

**UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MICHIGAN**

**CASE EVALUATION
PROGRAM DESCRIPTION**

Definition Case evaluation affords litigants an ADR process patterned after that extensively used in the state courts of Michigan. *See* MICH. COMP. LAWS §§ 600.4951-.4969; MICH. CT. R. 2.403. Case evaluation principally involves establishment of the settlement value of a case by a panel of three attorneys.

Authorization W.D. Mich. LCivR 16.5

THE CASE EVALUATORS

List of Case Evaluators The ADR Administrator maintains current lists of case evaluators certified by practice area for the Northern and Southern Divisions and updates the lists from time to time in order to maintain the minimum number of evaluators established by the Court. The ADR Administrator appoints evaluators for standard track case evaluations from these lists.

Certification of Case Evaluators Standard Track - A certified case evaluator:

- 1) is a member in good standing of the Bar of this Court with ten (10) years practice experience;
- 2) agrees to serve *pro bono* on at least one case per year, and
- 3) has acted as a case evaluator three times, in either state or federal court, in a particular substantive area in the previous five (5) years to be certified in that area.

Blue Ribbon Track: Not certified by the Court.

Disqualification Rules No person serves as a case evaluator in any action in which any of the circumstances specified in 28 U.S.C. § 455 exist, or, in good faith, is believed to exist.

Immunity Case evaluators are entitled to quasi-judicial immunity as officers of the Court.

CASE SELECTION

Eligible Cases All civil cases in which damages are sought, except social security cases, are eligible for case evaluation. Certain tort cases in which the rule of decision is supplied by Michigan law must be submitted to case evaluation, unless the parties have agreed to use voluntary facilitative mediation.

Referral Method and Notice to Parties

In preparation for the initial Rule 16 scheduling conference, all parties are required to discuss the use of alternative dispute resolution and indicate their preference in the joint status report. Qualified cases may be referred to case evaluation with or without the parties' consent.

Selection of Case Evaluators

Standard Track: Case evaluators are selected by the ADR Administrator.

Blue Ribbon: Case evaluators are selected by the parties.

Compensation of Evaluators

A. Standard Panel: Within seven (7) days after the mailing of the notice of case evaluation hearing, each plaintiff and each defendant pays each case evaluator the sum of one hundred dollars (\$100.00) for a total of three hundred dollars (\$300.00) per party. Proof of payment must be filed with the ADR Administrator upon payment.

1) Multiple parties, derivative claims: Multiple parties with derivative claims (e.g., husband/wife or parent/child) are treated as one party. Multiple parties, non-derivative claims: Each party shall pay the sum of three hundred dollars (\$300.00) for each award. However, in those cases in which an attorney certifies at the time of paying the case evaluation fees that the attorney represents multiple parties without conflict of interest and that there presently exists a substantial unity of interest between the parties on all issues, the parties may pay one fee. The case evaluation may include one lump sum award or separate awards to these parties, or a combination thereof, in the panel's discretion.

2) Multiple claims by members of a single family: When the plaintiffs are members of a single family, they may elect to treat the case as involving one claim, with the payment of one fee and the rendering of one lump sum award to be accepted or rejected. If no such election is made, a separate fee must be paid by each plaintiff, and the case evaluation panel will then make separate awards for each claim.

3) A party failing to pay fees within the time designated must pay an additional fee of fifty dollars (\$50.00) per evaluator. If any evaluator waives this fee, it is paid to the Court instead.

B. Blue Ribbon Panel: Evaluators are paid their normal hourly rate, to be assessed in as many equal parts as there are separately represented parties, or as otherwise agreed by the parties at the time the case is submitted to evaluation. The evaluators bill counsel directly.

C. Noncompliance: In the event of noncompliance, a case evaluator may petition the Court for an order directing payment of fees.

Chairperson

Each case evaluation panel has a chairperson. The ADR Administrator chooses the chairperson for standard track case evaluation; the attorneys agree on a chairperson for Blue Ribbon mediation. The duties of the chairperson are:

- A. presiding at the case evaluation session to ensure a fair and orderly presentation;
- B. filing with the ADR Administrator and serving upon all parties the evaluation award, with proof of service; and
- C. in Blue Ribbon evaluation only, coordinating the scheduling of hearings and deciding whether a request for an adjournment should be granted and, if so, coordinating the rescheduled evaluation session with the other evaluators and counsel, and filing and serving the notice thereof.

Timing for the Case Evaluation Hearing

Within a time frame fixed by the Court:

- A. Standard Track: Plaintiff’s counsel coordinates a specific time, date and place for the case evaluation hearing. The hearing is held in a suitably neutral setting (e.g., at the office of an evaluator or in the courthouse). Plaintiff’s counsel files with the ADR Administrator and serves upon all parties the notice of hearing. Thereafter, adjournments of the hearing are by unanimous stipulation only.
- B. Blue Ribbon Track: The chairperson in consultation with the parties and evaluators, arranges the date, time and place of the case evaluation hearing. The chairperson files with the ADR Administrator and serves upon all parties the notice of hearing. Thereafter, the chairperson may grant an adjournment of the case evaluation session for good cause, within the time limit set by the Court. The chairperson is responsible for coordinating the scheduling of the original or adjourned session and for filing with the ADR Administrator and serving a notice of the date and time thereof.
- C. Any notices of hearing or adjournment may be made by e-mail.

Timing and Nature of Submissions Required Before the Case Evaluation Session

- A. Standard Track: Not less than fourteen (14) days before the evaluation session, each party provides each evaluator with a written evaluation statement, with copies to all counsel and a proof of service to the ADR Administrator. The evaluation statement must not exceed twenty (20) pages, and any attachments to the brief must not exceed twenty (20) pages. Failure to submit such documents in a timely manner subjects the offending party or attorney to a one hundred fifty dollar (\$150.00) penalty.
- B. Blue Ribbon Track: There are no limits for the filing of case evaluation briefs or their length, unless agreed to in writing by all parties.

Status of Discovery and Motions During Case Evaluation Process

Any case referred to case evaluation continues to be subject to management by the judge to whom it is assigned. Unless otherwise ordered, parties are not precluded from filing pretrial motions or pursuing discovery.

Procedure at the Case Evaluation Hearing

- A. The parties may attend but do not actively participate. If scars, disfigurement, or other conditions exist, that may be demonstrated to the

panel by a personal appearance. However, no testimony is taken or permitted of any party.

- B. The rules of evidence do not apply before the case evaluation panel. Factual information having a bearing on damages or liability must be supported by documentary evidence, if possible.
- C. Oral presentation:
 - 1) Standard Track: Each attorney is limited to 30 minutes oral presentation.
 - 2) Blue Ribbon Track: Oral presentations are not limited.

Panel’s Decision

- A. At the conclusion of the hearing, the panel will make a written evaluation and personally serve a copy upon each party. In an extraordinary case, where the award cannot reasonably be rendered at the conclusion of the hearing, the evaluators in a Blue Ribbon evaluation may render their written evaluation within seven days of the conclusion of the hearing. In such circumstances, the chairperson is responsible for serving a copy on each party, with proof of service. The original evaluation is forwarded to the ADR Administrator. This document may not be electronically filed.
- B. The evaluation must include a separate award as to the plaintiff’s claim against each defendant and as to each cross-claim, counterclaim, or third-party claim that has been filed in the action. All such claims filed by any one party against any other party are treated as a single claim.
- C. The evaluation may not include a separate award on any claim for equitable relief, but the panel may consider such claims in determining the amount of an award.
- D. In a tort case to which MICH. COMP. LAWS § 600.4915(2) or MICH. COMP. LAWS § 600.4963(2) applies, if the panel unanimously finds that a party’s action or defense as to any other party is frivolous, the panel must so indicate on the evaluation. For these purposes, an action or defense is “frivolous” if, as to all of a plaintiff’s claims or all of a defendant’s defenses to liability, at least one of the following conditions is met:
 - 1) The party’s primary purpose in initiating the action or asserting the defense was to harass, embarrass, or injure the opposing party;
 - 2) The party had no reasonable basis to believe that the facts underlying that party’s legal position were in fact true; or
 - 3) The party’s legal position was devoid of arguable legal merit.
- E. In an action alleging medical malpractice to which MICH. COMP. LAWS § 600.4915 applies, the evaluation must include a specific finding that:
 - 1) there has been a breach of the applicable standard of care;

- 2) there has not been a breach of the applicable standard of care; or
- 3) reasonable minds could differ as to whether there has been a breach of the applicable standard of care.

Acceptance or Rejection of the Case Evaluation

- F. Each party must file with the ADR Administrator a written acceptance or rejection of the panel’s evaluation within 28 days after service of the panel’s evaluation. If there are separate awards on multiple claims, each party must either accept or reject the evaluation in its entirety as to each opposing party. The failure to file a written acceptance or rejection within 28 days constitutes rejection.
- G. There must be no disclosure of a party’s acceptance or rejection of the panel’s evaluation until the expiration of the 28-day period, at which time the ADR Administrator sends a notice indicating each party’s acceptance or rejection of the panel’s evaluation.
- H. In case evaluations involving multiple parties the following rules apply:
 - 1) Each party has the option of accepting all of the awards covering the claims by or against that party or of accepting some and rejecting others. However, as to any particular opposing party, the party must either accept or reject the evaluation in its entirety.
 - 2) A party who accepts all of the awards may specifically indicate that he or she intends the acceptance to be effective only if all opposing parties accept, or only if the opposing parties accept as to specified coparties. If such a limitation is not included in the acceptance, an accepting party is deemed to have agreed to entry of judgment or dismissal as provided below [Effect of acceptance of evaluation, ¶A] as to that party and those of the opposing parties who accept, with the action to continue between the accepting party and those opposing parties who reject.
 - 3) If a party makes a limited acceptance under the preceding provision [¶C. 2 above], and some of the opposing parties accept and others reject, for the purposes of the cost provisions [Rejecting party’s liability for costs, below] the party who made the limited acceptance is deemed to have rejected as to those opposing parties who accept.

Effect of Acceptance of Evaluation

- A. If all of the parties accept the panel’s evaluation, judgment will be entered in accordance with the evaluation unless the amount of the award is paid within 28 days after notification of the acceptances, in which case the Court dismisses the action with prejudice. The judgment or dismissal is deemed to dispose of all claims in the action and includes all fees, costs, and interest to the date it is entered.

**Proceedings after
Rejection**

- B. In a case involving multiple parties, judgment or dismissal is entered as to those opposing parties who have accepted the portions of the evaluation that apply to them.
- A. If all or part of the evaluation by the panel is rejected, the action proceeds to trial as to all remaining claims.
- B. If the panel finds a party's claim or defense to be frivolous, that party may request that the Court review the panel's finding by filing a motion within 14 days after the ADR Administrator sends notice of the rejection.
 - 1) The motion must be submitted to the Court on the case evaluation summaries and documents that were considered by the case evaluation panel. No other exhibits or testimony may be submitted. However, oral argument on the motion is permitted.
 - 2) After reviewing the material submitted, the Court determines whether the action or defense is frivolous.
 - 3) If the Court agrees with the panel's determination, the provisions below [C.] apply, except that the bond must be filed within 28 days after the entry of the Court's order determining the action or defense to be frivolous.
 - 4) The judge who hears a motion under this provision may not preside at a nonjury trial of the action.
- C. Unless the finding is overturned by the Court, if the panel finds unanimously a party's claim or defense to be frivolous in a tort case governed by MICH. COMP. LAWS 600.4915(2) or MICH. COMP. LAWS §600.4963(2) [Panel's decision, ¶ D.], that party must post a cash or surety bond in the amount of \$5,000 for each party against whom the action or defense was determined to be frivolous.
 - 1) The bond must be posted within 56 days after the case evaluation hearing or at least 14 days before trial, whichever is earlier.
 - 2) If a surety bond is filed, an insurance company that insures the defendant against a claim made in the action may not act as the surety.
 - 3) If the bond is not posted as required, the Court dismisses a claim found to have been frivolous, or enters a default of a defendant whose defense was found to be frivolous. The action proceeds to trial as to the remaining claims and parties, and as to the amount of damages against a defendant in default.
 - 4) If judgment is entered against the party who posted the bond, the bond shall be used to pay any costs awarded against that party by the Court under any applicable law or court rule.

**Rejecting Party's
Liability for Costs**

- D. The ADR Administrator places a copy of the case evaluation and the parties' acceptances and rejections in a sealed envelope for filing with the Clerk of the Court. In a nonjury action, the envelope may not be opened and the parties may not reveal the amount of the evaluation until the judge has rendered judgment.
- A. 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, that party is entitled to costs only if the verdict is more favorable to that party than the case evaluation.
- B. For the purpose of this provision, "verdict" includes 1) a jury verdict, 2) a judgment by the Court after a nonjury trial, and 3) a judgment entered as a result of a ruling on a motion after rejection of the case evaluation.
- C. For the purpose of this provision, a verdict must be adjusted by adding to it assessable costs and interest on the amount of the verdict from the filing of the complaint to the date of the case evaluation, and, if applicable, by making the adjustment of future damages as provided by MICH. COMP. LAWS § 600.6306. After this adjustment, the verdict is considered more favorable to a defendant if it is more than 10 percent below the evaluation, and it is considered more favorable to the plaintiff if it is more than 10 percent above the evaluation. If the evaluation was zero, a verdict finding that a defendant is not liable to the plaintiff is deemed more favorable to the defendant.
- D. In cases involving multiple parties, the following rules apply:
- 1) Except as provided below [D.2], in determining whether the verdict is more favorable to a party than the case evaluation, the Court considers only the amount of the evaluation and adjusted verdict as to the particular pair of parties, rather than the aggregate evaluation or verdict as to all parties. However, costs may not be imposed on a plaintiff who obtains an aggregate adjusted verdict more favorable to the plaintiff than the aggregate evaluation.
 - 2) If the verdict against more than one defendant is based on their joint and several liability, the plaintiff may not recover costs unless the verdict is more favorable to the plaintiff than the total case evaluation as to those defendants, and a defendant may not recover costs unless the verdict is more favorable to that defendant than the case evaluation as to that defendant.
 - 3) Except as provided below [J], in a personal injury action, the verdict against a particular defendant is not adjusted by applying that defendant's proportion of fault as determined under MICH. COMP. LAWS § 600.6304(1)-(2).

- E. If the verdict awards equitable relief, costs may be awarded if the Court determines that taking into account both monetary relief (adjusted as provided above [C]) and equitable relief, the verdict is not more favorable to the rejecting party than the evaluation, and that it is fair to award costs under all of the circumstances.
- F. For the purpose of this provision, “actual costs” include only those costs taxable in any civil action. The party entitled to recover actual costs shall be considered the prevailing party for the purpose of determining taxable costs.
- G. Costs shall not be awarded if the case evaluation award was not unanimous.
- H. A request for costs under this provision must be filed and served within 14 days after the entry of the judgment or entry of an order denying a timely motion for a new trial or to set aside the judgment.
- I. In an action governed by MICH. COMP. LAWS § 436.22, if the plaintiff rejects the award against the minor or alleged intoxicated person, or is deemed to have rejected such an award under “Acceptance or Rejection of the Case Evaluation” above, the Court does not award costs against the plaintiff in favor of the minor or alleged intoxicated person unless it finds that the rejection was not motivated by the need to comply with Mich. Comp. Laws § 436.22(6).
- J. A verdict awarding damages for personal injury, property damage, or wrongful death shall be adjusted for relative fault as provided by MICH. COMP. LAWS § 600.6304.
- K. If the verdict is the result of a motion as provided above [B.3], the Court may, in the interest of justice, refuse to award actual costs.

Taxation of Attorney’s Fees as Costs

- A. In diversity tort cases where Michigan law provides the rule of decision, this Court has determined that the state statute and court rules requiring case evaluation form a part of state substantive law. Such tort cases will be referred to mandatory case evaluation, unless the parties unanimously agree to Voluntary Facilitative Mediation. In all tort cases ordered to mandatory case evaluation, the provisions of Rule 2.403 governing liability for costs, including taxation of a reasonable attorney fee for rejection of a case evaluation award, apply.
- B. In any case referred to case evaluation, the parties may stipulate in writing to the taxation of attorney fees as costs pursuant to Mich. Ct. Rule 2.403(O)(6). Such stipulation must be filed before the mediation award is rendered.

Confidentiality

All case evaluation proceedings are considered compromise negotiations within the meaning of Fed. R. Evid. 408.

COURT ADMINISTRATION OF THE CASE EVALUATION PROGRAM

Administrative Structure

The case evaluation program is administered by the Clerk's Office. Problems are initially handled by the ADR Administrator.

Evaluation of the Program

The ADR Administrator gathers data relevant to a careful, in-depth analysis of the efficacy of the program, and reports to the Court on a regular basis. In an effort to gather information, the Court may develop questionnaires for participants, counsel and evaluators, to be completed and returned at the close of the evaluation process. Responses will be kept confidential and not divulged to the Court, the attorneys or the parties. Only aggregate information about the program will be reported.