

Case Evaluation and Mediation Study Released

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Case evaluation has been a topic of interest for years, probably all the way back to its inception in 1985 when it went by the label “mediation.” Not to be confused with present-day mediation, case evaluation was authorized by the Michigan Supreme Court as an alternative dispute resolution tool whereby a panel of three evaluators determine the monetary value of a case. Parties may accept the panel’s evaluation and place the agreement on the record, thereby avoiding additional litigation and the potential of a time-consuming and costly trial.

Case evaluation has its share of proponents and opponents. At issue is its effectiveness. In our circuit court, as is true of most high-volume, urban circuit courts in Michigan, the percentage of parties who accept the value placed on their cases typically hovers in the 15 to 18 percent range. And it’s been this way for years.

Some say that a 15 percent acceptance rate, or one of every seven cases, is not very good. Others say that resolving one of every seven cases, thereby avoiding trial and before running up against time guidelines, is a good thing. I guess case evaluation is like cauliflower – you like it or you don’t.

In 2010 the Supreme Court directed the State Court Administrative Office (SCAO) to study the effectiveness of case evaluation. To help with that endeavor, the SCAO hired a consultant and included civil mediation in the mix since many courts also use mediation.

The research methods used in the study included attorney and judicial surveys, focus groups with civil law practitioners, a review of hundreds of civil case files from several circuit courts in Michigan, and interviews and surveys with court administrators and case management personnel. The period during which data was compiled began in late 2010 and encompassed the first three quarters of 2011.

The consultant’s report was issued to the SCAO in late 2011. It highlights 33 major findings. At the conclusion of this article I will include a link to the full report for those who might be interested, but for now I will list a few of the noteworthy findings.

Michigan is the only state that statutorily requires case evaluation for tort claims and medical malpractice cases. Although not required, most courts in Michigan have historically used case evaluation and mediation for non-tort civil cases, but some courts are moving away from case evaluation and placing greater reliance upon mediation.

Mediation is more effective than case evaluation in resolving cases more quickly. Mediation is cost-effective for both parties and the courts. Mediation resolved 47 percent of the cases included in the study at the time of the mediation. Case evaluation awards were accepted in 22 percent of the cases, but only 2 percent were accepted within 28 days of the evaluation.

Compared with tort cases not subjected to ADR, mediation led to significantly higher settlement rates and reduced the time from filing to disposition. Case evaluation slightly increased settlement rates but increased the time to disposition. For non-tort cases, mediation produced significantly higher settlement rates with no change in the time to disposition. Case evaluation led to moderately increased settlement rates and increased the time to disposition.

Mediation is viewed by attorneys as having several advantages over case evaluation and more often produces desired outcomes. Mediation should be used before case evaluation and before discovery is completed. If case evaluation is used, its effectiveness is enhanced if used after an unsuccessful mediation. Two common criticisms of case evaluation from attorney surveys are a resentment that

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disinterested persons are placing a value on cases and that the time afforded by panels to cases is insufficient.

These are but a few of the findings detailed in the report. In light of these findings, several recommendations were offered. Courts should utilize mediation to a greater extent, especially earlier in the life of a case, and not require case evaluation for those cases for which it is not required by law.

For case evaluation, the penalty for late submission of summaries should be increased. Page limits should be imposed for summaries and attachments. Panels should be required to explain how values are determined. The Supreme Court should issue guidelines for case evaluators. Courts should obtain feedback from attorneys regarding the competence, impartiality and preparedness of case evaluators.

For mediation, parties should have a say in the selection of mediators and be able to opt out for certain reasons. Per-

sons with authority to settle should be required to attend mediations. Other forms of ADR, including case evaluation, should be offered to parties who object to mediation. The confidentiality rule should be fortified so that discussions are not disclosed. The courts should obtain feedback from attorneys regarding the effectiveness of mediators.

It is not known at this time whether the Supreme Court will make changes to case evaluation and mediation rules and procedures based upon the consultant's report. Courts are encouraged by SCAO to consider the recommendations and use their discretion as to whether changes to current practices are appropriate.

Our judges and members of the OCBA are expected to discuss the report and consider whether any of the recommendations should be adopted in Oakland County. Those interested in reading the report in its entirety will find it at <http://courts.michigan.gov/scao/resources/publications/reports/EffectivenessCaseEvalMediation.pdf>.

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Hon. Colleen A. O'Brien of the **Oakland County Circuit Court** is the treasurer of the Michigan Judges Association. The Michigan Judges Association represents Circuit and Court of Appeals judges with the goal of serving the people of Michigan through judicial excellence. Judge O'Brien has been a circuit court judge since 1998 and is currently the presiding judge of the female Adult Treatment Court.



Harvey R. Heller of **Maddin, Hauser, Wartell, Roth & Heller, P.C.** has been appointed by the Board of Commissioners of the State Bar of Michigan to serve a two-year term on the District I Character and Fitness Committee. The committee investigates and makes recommendations regarding the character and fitness of applicants for admission to the State Bar. Mr. Heller is the chair of the firm's

Insurance Coverage and Defense Practice Group.



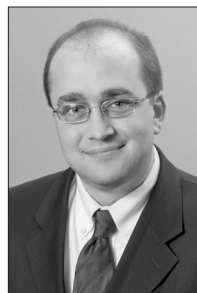
Michael A. Robbins of Bloomfield Hills, was showcased in a recent issue of *Newsweek* magazine as one of the "Top Eight Family Law Attorneys" in the United States. Mr. Robbins practices exclusively in the area of family law and divorce, and has dedicated his career to helping his clients and their families through some of the most difficult experiences in their life.



Jordan S. Bolton has been elected to membership of **Clark Hill PLC**. He works in the firm's Detroit office and is a member of their Litigation Practice Group and a member of the Recruiting Committee. Mr. Bolton has experience in a variety of litigation fields including Articles 2, 3, 4, and 9, business dissolution, collections, construction, consumer disputes, contracts, intellectual property, partnership and shareholder disputes, real estate, torts and warranties.



Mark R. James has been named shareholder at **Williams Willams Rattner & Plunkett, P.C.** Mr. James focuses his practice primarily in corporate law, including mergers and acquisitions, divestitures, commercial and private lending, and related business law matters. He also practices in the areas of commercial and residential real estate transactions and entertainment law.



Thomas W. Werner of **Maddin, Hauser, Wartell, Roth & Heller, P.C.** has been named an associate attorney in the firm's Defense and Insurance Coverage Litigation Group. Mr. Werner specializes in civil litigation, including professional liability, insurance coverage, product liability and commercial litigation, as well as appellate advocacy.