

Order

Michigan Supreme Court
Lansing, Michigan

November 23, 2010

Marilyn Kelly,
Chief Justice

ADM File No. 2010-30

Michael F. Cavanagh
Maura D. Corrigan
Robert P. Young, Jr.
Stephen J. Markman
Diane M. Hathaway
Alton Thomas Davis,
Justices

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

On order of the Court, this is to advise that the Court is considering proposed new Rule 2.412 of the Michigan Court Rules and amendments of Rules 2.403, 2.411, and 3.216 of the Michigan Court Rules. 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 www.courts.michigan.gov/supremecourt/Resources/Administrative/ph.htm.

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 are indicated by underlining and deletions are indicated by strikeover.]

Rule 2.412 Mediation Communications; Confidentiality and Disclosure

(A) Scope and Applicability of Rule; Definitions.

- (1) This rule applies to cases that the court refers to mediation as provided in MCR 2.411 and MCR 3.216.
- (2) “Mediator” means an individual who conducts a mediation under these rules.
- (3) “Mediation communications” include statements, whether oral or in a record, verbal or nonverbal, that occur during the mediation process or that are made for purposes of retaining a mediator or for considering, initiating, preparing for, conducting, participating in, continuing, adjourning, concluding, or reconvening a mediation.

- (4) “Mediation party” means a person who participates in a mediation and whose agreement is necessary to resolve the dispute.
 - (5) “Mediation participant” means a mediation party, a nonparty, or a mediator who participates in or is present at a mediation.
 - (6) “Protected” is used as defined in the Estates and Protected Individuals Code at MCL 700.1106 *et seq.*, and “vulnerable” is used as defined in the Social Welfare Act at MCL 400.11 *et seq.*
- (B) Confidentiality. Mediation communications are confidential unless the mediation parties agree otherwise or the mediation communication is
- (1) included in the report of the mediator under MCR 2.411(C)(3) or MCR 3.216(H)(6) or reasonably required by court personnel to administer and evaluate the mediation program;
 - (2) subject to disclosure by statute or court rule;
 - (3) subject to an exception under subrule (C) and as limited by subrule (D)(1) and (D)(2); or
 - (4) disclosed to an agency responsible for the protection of individuals against conduct described in (C)(4) or (C)(5).
- (C) Disclosure in Proceedings; Exceptions. Mediation communications shall not be disclosed in any proceeding, except when disclosure of 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 attend under MCR 2.410(D)(3);
 - (3) made during a session of mediation that is open, or is required by law to be open, to the public;
 - (4) a report, the subject of a report, or is sought or offered to prove or disprove a threat, act, or part of a plan to inflict bodily injury or commit a crime or is used to plan, attempt, or commit a crime, or to conceal a crime or criminal activity;

- (5) a report, the subject of a report, or is sought or offered to prove or disprove a claim of abuse or neglect of a child, or a protected or vulnerable adult;
- (6) the subject of a report of professional misconduct filed against a mediation participant;
- (7) sought or offered to prove or disprove a claim or complaint of professional misconduct or malpractice filed against a mediation participant in a matter from which the claim of misconduct or malpractice arose; or
- (8) considered by a court 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 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 the need for evidence substantially outweighs the interest in protecting confidentiality and the integrity of the mediation process.

(D) Scope of Mediation Communications.

- (1) If a mediation communication is subject to disclosure under subrule (C), only that portion of the communication necessary for the application of the exception may be disclosed.
- (2) Disclosure of a mediation communication under subrule (C) does not render the mediation communication subject to disclosure for any other purpose.
- (3) This rule does not bar disclosure of any information otherwise discoverable merely because it is disclosed in the course of mediation.

Rule 2.403 Case Evaluation

(A)-(I) [Unchanged.]

(J) Conduct of Hearing.

(1)-(2) [Unchanged.]

- (3) Oral presentation shall be limited to 15 minutes per side unless multiple parties or unusual circumstances warrant additional time. Information on applicable insurance policy limits and settlement negotiations not protected

under MCR 2.412 shall be disclosed at the request of the case evaluation panel.

(4)-(5)[Unchanged.]

(K)-(O) [Unchanged.]

Rule 2.411 Mediation

(A)-(B) [Unchanged.]

(C) Scheduling and Conduct of Mediation.

(1)-(4) [Unchanged.]

(5) Confidentiality in the mediation process is governed by MCR 2.412. Confidentiality. ~~Statements made during the mediation, including statements made in written submissions, may not be used in any other proceedings, including trial. Any communications between the parties or counsel and the mediator relating to a mediation are confidential and shall not be disclosed without the written consent of all parties. This prohibition does not apply to~~

- (a) ~~the report of the mediator under subrule (C)(3),~~
- (b) ~~information reasonably required by court personnel to administer and evaluate the mediation program,~~
- (c) ~~information necessary for the court to resolve disputes regarding the mediator's fee, or~~
- (d) ~~information necessary for the court to consider issues raised under MCR 2.410(D)(3).~~

(D)-(G) [Unchanged.]

Rule 3.216 Domestic Relations Mediation

(A)-(G) [Unchanged.]

(H) Mediation Procedure.

(1)-(7) [Unchanged.]

- (8) Confidentiality in the mediation process is governed by MCR 2.412. Statements made during the mediation, including statements made in written submissions, may not be used in any other proceedings, including trial. Any communications between the parties or counsel and the mediator relating to a mediation are confidential and shall not be disclosed without the written consent of all parties. This prohibition does not apply to
- (a) ~~the report of the mediator under subrule (H)(6),~~
 - (b) ~~information reasonably required by court personnel to administer and evaluate the mediation program,~~
 - (c) ~~information necessary for the court to resolve disputes regarding the mediator's fee, or~~
 - (d) ~~information necessary for the court to consider issues raised under MCR 2.410(D)(3) or 3.216(H)(2).~~

(I)-(K) [Unchanged.]

Staff Comment: 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.

The staff comment is not an authoritative construction by the 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 these proposals may be sent to the Supreme Court Clerk in writing or electronically by March 1, 2011, at P.O. Box 30052, Lansing, MI 48909, or MSC_clerk@courts.mi.gov. When filing a comment, please refer to ADM File No. 2010-30. Your comments and the comments of others will be posted at www.courts.mi.gov/supremecourt/resources/administrative/index.htm.



I, Corbin R. Davis, 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.

November 23, 2010

Corbin R. Davis
Clerk