

RULE 2.412 MEDIATION COMMUNICATIONS; CONFIDENTIALITY AND DISCLOSURE

(A)Scope. This rule applies to cases that the court refers to mediation as defined and conducted under MCR 2.411 and MCR 3.216.

(B)Definitions.

(1)“Mediator” means an individual who conducts a mediation.

(2)“Mediation communications” include statements whether oral or in a record, verbal or nonverbal, that occur during the mediation process or are made for purposes of retaining a mediator or for considering, initiating, preparing for, conducting, participating in, continuing, adjourning, concluding, or reconvening a mediation.

(3)“Mediation party” means a person who or entity that participates in a mediation and whose agreement is necessary to resolve the dispute.

(4)“Mediation participant” means a mediation party, a nonparty, an attorney for a party, or a mediator who participates in or is present at a mediation.

(5)“Protected individual” is used as defined in the Estates and Protected Individuals Code, MCL 700.1106(v).

(6)“Vulnerable” is used as defined in the Social Welfare Act, MCL 400.11(f).

(C)Confidentiality. Mediation communications are confidential. They are not subject to discovery, are not admissible in a proceeding, and may not be disclosed to anyone other than mediation participants except as provided in subrule (D).

(D)Exceptions to Confidentiality. Mediation communications may be disclosed under the following circumstances:

(1)All mediation parties agree in writing to disclosure.

(2)A statute or court rule requires disclosure.

(3)The mediation communication is in the mediator’s report under MCR 2.411(C)(3) or MCR 3.216(H)(6).

(4)The disclosure is necessary for a court to resolve disputes about the mediator’s fee.

(5)The disclosure is necessary for a court to consider issues about a party’s failure to attend under MCR 2.410(D)(3).

(6)The disclosure is made during a mediation session that is open or is required by law to be open to the public.

(7)Court personnel reasonably require disclosure to administer and evaluate the mediation program.

(8)The mediation communication is

- (a) a threat to inflict bodily injury or commit a crime,
- (b) a statement of a plan to inflict bodily injury or commit a crime, or
- (c) is used to plan a crime, attempt to commit or commit a crime, or conceal a crime.

(9) The disclosure

(a) Involves a claim of abuse or neglect of a child, a protected individual, or a vulnerable adult; and

(b) Is included in a report about such a claim or sought or offered to prove or disprove such a claim; and

(i) Is made to a governmental agency or law enforcement official responsible for the protection against such conduct, or

(ii) Is made in any subsequent or related proceeding based on the disclosure under subrule (D)(9)(b)(i).

(10) The disclosure is included in a report of professional misconduct filed against a mediation participant or is sought or offered to prove or disprove misconduct allegations in the attorney disciplinary process.

(11) The mediation communication occurs in a case out of which a claim of malpractice arises and the disclosure is sought or offered to prove or disprove a claim of malpractice against a mediation participant.

(12) The disclosure is 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 the court finds, after an in camera hearing, that the party seeking discovery or the proponent of the evidence has shown

(a) that the evidence is not otherwise available, and

(b) that the need for the evidence substantially outweighs the interest in protecting confidentiality.

(E) Scope of Disclosure When Permitted; Limitation on Confidentiality.

(1) If a mediation communication may be disclosed under subrule (D), only that portion of the communication necessary for the application of the exception may be disclosed.

(2) Disclosure of a mediation communication under subrule (D) does not render the mediation communication subject to disclosure for another 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.