



IS THERE A FUTURE FOR CASE EVALUATION IN NEGLIGENCE LITIGATION?

By Robert F. Riley

Lawyers regularly engaged in the practice of tort or negligence law have become increasingly animated in their commentary about case evaluation and its usefulness in reviewing personal injury lawsuits and achieving settlements. These remarks take many forms, but when combined, suggest the need for fundamental reconsideration of the case evaluation process.

For decades, civil litigation and, in particular, tort litigation have been subject to case evaluation.¹ It has become an institutional requirement for most civil cases in Michigan when money damages are sought.² Although variations exist, case evaluation typically occurs at the close of discovery and before trial. A panel of three evaluators reviews submissions detailing the issues in a particular case and recommends an award it believes should settle the case. In the interest of

reaching a fair award, the panel is comprised of one attorney representing the plaintiff side, one representing the defense side, and a third individual who is deemed a neutral.³ The process is brief, with many proceedings lasting no longer than 30 minutes.

Generally, the case evaluation panel gives no rationale or explanation for its award. However, a panel may issue either a unanimous or non-unanimous award.⁴ This has potential significance on future proceedings and affects whether a party is eligible for case evaluation sanctions.⁵ When an award is unanimous, a rejecting party may be responsible for the opposition's attorneys' fees and court costs from the date of the case evaluation forward.⁶ These sanctions can be substantial and are believed to induce a party's acceptance of the panel's unanimous recommendation. In the event the panel renders

a non-unanimous award, however, case evaluation sanctions may not be awarded.⁷

Considerable criticism has emerged regarding the case evaluation process in Michigan. This article is not intended to provide a statistical analysis of case evaluation or its effectiveness, but rather, it seeks to highlight the substantial concerns expressed among members of the negligence bar while recommending further study and analysis of the case evaluation process.

Mandatory proceedings

As pointed out previously, evaluation is mandatory for negligence cases, and by itself this feature of the existing court rules is the subject of criticism. Voluntary participation would reflect a thoughtful willingness to consider the opinions of disinterested attorneys about a lawsuit, its strengths and weaknesses, and its settlement value. According to some attorneys, the compulsory nature of the process diminishes case evaluation and renders awards a minor and trivial event in the life of a lawsuit. To others, compulsory case evaluation is a hurdle or obstacle to overcome. In addition, some parties determine in advance to reject an award, irrespective of its merits. Given the commitment necessary to properly prepare and argue the merits of a client's position, the costs and expenses associated with case evaluation must be worthwhile and achieve significant goals and objectives. Is it a waste of time or a productive exercise? Perhaps the time has come to assess generally and in the context of the following additional considerations the value of compulsory case evaluation in negligence litigation.

Timing of case evaluation

Case evaluation typically occurs at the close of discovery, however many judges and parties tend to advance evaluation into earlier stages of case preparation and development.⁸ Presumably, the objective is to promote settlement at a point in time when litigation costs and expenses can be minimized. To this end, the parties should have greater discretion as to if and when case evaluation should occur.

In complex cases, negligence attorneys routinely complain about early case evaluation. Attorneys for plaintiffs assert that absent complete discovery, they are denied meaningful information that can promote or enhance the likelihood of achieving a favorable outcome. Correspondingly, defense attorneys argue that they cannot adequately prepare for case evaluation without substantial discovery, including depositions of plaintiff's liability and damage experts. Although there is no one-size-fits-all solution to the timing of case evaluation, meaningful discussion is required regarding when it should occur and who should determine and control its placement in the chronology of case development before trial.

At a Glance

The merit of case evaluation is a frequent topic of conversation among trial lawyers practicing negligence law. Discontent is a common theme. It is time to assess whether there is a legitimate basis for its continued place in the judicial process.

Panel selection

Another frequent criticism of case evaluation is the poor quality, incompetence, and bias of panel members. Moreover, the relative strengths and experience of particular case evaluators is regularly raised as an issue. If, for example, a medical malpractice case is heard by a panel composed of one or more attorneys regularly practicing in first-party, no-fault automobile claims, an award is considered suspect or of little value. Correspondingly, when rendered by a panel of retired or semi-retired attorneys who do not actively engage in the subject matter at issue, a case evaluation award is viewed with diminished credibility.

Anecdotal evidence suggests that some attorneys and their clients are dissatisfied with the inconsistency of case evaluation panels, and perhaps no solution is readily available. Given the real and significant difficulty in recruiting experienced panel members in a number of jurisdictions, serious questions exist as to whether updated standards regarding the quality, expertise, and experience of potential panel members should be adopted.

Case evaluation summaries and their preparation

Anecdotal evidence also suggests that deadlines for timely filing case evaluation summaries are frequently ignored. Timely submission of summaries is essential to thoughtful and diligent preparation by the opposing attorneys and panel members. Late submissions are of little or no value to those entrusted with evaluating cases.

If case evaluation serves any purpose, it is the detailed exchange of positions, analysis of evidence, and highlighting of litigation strengths and weaknesses. These objectives are

compromised by late, superficial, and poorly prepared presentations. To achieve the stated goals of case evaluation, consideration should be given to the timing of written submissions and the quality of their content along with potential penalties for substandard or tardy submissions.

Case evaluation hearings

A disparity exists regarding how case evaluation hearings are conducted. It is my experience that in some jurisdictions, as many as 15–20 hearings have been scheduled before a single panel on a given day. When this occurs, case evaluation panels are faced with allocating time and limiting presentations to cope with the demands of a busy schedule. This sometimes produces short, superficial, assembly-line treatment. Moreover, if a panel falls behind schedule at the beginning of a day, litigants scheduled for later hearings may feel shortchanged by limited presentation time.

In contrast, some counties apparently have minimal personal injury dockets and their case evaluation panels may hear only two or three cases a day. In my experience, these panels can devote substantial time to each of these cases, with some hearings lasting an hour or more.

For case evaluation to be effective, parties need to have confidence that they will receive the full attention of unhurried case evaluators and that their arguments will be thoughtfully evaluated. It is inappropriate to turn case evaluation into an assembly line where awards are hastily dispensed without due regard for the legitimate needs of all counsel to be heard.

Application of the rules of evidence

The rules of evidence do not apply to case evaluation proceedings.⁹ Generally, most lawyers make a fair effort to comply with the basic propositions outlined in the evidentiary rules governing personal injury proceedings. However, some advocates regularly take liberty with even the most basic evidentiary standards and exploit the absence of rules governing the admissibility of evidence in case evaluation proceedings. Because the rules of evidence do not govern case evaluation proceedings, panel members must assess whether particular evidence may or may not be admissible.

Given the nature of compromise inherent in the case evaluation process and the deliberations that occur over an award, some recognition should be given to the potential prejudice that can occur to a particular party by consideration of inadmissible evidence. Practitioners victimized by inappropriate arguments or assertions regarding inadmissible evidence should, at a minimum, have support from the court rules governing case evaluation hearings. For solutions, reference can be made to arbitration and alternative dispute resolution agreements,

which provide for general adherence but not strict compliance with the rules of evidence and allow for subsequent judicial review for egregious violations of the rules.

Confidentiality

Settlement negotiations occur before, during, and after case evaluation. These discussions are deemed confidential under the court rules and rules of evidence.¹⁰ With the consent of opposing counsel, attorneys are free to discuss the status of their prior negotiations with case evaluation panel members, and this often improves the process and outcome. However, in other situations the parties might want to maintain the confidentiality of their pre-case evaluation discussions. This requires a willingness of all concerned to honor court rules governing settlement discussions and to maintain the confidentiality of pre-case evaluation efforts to achieve settlement.

This is not always the case. In a recent case evaluation, I witnessed an attorney accurately assert to the case evaluation panel that opposing counsel privately made a substantial settlement offer. This was without consent and, in my opinion, knowingly done to encourage a much higher award. This was a seemingly clear violation of the rules governing confidentiality and served to prejudice the panel's ultimate award. There is no effective remedy to adequately address this situation.

Medical care liens and healthcare obligations

Negligence lawsuits typically involve personal injuries requiring medical care and treatment. When medical bills are incurred as the result of alleged negligence or wrongdoing, statutory and contract provisions typically require reimbursement from the proceeds of any settlement.¹¹

When negligence lawsuits proceed to case evaluation, the medical care lienholders are typically not parties to the lawsuit. This, in turn, limits the potential success of the case evaluation process. Even if the liens are properly accounted for by the existing parties to the lawsuit, a case evaluation award cannot be accepted with any assurance that the liens will be resolved.

In a recent matter in which I was involved, a non-party lienholder represented to the case evaluation panel on two separate occasions that no medical care lien existed. However, when a resolution was reached, the lienholder—as it was allowed to do per statute—issued a final payment letter requiring a reimbursement in excess of \$300,000. Ultimately, the settlement was for naught and the litigation continues unresolved.

In some instances, certain medical care lienholders seek to intervene as party plaintiffs. Although this is not common, it brings the lien issue to the attention of all concerned. Moreover,

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it does not offer a universal solution. In almost all instances, the plaintiff's attorney prepares and develops the case and is usually the only advocate prepared to proceed to trial and advocate for reimbursement of the lien. In contrast, attorneys for lienholders typically do not develop personal injury cases, take depositions, hire experts, or otherwise prepare to participate in a trial. Thus, it is possible for a plaintiff's attorney to settle a personal injury case and leave the lienholder with the dilemma of whether to proceed to trial.

The case evaluation process has not yet successfully addressed these issues. Attention must be devoted to the statutory and contractual rights lienholders possess relative to personal injury settlements, and accommodations must be reached to account for these obligations in the context of case evaluation. To that end, potential review of statutory provisions and court rules relative to case evaluation needs to be assessed and reevaluated. Absent a meaningful role for lienholders in the process and a reasonable basis for assessing the merits of any lienholders' claim(s), the case evaluation process will be unsuccessful in resolving a significant segment of tort cases.

Acceptance and rejection

As is readily apparent, the primary objective of Michigan's court rules governing case evaluation is acceptance of a recommended award. However, two fundamental considerations inherent in virtually all personal injury lawsuits deter defendants from accepting an award.

First, if both parties to an award accept a case evaluation panel's recommendation, MCR 2.403(M)(1) provides that a judgment may be entered. Few defendants and even fewer insurance carriers acting on behalf of defendants will accept an award if there is the possibility of a judgment being entered. This, in turn, precludes an award from being accepted. It is an obstacle to the success of case evaluation that can and should be addressed.

Second, in addition to concerns over a potential judgment, most defendants will insist on some level of confidentiality as

a prerequisite to entering into any settlement. Although most plaintiff and defense attorneys address these issues routinely, the inability to assure confidentiality in the acceptance of a case evaluation award almost always impedes acceptance of the award.

In my view, there are special considerations that influence whether a plaintiff can accept a case evaluation award. In lawsuits that present catastrophic damage claims, particularly those involving minors, annuities and structured settlements providing for payments over an extended period are favored. However, defendants have no obligation to provide for an annuity out of the proceeds awarded through case evaluation and this can prevent plaintiffs from accepting the award.

Even if a limited sampling of case evaluation awards is affected by the considerations noted above, it would seem appropriate to contemplate modifying the case evaluation acceptance and rejection processes to allow for the conditional acceptance of awards for which negotiation and agreement need to be reached on issues other than the dollar amount of the settlement. This is also true regarding the allocation of any award to medical care liens and healthcare obligations.

There is a role for case evaluation in personal injury litigation. Under the best of circumstances, evolutionary rather than revolutionary change needs to be considered. The foregoing issues merit serious consideration, and the bench and bar should collaborate to adjust or modify the case evaluation process. A real and genuine interest exists in exploring settlements in virtually all personal injury lawsuits, and the negligence community—both plaintiff and defense attorneys—would welcome dialogue to address these changes. ■



Robert F. Riley is the founder of Riley & Hurley, PC. In a career spanning 38 years, he has litigated all kinds of civil actions. He is a mediator, facilitator, and arbitrator, and regularly assists with the settlement of complex lawsuits.

ENDNOTES

1. MCR 2.403 and MCR 2.404.
2. MCR 2.403(A)(2).
3. MCR 2.403(D) and MCR 2.404.
4. MCR 2.403(K).
5. MCR 2.403(O)(3).
6. MCR 2.403(O)(1).
7. MCR 2.403(O)(7).
8. MCR 2.403(A)(2).
9. MCR 2.403(J)(2).
10. MCR 2.412(C) and MRE 408.
11. E.g., the Michigan Department of Health & Human Services' right to recovery under MCL 400.106.