

FAMILY LAW SECTION

Respectfully submits the following position on:

\*

ADM File No. 2010-30

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The Family Law Section is not the State Bar of Michigan itself, but rather a Section which members of the State Bar choose voluntarily to join, based on common professional interest.

The position expressed is that of the Family Law Section only and is not the position of the State Bar of Michigan.

The State Bar of Michigan's position on this matter is to not comment specifically on the proposal but provide the Court with the reports from Civil Procedure & Courts Committee and Domestic Violence Committee.

The total membership of the Family Law Section is 2,481.

The position was adopted after discussion and vote at a scheduled meeting. The number of members in the decision-making body is 21. The number who voted in favor to this position was 21. The number who voted opposed to this position was 0.

## Report on Public Policy Position

**Name of committee:**

Family Law Section

**Contact person:**

Amy A. Yu

**E-mail:**

[ayu@amyylaw.com](mailto:ayu@amyylaw.com)

**Proposed Court Rule Amendment:**

[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:**

March 1, 2011

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

Position adopted after discussion and vote at a scheduled meeting.

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

21

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

17 Voted for position

0 Voted against position

4 Did not vote

**Position:**

See attachment

**The text of any legislation, court rule, or administrative regulation that is the subject of or referenced in this report.**

<http://courts.michigan.gov/supremecourt/Resources/Administrative/2010-30-11-23-10.pdf>



FAMILY LAW SECTION

OFFICERS

CHAIR

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Rebecca E. Shiemke, Ann Arbor

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James J. Harrington, III, Novi

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Barbara J. Kelly, Ann Arbor

COMMISSIONER LIAISON

Edward L. Haroutunian, Bingham Farms

March 1, 2011

Michigan Supreme Court  
925 W. Ottawa St.  
Lansing, Michigan 48913

March 1, 2011

**Re: Supreme Court Adm File No. 2010-30**

Dear Clerk:

The Family Law Council of the State Bar of Michigan, the governing body for the State Bar Family Law Section, has the following comments on the proposed changes to MCR 2.412. The Council, by a vote of 17-0, has again adopted the position it took on January 1, 2010 concerning possible amendment of MCR 2. 412. See January 28, 2010 letter and attached rule with “redline and strikeout” substantive changes.

As stated in the January 28, 2010 letter, all changes were approved without opposition by Council, except subsections (7) and (8). The majority of those voting believed that retention of subsections (7) and (8) was appropriate because public policy considerations associated with Grievance and Professional Negligence actions outweigh the “confidentiality” considerations. On the other hand, there was thoughtful debate and discussion, and a significant minority of Council members believed that involvement of Mediators in these matters was inappropriate and counter to confidentiality principles upon which Mediation is based.

The Family Law Council requests the opportunity to provide input through a representative if there is a hearing scheduled. Thank you for your assistance in this matter.

Sincerely,

Amy A. Yu  
Chair, Family Law Section

FAMILY LAW SECTION

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Friend of the Court Office  
101 E Huron St  
PO Box 8645  
Ann Arbor, MI 48107-8645

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Lissa R. Speaker, Lansing  
Robert Charles Treat, Jr., Woodhaven

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Carlo J. Martina, Plymouth

COMMISSIONER LIAISON

Donald E. McGinnis, Jr., Troy

January 28, 2010

Mr. Douglas Van Epps  
Michigan Supreme Court  
Supreme Court Administrative Office  
PO Box 30048  
Lansing, MI 48909

re: Mediation/Confidentiality  
Proposed Court Rule  
MCR 2.412

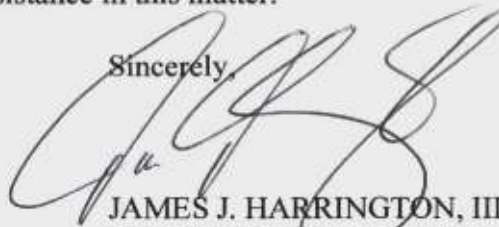
Dear Mr. Van Epps:

Please be advised that the Family Law Council conducted a special Vote regarding proposed changes to MCR 2.412 on January 20, 2010. This Vote followed extensive Committee consideration of various modifications to the proposed Court Rule. Attached herewith you will find in "redline and strikeout" format our substantive changes.

All changes were approved without opposition by Council, except subsections (7) and (8). The majority of those voting believed that retention of subsections (7) and (8) was appropriate because public policy considerations associated with Grievance and Professional Negligence actions outweigh the "confidentiality" considerations. On the other hand, there was thoughtful debate and discussion, and a significant minority of Council members believed that involvement of Mediators in these matters was inappropriate and counter to confidentiality principles upon which Mediation is based.

The Family Law Council does request the opportunity to provide input through a representative if there is a hearing, or a public hearing scheduled. Thank you for your assistance in this matter.

Sincerely,



JAMES J. HARRINGTON, III  
RECORDING SECRETARY

cc: Barbara J. Kelly, Esq.  
Kent Weichmann, Esq.

Revisions: CAPITALS/**RED FONT** indicate additions to the original, ~~strikethroughs~~ indicate deletions.

PER COURT RULES / ETHICS MEETING JANUARY 12, 2010

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MCR 2.412 MEDIATION COMMUNICATIONS; CONFIDENTIALITY AND DISCLOSURE

(A) Definitions.

- (1) "Mediator" means an individual who conducts a mediation.
- (2) "Mediation communication" means a statement, whether oral or in a record, verbal or nonverbal, that occurs during the mediation process, or is made for purposes of retaining a mediator, or considering, initiating, preparing for, conducting, participating in, continuing, adjourning, concluding, or reconvening a mediation.
- (3) "Mediation party" means a person that participates in a mediation and whose agreement is necessary to resolve the dispute.

(B) Confidentiality. Mediation communications are confidential, unless otherwise agreed upon by the mediation parties, except if the mediation communication is:

- (1) included in the report of the mediator under MCR 2.411(C)(3) or reasonably required by court personnel to administer and evaluate the mediation program;
- (2) subject to disclosure by statute or court rule; or
- (3) subject to an exception under subrule (C)(1)-(C)(8).

~~A MEDIATOR MAY NOT BE COMPELLED TO PROVIDE EVIDENCE OF A MEDIATION COMMUNICATION IN CLAIMS PERTAINING TO SUBRULES (C) 6 – 9. (MOVE TO FOLLOWING SENTENCE)~~

(C) Discovery and Admissibility of Mediation Communications; Exceptions. **A MEDIATOR MAY NOT BE COMPELLED TO PROVIDE EVIDENCE OF A MEDIATION COMMUNICATION IN CLAIMS PERTAINING TO SUBRULES (C) 7 – 8.** Mediation communications shall not be admissible in evidence, or subject to discovery in any other proceedings, including trial, except when the communication is:

- (1) necessary for a court to resolve disputes regarding the mediator's fee;
- (2) necessary for a court to consider issues raised regarding a party's failure to appear under MCR 2.410(D)(3);
- (3) made during a session of a mediation that is open, or is required by law to be open, to the public;
- (4) a threat, act, or plan to inflict bodily injury or ~~commit a crime~~, or **IS IN RESPONSE TO A SUBPOENA IN A CRIMINAL CASE.** ~~used to plan, attempt, or commit a crime, or to conceal a crime or criminal activity;~~
- (5) information that indicates the likelihood of child, ~~OR protected~~ **VULNERABLE** adult, ~~or elder~~ abuse or neglect;

**(6) testimony necessary to correct a scrivener's error in the settlement agreement.**

~~(6)~~ **(7)** the subject of a report of professional misconduct filed against a mediation participant **or attorney**;

~~(7)~~ **(8)** sought or offered to prove or disprove a claim or complaint of professional misconduct or malpractice filed against a mediation participant in a matter out of which the claim of misconduct or malpractice arose; or

~~(8)~~ **(9)** considered by a court, in a proceeding to enforce, rescind, reform, or avoid liability on a contract arising out of a mediation, and in which there is a finding, after a hearing in camera, that the party seeking discovery or the proponent of the evidence has shown that the evidence is not otherwise available, and that there is a need for the evidence that substantially outweighs the interest in protecting confidentiality.

(D) Scope of Mediation Communications.

(1) If a mediation communication is admissible or discoverable under subrule (C), only the portion of the communication necessary for the application of the exception may be admitted or discovered.

(2) Discovery or admission of evidence under subrule (C) does not render the evidence, or any other mediation communication, discoverable or admissible for any other 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.