PLUNKETT COONEY

Mandatory Case Evaluation Soon to be Thing of the Past in Michigan

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Jeffrey C. Gerish
(248) 901-4031
jgerish@plunkettcooney.com

As a result of a change to the Michigan Court Rules, effective Jan. 1, 2022, case evaluation and rejecting party sanctions will no longer be a mandatory part of the litigation of tort cases in Michigan.

Opinions on the effectiveness and necessity of case evaluations varied widely, but beginning next year the process will include an option that may be imposed in cases unless the parties agree to a separate Alternative Dispute Resolution (ADR) process. The new rule leaves the choice of the ADR process to the discretion of the litigants and only requires that the parties' stipulation identify the ADR process to be used, its timing, and state that it will be completed within 60 days of the close of discovery.

One caveat: there is still a Michigan statute that requires the case evaluation process, including the sanctions mechanism, to be followed in medical malpractice cases, MCL 600.4901 et seq., and in other tort cases, MCL 600.4951 et seq. This means that parties may still move to compel case evaluation as required by the statute.

What do I need to do now?

Although the new rule grants wide latitude to the parties in selecting an ADR process, attorneys should be aware that it's likely many judges will institute processes to automatically send cases to case evaluation if a stipulation is not timely received. The new rule permits a stipulation to an ADR process or a stipulation to be contained in a discovery plan submitted within 120 days of the first responsive pleading under MCR 2.401(C). Although discovery plans are not universally used, the time limitation will serve as a safe harbor for those planning to stipulate, whether or not a discovery plan is submitted. Until practices become more established, attorneys should plan to submit ADR stipulations within 120 days of the first responsive pleading.

Will this apply to pending cases and what if I have case evaluation scheduled in January?

There isn't a hard and fast rule about applicability of the new court rules to ongoing cases, but "[t]he general rule is that the newly adopted court rules apply to pending actions unless there is reason to continue applying the old rules." *Davis v O'Brien*, 152 Mich App 495, 500; 393 NW2d 914, 917 (1986); see also *Irwin v Mut Serv Cas Ins*, No. 237615, 2003 WL 21419427 (Mich Ct App, June, 19,

2003). However, "amended court rules will not apply retroactively if compliance with the newly prescribed time limits is impossible." *Ligons v Crittenton Hosp*, 490 Mich 61, 88–89; 803 NW2d 271, 288 (2011). As a result, litigants that timely stipulate to an ADR process in a currently pending case may be able to avoid case evaluation altogether, but, if not, case evaluations beginning in 2022 will not be accompanied by sanctions under the rule.

What else do I need to know?

In cases where you prefer that case evaluation be required, you can move to compel the process pursuant to the statute. Also, most, but not all, of the commenters to the Supreme Court's new rule agreed with the proposal to eliminate case evaluation sanctions. Those that lament the loss of that feature should re-read the Offers to Stipulate to Entry of Judgment Rule, MCR 2.405, which was also amended. Offers of judgment were rarely used because they were inapplicable in cases with a unanimous case evaluation. With the elimination of case evaluation sanctions, MCR 2.405 now fills at least some of the gap and allows a party to make an offer of judgment that, if rejected and not beaten by the opposing party at trial, may require the opposing party to pay the "actual costs" to try the case.