

Case Evaluation



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LET'S MAKE A DEAL!

**Understanding Court
Ordered Case Evaluation**

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Moderated by
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**Basic Types of
ADR in Michigan**

- Case evaluation (focus of today's webinar)
- Other types of ADR
 - Facilitation
 - Binding arbitration
 - Court ordered mediation

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Intent/Purpose of Case Evaluation Process

- Facilitate prior to trial resolution
- Save court resources
- Potential for sanctions is designed to prevent parties from foregoing opportunities to settle just to get a little more down the road.



Timing

- After close of discovery (generally)
- Per court rules, should get notice at least 42 days before the date (MCR 2.403(G))
- Initial scheduling may give month and year; as discovery nears a close, parties are notified of specific date and time.



Timing / Due Dates

- Due at least 14 days before the hearing
- Serve copy on all opposing parties and file three copies with POS with ADR clerk.
- Case evaluation fee due



Fees / Late Fees

- \$75 per party, regardless of whether there are counterclaims, cross-claims or third-party claims
- Derivative claims treated as single claim

Continued



Fees / Late Fees

- Not refunded if there is an adjournment of dates requested and granted within 14 days of the scheduled hearing, unless waived for good cause



Fees / Late Fees

- If summary is filed late, offending attorney owes \$150 late fee.
 - This shall not be charged to offending attorney's client UNLESS that client has agreed in writing to be responsible for penalty. MCR 2.403(I)(2)



Content of Summary

- MCR 2.403(I)(3)
 - "...concise summary setting forth that party's factual and legal position on issues presented by the action."
 - Except as permitted by court, shall not exceed 20 pages

Continued



Content of Summary

- Facts – Highlight those favorable to your position; minimize/explain away those plaintiff is expected to highlight; note things plaintiff is expected to ignore (pre-existing medical, factual inconsistencies, etc).
- Law – No need to cite case law regarding generally understood principles like in a MSD; helpful to attach factually analogous case law, even if unpublished

Continued



Content of Summary

- Less formal than motion format, but should be "sharp."



Exhibits

- Paper exhibits attached
- Typically bills, medical records, deposition summaries
- NOTE: evaluators cannot be relied upon to always read through exhibits, especially if they are voluminous. Only pages of depositions and/or summaries that are directly referenced need be attached and should be attached.



Who Attends

- Attorneys (or unrepresented parties)
- Evaluators
- Parties – Have right to attend, but almost never do. If scars, disfigurements, or another unusual condition exists, they may be demonstrated to panel by personal appearance, but no testimony will be taken or permitted by any party.



Evaluators

- Identity – Sometimes disclosed in advance on notice of date/time (Macomb and some other counties); other times not known until you arrive at hearing
- Qualifications
- Defense, neutral, plaintiff



Evaluators

- Potential difficulties with evaluators
 - Conflicts/bad history between evaluator and attorney
 - Evaluator having personal relationship with a party or witness or personal knowledge case facts

Continued



Evaluators

- Evaluator having particularly close relationship with plaintiff's counsel
- “Defense” evaluator being a pushover or weak voice on panel and/or “plaintiff” evaluator being particularly vocal and pushy



Hearing

- What it looks like (conference room, at table, relatively informal, etc)
- Play by play of what occurs
 - Presentation by plaintiff
 - Presentation by defense
 - Responses by both to claims made by other parties' summaries and presentations

Continued



Hearing

- Questions by evaluators throughout
- Panelists meet briefly with each party separately (plaintiff first, then defendant) to find out their "real number" or what they are really willing to pay/accept to settle.
- Panelists discuss privately, then determine award amount or evaluation and notify parties both orally and in writing.

Continued



Hearing

- Oral presentation is limited to 15 minutes per side unless multiple parties or unusual circumstances warrant additional time.
 - Normally, does not take a full 30 minutes for both parties
 - In reality, nobody's actually timing it.
 - Length of presentation depends on details of case and interaction by panelists.

Continued



Hearing

- Any tangible exhibits and video surveillance can be mentioned in summary and brought to actual hearing
- Rules of evidence do not apply.
- Applicable insurance limits shall be disclosed upon request of panelists – MCR 2.403 (J)(3); not otherwise.

Continued



Hearing

- Factual information having bearing on damages or liability must be supported by documentary evidence, if possible.
 - NOTE: Plaintiff's counsel SHOULD attach all documentation of medical specials, out of pocket expenses, lost wages, etc. However, they often do not, and then ballpark a number to panel without any documentation. Panels often give credence to these unsubstantiated estimates.



Award / Evaluation

- Panel must make separate award regarding each party, cross-claim, counterclaim and third party claim.
- If award is not unanimous, panel must indicate so in writing.
- If panel finds that party's action or defense is frivolous, panel shall indicate so in writing on evaluation form.

Continued



Award / Evaluation

- Panel must notify attorneys of evaluation within 14 days of hearing. Usually, they notify attorneys before moving on to next case.
- What does it signify?

Continued



Award / Evaluation

- Acceptance/rejection deadline - 28 days after service of panel's evaluation. This is almost always 28 days after hearing.
- Process of accepting/rejecting
 - Party's attorney completes form and submits it to ADR clerk
 - Once 28-day deadline passes, ADR clerk notifies parties of who accepted and who rejected.

Continued



Award / Evaluation

- Failure to respond = rejection
- Conditional acceptance
 - If there are multiple parties, for example, plaintiff may accept awards against both defendants conditional on both defendants also accepting. If one defendant rejects, then plaintiff rejects both awards.
 - This counts as a rejection for purposes of sanctions



Effect of Acceptance

- Judgment is entered according to evaluation, unless award is paid within 28 days of acceptance, in which case, court shall dismiss action with prejudice.
 - Exceptions: PIP benefits claim and if only part of action was submitted to the case evaluation process
 - Does not affect future entitlement to first-party benefits



Sanctions

- What they are - MCR 2.043(O)
- When they come into effect
- What constitutes a “verdict?”



Macomb v. Oakland v. Wayne

- WCCC tends to be high volume, depending on what time of day, it can get really backed up.
- MCCC and OCCC tend to have only one to two panels going at any given time.

Successes of Process

- Can force plaintiffs to lay out their case and arguments and put forward any helpful evidence they plan to rely on.



Shortcomings of Process

- Evaluators often rely on assertions by plaintiff's counsel, when evidence is not present.
- Evaluators can be swayed by who appears to argue at hearing versus actual evidence (i.e., named/senior partner appearing to argue when he has not handled case suggests it has a high value).

Continued



Shortcomings of Process

- Panelists sometimes just "split the baby" and give an award halfway between "real numbers" provided by parties.
- Not guaranteed a release! Can be a big issue if there's a large Medicare lien.

Continued



Shortcomings of Process

- In jury trials, first question judge often asks is what was the case evaluation award?
 - Award often becomes parties starting point for settlement discussions.
- High award can sometimes work against plaintiffs' attorneys, as they may have harder time convincing their client to accept less.



Strategies to Consider

- Having MSD pending at time of hearing
- If planning to accept, contact plaintiffs' attorney to gauge where they stand on it.
 - If both plan to accept, try to settle for that amount in advance of accept/reject deadline so that defense is entitled to release.



Questions?



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Post-Webinar Survey

We want to hear from you!



Audio File of Today's Program

The screenshot shows a registration page for a webinar titled "LET'S MAKE A DEAL! UNDERSTANDING COURT ORDERED CASE EVALUATION". The page includes a "REGISTER NOW" button, a "Share This" link, and a list of speakers: Bill Kunkler, Margaret A. Cooney, Patrick J. Hensley, and W. Wilson Hensley. The main graphic features a man in a suit standing in a doorway with the text "LET'S MAKE A DEAL!" and "UNDERSTANDING COURT ORDERED CASE EVALUATION". The Plunkett & Cooney logo is at the bottom, along with the date "Thursday, Sept. 25, 2014" and the time "Webinar, 11:30 a.m. - 12:00 p.m. EST. Complimentary".

Thank You!

The image shows a close-up of a brown bear's face. The bear has its mouth open, showing its teeth and tongue, and its right paw is raised towards its face. The background is a plain, light green color.
