

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 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 particular needs. In addition, a limited number of samples, drafting checklists and references are provided for the practitioner’s 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 that tendency. The ADR tools available to litigants, or those who are contemplating litigation, are far more diverse and rich. As stated by Chief Judge John Foster in an article written for the Macomb County Bar Association and identifying a potential project for the MCBA ADR Committee’s consideration: need to ID publication site or reduce reference... 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 Macomb County Judiciary.

The ADR Committee would like to thank _____.

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 General Court Rules have long provided the Michigan 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.

See also MCR 5.143

In addition to the authority provided by the General Court Rules, the Michigan 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? Do we utilize potential jurors’ time well, or do most of the jurors we summon sit in a waiting room all day only to be sent home unutilized? ... We can measure all this and much more.

With the emphasis on metrics such as “clearance rates” and “case age” on the Michigan judiciary’s dashboards, understaffed Courts are increasingly looking to ADR as one effective methodology to improve its 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” that challenges the judiciary to develop and refine those “best practices” that will assist in meeting the goal of delivering justice in the most cost effective, efficient, and speedy fashion practicable. As stated by the Honorable Christopher Yates, the Circuit Court Judge assigned 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 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 emphasize 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.”

Following these directives, the Macomb County Business Court Administrative Order (see Exhibit 1) and best practices call for the mandatory early exchange of certain designated categories of information and, within 28 days of these disclosures, 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 for 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.

As any litigator who regularly represents business clients will verify, ADR is an important tool in the litigator's tool box and an essential part of the litigation process in the desire 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 that are 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 in different Circuit Courts 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.

At least two additional factors are at play for the litigator'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 the alternative 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 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 serves the client's interests. Ideally, many ADR processes can and should be considered before filing a formal cause of action. See Exhibit 2 (a sample agreement for early mediation immediately after or before the filing of a complaint or demand for arbitration). 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 the ADR methodology that will best serve the needs and interests of the client.

The recently adopted Michigan Standards of Conduct for Mediators also places 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...

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 providers) 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 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. 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 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 use of strategic ADR techniques.

III. Organization of this *Taxonomy*

ADR is any process 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. 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” to the dispute and best serves the needs and interests of the parties.

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 require 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 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 the resolution of the case.

Choosing an ADR method is dependent upon several factors, but the seminal and first two 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 want 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, it is much easier to select the correct ADR strategy.

This *Taxonomy* begins with a discussion of the processes that most closely resemble the courtroom or traditional adjudication and are “dictatorial” or binding in nature. These processes include arbitration, multiple mediation-arbitration hybrids, the consensual selection of a special master, and Dispute Resolution Boards. These “adjudicative” processes typically result in a binding (or highly persuasive) decision with varying ability to appeal that decision.

On the ADR continuum, there are a number of highly evaluative, non-binding processes that are discussed 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 of each process is to obtain an “evaluation” or advisory opinion regarding the likely outcome of the dispute if allowed to progress through trial. These methods 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 a client’s active involvement. Unlike the other methods, facilitative processes enable the parties to maintain maximum control of the outcome and to actively fashion creative resolutions that otherwise could not be obtained through a jury verdict or arbitration.

IV. Forms and Checklists

In addition to the forms and checklists included in this *Taxonomy*, 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 courts.mi.gov/Administration/SCAO/Forms/Pages/Alternative-Dispute-Resolution.aspx.

V. Dictatorial ADR Processes

1. Arbitration

a. General

Arbitration is a creature of statutes and written contracts. 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*, 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. Employees who sign such agreements agree they will forego filing any claim (except 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 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://www.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, blanket 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. Assuming the applicable barriers have been successfully negotiated, such instruments can play a vital and effective role in the dispute resolution strategy of the organizations involved and significantly reduce the costs, delay and unpredictability of traditional litigation. The Business Courts in

Michigan, which will have jurisdiction over disputes that involve the enforcement of 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 lack a written agreement regarding arbitration, they can still enter into such an agreement post-dispute, or, may agree to move the conflict to arbitration once a lawsuit is 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 serve as arbitrator(s); what limitations are going to 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 also 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. Some parties view this benefit as a detriment in the arbitration process, particularly if significant legal and business issues are involved. Some counsel have attempted to contractually expand the scope of 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 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, is repealed effective July 1, 2013. Many practitioners and arbitrators welcome 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. 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 matters 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 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 in how to handle such cases.

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.

2. Mediation-Arbitration Hybrids

The Mediation-Arbitration hybrid process (typically referred to as "Med-Arb") typically initially involves beginning the ADR process with traditional mediation. If the parties reach impasse on some or all of the issues at the conclusion of the mediation, the mediator may become the arbitrator, conduct a hearing on the issues not resolved during the mediation, and render an award on the open issues. Alternatively, the parties may select a different person to serve as arbitrator. The predominant reasons for the development of Med-Arb is that it gives an opportunity for a mediated resolution of some or all of the issues with the assurance of a final and timely resolution on the open issues. Even if a global resolution is not achieved, effective use of this process frequently results in a resolution or a narrowing of the items subject to arbitration as the parties during the mediation process can reach agreements on a variety of substantive as well as procedural matters. 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 (if the mediator is also the arbitrator). 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 simplification of the items subject to arbitration and a redirected focus of attention on the unresolved issues during the arbitration.

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 a third person becomes the mediator and engages in a traditional mediation to determine if a full resolution can be achieved. If a resolution is not achieved, the arbitration award is issued.

The hybrid Med-Arb process is not without some 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 maintain 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, opponents challenge the ability of the same arbitrator's ability to maintain neutrality in the subsequent mediation.

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 effective ADR tool. It is their belief that if the

mediation takes place first, the parties are 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.

The parties who have selected the Med-Arb process with the same provider 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) to the dispute. While there are some who have not embraced this process, and have raised legitimate concerns, it has been a widely used ADR technique by many disputants. In a 1997 survey of the ADR practices of Fortune 1000 corporations, it was revealed that 40% of the respondents had actually participated in Med-Arb procedures. See Thomas J. Brewer and Laurence R. Mills, *Combining Mediation and Arbitration*, 54 *Disp. Resol. J.* 32, 34 (1999).

As many 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. Typically, Med-Arb hybrids require fairly sophisticated parties, counsel and 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 selected. See Exhibit 3. Also, the ADR provider must be very clear in the role being performed at any point in time during the process; 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 to adopt, follow, or not follow the recommendation of the mediator. Typically, the “mediator’s recommendation” will first be presented to the parties 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 a 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**. This is 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 which 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. **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 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. 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 may have 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 a resolution but to streamline the litigation process. The potential secondary objective may be that the Special Master’s determinations can 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. There appears to be no specific procedural directive for the Court appointment of a Special Magistrate in state court so many judges will not adopt or order the appointment. If the parties believe the case may be in danger of becoming needlessly complex, if the parties require more time from a “judge” than the assigned judge can provide, or if the parties believe any number of preliminary rulings (whether procedural, discovery, evidentiary, or otherwise) will materially expedite and streamline the litigation, this option should be considered.

The Special Master, based upon a knowledge of the case, may 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 mediator. In this role, the Special Master can be very effective in assisting the parties to shape a mutually beneficial resolution of the litigation.

The Special Master may add to the initial cost of the litigation as the Special Master's fee is borne pro rata by the parties. The decision the litigants are called upon to make is to weigh the likelihood the Special Master will materially reduce the overall cost of the litigation, reduce delay in the litigation, and/or increase the potential of achieving an early mutually beneficial resolution 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 Court will likely 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.

4. Friend of the Court (FOC) Referee Hearing

Similar to 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 to 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 which 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 preliminary determination of the Referee may also be an impetus to further settlement discussions or re-invigorate settlement discussion that have come to an impasse.

5. 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 have 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) issue 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 is 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 typically Dispute Resolution Boards consist of three or more members (to avoid a “deadlock”), depending upon the nature and significance of the contractual relationship, the Dispute Resolution Board can be composed of only one 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 the early, cost effective resolution of disputes.

Even post-dispute, whether before or after the filing of a lawsuit, the parties can 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, who desire to engage in significant discovery and desire more due process protections (even at an early stage in the litigation) than that 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 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 Trial is presided over by a neutral who 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.

Often the neutral who presides over the Summary Jury Trial will then be asked to immediately assume the role of 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 that 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 or, 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 “late” 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. Also, considerable time can be expended by counsel in preparing for a Summary Jury Trial. If the amount of potential exposure is not significant, or involves important principles that have the potential of a significant long term economic impact, typically the cost and expense associated with even an abbreviated Summary Jury Trial may not be warranted or justified. Moreover, if a party will not be influenced by a non-binding verdict, the process will likely not have the desired effect.

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. Exhibit 4 provides a list of some of the issues that should be addressed in negotiating the process.

2. Early Neutral Fact Finding

When confronted with highly technical and complex litigation involving scientific, business accounting, intellectual property, medical care, and similar issues, disputants have effectively leveraged the use of early neutral fact finding. Often the parties will retain the services of an agreed upon expert both 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 basis 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 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 a party’s case and often streamlines the trial, thus 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 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.

Because of the costs associated with retaining the services of an expert neutral, it is not appropriate for all cases particularly where the amount in dispute is not significant. Such experts are also not particularly helpful where the damages involve more intangible rather than highly technical issues (e.g., emotional distress, pain and suffering, loss or reputation, division of property, 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 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 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 concurrently while answering questions posed by the opposing expert, attorneys and in some instances, the jury. 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 review and approval of counsel, the neutral will outline the legal and factual issues where there is agreement between the opposing experts and generate an agenda outlining the areas of agreement 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 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 opposing experts in the presentations they 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” mediation where the parties required or needed an “evaluation” of the merits of their cases 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 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 may 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 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 on the value.

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 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 evaluation” in Michigan is conducted pursuant to MCR 2.403 and is mandatory for 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.

The evaluation panel is usually made up of 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.

Some believe there are significant limitations of 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 evaluation, the parties have limited opportunity to explore non-economic terms and conditions that might prove beneficial to the parties. As a result, the party “satisfied” with the evaluation will often come to an agreement with the party otherwise inclined to reject the evaluation to settle the matter by entering into a settlement agreement that calls for the payment of the value of the case assigned by the evaluators with certain non-economic conditions requested by the opposing party. 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 and “interests” based, creative resolution for a client has been squandered. Finally, a recent study performed by the Supreme Court Administrative Office has questioned the cost-benefit of the Case Evaluation process required by MCR 2.403. 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).

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 voluntary 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.

Although there is great variance among judges in the manner in which each judge will conduct such conferences they can be very effective and persuasive. 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. 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 of the case can be gleaned by counsel 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 the same detriments with case evaluation pursuant to MCR 2.403 previously discussed are applicable. 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 unless the Court has granted a partial summary judgment. Although 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 result in undue pressure negatively impacting the decision making quality of the client. Since the manner in which judges 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 in advance.

VII. Facilitative 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. See Form 5. 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 may engage in “Real Time” mediation 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, the parties may proceed directly to litigation.

Even in the absence of a contract, the parties to a dispute with settlement authority can 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 can 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 steps are taken to ensure the discussions that take place are protected and not subject to disclosure.

Meet and confer processes are frequently undertaken very early during the life of a dispute, often even before a complaint is filed before significant litigation costs have been incurred and before the positions of the parties have become entrenched. These meeting

can and do provide the parties the opportunity to engage in “interests” 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 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 necessary to reach a fully informed resolution. If the parties are in an unequal bargaining position, do not have the comparable bargaining skills, or one party is subject to being unduly influenced or intimidated by the other party, the process may be unsuccessful. Some or all of these issues are of particular 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 other ADR technique to resolve the dispute at a very early stage and before significant litigation costs are incurred. See Form 1. 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.

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, they want 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 be reflected by the offers that may be made.

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. See Exhibit 5. The parties are represented by counsel who are specially trained in Collaborative Practices who also agree they 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 to their respective clients. 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 practice 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. 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 reached. If a resolution is reached then the attorney representing the plaintiff will be compensated an agreed upon portion of the settlement. If the attorney is representing the defendant during this court referral process, the attorney typically agrees to 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 able to agree on these matters, the Friend of the Court will prepare an Order to be approved to by the parties and submit it to the Court for entry.

If the parties are unable to reach agreement on these issues, the Friend of the Court will make a report and recommendation that will be provided to 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 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 the issues it was believed that, on occasion, the results were unfair and 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 consolidation process simulates a facilitated meet and confer conference at the outset of the litigation that can address 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 jury trials and can be very useful in complex litigation, where important business interests are at stake, or the potential damages are high. Although the manner in which mini-trials are conducted can vary, 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 obtain the panel's impression of the case. It is then followed by the use of the panel's evaluation to facilitate 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 and move immediately into mediation. Again, depending upon the ground rules established, the neutral, if requested, may also give an opinion 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. 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, 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 late 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 can 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 not be able 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 an inexpensive process 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 believed that mediation has great attraction 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 has also 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 third party 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 keep control of their desired outcome. The process is also protected by strict rules of confidentiality as set forth in MCR 2.412 and in some statutes. In part because of the confidential nature of the process, negotiations taking place can encompass a frank discussion of all the pertinent facts, explore the interests of the parties, conduct a candid examination of the strengths and weaknesses of a party's case, and generate 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 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 are not particularly helpful or strategic in the mediation setting where the goal is to find a mutually acceptable solution. While aggressive 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 "rightness" 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. 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.

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 considerations. Is the mediator's style evaluative, directive, facilitative or analytical? Recent studies have suggested that most litigators are "more comfortable" with a mediator who is willing to be somewhat evaluative during the mediation process (typically during confidential caucuses). However, many parties are not necessarily comfortable with a highly evaluative mediator. Thus, the decision on who will be selected as the mediator demands the requisite due diligence by counsel and the parties to select a mediator that is best suited to the dispute

and the personalities of the parties¹.

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 that are discussed and reviewed can be quite extensive to ensure that all participants are prepared for the mediation.

In mediation there are very few hard and fixed rules. Rather, counsel, the parties and the mediator 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 attended by all the participants. During the joint session, after the mediator reviews the Mediation Agreement and Rules of Confidentiality. There is usually a re-iteration of the “ground rules” agreed upon during the pre-mediation conference call, followed by the parties and/or their counsel arguing a presentation on the strengths of their 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 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 issues, to aid the parties in narrowing the issues, and to develop an understanding of the interests of the respective parties.

Depending upon the parties’ procedural agreement, the joint session usually concludes and the parties adjourn to private sessions (the “caucus”). During caucus the mediator meets independently with each party and counsel for confidential discussions and to explore any number of issues including potential settlement options. Depending upon the circumstances, the mediator may review exhibits, further explore damage theories, anticipated witness testimony, and other aspects of the case that may follow if the parties are unable to mutually resolve the matter. For example, in an employment case, if not

¹ 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. See [http://courts.mi.gov/Administration/SCAO/OfficesPrograms/ODR/Documents/MediatorStandards of Conduct](http://courts.mi.gov/Administration/SCAO/OfficesPrograms/ODR/Documents/MediatorStandardsofConduct). If there is any confusion during a private mediation as to whether the mediator is adhering to these Standards, that confusion should be resolved before the mediation takes place by reviewing and knowing the Standards in advance.

addressed during the joint session, the mediator may explore potential options such as reinstatement, 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 they must declare to the mediator the information shared in caucus that should be held in confidence by the mediator. 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 private session 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 opposing 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 offers 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, 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. 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 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, or there is a desire to preserve an ongoing relationship, mediation is often the ADR procedure of choice. It provides a forum for risk-adverse parties to eliminate the

uncertainties of trial and potentially achieve their interests and objectives. 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 need 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 wish to necessarily 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 may also 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 the party. Mediation is also a tool that can be used to assess 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 mediation 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 alternative 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 allocations of the mediator’s fees, and other procedural details that might take place before and during the mediation. A typical Agreement to Mediate is attached as Form _____.

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 a written 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 mediation.

c. Court Rule Mediation MCR 2.411, 2.412; 3.216

Parties may be ordered into mediation by a 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 a 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.

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 cannot agree on the mediator, should the court become involved in the selection of the mediator. Absent agreement, the judge should 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. It is not within the judge's authority to make the selection or suggestion of the mediator. 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 as set forth in MCR 2.411 (F), which apply only to those individuals who wish to appear on the court-approved roster of mediators. See Form 6 for a stipulated order appointing a mediator. . By maintaining control, the parties may 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 will 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:

- 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 immediately 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 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 remain 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 by the litigants that the mediator is not neutral or is exhibiting favoritism. For this reason, use of evaluative mediation should come toward the end of the parties' negotiations and after they have

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. 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 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 contractual 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 a decision; (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 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 and there are some who believe the newly established Business Court Judges, after consultation with the parties, may assume the role of the DRA in assisting the parties to develop an ADR strategy.

7. Early Intervention Settlement Conference – TO BE DRAFTED

VIII. Community Dispute Resolution Centers

Any *Taxonomy of ADR* requires a discussion of the incredibly beneficial resources provided by the Community Dispute Resolution Centers throughout the State of Michigan. These CORP centers offer trained volunteers who provide assistance at most affordable prices, often 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.

Any court established ADR plan should recognize and utilize the valuable services provided by the local Community Dispute Resolution Center like the Resolution Center in Macomb County. Small claims disputes and district court conflicts are common sources of references by the judges to the CDRPs for resolution negotiations. Center mediators are trained to work with pro se parties and facilitate a wide variety of commercial and domestic disputes.

IX. Conclusion

The 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.”

51 Sep. Disp. Resol. J. 29 (1966).

MEDIATION AGREEMENT

The undersigned have agreed to participate in a mediation to be conducted by **Tracy L. Allen**, in the matter of _____ for purpose of compromising, settling or resolving disputed claims and agree as follows:

1. Mediation Proceedings. This is a voluntary, non-binding mediation. All parties to this Agreement agree to participate in the mediation and will attend with one (1) or more persons who have full settlement authority to resolve the dispute among the parties. All proceedings in connection with this mediation shall be subject to this Agreement and applicable provisions of Michigan law (including MCR 2.411 and 2.412) to the extent not inconsistent therewith.

The purpose of the mediation is to attempt to compromise, settle or resolve disputed claims between the parties. The Mediator's role is to act as a neutral party for the purpose of assisting the parties to resolve said claims. Prior, during and after the course of the mediation, the Mediator is authorized to conduct joint and separate communications and/or meetings with the parties and/or their counsel and, at her discretion, to provide an evaluation of each party's case, if requested, and to make recommendations for settlement. The parties acknowledge that the Mediator is not acting as an attorney or advocate for any party and any recommendations or statements by the Mediator do not constitute legal advice by the Mediator. The parties acknowledge they have been advised to seek and rely upon the advice of their own counsel in connection with any settlement or other agreement including the review of any written Mediation Settlement Agreement by each participant's independent counsel prior to execution.

2. Confidential and Privileged Nature of Mediation Proceedings. In order to encourage communications designed to facilitate settlement of disputed claims, the parties agree that all proceedings in connection with this mediation shall be subject to Rule 2.403(J)(4), 2.411 and 2.412 of the Michigan Court Rules and Section 408 of the Federal and the Michigan Rules of Evidence. These rules generally provide and the parties agree that evidence of conduct, anything said or of any admission made in the course of mediation and/or settlement discussions, or in documents prepared for or introduced in the course of mediation and/or settlement discussions, shall not be admissible in evidence or subject to discovery and that disclosure of said evidence shall not be compelled in any civil action. The participants agree they will not use a tape or digital devise to create an audio or video recording of the mediation proceedings. Evidence that the parties have entered into a written settlement agreement during the course of the mediation may be disclosed and is admissible to the extent necessary to enforce the settlement. This Agreement is subject to the Mediator's obligation to comply with the Michigan Rules of Professional Conduct as same may exist from time to time, and to the extent inconsistent with the terms of this Agreement, said Rules shall take precedence. All parties to this Agreement represent they will not secretly or overtly record (audio, video or electronic) any of the mediation proceedings and that they will not carry or bring firearms or weapons into the mediation facility or site.

3. Exclusion of Mediator Testimony and Limitation of Liability. The Mediator shall not be subpoenaed or otherwise compelled to testify in any proceeding and shall not be required to provide a declaration or finding as to any fact or issue, relating to the subject matter of and/or the mediation proceedings or the dispute which is the subject of said mediation proceedings. The Mediator

and any documents and information in the Mediator’s possession will not be subpoenaed in any proceeding and all parties will oppose any effort to have the Mediator or documents subpoenaed. The Mediator shall not be liable to any party for any act or omission in connection with the mediation proceedings conducted pursuant to this Agreement.

4. Mediator’s Services and Compensation. The Mediator’s services shall include attendance at mediation conferences, review of briefs and other written materials, participation in telephone or follow up conferences and any other services requested by the parties. The Mediator will be compensated at the rate of _____ *and 00/100 (\$____.00) Dollars per hour* for telephone conferences, preparation, pre and post mediation sessions, mediation, follow-up and subsequent work related to or arising out of her services in this matter. The Mediator will also be compensated for any out-of-pocket expenses or actual expenses incurred such as travel, hotel, mileage, facility charges, filing fees and any expenses incurred in providing reasonable accommodations as required by the Americans with Disability Act. Prior to the mediation, and prior to any subsequent or follow-up mediations, any person who violates this provision shall pay all fees and expenses of the Mediator, including reasonable attorney fees and expenses and the Mediator’s lost professional time resisting such efforts. The parties shall deposit with the Mediator an advance deposit, as set forth below, to cover their anticipated share of the Mediator’s compensation:

<u>Party</u>	<u>Deposit Amount</u>
Plaintiff	_____
Defendant	_____

Any additional fees not covered by the advance deposits shall be invoiced and are payable upon receipt of said invoice. Any deposit credit balance remaining at the conclusion of the mediation will be refunded. Counsel for the parties guarantee payment of all fees and expenses. Mediations cancelled within five (5) days of a reserved session date will be subject to cancellation fees. In the event the reserved session date is filled with another mediation, no cancellation fees will be charged.

5. Conflict of Interest; Disclosures; Waiver. The parties and their counsel acknowledge and agree that, in the Mediator’s capacity as mediator, neither she, nor the law firm of Global Resolutions, PLLC, of which she is a member, are acting as an attorney or advocate for any party in connection with the mediation. The parties and their counsel have disclosed to the Mediator, and the Mediator has disclosed to each of them, all matters that each reasonably believes requires disclosure pursuant to MCR 2.411. The parties and their counsel further acknowledge and agree that no conflict of interest has been or will be deemed to exist in any matter in which Global Resolutions, PLLC has represented, in the past or may represent in the future, interests that may be adverse to the parties or their counsel, and that Global Resolutions, PLLC not be disqualified in any such matters by virtue of the Mediator providing mediator services in this case.

6. Counterpart Execution; Binding on Representatives. This Agreement may be executed in any number of counterparts which, when taken together, shall constitute one (1) fully

executed Agreement. This Agreement when so executed, shall inure to the benefit of and be binding on the undersigned parties as well as their counsel, respective representatives or other persons they have caused to be present during these mediation proceedings.

PARTIES: _____

PLAINTIFF:

By: _____, Individually
Plaintiff
Dated: _____

DEFENDANT:

By: _____
Its: _____
Defendant
Dated: _____

By: _____
Its: _____
Defendant
Dated: _____

By: _____

By: _____

ATTORNEYS: _____

Attorney for Plaintiff
Dated: _____

Attorney for Defendant
Dated: _____

Mediator