

Report on Public Policy Position

Name of committee:

Civil Procedure and Courts Committee

Contact person:

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Proposed Court Rule or Administrative Order Number:

[2010-30 Proposed New Rule 2.412 of the Michigan Court Rules and Proposed Amendments of Rules 2.403, 2.411, and 3.216 of the Michigan Court Rules](#)

Proposed new MCR 2.412 and the proposed amendments of MCR 2.403, 2.411, and 3.216 would consolidate provisions related to mediation confidentiality into one rule and would expand the current exceptions to mediation confidentiality, as recommended by the Mediation Confidentiality and Standards of Conduct Committee convened by the State Court Administrative Office.

Date position was adopted:

January 20, 2011

Process used to take the ideological position:

Position adopted after a discussion at a scheduled meeting and an e-vote

Number of members in the decision-making body:

17

Number who voted in favor and opposed to the position:

13 Voted for position

0 Voted against position

0 Abstained from vote

4 Did not vote

Position:

Support the Revised Proposal for Rule Amendments on Mediation Confidentiality, as listed below.

Explanation of the position, including any recommended amendments:

[Revised Proposal for Rule Amendments on Mediation Confidentiality](#)

The following is a revision of the court's published proposal for a new MCR 2.412. The companion amendments to (1) MCR 2.403(J)(3) regarding disclosure of confidential mediation communications in case evaluation and (2) MCR 2.411(C)(5) and MCR 3.216(H)(8), removing the confidentiality provisions from those rules and incorporating new MCR 2.412 by reference, are unchanged. The committee proposes this revision to streamline and clarify language and to eliminate ambiguities in the original proposal.

Rule 2.412 Mediation Communications; Confidentiality and Disclosure

- (A) Scope. This rule applies to cases that the court refers to mediation as defined and conducted under MCR 2.411 and MCR 3.216.
- (B) Definitions.
- (1) “Mediator” means an individual who conducts a mediation.
 - (2) “Mediation communications” are oral, written, verbal, and nonverbal statements that are made—
 - (a) to retain a mediator, or
 - (b) for considering, initiating, preparing for, conducting, participating in, continuing, adjourning, concluding, or reconvening a mediation.
 - (3) “Mediation party” means a person who or entity that participates in a mediation and whose agreement is necessary to resolve the dispute.
 - (4) “Mediation participant” means a mediation party, a nonparty, an attorney for a party, and a mediator who participates in or is present at a mediation.
 - (5) “Protected individual” is used as defined in the Estates and Protected Individuals Code, MCL 700.1106(v).
 - (6) “Vulnerable” is used as defined in the Social Welfare Act, MCL 400.11(f).
- (C) Confidentiality. Mediation communications are confidential. They are not subject to discovery, are not admissible in a proceeding, and may not be disclosed to anyone other than mediation participants except as provided in subrule (D).
- (D) Exceptions to Confidentiality. Mediation communications may be disclosed under the following circumstances:
- (1) All mediation participants agree in writing to disclosure.
 - (2) A statute or court rule requires disclosure.
 - (3) The mediation communication is in the mediator’s report under MCR 2.411(C)(3) or MCR 3.216(H)(6).
 - (4) The disclosure is necessary for a court to resolve disputes about the mediator’s fee.
 - (5) The disclosure is necessary for a court to consider issues about a party’s failure to attend under MCR 2.410(D)(3).

- (6) The disclosure is made during a mediation session that is open or is required by law to be open to the public.
 - (7) Court personnel reasonably require disclosure to administer and evaluate the mediation program.
 - (8) The mediation communication is—
 - (a) a threat to inflict bodily injury or commit a crime,
 - (b) a statement of a plan to inflict bodily injury or commit a crime, or
 - (c) is used to plan a crime, attempt to commit or commit a crime, or conceal a crime.
 - (9) The disclosure—
 - (a) Involves a claim of abuse or neglect of a child, a protected individual, or a vulnerable adult; and
 - (b) Is included in a report about such a claim or sought or offered to prove or disprove such a claim; and
 - (c)
 - (i) Is made to a governmental agency or law enforcement official responsible for the protection against such conduct, or
 - (ii) Is made in any subsequent or related proceeding based on the disclosure under subrule (D)(9)(c)(i).
 - (10) The disclosure is included in a report of professional misconduct filed against a mediation participant.
 - (11) The disclosure is sought or offered to prove or disprove a claim of professional misconduct or malpractice against a mediation participant.
 - (12) The disclosure is in a proceeding to enforce, rescind, reform, or avoid liability on a document signed by the mediation parties or acknowledged by the parties on an audio or video recording that arose out of mediation, if the court finds, after an in camera hearing, that the party seeking discovery or the proponent of the evidence has shown—
 - (a) that the evidence is not otherwise available, and
 - (b) that the need for the evidence substantially outweighs the interest in protecting confidentiality and the integrity of the mediation process.
- (E) Scope of Disclosure When Permitted; Limitation on Confidentiality.

- (1) If a mediation communication may be disclosed under subrule (D), only that portion of the communication necessary for the application of the exception may be disclosed.
- (2) Disclosure of a mediation communication under subrule (D) does not render the mediation communication subject to disclosure for another purpose.
- (3) Evidence or information that is otherwise admissible or subject to discovery does not become inadmissible or protected from discovery solely by reason of its disclosure or use in a mediation.

Comments on Revisions to Court's Proposal

The revision makes stylistic changes throughout to simplify and clarify language.

Revised subrule (B) defines the meaning of confidentiality. The language is adapted from the Uniform Mediation Act.

The revision combines proposed subrules (B) and (C) in a single subrule (D) listing all the exceptions to the general rule of confidentiality.

The revision substantially revises the proposed provisions regarding disclosure of matters regarding criminal acts and threats of bodily injury. As originally proposed, such disclosures may be made only to an agency responsible for protection of individuals against such conduct. There is no apparent reason why that limitation should apply. The revised language is adapted from the Uniform Mediation Act.

The revised language of subrule (E)(3) is adapted from the Uniform Mediation Act.

The text of any legislation, court rule, or administrative regulation that is the subject of or referenced in <http://courts.michigan.gov/supremecourt/Resources/Administrative/2010-30-11-23-10.pdf>