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January 31, 2018

Larry S. Royster
Clerk of the Court
Michigan Supreme Court
P.O. Box 30052
Lansing, MI 48909

306 Townsend Street
Michael Franck Building
Lansing, MI
48933-2012

RE: ADM File No. 2017-19: Proposed Amendment of Rules 2.410 and 2.411 and Adoption of New Rule 3.970 of the Michigan Court Rules

Dear Clerk Royster:

At its January 26, 2018 meeting, the Board of Commissioners of the State Bar of Michigan (Board) considered the above-referenced rule amendments published by the Court for comment. In its review, the Board considered recommendations from its Access to Justice Policy Committee and Alternative Dispute Resolution Section. After a review of these recommendations, the Board voted unanimously to support the proposed rules, with the amendments recommended by the Access to Justice Policy Committee.

The Board strongly supports the Court amending the Michigan Court Rules to allow mediation in appropriate child protection proceedings. Many times, mediation can lead to a better outcome for both the parent and child compared to a trial. The published changes include a number of provisions to protect the parties:

- mediation is nonbinding;
- unless the court holds a hearing, the court shall not refer a case to mediation if there is a PPO or other protective order;
- parties may otherwise object to a mediation order; and
- mediators are required to screen for domestic violence using the SCAO protocol.

Because of the unique nature of child protective proceedings, the Board believes additional amendments to the proposed rules are necessary to improve the mediation process and to protect vulnerable parties. These changes are discussed below and detailed in the attached redline of the rule proposal.

1. **Fees.** The Board recommends that fees are addressed in MCR 3.970(C)(3). Under the proposed rule, the court has the authority to appoint a mediator and the parties may stipulate to a mediator. However, the rule is silent on apportionment of costs, if any. The Board recommends that the rule provide for cost sharing between parties. In addition, the Board recommends adding the following language to protect low-income parties:

If a party qualifies for a waiver or suspension of fees under MCR 2.002 or the court determines that the party is unable to pay the cost of the mediator provider and free or low-cost mediation services are not available, the court shall not order a party to pay any portion of the mediation fees.

2. **Grounds for Objection.** The Board recommends that the Court add grounds for objections to mediation in MCR 3.970(D). A central principle of mediation is that parties must have the capacity to meaningfully participate in the process to reach a mutually satisfactory resolution. The rule already accounts for cases where a PPO exists; however, there are many other reasons why a case may not be appropriate for mediation. Additionally, where parties have taken significant steps toward resolving the issues, mediation may not be necessary or helpful and this should be a ground to object. To address these issues, the Board recommends inserting language from MCR 3.216(D), the domestic relations mediation rule, that sets out specific reasons for objecting in addition to a ground based on past efforts (subparagraph (e) below):

Cases may be exempt from mediation on the basis of the following:

- (a) domestic abuse, unless attorneys for both parties will be present at the mediation session;
 - (b) inability of one or both parties to negotiate for themselves at the mediation, unless attorneys for both parties will be present at the mediation session;
 - (c) reason to believe that one or both parties' health or safety would be endangered by mediation;
 - (d) a showing that the parties have made significant efforts to resolve the issues such that mediation is likely to be unsuccessful; or
 - (e) for other good cause shown.
3. **Mediator Qualifications.** The Board recommends that the rules require all mediators to meet the qualifications requirements set out in MCR 3.970(H) unless parties can show an agreed mediator is otherwise qualified. As proposed, MCR 3.970(H) provides that qualifications for mediators include (1) completion of SCAO mediation training; (2) a JD, graduate degree or 5 years' experience in child protection; or 40 hours of mediation experience over two years; (3) observation of two mediation proceedings; and (4) 15 hours advanced training on child protection mediation and 8 hours on domestic violence screening. However, MCR 3.970(F)(1) provides that a mediator agreed upon by the parties need not meet the qualifications requirement. While parties may feel more comfortable with a particular mediator, it is also important that mediators have the knowledge and expertise to assist parties in resolving their dispute. For these reasons, the Board recommends the following (or similar language) be added at the end of the second sentence of MCR 3.970(F)(1):

... provided that the parties can demonstrate to the court that the mediator is otherwise qualified for the specific issues in the case.

4. **Due Process.** The Board is concerned that the proposed rules may raise due process concerns, specifically with regards to plea agreements. In *In re Wagler*, 498 Mich 911 (2015), the parties reached a mediation agreement with a provision that the respondent would enter a plea and the adjudication would be held in abeyance. When the respondent failed

to comply with services, the court entered an order taking jurisdiction (without advising her of her rights) and terminated parental rights. This Court reversed the Court of Appeals' affirmance, holding that the manner in which the court assumed jurisdiction violated due process because it failed to satisfy itself that the plea (in the mediation agreement) was knowingly made. In order to address this due process concern with respect to plea agreement, the Board recommends that MCR 3.970(G)(6) be amended to require any mediation agreement to comply with MCR 3.971, which requires the court to advise a parent of the effect of a plea.

5. **Confidentiality.** The Board also recommends that parties to the mediation are fully advised of confidentiality issues. In *In re Brock*, 442 Mich 101 (1993), the Court held that under child protection law, MCL 722.631, privilege (except attorney-client) is abrogated and may not be used to exclude privileged statements as evidence in a proceeding. There is no easy solution to this issue; because on substantive issues statutes takes precedent over court rules, it is unclear whether this court rule protection for confidentiality will prevail a legal challenge. Therefore, the Board recommends that the court rule require mediators to advise parents of the limits of confidentiality under the court rules and MCL 722.631 so at least they will be aware.
6. **Technical Correction.** The Board recommends that the Court correct the following typographical error: in MCR 2.410(A)(2), the added language should reference "MCR 3.970" rather than "MCR 3.974."

These amendments will not only improve the mediation process, they will increase the likelihood that only appropriate cases are subject to mediation and that the rules adequately protect vulnerable parties.

Thank you for the opportunity to convey the Board's position on this rule proposal.

Sincerely,



Janet K. Welch
Executive Director

cc: Anne Boomer, Administrative Counsel, Michigan Supreme Court
Donald G. Rockwell, President

Order

Michigan Supreme Court
Lansing, Michigan

October 17, 2017

Stephen J. Markman,
Chief Justice

ADM File No. 2017-19

Brian K. Zahra
Bridget M. McCormack
David F. Viviano
Richard H. Bernstein
Joan L. Larsen
Kurtis T. Wilder,
Justices

Proposed Amendment of Rules 2.410
and 2.411 and Adoption of New Rule 3.970
of the Michigan Court Rules

On order of the Court, this is to advise that the Court is considering an amendment of Rules MCR 2.410 and 2.411 of the Michigan Court Rules and adoption of MCR 3.970. Before determining whether the proposal should be adopted, changed before adoption, or rejected, this notice is given to afford interested persons the opportunity to comment on the form or the merits of the proposal or to suggest alternatives. The Court welcomes the views of all. This matter also will be considered at a public hearing. The notices and agendas for public hearings are posted at [Administrative Matters & Court Rules page](#).

Publication of this proposal does not mean that the Court will issue an order on the subject, nor does it imply probable adoption of the proposal in its present form.

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

Rule 2.410 Alternative Dispute Resolution

(A) Scope and Applicability of Rule; Definitions.

(1) [Unchanged.]

(2) For the purposes of this rule, alternative dispute resolution (ADR) means any process designed to resolve a legal dispute in the place of court adjudication, and includes settlement conferences ordered under MCR 2.401; case evaluation under MCR 2.403; mediation under MCR 2.411; domestic relations mediation under MCR 3.216; child protection mediation under MCR ~~3.974~~ 3.970; and other procedures provided by local court rule or ordered on stipulation of the parties.

(B)-(F) [Unchanged.]

Rule 2.411 Mediation

(A) Scope and Applicability of Rule; Definitions.

(1) This rule applies to cases that the court refers to mediation as provided in MCR 2.410. MCR 3.216 governs mediation of domestic relations cases. MCR 3.970 governs mediation in child protective proceedings.

(2) [Unchanged.]

(B)-(G) [Unchanged.]

[New] MCR 3.970 Child Protection Mediation

(A) Scope and Applicability of Rule; Definitions.

(1) This rule applies to the mediation of child protective proceedings.

(2) "Mediation" includes dispute resolution processes in which a neutral third party facilitates communication between parties, assists in identifying issues, and helps explore solutions to promote a mutually acceptable settlement. A mediator or facilitator has no authoritative decision-making power.

(B) ADR Plan. Each trial court that submits child protective proceedings to mediation processes under this rule shall either incorporate the process into its current ADR plan, or if the court does not have an approved ADR plan, adopt an ADR plan by local administrative order under MCR 2.410(B).

(C) Order for Mediation.

(1) At any stage in the proceedings, after consultation with the parties, the court may order that a case be submitted to mediation.

(2) Unless a court first conducts a hearing to determine whether mediation is appropriate, the court shall not refer a case to mediation if the parties are subject to a personal protection order or other protective order. The court may order mediation without a hearing if a protected party requests mediation.

(3) Unless the specific rule under which the case is referred provides otherwise, in addition to other provisions the court considers appropriate, the order shall:

(a) specify, or make provision for selection of, the mediation provider;
~~and~~

~~(b)~~ provide time limits for initiation and completion of the mediation process: AND

~~(b)~~(c) PROVIDE FOR PAYMENT OF COSTS OF MEDIATION. IF A PARTY QUALIFIES FOR A WAIVER OR SUSPENSION OF FEES UNDER MCR 2.002, OR THE COURT DETERMINES THAT THE PARTY IS UNABLE TO PAY THE COST OF MEDIATION AND FREE MEDIATION SERVICES ARE NOT REASONABLY AVAILABLE, THE COURT SHALL NOT

ORDER A PARTY TO PAY ANY PORTION OF THE
MEDIATION FEES.

- (4) The order may require attendance at mediation proceedings as provided in subrule (D).

(D) Objections to Mediation. A party may object to an order to mediate by filing a motion. CASES MAY BE EXEMPT FROM MEDIATION ON THE BASIS OF THE FOLLOWING:

(1) DOMESTIC ABUSE, UNLESS ATTORNEYS FOR BOTH PARTIES WILL BE PRESENT AT THE MEDIATION SESSION;

(2) INABILITY OF ONE OR BOTH PARTIES TO NEGOTIATE FOR THEMSELVES AT THE MEDIATION, UNLESS ATTORNEYS FOR BOTH PARTIES WILL BE PRESENT AT THE MEDIATION SESSION;

(3) REASON TO BELIEVE THAT ONE OR BOTH PARTIES' HEALTH OR SAFETY WOULD BE ENDANGERED BY MEDIATION;

(4) A SHOWING THAT THE PARTIES HAVE MADE SIGNIFICANT EFFORTS TO RESOLVE THE ISSUES SUCH THAT MEDIATION IS LIKELY TO BE UNSUCCESSFUL; OR

(5) FOR OTHER GOOD CAUSE SHOWN.

A motion must be decided before the parties meet at a mediation session.

~~(D)~~(E) Attendance at Mediation Proceedings.

- (1) Attendance of Counsel. The court may direct that the attorneys representing the parties attend mediation proceedings. If the attorney representing a party is unable to attend, another attorney associated with the representing attorney may attend, but must be familiar with the case.
- (2) Presence of Parties. The court may direct that the parties to the action and other persons:
- (a) be present at the mediation proceeding or be immediately available by some other means at the time of the proceeding; and
- (b) have information and authority adequate for responsible and effective participation in the proceeding for all purposes.

The court's order may specify whether the availability is to be in person or by other means.

- (3) Except for legal counsel, the parties may not bring other persons to the mediation session unless permission is first obtained from the mediator, after notice to opposing counsel.
- (4) Failure to appear. The failure of a party to appear in accordance with this rule may be considered a contempt of court.

~~(E)~~(F) Selection of the Mediator.

- (1) The parties may stipulate to the selection of a mediator. A mediator selected by agreement of the parties need not meet the qualifications set

forth in subrule (H). The court must appoint a mediator stipulated to by the parties, provided the mediator is willing to serve within a period that would not interfere with the court's scheduling of the case AND PROVIDED THE PARTIES CAN DEMONSTRATE TO THE COURT, AND THE COURT FINDS, THAT THE MEDIATOR IS OTHERWISE QUALIFIED FOR THE SPECIFIC ISSUES IN THE CASE. If the parties do not stipulate to a particular mediator, the court may select a Community Dispute Resolution Program (CDRP) center or other mediator who meets the requirements of subrule (H).

- (2) The rule for disqualification of a mediator is the same as that provided in MCR 2.003 for the disqualification of a judge. The mediator must promptly disclose any potential basis for disqualification.

~~(F)~~(G) Scheduling and Mediation Process.

- (1) Scheduling. The order referring the case for mediation shall specify the time within which the mediation is to be completed. A copy of the order shall be sent to each party, the CDRP center or the mediator selected. Upon receipt of the court's order, the CDRP center or mediator shall promptly confer with the parties to schedule mediation in accordance with the order. The mediator may direct the parties to submit in advance, or bring to the mediation, documents or summaries providing information about the case.
- (2) The mediator must make reasonable inquiry as to whether either party has a history of a coercive or violent relationship with the other party. Throughout the mediation process, the mediator must make reasonable efforts to screen for the presence of coercion or violence that would make mediation physically or emotionally unsafe for any participant or that would impede achieving a voluntary and safe resolution of issues. A reasonable inquiry includes the use of the domestic violence screening protocol for mediators provided by the State Court Administrative Office as directed by the Supreme Court.
- (3) Mediation Process. The mediator shall discuss with the parties and counsel, if any, the facts and issues involved. Mediation participants may ask to meet separately with the mediator throughout the mediation process. The mediation will continue until: an agreement is reached, the mediator determines that an agreement is not likely to be reached, the end of the first mediation session, or until a time agreed to by the parties. Additional sessions may be held as long as it appears to the mediator that the process may result in an agreement.
- (4) Following their attendance at a mediation session, a party may withdraw from mediation without penalty at any time.
- (5) Completion of Mediation. Within two days after the completion of the mediation process, the CDRP center or the mediator shall so advise the court, stating only: the date of completion of the process, who appeared at the mediation, whether an agreement was reached, and whether further mediation proceedings are contemplated. If an agreement was reached, the CDRP center or the mediator shall submit the agreement to the court within

14 days of the completion of mediation.

- (6) Agreements reached in mediation are not binding unless the terms are incorporated in an order of the court or placed on the record AND THE COURT COMPLIES WITH MCR 3.971.
- (7) Confidentiality. Confidentiality in the mediation process is governed by MCR 2.412. However, previously uninvestigated allegations of abuse or neglect identified during the mediation process are not confidential and may be disclosed. THE MEDIATOR SHALL ADVISE THE PARTIES, ORALLY AND IN WRITING, OF THE RULES REGARDING CONFIDENTIALITY UNDER MCR 2.412 AND MCL 722.631.

(G)(H) Qualification of Mediators.

- (1) To be eligible to serve as a mediator in child protection cases, a person must meet the following minimum qualifications:
 - (a) Complete a general civil or domestic relations mediation training program approved by the State Court Administrator providing the generally accepted components of mediation skills;
 - (b) Have one or more of the following:
 - (i) Juris doctor degree, graduate degree in conflict resolution or a behavioral science, or 5 years of experience in the child protection field; or
 - (ii) 40 hours of mediation experience over two years, including mediation, co-mediation, observation, and role-playing in the context of mediation.
 - (c) Upon completion of the training required under subrule (H)(1)(a), observe two general civil or domestic relations mediation proceedings conducted by an approved mediator, and conduct one general civil or domestic relations mediation to conclusion under the supervision and observation of an approved mediator.
 - (d) Complete a 15-hour advanced training program on child protection mediation practice and an 8-hour training program on domestic violence screening approved by the State Court Administrator.
- (2) Approved mediators are required to complete 8 hours of advanced mediation training during each 2-year period.
- (3) Additional requirements may not be imposed upon mediators.

Staff Comment: The proposed amendments of MCR 2.410 and MCR 2.411 and adoption of the new MCR 3.970 would provide explicit authority for judges to order mediation in child protection proceedings.

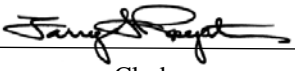
The staff comment is not authoritative construction by the Court. In addition, adoption of a new rule or amendment in no way reflects a substantive determination by this Court.

A copy of this order will be given to the Secretary of the State Bar and to the State Court Administrator so that they can make the notifications specified in MCR 1.201. Comments on the proposal may be sent to the Supreme Court Clerk in writing or electronically by February 1, 2018, at P.O. Box 30052, Lansing, MI 48909, or ADMcomment@courts.mi.gov. When filing a comment, please refer to ADM File No. 2017-19. Your comments and the comments of others will be posted under the chapter affected by this proposal at [Proposed & Recently Adopted Orders on Admin Matters page](#).



I, Larry S. Royster, Clerk of the Michigan Supreme Court, certify that the foregoing is a true and complete copy of the order entered at the direction of the Court.

October 17, 2017


Clerk