



Michigan Supreme Court
State Court Administrative Office
Michigan Hall of Justice
P.O. Box 30048
Lansing, Michigan 48909

Office of Dispute Resolution
517-373-4839

MEMORANDUM

DATE: October 28, 2009
TO: Persons Interested in Michigan Court Mediation Practice
FROM: Doug Van Epps, Director, Office of Dispute Resolution, and the Mediation Confidentiality and Standards of Conduct Committee
SUBJECT: Request for Comment on Draft Proposal MCR 2.412 (Confidentiality and Disclosure of Mediation Communications)
Comments due by February 1, 2010

Request for Comment

The purpose of this memo is to invite public comment on a proposed draft mediation confidentiality rule that has been developed by the Mediation Confidentiality and Standards of Conduct Committee. This committee was convened by the State Court Administrative Office to assess the operation of confidentiality in mediation proceedings and to offer recommendations concerning the amendment of current court rules in light of its assessment. Although the draft rule has not been submitted to the Michigan Supreme Court, the committee is inviting public comment prior to its issuing a final report that will summarize comments and make a recommendation.

The committee will review and consider all comments that are received before February 1, 2010. A final report that is based on review of the comments will be issued by the committee in the spring of 2010.

Draft Rule Background:

In reviewing the current confidentiality provisions of MCR 2.411(C)(5) and MCR 3.216(H)(8), the committee believed that the rules were too restrictive, noting, for example, that statements made during mediation with regard to child abuse, crimes, or alleged professional misconduct cannot be disclosed. The committee also reviewed the Uniform Mediation Act (UMA), which was drafted by the National Conference of Commissioners on Uniform State Laws, as well as other states' rules, to study provisions that might contain appropriate language to be used in Michigan's court rules.

The committee further discussed whether confidentiality in mediation proceedings should be managed by the operation of privilege, which would parallel the structure of the UMA. While the committee believed that the “privilege” approach may be statutorily appropriate, it concluded that a better approach for rule amendment purposes would be to build on the foundation of the current provisions of MCR 2.411(C)(5) and MCR 3.216(H)(8).

As a result, proposed MCR 2.412 preserves the current language of MCR 2.411(C)(5) and MCR 3.216(H)(8) stating that mediation communications are confidential except when agreed upon by the parties, and the rules’ current exceptions. Additional exceptions to confidentiality under review by the committee were derived chiefly from the UMA.

Please note: This rule would replace the current confidentiality provisions of MCR 2.411(C)(5) and 3.216(H)(8) and would apply to general civil, domestic relations, and probate actions.

Please submit all comments by February 1, 2010. After the comment period has expired, the committee will issue a report that will summarize the comments received and make a recommendation. Comments may be sent to:

Doug Van Epps
Michigan Supreme Court
State Court Administrative Office
P.O. Box 30048
Lansing, Michigan 48909
E-mail: VanEppsD@courts.mi.gov

Committee members include:

Robert Ackerman	Tracy L. Allen	Anne Bachle Fifer
Earlene Baggett-Hayes	Mary Bedikian	Susan Butterwick
Shauna Dunnings	Brian Einhorn	Pamela Enslin
Richard Figura	Ed Hartfield	Kevin Hendrick
Peter Houk	Dale A. Iverson	Barbara Johannessen
Jon Kingsepp	Jon R. Muth	Margo Nichols
Trish Oleska Haas	Brian Pappas	Edward Pappas
Antoinette R. Raheem	Philip D. Schaefer	Asher Tilchin
Matt Vititoe	Steven M. Wolock	Zena D. Zumeta

State Court Administrative Office
Mediation Confidentiality and Standards of Conduct Committee
Mediation Communications Disclosure Rule
Comments Due: February 1, 2010

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).

(C) Discovery and Admissibility of Mediation Communications; Exceptions. 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 used to plan, attempt, or commit a crime, or to conceal a crime or criminal activity;
- (5) information that indicates the likelihood of child, protected adult, or elder abuse or neglect;

- (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 out of 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 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.

Comments on this proposal may be sent to Doug Van Epps in writing or electronically by February 1, 2010, at the State Court Administrative Office, P.O. Box 30048, Lansing, Michigan 48909, or VanEppsD@courts.mi.gov.