\_techniques\\_tf\\_report.pdf](https://www.americanbar.org/content/dam/aba/administrative/dispute_resolution/med_techniques_tf_report.pdf).

1) settlement and related outcomes, including joint goal achievement, personalization of the mediated agreement, reaching a subsequent consent order, or filing post-mediation motions or actions; 2) disputants' relationships or ability to work together and their perception of the mediator, the mediation process or the outcome; and 3) attorneys' perceptions of mediation.<sup>147</sup>

It then grouped study results into three categories—negative, no effect, or positive—for various techniques. For example, does a mediator offering suggestions (i) decrease settlement rates, (ii) have no effect on settlement rates, or (iii) increase settlement rates?

Broadly speaking, the ABA meta-study suggests mediators pressuring disputants to settle either had no effect or increased settlement rates, but may lead to decreased settlement values and more negative impressions of mediation.<sup>148</sup> More evaluative methods like offering recommendations, suggestions, evaluations, or opinions also had no effect or increased settlement and had more mixed to favorable impacts on outcomes and perception of the process.<sup>149</sup> Looking specifically at times when “evaluation in various forms” was used, the studies examined found that attorneys were especially pleased with the process.<sup>150</sup>

While the ABA task force found few studies looking at the effectiveness of more facilitative techniques, like mediators eliciting suggestions or solutions from the parties, the studies it did review suggested that more facilitative techniques increase settlement rates and decrease parties' need to return to court to enforce the settlements.<sup>151</sup> The Maryland Administrative Office of the Courts commissioned studies in both general civil and family law areas, which were included in the ABA study. The Maryland studies remain some of the strongest sources of support for the use of elicitive or eliciting techniques, which includes “asking participants what solutions they would suggest, summarizing the solutions being considered, and checking in with participants to see how they think those ideas might work for them.”<sup>152</sup>

Overall, the ABA task force felt that more relational techniques like building trust (including the use of pre-mediation caucuses) and eliciting disputants' suggestions or solutions held greater potential for increasing both settlement and disputants' satisfaction.<sup>153</sup> Conversely, the task force issued cautionary notes about processes that involve recommended settlement options or case evaluations, noting

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147. *Id.* at 2.

148. *Id.* at 15.

149. *Id.* at 21. In particular, settlement was more likely in civil cases where mediators recommended a settlement than when they did not.

150. *Id.* at 30. Much of the data showing support for at least some evaluative techniques comes from Roselle Wissler's 2002 study. See Roselle L. Wissler, *Court-Connected Mediation in General Civil Cases: What We Know from Empirical Research*, 17 OHIO ST. J. ON DISP. RESOL. 641 (2002).

151. *Report of the Task Force on Research on Mediation Techniques*, *supra* note 146, at 31.

152. *Id.* (citing Admin. Office of the Courts, *What Works in District Court Day of Trial Mediation: Effectiveness of Various Mediation Strategies on Short- and Long-Term Outcomes*, MD. JUDICIARY (2016), <https://mdcourts.gov/sites/default/files/import/courtoperations/pdfs/districtcourtstrategiesfullreport.pdf>). Even the MACRO study, however, found that mediators offering opinions and solutions did not relate to disputant perceptions of the mediation process or the mediator and that only when mediators had offered opinions and solutions to a greater degree did disputants express less satisfaction with the outcomes when surveyed several months after the mediation.

153. *Report of the Task Force on Research on Mediation Techniques*, *supra* note 146, at 51.

that such evaluative processes could negatively affect disputants' relationships and their perceptions of the mediation.<sup>154</sup>

Even so, the task force's conclusions were tentative at best. Thus, twenty years into the debates about whether facilitative or evaluative techniques are "better" in mediation, the data is still inconclusive. The fact that we still need more empirical data on effectiveness of various techniques suggests that there is some value in maintaining a facilitative model of dispute resolution—or, at a minimum, that we should hesitate before getting rid of facilitative processes on grounds that parties prefer evaluative options.

## VI. RECOMMENDATIONS

Courts should continue to promote processes that provide parties with informed alternatives to litigation. If Michigan removes sanctions from case evaluation, then stakeholders should consider what will rise to take case evaluation's place.

Attorneys, in particular, like the anchoring effect that having an independent party's opinion can bring to settlement negotiations. For attorneys seeking a number around which to negotiate, and perhaps a neutral scapegoat to point to in talking clients down from unrealistic expectations, early neutral evaluation would be a good alternative. This might be especially attractive to court programs currently using case evaluation to triage high volumes of tort cases. For counsel who like the idea of receiving an opinion on the merits of their case, arbitration variants or mini-trials might afford a similar chance to present arguments and have a neutral or mock jurors weigh-in on the persuasiveness of each side's case. These options, however, may be cumbersome for courts to provide and less accessible for many parties. For those attorneys seeking to promote settlement through the threat of sanctions, greater use of offers of judgment provides an alternative to case evaluation's sanctions. However, the rise of gamesmanship by parties looms large, and judges need to have considerable discretion in enforcing the offer of judgement rule in a way that encourages good faith negotiations by the parties.

Sometimes parties may want to discuss options without having a third party weigh in on their case. For those who want an opportunity to explore settlement options, and especially those who would like to do so early in their case, mediation is attractive. Users should be informed about the different styles of mediation, and courts should continue to promote facilitative mediation as a non-evaluative alternative to the many evaluative ADR options available to parties. Courts should also educate and direct parties to data sources that will allow them to draw a more informed vision of settlement numbers. Having numbers at hand will help parties independently settle their cases or better equip them to participate in the ADR processes discussed above. Finally, neutrals, especially mediators, should be trained to have a greater awareness of evaluative techniques and how to use data analytics in helping parties settle cases. It does no good to ignore the fact that many parties will desire these services, but it does much good to be deliberate when using them.

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154. *Id.* at 54.

## VII. THE FUTURE OF ADR: THE REVOLUTION CONTINUES

This Article is meant to be a celebration of the panoply of processes available to disputants in the United States, generally, and the state of Michigan, in particular. It advocates for offering a broad variety of procedures, rather than using a one-size-fits-all approach. One of the approaches can and should be litigation. Likewise, one of the approaches can and should be mediation. Legal stakeholders—courts, ADR providers, lawyers, and the people they serve—should work to preserve some of mediation’s important distinctions from more evaluative alternatives.

Over the years, attorneys’ and judges’ perceptions of the effectiveness of case evaluation have dropped along with the number of plaintiffs accepting case evaluators’ awards. At least among lawyers, this dissatisfaction seems to be tied to the lack of persuasiveness of the case evaluators’ awards. Perhaps this discontent with case evaluation may have common roots with the discontent over the growing use of arbitration, particularly by private persons rather than businesses, as a means of resolving disputes. In an era in which well-trained and experienced neutrals are plentiful, parties resent being forced into a court alternative in which they do not have a significant degree of autonomy over the decision-making process. Although case evaluation is a non-binding process, it involves a similar loss of autonomy by parties to arbitration. Indeed, it looks very similar in practice to an arbitration, in which there are abbreviated briefings and a panel renders a decision.

While evaluative mediation still provides parties with decision-making autonomy, it strips the mediation process of a great deal of self-determination. Making mediation more evaluative, whether by court rule or local practice, runs the risk of creating the same complaints about mediators as are currently being leveled at case evaluators. Vanishing trial experience affects lawyers and lawyers-turned-mediators alike. Once they receive enough proposals from enough mediators, attorneys are likely to find that their court-appointed neutrals are not expert enough in the subject area.

In the early 2000s, Deborah Hensler made the observation that evaluative mediation looks more like a judicial settlement conference but that facilitative mediation “espouses more revolutionary goals.”<sup>155</sup> Despite the jokes about “Michigan Mediation,” Michigan has kept the facilitative mediation revolution going for one more generation. As an idealist, and as someone who believes in the power of a model that deliberately and consciously rejects an authoritarian neutral, I would encourage Michiganders, and ADR programs across the country, to keep promoting mediation as a process in which the mediator’s primary goal is to help parties uncover interests and create value.

If mediation is meant to be a true alternative to litigation, then it needs to be more than private judging. As one of the participants in Michigan’s 2018 ADR Summit put it, “If mediation is evolving into traditional settlement conferences, what value would mediation hold in the future?”<sup>156</sup> There is room within the spectrum of ADR offerings for processes like early neutral evaluation to give parties a dollar figure around which to negotiate. There is room for preserving sanctions

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155. Hensler, *supra* note 140, at 231.

156. 2018 ADR Summit Meeting Summary, *supra* note 68, at 3.

through offers of judgment. Case evaluation does not need to become evaluative mediation.

This discussion is part of a broader one about the direction that dispute resolution, particularly mediation, is taking in the United States. As Doug Yarn recently put it at the *Appreciating Our Legacy* conference at Pepperdine, the field of ADR as a whole has shifted its ethos from relational to transactional.<sup>157</sup> This shift is reflected in approaches like James Freund's, which identifies two key difficulties in resolving disputes: the first is emotional and the second is "assessing the litigation alternative."<sup>158</sup> Freund places greater weight on this second difficulty, and his preferred approach of evaluative mediation flows from it. Has this shift occurred because mediation has been ineffective in addressing relational concerns? Is this the inevitable result of bringing processes like mediation into the legal realm? The answers to both of these questions can be "no." Mediation can still address relational concerns, even in seemingly "money only" disputes. Legal stakeholders can still create spaces for people to talk about issues beyond legal rights and dollar values, and mediation offers an opportunity to try to address things like inevitable emotional issues.

Today's lawyers are capable of understanding and embracing the differences among ADR processes. Every year, a new crop of would-be lawyers in law school across the United States take an ADR class because they say they want to be problem-solvers for their clients. Many lawyers today are excellent negotiators, well-versed in interest-based negotiation theory and the many forms of ADR.

Michigan has a well-coordinated and sophisticated ADR landscape. It is already a leader in many forms of ADR, as with its statutory mandate that schools consider restorative practices in their disciplinary procedures, which has led to the growth of restorative circles and conferences in schools throughout the state over the past five years.<sup>159</sup>

There is a pleasing simplicity in making mediation the one-size-fits-all alternative to litigation. Yet, practicing neutrals are often used to wearing many hats, from arbitrator to mediator to facilitator and various points in between, or to consciously choosing to stick primarily or predominately with one process, such as mediation. Preserving mediation as a more facilitative process will help those mediators who choose to practice in that manner. Offering other evaluative ADR processes like early neutral evaluation will allow neutrals who so choose to market themselves as both evaluators and mediators.

This Article is not intended to be Pollyannaish about the superiority of facilitative mediation over other forms of ADR, but it is meant to be bullish about giving facilitative mediation a chance as a type of mediation in the United States. There are many forms of evaluative ADR that can serve the purpose of setting clients' expectations and giving parties a figure around which to negotiate. Soon, there will be technological tools that will give attorneys an even better sense of these numbers than a human being ever could.

This may be our field's last chance to take a normative and empirical stand for facilitative mediation in the United States, especially with regard to commercial disputes. We do not need to make mediation evaluative for it to continue to serve

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157. *Appreciating Our Legacy & Engaging Our Future: An International Conference for Dispute Resolution Teachers, Scholars, & Leaders*, PEPPERDINE SCH. OF LAW (June 18–19, 2019).

158. FREUND, *supra* note 125, at 170.

159. MICH. COMP. LAWS ANN. § 380.1310(c) (West 2017).

a valuable role as an alternative to litigation. By preserving mediation as a facilitative process, Michigan, which has shown a continued commitment to empirical examination of its ADR processes, can play a part in adding to our empirical knowledge about the effectiveness of facilitative mediation.