

Case Evaluation and Mediation in Michigan Circuit Courts: A Follow-up Study

**Michigan Supreme Court
State Court Administrative Office**

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EXECUTIVE SUMMARY

Study Purpose and Methods

Michigan's circuit courts currently employ two primary means of alternative dispute resolution (ADR) to resolve civil claims involving money: case evaluation and mediation. In fall 2017, the State Court Administrative Office (SCAO) contracted with Courtland Consulting to conduct a follow-up study to replicate portions of an ADR study conducted for SCAO in 2011. The purposes of the follow-up study were to 1) examine the efficacy of case evaluation and mediation in resolving civil cases and 2) assess current attitudes and opinions of attorneys, circuit court judges, and court administrators regarding case evaluation and mediation.

Data were collected through interviews, statewide surveys of judges and attorneys, and examination of a random sample of tort and non-tort civil cases in three Michigan circuit courts. The sample included cases that used one or both forms of ADR and some cases that used neither. As in the 2011 study, the two indicators of efficacy examined in the case reviews were length of time from case filing to disposition and the percentage of cases disposed through settlement or consent judgment.

Major Findings

Effects on Dispositions. The review and analysis of data from 358 civil case records in three circuit courts found the same pattern of results as in the earlier study: both forms of ADR resulted in high rates of settlement, but mediation provided a faster means for resolving cases. These effects were found for both tort and non-tort cases. Specific findings were as follows:

- Cases that used either case evaluation or mediation had high rates of disposition through settlement/consent judgment—upwards of 80% when used individually or in combination.
- Using mediation had little or no effect on length of time to dispose a case when compared to cases that did not use ADR.
- The use of case evaluation, when compared to mediation, increased the amount of time to disposition by an average of 3 to 4 months.
- Mediation was faster than case evaluation for disposing cases because it was held about two months sooner in ADR cases and because cases closed more quickly following mediation, also by nearly two months.
- Mediation provided a more direct means of achieving a disposition as two-thirds of the cases that used it settled at the mediation conference.
- In only 15% of the cases in which case evaluation was held did the parties accept the award amount and settle quickly, and many of the remaining cases were later disposed through mediation.

- An analysis of medical malpractice claims requested for this study found: Compared to other tort cases, medical malpractice cases used ADR less often (even though ordered to ADR at the same rate), were more likely to go to trial, and were open nearly three months longer.

Perspectives on Case Evaluation and Mediation. Surveys of 1,135 attorneys and 67 judges and the interviews with chief judges and administrators of the three circuit courts found that, as in the previous study, mediation is viewed as the more effective means of ADR. Although there is still support for the use of case evaluation, particularly among judges, it is not as strong as in 2011. Specific findings include:

- About two-thirds of both judges and attorneys said that mediation is used more often for civil cases than it was five years ago, as was recommended by the 2011 report.
 - However, most judges said they continue to order case evaluation as often as before.
- Both groups rated mediation as a more effective method of resolving cases than case evaluation, just as they did in 2011.
 - More judges said that mediation helped the courts dispose of cases within time guidelines (83%) than said that case evaluation had done this (45%).
 - Both groups rated mediators' expertise more highly than they did that of the case evaluation panelists.
 - Judges estimated that cases settled more often as a direct result of mediation (59% of the time) than as a direct result of case evaluation (41%).
- As in the earlier study, judges continue to hold a more positive view of case evaluation than attorneys. In particular:
 - Most judges agreed that case evaluation is an effective means to resolve civil cases, while most attorneys did not.
 - Judges assigned higher ratings to the expertise of case evaluators.
 - Judges were more likely to say that they would use case evaluation even if its use were no longer mandatory for some cases.
- But there were some signs of weakening support for case evaluation, especially among judges:
 - The portion of judges who said it is effective went from 69% in 2011 to 53% in the current study.
 - The percentage of judges who said they would voluntarily use case evaluation dropped from 83% then to 66% now.

Summary and Conclusions

The case reviews found that case evaluation and mediation both produced high rates of settlement, but that mediation was a more direct method for doing this and disposed of cases more quickly. Both judges and attorneys rated mediation as the more effective form of ADR, just as they had in the 2011 study. Judges continued to regard both case evaluation and mediation more positively than did attorneys. However, while most judges still rate case evaluation as effective and say they would use it voluntarily these numbers are not nearly as strong as they were in 2011.

Despite the increased use of mediation to resolve civil cases in Michigan and the evidence that it is the more effective form of ADR, some judges and attorneys want to retain the option of using case evaluation as needed to move civil cases toward resolution. In their comments on the survey, some argued for greater flexibility in choosing which type of ADR to use and when to use it—tailoring ADR use to the unique requirements of each case. Those who support the use of case evaluation frequently describe it as a tool that can be used to motivate parties to settle later once they have a potential settlement figure to work with and the threat of sanctions can be invoked for not accepting the award.

1. INTRODUCTION

1.1 BACKGROUND

Michigan's circuit courts currently employ two primary means of alternative dispute resolution (ADR)—case evaluation and mediation—to resolve civil claims involving money damages. In 2010, as part of its deliberation of a number of proposed court rule amendments to MCR.2.403 (Case Evaluation) and MCR 2.411 (Mediation), the Michigan Supreme Court directed the State Court Administrative Office (SCAO) to conduct a study of the efficacy of these two forms of ADR. The SCAO contracted with Courtland Consulting (Courtland) to evaluate the comparative effectiveness of case evaluation and mediation in resolving non-domestic civil cases in Michigan's circuit courts. The focus of the study was on the use of case evaluation and mediation in civil cases seeking awards of more than \$25,000—which puts them under the jurisdiction of the circuit courts.

Courtland produced a report in 2011 that concluded:

This study found evidence of the effectiveness of both case evaluation and mediation. However, mediation appears to be more effective than case evaluation in disposing cases more quickly and achieving settlements. Mediation (unlike case evaluation) was also considered to reduce costs for both the court and the litigants. Judges and attorneys expressed a more favorable view of mediation, but there was support for continuing case evaluation, particularly among judges. Flexibility regarding the method and timing of ADR was deemed important. A direct link to the 2011 report is here:

<http://courts.mi.gov/Administration/SCAO/OfficesPrograms/ODR/Documents/Effectiveness%20of%20Case%20Evaluation%20and%20Mediation%20in%20Michigan%20Circuit%20Courts.pdf>.

The report made a number of recommendations, including: 1) Michigan circuit courts should be encouraged to make mediation available and not require case evaluation for case types for which it is not required by statute; and 2) Michigan circuit courts should continue to offer both forms of ADR but provide more flexibility in choosing the most suitable method and timing for the specific case.

In Fall 2017, SCAO again contracted with Courtland to conduct a follow-up study that would replicate portions of the original study. The analyses in this report includes then-and-now comparisons to determine if there have been changes since 2011 in factors such as the percentage of cases ordered to each type of ADR, length of time to case resolution, and judges' and attorneys' opinions about case evaluation and mediation. Courtland worked closely and collaboratively with the SCAO's Office of Dispute Resolution to determine the scope of this study and to ensure that it incorporated multiple data sources and perspectives.

1.2 PROCESS DEFINITIONS

Case evaluation is a process through which a panel of three attorneys, appointed by a court and not involved in the dispute, hears issues specified by the parties and then renders a monetary evaluation of the case. The administration of the process is finely detailed by court rule, which includes provisions for supplying briefs to panelists, timing of various events, payment of fees, conduct of the hearing, and the effect of accepting and rejecting awards. Penalties (sanctions) may be attached for not accepting the award if the rejecting party does not improve upon a trial verdict by 10 percent over the award, and the other party(ies) accepted the award. With the exception of the case evaluation award, which is sealed for a period of time, the court rules do not specifically address the confidentiality of the case evaluation process.

MCL 600.4901-600.4969 mandates only referral of tort and medical malpractice cases to this process. MCR 2.403(A)(1) expands the potential scope of case types to “any civil action in which the relief sought is primarily money damages or division of property.” Courts vary considerably in their use of this process, from referring virtually all general civil cases to referring none, except upon request of the parties.

Mediation is defined by court rule as “a process in which a neutral third party facilitates communication between parties, assists in identifying issues, and helps explore solutions to promote a mutually acceptable settlement. A mediator has no authoritative decision-making power.”¹

Judges may order any civil case to mediation “at any time.”² Unlike case evaluation, the administration of the process, including requirements for briefs, style of mediation (e.g., face-to-face or caucus style, and facilitative or evaluative) is left to the parties and the mediator to determine. Notably, again unlike case evaluation where panelists are selected by the court, in mediation, parties are afforded an opportunity to select their own mediator. Only if parties do not select their own mediator does the court appoint one from a roster of persons who have met the training and experiential requirements. With some exceptions, outlined in MCR 2.412, the mediation process is confidential.

¹ MCR 2.411(A)(2)

² MCR 2.410(A)(1); MCR 2.411(C)(1)

Table 1-1
Comparison of Case Evaluation and Mediation by Feature

Feature	Case Evaluation	Mediation
Structure of process	Established by court rule	Determined by the parties and the mediator
Scope of discussions	Civil claims involving primarily money damages raised in pleadings	Any topic parties wish to raise
Selection of neutral	Panels are selected by the court	Mediator is selected by the parties
Participants in the process	Attorneys and panel members	Parties, attorneys, other participants identified by the parties and the mediator
Process goal	Two predominant goals: (1) to provide a true valuation of the case; (2) to provide a number around which parties can negotiate.	Disposition of case by agreement of the parties
Sanctions	May apply if a rejecting party does not improve upon an award following trial	Do not apply
Process duration	Established by court rule	Determined by the parties and mediator
Process approach	Adversarial	Collaborative
Process cost	Established by court rule	Negotiated between the parties and the mediator

1.3 THE USE OF CASE EVALUATION AND MEDIATION

Case evaluation and mediation can be used in combination as well as separately. Circuit courts may include both processes in the scheduling order or determine that a second process is needed if the first does not result in a settlement. The following diagram (Figure 1-1) illustrates the possible routes that cases can follow, the decision points along the way involving case evaluation and mediation, and the various points at which cases can be disposed prior to trial. Cases ordered to case evaluation first may settle prior to case evaluation or be resolved by the parties accepting the case evaluation panel's award. If the award is not accepted by both parties, the case may be ordered to mediation. Some cases ordered to mediation will settle prior to mediation being held. If not ordered to mediation, the parties may voluntarily choose to participate in mediation. If mediation occurs (either voluntarily or by court order), the parties may reach an agreement at the mediation table or settle later. Those cases that are not settled or otherwise disposed will proceed toward trial. The diagram also shows the paths that a case may take if mediation is ordered first.

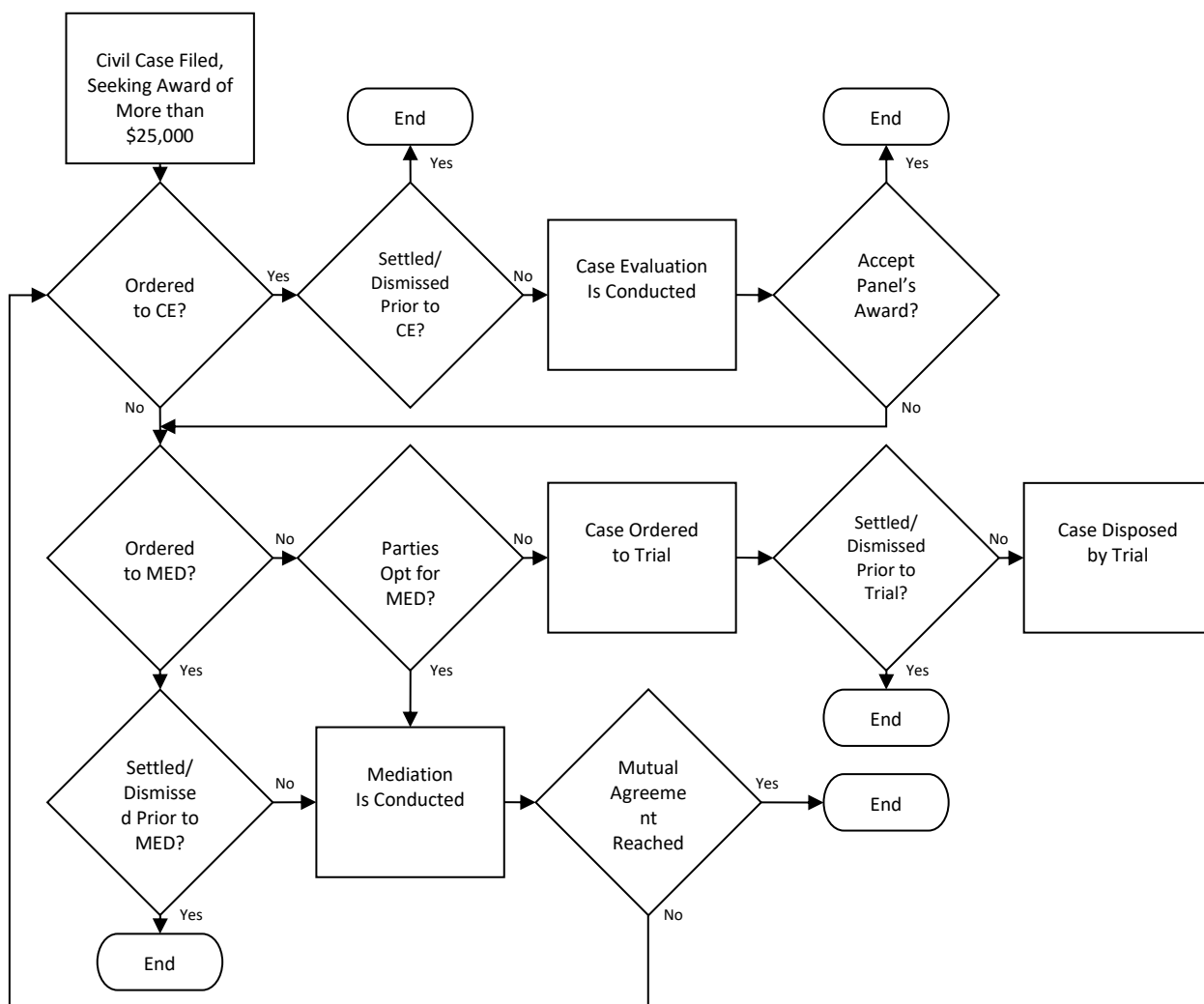


Figure 1-1. Use of Case Evaluation and Mediation in Case Disposition

1.4 PURPOSE AND SCOPE OF THE FOLLOW-UP STUDY

The State Court Administrative Office (SCAO) expressed interest in rerunning portions of the 2011 study conducted by Courtland Consulting that compared the effectiveness of case evaluation (CE) and mediation as methods of alternative dispute resolution (ADR) for civil claims. The SCAO was particularly interested in replicating those portions of the previous study that have had the most impact on the courts. The SCAO had observed a greater use of mediation since 2011 and noted that the courts are using it sooner and in many instances prior to CE. There is also growing momentum to change the Michigan statute requiring CE for tort cases to allow for it to simply recommend “alternative dispute resolution” (not specifically CE or mediation) and for it to occur earlier. The circuit courts in Michigan have become more focused on performance measures and making decisions that are data driven, this follow-up study was intended to provide SCAO with timely information to help in ADR decisions that may benefit the Michigan circuit courts.

The SCAO and Courtland collaborated to design this follow-up study, which utilized several research methods and data sources to assess the relative effectiveness of the following categories of ADR in resolving civil cases:

- Case evaluation only
- Mediation only
- Case evaluation and mediation
- Neither

The central evaluation questions guiding the study included:

- Does case evaluation or mediation affect disposition times?
- Does case evaluation or mediation increase the likelihood that cases will be disposed through a settlement or consent judgment?
- Has the frequency of use of case evaluation and mediation changed since 2011?
- What are attorneys' and judges' opinions of these processes today, compared to 2011?

Additional research questions were addressed as the available data allowed, with further analyses conducted where appropriate. Multiple data sources were used, including:

- Statewide web-based survey of attorneys
- Statewide web-based survey of circuit court judges
- Civil case file review at three circuit courts
- Interviews of the court administrators and chief judges at those three circuit courts

The various data sources were well integrated and comparable questions were used with different audiences in order to allow comparisons between respondent categories. A full description of the data sources is provided in the following chapter.

2. METHODS AND DATA SOURCES

The study used multiple methods of data collection to obtain as complete a picture as possible of the effectiveness of case evaluation and mediation in Michigan circuit courts' civil cases (including torts and other civil cases). Quantitative and qualitative data were obtained from several sources as described below.

2.1 STATEWIDE SURVEY OF ATTORNEYS

An online survey of attorneys to obtain their perspectives and opinions about case evaluation and mediation was conducted by the SCAO in December 2017. The SCAO sent a link to the survey to members of the State Bar of Michigan and sought the participation of attorneys who litigate general civil cases and who have experience with case evaluation and mediation in Michigan circuit courts. Responses were anonymous. The survey included a series of questions about case evaluation and mediation, many of which had been asked in the 2011 study.

Surveys were completed by 1,135 attorneys from all areas of the state. The majority of respondents (61%) had most of their case evaluation or mediation experience in the southeast region (where most of the state's cases are filed). The following graphic shows the geographic distribution of the attorneys who responded to the survey.

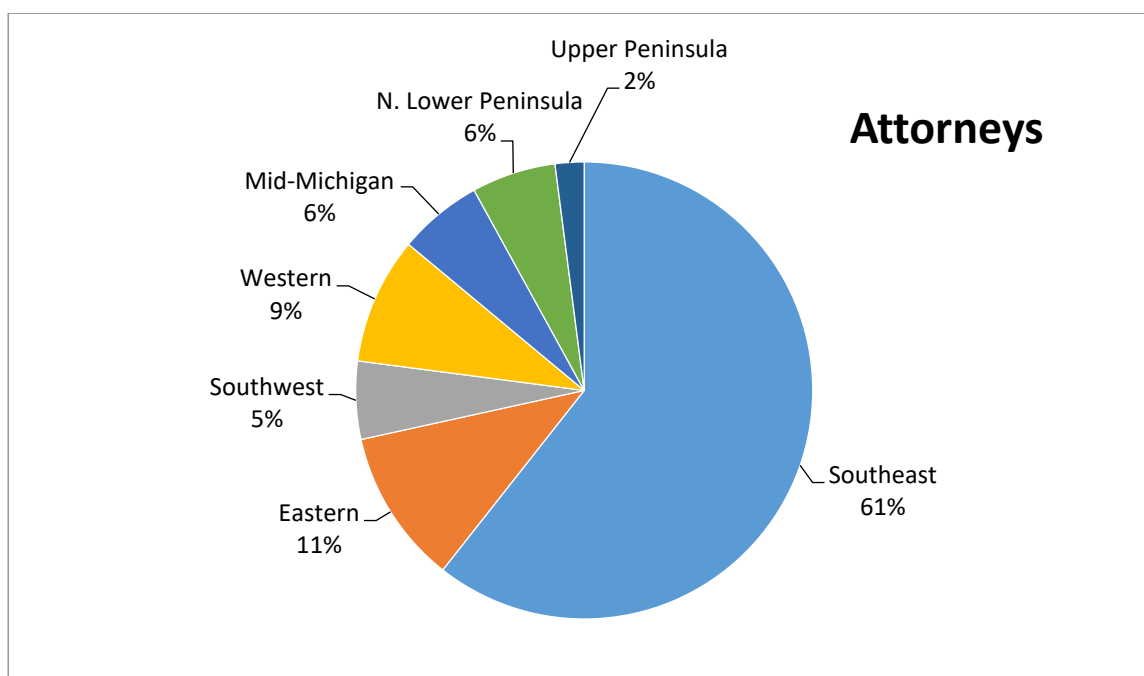


Figure 2-1. Attorney Survey Respondents by Region

Courtland was responsible for analyzing the survey data. Results from the attorney survey are incorporated into the study findings presented in Chapter 3: Findings. The survey questions and item-by-item responses are included in Appendix A.

2.2 STATEWIDE SURVEY OF CIRCUIT COURT JUDGES

A different online survey of circuit court judges was conducted in January 2018. The survey, which contained many of the questions asked of the attorneys, sought to determine how judges currently use case evaluation and mediation in their courts and their opinions of each process. The SCAO sent a memo to judges in all circuit courts inviting those who adjudicate non-domestic civil cases to complete the survey and providing them the URL for Courtland's online survey.

A total of 67 judges submitted complete surveys. Responses were anonymous. The figure below shows how respondents were distributed across the state. Courtland analyzed the survey data and incorporated the results into the study findings presented in Chapter 3: Findings. The survey questions and item-by-item responses are included in Appendix B.

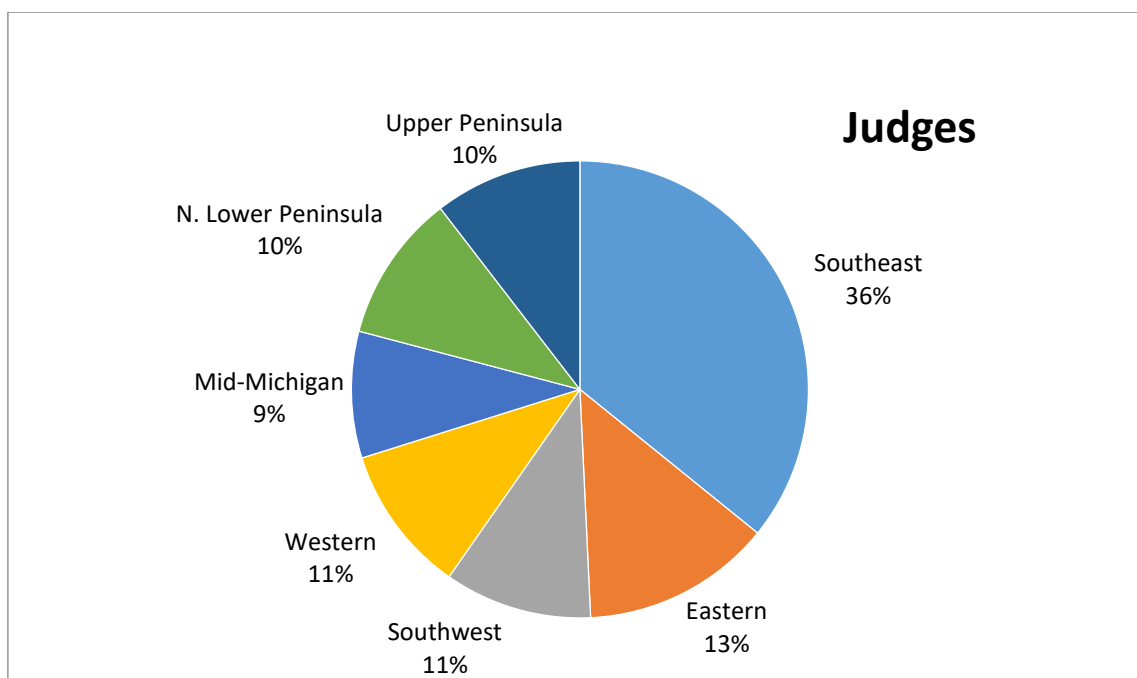


Figure 2-2. Judge Survey Respondents by Region

2.3 REVIEW OF CASE FILES FROM THREE CIRCUIT COURTS

In 2018, Courtland researchers visited three circuit courts and reviewed the files of more than 350 civil cases that were disposed in 2017. The three courts were among the six where similar reviews were conducted in 2011. The specific circuit courts were selected for participation in the study with the goal of obtaining an appropriate mix of courts of varying sizes, location, and different approaches to the use of case evaluation and mediation. The three participating courts were:

- Berrien County (Circuit 02 in SCAO region 2)
- Oakland County (Circuit 06 in SCAO region 1)
- Wayne County (Circuit 03 in SCAO region 1)

Based on the information provided to Courtland by the court administrators, ADR clerks and other court staff who assisted the researchers during the site visits, the following descriptions of their case evaluation and mediation processes are offered:



BERRIEN COUNTY MICHIGAN

Berrien. A joint settlement plan is due 30 days after filing any civil case in Circuit Court. The plan includes an agreed-upon or preferred method of ADR to be taken into consideration when determining which ADR process to

include in the case management scheduling order (CMSO). The CMSO is filed by the court and includes a timeframe for witness lists, discovery and a trial date, as well as a case evaluation and/or mediation date within 120 days. If the matter is not resolved by case evaluation or mediation, then a settlement conference is held with the judge two weeks prior to a trial date. If it is still not resolved, a trial is held.



Oakland. For most civil cases that remain pending 75 days after the filing of the complaint, an automated scheduling order is sent to the parties. The scheduling order provides dates governing the exchange of witness lists, discovery and motion cutoff and trial. It also provides the month and year parties may expect case

evaluation to occur. Exceptions to the automated scheduling are the business cases which go through a business case conference with a Business Court judge to determine which ADR path best suits the case. Case evaluation dates and panels are assigned and managed by the Circuit Court ADR department internally. Special evaluation panels include: General Commercial, General Negligence, Product Liability, Medical Malpractice, Labor and Employment, Complex Commercial and a new No-Fault panel for personal injury protection (PIP) cases. Most of the civil cases go through case evaluation first as a means of identifying a monetary value for the parties to agree upon or negotiate. If a civil case is referred at the request of the parties to mediation after discovery, it is usually done through a stipulated order of the parties or by a judge's order. Some judges offer settlement conferences as a means of facilitating a case early on to help determine the next ADR steps needed to resolve the case. The court also encourages parties/attorneys to utilize ADR tools throughout the life of a case using settlement conferences with the judge and ratifying

requests to refer cases to mediation and arbitration. Ultimately, a trial may occur after discovery and unsuccessful CE and/or mediation to resolve a civil case.



Third Judicial Circuit of Michigan

Wayne. For every civil case filed, a standard scheduling order provides dates for witness list exchange, discovery cutoff, case evaluation, and a settlement conference with a judge. The court

mandates case evaluation for all civil cases involving a damage claim after the close of discovery. Case evaluation dates and panels are managed and assigned through the Mediation Tribunal Association, with special case evaluation panels offered for medical malpractice, business/commercial, and employment discrimination cases. Case evaluation is intended to provide a monetary value for parties to agree upon and/or negotiate. In the event the amount is not accepted by both parties, a settlement conference to help negotiate the final award amount is held 42 days afterwards (allowing parties up to 28 days to reconsider and accept the recommended award amount and 14 additional days to settle on their own). Mediation (also referred to as facilitation) is used for a complex individual case only upon agreement of the parties or by an order from a judge. Mediation can occur following discovery, an unsuccessful case evaluation, or an unresolved settlement conference. Mediation is mandatory for all cases that are case evaluated for \$25,000.00 or less. Trials may occur only after an unsuccessful settlement conference. The Discovery Master's Program is a newer voluntary ADR process that is partially grant-funded. Through this program retired judges are available on a weekly basis to hear the discovery for any civil case soon after a motion has been filed.

Courtland, with input and feedback from the SCAO, developed a data extraction tool to gather relevant and available information from selected civil case files. The tool was essentially the same as the one used in the prior study in 2011. The data extraction tool can be found in Appendix C. It facilitated data collection regarding the scheduling order, case evaluation dates and outcomes, mediation dates and outcomes, trial dates and outcomes, disposition code and closure date, as well as other ADR-related information. These data were entered into Courtland's online database for analysis.

The SCAO contacted the court administrators and obtained their cooperation in providing Courtland with a stratified sample of cases (by case type and ADR category) that were disposed during 2017. Generally, the registers of action (ROAs) were made accessible to Courtland for a larger number of cases than needed so the Courtland team could identify the cases eligible for detailed file review during their site visits. The objective was to obtain sufficient numbers of torts and other civil cases, as well as sufficient numbers of cases receiving the different variations of these two ADR processes: case evaluation, mediation, both, or neither. A minimum target was established to support the statistical analyses to be conducted: 300 eligible cases overall and at least 50 in each of the four ADR categories. Medical malpractice cases were oversampled with the goal of reviewing at least 50 of these cases.

Using the data extraction tool, detailed information was collected from a total of 358 cases. Of these cases, 221 (62%) were torts (type "N" cases, which are civil damage suits); 137 cases (38%) were other civil cases.

The latter included both type “C” cases (contracts and other civil matters) and “P” cases (less common types of proceedings). The following table shows the number of useable cases obtained from each of the three courts and the ADR categories of those cases for the purpose of this study.

Table 2-1
Cases and ADR Categories by Court

Court	ADR Process Conducted				Total
	CE Only	Mediation Only	Both	Neither	
Berrien	19	15	2	36	72 (20%)
Oakland	54	23	36	45	158 (44%)
Wayne	41	13	38	36	128 (36%)
Total	114	51	76	117	358 (100%)

2.4 INTERVIEWS OF CIRCUIT COURT ADMINISTRATORS AND CHIEF JUDGES IN THREE COURTS

A set of interview questions for court administrators and chief judges was developed by Courtland, with input provided by the SCAO. The purpose was to obtain a better understanding of how each of the three courts uses case evaluation and mediation and to solicit court leadership opinions about how well those processes work. The interview questions located in Appendix D were e-mailed to the court administrator after the onsite case file review, and telephone interviews using these questions were conducted in February 2018. Their responses have been incorporated into the descriptions above and into the study findings in Chapter 3: Findings.

3. FINDINGS

This chapter presents the findings from the case file review and incorporates results from the other data sources to address the evaluation questions in this study. Complete results from the statewide survey of attorneys can be found in Appendix A. The complete results from the statewide survey of circuit court judges can be found in Appendix B.

Note: The major findings of the study are presented throughout this chapter in bold. Where a finding is reported as “significant,” it means a statistical test was conducted and the observed result would have occurred by chance less than 5% of the time.

3.1 OVERVIEW OF CIVIL CASES EXAMINED IN THE CURRENT STUDY

This section presents summary descriptive statistics for the 358 civil cases examined in this study. The analyses are the same as were performed for the sample of 396 cases examined in the 2011 study. Direct statistical comparisons to the previous results could not be made, however, since random case selection in the two studies produced samples that differed on a number of variables such as ratio of tort/non-torts and the distribution of types of cases within each sample.

Section 3.2 uses case data to map the sequence of events for cases ordered to either case evaluation or mediation and indicates where in the process each case was disposed and how it was disposed. Sections 3.3 and 3.4 provide statistical analyses of these data examining the effects of case evaluation and mediation on two indicators of efficacy: settlement rates and time to disposition. Case data are used again in Sections 3.5 through 3.7 to examine the use and relative effectiveness of these two types of ADR for torts and non-tort civil cases.

3.1.1 Use of Case Evaluation and Mediation

Table 3-1 summarizes the extent to which case evaluation and mediation were ordered and/or conducted for all 358 civil cases (torts and non-torts) that were examined in this study through case file reviews at the circuit court. According to the interviews with court administrators and chief judges in the courts where these case files were reviewed, mediation is usually ordered through stipulation and order by the parties or by a judge’s order at the request of the parties for civil cases seeking more than \$25,000 in damages. Cases with a case evaluation award amount less than \$25,000 that do not settle are sent to mediation automatically.

Of the 221 cases involving torts, judges ordered one or both forms of ADR to be used in all but nine of these cases. The case records revealed that case evaluation and/or mediation was conducted for 78% of the torts and in 29% of these cases both methods were used.

Records for the 137 non-tort cases examined in this study indicated that judges ordered one or both processes for 61% of these cases and that case evaluation and/or mediation was held in 50% of these cases. In 8% of the cases, both case evaluation and mediation were held.

Table 3-1
Use of Case Evaluation and Mediation for Torts and Other Civil Cases

	Torts (n = 221)		Other (n = 137)		Total (n = 358)	
	N	Percent	N	Percent	N	Percent
Court Order for:						
CE Only	136	62%	25	18%	161	45%
Both CE & Mediation	73	33%	31	23%	104	29%
Mediation Only	3	1%	27	20%	30	8%
Neither	9	4%	54	39%	63	18%
Held or Conducted:						
CE Only	95	43%	19	14%	114	32%
Both CE & Mediation	65	29%	11	8%	76	21%
Mediation Only	12	5%	39	29%	51	14%
Neither	49	22%	68	50%	117	33%

Source: Case file review

3.1.2 Disposition of Torts and Other Civil Cases

Table 3-2 shows that of the 358 cases examined in this study, the most frequent type of disposition—74% of the cases—was a settlement or consent judgment. Another 21% of the cases were disposed either through dismissal or default. Four percent of the cases went to trial and 1% was disposed through a court verdict.

Table 3-2
Disposition of Torts and Other Civil Cases

	Torts (n = 221)		Other (n = 137)		Total (n = 358)	
	N	Percent	N	Percent	N	Percent
Trial Held	9	4%	5	4%	14	4%
Type of Final Disposition						
Settlement/Consent Judgment	180	81%	86	63%	266	74%
Dismissed/Default	32	15%	44	32%	76	21%
Summary Disposition	6	3%	5	4%	11	3%
Court Verdict	3	1%	2	1%	5	1%

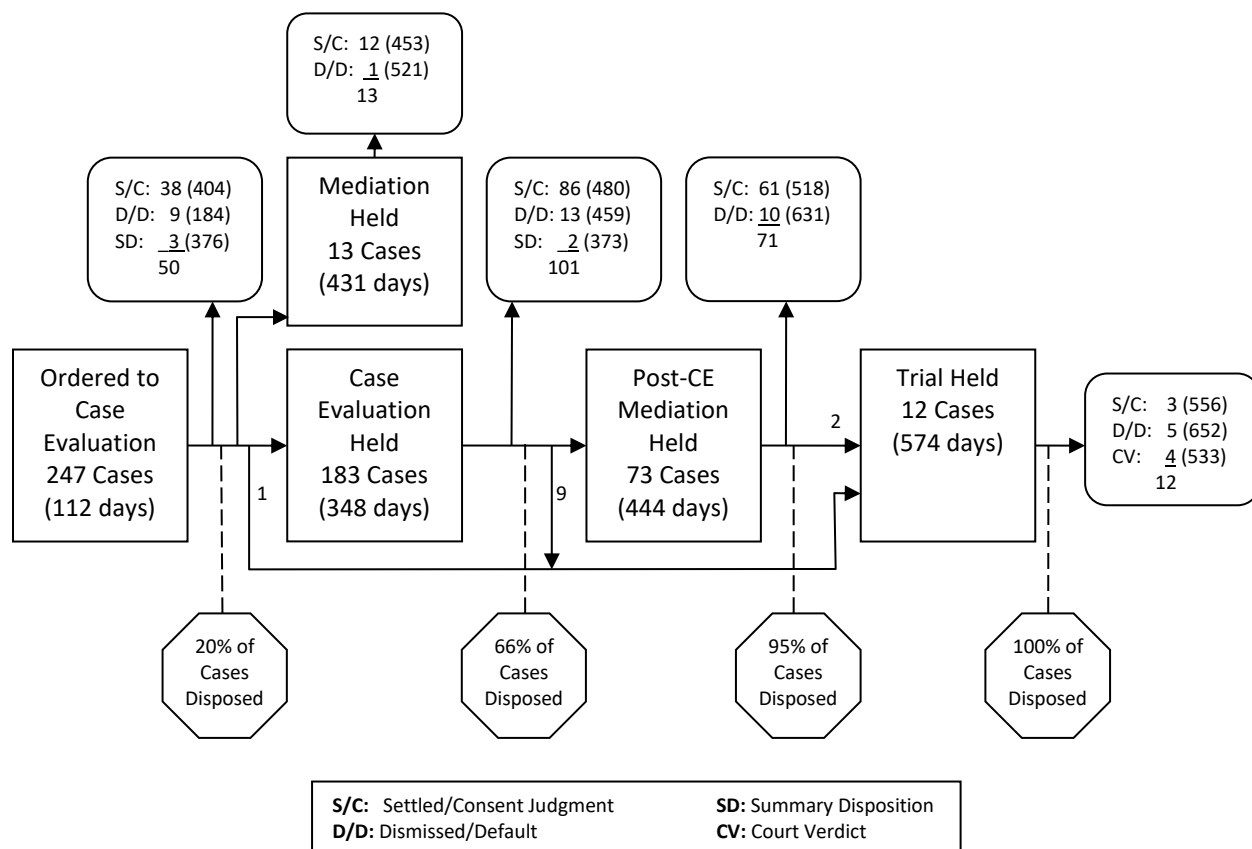
Source: Case file review

3.2 DISPOSITION OF CASES FOLLOWING AN ORDER FOR CASE EVALUATION AND/OR MEDIATION

The case file review revealed that when case evaluation and/or mediation were ordered in a case they did not always occur. Furthermore, when both forms of ADR were ordered, they were not always held in the sequence in which they were ordered. In addition, some parties opted for mediation even when it was not ordered. The following subsections describe how and when cases were disposed when either case evaluation or mediation was ordered as the first or only form of ADR held.

3.2.1 When Case Evaluation is the First or Only Type of ADR Ordered

Among the 358 civil cases reviewed, 247 were identified in which case evaluation was either the only type of ADR ordered by the court (161 cases) or it was ordered to be conducted first with mediation to be conducted later if needed (86 cases). Figure 3-1 provides an overview of the sequence of events for these cases and indicates where in the process each case was disposed and how it was disposed. The average age of the cases at disposition is indicated in parentheses.



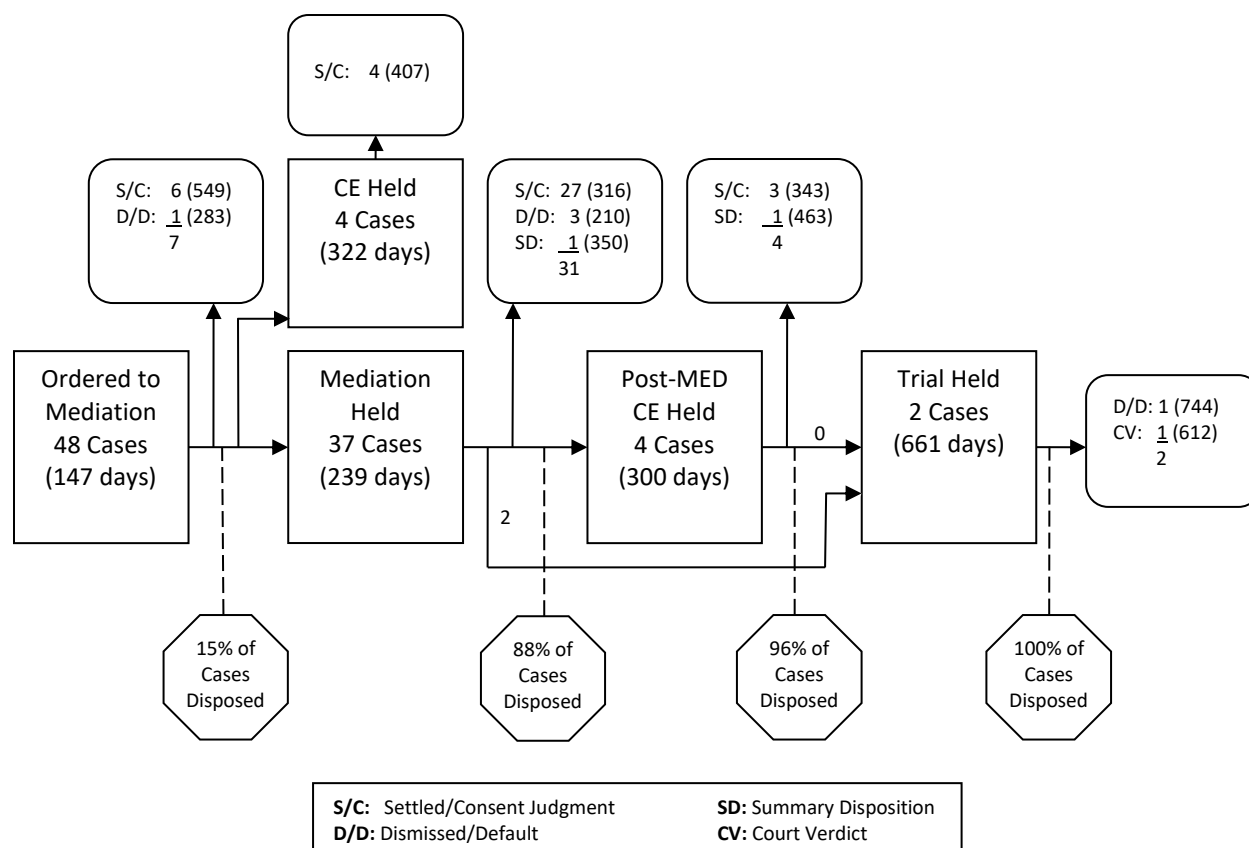
**Figure 3-1. Case disposition when case evaluation is the first or only type of ADR ordered:
Cases disposed and average (mean) age of cases at specific points in the process**

On average the order for case evaluation was issued 112 days after the case was initially filed. As shown in the figure above, 50 of the cases (20%) were disposed before either case evaluation or mediation could be conducted. In 13 other instances, the parties opted to use mediation instead of court-ordered case evaluation to resolve their cases.

Of the 183 cases in which case evaluation was held, 101 were disposed through this process with no other form of ADR subsequently taking place. Nine cases proceeded to trial without mediation taking place. After case evaluation, 73 cases proceeded to mediation, with all but two cases being disposed without trial. Thus 95% of the cases were disposed without going to trial.

3.2.2 When Mediation is the First or Only Type of ADR Ordered

Figure 3-2 shows the process through which 48 cases were disposed in which mediation was either the only type of ADR ordered by the court (30 cases) or it was ordered to be conducted first with case evaluation to be conducted later if needed (18 cases). These cases were ordered to mediation on average 147 days after the case filing date.



**Figure 3-2. Case disposition when mediation is the first or only type of ADR ordered:
Cases disposed and average (mean) age of cases at specific points in the process**

Seven of the 48 cases (15%) were disposed without mediation or case evaluation taking place. Case evaluation, instead of mediation, was used first to dispose four of the cases. Of the 37 cases in which mediation was held, 31 were disposed with no other form of ADR subsequently taking place; another 4 through case evaluation conducted later; and 2 cases proceeded to trial without case evaluation taking place. Thus 96% of the cases were disposed without going to trial.

3.3 THE EFFECT OF CASE EVALUATION AND MEDIATION ON RATES OF SETTLEMENT/CONSENT JUDGMENT

1. A settlement or consent judgment was achieved in over 80% of the cases in which one or both forms of ADR were used.

Examination of all 358 civil cases revealed that when neither case evaluation nor mediation was held, a settlement or consent judgment was reached in just over half (57%) of the cases, (see Figure 3-3). If case evaluation alone was used, the percentage of cases disposed through settlement/consent judgment was significantly higher at 82%, the same as when only mediation was used.³ When a combination of case evaluation and mediation was used, the percentage of cases disposed through settlement/consent judgment increased slightly to 84%. As can be seen in Figure 3-3, when the percentage of cases disposed through settlement/consent judgment increases, there are fewer cases that can be disposed through other means, such as dismissal/default, summary disposition, or court verdict.

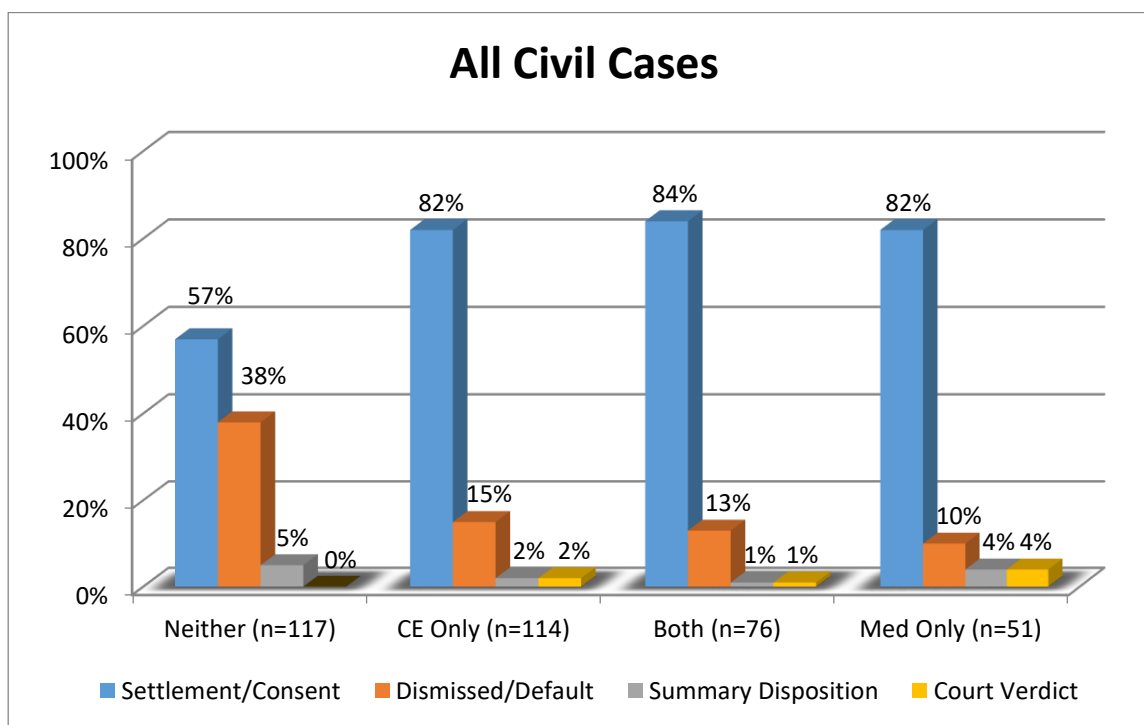


Figure 3-3. Percentage of cases disposed through settlement/consent judgment and other means by type of ADR used

Most cases in the Neither category were commercial ("C" type) cases that were resolved without the use of case evaluation or mediation. Compared to other civil cases, these cases are typically

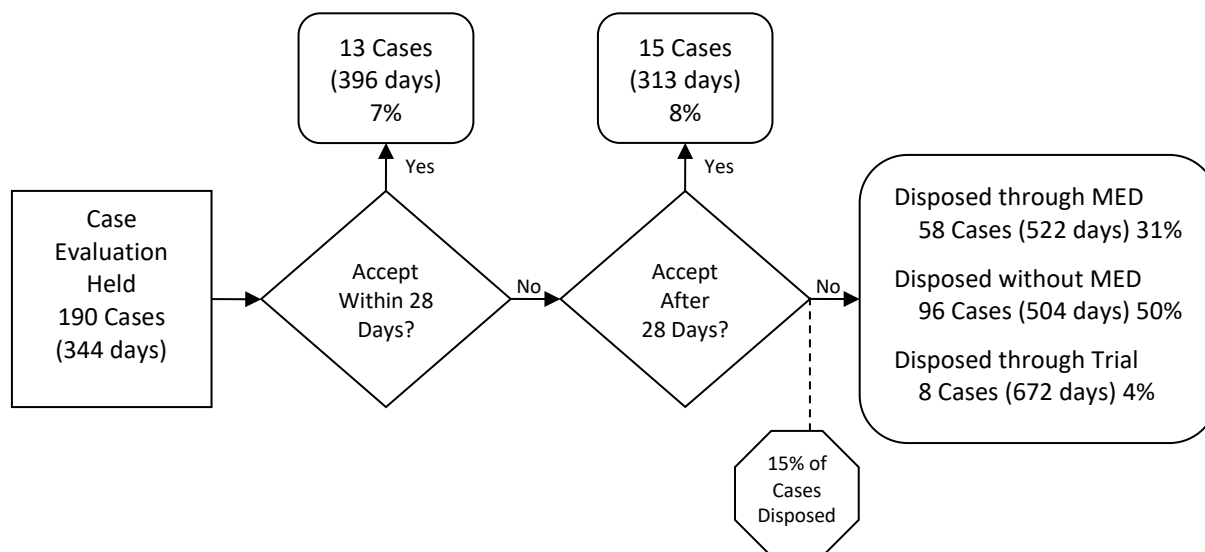
³ Statistical pair-wise comparisons were made between each of the ADR groups. These analyses found that the percentage difference between the Neither group (57% settlement/consent rate) and the CE Only group (82%) was statistically significant (chi-square = 20.140, df = 1, p < .001). Equally significant differences were found when the settlement/consent rate for the Neither group was compared to the rates for the Mediation Only and Both groups; however, the rates for the three ADR groups were not significantly different from each other.

less complex, involve lower value claims, and require less discovery and intervention to reach a settlement or dismissal. Resolution is often achieved through informal discussions, negotiations conducted outside of court, or at settlement conferences.

3.3.1 Acceptance of Case Evaluation Panel Award

2. The case evaluation award amount was accepted in 15% of the cases examined in this study. About half of the acceptances were made within 28 days.

Figure 3-4 displays the case award acceptance outcome and the court action disposing the case if the case evaluation award was not accepted for the cases in which case evaluation was held. Of the 190 cases in which case evaluation was held, the panel award amount was accepted by all parties within 28 days in 13 (7%) of the cases. Award amounts were accepted beyond the 28-day period in an additional 15 cases (8%).



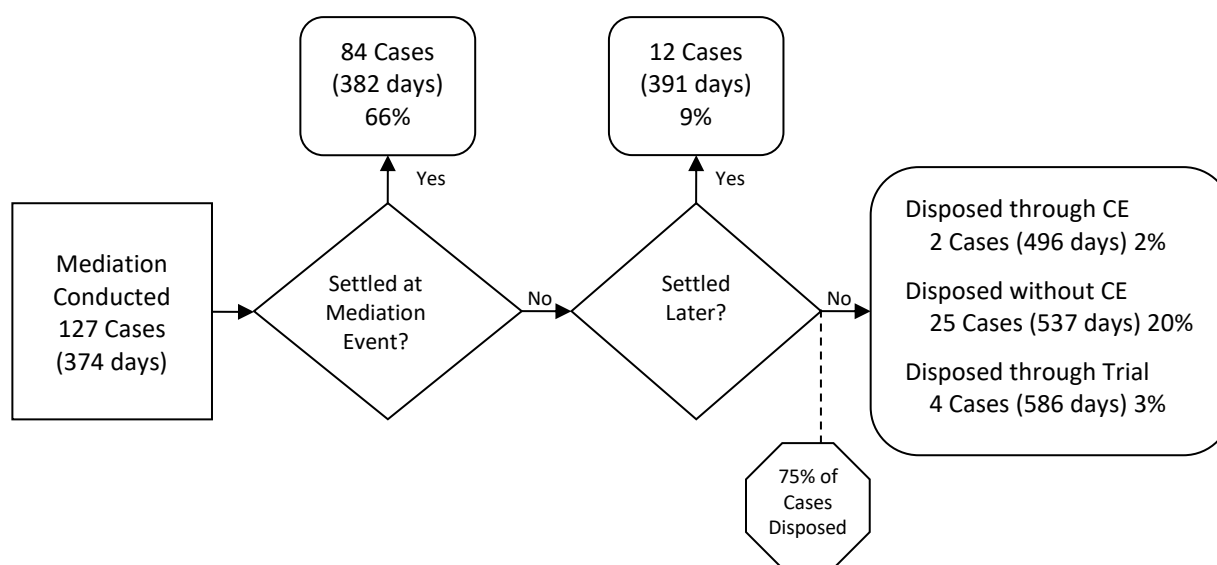
**Figure 3-4. Acceptance of case evaluation panel award:
Cases disposed and average (mean) age of case at each point in the process**

As shown in Figure 3-4, 58 of the cases in which the award was not accepted were later disposed following mediation; 96 were disposed without the use of mediation; and 8 were disposed after the case went to trial. For the 96 cases that were disposed without going to mediation, other court events may have occurred following the rejection of the case evaluation award, such as a settlement conference with a judge in which the parties used the award amount as a point of negotiation. These types of non-ADR events were not tracked in this study.

3.3.2 Settlement at or Following the Mediation Event

3. Where mediation was held, two-thirds of the cases were settled “at the table.” Ultimately three out of four cases that went to mediation were disposed through a settlement or consent judgment and without later using case evaluation or going to trial.

Figure 3-5 displays the mediation outcome and the court action disposing the case if a mediated agreement was not reached for the cases in which mediation was held.⁴ Of the 127 cases in which mediation was held, 84 cases (66%) were settled at the mediation event. Twelve of the cases (9%) were later disposed through settlement/consent judgment. Of the cases not resolved through mediation, 2 were later disposed following case evaluation, 25 were disposed via other means, and 4 were disposed through trial.



**Figure 3-5. Cases settled through mediation:
Cases disposed and average (mean) age of case at each point in the process**

The finding that 75% of the mediated cases were disposed through settlement/consent judgment is consistent with the results from the surveys of attorneys and judges. Most attorneys and judges agreed with the statement, “Overall, mediation is an effective method for resolving civil cases.” Seventy-eight percent of the surveyed attorneys agreed (36% strongly). Judges were even more positive with 94% agreeing with this statement (57% strongly).

⁴ This figure includes all cases in which mediation was conducted, whether ordered or not and regardless of whether case evaluation was conducted first. There is partial overlap with cases included in Figure 3-4, since 76 cases included both processes.

3.4 THE EFFECT OF CASE EVALUATION AND MEDIATION ON TIME TO DISPOSITION

- 4. The use of case evaluation—whether alone or in combination with mediation—significantly increased the length of time a case was open. Compared to mediation, case evaluation increased disposition time by three to four months.**

A key evaluation question for this study was whether either case evaluation or mediation affects the length of time needed to dispose a civil case. Time to disposition was calculated for each case by determining the length of time from the filing date to the date on which the case closed. As shown in Figure 3-6, the average length of time needed to close a case when neither case evaluation nor mediation was used was 309 days. Although the average time to disposition for cases that used mediation by itself was 377 days, statistically this was not a significant increase in time.⁵ Time to disposition increased significantly when case evaluation was used. Figure 3-6 indicates that the average increased to 489 days when only case evaluation was used and to 537 days if used in combination with mediation.⁶

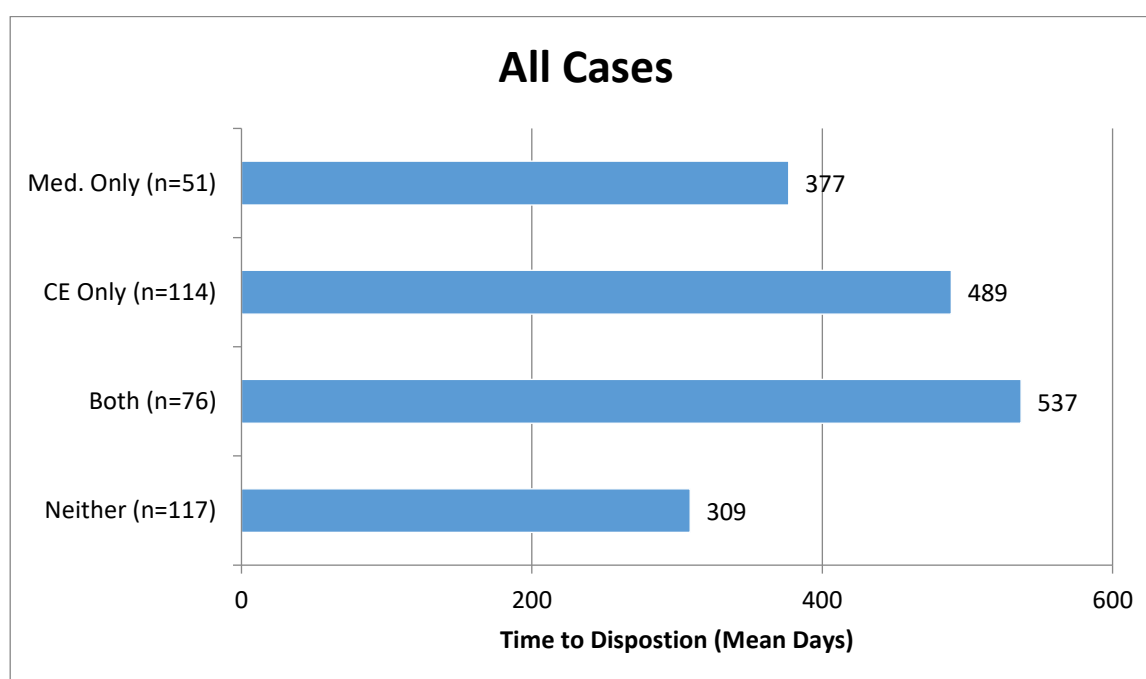


Figure 3-6. Average number of days needed to resolve civil cases by type of ADR used

⁵ An analysis of variance comparing mean days open for the four ADR groups found that cases closed significantly later for some groups ($F = 24.67$, $df = 3, 354$, $p < .001$). Post hoc comparisons between groups using the Tukey-B HSD statistic found the following: no significant differences between the Neither cases and the Mediation Only cases in average time to disposition; a significant increase in time to disposition ($p < .05$) if case evaluation was used either alone or in combination with mediation; and no significant difference between the CE Only group and the Both group in average time to disposition

⁶ For Both group cases, see Table 3-3 for length of time to disposition when case evaluation was used first and when mediation was used first.

3.4.1 Length of Time Before and After Case Evaluation/Mediation is Conducted

5. **Mediation was faster than case evaluation for disposing cases because it was held about two months sooner and because cases closed more quickly following mediation, also by nearly two months.**

In order to understand why cases that used mediation were disposed sooner than those that used case evaluation, the study examined the average length of time from case filing until one or both processes were conducted, and then the average length of time to case closure. Table 3-3 summarizes the results of this analysis.

When mediation was the *only* process conducted, the mediation session was held on average 300 days from the date of filing, and the cases closed about 77 days after mediation so that the entire process took an average of 377 days to complete. In contrast, when *only* case evaluation was used, it took 357 days on average just to complete this process and then another 132 days to close the case for a total of 489 days. If case evaluation was held first without success followed by mediation, it still took 330 days on average to complete this first form of ADR and then additional time to conduct the mediation. In summary, using mediation instead of case evaluation cut nearly two months from the beginning of the disposition process and nearly two more months from the end.

Table 3-3
Average Number of Days from Filing to ADR to Closure
For 5 Categories of ADR Cases

Type of ADR Case	N	Days from Filing to 1st ADR	Days from 1st ADR to 2nd ADR	Days from Last ADR to Closure	Total Days Case Open
CE Only	114	357	—	132	489
Mediation Only	51	300	—	77	377
Both – Mediation First	5	297	55	92	444
Both – CE First	71	330	143	71	544
Neither	117	—	—	—	309

Source: Case file review

As shown in Table 3-3, when mediation was the last process held, the cases closed on average 71 to 77 days after the mediation event. When case evaluation was the last process held, it took on average an additional 92 to 132 days to close a case. Cases in the Neither category closed more quickly than the others in part because many of these cases were less complex with lower values claims that were closed via dismissal or default judgments.

3.4.2 The Effect of Adjournments on Time to Disposition

6. Rescheduling a case evaluation panel hearing one time did not significantly increase the time needed to dispose a case, but multiple adjournments increased time to disposition significantly.

The study examined the extent to which adjournments during the ADR process affected time to disposition. For those cases in which only case evaluation was ordered, the panel hearing was rescheduled at least once 48% of the time (see Table 3-4). While rescheduling case evaluation one time did not significantly increase the time needed to dispose a case, multiple adjournments did increase time to disposition significantly—to an average of 555 days for two adjournments and 668 days for three or more.⁷

Table 3-4
Average Number of Days from Filing to Closure by
Number of Adjournments for 3 Categories of ADR Cases

Times Adjourned by ADR Case Type	N	Percent	Mean Days Case Open
CE Only			
None	84	52%	398
Once	48	30%	529
Twice	14	9%	555
Three Times or More	15	9%	668
Mediation Only			
None	22	73%	315
Once	6	20%	353
Twice	2	7%	592
Both CE and Mediation			
None	38	37%	434
Once	35	34%	457
Twice	20	19%	473
Three Times or More	11	10%	534

Source: Case file review

Cases in which both case evaluation and mediation were ordered presented more opportunities for adjournments since one or both forms of ADR could possibly be rescheduled. The majority of these cases

⁷ An analysis of variance comparing mean days open for the four adjournment groups within the CE Only group found that cases closed significantly later when there were multiple adjournments ($F = 13.79$, $df = 3, 157$, $p < .001$). Post hoc comparisons using the Tukey-B HSD statistic found no significant differences between the cases with no adjournments and those with one; however, those with two adjournments were open significantly longer ($p < .05$) than those with one or none, and the cases with three or more were disposed significantly later ($p < .05$) than all the others.

(63%) had at least one adjournment; however, even multiple adjournments did not significantly increase the time to disposition.⁸

For cases in which only mediation was ordered, there were not enough cases with adjournments to make statistical comparisons to those with no adjournments.

3.5 EFFECTIVENESS OF CASE EVALUATION AND MEDIATION FOR TORTS

MCR 2.403 requires the use of case evaluation for torts; however, it is also widely used for non-tort civil cases. Mediation is not required for either type of civil case but is frequently used for both (see Table 3-1 in Section 3.1 for statistics on the usage of these two forms of ADR for torts and non-tort cases). This section of the findings examines the effectiveness of case evaluation and mediation—used separately or in combination—in producing settlements and consent judgments for tort cases and examines their effects on the length of time needed to dispose tort cases.

A subsequent section of the findings (Section 3.6) provides similar analyses for non-tort civil cases. And another section (Section 3.7) provides statistical analyses comparing the relative effectiveness of using case evaluation and/or mediation to help dispose torts versus non-tort civil cases.

3.5.1 Case Dispositions for Torts

Examination of the 221 tort cases reviewed for this study (see Table 3-1) revealed that case evaluation *alone* was conducted for 43% of the cases, and for 29% of torts *both* case evaluation and mediation were held. Five percent of the tort cases received only mediation services and 22% of torts were disposed without either process being held. If both processes were conducted, case evaluation was held before mediation 98% of the time.

7. The use of one or both ADR processes tended to increase the percentage of tort cases in which a settlement or consent judgment was achieved. However, these increases were not statistically significant because a large majority of tort cases that did not use either form of ADR also settled.

As shown in Figure 3-7, when neither process was held a settlement or consent judgment was achieved for 71% of the tort cases. If case evaluation was held, the percentage of torts disposed through settlement/consent judgment increased to 82% for case evaluation-only cases and to 86% if mediation was also held. Tort cases that used only mediation were disposed through settlement/consent judgment 92% of the time. However, these percentage increases were not statistically significant due primarily to the already high settlement rate for torts that didn't use either form of ADR.⁹

⁸ An analysis of variance comparing mean days open for the four adjournment groups within the Both CE and Mediation group found no significant difference between the groups ($F = 1.01$, $df = 3, 100$, $p = .39$).

⁹ Statistical pair-wise comparisons were made between each of the ADR groups. These analyses found no statistically significant differences among any of the groups in regard to the settlement rate. For example, the rate for the Mediation Only group (92%) was not statistically greater than for

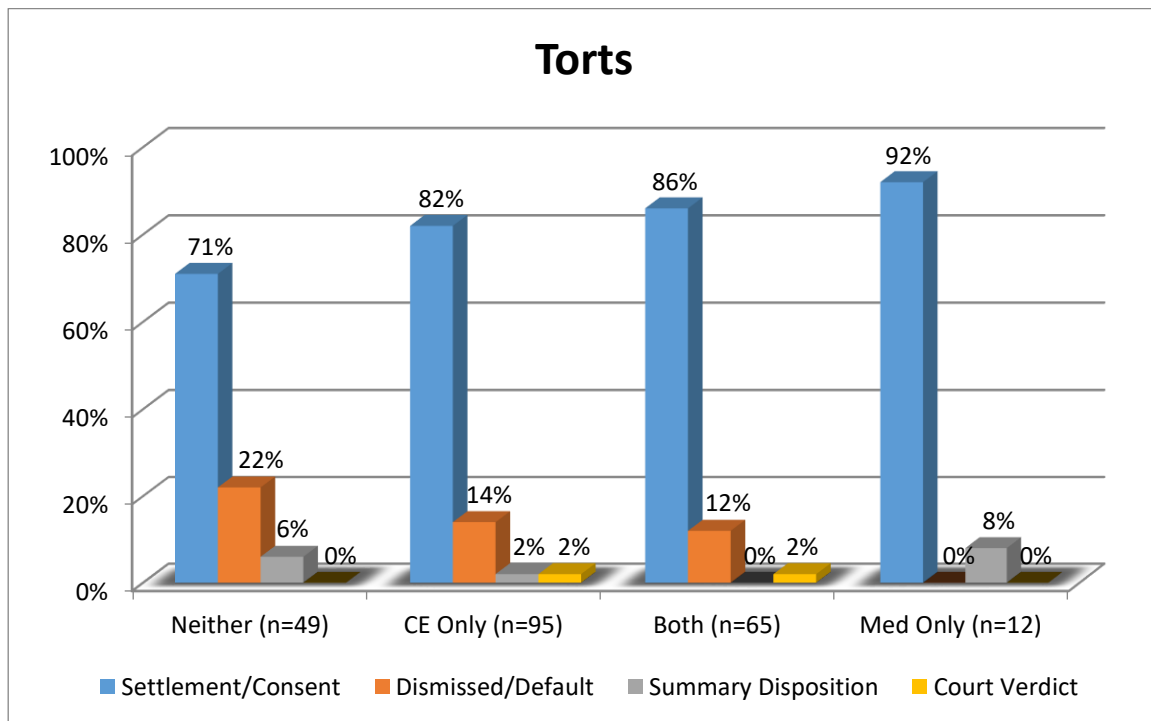


Figure 3-7. Percentage of torts disposed through settlement/consent judgment and other means by ADR process used

3.5.2 ADR Usage and Case Dispositions for Medical Malpractice Cases

8. Compared to other tort cases, medical malpractice cases used ADR less often, were more likely to go to trial, and were open significantly longer.

Of the 221 torts examined in this study, 52 (24%) were medical malpractice cases. Medical malpractice cases require more discovery time, and the case evaluation time allotted by a medical malpractice subpanel (60 minutes) is usually double the time for a normal panel according to court administrators and chief judges interviewed. Table 3-5 shows the extent to which case evaluation and/or mediation were ordered and held for these cases compared to all other torts. Statistical analyses found no significant difference between the two groups in the extent to which case evaluation and mediation were ordered: in both groups, the majority of cases were ordered to case evaluation only with nearly all others ordered to both case evaluation and mediation. The groups did differ significantly, however, in the extent to which ADR was used to resolve cases.¹⁰ The major difference was that just 65% of malpractice cases used one or both types of ADR compared to 82% of the other tort cases.

the Neither group (71%) (chi-square = 2.13, df = 1, p = .26). In part the lack of significance could be attributed to the small sample size for the Mediation Only group.

¹⁰ Use of ADR: Chi-square=15.41, df=3, p=.001

Table 3-5

**Use of Case Evaluation and Mediation
for Medical Malpractice versus Other Tort Cases**

	Medical Malpractice (n = 52)		Other Tort Cases (n = 169)	
	N	Percent	N	Percent
Court Order for:				
CE Only	34	65%	102	60%
Both CE & Mediation	15	29%	58	34%
Mediation Only	0	0%	3	2%
Neither	3	6%	6	4%
Held or Conducted:				
CE Only	21	40%	74	44%
Both CE & Mediation	7	13%	58	34%
Mediation Only	6	12%	6	4%
Neither	18	35%	31	18%

Source: Case file review

Table 3-6 indicates how cases were disposed for the two types of torts. The primary difference was that a significantly higher percentage of malpractice cases (14%) went to trial than did the other tort cases (1%).¹¹ A comparison made throughout this study was the extent to which cases were disposed through settlement/consent judgment. For both groups, over 80% of the cases were disposed this way and there was no significant difference between the groups on the type of disposition. Only 1 of the 7 malpractice cases that went to trial produced a verdict compared to 2 of 2 for the other cases.

On average malpractice cases were open for 550 days, which was significantly longer—by nearly three months—than the 464-day average for the other cases.¹²

¹¹ Cases that went to trial: Chi-square=15.35, df=1, p=.001)

¹² Length of time to disposition: t=2.90, df=219, p<.01

Table 3-6
Disposition of Medical Malpractice versus Other Tort Cases

	Medical Malpractice (n = 52)		Other Tort Cases (n = 169)	
	N	Percent	N	Percent
Trial Held	7	14%	2	1%
Type of Final Disposition				
Settlement/Consent Judgment	42	81%	138	82%
Dismissed/Default	6	11%	26	15%
Summary Disposition	3	6%	3	2%
Court Verdict	1	2%	2	1%

Source: Case file review

3.5.3 Time to Disposition for Torts

9. For tort claims, the use of case evaluation or mediation by themselves did not significantly affect the number of days a case was open when compared to cases that did not use any ADR process. But using both forms of ADR significantly increased the length of time a case was open.

For the 221 tort cases examined in this study, the average (mean) number of days needed to resolve a case was 484 (standard deviation = 189, range: 3 to 1,706 days). As shown in Figure 3-8, the average length of time needed to close a case when neither case evaluation nor mediation was used was 387 days. The average time to disposition for cases that used mediation by itself was 454 days, and it was 495 days when only case evaluation was used. Neither was a statistically significant increase in time.¹³ When both forms of mediation were used the average time to disposition (548 days) was significantly longer than if neither process had been used.

¹³ An analysis of variance comparing mean days open for the four ADR groups found that cases closed significantly later for at least one of the groups ($F = 6.18$, $df = 3, 217$, $p < .001$). Post hoc comparisons between groups using the Tukey-B HSD statistic found that the only significant difference in average time to disposition was between the Neither cases and the Both cases ($p < .05$).

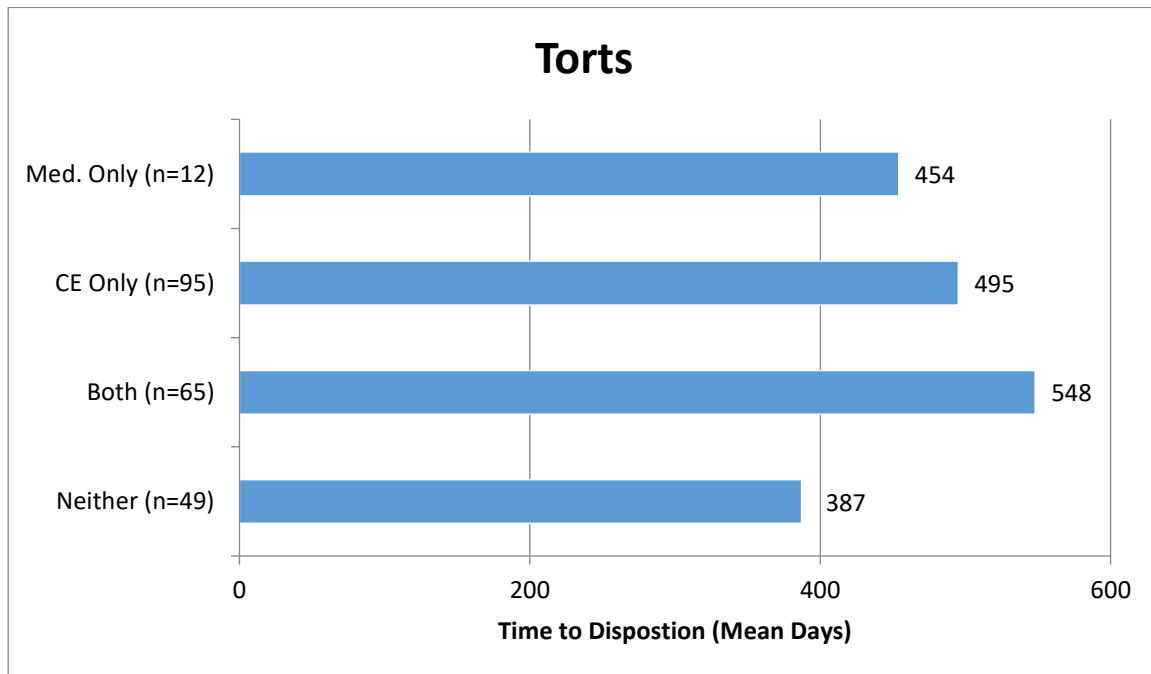


Figure 3-8. Average number of days needed to dispose torts by category of ADR used

3.6 EFFECTIVENESS OF CASE EVALUATION AND MEDIATION FOR NON-TORT CIVIL CASES

3.6.1 Case Dispositions for Non-Tort Civil Cases

Case evaluation alone was conducted for 14% of the 137 non-tort civil cases examined, and for 8% of the examined cases both case evaluation and mediation were held (see Table 3-1). Twenty-nine percent of these cases received only mediation services and half (50%) were disposed without either process being held. If both processes were conducted, case evaluation was held before mediation 64% of the time.

10. For non-tort civil cases, the use of one or both ADR processes significantly increased the percentage of cases in which a settlement or consent judgment was achieved.

Figure 3-9 shows the percentage of non-tort cases disposed by the type of ADR process used.

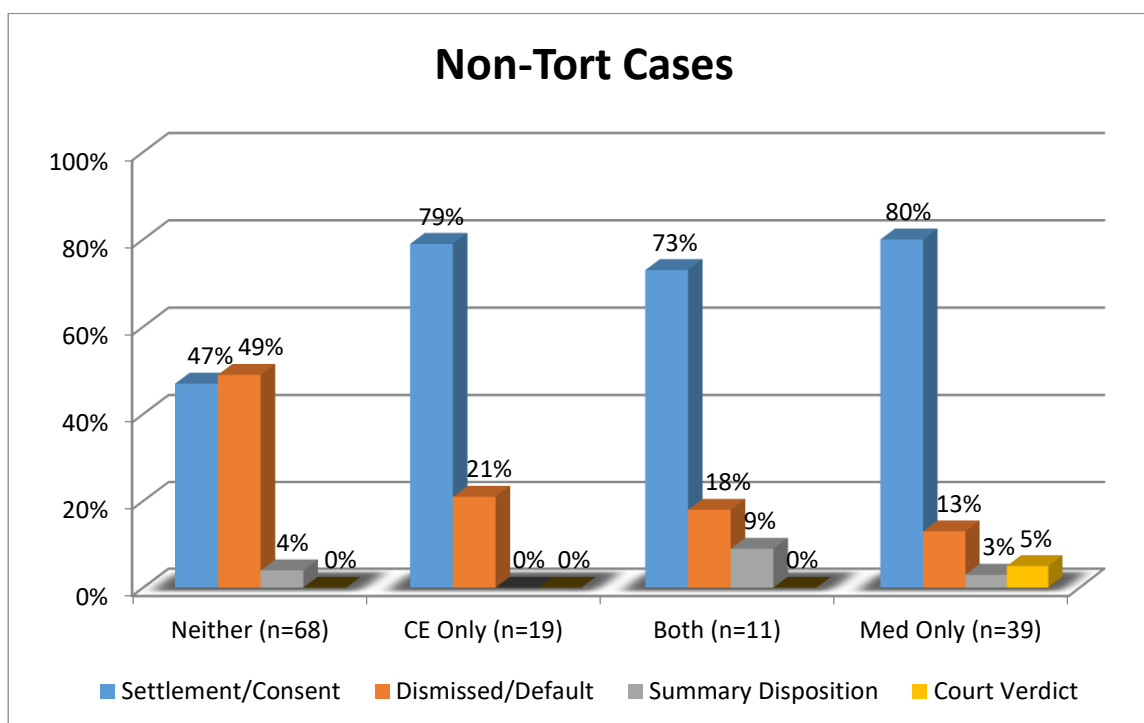


Figure 3-9. Percentage of non-tort civil cases disposed through settlement/consent judgment and other means by ADR process used

Only 47% of the non-tort cases that did not use either form of ADR were disposed through settlement/consent judgment. When case evaluation or mediation was used – singly or in combination – the percentage of dispositions in non-tort cases achieved via settlement/consent judgment was significantly higher than for the no-ADR group.¹⁴ Two of the 39 mediation-only cases (5%) were resolved by a court verdict, perhaps because, as judges stated in interviews, complex non-tort cases were more likely to be ordered to mediation.

The major difference between the non-tort and tort cases was that the settlement rate for cases that did not use either form of ADR was substantially higher for tort cases at 71% (see Figure 3-7). Otherwise the pattern of results was similar in that case evaluation and mediation were equally effective in achieving high rates of settlement/consent.

¹⁴ Statistical pair-wise comparisons were made between each of the ADR groups for non-tort civil cases. These analyses found that the percentage difference between the CE Only group (79% settlement/consent rate) and the Neither group (47%) was statistically significant (chi-square = 6.08, df = 1, p<.05) as were the differences between the Neither group and the Mediation Only group (80%) (chi-square = 10.77, df = 1, p<.01) and the Both group (73%) (chi-square = 4.87, df = 1, p<.05). The percentage differences between the CE Only group, the Mediation Only group, and the Both group were not statistically significant.

3.6.2 Time to Disposition for Non-Tort Civil Cases

- 11. For non-tort civil cases, the use of mediation alone did not significantly affect the average number of days a case was open when compared to cases that did not use either ADR process. Compared to mediation, using case evaluation significantly increased the average length of time a case was open by about four months.**

For the 137 non-tort civil cases examined in this study, the average number of days needed to dispose a case was 327 (standard deviation = 244, range: 16 to 1,225 days). Figure 3-10 indicates the average number of days these cases were open when case evaluation, mediation, or both were held, and when neither was held.

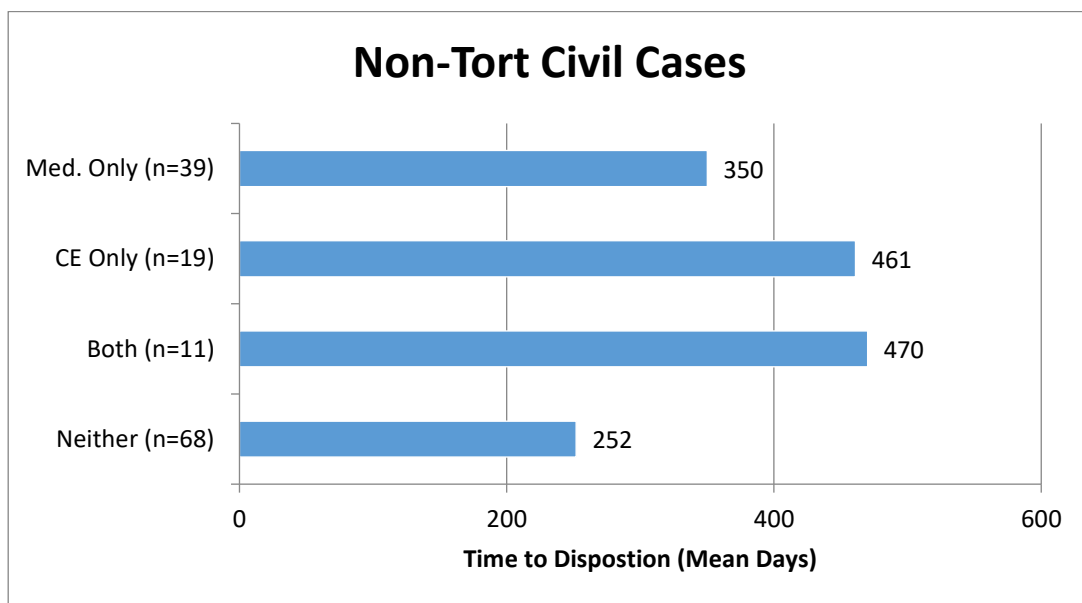


Figure 3-10. Mean number of days to dispose non-tort civil cases by category of ADR used

Statistical analyses¹⁵ revealed that there was no significant difference in the average time to disposition for cases that used only mediation (350 days) compared to cases that did not use either ADR process (252 days).¹⁶ These two groups of cases closed significantly sooner than cases that used case evaluation only (461 days on average) or case evaluation combined with mediation (470 days).

¹⁵ An analysis of variance comparing mean days open for the four ADR groups of non-tort civil cases found that cases closed significantly later for some groups ($F = 5.94$, $df = 3, 133$, $p = .001$). Post hoc comparisons between groups using the Tukey-B HSD statistic found the following: no significant difference between the Neither cases and the Mediation Only cases in average time to disposition; a significant increase in time to disposition ($p < .05$) if case evaluation was used either alone or in combination with mediation; and no significant difference between the CE Only group and the Both group in average time to disposition.

¹⁶ Although the 98-day difference between the Mediation Only and Neither groups appears large in Figure 3-10, the 95% confidence interval for this difference was between 9 and 193 days due to the high variability of disposition times within the Neither group (16 to 1,225 days). This means that for all non-torts (not just the ones in this sample) the real difference in average length of time is probably somewhere between 9 and 193 days.

3.7 COMPARISONS ON THE USE OF CASE EVALUATION AND MEDIATION FOR TORTS AND OTHER NON-TORT CIVIL CASES

12. Case evaluation, which under MCR 2.403 is required to be ordered for torts, was conducted for seven out of ten tort cases. In contrast, only two of ten non-tort cases used case evaluation, which was ordered about forty percent of the time for non-torts.

Table 3-7
Comparisons between Torts and Non-Tort Civil Cases

	Torts (N = 221)	Non-Torts (N = 137)	Level of Significance
ADR Ordered			
Case Evaluation	94%	41%	p<.001
Mediation	34%	42%	ns
ADR Conducted or Held			
Case Evaluation	72%	22%	p<.001
Mediation	35%	37%	ns
Neither	22%	50%	p<.001
Disposition			
Settled/Consent Judgment	81%	63%	p<.001
Dismissed/Default	15%	32%	p<.001
Summary Disposition	3%	4%	—
Court Verdict	1%	1%	—

Source: Case file review

Statistical comparisons between the tort and non-tort civil cases on the use of ADR produced the results summarized in Table 3-7.¹⁷ These results show that case evaluation was ordered significantly more often for torts (94% of the cases) than for non-tort cases (41%), which is consistent with the fact that referral to case evaluation is required for the former but not the latter. A similar difference was found in the percentage of cases for which case evaluation was actually held: 72% for torts compared to 22% for non-tort cases. These findings indicate that when case evaluation was ordered for a tort claim it was usually used by the parties to help dispose the case. On the other hand, even though case evaluation was ordered for about two-fifths (41%) of the non-tort cases, it was only used in about one-fifth (22%) of the cases.

¹⁷ Chi-square statistics comparing torts and non-tort cases were computed for each of the variables listed in Table 3-7. The probability level (p value) is listed for results that were statistically significant. Non-significant results are indicated by “ns,” and a dash indicates that the small number of cases precluded making meaningful statistical comparisons.

13. Mediation was ordered to be used in over a third of both the tort and non-tort cases. It was also held at about the same rate for torts as for non-torts, about a third of the time for each.

As shown in Table 3-7, there was no statistical difference in the percentage of torts and non-tort cases for which mediation was ordered and conducted. Mediation was ordered and used over a third of the time for each type of case.

14. The higher use of case evaluation and mediation in the tort cases may account for the significantly higher rate of cases disposed through settlement/consent judgment for torts than non-tort cases.

Further evidence of the lack of use of ADR for non-tort civil cases is the finding that half (50%) of these cases were disposed without either case evaluation or mediation being held compared to just 22% of the torts, a highly significant difference. The higher use of these two forms of ADR in the tort cases may account for the significantly higher rate of cases disposed through settlement/consent judgment for torts (81%) than non-tort cases (63%).

A significantly smaller percentage of torts (15%) were dismissed or disposed through a default judgment than non-tort cases (32%). The small numbers of cases disposed through court verdict and summary disposition (less than 5 in some instances) precluded making meaningful statistical comparisons between tort and non-tort cases on these dispositions.

3.8 PANELS AND AWARDS

15. Limited available data suggests that a panel usually arrived at an award that was less than the amount of relief sought by the plaintiff. If the panel award was not accepted, the plaintiff more often than not received less than the award amount.

The case files and local ADR databases at the circuit courts usually did not contain specific information on the amount of relief sought by the plaintiff or the final amount received by the plaintiff. Most of the records just indicated that the plaintiff sought relief in excess of \$25,000. Ten of the 189 files¹⁸ for cases where case evaluation was held recorded the amount sought; the average (mean) amount was \$102,229 and the median¹⁹ was \$69,107. The final amount received was available for 45 of the cases; the average (mean) amount was \$97,938 and the median was \$28,500. Only 5 case files had both the amount sought and the final amount: in one case the amount received was more than the amount sought and in four cases it was less.

¹⁸ The following averages and the data in Table 3-8 exclude one extreme outlier. In a general civil case, the plaintiff sought and was awarded \$10,580,000 plus interest even though the case evaluation panel recommended an award amount of \$25,000.

¹⁹ The median is the 50/50 point indicating that half the awards were larger and half smaller than the median amount. The mean amount is an average that can be skewed by a few extremely high or low awards, particularly when there are not many cases.

Table 3-8
Case Evaluation Panel Awards

Panel Award Compared to Plaintiff's Request (N=10)		Plaintiff's Final Dollar Amount Upon Disposition Compared to Panel Award (N=45)	
Average amount sought		Average amount received	
Mean	\$102,299	Mean	\$97,938
Median	\$ 69,107	Median	\$28,500
Panel Award:		Plaintiff Received:	
More than sought	0%	More than panel award	27%
Same as sought	0%	Same as panel award	35%
Less than sought	100%	Less than panel award	38%
Average difference from amount sought		Average difference from panel award	
Mean	-\$65,899	Mean	-\$11,498
Median	-\$47,995	Median	\$0

Source: Case file review

Nearly all the files (186 of 189) listed the amount of award determined by the case evaluation panel; the average (mean) award was \$159,433 and the median was \$28,000. Table 3-8 shows that, for the 10 cases where both the amount requested by the plaintiff and the case evaluation panel award were available from the file, in all cases the award was less than requested.

In the 45 case files that contained both the final amount upon disposition and the panel award, 16 (35%) of the plaintiffs accepted the panel award. Among the 29 cases in which the panel award amount was rejected, 41% received more than the panel recommended and 59% received less. One of these cases was disposed by a court verdict in which the plaintiff got less than the panel had recommended.

3.9 PERSPECTIVES ON CASE EVALUATION

3.9.1 Perceived Purpose of Case Evaluation

16. Judges and attorneys considered the primary purpose of case evaluation to be arriving at a number the parties can accept rather than providing a fair valuation.

When asked about the primary purpose of case evaluation, 65% of the respondents to the judicial survey indicated that it is to “arrive at a number that the parties can accept (likely to produce a settlement or resolution)” and only 28% chose “provide a fair valuation of the case (close to the value a jury or judge might award).” Attorneys responded similarly to that question in their survey: 77% and 12% respectively. Seven percent of judges and 12% of attorneys said case evaluation primarily serves other purposes, including responding to unrealistic expectations (3% of each group).

A small number of attorneys said the primary purpose was to initiate settlement discussions that would later be resolved through mediation or other negotiations—once the case evaluation process had provided an estimate of the strength of their case and produced the likely floor or ceiling amount of the potential award. Others said the purpose was to establish sanction amounts that would pressure clients to settle rather than go to trial. Some said that the purpose of case evaluation varied from panel to panel depending on the perspectives of the evaluators. A few could see no purpose to conducting case evaluation other than clearing dockets and preventing cases from going to trial.

In the interviews court administrators and chief judges observed that while case evaluation may not result in award acceptance and disposition, it can still contribute to the settlement overall by offering a number to move up or down to determine damages. In this way it contributes to meaningful settlement conferences, thus avoiding the use of trials to resolve most civil cases involving damages.

3.9.2 Change in the Frequency of Use of Case Evaluation

17. Most judges said that there had been no change in the frequency of use of case evaluation in the past five years, although one in five said it was used less often. Most attorneys, on the other hand, said its use had not remained the same with a greater number saying it was used less, rather than more, often.

The survey of circuit court judges asked them whether case evaluation is used to resolve civil cases more or less often than it was five years ago. Three-quarters of the judges (77%) said there had been no change, but one-fifth (21%) said it is now used less often (see Figure 3-11). Attorneys gave significantly different

responses to the same question: less than half (47%) said the use of case evaluation had remained the same, while 32% said it was used less often and 21% said more often.²⁰

When asked what percentage of cases in their dockets were ordered to case evaluation, judges on average estimated 89% for torts and 72% for non-tort cases. Both estimates were slightly higher than those provided by judges in the 2011 survey (85% and 65% respectively), but these increases were not statistically significant.

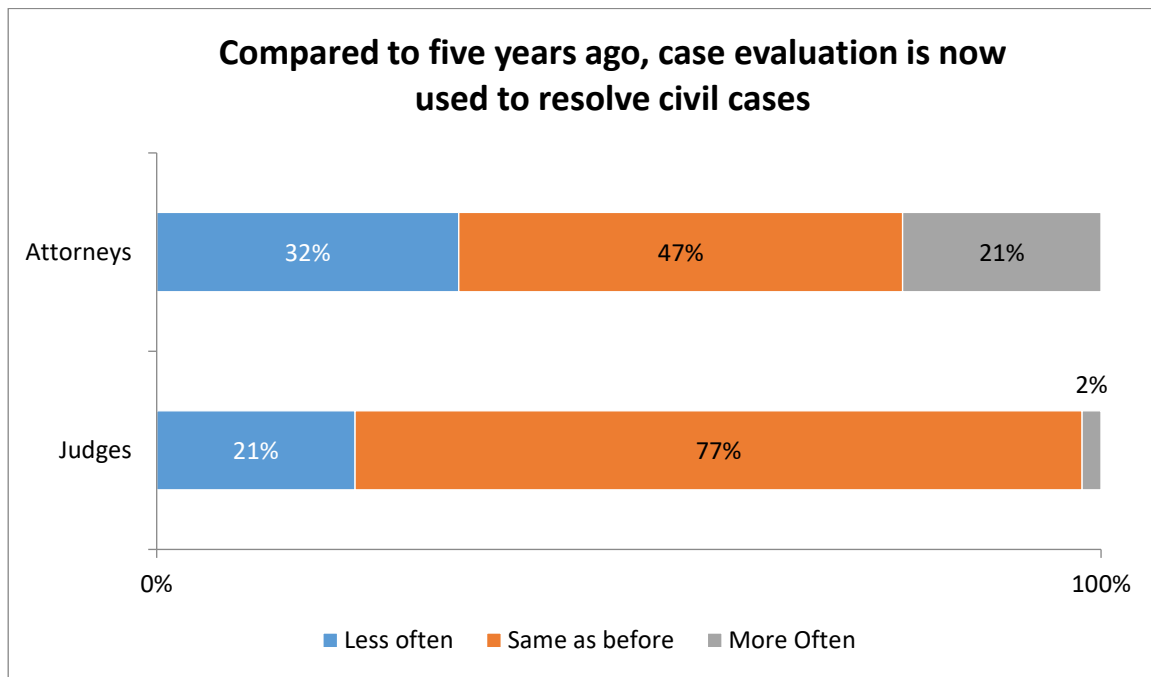


Figure 3-11. Attorneys' and judges' ratings of change in frequency of case evaluation use

3.9.3 Frequency of Objections to Case Evaluation

18. More than two-thirds of attorneys said they have rarely or never objected to case evaluation, a rate unchanged since the 2011 study.

When asked how frequently they have objected to case evaluation, more than two-thirds (68%) of the attorneys said they have rarely or never objected. Similarly, 70% of judges said that attorneys rarely or never object to case evaluation before it takes place. Twenty-one percent of attorneys said they have sometimes objected and just 11% said they object often or more than often. These numbers were not appreciably different from the responses attorneys and judges provided on the 2011 surveys.

²⁰ The response patterns for judges (n=53) and attorneys (n=850) who had a basis for comparison over the past five years were statistically significantly different (chi-square=20.77, df=2, p<.001).

3.9.4 Use of Sanctions

19. Neither attorneys nor judges consistently said that the sanction provisions had been the primary incentive for parties to accept the case evaluation award, a finding similar to that of the 2011 study.

The case files reviewed in the three circuit courts found that sanctions were requested in two of the three tort cases that were resolved by trial. In the statewide survey of judges, 45% of the respondents indicated that sanctions are applied often or more (17% often, 13% very often, 15% always) when the parties do not accept the award within 28 days and the case is ultimately disposed of by bench or jury trial. Forty percent said sometimes, 13% rarely and 2% never.

When asked how often the sanction provisions have been the primary incentive for parties to accept the award, 33% of the judges indicated often or more, as did 43% of the attorneys surveyed (See Figure 3-12). On the other hand, 22% of judges said sanctions were rarely the primary incentive and 25% of attorneys also said they rarely or never were. These responses were not significantly different from those provided by judges and attorneys in the 2011 surveys.

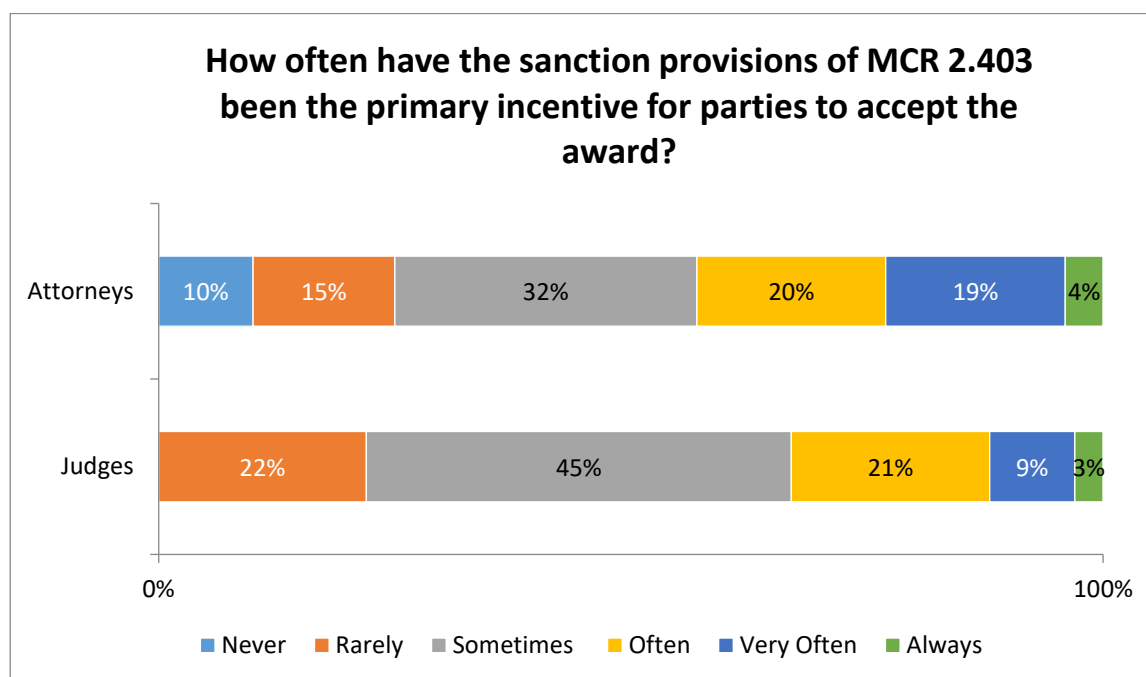


Figure 3-12. The effect of sanction provisions on the acceptance of case evaluation awards

3.9.5 Expertise of Case Evaluators

20. Judges assigned high ratings to the expertise of case evaluators, while attorneys expressed more mixed views of the panels' expertise.

Circuit court judges gave high ratings when asked how often case evaluation panels had sufficient subject matter expertise to evaluate the cases they reviewed. On the survey, three out of four judges (77%) said the panels often or more than often had the required expertise, with over half (54%) saying the panels very often or always had this expertise (see Figure 3-13). Attorneys expressed a less favorable view of panels' expertise: 57% said often or more and just one in three (31%) of the attorneys indicated that panels had very often or always had sufficient expertise to evaluate their cases. Attorneys asked the same question in the 2011 survey had provided nearly similar responses: 60% often or more and 29% very often or always.²¹

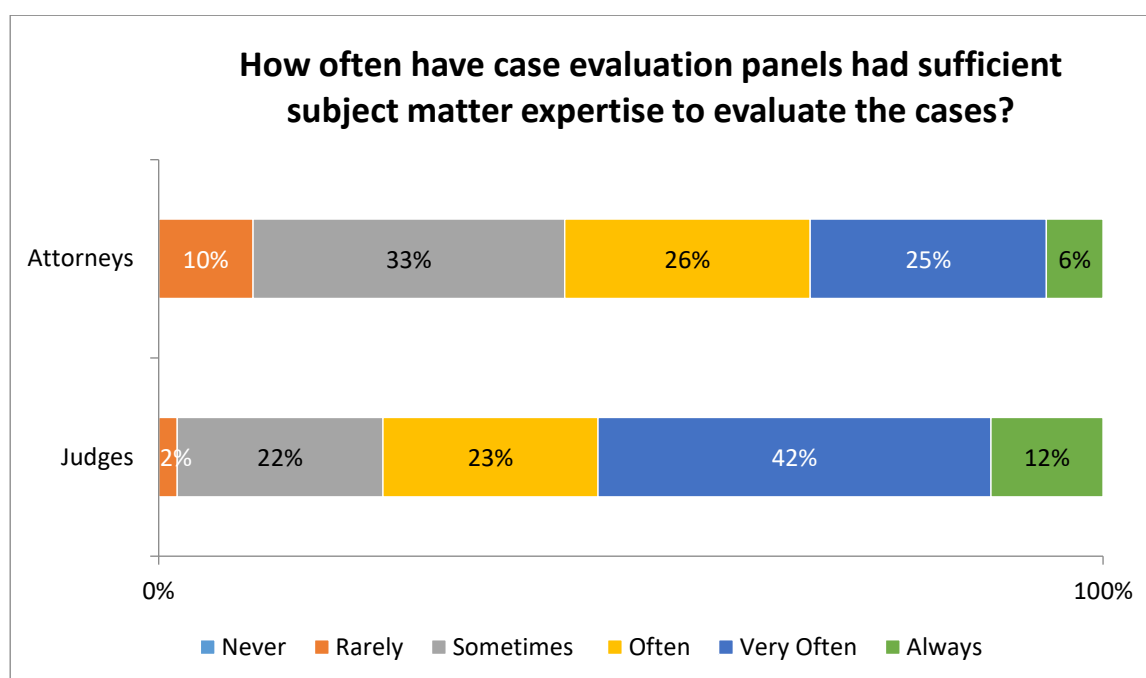


Figure 3-13. Attorneys' and judges' ratings of panels' subject matter expertise

The most frequent comments about case evaluation provided by attorneys in the survey were about problems they perceived with the panels—that, in their opinion, panelists are often unprepared or inexperienced, and sometimes biased. Another frequent complaint was that panels don't address the merits of the case, with some noting that panels tend to just split the amount in dispute in half "Solomon-like."

²¹ Judges were not asked this question in 2011, but were asked to rate the quality of the evaluation panels, which they rated highly.

3.9.6 Overall Opinion about Case Evaluation

21. While the majority of circuit court judges in Michigan regard case evaluation as an effective means to resolve civil cases, attorneys are less convinced of its effectiveness. Fewer judges and attorneys agreed that it is effective than in 2011.

Both the attorney survey and the judicial survey asked respondents to indicate the extent to which they agree or disagree with the following statement: “Overall, case evaluation is an effective method for resolving civil cases.” The judges held the more positive view of case evaluation, with over half (53%) of them agreeing or strongly agreeing with that statement and only 30% disagreeing. In contrast, less than half (43%) of the attorneys agreed and nearly as many of them (37%) disagreed.²²

Compared to the results of the 2011 survey, both groups had a less favorable view of the effectiveness of case evaluation. The percentage of judges who agreed that it is effective dropped from 69% to 53%; for attorneys the percent agreeing decreased from 49% to 43%.

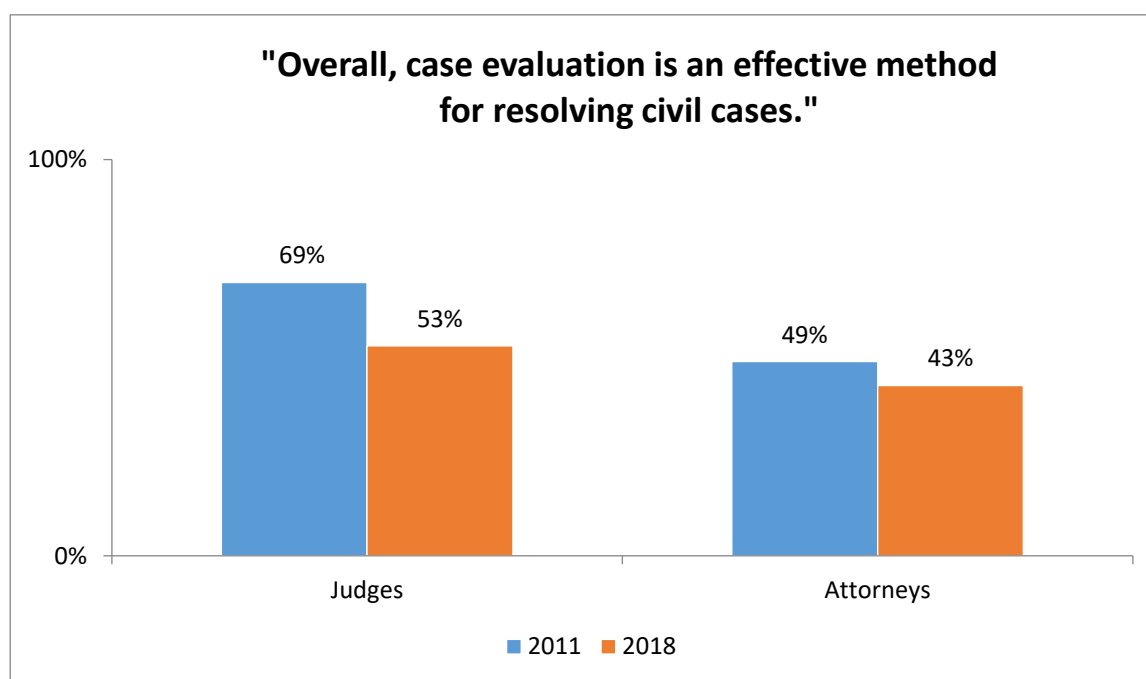


Figure 3-14. Percentage of attorneys and judges agreeing that case evaluation is effective

Judges were asked if the “use of case evaluation has improved the court’s ability to dispose of cases within the time guidelines.” Just under half (45%) of the judges agreed with this statement, while 28% disagreed and 27% gave a neutral response.

²² Attorneys who had served as case evaluators were more likely to agree than those who had not served that case evaluation was effective (51% vs. 37%).

22. Most judges said they would frequently order case evaluation even if it was not mandatory for tort claims. Less than a third of attorneys would use case evaluation frequently if it were not court ordered. Both groups would be less inclined to use it now than in 2011.

In the interviews, court administrators and chief judges observed that more than 50% of the civil cases handled in Michigan mandate a scheduling order that assigns civil cases to case evaluation. Only the southwestern region of the state requires a joint settlement plan to be completed by the parties indicating their preferred ADR method.

In the surveys, judges expressed a more favorable view of case evaluation than attorneys when they were asked similarly worded questions about using case evaluation when it is not required (see Figure 3-15). Judges were asked how often they would order case evaluation if it was not mandatory for tort claims. Two-thirds (66%) said often or more. Only 12% indicated they would rarely or never order case evaluation if it were no longer mandatory for tort claims.

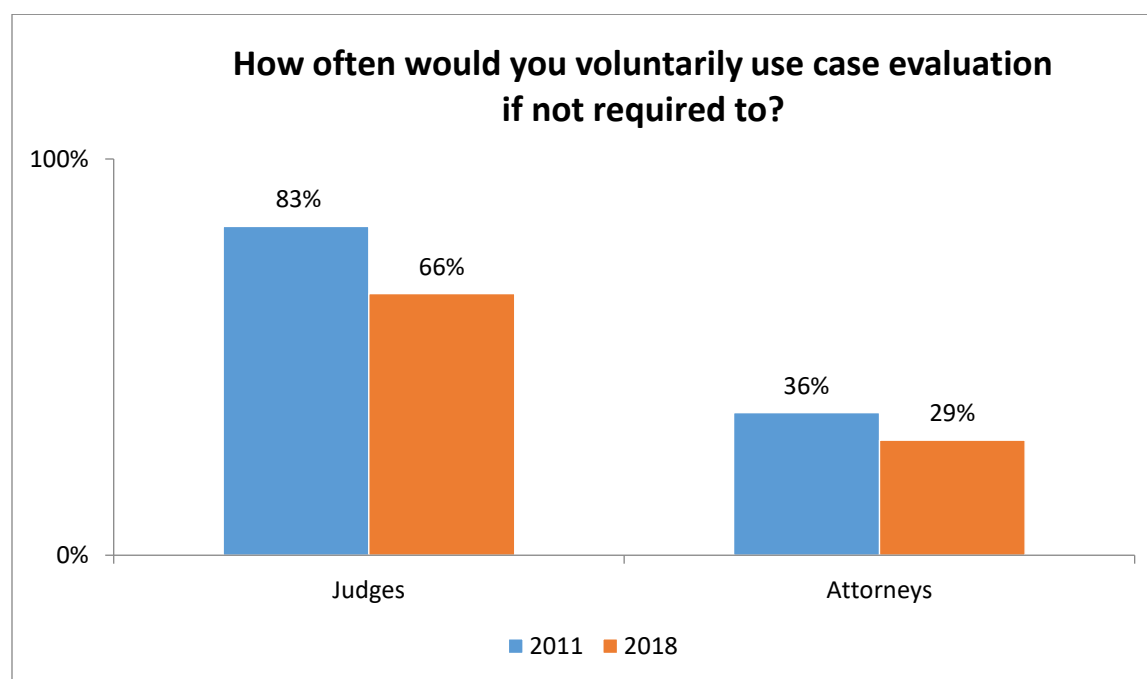


Figure 3-15. Percentage of attorneys and judges who would use case evaluation "Often" or more if not required to use it

When asked whether they would have used case evaluation voluntarily if it had not been ordered in their cases, only 29% of the attorneys said they would have done so often or more. A larger number (45%) said rarely or never. They were also asked how often they plan to use case evaluation during the next five years. Most attorneys (66%) expect to use it about as often as they do now, while 28% plan to use it less and 6% anticipate using it more.

Comparisons to the 2011 survey results revealed that the percentage of attorneys who said they would use case evaluation often or more frequently if it was not ordered declined from 36% to 29%. A sharper drop was found among judges regarding whether they would use case evaluation if it was not mandated for tort claims: going from 83% in 2011 to 66% in the current survey who said they would still use it often or more. Only 31% now say they would always order it compared to 49% in 2011.

3.10 PERSPECTIVES ON MEDIATION

3.10.1 Change in the Frequency of Use of Mediation

23. Judges and attorneys generally agreed that mediation is now used more often to resolve civil cases than it was five years ago.

When judges and attorneys were asked if mediation is used to resolve civil cases more or less often than it was five years ago, the majority in each group responded that it is used more often: 69% of judges and 65% of attorneys. No judges and only 7% of attorneys said it is now used less often. (See Figure 3-16)

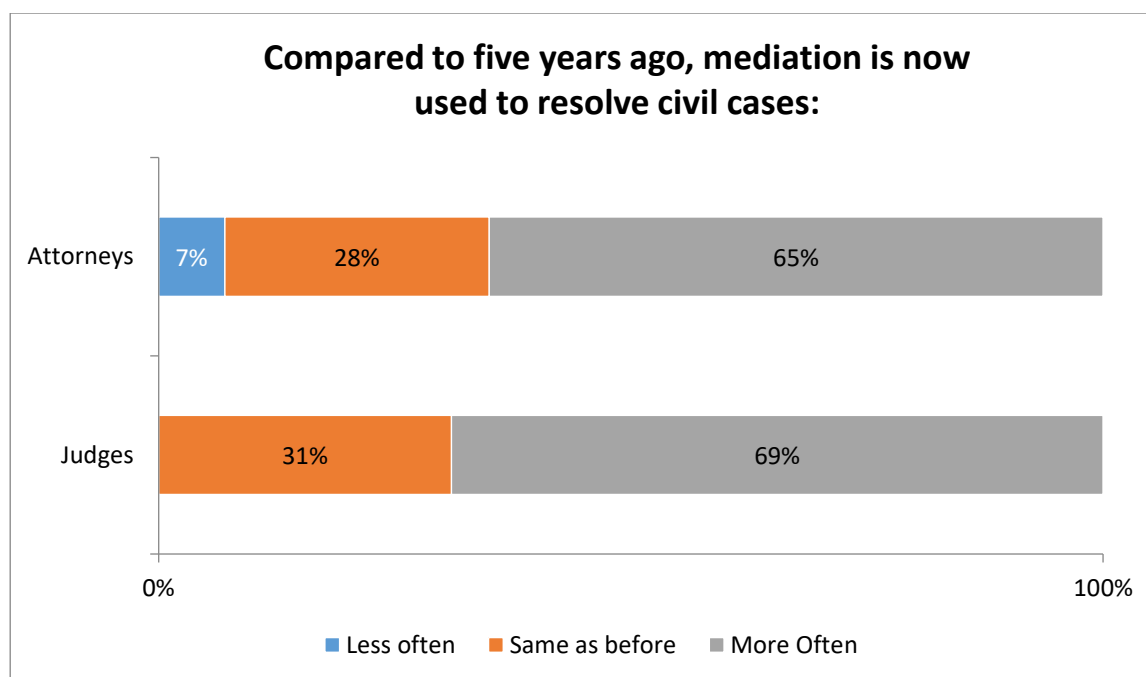


Figure 3-16. Attorneys' and judges' ratings of change in frequency of mediation use

Judges estimated that they ordered or referred nearly half of their cases to mediation (46% of torts and 47% of other civil cases). This was a significant increase over the estimates provided by judges in the 2011

survey (31% and 27% respectively).²³ When asked how frequently their cases were ordered to mediation, 63% of the attorneys surveyed indicated it was a frequent occurrence (often or more), which was significantly higher than the 44% of attorneys who responded this way in 2011.²⁴

Judges were asked if they had observed a change in attorney's willingness to participate in mediation without the court ordering it. Twenty-seven percent said they had not observed any change and the remaining 73% said attorneys have become more willing to use mediation voluntarily.

3.10.2 Frequency of Objections to Mediation

24. Eighty-four percent of attorneys said they have rarely or never objected to mediation; judges concurred that objections are rare. The findings are similar to those found in the 2011 study.

Nearly half (48%) of the attorneys have never objected to mediation and over a third (36%) said they have rarely objected. Just 4% of attorneys said they frequently object to mediation (often or more). The judges also indicated that attorneys seldom object to mediation: 74% said attorneys rarely or never object and 26% said attorneys object sometimes. The findings for both groups were no different than for those surveyed in 2011.

3.10.3 Perceived Quality of Mediators

25. Mediators' skills were rated highly by circuit court judges. Attorney's ratings were also positive, but not nearly as high. Judges' ratings of mediation services provided by Community Dispute Resolution Program centers dropped from their 2011 levels

Judges and attorneys were asked to indicate how often mediators had the skills necessary to resolve disputes in civil cases. As shown in Figure 3-17, while both groups gave mediators positive ratings, judges rated mediators' skills somewhat more highly than did attorneys. Three of four judges (74%) said that mediators very often or always had the necessary skills, while half (52%) of attorneys rated mediators this highly. The 2011 surveys did not ask the question this way, so it was not possible to measure changes in opinion over time.

²³ An increase of 15 percentage points for torts ($t=2.18$, $df=106$, $p<.05$) and 20 percentage points for non-tort cases ($t=2.82$, $df=106$, $p<.01$).

²⁴ Chi-square=119.8, $df=5$, $p<.001$).

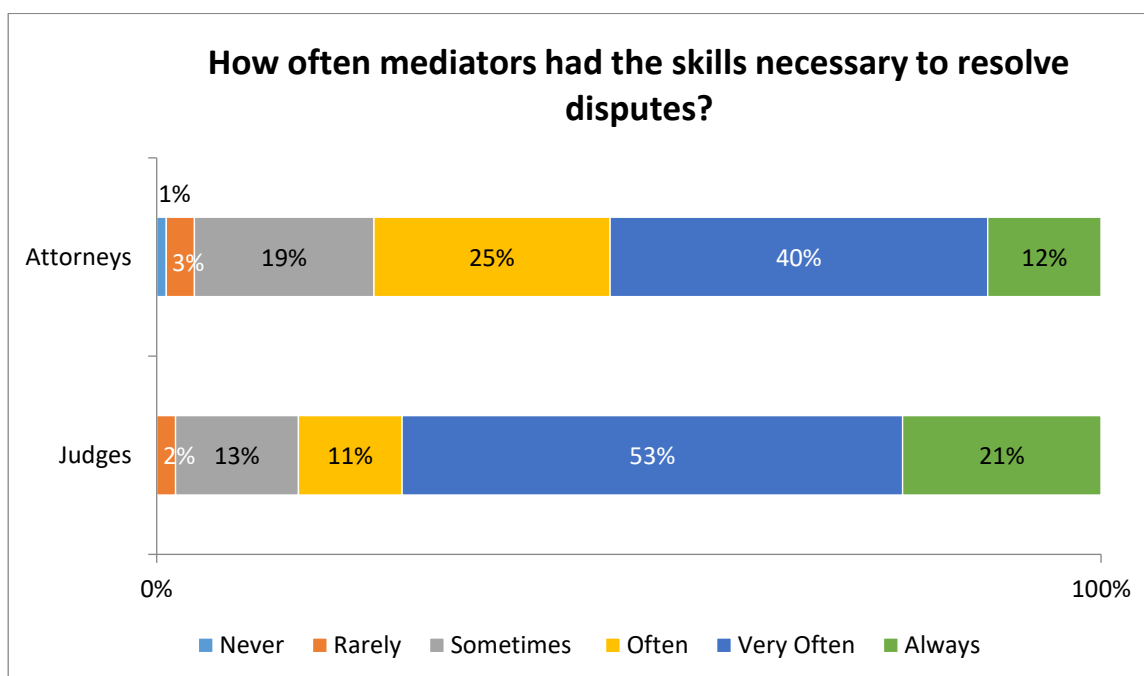


Figure 3-17. Mediators have the necessary skills to resolve disputes

Attorneys often ask mediators to suggest or propose a settlement amount in their cases. While 34% said they sometimes ask, 40% said they ask often or more than often. The other attorneys said they rarely (16%) or never ask (10%).

When judges were asked to rate the mediation services provided by the Community Dispute Resolution Program center in the area, the percentages were adjusted to remove those for whom it was not applicable.²⁵ The adjusted percentages were 54% of the judges rating them excellent or very good and 30% rating them poor or unsatisfactory. This was a significant drop from the ratings in 2011 when 83% of judges said the services were very good or excellent and just 3% rated them as poor.²⁶

²⁵ Only 37 of the 67 judges in the 2018 survey were in jurisdictions that used CDRP services. In the 2011 survey, 29 of 44 judges answered this question. The response summary for Q 3.5 in Appendix B provides the unadjusted percentages for the current survey.

²⁶ On a scale from 1=Unsatisfactory to 5=Excellent, the rating of CDRP services fell from a mean of 4.07 in 2011 to 3.40 in 2018 ($t=2.99$, $df=62$, $p<.01$)

3.10.4 Overall Opinion about Mediation

26. Judges and attorneys both gave high marks to mediation as a means for resolving civil cases at rates that were comparable to those in 2011.

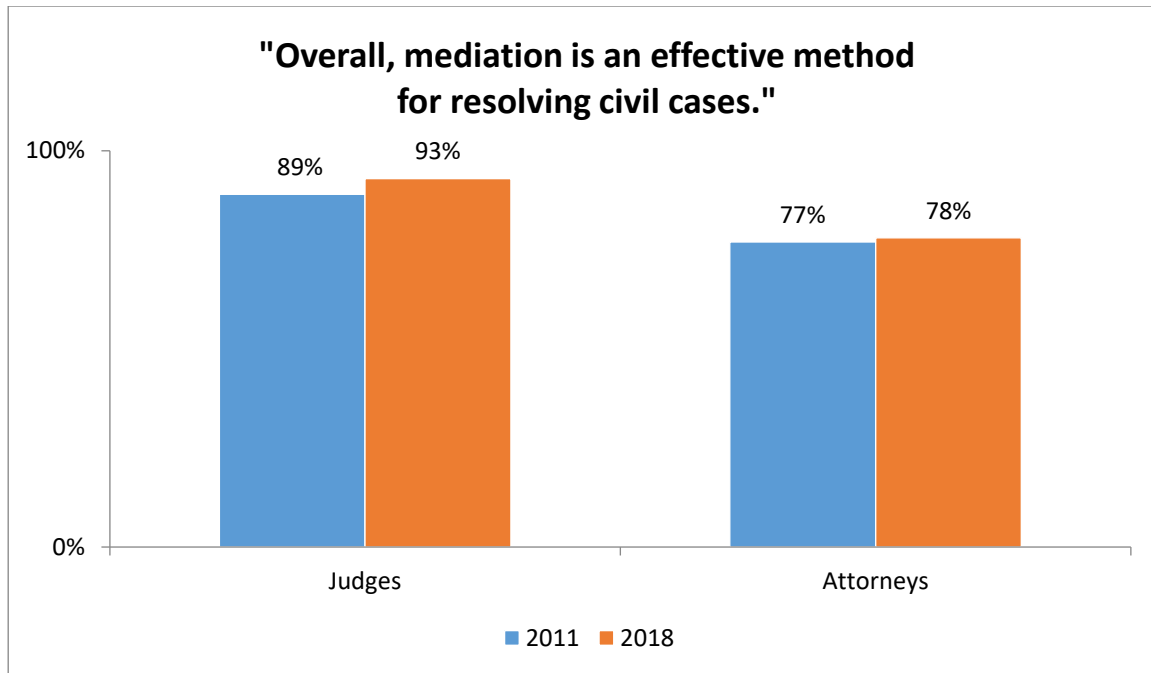


Figure 3-18. Percentage of attorneys and judges agreeing that mediation is effective

The attorney survey and the judicial survey asked respondents the extent to which they agree or disagree with the following statement: “Overall, mediation is an effective method for resolving civil cases.” Both groups indicated agreement with that statement. The judges were especially positive (93% strongly agree or agree), compared to 78% of the attorneys.²⁷ There was very little disagreement from either group: only about 7% of attorneys and 2% of judges disagreed. These results were very similar to those from the judge and attorney surveys conducted in 2011.

Judges were asked if the “use of mediation has improved the court’s ability to dispose of cases within the time guidelines.” A total of 93% of the judges agreed with this statement (58% agreed strongly), while 5% gave a neutral response and just 2% disagreed.

Attorneys were asked how often they plan to use mediation during the next five years. Most attorneys (63%) expect to use it about as often as they do now, while 29% plan to use it more and 8% anticipate using it less.

²⁷ Attorneys who had served as mediators were more likely to indicate a positive view of mediation than those who had not: 85% vs. 75%. The difference was most notable in the percentages of attorneys who strongly agreed: 44% of those who had been mediators and 24% of those who had not.

3.11 PREFERRED SEQUENCE FOR USING CASE EVALUATION AND MEDIATION

27. Neither the judges nor the attorneys provided a clear opinion on whether it was more effective to use one form of ADR prior to the other.

Several survey questions addressed the issue of whether it is better to try using case evaluation or mediation first when both options are available in a case. Forty-two percent of judges reported that they ordered case evaluation first followed by mediation; 32% ordered mediation first; and 26% said both sequences were equally common in their courts.

Asked when case evaluation is most effective, a quarter of both the judges (25%) and the attorneys (26%) said case evaluation has rarely or never been effective.²⁸ Among those who felt it was effective, the majority of judges (58%) said it was most effective when held after mediation, but most attorneys (55%) said it was most effective when used before mediation. However, these differences were not statistically significant.

The same question was asked regarding the efficacy of mediation. In this instance only 2% of the judges and 6% of attorneys said mediation has rarely or never been effective. Among the rest, majorities of both judges (56%) and attorneys (53%) said mediation was most effective when used prior to case evaluation.

²⁸ In the 2011 survey 15% of attorneys said case evaluation has rarely or never been effective; judges were not asked the same question in 2011.

3.12 SETTLEMENT AND RESOLUTION OF CASES WITHIN TIME GUIDELINES

28. Judges estimated that cases settled more often as a direct result of mediation (59% of the time) than as a direct result of case evaluation (41%).

Judges were asked to estimate the percentage of cases on their dockets that went through the case evaluation process and “settled as a direct result of participation in that process.” They were asked the same question about mediation. Figure 3-19 shows the average (mean) response to each question. The judges estimated that in 59% of the cases where mediation was held the process led directly to a settlement; the estimated rate was only 41% in cases where case evaluation was used.

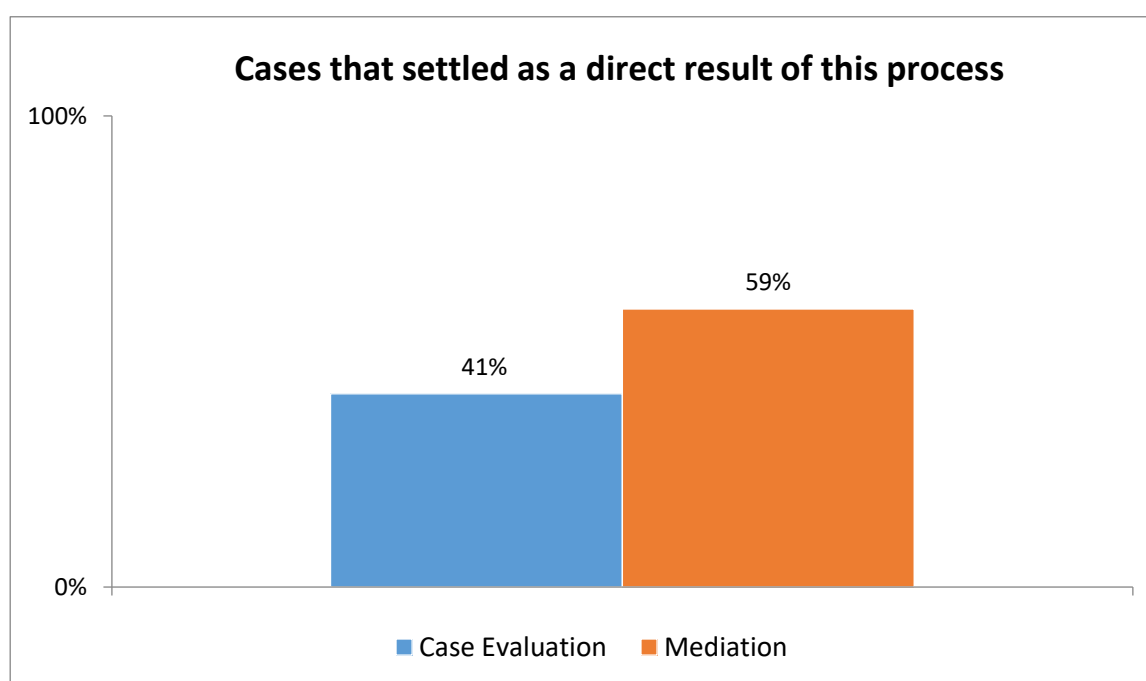


Figure 3-19. Judges’ estimates of percentage of cases that settled as a direct result of case evaluation and mediation

29. More judges said that mediation helped the courts dispose of cases within time guidelines (83%) than said that case evaluation had done this (45%).

Judges were asked for both case evaluation and mediation whether the court’s use of that particular process had improved the court’s ability to dispose of cases within the time guidelines. Figure 3-20 shows that a greater percentage of judges agreed that mediation helped the courts dispose of cases within time guidelines (83%) than agreed that case evaluation had (45%).

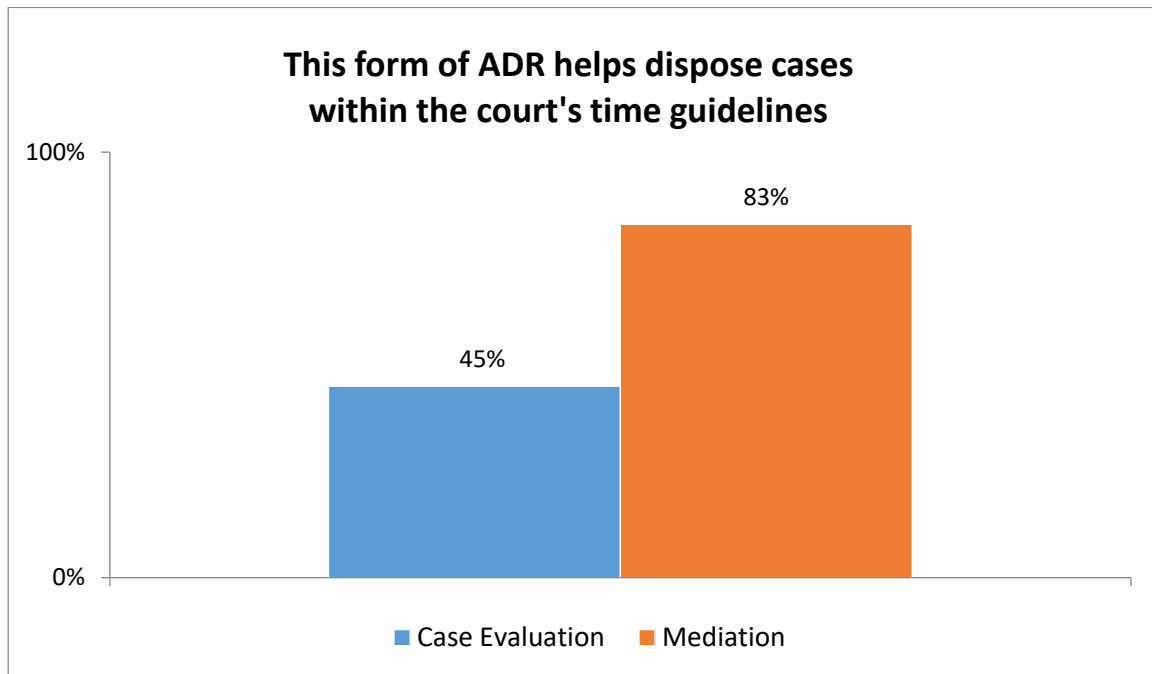


Figure 3-20. Percentage of Judges agreeing that case evaluation and mediation improves the court's ability to dispose cases within time guidelines

4. SUMMARY AND CONCLUSIONS

4.1 THE EFFECTS OF CASE EVALUATION AND MEDIATION ON SETTLEMENT RATES AND TIME TO DISPOSITION

4.1.1 Summary of Findings

The review and analysis of data from 358 civil case records in three circuit courts was designed to answer these two primary questions:

- Does either case evaluation or mediation increase the likelihood that civil cases will be disposed through a settlement or consent judgment?
- Does either case evaluation or mediation affect disposition times for civil cases?

All Cases. The study found that for all civil cases combined—torts and non-torts—cases that used mediation had significantly higher rates of disposition by settlement/consent judgment (82%) than when no ADR was used (57%). The use of mediation by itself did not affect the average time to disposition when compared to cases that did not use either form of ADR; the length of time was about the same for each.

Cases that just used case evaluation achieved the same high rate of settlement/consent (82%) as when mediation was used, but the time to disposition was significantly longer by an average of nearly four months. The reason for this difference was that mediation was usually conducted sooner after case filing than was case evaluation, and cases closed more quickly following the mediation event than they did following the determination of a case evaluation award amount.

When both types of ADR were used, the rate of settlement/consent (84%) was about the same as when they were used separately. The time to disposition was nearly eight months longer on average than for cases in which no ADR was used.

It should be noted that cases that did not use either form of ADR were more likely to be less complex, lower value cases that were also more likely to be dismissed or disposed through a default judgment. There was no evidence that cases using case evaluation or mediation differed from each other in complexity or value.

Torts. The tort cases that did not use ADR had a 71% rate of settlement/consent. While the rates of settlement were higher for cases that used case evaluation (82%) and mediation (92%), these were not statistically significant increases. The lack of significance was likely due to the fact that the high rate of settlement for non-ADR cases left relatively little room for improvement when ADR was used. In regard to length of time to case disposition, data analyses performed on the 221 tort cases examined in this study found a pattern that was similar to that for all cases combined: the use of either form of ADR resulted in a moderate increase in the time to disposition when compared to tort cases that did not use ADR, and the use of both case evaluation and mediation significantly increased the length of the case.

Non-Torts. Data from the 137 non-tort cases reviewed for this study revealed that without the use of ADR, non-tort cases were settled 47% of the time; the rate of settlement/consent increased significantly to 79% when case evaluation was used alone and to 80% with the use of just mediation. Using mediation for these

types of cases did not significantly increase the time to disposition, but using case evaluation did by an average of seven months.

Similarity to Results from the 2011 ADR Study. The same pattern of results was found for the two studies, namely:

- Cases that used either case evaluation or mediation had high rates of disposition through settlement/consent judgment.
- Using mediation had little or no effect on length of time to dispose a case when compared to cases that did not use ADR.
- The use of case evaluation, when compared to mediation, increased the amount of time to disposition.
- Mediation was faster than case evaluation for disposing cases because it was held sooner in ADR cases and because cases closed more quickly following mediation.
- Mediation provided a more direct means of achieving a disposition as most cases that used it settled at the mediation conference.
- These effects were found for both tort and non-tort cases.

4.1.2 Conclusions

This analysis of case records from three circuit courts supports the conclusions of the 2011 study that either case evaluation or mediation can be used effectively to produce high rates of settlement for both tort and non-tort cases; however, mediation is a more direct method for doing this and disposes of cases more quickly.

4.2 PERSPECTIVES ON CASE EVALUATION AND MEDIATION

4.2.1 Summary of Findings

The surveys of 1,135 attorneys and 67 judges and the interviews with chief judges and administrators of the three circuit courts were conducted to gain insights into:

- whether the use of case evaluation and mediation for civil cases in Michigan has changed since the 2011 study; and
- whether judges and attorneys have changed their perceptions about these forms of ADR since 2011.

Use of Case Evaluation and Mediation. Most judges (77%) said that there had been no change in the frequency of use of case evaluation for civil cases in the past five years, although one in five (21%) said it was used less often. Most attorneys, on the other hand, said its use had not remained the same with a greater number saying it was used less often (32%) than more often (21%). In contrast, about two-thirds of each group (judges, 69%; attorneys, 65%) said that mediation is used more often for civil cases than it was five years ago.

Objections to Case Evaluation and Mediation. The frequency with which attorneys object to the use of these two forms of ADR remained unchanged from the previous survey. More than two-thirds (68%) of attorneys said they have rarely or never objected to case evaluation. A greater percentage of attorneys (84%) said they have rarely or never objected to mediation. Judges concurred that attorney objections are rare for both case evaluation (70%) and mediation (74%). Nearly identical results were found in the 2011 surveys.

Use of Case Evaluation if Not Mandated. Both groups would be less inclined to use case evaluation voluntarily now than in 2011. In the earlier study, 36% of attorneys said they would voluntarily use case evaluation often or more than often—a percentage that dropped to 29% in this study. An even steeper decline was found in the judges' responses, going from 83% in 2011 to 66% now.

Effectiveness of Case Evaluation and Mediation. While the majority (53%) of circuit court judges in Michigan regards case evaluation as an effective means to resolve civil cases, attorneys are less convinced with only 43% agreeing it is effective. In 2011 a greater percentage of each group said it was effective: judges, 69%; attorneys, 49%.

Judges and attorneys both gave high marks to mediation as a means for resolving civil cases at rates that were comparable to those in 2011. The judges were especially positive with 93% agreeing that it is effective compared to 78% of the attorneys. In the earlier survey 89% of judges and 77% of attorneys had agreed to its effectiveness.

Judges estimated that cases settled more often as a direct result of mediation (59% of the time) than as a direct result of case evaluation (41%). Also, more judges said that mediation helped the courts dispose of cases within time guidelines (83%) than said that case evaluation had done this (45%).

Expertise of Case Evaluation Panels and Mediators. Judges assigned higher ratings to the expertise of case evaluators than did attorneys. Most judges (54%) said the panels very often or always had sufficient subject

matter expertise to evaluate cases. Attorneys expressed a less favorable view with only 31% rating the panels this highly, about the same rating (29%) as in 2011. (Judges had not been asked this question on the earlier survey.)

The same pattern of response was found when the two groups were asked how often mediators had the skills necessary to resolve disputes; however, both groups rated mediators' skill levels more highly than they did the expertise of case evaluators. Three out of four judges (74%) said that mediators very often or always had the necessary skills, while half (52%) of attorneys rated mediators this highly. (The 2011 survey had not asked this question the same way.)

Judges' ratings of mediation services provided by Community Dispute Resolution Program centers dropped from their 2011 levels. In 2018, 54% of the judges rated them excellent or very good and 30% rated them poor or unsatisfactory. This was a significant drop from the ratings in 2011 when 83% of judges said the services were very good or excellent and just 3% rated them as poor. (Attorneys did not rate these services.)

4.2.2 Conclusions

As in the 2011 study, this follow-up study found that mediation is more highly regarded as a means to resolve civil cases than case evaluation—both by judges and attorneys. Both groups continue to rate mediation's effectiveness very highly, while the ratings for case evaluation have declined since 2011. Mediators' skills are more highly rated by both groups than case evaluators' expertise, and attorneys continue to be less likely to object to mediation than to case evaluation.

A recommendation from the earlier study was:

Given the evidence that mediation is generally more effective and preferred over case evaluation, Michigan circuit courts should be encouraged to make mediation available and not require case evaluation for case types for which it is not required by statute.

The survey data from this follow-up study indicate that both judges and attorneys report a greater use of mediation in the past five years, while some in each group noted that case evaluation is used less often now. In addition, there has been a decline in the percentage of judges saying they would continue to use case evaluation if it was not mandated.

Another conclusion that is consistent with the findings of the previous 2011 study is that judges tend to be more positive about the operations and effectiveness of both forms of ADR than are attorneys. This is particularly true for case evaluation, which many judges want to retain as an option to use as needed to move civil cases toward resolution. In their comments, both judges and attorneys have argued for greater flexibility in choosing which type of ADR to use and when to use it—tailoring ADR use to the unique requirements of each civil case.

APPENDIX A: RESULTS OF STATEWIDE SURVEY OF ATTORNEYS

1. Your Practice

1.1 In what part of the state have you had the most case evaluation or mediation experience?

- 61% **Southeast Michigan** (Lenawee, Livingston, Macomb, Monroe, St. Clair, Oakland, Washtenaw, Wayne)
- 11% **Eastern Michigan** (Arenac, Bay, Clare, Genesee, Gladwin, Huron, Isabella, Lapeer, Midland, Saginaw, Sanilac, Tuscola)
- 9% **Western Michigan** (Ionia, Kent, Mecosta, Montcalm, Muskegon, Newaygo, Oceana, Ottawa)
- 6% **Mid-Michigan** (Clinton, Eaton, Gratiot, Hillsdale, Ingham, Jackson, Shiawassee)
- 6% **Northern Lower Peninsula** (Alcona, Alpena, Antrim, Benzie, Charlevoix, Cheboygan, Crawford, Emmet, Grand Traverse, Iosco, Kalkaska, Lake, Leelanau, Manistee, Mason, Missaukee, Montmorency, Ogemaw, Osceola, Oscoda, Otsego, Presque Isle, Roscommon, Wexford)
- 5% **Southwest Michigan** (Allegan, Barry, Berrien, Branch, Calhoun, Cass, Kalamazoo, St. Joseph, Van Buren)
- 2% **Upper Peninsula**

The majority (61%) of the 1,135 respondents were from the Southeast region. The Upper Peninsula (2%) had the fewest number of respondents.

1.2 What are your primary areas of litigation? (Select all that apply.)

- 34% Personal Injury
- 32% General Practice
- 28% Commercial
- 23% Real Property
- 20% Probate
- 18% Insurance
- 17% Other Negligence
- 13% Other
- 10% Labor and Employment
- 9% Consumer
- 8% Medical Malpractice
- 3% Products Liability
- 2% Environmental
- 1% Health Care
- 1% Intellectual Property

42% of respondents reported having only one primary area of litigation; 55% reported 2 to 5 areas; and 3% had more than 5 areas.

1.3 Do you primarily represent plaintiffs, defendants, or both equally?

- 36% Plaintiffs
- 16% Defendants
- 48% Both Equally

2. ADR Experience

2.1 Have you served as a case evaluator in the past five years?

39% Yes
61% No

2.2 If yes, how many times have you served as a case evaluator in the past five years?

55% 1-10 times
30% 11-20 times
7% 21-30 times
8% More than 30

2.3 Have you served as a mediator in the past five years?

30% Yes
70% No

2.4 If yes, how many times have you served as a mediator in the past five years?

67% 1-10 times
15% 11-20 times
5% 21-30 times
13% More than 30

39% of respondents (442) had served as case evaluators and 30% (337) had served as mediators in the past 5 years. Half of the respondents (50%) had served as either a case evaluator or mediator in the past 5 years, and 19% had served as both.

2.5 Compared to five years ago, case evaluation is now used to resolve civil cases . . .

16% ... more often than before
36% ... about as often as before
24% ... less often than before
24% ... unsure/don't have a basis for comparison

2.6 Compared to five years ago, mediation is now used to resolve civil cases . . .

52% ... more often than before
22% ... about as often as before
5% ... less often than before
21% ... unsure/don't have a basis for comparison

3. Case Evaluation

3.1 As a litigator, how many case evaluations have you participated in over the past five years?

47% 1-10 times
17% 11-20 times
10% 21-30 times
26% More than 30

854 of 1,093 respondents (78%) said they had participated in at least one case evaluation in the past 5 years. The rest of the results presented in the Case Evaluation section of this report are based on the responses of these 854 respondents unless otherwise noted.

3.2 In your opinion, the primary purpose of case evaluation is to provide an award amount...

12% ...that is close to the value a jury or judge might award
77% ...that is likely to produce a settlement or resolution
3% ...that responds to unrealistic expectations
9% ...that serves other purposes

3.3 How often have case evaluation panels had sufficient expertise to evaluate your cases?

6% Always
25% Very Often
26% Often
33% Sometimes
10% Rarely
0% Never

Only 57% of attorneys said that panels had sufficient expertise to evaluate their cases often or more. Ten percent indicated that panels rarely had sufficient expertise.

3.4 How frequently have you objected to case evaluation?

1% Always
4% Very Often
6% Often
21% Sometimes
33% Rarely
35% Never

Approximately 68% of respondents rarely or never objected to case evaluation.

3.5 How often have the sanction provisions of MCR 2.403 been the primary incentive for your clients to accept the award?

- 3% Always
- 17% Very Often
- 22% Often
- 31% Sometimes
- 20% Rarely
- 7% Never

3.6 How often would you have voluntarily used case evaluation if it had not been ordered in your cases?

- 4% Always
- 19% Very Often
- 20% Often
- 32% Sometimes
- 15% Rarely
- 10% Never

3.7 Relative to mediation, case evaluation has been most effective when it was held:

- 37% Before mediation
- 31% After mediation
- 25% Case evaluation has rarely or never been effective
- 7% I have not participated in mediation

3.8 To what extent do you agree or disagree with the following statement? "Overall, case evaluation is an effective method for resolving civil cases."

- 11% Strongly Agree
- 32% Agree
- 20% Neutral
- 21% Disagree
- 16% Strongly Disagree

Less than half of the attorneys (43%) agreed that case evaluation is an effective method of resolving civil cases, while 37% disagreed. The percentage of attorneys who strongly disagreed (16%) was greater than the percentage who strongly agreed that it is effective (11%).

3.9 During the next five years, do you plan to use case evaluation . . .

- 1% ... much more often than you do now
- 5% ... somewhat more often
- 66% ... about as often as you do now
- 12% ... somewhat less often
- 16% ... much less often than you do now

3.10 Additional comments about case evaluation (open-ended)

There were a total of 331 comments written in by attorneys. Respondents included: 111 (32%) who agreed with the statement in question 3.8 that case evaluation is effective, 45 (13%) who were neutral, and 188 (55%) who disagreed. The most common category overall (54) involved problems with the panels—that they were often unprepared or inexperienced and sometimes biased. An additional 29 comments indicated that panels don't address the merits of the case. There were 31 comments that mediation is preferable to case evaluation. There were 25 comments about sanctions and how they operate unfairly and 52 comments suggesting that case evaluation is a waste of time and money. Among those who rated case evaluation as effective, 24 qualified their statements with many saying it is a good way to get the process started and obtain an initial award estimate but not the best way to achieve a settlement. Other comments indicated that it is not suited to all claims (30)—especially PIP cases—or offered various suggestions for improvement (27). Suggestions included that it be voluntary or optional, that panelist be given the results of the case when it is finished, that case evaluation not be scheduled too early, and that panelists' experience should match the type of claim evaluated.

4. Mediation

4.1 As a litigator, how many mediations have you participated in over the past five years?

48%	1-10 times
20%	11-20 times
13%	21-30 times
20%	More than 30

875 of 1,053 respondents (83%) said they had participated in at least one mediation in the past 5 years. The percentages above are based on the responses of these 875 attorneys, as are the rest of the results presented in the Mediation section of this report, unless otherwise noted

4.2 How frequently do you use mediation prior to filing lawsuits?

1%	Always
5%	Very Often
4%	Often
19%	Sometimes
34%	Rarely
37%	Never

Over a quarter (29%) of the respondents used mediation at least sometimes prior to filing lawsuits.

4.3 Post-filing, how frequently do you voluntarily (without court order) use mediation in civil cases?

4%	Always
21%	Very Often
20%	Often
30%	Sometimes
15%	Rarely
10%	Never

A quarter of the respondents (25%) rarely or never use mediation voluntarily; another 30% sometimes use it voluntarily; and the remaining 45% use it often or more often without court order.

4.4 How frequently are your cases ordered to mediation?

11%	Always
28%	Very Often
24%	Often
28%	Sometimes
8%	Rarely
1%	Never

4.5 How often have mediators had the skills necessary to resolve disputes in your cases?

12%	Always
40%	Very Often
25%	Often
19%	Sometimes
3%	Rarely
1%	Never

4.6 How frequently have you objected to mediation?

<1%	Always
1%	Very Often
2%	Often
13%	Sometimes
36%	Rarely
48%	Never

4.7 How often have you asked a mediator to suggest or propose a settlement amount in your cases?

- 7% Always
- 15% Very Often
- 18% Often
- 34% Sometimes
- 16% Rarely
- 10% Never

4.8 Relative to case evaluation, mediation has been most effective when it was held:

- 44% Before Case Evaluation
- 40% After Case Evaluation
- 6% Rarely/Never
- 11% I have not participated in case evaluation

**4.9 To what extent do you agree or disagree with the following statement?
"Overall, mediation is an effective method for resolving civil cases."**

- 36% Strongly Agree
- 42% Agree
- 15% Neutral
- 5% Disagree
- 2% Strongly Disagree

4.10 During the next five years, do you plan to use case evaluation . . .

- 10% ... much more often than you do now
- 19% ... somewhat more often
- 63% ... about as often as you do now
- 4% ... somewhat less often
- 4% ... much less often than you do now

4.11 Additional comments about mediation (open-ended)

There were 191 comments written in about mediation. The respondents included 149 (78%) who agreed or strongly agreed with the statement in question 4.9 that mediation is effective, 23 (12%) who were neutral, and 19 (10%) who disagreed or strongly disagreed. While 35 of the attorneys commented without elaboration that mediation is effective, 46 qualified their answers saying, for example, that mediation is most effective when it is voluntary and when the parties can choose the mediator. Another 34 remarked that mediation is only successful to the extent there is a skilled, experienced mediator. The most common comment made by those who disagreed that mediation is an effective method was that it is too expensive (8), which was also stated by 15 other attorneys. Remaining comments generally offered suggestions such as ordering it early in the process to save the costs of discovery, scheduling it after discovery to be more successful, replacing case evaluation with mediation, and lowering the costs associated with mediation.

APPENDIX B: RESULTS OF STATEWIDE SURVEY OF CIRCUIT COURT JUDGES

1. ADR Processes Used in Your Court

1.1 In what part of the state is your Circuit Court located?

- 36% **Southeast Michigan** (Lenawee, Livingston, Macomb, Monroe, St. Clair, Oakland, Washtenaw, Wayne)
- 13% **Eastern Michigan** (Arenac, Bay, Clare, Genesee, Gladwin, Huron, Isabella, Lapeer, Midland, Saginaw, Sanilac, Tuscola)
- 11% **Southwest Michigan** (Allegan, Barry, Berrien, Branch, Calhoun, Cass, Kalamazoo, St. Joseph, Van Buren)
- 11% **Western Michigan** (Ionia, Kent, Mecosta, Montcalm, Muskegon, Newaygo, Oceana, Ottawa)
- 10% **Northern Lower Peninsula** (Alcona, Alpena, Antrim, Benzie, Charlevoix, Cheboygan, Crawford, Emmet, Grand Traverse, Iosco, Kalkaska, Lake, Leelanau, Manistee, Mason, Missaukee, Montmorency, Ogemaw, Osceola, Oscoda, Otsego, Presque Isle, Roscommon, Wexford)
- 10% **Upper Peninsula**
- 9% **Mid-Michigan** (Clinton, Eaton, Gratiot, Hillsdale, Ingham, Jackson, Shiawassee)

Over a third (36%) of the 67 respondents were from the Southeast region. Mid-Michigan (9%) had the fewest number of respondents.

1.2 Which alternative dispute resolution (ADR) processes do you use? (Select all that apply.)

- 93% Case evaluation under MCR 2.403
- 97% Mediation under MCR 2.411 (includes what some call facilitation)
- 16% Other (not including pre-trial settlement)

1.3 Approximately what percentage of tort claims (case type N) in your docket do you order or refer (without order) to each ADR process?

Mean

- 89% Case evaluation under MCR 2.403
- 46% Mediation under MCR 2.411
- 42% Other ADR

1.4 Approximately what percentage non-tort civil cases (case types C and P) in your docket do you order or refer (without order) to each ADR process?

Mean

- 72% Case evaluation under MCR 2.403
- 47% Mediation under MCR 2.411
- 35% Other ADR

1.5 Of the cases in your docket that go through an ADR process, approximately what percentage settle as a direct result of participation in each of the following processes?

Mean

41% Case evaluation under MCR 2.403
59% Mediation under MCR 2.411
30% Other ADR

1.6 If case evaluation and mediation are both ordered or referred, which sequence is most common in your court?

37% Case evaluation followed by mediation
28% Mediation followed by case evaluation
24% Both sequences are equally common
10% Not applicable: our court does not order or refer both processes in one case

2. Case Evaluation

2.1 Compared to five years ago, case evaluation is now used to resolve civil cases . . .

2% ... more often than before
68% ... about as often as before
18% ... less often than before
12% ... unsure/don't have a basis for comparison

2.2 In your opinion, the primary purpose of case evaluation is to provide an award amount...

28% ...that is close to the value a jury or judge might award
65% ...that is likely to produce a settlement or resolution
3% ...that responds to unrealistic expectations
3% ...that serves other purposes

2.3 How often have case evaluation panels had sufficient subject matter expertise to evaluate cases in your court?

12% Always
42% Very Often
23% Often
22% Sometimes
2% Rarely
0% Never

2.4 Before case evaluation takes place, how often do attorneys in your circuit court object to case evaluation, such as formally by motion or informally as in a settlement conference?

0% Always
2% Very Often
5% Often
23% Sometimes
63% Rarely
7% Never

2.5 How often have the sanction provisions of MCR 2.403 been the primary incentive for parties to accept the award?

3% Always
9% Very Often
21% Often
45% Sometimes
22% Rarely
0% Never

2.6 When parties do not accept the case evaluation award within 28 days of the award and the case is ultimately disposed by bench or jury trial, how often are sanctions applied?

15% Always
13% Very Often
17% Often
40% Sometimes
13% Rarely
2% Never

2.7 If case evaluation was not mandatory for tort claims (case type N), how often would you nevertheless order the process?

31% Always
21% Very Often
14% Often
22% Sometimes
9% Rarely
3% Never

2.8 Relative to mediation, case evaluation has been most effective when it was held:

29% Before mediation
40% After mediation
22% Case evaluation has rarely or never been effective
9% Not applicable: Our court does not order or refer both processes in one case

2.9 To what extent do you agree or disagree with the following statement? "Overall, case evaluation is an effective method for resolving civil cases."

22% Strongly Agree
32% Agree
16% Neutral
27% Disagree
3% Strongly Disagree

2.10 The court's use of case evaluation has improved the court's ability to dispose of cases within the time guidelines.

22% Strongly Agree
23% Agree
27% Neutral
28% Disagree
0% Strongly Disagree

2.11 Additional comments about case evaluation (open-ended)

Judges wrote a total of 17 comments about case evaluation. Respondents included: 8 (47%) who agreed with the statement in question 2.9 that case evaluation is effective, 3 (18%) who were neutral, and 6 (35%) who disagreed. The most common category of response (7) was praise for case evaluation as an effective tool that provides a reasonable basis for settlement discussions and is a catalyst for settlement. Five judges had negative comments about case evaluation saying that it increases costs for litigants, delays and hampers the ability to settle cases, and the case evaluation awards create unrealistic expectations for plaintiffs. Two said they preferred mediation to case evaluation. One judge suggested shorting the award accept/reject period from 28 days to 7-14 days.

3. Mediation

3.1 Compared to five years ago, case evaluation is now used to resolve civil cases . . .

61% ... more often than before
27% ... about as often as before
11% ... less often than before
12% ... unsure/don't have a basis for comparison

3.2 Over the past 5 years, have you observed a change in attorneys' willingness to participate in mediation without the court ordering it?

73% Attorneys have become more willing
27% Attorneys have become less willing
0% I have not observed any change

3.3 How often do mediators who are on the approved list for cases in your court have the skills necessary to resolve cases?

21% Always
53% Very Often
11% Often
13% Sometimes
2% Rarely
0% Never

3.4 How often do attorneys in your Circuit Court object to mediation, such as formally by motion or informally as in a settlement conference?

0% Always
0% Very Often
0% Often
26% Sometimes
58% Rarely
16% Never

3.5 If your court refers cases to a Community Dispute Resolution Program center, please rate the quality of service you believe the center delivers for your court's litigants

7% Excellent
24% Very good
13% Fair
11% Poor
2% Unsatisfactory
44% Not applicable

3.6 Relative to case evaluation, mediation has been most effective when it was held:

48% Before mediation
38% After mediation
2% Case evaluation has rarely or never been effective
13% Not applicable: Our court does not order or refer both processes in one case

**3.7 To what extent do you agree or disagree with the following statement?
"Overall, mediation is an effective method for resolving civil cases."**

58% Strongly Agree
36% Agree
5% Neutral
2% Disagree
0% Strongly Disagree

3.8 The court's use of mediation has improved the court's ability to dispose of cases within the time guidelines.

47% Strongly Agree
36% Agree

13% Neutral
3% Disagree
2% Strongly Disagree

3.9 Additional comments about mediation (open-ended)

There were 10 comments about mediation. The respondents included 9 who agreed or strongly agreed with the statement in question 3.7 that mediation is effective and 1 who disagreed. The most common comment, made by 4 judges, was that the parties should choose their own mediator, rather than be assigned one by the court. Another 3 judges had positive comments saying that mediation was an effective and efficient way to manage the docket and resolve cases, particularly if used early. Two saw it as costly to the litigant and as a source of delay. One judge commented that mediation is appropriate at various stages for different cases, and that the judge needs to retain the discretion to set the case for facilitation at the appropriate time.

APPENDIX C: CIVIL CASE FILE REVIEW DATA EXTRACTION TOOL

CIVIL CASE SUMMARY

1. Court:
___Berrien ___Oakland ___Wayne
2. Docket Number: ____-____-____
3. Filing Date: _____ (mm/dd/yy)
4. Case Closure Date: _____ (mm/dd/yy) (This is the date that the order to close the case was filed. It will later be compared to CE acceptance date or MED acceptance date to test 28-day rule.)
5. Final Disposition Filed (court code/description): _____ (ABC/abcdef...) and the (Courtland code – see list below) _____ (ABC/abcdef...)
 - BV – Bench Verdict
 - CJV– Consent Judgment -Voluntary
 - CJE – Consent Judgment –Result of Case Evaluation (within 28 days)
 - DC – Dismissed by Court
 - DF – Default Judgment
 - DP – Dismissed by Party – With No Award
 - JV – Jury Verdict
 - SD – Summary Disposition
 - ST – Settlement/Stip & Order
6. What was CE award amount? \$ _____ (if available)
7. If verdict, what was verdict amount? \$ _____ (if available)

CASE EVALUATION (CE) DETAIL

8. Was CE held? ☐ No ☐ Yes

If Yes:

a. Was an order issued for CE?

☐ No ☐ Yes

b. Date of order: _____ (mm/dd/yy)

c. Initial date set for CE: _____ (mm/dd/yy)

d. Number of times CE reset/rescheduled? _____

e. Date CE was held: _____ (mm/dd/yy)

f. Did CE result in a mutual agreement disposing of the case?

☐ No ☐ Yes

g. Unanimous: ☐ No ☐ Yes

h. Was there an order disposing this case post 28 days from CE that could be attributed to the mutual acceptance of the CE award amount? i.e., no other future events occurred between CE and final disposition.

☐ No ☐ Yes

If No (to #9): Was a motion filed to remove the case from CE? ☐ No ☐ Yes

a. Was the motion granted? ☐ No ☐ Yes

b. Date of Order: _____ (mm/dd/yy)

MEDIATION (MED) DETAIL

9. Was the MED conducted? (court ordered or not court ordered)
___ No ___ Yes

If Yes (to #10): Was MED court-ordered?

___ No ___ Yes

- a. Date of the order: _____ (mm/dd/yy)
- b. Date set for MED: _____ (mm/dd/yy)
- c. Number of times MED reset/rescheduled: ____
- d. Date MED completed: _____ (mm/dd/yy)
- e. MSR (mediator status report filed?)
___ No ___ Yes
- f. Did MED result in a mutual agreement disposing of the case (at the table)?
___ No ___ Yes
- g. Was this case closure attributed to MED? i.e., no other future events occurred between MED and final disposition.
___ No ___ Yes

If No (to #10): Was a motion filed to remove the case from MED? ___ No ___ Yes

- a. Was the motion granted? ___ No ___ Yes
- b. Date of order: _____ (mm/dd/yy)

TRIAL DETAIL

1. Was a Trial Conducted?

☐ No ☐ Yes

If Yes:

a. Was the Trial ordered?

☐ Bench ☐ Jury

b. Date order issued for Trial: _____ (mm/dd/yy)

c. Original date set for the Trial: _____ (mm/dd/yy)

d. Number of times Trial reset/rescheduled _____

e. Trial start date: _____ (mm/dd/yy)

f. Date trial was concluded: _____ (mm/dd/yy)

g. A verdict was delivered for

☐ Plaintiff(s) ☐ Defendant(s) ☐ No Verdict

h. Sanction requested? (only if CE/Trial occurred)

☐ No ☐ Yes

i. Was this case closure attributed to Trial (aka verdict)? (i.e., no other future events occurred between TRIAL and final disposition)

☐ No ☐ Yes

Case Types included in this study are:

(4) Civil Damage Suits (Torts):

ND – Property Damage, Auto Negligence. All complaints of property damage but not personal injury involving the use of a motor vehicle.

NF – No-Fault Automobile Insurance. All claims for first-party personal protection benefits and first-party property protection benefits under the no-fault automobile insurance act.

NH – Medical Malpractice. All claims involving health care provider malpractice.

NI – Personal Injury, Auto Negligence. All complaints of personal injury, or personal injury and property damage, involving the use of a motor vehicle.

NM – Other Professional Malpractice. All claims involving professional malpractice other than health care provider malpractice.

NO – Other Personal Injury. All other claims involving liability for personal injury not otherwise coded.

NP – Products Liability. All claims involving products liability.

NS – Dramshop Act. All claims involving liability under the liquor control code.

NZ – Other Damage Suits. All other claims for damages.

(5) Other Civil Matters:

CB – Business Claims. All claims involving partnership termination and other business accountings.

CC – Condemnation. All condemnation proceedings.

CD – Employment Discrimination. All complaints of employment discrimination.

CE – Environment. All environmental matters such as zoning, pollution, etc.

CF – Forfeiture Claims. All claims of interest in property seized under the Controlled Substance Act which may be subject to forfeiture.

CH – Housing and Real Estate. All housing, real estate, foreclosure, land contracts, and other property proceedings (except landlord-tenant and land contract summary proceedings).

CK – Contracts. All proceedings involving contractual obligations not otherwise coded.

CL – Labor Relations. All labor-management matters except employment discrimination.

CP – Antitrust, Franchising, and Trade Regulation. All complaints regarding unlawful trade practices including but not limited to pricing and advertising of consumer items, regulation of watercraft, restraint of trade and monopolies, Consumer Protection Act, Farm and Utility Equipment Franchise Act, franchise investment law, motor vehicle dealer agreements, and the Motor Fuel Distribution Act.

CR -- Corporate Receivership. All corporate receivership proceedings.

CZ – General Civil. All other civil actions not otherwise coded.

PC – Proceedings to Restore, Establish, or Correct Records. All proceedings to restore, establish or correct records which are assigned a new case number (not brought under an existing case).

PD – Claim and Delivery. All complaints to recover personal property which are assigned a new case number (not brought under an existing case).

PR – Receivers in Supplemental Proceedings. All proceedings appointing a receiver which are assigned a new case number (not brought under an existing case).

PS – Supplemental Proceedings. All supplemental proceedings which are assigned a new case number (not brought under an existing case).

PZ – Miscellaneous Proceedings. All other matters assigned a new case number (not brought under an existing case), including the following matters: grand jury and multi-county grand jury.

APPENDIX D: CIRCUIT COURT ADMINISTRATOR / CHIEF JUDGE INTERVIEW QUESTIONS

Courtland Consulting is working under contract with SCAO to provide a follow-up to the 2011 Michigan Circuit Court ADR study. We have examined selected civil case files from three circuit courts, and now we are interested in learning more from each of the Court Administrators and Chief Judges about how cases are handled. We also want to obtain your perspectives on the ADR processes. These questions are designed to be used in a telephone interview to be conducted at your earliest convenience with our Evaluation Manager, Sharon Pizzuti.

A few questions ask for specific data, if available, or best estimates. It is recommended that you review all questions prior to the scheduled interview. We appreciate your assistance and highly value your input.

Use of ADR in Your Court

1. What ADR processes are used by this court? (Please indicate all that apply.)
 - Case evaluation under MCR 2.403
 - Mediation under MCR2.411
 - Arbitration
 - Other (explain). i.e. types of settlement conferences or other events?
 - If you use other forms of ADR, please explain the timing and impact of that ADR occurring relative to mediation and/or case evaluation.
 - If your court uses the word "facilitation," or another term to refer to mediation under MCR 2.411, please identify that for us here: _____.
2. Do you have any reports (including Annual Reports) that you use to monitor ADR that you can share with us? If so, please send an online link or attach the reports in an email to:
PizzutiS@courtlandconsulting.com
3. How are torts and other civil cases referred to one or another of the ADR processes?
 - a. Please provide the percentage of cases that are "ordered" (via scheduling order, etc.) versus simply "recommended" by judges in your Court to one or more ADR process?
 - b. Do attorneys interpret judges' comments/recommendations about going to ADR as an order, even if there is no signed order?

- c. Please provide the percentage of cases ordered or recommended to case evaluation and/or mediation/facilitation that actually result in the process occurring?
- 4. Is there a single scheduling order for all key events (e.g., case evaluation, mediation, trial) or are events in a case scheduled throughout the life of the case?

Case Evaluation

- 5. How many case evaluators are on the roster?
- 6. Are there subpanels that specialize in particular types of cases?

If yes, which ones?

- 7. How are cases assigned to a panel?
- 8. How many cases per day per panel?
- 9. How much time does a panel allot for each case?
 - a. How much time does a panel spend with the parties' attorneys?
- 10. Does the court track disposition dates within 28 days of award?
- 11. How frequently are sanctions sought in case evaluation?
 - ☐ Always
 - ☐ Very often
 - ☐ Often
 - ☐ Sometimes
 - ☐ Rarely
 - ☐ Never
- 12. Would you prefer to restrict the use of case evaluation to certain case types? If so, which types?

Mediation (if applicable)

13. How does the court determine whether or not to recommend/order mediation?
14. How are cases referred to particular mediators?
 - a. Does the judge play any role in identifying and/or selecting the mediator?
15. If the court has a roster, how many mediators are on the roster?
 - a. How frequently is a mediator assigned from the roster?
16. If case evaluation and mediation are both ordered, what sequence is most common? Why?
 - a. Does it vary with the type of case?
 - b. What sequence do you prefer? Why?

Estimated Cost and Workload Impact of ADR

17. From a case flow perspective, do you think either case evaluation or mediation promotes better docket management?
18. What is the impact, if any, of the ADR processes on the court workload?
19. What efficiencies do case evaluation and mediation offer the **court** that may not occur if neither process was used?
20. What efficiencies does ADR offer the **litigants** that may not occur if neither process was used?
21. In your opinion, do case evaluation and/or mediation reduce costs for the **court**? (Court costs may include: case screening time, scheduling, noticing, rescheduling, notifying parties of awards, time spent convening and managing panels.) If so, which type of ADR reduces the costs more and in what ways?

22. In your opinion, do case evaluation and/or mediation reduce costs for the **litigants**? (Litigant costs may include: attorney time spent writing a brief, service on other parties, attendance at case evaluation or mediation, time discussing purpose of processes with parties, time discussing whether to accept award.) If so, which type of ADR reduces the costs more and in what ways?

Overall Assessment of ADR

23. Are some case types more amenable to earlier disposition through case evaluation and mediation/facilitation than others?
24. Are there any indirect benefits of ADR for cases not disposed as a direct result of the ADR process?
25. What do you see as the pros and cons of the ADR processes offered by your court?
26. Will your court be making any changes to the ADR processes the near future? If so, what?
27. Is there anything else about offering and managing these ADR processes that you would like SCAO and the Court to know?

APPENDIX E: SUGGESTIONS FROM ATTORNEY SURVEY

Attorneys were asked to provide additional comments about Case Evaluation (Q.19) and Mediation (Q.30). Upon review of all the comments received, the following were coded as suggestions for SCAO consideration and presented for review.

Q19
If you have additional comments about CASE EVALUATION that you would like to share with the State Court Administrative Office, please note them here.

1. Courts need to do a better job at removing cases from case evaluation even where matters of equity are involved.
2. In district courts a combined mediation/case evaluation should be used where after 1 hour the mediator issues a case evaluation award. Often, case evaluation is valuable at the start of the case before attorney fees have accrued, but it is hard to do that anymore.
3. Wayne County needs a specialized panel for PIP/auto cases. It is about 70% of Wayne County's civil docket, but with all due respect, I do not feel that most of the evaluators in Wayne county are qualified to evaluate these cases. There are many attorneys who actively litigate PIP/auto, know case value, and would be willing to be an evaluator. Case evaluation is a great tool to settle cases, but having unqualified evaluators putting what is obviously random number on the case only hurts settlement prospects. With a qualified panel there is much more credibility in the evaluation and it will settle many more cases.
4. Case evaluation should occur early, if not objected to by either party. The costs of discovery yet to be incurred are an important reason to have case evaluation early.
5. Case evaluation is more effective if conducted after a summary disposition motion decision. At that point, the parties are more focused upon the financial recovery and defense costs aspects.
6. Discovery should be completed or Rules of Discovery changed.
7. Important that case evaluators have actual trial experience and have practiced law for at least 7 years.
8. In the 13th Circuit, case evaluation was exterminated by Judge Rodgers and Judge Power. Mediation is mandatorily ordered in its place. Since some cases are well suited for case evaluation (and not mediation), then I have to object to the Scheduling Order, convince my adversary to participate, propose a new Order requiring case evaluation, create my own panel of evaluators (at above MCR prices), and host the event. The 13th Circuit offers no assistance. There is a need for both forms of ADR, which depends on the specific case. And, resolution is often facilitated by the results of either event, even when resolution did not occur at the event. Moreover, case evaluation instills collegiality amongst the local attorneys because it is one of the few times that they get to work "with each other", instead of always "against each other". Our circuit exhibits that lack of collegiality, and I believe the lack of case evaluation furthers that divide.
9. Parties should be limited on summary size.
10. Stop forcing us to efile case evaluation summaries. The evaluators (and I am one of them) cannot read the summaries as efficiently as the exhibits are not tabbed on the efile copies. In addition, you cannot write/type notes on the summaries when viewing as pdf files.
11. The dates set in scheduling orders, especially for discovery and case evaluation, are unreasonably/unrealistically short and need to be longer. Case evaluators can't help when the parties don't have all the records and interrogatory/deposition answers necessary to evaluate a case.
12. There is a structural problem with case evaluation that is so glaring, that I am amazed that it hasn't elicited more attention. The case evaluators, especially in "other civil panel" matters, have no automatic way of knowing what ensued after their work was finished, yet doesn't common sense indicate that such follow-

up should be part of the system? If case evaluators peg my case at a miserly \$1,700.00 and later I settle it for \$12,000, shouldn't they know what happened? So few cases these days go to trial that it is a relatively rare case evaluator who can honestly base his or her recommended award on trial experience. Instead, many of them are relying on just vague, gut instincts. The figures used in my example represent actual numbers in a case I had. In another case, the award was \$10,000 and I settled it for \$17,500, and but for circumstances unknown to the case evaluators, would have held out for maybe \$22,000 to \$25,000. To the extent that case evaluation awards are skewed downward because one side takes an utterly unrealistic settlement posture, that is unfair to the opponent as well. The system should be in place with the goal being to determine a fair settlement amount, not to just find a number that a plaintiff will grudgingly accept when it is practically forced on him or her with the sanctions as a very powerful incentive against rejecting the award. With ADR becoming the new norm and taking the place of trials, I think it is more and more important that structural defects in the process be eliminated. Why couldn't both parties be supplied with a form to mail or email to the case evaluators that would say the case of ____ that you recommended be settled for \$____ proceeded to trial/further negotiations with this result: \$____. As things stand, defendants in most civil litigation hold a great advantage, and given the high risk that plaintiffs take when they reject an award, it behooves the legal profession to make the process as reliable and accurate as possible. I don't believe that we can now say that that goal has been achieved. I hope that my perspective is helpful.

13. The parties must certify that they have affirmatively met, discussed settlement and have narrowed the remaining issues for trial/mediation. This should be standard. Also, in first party no fault cases, other than dispute third party issues and claims that the disputes carry over to the first party issues, unless both parties specifically dispute the medically and other proofs, those matters shall be taken against the non-disputing party.
14. Whether or not case evaluation is an effective method to resolve cases, you should ask if it is a fair or proper way. Flipping a coin is an effective way to resolve disputes, but it is not a fair or proper way.
15. I dislike multiple case evaluation events within a single case -- I say it should be one and done.
16. It was better when an offer of judgment could be used to supersede the evaluation. Attorneys involved know the case better than the mediators, but since the courts use the device to get cases off the docket, I doubt the old rule will be restored.
17. The practice of closing discovery before case evaluation "so the evaluators will have everything" ought to be undone. Early case evaluation is better. Discovery ought to remain open after. Also, case evaluators must not go overtime on a case or two and then cut short the cases at the end of the working day
18. Whether or not case evaluation is used in a case should be discussed between the parties and presiding judge at an initial pre-trial conference.
19. Case evaluation should be geared toward assisting the parties with evaluating the case in terms of what a jury would likely find following trial rather than trying to get the case settled. Getting the case settled should be the primary focus of mediation.
20. Case evaluation needs fixing. More time allotted to it per case and perhaps a short report.
21. Make case evaluation voluntary. Both sides have to agree.
22. Must coordinate with offer of judgment rule to make both more effective tools to encourage settlement.
23. Panelists should be given the results of the case when it is finished.
24. The case evaluation process should be the same in every county. In Genesee County, it is quite simple and straight forward. However, Wayne County has complex forms that makes case evaluation much more complicated than it should be.
25. I suggest that mediation and offer of judgment be used in place of case evaluation.
26. Case evaluation should be optional.

27. The MCR needs to be modified to provide that any case involving equitable relief is automatically excluded from case evaluation upon the noticing by any party that such relief is prayed for. The exclusion upon motion of a party needs to be eliminated. Exclusion should be of right and not within the purview of the judge. The requirement that a party must file a motion to exclude from case evaluation, if equitable relief is prayed for, should be stricken.
28. Case evaluation should be an option between facilitation just like in Federal Court.

Q30
If you have additional comments about MEDIATION that you would like to share with the State Court Administrative Office, please note them here.

1. An initial mediation should be ordered immediately, and if not resolved a second more comprehensive one ordered after discovery.
2. I believe in the business court model. For most civil cases, schedule mediation after a reasonable discovery period, but before case evaluation. I also recommend that the Michigan Supreme Court junk case evaluation and substitute mediation. It is far more effective in resolving cases.
3. In this area we use the term facilitation to refer to what is called mediation in this survey. You might wish to clarify the terminology at the beginning of the survey and call it facilitation.
4. Mediators should be given more authority in determining when, where, how and who participates.
5. Rather than use case evaluation, the courts should use early mediation on a mandatory basis and then just before trial on a mandatory basis.
6. Mediation should be used to replace case evaluations.
7. Show more alternatives to mediation or shortened trial approaches for ADR.
8. Support the House bill for automatic mediation.
9. The judges in the Wayne, Oakland and Macomb circuits have become very lazy and do not effectively use settlement conferences to settle cases. Rather, most of the time these jurists merely order the cases to facilitation (i.e. mediation) without even attempting to settle the case at the settlement conference. In an ideal world, I would like to see case evaluation done away with and the judges do some work at settlement conferences to settle the case. Only if the case cannot be settled at the settlement conference would mediation then be appropriate.
10. Trial courts should establish the latest possible deadline for the parties to schedule mediation and then let the parties and the mediator determine when the best time is for the mediation. In some cases, mediation is more likely to be successful after some or all discovery is completed, while in other cases, little or no discovery is necessary for a successful mediation.
11. Trial judges need to order a commercial case to mediation as soon as possible after the case is underway.
12. Discovery Mediation should be encouraged.
13. Mediation should be renamed facilitation.
14. Judges should not be given the power to select mediators or anyone who financially benefits. The parties should agree on a mediator and mediation should not be forced on the parties by the judge.
15. Maybe try to use mediation in criminal cases.
16. Mediation should be the courts obligation. You have shifted this burden to the parties and that is harmful to the access to justice. It works, but the court should be doing it.

17. Mediation should be voluntary and not court ordered. The attorneys and their clients can figure out which cases are appropriate for mediation where there is a mutual interest in settling a case. There is no point in ordering mediation if the defendant does not intend to offer money which happens frequently and justifiably in medical malpractice cases.
18. Mediation should replace case evaluation as the ongoing ADR method in the court system.
19. Mediation should take place earlier in the process; preferably before the parties have invested any substantial time or money into the case for depositions, discovery etc.
20. SCAO needs to be restructured and needs to listen more to those of us who have worked "in the trenches".
21. Whatever the court's policy on mediation is, there must be a clear opportunity for counsel to inform the trial court that a case is either not a good candidate for mediation or not ripe for it. I have seen mediation push the parties farther apart early in the process, despite the best of intentions.
22. Mediation and case evaluation should only be scheduled after discovery has closed.
23. There is significant push back to suggestions to use mediation. Perception: resource consuming without finality/finality from unqualified mediator/reluctance to add layer/reluctance to disclose info.