

The Nuts and Bolts of Local Practice in the Eastern District of Michigan (Part 3)

A guide to practicing in the U.S. District Court for the Eastern District of Michigan, adapted from the Federal Bar Association's *Handbook on Local Practice in the Eastern District of Michigan*

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A civil jury trial is a risky proposition in any court, state or federal. To manage that risk, it is usually in each party's interest to engage in some form of alternative dispute resolution, or ADR. Knowledge of the local ADR rules and—if your case doesn't settle—knowledge of local trial procedures are key elements of successful civil practice in the Eastern District of Michigan.

As the final piece of our series highlighting the key practice and procedure points in handling a civil case in the United States District Court for the Eastern District of Michigan, we begin with ADR and continue through the conclusion of trial. The information in this series is more fully set forth in the *Handbook on Local Practice in the Eastern District of Michigan* as maintained by the Eastern District of Michigan chapter of the Federal Bar Association.¹

Alternative dispute resolution

ADR is expressly favored in the Eastern District of Michigan, and the local rules were amended a few years ago to comprehensively address it.² While the rules do not mandate ADR, most of the judges will address it in some form in your case scheduling order.

Facilitative mediation—a flexible non-binding process in which a third-party mediator facilitates settlement discussions—is the most common form of ADR used in the Eastern District.³ Most judges will allow the parties to select a mediator by themselves. If you need recommendations, some of the judges maintain a list, which you may obtain by calling the case manager. You may also request that another district judge or a magistrate judge act as mediator.⁴ The

district's magistrate judges routinely conduct settlement conferences and facilitations. They are experienced and effective in bringing parties together toward settlement, and they perform their services without the fee charged by private mediators.

The local rules state a procedure to govern in the absence of direction from the mediator,⁵ but typically the mediator will establish a process with the parties for the exchange (or, alternatively, the confidential submission) of mediation statements. In some cases, the mediator may invite a separate, short, confidential submission from both parties stating their settlement positions in monetary terms.

"Case evaluation" is a creature of the Michigan Court Rules.⁶ In some cases, it is an effective tool that leads to the resolution of civil disputes. In others, it is a bad fit. While it is an option under the local rules in the Eastern District of Michigan, the majority of civil cases in the district are not assigned to case evaluation. A judge may refer a matter to case evaluation with or without the parties' consent,⁷ and some judges occasionally use this resource. When they do, however, the sanctions set forth in the Michigan Court Rules do not apply unless the parties consent.⁸

ADR, in one form or another, is a part of almost every civil case adjudicated in the Eastern District. It is good practice to give thought to your preferences and discuss them with your adversary before your Rule 16 scheduling conference.

Pretrial and trial

The joint final pretrial order

The Federal Rules of Civil Procedure state disclosure obligations applicable to the various phases of a civil proceeding. Federal Rule 26 contemplates initial disclosures at the beginning of a civil case, expert witness disclosures thereafter, and pretrial disclosures as your trial date approaches.⁹ The rule's pretrial disclosure obligations—identification of witnesses, exhibits, and deposition testimony—are fulfilled in the Eastern District through submission of the required joint final pretrial order referenced in its Local Rule 16.2.¹⁰ Therefore, the deadline for your disclosures (which would otherwise be determined by Federal Rule 26(a)(3)) is the date stated in your case scheduling order for submission of the joint final pretrial order.

The joint final pretrial order is essentially a roadmap for the trial, identifying the witnesses each party will call to testify, the

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documents they will seek to admit as evidence, the issues of law and fact to be tried, and evidentiary issues likely to arise.¹¹ Designation of deposition testimony to be read at trial and any objections to that testimony must be made in the order as well.¹² Since both the deposition designations and the objections to those designations must be included in the order, you should confer with your adversary to agree on an earlier date for exchange of the designations. That way, your objections can be completed in time for submission of the joint final pretrial order.

A full list of what is to be included in the joint final pretrial order is stated in Local Rule 16.2.¹³ It is the responsibility of the plaintiff's counsel to formulate the document.¹⁴ Once completed, you do not file the order, since it must be approved by the judge. Instead, you submit the proposed order through the electronic case filing (ECF) utilities function.

The judge will use the joint final pretrial order as a discussion piece at the final pretrial conference. Each party must be represented at the conference by at least one attorney who will actively participate in the trial and has information to discuss the case and the authority to authorize a settlement.

Other pretrial filings

Most pretrial filing deadlines will be stated in your case scheduling order. For those that are not, you should consult your judge's practice guidelines available on the court's website.

Trial briefs are due on of the first day of trial.¹⁵ If your case is to be tried by jury, you must also exchange proposed jury instructions on the first day of trial.¹⁶ The case manager can tell you whether your judge prefers to use his or her own general instructions explaining the role of the jury, burden of proof, etc. To save yourself the effort of preparing general instructions in that instance, it is a good idea to call the case manager and make that inquiry.

In nonjury trials, the local rules require findings of fact and conclusions of law to be filed before the last day of trial.¹⁷ It is wise to discuss this rule-imposed deadline with the case manager, however. It is most often helpful for both the court and the parties

involved to include trial transcript references in the findings. To accommodate this, the court will typically allow the submission to be made within a reasonable time following conclusion of the trial.

Trial

Your presentation of witnesses and evidence at trial is limited to the witnesses and evidence you identified in the joint final pretrial order.¹⁸ You should be mindful of this rule when identifying your exhibits and witnesses in the order. Except for rebuttal evidence that could not be reasonably anticipated before trial, no evidence outside of what you identified in the pretrial order will be admitted.¹⁹

Exhibits must be marked and exchanged before trial.²⁰ It is a good idea to ask the case manager whether the judge would like a binder of exhibits in hard copy. Most courtrooms are now equipped with video monitors for presenting evidence. For those that are not, you should call the case manager to arrange a meeting with the court's information technology staff to determine alternatives, such as bringing your own video monitors.

At trial, only one lawyer may examine a given witness, absent leave of court.²¹ Otherwise, you may split tasks among counsel (for example, the opening statement and closing argument). The local rules do not provide guidance on when you must disclose the order of your witnesses. It is good practice therefore, and in both parties' interest, to set a deadline for the disclosure of testimony to be presented on a given day (for example, by noon two days before the anticipated testimony).

Taxation of costs

Once your trial is concluded and judgment is entered, the prevailing party may be able to tax its costs and, in some circumstances, obtain attorneys' fees. A party seeking to tax costs must file a bill of costs within 28 days following entry of judgment.²² To assist parties, the Eastern District has published a *Bill of Costs Handbook* on its website; when submitting your bill of costs, you should follow the handbook closely.

If a party seeks attorneys' fees and related nontaxable expenses, it must file a motion for attorneys' fees no later than 28 days after the judgment has been entered.²³ Local Rule 54.1.2 identifies the specific content that you must include in your brief and in a supporting affidavit.²⁴

Wrap up: The high points

Over the course of this three-part series, we've walked through the procedural rules and local practice customs in handling a civil case in the Eastern District of Michigan.²⁵ Along the way, we've highlighted the distinctions between practice in the Eastern District and practice in Michigan's state court system. In summary, here are the high points:

- You must become a member of the Eastern District Bar to practice in the Eastern District.
- All papers must be presented in 14-point font.
- The cover page of your filing should not list the names of counsel.
- Motions are short, they are not presented in number paragraphs, and they rely on accompanying briefs for substantive arguments.
- Motion hearings are scheduled by the court, not counsel.
- Motion hearings are not a roll call of multiple cases, so be present at the time assigned for your hearing.
- The court enters its own order following resolution of motions.
- Each judge has his or her own unique practice guidelines; become familiar with them.
- It is appropriate to call the judge's case manager to confirm the judge's procedural preferences.
- All filings are electronic; become familiar with the court's ECF procedures. ■

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ENDNOTES

1. The handbook was authored by James D. VandeWyngearde (Adient PLC), Mary K. Deon (Shelton Deon Law Group, PLLC), Brett M. Gelbord (Pepper Hamilton LLP), and the authors of this article. It is available at <<https://fbamich.org/docsremarks>> [<https://perma.cc/XSTQ-P2BH>]. All websites cited in this article were accessed February 8, 2020.
2. ED Mich LR 16.3(a). This and other local court rules are available at *Local Rules*, Eastern Dist of Mich, US Dist Court <<https://www.mied.uscourts.gov/index.cfm?pagefunction=rulesPlansOrders>> [<https://perma.cc/57XZ-SKHR>].
3. ED Mich LR 16.4(a)(2).
4. ED Mich LR 16.4(c).
5. ED Mich LR 16.4(e).
6. MCR 2.403.
7. ED Mich LR 16.5(a).
8. *Id.*
9. FR Civ P 26(a)(1)–(3).
10. ED Mich LR 16.2(a).
11. ED Mich LR 16.2(b).
12. ED Mich LR 16.2(b)(7).
13. ED Mich LR 16.2.
14. ED Mich LR 16.2(a).
15. ED Mich LR 16.8(b).
16. ED Mich LR 16.8(d)(1).
17. ED Mich LR 52.1.
18. ED Mich LR 16.2(a), (b)(8).
19. ED Mich LR 16.2(a), (b)(8).
20. ED Mich LR 16.8(c).
21. ED Mich LR 43.1.
22. ED Mich LR 54.1.
23. ED Mich LR 54.1.2(a).
24. ED Mich LR 54.1.2(b).
25. See Lund & Zeman, *The Nuts and Bolts of Local Practice in the Eastern District of Michigan (Part 1)*, 99 Mich B J 40 (January 2020) <<http://www.michbar.org/file/barjournal/article/documents/pdf4article3864.pdf>> and *The Nuts and Bolts of Local Practice in the Eastern District of Michigan (Part 2)*, 99 Mich B J 36 (February 2020) <<http://www.michbar.org/file/barjournal/article/documents/pdf4article3887.pdf>>.



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LAWYERS GIVE SERVICES



PRO BONO SERVICES

Lawyers volunteer to provide free legal services to low-income families or nonprofit agencies who serve those in need. It is one way to fulfill the duties in the Voluntary Pro Bono Standard.

LAWYERS GIVE MONEY



ACCESS TO JUSTICE FUND

Lawyers make donations to the Access to Justice Fund to support civil legal aid for the poor. It is one way to meet obligations under the Voluntary Pro Bono Standard.

LAWYERS GIVE TIME



COMMUNITY SERVICE

In addition to giving pro bono legal services to the poor and monetary donations for legal aid, many lawyers also give time to their community efforts.

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