Prepared for the ADR Section Council's Task Force (SBM)

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EXECUTIVE SUMMARY

The purpose of this white paper is to consider whether Michigan should adopt an automatic mediation process for civil disputes in circuit courts.[2] Court–rule based voluntary ADR programs, which include traditional facilitative mediation, often report low utilization rates. To improve usage and also to increase satisfaction levels among litigants earlier in the litigation life cycle, numerous states revised their court rules to compel one or several forms of ADR. The most common forms of ADR are non-binding arbitration and mediation.[3] In non-binding arbitration, a neutral evaluates the evidence and renders a decision that the parties are free to accept or reject. In mediation, a trained mediator facilitates dialogue between the parties to maximize areas of agreement. Optimal results may occur in the context of a single session or multiple sessions. States that have implemented ADR programs, primarily mediation which focuses on a more facilitative structure, have reported significant settlement success and high participant satisfaction, resulting in fewer judicial resources expended overall.

INTRODUCTION

The last several decades have witnessed a dramatic growth in both court–directed discretionary referrals to ADR and also court-mandated ADR.[4] These programs have been introduced for various reasons, largely in response to criticism that the trial process is long, costly, cumbersome, and emotionally debilitating for litigants. Michigan responded to this

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[2] Nearly every state in the United States has some type of mediation process. If mediation is "required" it is usually called "mandatory mediation" or "compulsory mediation." To distinguish our proposed legislation, we are calling it "automatic mediation (A/M)."

[3] Other ADR techniques – facilitative, evaluative, or adjudicatory – are available to litigants on a voluntary basis. These techniques include: early case management conference, early neutral evaluation, fact-finding, mini-trial, Friend of the Court conciliation, moderated settlement conference, mediation/arbitration hybrids, arbitration, and summary jury trial.

[4] Court-annexed ADR programs gained major traction in 1983 when Rule 16 of the Federal Rules of Civil Procedure was amended to encourage courts to use "extrajudicial procedures to resolve the dispute" at pre-trial conferences. Since then, both state and federal courts have gone beyond this initial mandate to rely more heavily on court-mandated mediation as an appropriate adjunct to civil proceedings.

criticism in the late 70s, when it adopted "case evaluation" under MCR 2.403 for all tort cases and other civil cases upon election. Case evaluation, however, which focuses on applying rules of law to make a determination of liability and includes penalties for failure to achieve a sufficient verdict, does not satisfy broader party interests nor does it provide control over outcome. Mediation, if structured properly, addresses these deficiencies.

REASONS WHY MICHIGAN SHOULD ADOPT AN AUTOMATIC MEDIATION PROGRAM

Current empirical research strongly suggests that diverting cases automatically into mediation retains the traditional benefits of mediation while removing arbitrary or inconsistent court referrals from the mainstream. Specifically,

- ***Mediation Offers an Opportunity to Address More Than the Legal Claim:*** Unlike adjudicatory processes, including arbitration, the communications in mediation are not confined to the narrow legal parameters of a dispute. The mediated session(s) can include whatever the parties believe is relevant, including any aspect of their past, present or future circumstances or relationship.

- ***Mediation Provides Superior Outcomes:*** Mediation enables parties to reach the outer limits of their conflict, which may include interpersonal dynamics. This holistic approach to case resolution also allows parties to consider remedies not common in adjudicatory processes. For example, in non–domestic civil disputes, mediated outcomes can include a letter of reference, an apology, or a reformed commercial contract. In domestic cases, where violence is not an issue, the parties can craft a parenting arrangement that is particularized to their needs, without being subject to black letter law applications that often do not take into account their family's unique dynamics. Even contested dissolutions of marriage and custody battles benefit from mediation because the goal of mediation is to tailor solutions to the needs of parents and children. Luchs, *Is Your Client a Good Candidate for Mediation? Screen Early, Screen Often, and Screen for Domestic Violence,* 28 J. AM. ACAD. MATRIM. LAW 455 (2016). The rigidity of court rules thwarts the ability of the parties to present their "full" story and to use the venting process as a cathartic release. Mediation overcomes these barriers.

- ***Parties Consider Mediation Results Generally More Fair:*** Compared to litigation and even arbitration, parties in mediation tend to view the process as more fair, largely because outcomes are self-determined and they are able to consider a broader range of remedies. Placing parties in a confidential environment where they are in full control of their settlement at any early stage provides them with an opportunity to delve deeper into the issues separating them, and protects them from being bound by judicial decisions with which they would have to fully comply regardless of whether or not they agree with the ruling. Wissler, *The Effects of Mandatory Mediation: Empirical Research on the Experience of Small Claims and Common Pleas Courts,* 33 WILLAMETTE L. REV. 565 (1997).

- ***Diverting Cases Provides Faster and Less Expensive Resolution:*** When mediation occurs early in the litigation process, there is usually less use of court staff and judicial time. Given the settlement rate associated with compulsory mediation (less than voluntary mediation), $$$ are saved in both legal and court fees. For example, in a 2011 study of civil cases in Michigan with a monetary value of $25,000 or more, mediation produced far more settlements and consent judgments (*i.e.*, 84% of cases) than other approaches including case evaluation (62%), mediation plus case evaluation (62%), and the regular litigation stream (45%). Additionally, mediated cases took an average of 295 days to resolve (regardless of whether they settled or not), while case evaluation took an average of 463 days, and cases in the regular litigation stream took an average of 322 days. Campbell and Pizzuti, *The Effectiveness of Case Evaluation and Mediation in Michigan Circuit Courts*, Report to the State Court Administrative Office, Michigan Supreme Court (2011).

- ***Trained Mediators Increases Likelihood of Settlement:*** Generally, court–mandated mediation assures that mediators are sufficiently trained in the mediation process. Typically, such programs require a minimum of 40-hours of training. Training exposes neutrals to all aspects of the mediation process, including ways in which to facilitate discussion and encourage participants to share information likely to lead to resolution. Also, trained mediators often have subject matter expertise, which enables them to migrate upon the parties' request into a more evaluative role should the circumstances demand. This transference of role from facilitator to evaluator, where the mediator actually evaluates the parties' legal claims and defenses and offers a best-case scenario, heightens settlement probabilities.

- ***Early Intervention Increases the Potential of Resolution and Avoids Multiple Court Proceedings:*** If properly designed, a compelled process early in the litigation cycle can help parties better shape the parameters of their dispute, settle all or a portion of it, or reduce the need for court reliance on discovery exchanges through a discovery order. From a human perspective, early engagement of mediation reduces the likelihood that parties will become entrenched in positions. Once positions solidify, settlement becomes more elusive.

- ***Compulsory Process Already Exists in Michigan:*** Michigan circuit courts already employ two primary means of dispute resolution – case evaluation and mediation – to dispose of civil claims. Case evaluation is mandatory; mediation is not. In case evaluation, three attorneys appointed by a court and not involved in the dispute, hear arguments and evaluate the case. Their result, an award, may be accepted or rejected by the parties. If rejected within a certain time frame, penalties attach if trial results do not improve the award by 10 percent. Mediation follows the orthodox method, where a facilitator encourages communication between the parties, and aids in identifying issues

and solutions. A 2011 in-depth study found: a) the use of one or both of these ADR processes greatly increased the percentages of cases in which a settlement or consent judgment was achieved; b) where mediation occurred, nearly half (47%) were settled during the actual mediation, with 72% of the cases ultimately resolved through settlement or consent judgment without resort to case evaluation or trial; and c) using mediation to resolve civil cases generally reduces costs to the court. Campbell and Pizzuti, *The Effectiveness of Case Evaluation and Mediation in Michigan Circuit Courts*, Report to the State Court Administrative Office, Michigan Supreme Court (2011). Because automatic mediation would not carry consequences for failing to reach agreement, it may be viewed in a more positive light than case evaluation.

- ***Mediation Preserves the Parties' Ability to Exercise Self-Determination:*** Self-determination – the parties' ability to make free, informed choices – is a core principle of mediation. While some critics of compelled mediation contend that forcing parties into mediation undermines the concept of self-determination, this criticism is easily addressed. There is a difference between coercion within the mediation process and the type of "coercion" involved in being required to participate in mediation. Being told to participate in mediation is simply different than being told to settle – or worse – told how to settle. If mediation fails, the parties may still pursue litigation unencumbered. Court access is merely delayed, not foreclosed. Quek, *Mandatory Mediation: An Oxymoron? Examining the Feasibility of Implementing a Court-Mandated Mediation Program*, 11 CARDOZO J. CONFLICT RESOL. 479, 485 (2010).

- ***Mandatory Mediation Removes the Discretionary Factor from Case Referral***: In a discretionary framework, whether mediation occurs at all is highly contingent on a judge's proclivities towards mediation and training. An automatic mediation regime, which directs cases into mediation irrespective of the above factors, ensures predictability and removes the possibility of arbitrary use of discretion.

SUCCESSFUL STATE EXPERIENCE WITH AUTOMATIC MEDIATION, NON-BINDING ARBITRATION OR OTHER FORMS OF ADR

Numerous states have adopted some form of ADR to augment litigation, with notable success. A few of the institutionalized programs, cited in the Michigan case evaluation and mediation report, are noted below. Most of these programs are in addition to either voluntary or automatic mediation, or a mediation variant.

Arizona, ARIZ. REV. STAT. ANN. § 12-133 (mandatory non-binding arbitration of money damage claims under $65,000).

California, CAL. CIV. PROC. CODE § 1141.10-28 (mandatory arbitration of civil claims with damages under $50,000 in jurisdictions with 16 or more judges).

Nevada, NRS 38.258 (mandatory arbitration of money damage claims not exceeding $50,000 in jurisdictions of 100,000 populations).

New Jersey, N.J. STAT. ANN. § 2A:23A-20 (after unsuccessful mediation, auto negligence and PI cases along with stipulated cases, may be ordered to arbitration where money damages do not exceed $20,000).

New York, U.S. DIST. CT. RULES N.D.N.Y., ORDER 47 (mandatory mediation plan applying to all civil actions pending as well as newly filed, except as otherwise indicated).

North Carolina, N.C. GEN. STAT. § 7A-38.1 (mandatory mediation in superior court of all civil disputes).

Texas, TEX. CIV. PRAC. & REM. CODE ANN. § 154.002 (West 2011) (not a pure compulsory mediation process; leaves discretion to the court to refer cases to mediation, however, the majority of judges now order mediation).

CONCLUSIONS

- Mediated resolutions achieve higher compliance rates, resulting in less cost overall and more targeted application of judicial resources.
- Higher mediation usage results in higher net economic benefits.
- Mediation focuses on finding solutions, not assessing fault, allowing parties to avoid the risks and uncertainty of trial.
- Mediation provides for flexibility and creative resolutions not typically associated with litigation or other adjudicatory forms of ADR.
- Mediation's focus on a more fulsome exchange of information promotes more settlement opportunities, even if the initial session culminates in impasse.
- Incorporating a mediation step integrates settlement efforts into Michigan civil procedures and changes the emphasis from excessive trial preparation to settlement with trial as a last resort. It decisively shifts the focus from an adversarial process to one where settlement is both a viable option and a goal.

RECOMMENDATIONS

In designing the mediation mechanism, the following parameters should be considered:

- To heighten mutually satisfactory settlements, mediation should occur early in the litigation.

- The program design should include confidentiality and privilege[5] provisions to protect the integrity of the process and to ensure that mediation communications are not admitted into evidence if a trial were to occur.

- Mediation should not prescribe any particular level of participation. Confidentiality of mediation may be jeopardized if a court were to make evaluations concerning what occurred during mediation. This, in turn, would impact party perception of process and impede the sharing of useful information. Mediation parties should be permitted to exercise complete autonomy within the process, including the level at which they participate.

- An opt-out provision should be available, using a "good cause" barometer, for cases involving public policy, domestic violence,[6] or child abuse and neglect. Employing an opt-out provision limits any innate contradiction with the self-determination principles of mediation.

- Mediation should not include any financial penalties. The right to trial should remain unencumbered and accessible.

SOURCES CONSULTED

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Jacqueline Nolan–Haley, *Mediation Exceptionality*, 78 FORDHAM L. REV. 1247 (2009)(available at http://ir.lawnet.fordham.edu/flr/vol78/iss3/7).

Thomas Luchs, *Is Your Client a Good Candidate for Mediation? Screen Early, Screen Often, and Screen for Domestic Violence*, 28 J. AM. ACAD. MATRIM. LAW 455 (2016).

[5] The current draft of the "Automatic Mediation Statute" specifically addresses this point. Draft Section 4902(6): "Mediation proceedings shall be held in private and 'mediation communications' shall be confidential and privileged. Privileged mediation communications shall not be subject to discovery and shall be inadmissible in any proceedings, subject to the exceptions in this chapter."

[6] This issue is also addressed in the proposed legislation. Draft Section 4902(4)(a): "To object to mediation, a party must either notify the court the matter is not appropriate for mediation, as provided in MCL 600.1035, or file a written objection to mediation containing facts to establish good cause, including without limitation: (i) child abuse or neglect; (ii) domestic abuse…"

Lucy V. Katz, *Compulsory Alternative Dispute Resolution and Voluntarism: Two – Headed Monster or two Sides of the Coin*, 1993 J. OF DISP. RESOL. (1993).

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Tracy Walters McCormack, Susan Schultz, and James McCormack, *Probing the Legitimacy of Mandatory Mediation: New Roles for Judges, Mediators & Lawyers,* 1 ST. MARY'S J. ON LEGAL MALPRACTICE & ETHICS, 150 (2011).

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