Order

Michigan Supreme Court
Lansing, Michigan

April 5, 2011

Robert P. Young, Jr.,
Chief Justice

Michael F. Cavanagh
Marilyn Kelly
Stephen J. Markman
Diane M. Hathaway
Mary Beth Kelly
Brian K. Zahra,
Justices

ADM File No. 2010-30

Amendments of Rules 2.403, 2.411, and 3.216 of the Michigan Court Rules and Adoption of New Rule 2.412 of the Michigan Court Rules

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On order of the Court, notice of the proposed changes and an opportunity for comment in writing and at a public hearing having been provided, and consideration having been given to the comments received, the following amendments of Rules 2.403, 2.411, and 3.216 of the Michigan Court Rules, and new Rule 2.412 of the Michigan Court Rules are adopted, effective September 1, 2011.

[Additions are indicated by underlining and deletions are indicated by strikeover. New MCR 2.412 contains no underlining or strikeover.]

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 <u>not protected under MCR 2.412</u> 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.]

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 used 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 legal malpractice arises and the disclosure is sought or offered to prove or disprove a claim of legal 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.

Staff Comment: The amendments of MCR 2.403, 2.411, and 3.216, and the adoption of new MCR 2.412 consolidate provisions related to mediation confidentiality into one rule and expand the number of exceptions to mediation confidentiality.

The staff comment is not an authoritative construction by the Court.

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.

April 5, 2011

Corbin R. Davis

Clerk