

## Report on Public Policy Position

**Name of committee:**

Domestic Violence Committee

**Contact person:**

Mary Lovik

**E-mail:**

[Lovikm@michigan.gov](mailto:Lovikm@michigan.gov)

**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:**

February 11, 2011

**Process used to take the ideological position:**

Position adopted after a discussion at a scheduled meeting

**Number of members in the decision-making body:**

20

**Number who voted in favor and opposed to the position:**

12 Voted for position

0 Voted against position

0 Abstained from vote

8 Did not vote

**Position:**

Recommend amendments only.

**Explanation of the position, including any recommended amendments:**

The Domestic Violence Committee (“the Committee”) of the State Bar submits the following comments to ADM File No. 2010-30, a proposal to replace the current mediation confidentiality provisions of MCR 2.411(C)(5) and 3.216(H)(8) with a new rule on this subject, MCR 2.412.

## Why Are Mediation Confidentiality Provisions Important to Survivors of Domestic Violence?

Because the presence of domestic violence has particular significance for the safety of survivors and children in domestic relations mediation, the Committee’s comments will focus on proceedings governed by MCR 3.216. The Committee notes that the current SCAO Domestic Violence and Child Abuse/Neglect Model Screening Protocol for Domestic Relations Mediation contains a presumption that cases involving domestic violence are inappropriate for mediation.<sup>1</sup> The protocol explains this presumption as follows:

“Mediation presumes that participants can maintain a balance of power with the help of a mediator in order to reach a mutually satisfactory resolution of a dispute. The mediation process and resulting agreement can be dangerous and unfair if the imbalance of power is great or if the imbalance is unrecognized.

“When domestic violence is present among parties in a dispute, the abuser’s desire to maintain power and control over the victim is inconsistent with the method and objective of mediation. Fear of the abuser may prevent the victim from asserting needs, and the occasion of mediation may give abusers access to victims, which exposes the victim, the children, and the mediator to a risk of violence.

“Mediator neutrality may support the abuser’s belief that the abuse is acceptable. The future orientation of mediation may discourage discussion of past abuse, which in turn invalidates the victim’s concerns and excuses the abuser. This may result in agreements that are inherently unsafe.

“Mandatory referral to mediation by the court may communicate to the abuser and the abused that the violence is not serious enough to compromise the parties’ ability to negotiate as relative equals. This message also may invalidate the seriousness of the abuse, dilute abuser accountability, and result in unsafe agreements.

“When domestic violence is present, the case should be presumed inappropriate for mediation.”<sup>2</sup>

Consistent with the above principles, the protocol further states that parties should be fully and regularly informed that continuation of mediation is a voluntary process and that they may withdraw for any reason. MCR 3.216(C)(3) provides that parties who are subject to a personal protection order or who are involved in a child neglect or abuse proceedings may not be referred to mediation without a hearing to determine whether mediation is appropriate. MCR 3.216(D) sets forth a process by which parties may object to mediation if they feel unsafe participating in it.

Despite the foregoing protective policies and court rules, the Committee is aware that survivors of domestic violence are frequently involved in mediation. Some cases involving domestic violence are not screened prior to

<sup>1</sup> The protocol is available online at: <http://courts.michigan.gov/scao/resources/standards/odr/dvprotocol.pdf>.

<sup>2</sup> See also the Michigan Supreme Court Administrators Standard Code of Conduct for Mediators January 4, 2001, which states as follows:

(2) **Self-Determination.** A mediator shall recognize that mediation is based upon the principle of self determination by the parties. This principle requires that the mediation process rely upon the ability of the parties to reach a voluntary, uncoerced agreement.

(3) **Impartiality.** A mediator shall conduct the mediation in an impartial manner. The concept of mediator impartiality is central to the mediation process. A mediator shall mediate only those matters in which it is possible to remain impartial and even-handed. If at any time the mediator is unable to conduct the process in an impartial manner, the mediator is obligated to withdraw.

referral to mediation or participation in the process because adoption and implementation of the screening protocol are not mandatory and vary from county to county. Some domestic violence survivors believe that mediation is a safe option, and choose to participate.<sup>3</sup> Others may feel compelled by the court to mediate, or do not have the knowledge or resources to invoke the process for objecting to mediation after a court referral to the process. Accordingly, rules governing confidentiality in mediation should be drafted to foster safe, meaningful participation by survivors of domestic violence.

Survivors of domestic violence have several concerns about confidentiality in the context of mediation:

- Perpetrators of domestic violence can threaten, harass, or assault their former partners or children if they have access to them. Disclosures of locating information for survivors or their children can endanger them by providing perpetrators with this access.
- Domestic violence perpetrators use secrecy to further their efforts to control children or former partners. If a perpetrator uses actual or threatened violence as a mechanism to enforce secrecy, discovery that a child or former partner has disclosed abuse to a mediator is likely to trigger retaliatory violence.
- Access to sensitive private information (e.g., details of medical or mental health treatment) creates opportunities for perpetrators to use this information to harm or embarrass their former partners, particularly in the context of custody litigation.
- Some child protection personnel respond to reports of a child's exposure to a domestic violence perpetrator by holding the non-offending parent responsible for "failing to protect" the child from such exposure. As a result, some domestic violence survivors may be reluctant to disclose information to a mediator if they fear a report to Children's Protective Services will cause them to lose custody of their children, or embroil them in additional court proceedings for which they have little fiscal, emotional, or time resources.

Domestic violence survivors who have the foregoing concerns may be reluctant to share sensitive information with the mediator if they are not confident that it will be held in confidence. Additionally, uncertainty about what information a mediator may or may not disclose - and to whom - may inhibit a survivor's ability to safety plan after making a disclosure, causing the survivor to withhold important, but potentially sensitive, information. Survivors' reluctance to share information will impede their ability to participate freely and meaningfully in mediation, and will thwart mediators' efforts to assist parties to reach fair, voluntary, and safe agreements. In these cases, the end result may be the negotiation of agreements between the parties that are not fair or safe for the survivor or the parties' children.

---

<sup>3</sup> The SCAO protocol provides that mediation may proceed in a case involving domestic violence if the following conditions are met:

- The situation is not dangerous for the parties or the mediator.
- The mediation is conducted by a skilled mediator knowledgeable about the substance abuse, mental illness or other circumstances affecting a party's ability to negotiate.
- The mediator assesses that the parties have the ability to negotiate voluntarily, fairly, safely, and in good faith, with or without an attorney or advocate present, or with or without specific conditions to address concerns about safety and circumstances affecting the ability to negotiate.
- If, to ensure the ability to negotiate, a party requires the presence of an attorney or advocate during mediation, or a specialized process to which both parties agree, the mediation must be conducted with those accommodations.
- The parties want to mediate.

With the above considerations in mind, the Committee has the following comments to proposed MCR 2.412. The Committee’s comments assume that the parties participating in mediation are competent adults. The extensive nature of these comments reflects the complexity and uncertainty that is always present in safety planning for domestic violence, and so illustrates why mediation is so often not a safe option in cases where it is present.

Comments

1. *Proposed MCR 2.412(A)(1) should be amended to clarify its applicability to alternative dispute resolution proceedings under MCL 552.513.*

Proposed MCR 2.412(A)(1) states that the rule applies to cases referred to mediation as provided in MCR 2.411 and 3.216. The proposed rule does not specify whether it applies to Friend of Court mediation conducted under MCL 552.513. Prior to Jan. 8, 2010, this statute had its own confidentiality provisions. However, 2009 PA 233 amended MCL 552.513 effective Jan. 8, 2010 to delete its confidentiality provisions, making confidentiality subject to the Supreme Court’s regulation by court rule. As a result, communications during dispute resolution proceedings under MCL 552.513 are not presently covered by any court rule confidentiality protections.<sup>4</sup> Thus, the Committee suggests an amendment to proposed MCR 2.412(A)(1) to clarify its applicability to alternative dispute resolution proceedings under MCL 552.513.

2. *Proposed MCR 2.412(B) should generally require that mediators: a) disclose their reporting duties to mediation participants prior to undertaking mediation, and b) where feasible and safe, notify the mediation parties in advance of making any disclosures under this subsection. If advance notification is not feasible or safe, mediators should take other steps reasonable under the circumstances to protect the privacy and safety of persons affected by the report.*

Current Michigan statutory reporting requirements sometimes have the unintended effect of discouraging domestic violence survivors from revealing abuse by creating a situation in which a survivor and child or vulnerable adult may be the target of retaliatory violence from a perpetrator who discovers a disclosure to authorities or others. Despite this fact, the Committee recognizes that mediators who are subject to Michigan’s current statutory reporting requirements must obey the law, see, e.g., MCL 400.11a(1) and 722.623. To create an environment that fosters safe disclosure of abuse and neglect, a mediator who is a mandated reporter should provide participants with information that allows them to: a) make knowledgeable choices about what they can safely reveal, and b) safety plan for potential repercussions or retaliatory actions resulting from disclosures.

To make knowledgeable choices about what they may safely reveal, participants need to know from the outset of services what information must be reported and to whom. Thus, the Committee suggests that proposed MCR 2.412(B) include a requirement to provide mediation parties with this information.

Further, if a mediator must make a report, the mediator should consult with affected parties in advance if at all possible, so that the client may engage in safety planning for any anticipated repercussions from the abuse perpetrator. If feasible, the client should also be advised as to what official action may result from the report. Adherence to these principles creates an environment where abuse or neglect may be more candidly discussed by removing some of the uncertainties that inhibit disclosures. If advance consultation is not feasible and safe, mediators should take other steps reasonable under the circumstances to protect the privacy and safety of persons affected by a disclosure.

---

<sup>4</sup> MCR 3.218(A)(3) protects formal mediation records and staff notes from mediation sessions, but not mediation communications as defined in proposed MCR 2.412.

The federal Violence Against Women Act (VAWA), 42 USC 13925(b)(2), contains provisions that are consistent with the Committee’s suggested amendments. This statute forbids recipients of VAWA grant funding from disclosing personally identifying information about survivors of domestic violence, sexual assault and stalking unless the survivor has consented to the disclosure in writing, or the disclosure is compelled by statutory or court mandate. Where disclosure is so compelled, the statute requires that:

- “(C)(i) grantees and subgrantees shall make reasonable attempts to provide notice to victims affected by the disclosure of information; and
- “(ii) grantees and subgrantees shall take steps necessary to protect the privacy and safety of the persons affected by the release of information.”

3. *Proposed MCR 2.412(B)(4) should: a) allow mediators to disclose threats of crimes or bodily injury to the individuals who are the subject of such threats where this is safe and/or feasible; b) allow competent adult parties to mediation who are the subject of threats to object to disclosures to protective agencies; and c) provide advance notice of disclosures to protective agencies, or take other steps reasonable under the circumstances to protect the privacy and safety of persons affected by the report.*

The Committee supports the provisions of MCR 2.412(B)(4) allowing disclosures to protective agencies where a mediator learns of a party’s threat, act, or plan to inflict bodily injury or commit a crime. The Committee suggests that it further would promote victim safety if this subsection were amended to

- Permit the mediator to disclose a threat of a crime or bodily harm to a competent adult who is at risk from it, if doing so is safe and feasible, or
- Permit disclosure of the threat to the parent, guardian or other caretaker of a child or vulnerable adult at risk, if doing so is safe and feasible.

As drafted, MCR 2.412(B)(4) appears to require the agreement of both mediation parties to the disclosures to threatened individuals just described. Disclosures to threatened individuals will promote their safety by allowing them to take steps to protect themselves from the threat.

Additionally, MCR 2.412(B)(4) should give competent adult parties to mediation who are the subject of threats the opportunity to object to disclosures to protective agencies under this subsection if this disclosure would increase the danger to them. The Committee notes that protective agencies’ contacts with individuals who threaten acts of domestic violence sometimes trigger retaliatory violence against the victim of such violence. Giving the victim the opportunity to control the timing of calls to protective agencies – as well as who makes the call – allows the individual who is most familiar with the perpetrator’s patterns of behavior to take protective measures against retaliatory violence.

Finally, as noted in part 2 above, threatened individuals or their parents, guardians, or other caretakers should receive advance notice of disclosures under MCR 2.412(B)(4) whenever possible and/or feasible. Advance notice of disclosures to protective agencies gives threatened individuals time for safety planning in the event that the disclosure causes retaliatory violence. If advance notice is not possible or feasible, mediators should take other steps reasonable under the circumstances to protect the privacy and safety of persons affected by the report.

4. *Proposed MCR 2.412(C)(4) - (5) should be amended to clarify the relationship between these provisions and existing rules governing: a) confidentiality of Friend of Court Records, and b) admissibility of hearsay evidence.*

a. Confidential Friend of Court records

MCR 3.218(A) and (B) protect the confidentiality of staff notes from mediation sessions and formal mediation records in Friend of Court files. As drafted, MCR 2.412(C)(4)-(5) makes no mention of MCR 3.218, and could be

interpreted to abrogate this provision. First, the definition of “mediation communication” in proposed MCR 2.412(A)(3) is broad enough to include staff notes and formal mediation records in that it encompasses “statements, whether oral or in a record...that occur during the mediation process or that are made for purposes of...preparing for, conducting, [or] participating in...a mediation.” Second, proposed MCR 2.412(C)(4)-(5) permit disclosures of mediation communications that are “sought or offered to prove or disprove” threats or acts of bodily injury or other criminal activity. The Committee believes that the proposed new court rule should specify that it does not abrogate the provisions of MCR 3.218(A) and (B).

b. Applicability of evidence rules

Proposed MCR 2.412(C)(4)-(5) is silent as to the applicability of existing rules governing hearsay to mediation communications that are “offered to prove or disprove” threats or acts of bodily injury or other criminal activity. The Committee is concerned that proposed MCR 2.412(C)(4)-(5) could be interpreted to create a new exception to current rules against admission of hearsay statements, by stating that mediation communications “shall not be disclosed in any proceeding” except when disclosure is in the cases listed. The Committee believes that communications made during mediation should be subject to current rules governing hearsay, which condition admissibility of out of court statements on circumstances tending to verify their reliability.

**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>**