Order

Michigan Supreme Court
Lansing, Michigan

December 2, 2021

Bridget M. McCormack,
Chief Justice

Brian K. Zahra
David F. Viviano
Richard H. Bernstein
Elizabeth T. Clement
Megan K. Cavanagh
Elizabeth M. Welch,
Justices

ADM File No. 2020-06

Amendments of Rules 2.403, 2.404, and 2.405 of the Michigan Court Rules

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On order of the Court, notice of the proposed changes and an opportunity for comment in writing and at a public hearing having been provided, and consideration having been given to the comments received, the following amendments of Rules 2.403, 2.404, and 2.405 of the Michigan Court Rules are adopted, effective January 1, 2022.

[Additions to the text are indicated in underlining and deleted text is shown by strikeover.]

Rule 2.403 Case Evaluation

(A) Scope and Applicability of Rule.

(1) A court may submit to case evaluation any civil action in which the relief sought is primarily money damages or division of property unless the parties stipulate to an ADR process as outlined in subsections (A)(2)-(3) of this rule. Parties who participate in a stipulated ADR process approved by the court may not subsequently be ordered to participate in case evaluation without their written consent.

(2) ~~Case evaluation of tort cases filed in circuit court is mandatory beginning with actions filed after the effective dates of Chapters 49 and 49A of the Revised Judicature Act, as added by 1986 PA 178.~~In a case in which a discovery plan has been filed with the court under MCR 2.401(C), an included stipulation to use an ADR process other than case evaluation must:

(a) identify the ADR process to be used;

(b) describe the timing of the ADR process in relation to other discovery provisions; and

(c) state that the ADR process be completed no later than 60 days after the close of discovery.

(3) In a case in which no discovery plan has been filed with the court, a stipulated order to use an ADR process other than case evaluation must:

(a) be submitted to the court within 120 days of the first responsive pleading;

(b) identify the ADR process to be used and its timing in relationship to the deadlines for completion of disclosure and discovery; and

(c) state that the ADR process be completed no later than 60 days after the close of discovery.

(3)-(4) [Renumbered (4)-(5) but otherwise unchanged.]

(B) Selection of Cases.

(1) The judge to whom an action is assigned or the chief judge may select it for case evaluation by written order after the filing of the answer

(a)-(b) [Unchanged.]

(c) if the parties have not submitted an ADR plan under subsection (A)~~on the judge's own initiative~~.

(2) [Unchanged.]

(C)-(H) [Unchanged.]

(I) Submission of Summary and Supporting Documents.

(1) Unless otherwise provided in the notice of hearing, at least 7~~14~~ days before the hearing, each party shall

(a)-(b) [Unchanged.]

(2) Each failure to timely file and serve the materials identified in subrule (1) and each subsequent filing of supplemental materials within 7~~14~~ days of the hearing, subjects the offending attorney or party to a $150 penalty to be paid in the manner specified in the notice of the case evaluation hearing. Filing and serving the materials identified in subrule (1) within 24 hours of the hearing subjects the offending attorney or party to an additional $150 penalty~~An offending attorney shall not charge the penalty to the client, unless the client agreed in writing to be responsible for the penalty~~.

(3) [Unchanged.]

(J) [Unchanged.]

(K) Decision.

(1) Within 7~~14~~ days after the hearing, the panel will make an evaluation and submit the evaluation to the ADR clerk. If an evaluation is made immediately following the hearing, the panel will provide a copy to the attorney for each party of its evaluation in writing. If an evaluation is not made immediately following the hearing, the evaluation must be served by the ADR clerk on each party within 14 days after the hearing. If an award is not unanimous, the evaluation must so indicate.

(2)-(5) [Unchanged.]

(L)-(N) [Unchanged.]

~~(O) Rejecting Party's Liability for Costs.~~

~~(1) If a party has rejected an evaluation and the action proceeds to verdict, that party must pay the opposing party's actual costs unless the verdict is more favorable to the rejecting party than the case evaluation. However, if the opposing party has also rejected the evaluation, a party is entitled to costs only if the verdict is more favorable to that party than the case evaluation.~~

~~(2) For the purpose of this rule "verdict" includes,~~

~~(a) a jury verdict,~~

~~(b) a judgment by the court after a nonjury trial,~~

~~(c) a judgment entered as a result of a ruling on a motion after rejection of the case evaluation.~~

~~(3) For the purpose of subrule (O)(1), a verdict must be adjusted by adding to it assessable costs and interest on the amount of the verdict from the filing of the complaint to the date of the case evaluation, and, if applicable, by making the adjustment of future damages as provided by MCL 600.6306. After this adjustment, the verdict is considered more favorable to a defendant if it is more than 10 percent below the evaluation, and is considered more favorable to the plaintiff if it is more than 10 percent above the evaluation. If the~~

~~evaluation was zero, a verdict finding that a defendant is not liable to the plaintiff shall be deemed more favorable to the defendant.~~

~~(4) In cases involving multiple parties, the following rules apply:~~

~~(a) Except as provided in subrule (O)(4)(b), in determining whether the verdict is more favorable to a party than the case evaluation, the court shall consider only the amount of the evaluation and verdict as to the particular pair of parties, rather than the aggregate evaluation or verdict as to all parties. However, costs may not be imposed on a plaintiff who obtains an aggregate verdict more favorable to the plaintiff than the aggregate evaluation.~~

~~(b) If the verdict against more than one defendant is based on their joint and several liability, the plaintiff may not recover costs unless the verdict is more favorable to the plaintiff than the total case evaluation as to those defendants, and a defendant may not recover costs unless the verdict is more favorable to that defendant than the case evaluation as to that defendant.~~

~~(c) Except as provided by subrule (O)(10), in a personal injury action, for the purpose of subrule (O)(1), the verdict against a particular defendant shall not be adjusted by applying that defendant's proportion of fault as determined under MCL 600.6304(1)-(2).~~

~~(5) If the verdict awards equitable relief, costs may be awarded if the court determines that~~

~~(a) taking into account both monetary relief (adjusted as provided in subrule [O][3]) and equitable relief, the verdict is not more favorable to the rejecting party than the evaluation, or, in situations where both parties have rejected the evaluation, the verdict in favor of the party seeking costs is more favorable than the case evaluation, and~~

~~(b) it is fair to award costs under all of the circumstances.~~

~~(6) For the purpose of this rule, actual costs are~~

~~(a) those costs taxable in any civil action, and~~

~~(b) a reasonable attorney fee based on a reasonable hourly or daily rate as determined by the trial judge for services necessitated by the rejection of the case evaluation, which may include legal services provided by~~

~~attorneys representing themselves or the entity for whom they work, including the time and labor of any legal assistant as defined by MCR 2.626.~~

~~For the purpose of determining taxable costs under this subrule and under MCR 2.625, the party entitled to recover actual costs under this rule shall be considered the prevailing party.~~

~~(7) Costs shall not be awarded if the case evaluation award was not unanimous. If case evaluation results in a nonunanimous award, a case may be ordered to a subsequent case evaluation hearing conducted without reference to the prior case evaluation award, or other alternative dispute resolution processes, at the expense of the parties, pursuant to MCR 2.410(C)(1).~~

~~(8) A request for costs under this subrule must be filed and served within 28 days after the entry of the judgment or entry of an order denying a timely motion~~

~~(i) for a new trial,~~

~~(ii) to set aside the judgment, or~~

~~(iii) for rehearing or reconsideration.~~

~~(9) In an action under MCL 436.1801, if the plaintiff rejects the award against the minor or alleged intoxicated person, or is deemed to have rejected such an award under subrule (L)(3)(c), the court shall not award costs against the plaintiff in favor of the minor or alleged intoxicated person unless it finds that the rejection was not motivated by the need to comply with MCL 436.1801(5).~~

~~(10) For the purpose of subrule (O)(1), in an action filed on or after March 28, 1996, and based on tort or another legal theory seeking damages for personal injury, property damage, or wrongful death, a verdict awarding damages shall be adjusted for relative fault as provided by MCL 600.6304.~~

~~(11) If the "verdict" is the result of a motion as provided by subrule (O)(2)(c), the court may, in the interest of justice, refuse to award actual costs.~~

Rule 2.404 Selection of Case Evaluation Panels

(A) [Unchanged.]

(B) Lists of Case Evaluators.

(1)-(3) [Unchanged.]

(4) Specialized Lists. If the number and qualifications of available case evaluators makes it practicable to do so, the ADR clerk shall maintain

(a) [Unchanged.]

(b) where appropriate for the type of cases, separate sublists of case evaluators who primarily represent plaintiffs, primarily represent defendants, and neutral case evaluators whose practices are not identifiable as representing primarily plaintiffs or defendants. Neutral evaluators may be selected on the basis of the applicant's representing both plaintiffs and defendants, or having served as a neutral alternative dispute resolution provider, for a period of up to 15 years prior to an application to serve as a case evaluator.

(5)-(8) [Unchanged.]

(C)-(D) [Unchanged.]

Rule 2.405 Offers to Stipulate to Entry of Judgment

(A) Definitions. As used in this rule:

(1)-(3) [Unchanged.]

(4) "Verdict" includes,

(a)-(b) [Unchanged.]

(c) a judgment entered as a result of a ruling on a motion after rejection of the offer of judgment, including a motion entering judgment on an arbitration award.

(5) [Unchanged.]

(6) "Actual costs" means the costs and fees taxable in a civil action and a reasonable attorney fee, dating to the rejection of the prevailing party's last offer or counteroffer, for services necessitated by the failure to stipulate to the entry of judgment.

(B)-(C) [Unchanged.]

(D) Imposition of Costs Following Rejection of Offer. If an offer is rejected, costs are payable as follows:

(1)-(2) [Unchanged.]

(3) The court shall determine the actual costs incurred. The court may, in the interest of justice, refuse to award an attorney fee under this rule. Interest of justice exceptions may apply, but are not limited to:

(i) cases involving offers that are token or de minimis in the context of the case; or

(ii) cases involving an issue of first impression or an issue of public interest.

(4)-(6) [Unchanged.]

(E) This rule does not apply to class action cases filed under MCR 3.501.~~Relationship to Case Evaluation. Costs may not be awarded under this rule in a case that has been submitted to case evaluation under MCR 2.403 unless the case evaluation award was not unanimous.~~

Staff Comment: The amendments of MCR 2.403, 2.404, and 2.405 improve the case evaluation process in various ways including: allowing parties to stipulate to a different ADR process (with judicial approval), removing sanctions provisions, reducing the number of days case evaluation materials must be filed in advance, reducing the number of days for case evaluators to provide parties with an award, establishing that an applicant who seeks designation as a neutral case evaluator may show experience of up to 15 years as part of the application, updating the definitions of "verdict" and "actual costs," and defining interest of justice exceptions for attorney fees.

The staff comment is not an authoritative construction by the Court. In addition, adoption of a new rule or amendment in no way reflects a substantive determination by this Court.

CAVANAGH, J. (*concurring*).

I support the Court's order. I write separately because I feel compelled to provide a complete picture of the process that led to these amendments, lest the public wrongly assume that we have made this decision without supporting data, input from stakeholders, or due deliberation.

In 2011, the State Court Administrative Office (SCAO) commissioned a study of more than 3,000 lawyers and judges, seeking their opinions about the impact of the case evaluation process on docket management.[1] This study found that case evaluation added several months to case disposition times, that a significant majority of lawyers felt the process was less valuable than mediation, and that judges rated the process more favorably than lawyers. In a 2018 follow-up study, SCAO evaluators returned to three courts that participated in the 2011 study and received survey responses from more than 1,000 lawyers and judges.[2] This study reported similar findings to the 2011 study, noting that support for the case evaluation process—among both lawyers and judges—had eroded further. To assess the implications of these studies and to gather input on the status of alternative dispute resolution practice in Michigan, SCAO convened an "ADR Summit" that was attended by 45 judges, lawyers, insurance company representatives, ADR practitioners, and court administrators. After the summit, an online survey of participants was conducted and a majority of respondents agreed or strongly agreed that case evaluation should become voluntary, while a majority of respondents disagreed or strongly disagreed with eliminating sanctions altogether.

SCAO next convened the Case Evaluation Court Rules Review Committee in early 2019 to further assess the efficacy of the current case evaluation rules and to recommend to the Court any amendments the committee deemed appropriate. This committee met throughout the course of about a year and published a report with several recommendations.[3] With respect to the issue of the sanctions provisions, the committee concluded that they should be removed for a variety of reasons. Significantly, the committee concluded that eliminating sanctions would level the playing field for plaintiffs and defendants, given the consensus that case evaluation primarily favored defendants and insurance carriers (who could absorb the cost of sanctions across hundreds of cases) over plaintiffs with a single case. In addition, the committee concluded that sanctions force

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[1] Campbell & Pizzuti, Courtland Consulting, *The Effectiveness of Case Evaluation and Mediation in Michigan Circuit Courts* (October 31, 2011), available at <https://www.courts.michigan.gov/4a814d/siteassets/reports/odr/effectiveness-of-case-evaluation-and-mediation-in-michigan-circuit-courts.pdf> [https://perma.cc/XF62-PENM].

[2] Campbell & Pizzuti, Courtland Consulting, *Case Evaluation and Mediation in Michigan Circuit Courts: A Follow-up Study* (May 1, 2018), available at <https://www.courts.mi.gov/siteassets/reports/odr/2018-mediation-and-case-evaluation-study.pdf> [https://perma.cc/869U-9SBH].

[3] State Court Administrative Office, Case Evaluation Court Rules Review Committee, *Report to the Michigan Supreme Court* (December 2019), available at <https://www.courts.michigan.gov/4af55a/siteassets/reports/ce-rule-committee-report.pdf> [https://perma.cc/XWW9-3S78].

settlements that are not based on the merits of claims and defenses, sanctions are not used by other states' ADR processes,[4] and sanctions are no longer needed in an era in which less than one percent of circuit court civil claims are adjudicated at trial.

After seeking and receiving comment from a variety of judicial associations and State Bar of Michigan sections,[5] the committee recommended to the Court that it amend the court rules in three key ways: (a) retain the case evaluation process of having a three-member panel provide an award, (b) remove the sanction provisions so that parties are not penalized for rejecting an award and proceeding to trial, and (c) permit the parties to waive participation in case evaluation with approval of the presiding judge upon issuance of an order adopting the parties' stipulation to use a different ADR process. The Court published the proposed amendments for comment, and a public hearing was held on September 23, 2020.

To be sure, as Justice VIVIANO pointed out, some lawyers and judges' organizations submitted comments in opposition to the proposed rule change. However, just as many commenters supported the change as an appropriate response to the problems identified through the various studies mentioned earlier. Moreover, by and large, the opposition to the amended rule was based on a misunderstanding that the proposal would completely eliminate the case evaluation process and eliminate a judge's ability to order the parties to participate. But the amended rule does neither. The rule adopted today retains case evaluation as the default ADR process in circuit court civil actions and allows parties who have completed mediation, but who have not reached an agreement, to provide the court with a stipulation to waive participation in a subsequent case evaluation. Judges retain authority to accept or reject the parties' stipulation to waive case evaluation.

It is perplexing why Justice VIVIANO is vigorously opposed to an amendment that he seems confident will have no effect. While I think it improper to pre-judge or make predictions as to the likely merit of any legal challenge on the issue, I believe it to be well established that court rules govern matters of practice and procedure in the courts of this state, Const 1963, art 6, § 5, and statutes that concern court administration yield to the court

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[4] The 2011 study noted that "Michigan's case evaluation process appears to have no direct counterpart elsewhere." *The Effectiveness of Case Evaluation and Mediation in Michigan Circuit Courts*, p 11. In addition, the study noted that "[n]o state appears to have as sweeping a sanction-based ADR process as Michigan's case evaluation, which includes a wide range of case types and a limitless award amount." *Id*.

[5] Association commenters included the Michigan Judges Association, the Michigan District Judges Association, the Michigan Association for Justice, and the Michigan Defense Trial Counsel Association. Michigan State Bar commenters included the following sections: Business Law, Negligence Law, Insurance and Indemnity Law, ADR, Consumer Law, and Litigation.

rules. *People v Williams*, 475 Mich 245, 260 (2006); *McDougall v Schanz*, 461 Mich 15, 30-31 (1999); Joiner & Miller, *Rules of Practice and Procedure: A Study of Judicial Rule Making*, 55 Mich L Rev 623, 635 (1957). The statutory provisions concerning mediation differ in any number of respects from the court rule—including on the issue of available sanctions.[6] It is not at all clear that the court rule—either with or without sanctions—would yield to the statutes. In fact, in a number of places, the statutes specifically state that the court rules govern the statutory procedure.[7] Moreover, it appears to be common practice for courts to submit all cases, including tort and medical malpractice actions, to case evaluation under the court rule rather than to mediation under the statutes. Whether, and to what extent, the current practice is affected by this amendment is far from clear, but Justice VIVIANO's prediction of devastation resulting from dismantling a practice "with a proven track record" for resolving cases is, in my opinion, not a reasonable prediction given the data establishing the declining efficacy of the process—particularly when case evaluation remains available and subject to judicial approval.

VIVIANO, J. (*dissenting*).

I agree with all of the trial judges who submitted comments during this process that the amendments the Court adopts today are ill-advised. These amendments will cause much confusion and litigation since they purport to allow parties to stipulate to avoid the statutorily mandated case evaluation process for medical malpractice and tort cases. See MCL 600.4901 *et seq.*; MCL 600.4951 *et seq*. And, to the extent they are intended to eliminate sanctions from the case evaluation process, the amendments seem destined to fail because they do not take account of the parallel statutory requirements adopted by our Legislature more than three decades ago. See MCL 600.4921; MCL 600.4969. If the amendments actually accomplished what they set out to do—allowing parties to opt out of

[6] For example, while MCR 2.403(O)(3) requires that the verdict be adjusted for future damages under MCL 600.6306, if applicable, neither MCL 600.4921 nor MCL 600.4969 has the same requirement. MCR 2.403(O)(3) also specifies that, if the evaluation was zero, a verdict finding that a defendant is not liable to the plaintiff is deemed more favorable to the defendant. Both MCL 600.4921 and MCL 600.4969 are silent on this issue. MCR 2.403(O)(4) specifies what constitutes a favorable verdict in cases involving multiple parties, but such provisions are absent from MCL 600.4921 and MCL 600.4969. Finally, MCR 2.403(O)(5) specifies when costs may be awarded in cases where equitable relief is at issue; the statutes have no corresponding provision.

[7] For example, both MCL 600.4905 and MCL 600.4953 provide that the procedure for selecting mediation panel members and their qualifications, as well as the grounds for disqualification of a mediator, are as prescribed by the court rules. MCL 600.4907(1) and MCL 600.4955(1) provide that the court designates who serves as the mediation clerk. MCL 600.4907(3) and MCL 600.4955(3) state that adjournments may be granted in accordance with the court rules.

case evaluation and eliminating sanctions—it would sound the death knell of case evaluation as an effective dispute resolution tool.[1] In my view and the view of many thoughtful lawyers and judges who have expressed their views during this process, that would be an unfortunate result.[2] Finally, even if we could eliminate sanctions and I were inclined to do so, I would not dismantle case evaluation now, while many of our trial courts are faced with a massive backlog of cases due to the COVID-19 pandemic.[3]

As an initial matter, these changes put our rules in direct conflict with Michigan statutory law. See MCL 600.4901 *et seq*. (medical malpractice cases); MCL 600.4951 *et seq*. (tort cases). New rule 2.403(A)(1) purports to allow parties to avoid case evaluation by stipulating to a different alternative dispute resolution (ADR) process approved by the court. However, as our prior rule explicitly recognized, Chapters 49 and 49A of the Revised Judicature Act (RJA), MCL 600.101 *et seq*., make case evaluation mandatory for all medical malpractice cases and for tort cases in which the claimed damages exceed

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[1] We have recognized that "[t]he purpose of this fee-shifting provision is to encourage the parties to seriously consider the evaluation and provide financial penalties to the party that, as it develops, 'should' have accepted but did not. This encouragement of settlements is traditional in our jurisprudence, as it deters protracted litigation with all its costs and also shifts the financial burden of trial onto the party who imprudently rejected the case evaluation." *Smith v Khouri*, 481 Mich 519, 527-528 (2008).

[2] As one experienced lawyer commented at an earlier stage of this process: "[E]liminating sanctions from MCR 2.403 would seem counterintuitive, at best. Without sanctions, the efficacy of the rule is eviscerated. If the actual intent of the proposed rule change is to completely do away with MCR 2.403 Mediations[,] the committee should just say so."

[3] See Michigan Supreme Court, State Court Administrative Office, *Trial Court Backlogs Backgrounder, March 2021* <https://www.courts.michigan.gov/siteassets/covid/covid-19/trial-court-case-backlog-backgrounder.pdf> (accessed November 5, 2021) [https://perma.cc/4QPF-SCG5] (noting that the number of pending felony and misdemeanor cases increased by more than 75% and that the number of pending noncriminal cases increased by approximately 14% in district courts and approximately 18% in circuit and probate courts). It appears that these case backlogs have continued to increase in 2021 and that they continue to be a problem, as chronicled in numerous news reports. See, e.g., Anderson, *Wayne County Prosecutor: Office is in "Crisis Mode" and Caseloads are "Inhumane"*, Detroit Free Press (September 20, 2021), <https://www.freep.com/story/news/local/michigan/wayne/2021/09/20/wayne-county-prosecutors-office-kym-worthy/8419000002/> (accessed November 5, 2021) [https://perma.cc/N8N3-54QG]; see also Administrative Order No. 2019-33, 507 Mich ___ (2021) (VIVIANO, J., concurring in part and dissenting in part).

$10,000, something our prior rule explicitly recognized.[4] Each statute requires judges to refer to mediation cases falling within its scope. See MCL 600.4903(1) ("An action alleging medical malpractice shall be mediated . . . ."); MCL 600.4951(1) (stating that tort cases in which the claimed damages exceed $10,000 "shall be mediated").[5] In addition, each statute contains a sanctions provision nearly identical to the one eliminated today from MCR 2.403(O)(1). MCL 600.4921; MCL 600.4969.[6]

These statutes, which cover a wide swath of civil litigation, remain on the books, and parties can continue to file motions seeking enforcement of them. Unfortunately, the majority today puts our trial courts in the unenviable position of having to determine whether the newly amended court rule or the conflicting laws enacted by our Legislature govern the case evaluation process. In general, "[o]ur authority to promulgate court rules that trump statutes extends only to matters of practice and procedure, not to substantive law." *Hunt v Drielick*, 507 Mich 908, 913 n 6 (2021) (VIVIANO, J., dissenting), citing *McDougall v Schanz*, 461 Mich 15, 27 (1999). But for this to be a consideration, the rule and the statute must inherently conflict. *McDougall*, 461 Mich at 24. As noted above, the new rule does appear to conflict with the statutorily mandated case evaluation process for cases that come within the statute's scope. But, on the other hand, it is hard to see how the new rule, which is now silent on sanctions, conflicts with statutes that require sanctions. A

[4] See prior MCR 2.403(A)(2) ("Case evaluation of tort cases filed in circuit court is mandatory beginning with actions filed after the effective dates of Chapters 49 and 49A of the [RJA], as added by 1986 PA 178.").

[5] The rule was amended in 2000 "to change terminology, replacing 'mediation' . . . with the term 'case evaluation.' " MCR 2.403, 462 Mich lxxxv, cxx (staff comment) (comma omitted). Thereafter, the term "mediation" has been used "to describe the facilitative process established in MCR 2.411, in keeping with the generally accepted usage of the term." *Id*.

[6] The similarity is no surprise. Our first mediation court rule was adopted in 1980. See GCR 1963, 316. As noted above, our Legislature codified the court rule in 1986 PA 178. And, although our first case evaluation rule preceded the statutes by a few years, we have frequently amended the rule to align with and implement this and other statutory directives, as noted in the text of the rule and the staff comments accompanying various amendments of MCR 2.403. See, e.g., MCR 2.403, 429 Mich cvii, cxviii-cxix (staff comment). See also MCR 2.403(K)(4) ("In a tort case to which MCL 600.4915(2) or MCL 600.4963(2) applies . . . ."); MCR 2.403(K)(5) ("In an action alleging medical malpractice to which MCL 600.4915 applies . . . ."); MCR 2.403(O)(3) (incorporating the adjustment for future damages required by MCL 600.6306); MCR 2.403(O)(9) (incorporating the requirements of MCL 436.1801); MCR 2.403(O)(10) (incorporating the comparative fault provisions of MCL 600.6304).

persuasive argument therefore could be made that today's amendments do not vitiate the statutory sanction requirements.[7]

To the extent there is a conflict, before accepting a stipulation to avoid the statutorily mandated case evaluation process, trial courts will need to determine whether a statute entitling a party to a reasonable attorney fee as part of costs, depending upon the outcome of the case, is procedural.[8] Michigan follows the "American rule" for attorney fees, under which attorney fees are generally not recoverable from the losing party as part of costs unless expressly authorized by statute or court rule. *Haliw v Sterling Hts*, 471 Mich 700, 706-707 (2005). I question whether a broad exception to this general rule is procedural. See *TGI Friday's, Inc v Dvorak*, 663 So 2d 606, 611 (Fla, 1995) (holding that a similar provision in a statute was substantive and therefore did not interfere with the court's power to issue procedural rules); cf. *Ashland Chem Inc v Barco Inc*, 123 F3d 261, 264 (CA 5, 1997) (holding a similar rule to be substantive rather than procedural); *Boyd Rosene & Assoc, Inc v Kansas Muni Gas Agency*, 174 F3d 1115, 1126 (CA 10, 1999) ("Loser-pays attorney's fees are normally not within a court's inherent power. Instead, they reflect a conscious policy choice by a legislature to depart from the American rule and codify the English rule."). That the deviation from the American rule is limited to specific classes of litigation—medical malpractice and tort cases in which the alleged damages are above $10,000—further leads me to question whether the rule can be characterized as procedural. See *Persichini v William Beaumont Hosp*, 238 Mich App 626, 638 (1999) (providing "a statute that permits a prevailing party in certain classes of litigation to recover fees" as an example of a "fee-shifting rule[] that actualize[s] a substantive policy"); see also *Chambers v NASCO, Inc*, 501 US 32, 52 (1991). No doubt the majority's changes today will engender much confusion and litigation on this subject.

But even if we had the authority to allow parties to opt out of case evaluation and eliminate statutorily mandated sanctions, I would not do so. Case evaluation has been an effective tool for resolving litigation in our trial courts, and while not immune from

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[7] While I agree with Justice CAVANAGH that "it is improper to prejudge . . . the likely merit of any legal challenge" to the amendments, it surely must be an important step in our administrative process to at least consider whether we even have the power to make certain policy changes before we adopt amendments that purport to do so. My position, simply stated, is that in addition to being a bad idea as a matter of policy (for the reasons discussed below), I believe the Court's action today is detrimental to the administration of justice because it will take thousands of motions and many appeals to determine its legal effect. This latter point, I believe, is worth discussing because the Court's primary mission is to bring clarity to the law for our citizens, not the opaqueness the majority is delivering today.

[8] It is well settled "that a court is not bound by the parties' stipulations of law" and must instead "determine the applicable law in each case." *In re Finlay Estate*, 430 Mich 590, 595 (1988).

criticism, it remains popular among trial judges. In the last survey of Michigan circuit court judges regarding ADR, conducted for the State Court Administrative Office in January 2018, 54% agreed or strongly agreed with the statement "Overall, case evaluation is an effective method for resolving civil cases."[9] Regarding the importance of the sanctions provision in particular, 73% of attorneys and 78% of judges agreed that sanctions are always, often, or at least sometimes the primary incentive for parties to accept a case evaluation award.[10] These survey results confirm my view that eliminating the sanctions

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[9] Campbell & Pizzuti, Courtland Consulting, *Case Evaluation and Mediation in Michigan Circuit Courts: A Follow-up Study* (May 1, 2018), p 65, available at <https://www.courts.mi.gov/siteassets/reports/odr/2018-mediation-and-case-evaluation-study.pdf> [https://perma.cc/869U-9SBH]. Additionally, when asked whether they would still order case evaluation even if it were not mandatory for tort claims, most judges indicated that they would. *Id*. at 64.

[10] *Id*. at 58, 64. The 2019 report from the Case Evaluation Court Rules Review Committee, which Justice CAVANAGH cites in support of removing sanctions from the court rule, contains a number of inaccuracies. Specifically, the report incorrectly states that "a majority of attendees [from the 2018 summit] recommended that case evaluation should become voluntary *and* that the sanctions provisions should be removed." Michigan Supreme Court, State Court Administrative Office, Case Evaluation Court Rules Review Committee, *Report to the Michigan Supreme Court* (December 2019), p 2, available at <https://www.courts.michigan.gov/4af55a/siteassets/reports/ce-rule-committee-report.pdf> [https://perma.cc/XWW9-3S78] (emphasis added). In point of fact, only half of the attendees responded to the survey, and of those, a wide majority disagreed or strongly disagreed that "[s]anctions provisions should be removed altogether." Michigan Supreme Court, State Court Administrative Office, Office of Dispute Resolution, *2018 ADR Summit Meeting Summary* (August 2018), p 5. Unfortunately, that is not the only inaccuracy contained in the report. That the committee was biased against the case evaluation process is perhaps best demonstrated by the fact that it virtually ignored all dissenting voices, particularly those of trial judges who submitted comments during the process. Indeed, in light of the informal comments it received, some of which are noted below, it was patently untrue for the committee to assert that there was a "[l]ack of any evidence, empirical or otherwise, that sanctions provided meaningful value to the parties or the court." *Report to the Michigan Supreme Court*, p 12. The report was also deficient because it failed to discuss the statutorily mandated case evaluation process and sanctions, and the confusion that will arise by allowing parties to opt out and by eliminating sanctions from the court rule. In light of these deficiencies, and even though I was nominally a member of the committee (I was invited to attend one meeting, and my dissenting comments were apparently ignored since they, too, are not accounted for in the report), I would give the report very little weight.

provision would likely lead to fewer awards being accepted, weakening case evaluation's effectiveness as a tool to resolve cases.[11]

Perhaps most importantly, this conclusion is also confirmed by every trial judge who submitted a comment during this process and by their judicial associations. The Michigan Judges Association (MJA) is the judicial organization for the circuit and Court of Appeals judges in Michigan. The MJA vigorously opposes these changes and believes they will have a detrimental impact on the efficient administration of justice in our state. In its comment letter submitted June 15, 2021, the MJA stated as follows:

> [M]any judges find the case evaluation process to be an indispensable component of resolving cases. It often sets realistic expectations for litigants and lawyers about reasonable settlement negotiations and trial prospects. Often at pretrials, the first thing lawyers discuss is the case evaluation award and how that usually (certainly there are exceptions) sets a range by which the parties could negotiate resolution of the case. Also, the prospect of meaningful case evaluation sanctions are often vital for litigants and lawyers to soberly evaluate their expectations. This is especially true for business court and no-fault cases. *The wholesale elimination of meaningful case evaluation and sanctions will almost certainly result in protracted litigation and the waste of jury and judicial resources.* [Emphasis added.]

The chief judge, the presiding civil division judge, and, indeed, all of the judges in the civil division of the Third Circuit Court (our largest trial court) oppose these rule changes and believe they "will be detrimental to effective docket management." In particular, these judges oppose the elimination of mandatory case evaluation sanctions and instead propose that the rule be changed to give trial judges the discretion to decline to award sanctions in appropriate cases. The chief judge of the Sixth Circuit Court (our second largest trial court) agreed wholeheartedly with one of her colleagues that "case evaluation is generally a useful tool that crystalizes the attention of the parties and lawyers to become serious about resolving a case—or to get serious about trying a case" and that "the threat of sanctions also plays an important part in moving parties to become realistic about their positions."

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[11] The 2018 Courtland Consulting report concludes from the survey questions that "[n]either attorneys nor judges consistently said that the sanction provisions had been the primary incentive for parties to accept the case evaluation award . . . ." *Case Evaluation and Mediation in Michigan Circuit Courts*, p 40. But the report's conclusion here misses the point. Even if case evaluation sanctions are only sometimes the primary incentive for parties to accept the award, the sanction provision has a much larger impact because it continues to incentivize a party to reach a reasonable settlement after the case evaluation process has been completed.

The Mediation Tribunal Association (MTA), which was the catalyst for the original case evaluation rule, also opposes the proposed changes.[12] The MTA was formed more than 40 years ago to, among other things, "relieve[] the trial docket of the courts and the backlog of cases awaiting trial." In 2018, the MTA evaluated 6,540 cases in Wayne County. The MTA asserts that "*[i]n large counties, such as Wayne County, case evaluation is not only an effective docket management tool, but also a necessity.*" (Emphasis added.) In addition, the MTA asserts that "[w]hether or not the case is ultimately settled at case evaluation is not as relevant as the process of negotiating sparked by the coming together of the parties." Finally, the MTA "firmly asserts that keeping the process mandatory and with sanctions, provides the most reliable, accessible, and cost-efficient form of ADR available to parties in Wayne County."

In addition, the Oakland County District Judges Association (OCDJA) and the Oakland County Bar Association oppose the rule changes adopted today as they relate to district court, pointing out that the current case evaluation process is highly effective and has resulted "in resolution of 59 percent of district court matters submitted to case evaluation over the past five years, and at a price point far below that of private mediation." The OCDJA believes the rule changes will add costs and cause significant delays. *The OCDJA also believes that by omitting sanctions, the amendments will "eliminate[] a powerful tool in resolving cases."* (Emphasis added.)[13]

[12] The MTA's views reflect the views of the Third Circuit Court, since its board currently includes the chief judge, chief judge pro tem, and several other judges from that court.

[13] The Alternative Dispute Resolution Section of the State Bar of Michigan, which supports the rule, advocated for "a possible carve out, in regard to both mandatory [case evaluation] and retention of sanctions," for no-fault cases. The special attention given to no-fault cases is undoubtedly due to the fact that such cases comprise the vast majority of civil cases in our district courts, and much of the circuit court civil docket as well.

In summary, I strongly disagree with the Court's efforts to make case evaluation optional and to eliminate case evaluation sanctions altogether. These amendments will cause confusion and require much additional litigation to clarify what effect, if any, the amendments will have in light of the statutorily required case evaluation process that mandates sanctions. Regardless, like every trial judge who has commented during this process, I vigorously oppose the elimination of sanctions because of the harm I believe it will do to case evaluation as a useful tool for resolving cases in our trial courts.[21] And I would not dismantle a 40-year-old dispute resolution practice with a proven track record while our trial courts are still confronting the massive docket backlogs caused by the pandemic. I fear these changes will only exacerbate the enormous docket management problems many of our trial courts are currently facing. For these reasons, I respectfully dissent.

ZAHRA, J., joins the statement of VIVIANO, J.

[21] A number of organizations and attorneys have taken issue with our current provision, arguing that it unfairly penalizes individual plaintiffs who have a single case and cannot absorb a sanctions award as readily as an insurance company with a large portfolio of cases. But like the judges from the Third Circuit, I believe the rule can be tweaked to address this criticism without destroying its essential features. In particular, I would encourage the Legislature to give judges more discretion to reduce or refuse to award the attorney fee portion of sanctions if imposing the full amount would create a substantial economic hardship.