A Taxonomy of ADR

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I. Introduction – The Objectives of this Taxonomy

This *Taxonomy of ADR* was prepared by the ADR Committee of the Macomb County Bar Association for a number of purposes: to identify the rich diversity of ADR techniques that can be employed by the Bench and the Bar and tailored, staged and "right sized" to meet the particular needs of the parties in resolving all or a portion of their dispute; to briefly describe these ADR techniques and suggest the settings in which they might be most effective; and, to encourage creativity by the Bar, the Bench and litigants to explore and experiment with unique forms of ADR that might be mutually shaped by the parties to address their unique needs. In addition, a number of samples, drafting checklists and references are provided for consideration.

When one thinks of ADR, the tendency may be to focus solely on Mediation (MCR 2.411) and Case Evaluation (MCR 2.403). In part, the ADR Committee hopes this *Taxonomy* will effectively counter any such tendency. The ADR tools available to litigants, the courts and those who are contemplating litigation are far more diverse and rich. As stated by Chief Judge John Foster in an article published in the Macomb County *Bar Briefs* (May 2013) identifying a potential project for the MCBA ADR Committee's consideration:

> … the ADR field is rich and diversified and all consumers of ADR practices, including the judiciary, may not have a full appreciation and understanding of all the ADR tools that are available and can be tailored to vastly different types of disputes. For this reason, a compilation of ADR options that are available would be a high priority. Any such compilation would be complimented by a description of the techniques and supplemented with educational programs that would be offered to members of the bench and the bar. In many regards, alternative dispute resolution may be a misnomer. When individuals think of ADR the first thought and sometimes only thought that comes to mind is mediation. While mediation is an extremely powerful tool, it is not the only ADR tool available to the judiciary and consumers to resolve disputes. Perhaps "appropriate" might be a substitute for "alternative" as the ADR field continues to grow. With this evolution in ADR, potential consumers of ADR would be well served by education and training on the various forms of "appropriate dispute resolution" mechanisms and new cutting edge, innovative and effective techniques that are available for consideration.

While the ADR Committee is desirous of responding to Judge Foster's challenge, in many regards developing a *Taxonomy of ADR* techniques is virtually impossible. The field is ever growing and evolving and as soon as a *Taxonomy* is prepared it is outdated as new ADR techniques and methodologies are developed. As such, it is the ADR Committee's intent to periodically update this *Taxonomy*.

The Committee hopes this *Taxonomy of ADR* is helpful to the Bench and the Bar and we welcome all comments, suggestions and thoughts as to how this *Taxonomy* might be improved to best serve the needs of the Bench and the Bar and the litigants who are served by the judiciary.

The ADR Committee would like to thank Judge Foster for his leadership in embracing ADR and the contributions of Richard L. Hurford and Tracy L. Allen in the preparation of this *Taxonomy*.

II. An Overview – Why ADR is So Important

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

The Michigan Court Rules have long provided the judiciary with the authority to order parties to engage in various forms of ADR. MCR 2.410 states:

> All civil cases are subject to alternative dispute resolution processes…[and] ADR means any process designed to resolve a legal dispute in the place of court adjudication, and includes settlement conferences…, case evaluation…, mediation…, domestic relations mediation…, **and other procedures provided by local court rule or ordered on stipulation of the parties.**
>
> ***
>
> **At any time, after consultation with the parties, the court may order that a case be submitted to an appropriate ADR process. More than one such order may be entered in a case** (emphasis added).
>
> See also MCR 5.143.

In addition to the authority provided by the Michigan Court Rules, the judiciary is increasingly facing unprecedented pressure to "do more with less." For example, the Macomb County Circuit Court is understaffed by approximately 4 judges according to guidelines established by the Supreme Court Administrative Office (SCAO). However, strained judicial staffing levels will not exempt the Courts from the pressures of judicial "dashboards" and compliance with the standards SCAO has developed that focus on judicial performance in the processing of a case load. As recently stated by Chief Justice Robert P. Young Jr. in his 2011 Annual Report:

> [The Courts] can and will do more. Performance measurement, long a staple of the private sector, is coming to the Michigan judiciary. The quality of justice is not easy to measure, but other aspects of our work are. How long do we take to resolve cases?… We can measure all this and much more.

With the emphasis on such measurements as "clearance rates" and "case age," understaffed courts are increasingly looking to ADR as one effective methodology to improve their metrics.

The recently established Business Courts will give further impetus to the development of ADR practices. The creation of the Business Courts evidences a major legislative desire for the judiciary to deliver justice in a speedier and more economic fashion. The Business Courts are literally a "legal process improvement" endeavor that challenges the Michigan judiciary to develop and refine those "best practices" that will assist in meeting the goal of delivering 21st century justice in the most cost effective, fair, efficient, and speedy fashion practicable. As stated by the Honorable Christopher Yates, the Circuit Court Judge appointed to preside over the Specialized Business Docket in Kent County, in his message to the public entitled *Specialized Business Dockets: An Experiment in Efficiency*:

> In its landmark ruling in *AON Risk Services Australia Ltd. v. Australian National University*, the High Court of Australia observed that the "efficiency or inefficiency of the courts has a bearing on the health or sickness of commerce." If the state courts in Michigan cannot address commercial disputes in a timely fashion, the commercial well-being of the state necessarily will be impaired. For this reason, a 21st century Michigan economy requires a 21st century court system that can dispense justice

> efficiently in even the most complex commercial cases. The SBD pilot projects in Michigan will move the state forward, clearing the way for commercial enterprises to devote more resources and time to business and less attention to litigation. But beyond that, the SBD pilot projects should benefit all litigants in Michigan by spawning innovations such as electronic case filing and proactive judicial intervention that can be incorporated into all litigation, regardless of its complexity. In other words, the SBD pilot projects will not only assist the business community, but also enhance the State of Michigan as a whole by creating a more efficient, responsive court system. For this, we should all be grateful.

Clearly, one "best practice" highly commended for consideration by the Business Courts is to rely heavily upon various forms of ADR. The Michigan Supreme Court on February 6, 2013, promulgated Standards for the Business Courts that emphasized the importance of ADR as a case management technique:

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

Similarly, the Supreme Court Administrative Office recommended each Business Court set forth "how the business court will utilize early alternative dispute resolution." See *Supreme Court Administrative Office, Model Local Administrative Order 40 (Creation of a Specialized Business Court)*.

In accordance with these directives the Macomb County Business Court Administrative Order and best practices call for the mandatory early exchange of certain designated categories of information and the filing of a joint pretrial statement that sets forth the "proposed settlement discussions and current status; existence of arbitration and mediation agreements, if any; ADR possibilities considered and proposed; and barriers to resolution financial and otherwise." The emphasis on early ADR is certainly no accident.

The embrace of ADR is not only being driven by the judiciary. Over the past two decades, business clients in general have become increasingly frustrated with the cost and delay of traditional litigation and have embraced ADR as an effective tool to reduce the cost of litigation while achieving important business objectives. The entire premise of the Value Challenge issued by the Association of Corporate Counsel (ACC) was to drive a greater alignment between costs and the value of legal services. The former chair of the ACC Value Challenge candidly stated the organization's frustration with the status quo:

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

Although the tone of frustration has been modified, the purpose of the challenge remains the same. Today the ACC describes the rationale of the ongoing Value Challenge initiative as:

> The ACC Value Challenge is an initiative to reconnect the value and the cost of legal services. Believing that solutions must come from a dialogue and a mutual willingness to change, the ACC Value Challenge is based on the concept that law departments can use management practices that enhance the value of legal service spending, and that law firms can reduce their costs to corporate clients and still maintain strong profitability. The ACC Value Challenge promotes the adoption of management practices that allow all participants to achieve key objectives.
>
> www.acc.com/value challenge/

As any litigator who regularly represents business clients will verify, ADR is an important case management practice in the litigator's tool box and an essential part of the litigation process in the effort to bring costs under control in achieving the business client's objectives.

Businesses are not the only disputants who have been frustrated with the costs, delay and acrimony all too often associated with the traditional litigation process. The field of family law has long been an innovator in the use of ADR. The development of "collaborative law" and various Friend of Court protocols are just some of the initiatives that have been developed to find cost effective resolutions that meet the needs of families experiencing one of the most stressful events in life. Perhaps the stress of such disputes explains, in part, the fact that a higher percentage of divorce cases (where minors are involved) are resolved by bench trials when compared to the general civil docket. See *2012 Civil Cases Disposed by Jury and Bench Trials, Supreme Court Administrative Office, 2013*.

At least two additional factors are at play for the litigant's consideration to recommend the use of ADR and evaluating the potential efficacy of various forms of ADR: ethical standards and the recently adopted Mediator Standards.

Lawyers are ethically obligated to recommend alternatives to litigation when an alternative is a reasonable course of action to further the client's interests or the lawyer believes the client would find such alternatives desirable. RI-262 (May 7, 1996). In light of the ADR court rules and the practices of the Business Courts, very early in the litigation process counsel must now affirmatively consider whether ADR is a reasonable course of action, whether the client would find ADR desirable, and, if so, the most appropriate ADR strategy to pursue. To effectively comply with this professional obligation, counsel are well advised to have an understanding of the alternatives to litigation and the advantages and disadvantages of each process and be prepared to recommend and discuss those processes that best serve the client's interests. Ideally, many ADR processes can and should be considered before or shortly after the filing of a formal cause of action. Moreover, it has become increasingly important for the attorney to be familiar with all ADR methodologies before the Court enters an ADR order providing for a process the lawyer believes may not be appropriate to the case or the client's needs. It behooves, the Courts, the ADR provider, counsel and the parties, to assess the possibilities and promote those ADR methodologies that will best serve their needs and interests.

The recently adopted Michigan Standards of Conduct for Mediators also place greater importance on any mediator and litigant to have a robust understanding and discussion of the most appropriate ADR process. Standard I, Self-Determination provides:

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

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

All of these factors, as well as the uncertainly, costs and delay associated with civil litigation, have contributed to the phenomenon known as the "Vanishing Jury Trial." See American College of Trial Attorneys, *The "Vanishing Trial", the College, the Profession,* 22 (2004). As documented by SCAO's most recent statistics, only 1.4% of the entire civil case load closed by all Michigan Courts in 2012 was disposed of by a jury or bench trial. See *2012 Civil Cases Disposed by Jury and Bench Verdict, State Court Administrative Office, 2013*. To the extent that 98.6% of all civil cases filed in Michigan do not result in a bench or jury trial, the issue most litigants must realistically face when confronting litigation is

how to resolve the litigation in the most cost effective manner consistent with reaching the client's most important objectives. If obtaining summary judgment or other early dismissal of the case is not realistic, achieving these objectives is perfectly suited to the judicious consideration and strategic use of various ADR techniques.

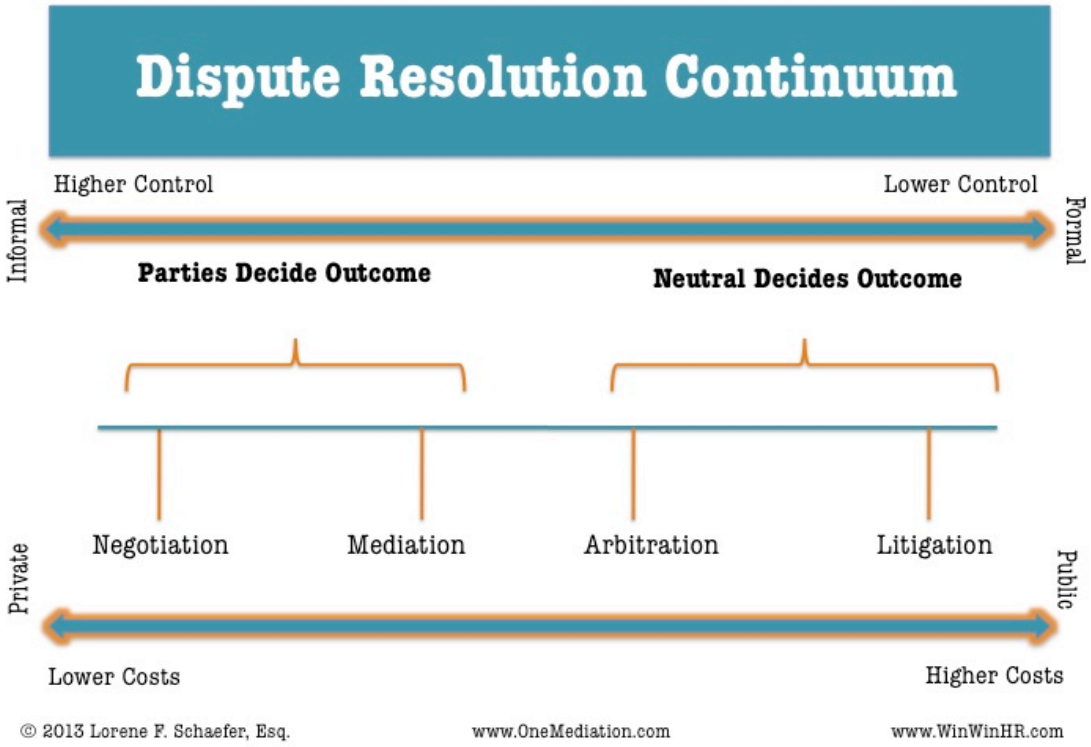
III. Organization of this Taxonomy

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

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

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

ADR can be viewed as presenting the parties with various options on what has been characterized as the "Dispute Resolution Continuum" in which there are three main variables: the control over the outcome, the control over the process, and the cost. See Kimberly Fauss, *The Dispute Resolution Continuum,* Virginia ADR pp. 3-5 (Fall 2006); American Arbitration Association, *A Guide to Early Dispute Resolution Options*, www.adr.org/csi/ids. All of the processes discussed in this Taxonomy can be placed along this continuum:



This *Taxonomy* begins with a discussion of the processes that most closely resemble the courtroom or traditional adjudication and are binding in nature. These processes, where party control over the outcome and processes is most limited, include arbitration, multiple mediation-arbitration hybrids, fast track jury trials, the consensual selection of a special master, and Dispute Resolution Boards. These "adjudicative" processes typically culminate in a binding (or highly persuasive) decision with varying ability to appeal that decision.

On the ADR continuum, a second collection of processes involve a number of highly evaluative, non-binding techniques including: summary jury trial, case evaluation, moderated settlement conference, neutral fact finding, early neutral evaluation and "hot tubbing." These processes are deemed evaluative because the outcome is an "evaluation" or advisory opinion regarding the likely outcome of the dispute if allowed to progress through trial. These methods, which provide the parties greater control than adjudicative processes, can be very effective in obtaining an independent first impression of the entire matter, the strengths and weaknesses of the case, and causing the parties to modify settlement positions and make a dramatic shift in litigation strategy. Where a subject matter expert is used as a neutral in the evaluative process, the weight of the expert's opinion can be very effective in influencing a party's position and expectations. If the opinions are negative, these processes can lead to the implementation of other ADR processes and result in a relatively swift settlement.

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

This *Taxonomy* is organized in a fashion that increasingly provides for party control of the process and outcome. The decision making grid provides a number of the considerations that might be evaluated by

the parties and the courts in identifying the optimal ADR technique. If the parties' dispute requires an "adjudicative" process to address portions or all aspects of their dispute, the adjudicative processes are worthy of consideration; if the parties desire to maintain more control over the process and outcome, yet desire a highly evaluative consideration of some or all aspects of their dispute, then the "evaluative" processes should be considered; finally, if the parties want to maximize control of the process and the outcome, then the "facilitative" processes may be the most appropriate. The incredible power of ADR is the multiplicity of tools that can be employed to serve the particular needs of the parties in a myriad of contexts. The courts, counsel, the disputants and ADR neutrals are encouraged to be creative by exploiting and staging all of the tools that are available to cost effectively serve the parties.

IV. Forms and Checklists

SCAO has developed a number of excellent forms involving ADR that the Bench, Bar and litigants may desire to evaluate and become familiar with. Those forms include:

- Binding Arbitration Award (mc284)
- Civil Mediator Application (mc2841a)
- Domestic Relations Mediator Application (mc281b)
- Domestic Violence Screening for Referral to Mediation (mc282)
- Judgment Regarding Arbitration Award (mc285)
- Mediation Status Report (mc280)
- Motion to Modify Order for Mediation (mc278)
- Motion to Remove Case from Mediation (mc276)
- Notice Regarding Court Selected Mediator (mc275)
- Order for Mediation (mc274)
- Order on Motion to Remove Case from Mediation (mc277)
- Stipulation for Mediation (mc279)

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

V. Adjudicative ADR Processes

1. Arbitration

a. General

Arbitration is a creature of statutes and a written contract. It is a private, voluntary process in which a neutral third party (or a panel of three neutrals), who may or may not have specialized subject matter expertise of the issues in dispute, is selected by the parties to render a binding decision. Depending on the terms of the written agreement to arbitrate, the parties may have the right to engage in discovery, file dispositive motions, and engage in other activities typically associated with standard litigation. Each party has the opportunity to present proofs and arguments at the arbitration hearing. The arbitrator's decision is reduced to writing known as the "award" which may be perfunctory and only designate the "winner" and the relief awarded, or it may be a "reasoned" award containing findings of fact and conclusions of law. Traditionally, arbitration has been viewed as a speedier and a less costly dispute resolution alternative to traditional litigation although many commentators have increasingly bemoaned that arbitration has become just as costly and as expensive as litigation. See Thomas Stipanowich, *Arbitration the New Litigation,* 1 U. of Ill. Law Review Vol. 2010, p. 1 (2010).

Arbitration provisions are prevalent and many companies are turning to so-called pre-dispute arbitration provisions as the exclusive method for resolving disputes that might arise during the course of the relationship of the parties. For example, it has been estimated that approximately 25% of the non-unionized work force in the United States is a party to a mandatory pre-dispute arbitration agreement as a condition of employment. Stipanowich, *supra*. Employees who sign such agreements agree they will forego filing any claim (except for a few mandated exceptions) against the employer in court and will redress any and all rights exclusively through arbitration. Similarly, many companies that offer customer-related services (i.e., credit card companies, telephone service providers, on line purchasers) have turned to arbitration agreements to provide for the resolution of disputes through arbitration. Most construction and design professional contracts contain mandatory arbitration provisions in accordance with the rules and regulations of an ADR service provider such as the American Arbitration Association (AAA; http://www.adr.org) or the National Center for Dispute Settlement (NCDS; http://wwww.ncdsusa.org). Similar provisions exist in new account application forms filled out by customers of stock brokerage or securities firms. Patients admitted to many hospitals in Michigan are provided, along with the admission package, arbitration agreements by which they are asked to agree to waive their right to a jury trial and submit any potential medical malpractice case to resolution through binding arbitration.

In drafting such agreements, particularly in the employee and consumer context, practitioners must be knowledgeable of applicable state and federal statutes, substantive and procedural due process requirements expressed in case law, and the due process protocols required by any selected third party administrator (AAA, NCDS, JAMS, etc.) that may pose a bar to the enforcement of arbitration agreements. See, e.g., *Lowry v. J.P. Morgan Chase Bank, N.A.*, No. 12-4222 (6th Cir. June 11, 2013) (validity of a class action waiver is to be determined by the arbitrator); *Boaz v. FedEx Customer Information Services*, No. 12-5319 (6th Cir. August 6, 2013) (shortened statute of limitations for FLSA claims in arbitration agreement not enforceable). Assuming the applicable barriers have been successfully addressed, such instruments can play a fair, vital and effective role in the layered and progressive dispute resolution strategy of the organizations involved and significantly reduce the costs, delay and unpredictability of traditional litigation. See Richard Boothman and Margo Hoyler, *The University of Michigan's Early Disclosure and Offer Program,* American College of Surgeons Bulletin (March 2, 2013); Richard L. Hurford, *SMART Dispute Resolution Processes*, Michigan Bar Journal p. 42 (June 2010). The Business Courts in Michigan, which will have jurisdiction over disputes that involve many of these arbitration agreements, will undoubtedly lead to greater predictability in the enforcement of appropriate agreements. As the Michigan Business Courts will be making all of their decisions available on line, it is incumbent upon the practitioner to periodically review these decisions prior to the drafting of arbitration agreements.

Where parties have not entered into a written pre-dispute agreement to arbitrate, they can still enter into such an agreement post-dispute or may agree to move the conflict to arbitration after a lawsuit has been filed. Agreements to arbitrate post-dispute do not involve many of the pre-dispute due process concerns and the drafting issues confronted are typically strategic ones involving: who will be the arbitrator(s); what limitations, if any, will be placed on discovery and pre-hearing motion practice; how quickly will the arbitration hearing be scheduled; will the agreement call for cost shifting provisions for the "prevailing party," the scope of appellate review, etc. Although the case law is somewhat unsettled, counsel will need to consider and evaluate the scope of appellate review. One of the advantages typically associated with arbitration is that appellate review is significantly limited and the award is binding and final. There may be parties who view this benefit as a detriment in the arbitration process, particularly if significant legal and business issues are involved. As a result, some counsel have attempted to contractually expand the scope of appellate review in agreements to arbitrate. Many of these attempts have been unsuccessful and it is a factor to consider in deciding whether and how to use arbitration as a viable ADR option. See *Hall St. Assocs., L.L.C.* v. *Mattel, Inc.*, 128 S. Ct. 1396, 1404 (2008).

b. Revised Uniform Arbitration Act

The Michigan Legislature has enacted the (Revised) Uniform Arbitration Act, MCL 691.1681–.1713, effective July 1, 2013 ("RUAA"), which provides terms for enforceability of arbitration agreements, procedures for the arbitration of disputes, remedies, immunity from civil liability, and testimonial privileges. The Act is intended to preserve the efficiency of arbitration, incorporate pertinent law, and offer some predictability in the process. The Michigan Arbitration Act (MAA), MCL 600.5001–.5035, was repealed effective July 1, 2013. Many practitioners and arbitrators welcomed the new law as it clarifies many uncertainties that existed under the prior law and affords contracting parties more flexibility in designing their contract arbitration clauses. See e.g., *ADR Section Enjoys a Major Success with the Passage of Revised Uniform Arbitration Act!*, The ADR Quarterly (January 2013). Key features of the RUAA include limitations on the parties' rights to vary the terms of their arbitration agreement before a dispute arises as well as after they are in conflict. Such topics as enforceability of the agreement to arbitrate, certain maters addressing judicial relief, subpoena power, arbitral jurisdiction and enforcement of awards are just some of the items now codified in the RUAA and must be reviewed carefully by counsel before drafting and enforcing agreements governed by the RUAA. See Mary A. Bedikian, *What Michigan Attorneys and Arbitrators Must Know About the New Revised Uniform Arbitration Act*, Michigan Bar Journal (May 2013).

c. Domestic Relations Arbitration

Under the Domestic Relations Arbitration Act (DRAA), MCL 600.5070 *et seq*., divorce litigants may stipulate to binding arbitration conducted by an attorney following an acknowledgment on the record that the parties have been informed that arbitration is voluntary, the award is binding, and the right of appeal is limited. A court may not order this process without the parties having agreed to submit their matter to binding arbitration through a written agreement to arbitrate. Unlike domestic relations mediation, in which the parties themselves generate options for resolving differences, an arbitrator renders an award governing the matters predetermined by the parties in their arbitration agreement. Arbitrators must be attorneys with five years' experience in domestic relations; the only explicit training requirement is for training in the dynamics of domestic violence and how to handle such cases. MCL 600.5073.

While arbitration of a domestic dispute may be more expedient, counsel must remain well informed of the case law and statutory pitfalls that may impact the validity of an arbitrator's decision and the award is subject to an independent review by the Court to ensure the interests of any minors are protected. MCL 600.5080 (1).

2. Mediation-Arbitration Hybrids

The Mediation-Arbitration hybrid process (typically referred to as "Med-Arb") commences the ADR process with traditional mediation. If the parties reach an impasse on some or all of the issues at the conclusion of the mediation, the mediator becomes the arbitrator, conducts a hearing on the issues not resolved during the mediation, and renders an award on the open issues. Alternatively, the parties may select a neutral different than the mediator to act as the arbitrator (Med-Arb Different). The predominant reasons for the development of Med-Arb were that it gave an opportunity for a mediation resolution of some or all of the issues with the assurance of a final, timely and cost effective resolution on the open issues through arbitration. Even if a global resolution is not achieved, the effective use of this process frequently results in a narrowing of the items subject to arbitration as the parties often reach agreements on a variety of substantive as well as procedural matters during the mediation process. It also tends to expedite the arbitration hearing and testimony because of the reduction in contested issues and/or the familiarity of the arbitrator with the case. Because a mediator turned arbitrator has familiarity with the facts and context of the dispute, many of the facts introduced at the arbitration can be accomplished by

stipulation. The result is a cost saving, simplification of the items subject to arbitration. See, e.g., Martin Weisman, *Med-Arb: A Time and Cost Effective Combination for Dispute Resolution,* 3 Dispute Resolution Magazine Vol. 9 (Spring 2013).

Alternatively, the parties might proceed through arbitration and, after the hearing is conducted, the arbitrator prepares a written award but does not immediately disclose the decision to the parties. Rather, the arbitrator or other neutral becomes a mediator and engages the parties in a traditional mediation to determine if a resolution can be achieved (Arb-Med). If a resolution is not achieved, the arbitration award is issued on the unresolved issues.

The hybrid Med-Arb process is not without controversy and some highly respected mediators believe it has the potential of negatively impacting the dynamics of traditional mediation. For example, the mediator is often told highly confidential information in private meetings (the caucus) that is not shared with the other party. If the mediator then becomes the arbitrator and the confidential information is not presented at the arbitration, some maintain there is a conflict for the mediator turned arbitrator. Some believe this conflict also has a "chilling effect" on the willingness of the parties to make confidential disclosures in mediation thus making settlement at mediation more difficult. Where arbitration occurs first, some question the ability of the arbitrator to maintain neutrality in the subsequent mediation. See Brian A. Pappas, *Med-Arb: The Best of Both Worlds May Be Too Good to Be True,* 3 Dispute Resolution Magazine Vol. 9 (Spring 2013); Barry C. Bartel, *Med-Arb as a Distinct Method of Dispute Resolution: History, Analysis and Potential*, 27 Willamette L. Rev. 661 (1991).

Other highly respected mediators believe that if the parties are fully informed, the confidentiality issues can be effectively handled and Med-Arb is a very potent ADR tool. It is their belief that if the mediation takes place first, the parties will be highly motivated to resolve the matter to avoid the costs and expenses of a certain arbitration that will immediately follow any unsuccessful mediation. If the arbitration takes place first, these mediators believe the mediation can be enhanced as there are no "surprises" and the parties have had the opportunity to fully evaluate the strengths and weaknesses of their respective cases. Edna Sussman, *Developing an Effective Med-Arb/Arb-Med Process,* New York Dispute Resolution Lawyer, Vol.2, No.1 (Spring 2009) at pp. 71-74; Weisman, *supra*.

The parties who have selected the Med-Arb process with the same neutral believe it achieves significant cost savings and efficiencies as the parties do not have to spend the time educating a different arbitrator and mediator as to the nuances (both factual and legal) of the dispute. While there are some who have not embraced this process, and have raised legitimate concerns, it is has been an effective and widely used ADR technique by many disputants. In a survey of the ADR practices of Fortune 1000 corporations, it was revealed that 40% of the respondents had actually participated in some form of Med-Arb procedures. See Thomas J. Brewer and Laurence R. Mills, *Combining Mediation and Arbitration,* 54 Disp. Resol. J. 32, 34 (1999).

As some ADR providers may not be comfortable with being the neutral during both the mediation and the arbitration, these issues should be fully explored and discussed with the selected ADR provider. These hybrid processes involve ethical issues for the neutral and are addressed in the Michigan Standards of Conduct for Mediators. Standard I requires the mediator to ensure that the parties are fully advised and informed of the nuances of the hybrid process and voluntarily select the appropriate hybrid. As a result, the ADR provider will typically engage in a conference with the parties to fully explain the process and prepare an agreement fully describing the selected process to ensure there is clarity with the process. Also, the ADR provider must be very clear in the role being performed at any point in time; the neutral cannot cavalierly switch roles as a mediator and arbitrator during the course of the process. See Standard VII. As a result, when acting as the mediator during this hybrid process, the mediator may typically be far more facilitative and avoid evaluative techniques that sometimes are brought to bear during mediation.

The various Med-Arb hybrid processes that have been used include:

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

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

c. **Med-Arb Different/Recommendation**. This process is identical to Med-Arb Different except that if the participants do not reach a voluntary agreement during the mediation the mediator submits a "mediator's recommendation" to the arbitrator who may choose at the conclusion of the arbitration hearing to adopt, follow, or not follow the recommendation of the mediator. Typically, the "mediator's recommendation" will first be presented to the parties prior to the arbitration for their consideration in an attempt to break the impasse that has stalled the mediation.

d. **Co-Med-Arb**. In this format, the mediator and the arbitrator are different but jointly conduct a fact-finding hearing that is followed by mediation without the arbitrator. If the mediation does not resolve all the issues, the arbitrator takes over and ultimately issues an award on the unresolved issues.

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

f. **Arb-Med**. The Arb-Med process reverses the sequence of Med-Arb in that the mediation follows the arbitration. Typically, the Arbitrator will conclude the arbitration hearing and then "seal" the award so the parties do not know the decision. The arbitrator then becomes a mediator of the dispute. A variation of this process is when the mediator is a different person than the arbitrator, Arb-Med Different.

g. **Med-Arb LO (Last Offer)**. A hybrid process very much like Med-Arb except that in the arbitration stage if the parties have not reached a voluntary settlement through mediation, each party submits a last offer to the arbitrator at the conclusion of the arbitration hearing and the arbitrator must choose between one of the two final offers. Another variation of this approach is the so-called "baseball" arbitration process. The parties make their last best offer at the conclusion of the mediation and the arbitrator, after the hearing, is required to

select which of the last best offers made at the mediation is the most appropriate that then becomes the arbitrator's award as to those issues that are unresolved during the mediation phase. Regardless of the timing in which the last best offer is made, the arbitrator's authority is specifically limited in that one or the other last best offer must become the award.

h. **Med-Arb Hi-Low**. Very much like Med-Arb except that in the mediation stage the parties have agreed whatever the decision of the arbitrator, the amount the defendant will pay will not exceed a certain amount (the High) and even if the arbitrator finds entirely in the favor of the defendant and no faults the plaintiff, the plaintiff will receive a guaranteed minimum amount (the Low). If the arbitration award is between the Hi and the Low, then that is the binding decision imposed upon the parties. Typically, the arbitrator is not aware of the Hi-Low agreement and issues an award independent of the Hi-Low agreement of the parties. This arrangement is often utilized to minimize the risk to the respective parties and is often used as an inducement in reaching an agreement to arbitrate.

i. **Mediation Windows in Arbitration**. This process is one in which there is an opportunity to conduct a separate mediation during an ongoing arbitration. This can happen at any time during the arbitration, between the hearings, and, on more than one occasion. This makes the Med-Arb process very flexible and creative especially when the same neutral is used throughout the process.

This listing of the various hybrid processes reflects the incredible flexibility and creativity that can be employed to meet the goals and objectives of the disputants. The Med-Arb hybrids also underscore that ADR is not necessarily a single event but can be strategically "staged" in any number of potential permutations. Such flexibility, creativity, and staging should be considered with all of the ADR processes discussed throughout this *Taxonomy*.

3. Fast Track Jury Trials

A number of courts outside the State of Michigan have explored the efficacy of utilizing binding "Fast Track Jury Trials" as a form of alternative dispute resolution when the amount in controversy is not sufficiently large to justify the cost and expense of a full, traditional trial and the parties desire a binding decision from a jury rather than an arbitrator. See *Short, Summary & Expedited, The Evolution of Civil Jury Trials,* National Center for State Courts, www.ncsc.org. Perhaps the best known example of this particular dispute resolution mechanism is that provided in the Charleston, South Carolina County Courts. See Steven Croley, *Summary Jury Trials in Charleston County, South Carolina,* 41 Loyola of Los Angeles Law Rev. 1585 (Summer 2008). This process involves the voluntary agreement of both parties to be bound by the decision of the Fast Track Jury and select a mutually agreeable Hearing Officer. On the day scheduled for the trial, the parties empanel a jury drawn from the court's standard jury pool. Typically the jury will consist of no more than 6 individuals and each side is limited to two peremptory challenges. The voir dire is limited and usually conducted by the Hearing Officer.

Although the parties have significant latitude in agreeing on the procedures that will govern the process and the presentation of the evidence, the usual agreements on the process involve among other items:

- That no party will call more than an agreed number of live witnesses;
- The admissibility of designated depositions and affidavits;
- The parties will have the right to issue subpoenas;

- That certain records (such as medical records and test results) will be admitted without the usual requirements of authentication and other limiting rules of evidence;
- Those instructions that will be provided to the jury prior to the deliberations; and
- To waive the right for a directed verdict, motion to set aside the verdict, or the filing of motions for additur or remittitur.

The role of the Hearing Officer is to ensure the procedures are followed as agreed to by the parties, make any necessary evidentiary rulings, and instruct the jury. The jury's verdict is binding and not appealable.

Although the Fast Track Jury Trial can be a stand-alone ADR technique, it may also be incorporated into multi-staged ADR agreements very similar to the Med-Arb hybrid processes previously discussed. For example, the parties might select a mediator who will act as the Hearing Officer should the mediation not resolve the entire case. Following the mediation, the mediator will become the Hearing Officer to preside over the fast track jury trial (unless the parties desire a different Hearing Officer than the agreed upon mediator) to decide those issues that were not resolved at the mediation. Similarly, if the parties agree to a hi-low arrangement, then, just like in the Med-Arb Hi-Low hybrid, the parties will be bound by that agreement should the jury's verdict be higher than the agreed upon "hi" or the verdict is below the agreed upon "low." If the jury's verdict falls between the agreed upon hi- low, then that verdict will be binding on the parties.

Utilizing the fast track jury trial as the penultimate dispute resolution step avoids many of the various concerns previously discussed that some parties and neutrals may have with the hybrid med-arb process when the mediator becomes the arbitrator. The use of a fast track jury trial may also appeal to parties who want to avoid the costs of a traditional jury trial but are more comfortable with a jury making the binding determination rather than a single arbitrator or an arbitration panel. As found by the National Center for State Courts in its study, *Short, Summary & Expedited, supra*:

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

Although there is no known Circuit or District Courts in Michigan that employ fast track jury trial programs, it would appear to be an available ADR mechanism even in the absence of a modification of current Circuit Court ADR plans. If the parties stipulate to the use of this procedure, then a Court should have the authority to order the process as specified in MCR 2.401 (A) (2). Of course, the use of this technique should be explored and fully discussed with the Court to ensure the process will be supported by the judge assigned to the case.

4. Consensual Special Magistrate or Special Master

If the parties are interested in expediting the dispute resolution process, the use of a special magistrate or special master is often a viable alternative particularly in complex or multi-party litigation. The opportunity to select the special magistrate or special master, or at least have input into the selection, is often very attractive to the parties. The special master often has a limited, defined task. For example, the special master may be appointed to conduct a hearing to determine if a receiver should be appointed; to determine whether preliminary equitable relief will be awarded; evaluate whether the requirements for class certification have been satisfied; to determine discovery and/or case management issues; make preliminary evidentiary rulings; review documents for the applicability of the attorney-client or work product privileges; or, engage in certain fact finding on tangential issues that will expedite the ultimate trial of the matter. The immediate objective of the appointment of the special master is not to achieve an

immediate resolution of the dispute but to streamline and expedite the litigation process. The potential secondary objective may be that the special master's evaluative determination(s) may lead to other ADR events focused on a resolution of the litigation as early as practicable.

Although the use of a special master is more common in federal litigation, it is a viable option in state court litigation and arbitration where appropriate. However, there appears to be no specific procedural directive for the Court appointment of a special master in Michigan courts. As a result, some judges may be reluctant to consider such an appointment even if stipulated to by the parties. MCR 2.410 (A) (2) does provide that "[f]or purposes of this rule, alternative dispute resolution (ADR) means any process designed to resolve a legal dispute in the place of court adjudication, and includes…**other procedures provided by local court rule or ordered on stipulation of the parties.**" If the parties stipulate to the use of a special master to resolve certain issues of the dispute (i.e., discovery, class certification issues, the applicability of a privilege, etc.) and the decision is subject to *de novo* review by the Court, there would not appear to be any impediment to a court ordering the use of a special master. See *Mitan v. New World Television*, 469 Mich. 898 (2003). In *Mitan*, the Michigan Supreme Court did not explicitly authorize the use of special masters, but did hold it is improper to reverse the appointment on appeal where the parties requested a special master. *Id*. at 898. However, where trial courts have attempted to grant specific judicial powers to special masters without the stipulation of the parties, the Michigan Court of Appeals has not sanctioned the appointment. For example, in *Carson Fischer Potts & Hyman v. Hyman*, the Michigan Court of Appeals struck down a trial court order that appointed a special master where the order conferred the power to make recommendations of findings of fact and conclusions of law to the court. 220 Mich. App. 116, 124 (1996). The Court reasoned that Michigan Rule of Evidence 706, which was the trial court's basis for appointing the special master, does not expressly authorize such powers. Similarly, in *Oakland Co Pros v. Beckwith-Evans Co.*, the Michigan Court of Appeals reversed the appointment of a special master who was granted the authority to make recommendations to the trial court pertaining to factual findings and legal conclusions. 242 Mich. App. 579, 590 (2000). In *Beckwith*, the trial court had relied on MCR 1.105 instead of MRE 706 in its order, but the Michigan Court of Appeals again found this rule did not expressly authorize the delegation of such judicial functions to a special master. In a more recent case*, Caudill v. State Farm Mutual Ins. Co.*, both the Michigan Court of Appeals and the Michigan Supreme Court declined, without comment, to review the trial court's appointment of a special master under terms similar to that in *Carson* and *Beckwith*. 485 Mich. 1107 (2010). While the declination itself is not instructive, the dissent in *Caudill* implicated the Michigan Court Rule that provides for alternative dispute resolution as one legally permissible avenue for appointing a special master. Per MCR 2.410, after consultation with the parties, a trial court may order that a case be submitted to an "appropriate ADR process," which is defined as "any process designed to resolve a legal dispute in the place of court adjudication." MCR 2.410(A)(1), (A)(2), (C). Further, MCR 2.410(C) provides authority for the court to "specify, or make provision for selection of, the ADR provider" as well as "make provision for the payment of the ADR provider."

In summary, a trial court's appointment of a special master where all parties have consented has been upheld. Absent such a stipulation, the legal ground for the appointment is uncertain in Michigan courts. However, given the considerable flexibility provided by the Michigan Court Rules in providing for alternative dispute resolution, the trial court could invoke MCR 2.410 and appoint a mediator to mediate the case and order, in the event that the parties cannot reach a settlement, the mediator would then render other ADR services such as those performed by a special master to issue a recommendation or an advisory opinion.

Should the courts desire to avail themselves of this particular ADR technique, the courts may consider modifying their local ADR plans to provide specifically for the appointment of a special master if certain conditions are met (*i.e.,* the parties must stipulate to the use of the special master as to certain specified issues, the parties must agree as to who will be the special master, and the decision of the special master is subject to de novo review by the trial court), then the authority of the Courts to order the use of a special

master would appear to be available. If the parties or the Court believe the case may be in danger of becoming needlessly complex, or the parties require more time from a "judge" than the assigned judge can provide, or if the parties or the Court believe any number of preliminary rulings (whether procedural, discovery, evidentiary, or otherwise) will materially expedite and streamline the litigation, this option should be considered and explored.

The Special Master, based upon a knowledge of the case, may also be invited by the parties to perform the role of a mediator in assisting the parties to resolve some or all of the issues presented in the litigation. If this option is being considered, the parties may be well served to select a Special Master who can potentially perform the role of a mediator. In this role, the Special Master can be very effective in assisting the parties to shape a mutually beneficial and creative resolution of the litigation.

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

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

5. Friend of the Court (FOC) Referee Hearing

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

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

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

The hearing is private and not held in public that has appeal to many parties. The process is formal in that Rules of Evidence are followed, testimony is taken from both lay and expert witnesses as relevant, and a record is made. If the parties are represented, attorneys will serve as advocates and present the client's case.

As in the case of a Special Master, the private, evaluative and preliminary determination(s) of the Referee may also be an impetus to further settlement discussions or re-invigorate settlement discussions that have come to an impasse.

6. Dispute Resolution Boards

Dispute Resolution Boards have been a very powerful ADR technique particularly in the commercial construction setting where it has a long history of use. The effectiveness of Dispute Resolution Boards,

however, can extend well beyond the construction setting.

The construction industry has long been plagued with disputes between owners, design professionals, general contractors, and subcontractors during the performance of the construction contract that had the potential of interfering with continued performance of the contract. To avoid delays in the performance of the contract, many parties in the construction industry have embraced Dispute Resolution Boards.

At the outset of a construction project, the construction contract sets forth any number of staged and progressive dispute resolution provisions that often include a Dispute Resolution Board (i.e., meet and confer obligations, then a Dispute Resolution Board, then mediation followed by arbitration or litigation). Such a Board is comprised of contractually designated subject matter experts who, following a very truncated presentation of the dispute (typically during the course of the performance of the contract), issues a determination that will be binding on the parties to the dispute until one of the parties decides to appeal that decision to the next level of the dispute resolution process. As initially developed, the main purposes of the Dispute Resolution Board are to ensure that performance under an ongoing contract was not halted and to provide the disputants with an early neutral expert evaluation of the merits of their dispute. The presentation that is made is typically very truncated and does not call for any significant discovery and relies primarily on the information exchanged during "meet and confer" meetings held earlier during the life of the dispute. While a Dispute Resolution Board typically consists of three members (to avoid a "deadlock'), depending upon the nature and significance of the contractual relationship, the Dispute Resolution Board might be a single individual. In determining the composition of the Dispute Resolution Board the parties often desire to have subject matter experts who are familiar with the customs and practices in the industry involved. Unless the parties desire, it is not necessary that all members of the Dispute Resolution Board have legal training. Significantly, the rulings of Dispute Resolution Boards are appealed in less than 50% of disputes in the construction setting. Such Boards have been very successful in preserving important relationships and the early, cost effective resolution of disputes.

Even post-dispute, whether before or after the filing of a lawsuit, the parties may contractually agree to use a Dispute Resolution Board to evaluate the merits of the dispute. In this setting, the parties who are desirous of an "early expert evaluation" of the merits of their dispute, in a very truncated proceeding and without extensive discovery, can obtain a very cost effective evaluation and even agree to be bound by the evaluation of the experts selected pending an appeal of that decision.

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

VI. Evaluative ADR Processes

1. Summary Jury Trial

The summary jury trial is typically a one or two day process where "mock" jurors will hear a brief presentation by the attorneys representing the disputants and render an advisory verdict that often becomes the starting point for settlement discussions between the parties or a driver for further settlement discussions that have reached impasse.

The Summary Jury Trial can be constructed in any number of ways. It can involve formal presentations by all the parties; a formal presentation by one or more of the parties and a surrogate presentation for any "absent" party; live but truncated testimony of witnesses or "simulated" testimony (i.e., reading of depositions, etc.); and the viewing and discussion of demonstrative evidence and exhibits. Typically, the

parties will desire the seating of a "mock jury" that is similar in demographics to the jury pool that will be available in the jurisdiction involved. The Summary Jury Trail is presided over by a neutral who, similar to the Hearing Officer in Fast Track Jury Trials, may be called upon to make evidentiary rulings, ensure the format agreed to by the parties is followed, and to instruct the jury on the applicable law. Following the jury rendering a verdict, the summary jury will agree to respond to questions by the parties to gain further insight into the strengths and weaknesses of their case and the most persuasive (or unpersuasive) arguments. In addition to fostering further settlement discussions, it is also viewed as an excellent trial preparation device.

The neutral who presides over the Summary Jury Trial will often be asked to immediately assume the role of a mediator to further settlement discussions among the litigants until a settlement is achieved or the trial date arrives.

A Summary Jury Trial is useful when there is a need by the parties for a neutral opinion of typical jurors. For example, it may become apparent during the mediation process the parties view potential liability and the scope of recoverable damages in a very different way that causes the mediation to come to an impasse. Or, during the course of the litigation it may become apparent to the parties that commencing mediation may be futile until one or the other of the parties becomes more "realistic" on the issues of liability and exposure. In these examples mediation may be adjourned to provide for a Summary Jury Trial; in the alternative it might be pursued even before the mediation is commenced. In essence it has the potential of being an extremely effective "icebreaker" for opening settlement negotiations or re-invigorating stalled settlement discussions. It also gives clients a sense of having had their day in court, which is particularly helpful when the real trial would be very lengthy or costly.

Summary Jury Trials are not an inexpensive proposition as the "mock jurors" and the neutral receive compensation. Summary Jury Trials are typically a later stage ADR technique after all or most discovery and preliminary motion practice has been completed. This technique (or other evaluative ADR options) may even be suggested by the trial court before ruling on a difficult dispositive motion that will likely be appealed by the losing party.

Considerable time can be expended by counsel in preparing for a Summary Jury Trail. Although less expensive than a jury or bench trial, if the amount of potential exposure is not significant, or does not involve important principles and issues that have the potential of a significant or long term economic impact, the cost and expense associated with even an abbreviated Summary Jury Trial may not be warranted. That is particularly true if a party will not be influenced by a non-binding verdict. In these situations the parties may want to consider other ADR techniques such as a Fast Track Jury Trial following a mediation or other ADR event.

Establishing the procedure to be used during a Summary Jury Trial is critical. If all sides to a dispute intend to participate, it requires negotiation between counsel to reach an acceptable procedure.

2. Early Neutral Fact Finding

When confronted with highly technical and complex litigation involving scientific, business accounting, intellectual property, medical care, insurance coverage and similar issues, disputants have effectively leveraged the use of early neutral fact finding. See e.g., Mark Cooper and Hal Carroll, *Business Courts, Insurance Coverage and Indemnity Disputes and Early Expert Evaluation,* 6 Journal of Insurance and Indemnity Law 1 (Jan. 2013). Often the parties will retain the services of an agreed upon subject matter expert to investigate and evaluate the technical or scientific issues involved and to prepare a written, non-binding report. Often the parties will submit the necessary materials and legal arguments to the neutral expert and otherwise cooperate with the neutral expert's request for information and data preliminary to the issuance of any report. Counsel may also confidentially meet with the neutral expert, often supplemented with the input of the party's retained expert, to explain the bases for their respective

positions. The parties may be in agreement that the neutral's report is confidential and may not be used at trial, or, in the alternative, the parties may agree in advance to use the written report at trial or other ADR event as the base line or expert opinion to which everyone will be bound.

Use of the neutral's report as binding, particularly in a highly technical case, may be of great use to the judge or jury because it removes or narrows the issues from their decision making authority. This eliminates the inherent risk of allowing laypersons with no subject matter expertise to decide a technical or scientific issue critical to the parties' case and often streamlines the trial by reducing the time and resources necessary to "educate" the jury on all the technical issues involved. Use of a neutral fact-finding expert, whether binding or not, may also promote a resolution of the case without the obfuscation of issues or litigation posturing. It is not unusual to commission such a report preliminary to convening a mediation and confidentially provide the report to the mediator along with the parties' mediation summaries.

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

Although far less expensive than a jury or bench trial, the costs associated with retaining the services of an expert neutral may not be appropriate for all cases particularly where the process will not lead to a resolution and the amount in dispute is not significant. Such experts are also not particularly helpful where the primary concerns involve intangible issues such as emotional distress, pain and suffering, loss of reputation, etc.

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

3. Hot Tubbing

An ADR technique that can result in many of the benefits of a Neutral Expert Evaluation without as much cost is Hot Tubbing. This practice was first employed in the Australian Courts as a method for streamlining trials on highly technical issues. As originally conceived, the opposing experts give testimony while answering questions posed by the opposing expert, attorneys and in some instances the jury. However, hot tubbing can be a technique that is used in any number of settings that involve disputes that will be subject to a "battle of experts." The objective is to provide clarity and definition of the factual, technical and legal issues involved in the dispute.

In the ADR context, typically a third party neutral assists in the orchestration and presides over the "hot tubbing" event to narrow the issues in dispute between the opposing experts. The neutral may review any preliminary reports issued by the opposing experts and confer with the experts to determine those technical and factual issues about which there is no dispute. Subject to a review and the approval of counsel, the neutral will outline the legal and factual issues where there is agreement and disagreement between the opposing experts and generate an agenda outlining the areas of agreement and disagreement so the experts simply focus on those matters that are in dispute and why. The opposing experts then engage in a confidential hot tubbing event, with representatives of the parties having settlement authority present, and respond to questions posed by the neutral, opposing counsel, and the opposing expert. It is not unusual that immediately following or shortly after the hot tubbing exercise the neutral will then act as a mediator and conduct a mediation with the parties who were present during the hot tubbing event.

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

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

4. Early Neutral Evaluation

Early neutral evaluation is an ADR process in which the parties obtain an assessment of the strengths and weaknesses of their case, typically from a seasoned and experienced litigator with subject matter expertise, very early during the life of the case and before significant discovery has commenced. It is an informal, non-binding process where the parties select the neutral to evaluate the issues and submit a report. Each side presents the factual and legal support for its position, which is then discussed with the parties. The primary purpose of the discussion is to identify the areas of agreement and disagreement and to identify the key factual and legal issues that will bear upon the ultimate question of liability and potential damages. The evaluation can be a potent tool that allows the neutral to assist the parties in devising a discovery and motion strategy that will be focused and reduce the costs and delay in the disposition of the case. For example, in a potential class action the early neutral evaluation may result in the parties agreeing the only issues are whether the class meets the requirements of MCR 3.501 (c) and (d). The parties can then agree to focus their preliminary discovery efforts on addressing these two preconditions to class certification and the timing of the motion practice to determine whether class certification will be granted.

At any time during the process, the neutral may be requested to explore settlement possibilities with the parties. Because the neutral is retained very early in the case, the matter may not be ripe for resolution because there is discovery that one or both parties may need. In such a situation the neutral may suggest that initial discovery be limited to that which each party believes is necessary for a meaningful mediation or an evaluation of issues that require resolution before a mediation takes place. The parties will focus their discovery on those matters and then engage in the mediation. If unsuccessful in resolving all the issues at the mediation, the parties will engage in further discovery, motion practice and otherwise prepare for a trial.

The neutral plays two primary roles: to play the "devil's advocate" with both parties and to provide a vehicle for aggressive case management. As such, like other evaluative processes it can be quite enlightening for the parties in identifying the strengths and weaknesses of their cases and the risks the litigation poses. It can also be a very effective in the education process of the recalcitrant client who may have an unrealistic expectation of the benefits that might be obtained from the litigation. When confronted with very aggressive opposing counsel, who may be prepared to expend more resources in the "lawyering" of a case than potentially warranted by the realistic exposure, it can also be of assistance in the "right sizing" and staging of the case management plan.

5. Case Evaluation

a. In General

Case evaluation is a voluntary process where the parties typically work with three neutrals at least two of whom have subject matter expertise in the nature of the dispute. If the parties cannot agree on the three neutrals to be selected, it is not unusual for each party to select a neutral whose opinion they respect and then ask those neutrals to agree on the selection of the third neutral. The parties then make a presentation to the neutrals as to the merits of their case and the neutrals will place a value on the case based upon their expertise and experience. It is most helpful if the neutrals agree on the value of the case but there is always the possibility the three neutrals will not agree.

Considerations relevant to selecting this technique include the following:

- There is significant disagreement between the parties on the value of the case and such an independent evaluation will be helpful to the parties in re-assessing their settlement positions;
- The significant issues dividing the parties involve liability or economic damage issues and not equity or nonmonetary issues;
- There is a desire to educate a party or client on the realistic value of the case;
- This process might be avoided if the parties select a mediator who is a subject matter expert and willing, if requested, to provide a confidential evaluation during the course of the mediation or who is willing to break an impasse during the mediation by providing, if requested, a "mediator's recommendation";
- If a party has a very "favorable" case evaluation, there is always the potential that the settlement position of that party may become entrenched and it may be strategically more appropriate to pursue this option only after a mediation has failed or the mediation has come to an impasse; and,
- In tort or other cases that may be subject to mandatory case evaluation pursuant to MCR 2.403, the parties may believe the expense involved provides no significant cost benefit.

Once the neutrals provide a dollar value at the conclusion of the Case Evaluation their involvement in the matter ends and the parties might pursue other ADR techniques through other providers.

b. Court Rule Case Evaluation; MCR 2.403

Most case evaluations in Michigan are conducted pursuant to MCR 2.403 that is mandatory for all tort cases. Unlike any other evaluative process, penalties may automatically attach for not accepting the outcome of this process. See, e.g., *Kusmierz v Schmitt*, 288 Mich App 731, 708 NW2d 151 (2005), *rev'd on other grounds*, 477 Mich 934, 732 NW2d 833 (2006). Failure to receive a more favorable trial verdict than the evaluation, as defined in the Court Rule, results in penalties to the party rejecting the evaluation. MCR 2.403 (O).

The evaluation panel is comprised of three attorneys selected by the court through a blind rotation system, although there is the opportunity for the parties to select a special panel of attorneys who are experienced in the type of dispute involved (MCR 2.204 (C) (2)) if the jurisdiction maintains such a sub list. In the alternative, the parties may request by stipulation a special panel (MCR 2.204 (C) (3)).

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

There are significant limitations to the benefits of evaluations conducted pursuant to MCR 2.403. The presentations made to the evaluators by counsel are not permitted to exceed 15 minutes by each party

unless there are unusual circumstances. If dealing with a complex case, the concern is that such a limitation will not provide the opportunity for a truly meaningful evaluation. While parties may attend the case evaluation presentation, they are not permitted to participate. The panel of evaluators, although required to meet certain minimal qualifications as established in each county, are not selected by the parties and the parties may not attach the same significance to the evaluation when the parties select the evaluators. For example, the evaluators may or may not have any subject matter expertise.

In making a determination of whether or not to accept the case evaluation, the parties have a limited opportunity to explore non-economic terms and conditions that might prove beneficial. For example, even if one party "rejects" the case evaluation, and the opposing party "accepts" the evaluation, a resolution can still be achieved if the parties are willing to continue the negotiation process. It is not uncommon for the rejecting party to settle the matter in the amount of the case evaluation (or at a level fairly close to the case evaluation) by entering into a settlement agreement provided that certain non-economic conditions requested by the rejecting party are incorporated into any settlement. When this occurs, the rejecting party's negotiation position is not optimal and typically far weaker than positions and interests that might have been explored in a mediation conducted prior to the case evaluation. Moreover, even if a party is "satisfied" with the evaluation amount, if this is the only ADR strategy relied upon, then the opportunity to obtain an earlier, more favorable or "interests" based and creative resolution for a client was squandered. It should be noted that in a recent study performed under the auspices of the Supreme Court Administrative Office, the cost-benefit and effectiveness of the Case Evaluation process required by MCR 2.403 has been questioned. See *The Effectiveness of Case Evaluation and Mediation in Michigan Circuit Courts*, Report to the State Court Administrative Office, Michigan Supreme Court (October 31, 2011). As a result, some courts do not routinely schedule Case Evaluation unless and until other ADR options have been attempted or routinely grant objections to case evaluation filed pursuant to MCR 2.403 (C) where both parties agree that case evaluation, given other ADR options that are being pursued, will not be a cost-benefit.

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

6. Moderated Settlement Conference

Immediately prior to a trial of the matter, it is the practice of most trial courts to schedule a settlement conference with all counsel that requires the attendance of parties with authority to settle the matter. The trial judge or designee will moderate this settlement conference.

Judicial practices in conducting moderated settlement conferences differ markedly. The moderated settlement conference allows the parties, on many occasions for the first time, to assess the court's temperament, reactions and attitudes toward the parties, counsel, expert witnesses and the merits of the case. Typically, these conferences are highly evaluative and the court, while always reserving judgment and having an open mind, may send certain signals thus leaving very little doubt as to any number of issues that may be addressed or ruled upon including pending Motions in Limine, jury selection issues, and the trial. Extremely valuable information relevant to the trial and trial risks of the case can be gleaned by counsel and the client who listen carefully.

While a very effective tool in resolving cases, there are significant concerns should the parties not have

exhausted and explored other ADR techniques prior to the moderated settlement conference. Like case evaluation the conference takes place very late in the litigation process and suffers from the same detriments as case evaluation pursuant to MCR 2.403. The potential for a creative, interests based resolution is certainly more limited in comparison to what might have been achieved for the client during, for example, mediation. Similarly, the opportunity to limit the issues that will be tried has passed. As the decision maker is typically present during the moderated settlement conference, and the process is typically highly evaluative, while it may educate the client on the Court's perspective of the case, it may also result in undue pressure that negatively impacts the quality of a party's decision making. Since, the manner in which the courts conduct these moderated settlement conferences varies significantly, the litigator who is not familiar with the practices of a particular trial judge would be well served to conduct the necessary and appropriate due diligence.

VII. Facilitative ADR Processes

1. Meet and Confer

Many contracts contain dispute resolution provisions that prescribe a methodology for resolving conflicts that might arise between the parties to the contract. Typically, the first step in the contractually provided dispute resolution methodology is a "meet and confer" obligation. The usual meet and confer provision requires representatives (with full authority to resolve the conflict) to meet and exchange opinions and information in a "good faith" attempt to resolve the conflict. During such meetings, which are very informal, counsel for the parties are not usually present. If the parties are unable to resolve the dispute at the "meet and confer" stage, the parties might engage in "Real Time" mediation to facilitate their settlement discussion or the dispute may move to the next step of the dispute resolution mechanism set forth in the contract. If there is no next step provided in the contract, absent a resolution, the parties may proceed directly to litigation.

Even in the absence of a contract, the parties to a dispute with settlement authority may always voluntarily agree to meet and confer, with or without counsel present, in an attempt to resolve the dispute. Although one party is well advised not to directly contact another party represented by counsel for the purpose of discussing a resolution without the consent of the attorney representing that party, as long as such permission is obtained the parties may opt to schedule such a meeting and establish their own ground rules that will apply during the course of the meeting. One important ground rule is to make certain the discussions that take place are protected by confidentiality and not subject to disclosure.

Although such discussions may take place at any time during the course of the litigation, meet and confer processes are frequently undertaken very early during the life of a dispute, often even before a complaint is filed, and before significant litigation costs have been incurred and before the positions of the parties have become entrenched. These meetings can and do provide the parties the opportunity to engage in "interest" based bargaining as opposed to "positional" bargaining. In that the parties are communicating directly, it also reduces the opportunity for misunderstandings that might otherwise arise during the "fog of litigation." Where the parties are motivated to resolve, and there is a prior relationship between the parties, meet and confer mechanisms can result in an early resolution that avoids the cost, delay, and risks of further litigation.

Such meetings are most appropriate when the parties are relatively sophisticated and fully apprised of their legal rights and all the issues that need to be addressed. The risks are that one party may not have engaged in all the necessary discovery or have access to all the pertinent facts to reach a fully informed resolution. If the parties are in an unequal bargaining position, do not have comparable bargaining skills, or one party is subject to being unduly influenced or intimidated by the other party, the process may be inappropriate. Some or all of these issues are of particular of concern in divorce disputes. Where these concerns do not exist, and if there is the opportunity to prepare for the meet and confer with counsel and other advisors as appropriate, there can be success in achieving mutually beneficial resolutions very early in the life of the dispute.

a. Demand Letters

Many sophisticated plaintiffs' counsel, particularly those who specialize in business, tort, malpractice, and employment matters, send the defendant a demand letter prior to the formal initiation of litigation that invites a meet and confer opportunity. Along with outlining the potential causes of action that will be asserted if a satisfactory response is not received within a specified period of time, these letters typically allude to the risks posed to the defendant if the matter is not quickly and confidentially resolved. It is not unusual for such letters to also include a copy of the Complaint that will be filed as well as requesting certain information and documents. Most defendants will immediately refer such demands to counsel so that a dialogue can be established before the filing of a complaint. In addition to direct settlement discussions, these communications also have the potential to lead to an early agreement to mediate or employ other early ADR techniques before significant litigation costs are incurred. There is a litigation adage that many business defendants have embraced: "Unlike fine wine litigation does not get better with time." As such, many defendants are motivated to resolve the case as soon in the process as possible assuming the demand is deemed reasonable and appropriate.

This "best practice" should not be ignored by counsel where appropriate. At one time it was thought that sending such a letter may signal a "weakness" or any response by the potential defendant might be viewed as being "weak." Most seasoned litigators and sophisticated clients know better. If a party's position is weak, that party typically wants to deal with that fact sooner than later; if a party's position is strong, then that position will be maintained throughout any early settlement discussions and reflected in any offers and demands that may be exchanged.

b. Settlement Counsel

Another potential "best practice" that is used by many business entities, particularly when dealing with consumer tort claims, is to retain Settlement Counsel who will affirmatively reach out to potential plaintiffs even before counsel is retained by the injured party or a demand letter is transmitted. The goal of the outreach is to determine if any potential claim the party might have can be resolved quickly. Typically the party who is contacted will retain counsel to obtain advice and assist in responding to the overtures made by Settlement Counsel. In fact, the injured party may be encouraged to retain counsel. If the injured party does not retain counsel, there is a concern that the relative imbalance of sophistication of the negotiating parties could pose a significant problem. After the preliminary introduction by Settlement Counsel, the "meet and confer" process will commence as Settlement Counsel has the prior authorization to negotiate a resolution on behalf of the potential defendant. These preliminary meet and confer opportunities often lead to an early resolution or the staging of early pre-complaint ADR events such as mediation. Although the practices of companies differ, if Settlement Counsel is unable to resolve the matter, responsibility for the dispute is then transferred to a trial attorney who will defend the company in litigation. Often the transfer is accompanied with the assertion the last best offer made by Settlement Counsel is "off the table" and that trial counsel will not make a better offer during the course of the litigation.

2. Collaborative Practice

Collaborative Practice has grown significantly over the last decade particularly in the area of divorce. Unlike many other ADR techniques it cannot be ordered by the Courts.

Collaborative Practice generally occurs before a divorce complaint is filed and includes a contract between all the participants not to initiate formal divorce proceedings (i.e., the "Participation Agreement") unless and until certain pre-conditions are met. The parties are represented by counsel who are specially trained in Collaborative Practices who also agree they (nor attorneys in their respective firms) will not be involved in the representation of any party in the event the collaboration fails and a formal contested divorce proceeding is commenced.

The goal of the Collaborative Practice is to address any inequities that might exist during standard meet and confer proceedings and yet empower the parties to engage in direct negotiations. The collaborative attorneys (a/k/a "divorce coaches") meet with their clients prior to engaging in negotiations and conduct an assessment and screen for any impediments to negotiations. They will arrange for the exchange of needed information and provide legal guidance. Negotiations are conducted periodically rather than continuously, with the attorneys and parties in the same room, and may also include other "team members" such as child specialists, financial specialists, etc. It is required that all the members of the "team" have completed approved collaborative training. Information sharing is open, voluntary, and informally accomplished as a part of the process. The goal is to assemble a *de facto* "team" that is committed to resolving the divorce with problem solving techniques without recourse to a formal contested divorce proceeding.

If a resolution is achieved as a result of the Collaborative Process, a divorce action is commenced to obtain judicial approval of the resolution. In such a situation the parties will typically seek a waiver of the 6 month requirement for the entry of a judgment in cases of divorce with minor children and typically opt-out of Friend of the Court services and oversight. Although the practices of individual judges vary, these waivers are typically granted and the entry of a judgment of divorce can be entered in 60 days.

a. Pro Se Plaintiffs and Defendants

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

3. Friend of the Court – Conciliation

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

The Friend of the Court Conciliator will acquire information from the parties and attempt to work out an agreement on matters of custody, support, and issues related to the children on an interim basis until the conclusion of the divorce. If the parties are unable to agree to an Order on these matters, the Friend of the Court will prepare a recommended Order for the consideration of the parties. The parties may either accept the recommendation or object. If an objection is made, a referee from the Friend of the Court or the court will then decide the contested issues.

The practice of convening the Conciliation Conferences developed to avoid inequities that might arise should the court enter child custody and child support Orders for the first party to file a divorce or custody case. When such Orders were entered without allowing the other party to have his or her position heard

on these issues it was believed that, on occasion, the results were perceived as unfair or may have had the effect of polarizing the parties.

In some cases counsel for the parties will not be encouraged to be present for the Conciliation Conference.

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

4. Mini-trial

Mini-trials are less formal and preparation intensive than summary or fast track jury trials and can be a very useful ADR technique in complex litigation, where important business interests are at stake, or the potential damages are high. Although the manner in which the mini-trials are conducted can vary, typically a neutral facilitator and high-level representatives with full settlement authority on behalf of each party may serve on a panel. The goal of the mini-trial is to simulate the risks of litigation, underscore to the party representatives the potential weaknesses in their respective cases, and provides each panel member the opportunity to form an impression of the case that can lead to facilitated settlement negotiations.

Each party's counsel makes an abbreviated best-case presentation to the panel and, depending on the ground rules established for the mini-trial, the panel members may be permitted to ask questions or seek clarification of issues during the course of the presentation. At the conclusion of the presentation, settlement discussions take place. Depending upon the sophistication of the party representatives, the discussion that takes place might be "meet and confer" conversations where counsel is not present and without the presence of the neutral to facilitate the settlement discussions. Or, the representatives might meet with counsel and the neutral present and move immediately into mediation. Again, depending upon the ground rules established and the manner in which the parties tailor the process, the neutral, if requested, may also give an opinion (typically during a private confidential caucus) on the presentation of the parties, the extent or allocation of liability, and the likelihood of success of each party's case.

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

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

The mini-trial is typically a later stage ADR technique that takes place after the parties have completed most or all discovery and settlement discussions have come to an impasse. For example, a standard mediation might be suspended by the parties to conduct a mini-trial when one or all of the parties do not believe the opposing party has a full appreciation of the risks of litigation or a party representative is desirous of additional information and input as to the strengths and weaknesses of its case or the quality of the opposing party's case. In such a situation the mediator will typically act as the neutral panel member at the time of the mini-trial. In the alternative, the mini-trial can be the precursor to a traditional mediation should the panel members be unable to agree on the terms of a settlement immediately after the mini-trial.

Although a less expensive process than a summary jury trial, the mini-trial is not inexpensive and may not be warranted when the amount in dispute does not justify the cost. It may not be effective where all the parties to the dispute have a realistic picture of each other's case or where one side is not motivated to alter its settlement position regardless of the presentations made during the course of a mini-trial. If, however, the decision-makers have an open mind, and are willing to modify settlement positions, it can be a very useful technique to re-invigorate discussions that have come to an impasse or to commence settlement discussions after all the necessary discovery has been completed.

5. Mediation

a. In General

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

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

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

In mediation, the mediator does not impose a decision or opinion on the parties. Consequently, the advocates do not need to persuade the mediator of the "righteousness" of their legal positions. Rather, the advocates use their talents to persuade the true decision makers in the dialogue, i.e., the clients. A passionate yet diplomatic discussion is far more productive than one filled with accusations and contempt. The role of the advocate in mediation is to be a joint problem solver and a counselor to the client. Settlement is reached by the parties through their active participation in problem-solving. The case is resolved on terms and conditions agreed to by all the parties. Despite the non-coercive nature of the process, it has proven to be a very persuasive, powerful and effective ADR tool. The vast majority of cases voluntarily submitted to mediation are resolved either at the mediation or shortly thereafter. See *The Effectiveness of Case Evaluation and Mediation in Michigan Circuit Courts,* Report to the State Court Administrative Office, Michigan Supreme Court (October 31, 2011).

The selection of the mediator offers the parties any number of choices: whether to select a mediator who is very knowledgeable about the subject matter of the dispute; whether process expertise may be more

important; or whether a mediator with both process and subject matter expertise is needed are among the many considerations. Is the mediator's style evaluative, directive, facilitative or analytical? Some studies have suggested that many litigators are "more comfortable" with a mediator who is willing to be somewhat evaluative during the mediation process (typically during confidential caucuses). See John Lande, *How will Lawyering and Mediation Practices Transform Each* Other, 24 Florida State Univ. Law Rev. 839 (1997); Love and Kovach, *ADR: An Eclectic Array of Processes, Rather Than One Eclectic Process*, 2 Journal of Dispute Resolution 295 (2000); Nolan-Haley, *Mediation: The New Arbitration,* 17 Harvard Negotiation Law Review 61 (2012). However, many parties are not necessarily comfortable with a highly evaluative or directive mediator. Thus, the decision on who will be selected as the mediator demands the requisite due diligence by counsel and the parties to select the mediator best suited to the dispute and the personalities of the parties.

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

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

In mediation there are very few hard and fixed rules. Rather, the parties, counsel and the mediator will tailor the process to meet the needs of the parties (which usually takes place during the pre-mediation conference call). When the parties with full settlement authority appear for the mediation, the mediation may begin with a "joint" or "general" session. During the joint session the mediator typically reviews the Mediation Agreement and Rules of Confidentiality. There is usually a re-iteration of "ground rules" agreed upon during a pre-mediation conference call followed by the parties and/or their counsel identifying the strengths of their respective cases and the believed weaknesses in the opposing party's case. Clients are often encouraged to supplement these presentations and to vent their concerns and interests. Brainstorming of potential solutions may also commence during the joint session. The meeting during the joint session is not intended to be overly confrontational or argumentative. It is an opportunity for the parties and counsel to address each other in a confidential setting and to hear (and hopefully understand although not necessarily agree with) their respective positions and interests. The mediator's role is to facilitate a robust discussion during the joint session, to ask thought-provoking and clarifying questions, to aid the parties in narrowing the issues, and to develop an understanding of the underlying interests of the respective parties.

Depending upon the procedural agreement, the joint session will conclude and the parties may adjourn to private sessions (the "caucus"). During the caucus the mediator meets independently with each party and counsel for confidential discussions and to explore any number of issues including potential settlement options. The mediator may review exhibits, further explore damage theories, the anticipated witness testimony, and other aspects of the trial that will follow should the parties be unable to mutually resolve the matter at the conclusion of the mediation. For example, in an employment case, if not addressed during the joint session, the mediator may explore potential options such as re-instatement, a change in job duties or a transfer, the efficacy of job placement services, suspension, an apology, letter of reference, further training or education. All of these discussions during the caucus are generally confidential and cannot be disclosed to the opposing party by the mediator absent an agreement by the party making the

disclosure. Some mediators put this burden of "caucus confidentiality" on the parties and, therefore, the parties must declare to the mediator the information shared in caucus that must be held in confidence. The particular practice of the mediator regarding caucus confidentiality should always be determined in advance.

The benefits of confidentiality are that it fosters candid and robust problem solving sessions and an exploration of a party's "best alternative to a negotiated agreement" (BATNA). See Roger Fisher and William Ury, *Getting to Yes, Negotiating Agreement Without Giving In,* Second Edition, Penguin Books (1991). Although the parties are encouraged to fully explore their BATNA prior to the mediation, the mediation process provides the parties with an excellent opportunity to re-evaluate their BATNA in light of the presentation made by the opposing party and the discussions that take place during the joint session and the caucus.

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

Whether through the joint session or the caucus, settlement proposals are exchanged in a series of offers and counteroffers until a full and final resolution is achieved. Sometimes these offers are exchanged in joint session; in other cases the mediator works with each party and counsel on the offer and counteroffers in a series of separate caucuses. Offers can be crafted by the parties with or without suggestions or input of the mediator. The object of the exercise is to assist each party in a neutral and unbiased manner to objectively re-evaluate their positions, reality test and explore the benefits of various offers, and make informed and un-coerced decisions regarding settlement.

Mediations may take several hours or extend over days and months depending upon the complexity of the case. If a settlement is reached, a binding memorandum of understanding may be signed by the parties pending preparation and signature of a formal settlement agreement or the parties will prepare a full settlement agreement immediately after a resolution is reached. In this regard, one note of caution is warranted as discussed in a two part study that discussed litigation issues arising out of mediations. In *Mediation Litigation Trends: 1999-2003* the authors undertook an initial study of mediation litigation trends from 1999 through 2003 and subsequently supplemented that study based on decisions from 2004 through 2007. See James R. Coben and Peter N. Thompson, *Disputing Irony: A Systematic Look at Litigation About Mediation*, 11 Harv. Negot. L. Rev. 43 (2006) and James R. Coben and Peter N. Thompson, *Mediation Litigation Trends: 1999-2007*, 1 World Arbitration & Mediation Review 395 (2007). The reported data commends the development of at least one "best practice" during mediation: to the extent practicable the parties should be requested to draft and execute a formal settlement agreement before the conclusion of the mediation. The adoption of that "best practice" had the potential of avoiding almost one-half of the over 2100 post-mediation disputes evaluated by the authors. As stated by one court in enforcing a post-mediation settlement agreement never formally executed by both parties:

> We are mindful that the practical implications of this opinion may be that parties and mediators end up working harder and longer to make sure they have reached a full and final settlement agreement by the end of mediation. Of course, the settlement memorandum could state that, if the parties do not reach agreement on additional documentation within a stated period of time, then any party shall be entitled to have the case resolved solely on the terms in the settlement memorandum. In contrast to either of these approaches, however, in the practice of leaving for another day additional terms to be negotiated, which, ironically, invites the potential for further litigation rather than ending it. This dispute is a case in point.
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> *Yaekle v. Andrews*, 195 P.3d 1101 (Colo. 2008).

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

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

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

b. Private Mediation

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

It is typical in private mediations for the parties and mediator to execute an Agreement to Mediate that contains a Confidentiality Agreement as a condition precedent to conducting the mediation. The Agreement to Mediate will typically provide scheduling information, the parties who will be present at the mediation, the terms and allocation of the mediator's fees, and other procedural details that might take place before and during the mediation.

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

c. Court Rule Mediation MCR 2.411, 2.412 and 3.216

Parties may be ordered into mediation by the Court under MCR 2.410 (C). The procedure for court-referenced mediation is set forth in MCR 2.411, 2.412 and 3.216.

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

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

> The court shall not appoint, recommend, direct, or otherwise influence a party's or attorney's selection of a mediator excepts as provided pursuant to this rule. The court may recommend or advise parties on the selection of a mediator only upon request of all parties by stipulation in writing or orally on the record.

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

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

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

- Who will be required to attend and be physically present during the entire course of the mediation (MCR 2.411 contemplates the attendance of trial counsel and not just another lawyer in the firm);
- Whether participation may be by phone or must be in person;
- Whether confidential mediation summaries will be exchanged;
- Whether the attendees must have full settlement authority;
- Who will pay for the mediation and when payment is due.

As the Court's order typically specifies the time within which the mediation is to be completed, as soon as the mediator is selected, the mediator usually contacts the parties to schedule the mediation in accordance with the terms of the order. The mediator may also take into consideration the need for limited discovery

or the exchange of information, the number of parties and issues, and the need for multiple sessions in scheduling the mediation. The mediator may also request the parties to submit and possibly exchange documents providing information about the case.

Within 7 days of the completion of the court ordered mediation the mediator will advise the court of the outcome by filing a mediator's report on the form provide by SCAO. If the matter is settled through mediation, the attorneys must prepare and submit appropriate documents to conclude the case within 21 days of the settlement. MCR 2.411 (C) (4).

d. Domestic Relations Mediation MCR 3.216

Most Circuit Courts have adopted an ADR plan that permits the courts to refer cases to mediation under MCR 3.216. When domestic relations cases are being considered for divorce mediation, under the ADR plan judges must "screen for cases which are not appropriate for mediation pursuant to MCR 3.216(D) (3) prior to referral. Mediators shall screen cases under this rule as part of the mediation process."

Parties may be ordered to attempt mediation, and mediators appearing on domestic court rosters must have completed specialized mediation training requirements established by SCAO. MCR 3.216 offers divorce litigants two processes: mediation and evaluative mediation. Mediation under this rule is essentially the same as mediations discussed above. Evaluative mediation offers parties the option of having a willing mediator recommend proposed settlement terms for any issues that have remained unresolved at the conclusion of the mediation. Parties must specifically request this process and they are not bound by any recommended terms provided by the mediator. The mediator's proposed settlement terms are not revealed to the court and there are no sanctions for rejecting the mediator's proposal.

Just like the "mediator's recommendation" that can be requested by the parties to break an impasse during non-divorce mediations, the evaluative mediation can be a useful tool to influence decision making. However, once the opinion is given, the mediator risks losing effectiveness as a mediator in facilitating further settlement discussions. Disputants generally lose some trust in the mediator if there is a perception (whether real or imagined) by the litigants that the mediator is not neutral or exhibiting favoritism. For this reason, use of evaluative mediation should come toward the end of the parties' negotiations and after they have truly failed to reach consensus.

e. Friend of the Court Mediation (MCL 552.513)

In all jurisdictions, the Friend of the Court offers mediation services either directly or by contract through a third party provider (oftentimes Community Dispute Resolution Centers). Like other mediations, the assigned mediator will meet with the parties during a session that will last one to three hours in an attempt to resolve all or a portion of the issues involved in the divorce proceeding. If the dispute is resolved, a consent order is prepared. If no agreement is reached, the case proceeds to investigation and/or hearing.

6. Dispute Resolution Advisors

Adding to the panoply of ADR measures used in the construction industry there is now the Dispute Resolution Advisor ("DRA"). In its simplest terms the DRA is a neutral who meets with the parties once a dispute has arisen and assists in tailoring a dispute resolution mechanism that is best suited to resolving the specific dispute and achieving the interests of the parties. Its efficacy is not confined to the construction industry as explored by two different scenarios and can be selected by the parties post-dispute to assist in creating an appropriate ADR methodology at any time after a dispute arises.

In Scenario A the dispute involves whether ABC Company has used its "best efforts" in marketing a particular product manufactured by XYZ Company. The amount in controversy involves approximately $100,000.00. In Scenario B there is a dispute between the parties over whether or not parts supplied to

Buyer meet the contract specifications and, if not, whether Supplier will incur the costs of a potential recall and indemnify Buyer. The damages that will potentially be sustained by Buyer are in the range of $10,000,000.00 to $15,000,000.00. Any litigation between Buyer and Seller has all the earmarks of being a classic "battle of experts."

In both Scenarios the parties' selected a neutral DRA. The DRA met with the parties and their attorneys and developed an agreed upon dispute resolution methodology specifically tailored to resolve these vastly different disputes. In Scenario A the parties agreed to the following graduated or "layered" dispute resolution steps: (1) the voluntary exchange of specified information; (2) a hybrid facilitative mediation – arbitration last offer opt out process within two weeks of the exchange of information; (3) if the mediation is unsuccessful the mediator will become an arbitrator; (4) the arbitration will be governed by the following agreed upon rules: the parties will stipulate to those facts that are not in dispute at the outset of the arbitration, there will be no formal discovery, no more than 4 witnesses will be presented by each side, the arbitrator's award must be the last demand made by ABC at the conclusion of the mediation or the last offer made by XYZ; and (5) the arbitration proceedings and award will be confidential and the fact of and results of the arbitration will not be disclosed to any party except as necessary to enforce the arbitration award.

In light of the flexibility the DRA brings to the process, the dispute resolution mechanism established in Scenario B is entirely different: (1) the principals will meet and confer; (2) if no agreement is reached there will be a "hot tubbing" event and representatives with settlement authority must be present; (3) immediately following the "hot tub" meeting the representatives will meet and confer; (4) if a settlement is not achieved the parties will participate in a non-binding Neutral Expert Evaluation who will issue an opinion; (5) if the parties do not accept the decision of the Neutral Expert the parties will participate in a mediation; (6) if the mediation is unsuccessful the parties will have the option of proceeding to litigation or arbitration; and (7) the parties agree that during any litigation or arbitration they will be governed by the following: the litigation budget will not exceed $500,000 by either party; an agreed upon Protective Order will be presented to the Court; an agreement to voluntarily exchange specified information before any scheduling conference; the number of depositions that will be taken will be limited to 10 for each party; an agreement to engage in another mediation no later than 20 days after the discovery cut-off date or such earlier date as the parties might agree; and, the "losing party" will pay the costs of litigation incurred by the prevailing party.

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

7. Early Intervention Conferences

Many courts will rely upon neutrals to meet with the parties shortly after the complaint and answer have been filed typically in anticipation and preparation of the first meeting with the court, to explore a litigation plan, the staged exchange of discovery, and the timing and use of alternative dispute resolution procedures and processes. The agreements reached by the parties during the early intervention conference are then explored and adopted by the court during the initial scheduling conference. These neutrals will often simulate the role of a Dispute Resolution Advisor and assist the parties to develop

strategies and procedures to streamline the case in a cost effective and expeditious manner. These neutrals, based upon their familiarity with the case and the parties, may subsequently be called upon to be special masters or mediators as agreed to by the parties.

VIII. Community Dispute Resolution Centers

Any *Taxonomy of ADR* requires a discussion of the incredibly beneficial resources provided by Community Dispute Resolution Centers (CDRC). The Community Dispute Resolution Program was derived from Michigan Public Act 260 in 1988 to establish a statewide program to offer conciliation, mediation, and other forms and techniques of dispute resolution as an alternative to traditional judicial processes.

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

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

> Alternative Dispute Resolution and Conflict Resolution are terms that are being used more and more in every facet of today's business, education, medical and legal professions. Living in a democratic society, people understand the need to be able to trust their neighbor, contractor, attorney, landlord, consumer, accountant, doctor and local merchant. We depend on these trusting relationships to accomplish our goals and improve our place in life. Every so often, these relationships are tested through conflict.
>
> The Resolution Center believes that conflict is a naturally occurring phenomenon and that it should be viewed as something positive. Conflict provides an opportunity for change. It is up to those involved in the conflict to make the change positive or negative.
>
> Restoring and maintaining relationships is a positive event that helps to build community rather than fracture and destroy. The Resolution Center provides the non-adversarial dispute resolution process of mediation that offers people the chance to seize the opportunity of conflict and create something positive… to help build community. In this way, The Resolution Center is a catalyst for peace.

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

IX. Conclusion

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

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