

CONSIDERATION OF ALTERNATIVE DISPUTE RESOLUTION SECTION PROPOSALS

Issue

Should the Representative Assembly support the Alternative Dispute Resolution Section's request that the Supreme Court or State Court Administrative Office consider the merits of the Section's proposal below?

Proponent

Lisa Taylor
Taylor-Made Solutions, PLLC
Chair, Legislative and Court Procedures Action Team,
Alternative Dispute Resolution Section
5015 Cold Spring Lane
West Bloomfield, MI 48322-4205
Phone: 248-909-0631
Email: lisataylor@apeacefuldivorce.com

Synopsis

The Alternative Dispute Resolution Section is requesting the Representative Assembly support the Section's request that the Supreme Court or State Court Administrative Office (SCAO), respectively, consider the merits of the Section's proposal listed below. The proponent is not requesting that the RA review the merits of the proposals themselves.

Proposal 1 – Amend MCR 2.411(B)(5) and MCR 3.216(E)(5) regarding mediator disqualification, and change the Mediator Standards of Conduct regarding mediator disclosures.

Joint with Family Law Section.

Sent to the State Court Administrative Office on January 28, 2022.

As explained in the attached summary, these changes were prompted by a Court of Appeals decision and an Attorney Discipline Board ruling that lamented the lack of clarity regarding what constituted a "conflict of interest" for a mediator. The proposed changes would clarify what types of relationships mediators should disclose, and the grounds for withdrawal of a mediator for partiality.

Background

The ADR Section has developed some proposals over the last several years that will enhance mediation or ADR in the Michigan court system. These proposals have been submitted to the State Court Administrative Office, or to the Supreme Court, but there has been no response. Two of these proposals were also approved by the Family Law Section. The ADR and Family Law Sections are enlisting the support of the Representative Assembly in requesting that the Supreme Court or SCAO, respectively, review and give due consideration to these three proposals. The Civil Procedure & Courts Committee has endorsed this step.

Opposition

None known.

Prior Action by Representative Assembly

None known.

Fiscal and Staffing Impact on State Bar of Michigan

None known.

STATE BAR OF MICHIGAN POSITION

By vote of the Representative Assembly on September 18, 2026

Should the Representative Assembly support the Alternative Dispute Resolution Section's request that the Supreme Court or State Court Administrative Office consider the merits of the Section's proposal below?

- (a) Yes
- or
- (b) No

**Proposed Amendments to
MCR 2.411(B)(5) and 3.216(E)(5)**

MCR 2.411 Mediation

(A) Scope and Applicability of Rule; Definitions. [UNCHANGED]

(B) Selection of Mediator. [UNCHANGED]

(1) - (4). [UNCHANGED]

~~(5) 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. The Michigan Standards of Conduct for Mediators govern mediator disclosure and withdrawal.~~

(C) Scheduling and Conduct of Mediation. [UNCHANGED]

(D) Fees. [UNCHANGED]

(E) List of Mediators. [UNCHANGED]

(F) Qualification of Mediators. [UNCHANGED]

(G) Standards of Conduct for Mediators. [UNCHANGED]

(H) Mediation of Discovery Disputes. [UNCHANGED]

MCR 3.216 Domestic Relations Mediation

(A) Scope and Applicability of Rule, Definitions. [UNCHANGED]

(B) Mediation Plan. [UNCHANGED]

(C) Referral to Mediation. [UNCHANGED]

(D) Objections to Referral to Mediation. [UNCHANGED]

(E) Selection of Mediator.

(E) Selection of Mediator.

(1) - (4) [UNCHANGED]

~~(5) 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. The Michigan Standards of Conduct for Mediators govern mediator disclosure and withdrawal.~~

(F) List of Mediators. [UNCHANGED]

(G) Qualification of Mediators. [UNCHANGED]

(H) Mediation Procedure.

[UNCHANGED]

(I) Evaluative Mediation.

[UNCHANGED]

(J) Fees.

[UNCHANGED]

(K) Standards of Conduct.

[UNCHANGED]

Proposed Revisions to Michigan Mediator Standards of Conduct I and II

Applicability.

These Standards of Conduct apply to cases managed under the Michigan Court Rules.

Failure to comply with an obligation or prohibition imposed by a standard is a basis for removal of a mediator from a court roster under MCR 2.411(E)(4) and MCR 3.216(F)(4). ~~The standards~~These Standards do not give rise to a cause of action for enforcement of a rule or for damages caused by failure to comply with an obligation or prohibition imposed by a standard~~., and a violation of a standard is not a basis for invoking a disciplinary process.~~ In a civil action, the admissibility of ~~the standards~~these Standards is governed by the Michigan Rules of Evidence or other provisions of law.

Standard I. Self-Determination

- A. A mediator ~~shall~~must conduct mediation based on the principle of party self-determination. Self-determination is the act of coming to a voluntary, uncoerced decision in which each party makes free and informed choices as to process and outcome, including mediator selection, process design, and participating in or terminating the process.

~~Although party self-determination for process design is a fundamental principle of mediation practice, a mediator may need to balance party self-determination with a mediator's duty to conduct a quality process in accordance with these Standards.~~

~~A mediator cannot personally ensure that each party has made free and informed choices to reach particular decisions, but, where appropriate, a mediator should make the parties aware of the importance of consulting other professionals to help them make informed choices.~~

- B. A mediator ~~shall~~must continuously assess the capacity of the parties to mediate. A mediator ~~shall~~must make appropriate modifications to the process if there is concern about a party's ability to make voluntary and uncoerced decisions. A mediator ~~shall~~must terminate the mediation process when a mediator believes a party cannot effectively participate.
- C. A mediator's commitment is to the parties and the mediation process. A mediator ~~shall~~must not undermine party self-determination for reasons such as obtaining higher settlement rates, ego satisfaction, increased fees, or outside pressures from court personnel, program administrators, provider organizations, or the media.

Comments to Standard I:

Comment I(a): Although party self-determination for process design is a fundamental principle of mediation practice, a mediator may need to balance party self-determination with a mediator's duty to conduct a quality process in accordance with these Standards.

Comment I(b): A mediator cannot personally ensure that each party has made free and informed choices to reach particular decisions, but, where appropriate, a mediator should make the parties aware of the importance of consulting other professionals to help them make informed choices.

Standard II. Impartiality, Disclosure, and Withdrawal

A.——A mediator ~~shall~~must conduct mediation in an impartial manner and avoid conduct that gives the appearance of partiality. “Impartial manner” means freedom from favoritism, bias, or prejudice in word, action or appearance, and includes a commitment to assist all participants.

A. ~~A mediator should act with impartiality and without prejudice based on~~ regardless of any participant’s personal characteristics, background, values and beliefs, or performance during mediation.

1.——~~1. The mediator should neither~~ or the mediator’s family member must not give ~~nor~~ or accept a gift, favor, loan, or other item of value that reasonably raises a question as to the mediator’s actual or perceived impartiality.

B. ~~2. A mediator shall decline~~ may give or accept de minimis or incidental items or services that are provided to facilitate a mediation or ~~withdraw from mediation if the mediator cannot conduct it in an impartial manner, regardless of the express agreement of the parties~~ respect cultural norms.

A mediator must make a reasonable inquiry to determine whether there ~~Standard III=Conflicts of Interest~~

C. ~~A mediator should avoid a conflict of interest or the appearance of a conflict of interest both during and after mediation. A conflict of interest is a dealing or relationship that could reasonably be viewed as creating an impression of possible bias or as raising a question about the mediator’s impartiality or self-interest on the part of the mediator.~~

A.——~~A mediator shall make a reasonable inquiry to determine whether there are any facts that a reasonable individual would consider likely to create a potential or actual conflict of interest for a mediator. The duty to make reasonable inquiry is a continuing duty during the mediation process.~~

D. ~~A mediator shall~~ A mediator must promptly disclose ~~conflicts of interest and grounds of bias or partiality~~ a dealing or relationship that is reasonably known to the mediator and could reasonably be viewed as raising a question about the mediator’s impartiality or self-interest. A mediator should resolve all doubts in favor of disclosure. Where possible, such disclosure should be made ~~early in the mediation process and~~ in time to allow the participants to make an informed decision on whether to waive any objection or select an alternate mediator. The duty to disclose is a continuing duty during the mediation process.

B.——~~After disclosure, the mediator shall decline to mediate unless all parties choose to~~

retain the mediator. If all parties agree to mediate after being informed of conflicts, the mediator may proceed with the mediation.

~~C. If a mediator's conflict of interest could be reasonably viewed as undermining the integrity of the mediation process, a mediator shall withdraw from or decline to proceed with the mediation regardless of the express agreement of the parties to the contrary.~~

~~E. A mediator shall not establish another relationship with any of the participants during~~
Responding to Concerns Regarding Impartiality, Withdrawal or Continuation.

1. Proceeding if there are no objections or questions regarding impartiality.

Except as provided in subparagraph (4) below, if after a mediator makes disclosures, no party objects to the mediator and no participant raises any question or concern about the mediator's ability to conduct the mediation impartially, the mediator may proceed.

2. Responding to questions or concerns regarding impartiality. If after a mediator makes disclosures or at any other point in the mediation process, a participant raises a question or concern about the mediator's ability to conduct the mediation impartially, the mediator must address the question or concern with the participants. Except as provided in subparagraph (4) below, if after the question or concern is addressed, no party objects to the mediator, the mediator may proceed.

3. Withdrawal or continuation upon party objection regarding impartiality.

In a two-party mediation, if any party objects to the mediator after the mediator makes disclosures and addresses a participant's question or concern regarding the mediator's ability to conduct the mediation impartially, the mediator must withdraw. In a mediation in which there are more than two parties, the mediator may continue the mediation with the non-objecting parties, provided that doing so would not violate any other provision of these Standards, any court rule, or law.

4. Circumstances requiring mediator recusal despite party consent.

Regardless of the consent of the parties, a mediator either must decline to serve as mediator or, if already serving, must withdraw from the mediation if:

- i. The mediator believes they cannot maintain impartiality toward all participants in the mediation process ~~that; or~~
- ii. Proceeding with the mediation could be reasonably viewed as undermining the integrity of the mediation process , or impartiality of the mediator, without the consent of all parties.

E.F. Establishing a Relationship After Mediation. In considering whether establishing a personal or another professional relationship with any ~~of the~~ participant after the conclusion of the mediation process ~~might create a perceived or actual conflict of~~ could reasonably raise a question about the mediator's impartiality or self-interest, the mediator should consider factors such as time elapsed since the mediation, consent of the parties,

the nature of the relationship established, and any services offered.

G. Use of Information About Participants. A mediator ~~shall~~must not use information about participants obtained in mediation for personal gain or advantage.

Comments to Standard II:

Comment II(a): Dealings or relationships which may need to be disclosed include financial, professional, and personal dealings or relationships.

Comment II(b): To determine whether to disclose financial dealings or relationships, a mediator should also consider the following potential conflicts if a mediator or a mediator's family member, individually or as a fiduciary:

- Holds a material financial interest in the subject matter in controversy or with a party, or a participating attorney or participating attorney's law firm.
- Is a member of a related board of directors of a party or a mediation participant.
- Serves as a representative, advocate or consultant to a mediation participant, or the mediator owns stocks or bonds in a corporate mediation participant.

Comment II(c): To determine whether to disclose professional dealings or relationships, a mediator should also consider the following potential conflicts if a mediator or a mediator's family member:

- Is currently, or currently expected to serve as, a mediator, arbitrator or attorney in another mediation or other matter involving any of the participants in the present mediation.
- Served as a mediator or arbitrator multiple times in the past two years involving any of the participants in the present mediation.
- Consulted as an attorney in the matter in controversy.
- Was a partner of a party, shareholder with, or member with, a party, attorney for a party or a member of a law firm representing a party in the past two years.

Comment II(d): To determine whether to disclose personal dealings or relationships, a mediator should also consider the following:

- **Acquaintanceships.** Acquaintances may not need to be disclosed. Acquaintances are relationships in which a mediator and participant have interactions which are incidental or relatively casual, such as being members of the same place of worship, professional or civic organization or the like. Mediators establish personal relationships with many representatives, attorneys and mediators in various professional associations and on social media. There should be no attempt to be secretive about such acquaintances. Disclosure is encouraged when some feature of a particular relationship might reasonably appear to impair impartiality.
- **Friendships.** Friendships most often should be disclosed. Friendships are relationships

that imply a degree of affinity greater than being acquainted with a person and connote some degree of mutual affection such that, based on the relevant facts, including the length of time of the relationship, number of contacts, and nature of the contacts, a reasonable person would question the neutrality of the mediator. Disclosure may not be necessary when some feature of a particular friendship might reasonably appear not to impair impartiality.

- **Close Personal Relationships.** Close personal relationships must be disclosed. A mediator may have or desire to have a close or intimate relationship with a participant that goes beyond or is different from common concepts of friendship such as a current, contemplated, or past romantic relationship.

Standard III. Mediator Competence [UNCHANGED, except paragraph number]

Standard IV. Confidentiality [UNCHANGED, except paragraph number]

Standard V. Safety of Mediation [UNCHANGED, except paragraph number]

Standard VI. Quality of the Process [UNCHANGED, except paragraph number]

Standard VII. Advertising and Solicitation [UNCHANGED, except paragraph number]

Standard VIII Fees and Other Charges [UNCHANGED, except paragraph number]

Standard IX. Advancement of Mediation Practice [UNCHANGED, except paragraph number]