

Michigan Supreme Court

Mediation Confidentiality and Standards of Conduct Committee

Report to the Michigan
Supreme Court

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Background

In 2007, the State Court Administrative Office (SCAO) appointed the 22-member Dispute Resolution Rules Committee to review alternative dispute resolution (ADR) practices affecting general civil litigation under MCR 2.410 (Alternative Dispute Resolution) and MCR 2.411 (Mediation). The committee's July 2008 "Report to the Michigan Supreme Court," recommended that a successor committee be appointed to focus exclusively on the confidentiality rule provisions of MCRs 2.411(C)(5) and 3.216(H)(8) (Domestic Relations Mediation). The committee observed that it was not constituted to consider confidentiality in the context of domestic relations cases, that a subcommittee lacked consensus on the scope and applicability of confidentiality, and that there were significant questions regarding the extent to which provisions of the Uniform Mediation Act (UMA)¹ should be adopted.

Subsequently, in November 2008, the State Court Administrator appointed the 26-member Mediation Confidentiality and Standards of Conduct Committee to examine mediation confidentiality practices and to recommend court rule revisions as well as to recommend revisions to the Mediator Standards of Conduct adopted by the SCAO pursuant to MCRs 2.411(G) and 3.216(K) in 2000.² The committee met six times between November 2008 and February 2010. During the course of its deliberations, the committee circulated a "discussion draft" of a proposed new confidentiality rule that would apply to both general civil and domestic relations cases.³

The committee considered the comments received prior to reaching consensus on recommending that the Court adopt a new court rule pertaining to mediation confidentiality, as well as proposed amendments to MCRs 2.411(C)(5) and 3.216(H)(8).

¹The Uniform Mediation Act (2001), hereafter referred to as the "UMA" appears as Appendix 1. As of the date of this report, the UMA had been adopted, with various amendments, in the following 11 states: District of Columbia, Idaho, Illinois, Iowa, Nebraska, New Jersey, Ohio, South Dakota, Utah, Vermont, and Washington.

²These Standards of Conduct were based on the Model Mediator Standards of Conduct originally adopted by the American Bar Association, American Arbitration Association, and Association for Conflict Resolution in 1994. The ABA Standards were later revised in 2005.

³The discussion draft of the rule and a list of persons and agencies providing comments appear at Appendix 2.

The committee also created a subcommittee to assess whether the Mediator Standards of Conduct adopted by the State Court Administrator in 2000 should be revised to reflect revisions adopted by the American Bar Association, American Arbitration Association, and the Association for Conflict Resolution in 2005. The subcommittee's proposed revisions to the Mediation Standards of Conduct are published in a separate report, "Proposal for Revising Michigan's Standards of Conduct for Mediators."

The Need for Addressing Confidentiality Questions

The Dispute Resolution Rules Committee and its successor, the Mediation Confidentiality and Standards of Conduct Committee, both concluded that current confidentiality provisions of the general civil and domestic relations mediation rules are overbroad in several respects. The current rule governing general civil mediation provides:

MCR 2.411(C)(5) *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).

The domestic relations confidentiality rule mirrors this rule.⁴

In identifying the rules as being overly protective, members of both committees noted, for

⁴MCR 3.216(H)(8) 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).

example, that statements relating to child and elder abuse, criminal conduct, attorney misconduct, and fraud occurring during the mediation process may be protected communications.

Committee members also cited concerns over the current rule that posed special challenges in cases they have litigated. For example, in actions to defend malpractice claims arising out of negotiations occurring in mediation, statements between attorneys and clients occurring in the course of mediation were inadmissible. In a domestic relations action, statements misleading parties as to the valuation of business interests were protected under the current rule.

The committee observed that other states have addressed these considerations in varying degrees, but perhaps no more comprehensively than by the Uniform Law Commissioners in approving the Uniform Mediation Act.

The Role of the Uniform Mediation Act in Committee Deliberations

Having concluded that a need existed for addressing mediation confidentiality to afford an expanded set of protections for litigants using the mediation process, the committee considered other states' practices, and teleconferenced with Ms. Sharon Press, J.D., then director of Florida judiciary's Dispute Resolution Center, regarding the Florida judiciary's approach to mediator confidentiality.⁵ Florida is widely regarded as having the most progressive judiciary in the nation in terms of implementing ADR practices. Ms. Press validated committee members' concerns over the need for expanded exceptions to confidentiality, but indicated that owing to previously existing Florida statutes that created numerous exceptions to confidentiality, the UMA afforded little advantage over that state's current protections.⁶

Michigan does not have the equivalent of Florida's confidentiality statute pertaining to court ordered mediation. The closest example may be found in the Community Dispute Resolution Act,⁷ which itself affords few exceptions to confidentiality.

⁵ Sharon Press currently serves as the Director of the Dispute Resolution Institute, Hamline University School of Law.

⁶ See Florida Statutes Sections 44.101-405, Appendix 3.

⁷ 1988 PA 260, MCL 691.1551 *et seq*

MCL 691.1557 Confidentiality.

Sec 7.

(1) The work product and case files of a mediator or center and communications relating to the subject matter of the dispute made during the dispute resolution process by a party, mediator, or other person are confidential and not subject to disclosure in a judicial or administrative proceeding except for either of the following:

(a) Work product, case files, or communications for which all parties to the dispute resolution process agree in writing to waive confidentiality.

(b) Work product, case files, or communications which are used in a subsequent action between the mediator and a party to the dispute resolution process for damages arising out of the dispute resolution process.

(2) Subsection (1) does not apply to statements, memoranda, materials, and other tangible evidence, otherwise subject to discovery, that were not prepared specifically for use in the dispute resolution process.

The committee observed that, like current court rule provisions, this statute does not address the various areas of concern noted above, nor does it apply to cases that are not managed through Community Dispute Resolution centers.

There was early consensus that the exclusionary provisions of the UMA could serve as a framework for the committee's deliberations. One question that recurred throughout committee deliberations was whether concerns regarding Michigan's current rules could be best addressed statutorily or through court rule amendments. Committee members generally agreed that given the increased use of mediation outside of the litigation context, a statutory response to confidentiality may be optimal. In the short term, however, the committee believed that an immediate response to problems encountered with mediation confidentiality could be best achieved by amending the current court rules to reflect relevant provisions of the UMA.

Privilege or Confidentiality Rule?

Having decided to address confidentiality through court rule amendments, the committee next discussed whether the structure of the current rule should be retained, e.g., to have a general statement of confidentiality followed by a list of exceptions, or whether instead a privilege should be created.

The UMA is drafted as a statutory privilege. Under the definition of privilege used by the committee, a privilege regarding mediation communications would create a mediator and mediation party's right to refuse to disclose, and to prevent any other person from disclosing, mediation communications in subsequent proceedings. "Privilege" was discussed as applying to court proceedings, in which, for example, statements could be prohibited from being introduced into evidence. But privilege was not viewed as protecting parties in a broader capacity, outside of the use of statements in court proceedings. The UMA, committee members noted, addressed this by adding the following confidentiality provision:

Section 8. Confidentiality. Unless subject to the [insert statutory references to open meetings act and open records act], mediation communications are confidential to the extent agreed by the parties or provided by other law or rule of this State.⁸

Under the UMA's framework, confidentiality is considered a matter of contract, to be negotiated by the parties, unless otherwise addressed by court rule or statute.

The committee observed that mediation confidentiality rules and statutes that do not create a privilege generally resemble a structure in which a general statement indicating that all mediation communications are confidential is followed by a list of exceptions, meaning that under no circumstance can parties agree that a particular communication can be made confidential. This is often followed by provisions stating that additional exceptions may exist under certain circumstances. Additional provisions have addressed whether evidence can become a confidential communication solely by its being used in mediation, remedies for disclosure of confidential communications, and whether documents used in mediation can be used in subsequent court proceedings if otherwise discoverable outside of mediation.

Florida's confidentiality statute reflects this format, and Michigan's current confidentiality rules follow the first two structural elements in that they establish the main rule and then create a brief set of exceptions.⁹

⁸ UMA, Section 8.

⁹ Florida Statute 44.405 is an example of this structure and appears at Appendix 3.

Reflecting on the two approaches, the committee questioned whether a privilege could be created by court rule. A subcommittee report concluded that while not a common practice, a mediation privilege could be adopted via court rule. After extended discussion, the committee decided to retain the current rule approach, but to incorporate key provisions of the UMA, most notably an expanded set of exceptions, guidance as to the scope of use of disclosed communications, and emphasizing parties' abilities to negotiate terms of confidentiality not otherwise covered under the rule.

The Proposed Rule and Amendments to Current Rules

The committee recommends creating a new rule rather than amending the current provisions of MCRs 2.411 and 3.216, chiefly because of its length, but as well as to provide additional focus to perhaps the most integral part of ADR practice: confidentiality. The entire rule appears here. This is followed by a discussion of the new rule's components. Proposed amendments to MCRs 2.403, 2.410, 2.411, and 3.216 that would be required to implement the rule appear at the conclusion of the report.

MCR 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 3.216.
- (2) "Mediator" means an individual who conducts a mediation under these rules.
- (3) "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.
- (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.

(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 protecting individuals against the 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 a 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 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 document signed by the mediation parties or acknowledged by the parties on an audio or video recording arising out of a 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 there is a need for the evidence that 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.

Discussion of the Rule Provisions

In the following section, each subrule is followed by a brief discussion.

(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 3.216.
- (2) “Mediator” means an individual who conducts a mediation under these rules.
- (3) “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.
- (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.

Discussion: Subrule (A)(1) indicates the rule’s applicability to both general civil actions under MCR 2.411 and domestic relations actions under MCR 3.216.

Subrule (A)(2) adopts the UMA definition of a “mediator.”

Subrule (A)(3), adopts the UMA language defining a “mediation communication,” and adds “adjourning,” “reconvening,” and “concluding” to the list of possible mediation process points. Listing the sequence of events is intended to illustrate that mediation begins from the first contact with a mediator, whether by telephone, letter, e-mail, or otherwise, and continues on through a mediation that may have been concluded, but was later reconvened for additional

settlement discussions. The proposed language also reorders the UMA terms in the order they would most likely occur in a typical mediation process.

Subrule (A)(4) adopts the UMA definition of a “mediation party” with the exception of grammatically editing the phrase “a person *that* participates in mediation...” to read “a person *who* participates in mediation...” [Emphasis added.]

Subrule (A)(5) adopts the UMA definition of a “nonparty participant” in mediation and expands the number of persons potentially affected by the rule to anyone “present at” a mediation. A party’s relative, advisor, support person, advocate, or others may be in attendance, although not directly “participating in” the mediation. Additionally, persons completing training requirements or student observers may be present in mediation as non-participants. The committee believed that the UMA did not sufficiently protect confidences as to these persons, and recommended the expanded definition.

(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 protecting individuals against the conduct described in (C)(4) or (C)(5).

Discussion: This provision retains the substance of MCRs 2.411(C)(5) and 3.216(H)(6) and also closely follows the UMA’s formulation of confidentiality:

Section 8. Confidentiality. Unless subject to the [insert statutory references to open meetings act and open records act], mediation communications are confidential to the extent agreed by the parties or provided by other law or rule of this State.

The main statement of confidentiality appears as three parts. First, the general rule is that mediation communications are confidential. Second, parties may agree that certain mediation communications are not confidential. And third, there are four instances in which mediation

communications are not confidential, regardless of parties' preferences, and these are reflected in subrules (1)-(4).

Subrule (B)(1) incorporates the current language of MCR 2.411(C)(5)(a)-(b) and 3.216(H)(6)(a)-(b).¹⁰ Subrule(B)(2) adopts the UMA's inclusion of references to other statutes or rules that may control in a given case. The committee discussed whether to include specific statutes, but decided not to include citations to statutes or other court rules given the wide array of statutes or rules that may apply.

Subrule (B)(3) incorporates the limited disclosure of mediation communications that appear in subrule (C). The limited disclosure provisions appearing as (D)(1) and (D)(2) are also drawn from the UMA.

Subrule (B)(4) makes clear that mediation communications pertaining to criminal activity under subrule (C)(4) and claims of abuse or neglect under subrule (C)(5) may be reported to an agency responsible for protecting persons from criminal activity and abuse or neglect. The limitation of disclosures to an "agency responsible" is drawn from the UMA, however under the UMA, disclosure is limited to the mediator. This subrule extends the authority to disclose to any mediation participant.

(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 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 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;

¹⁰ The rule appears at page 3, above.

(6) sought or offered to prove or disprove a claim or complaint of professional misconduct or malpractice filed against a mediation participant; or

(7) 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 arising out of a 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 there is a need for the evidence that substantially outweighs the interest in protecting confidentiality and the integrity of the mediation process.

Discussion: Subrule (C)(1), regarding communications necessary for a court to resolve disputes regarding the mediator's fee, currently appears as MCRs 2.411(C)(5)(c) and 3.216(H)(6)(c).

Subrule (C)(2), regarding communications necessary for a court to consider issues relating to a party's failure to appear at a mediation event, currently appears as MCRs 2.411(C)(5)(d) and 3.216(H)(6)(d).

Subrule (C)(3), regarding communications made during a session of a mediation that is open, or is required by law to be open to the public, addresses mediation conducted in cases involving public bodies. While the operation of confidentiality in public settings arguably falls within the ambit of subrule (B)(2) concerning the operation of confidentiality pursuant to other statutes and rules, the committee believed that confidentiality in the public context warranted special mention, particularly since it was also identified in the confidentiality provisions of the UMA.

Subrule (C)(4), relates to threats and acts to injure someone or to commit a crime. Here, the committee combined subsections (a)(3) and (a)(4) of Section 6 of the UMA to create one statement.¹¹ The committee discussed several definitions, e.g., what constituted a "crime of

¹¹ UMA Section 6, exceptions to privilege, reads as follows:

“(a) There is no privilege under Section 4 for a mediation communication that is:

(1)-(2) Omitted.

(3) a threat or statement of a plan to inflict bodily injury or commit a crime of violence;

(4) intentionally used to plan a crime, attempt to commit or commit a crime, or to conceal an ongoing crime or ongoing criminal activity;

(5)-(7) Omitted.”

violence” and an “ongoing” crime and criminal activity under the UMA and questioned whether to broaden the scope of the exception to include any crime (not just a crime of violence), and to criminal activity that is not necessarily “ongoing.” The committee concluded that the UMA’s approach would be largely unworkable and overly restrictive, and that communications relating to any criminal activity, regardless of its being “ongoing” or not, should not be protected. The inclusion of “a report, or the subject of a report” in both this subrule and subrule (C)(5) clarifies that disclosures originally made in reports to agencies may also be disclosed in subsequent proceedings. Additionally, the notion of intentionality, appearing in UMA subsection 6(a)(4) appeared largely irrelevant, as intent in making a statement related to a crime appeared to have little relationship to a crime’s previously or subsequently taking place. Further, the notion of intention does not appear in UMA subsection 6(a)(3) relating to threats of bodily injury. Using an “intentionality test” in one circumstance but not in another closely related circumstance appeared incongruous to the committee, and it was not adopted by the committee.

Subrule (C)(5), excepting from confidentiality communications related to abuse or neglect of a child, or protected or vulnerable adult abuse, also has a UMA counterpart:

Section 6. Exceptions to Privilege.

(a) There is no privilege under Section 4 for a mediation communication that is:

(1)-(6) Omitted.

(7) sought or offered to prove or disprove abuse, neglect, abandonment, or exploitation in a proceeding in which a child or adult protective services agency is a party, unless the

[Alternative A: [State to insert, for example, child or adult protection] case is referred by a court to mediation and a public agency participates.]

[Alternative B: public agency participates in the [State to insert, for example, child or adult protection] mediation].

First, the committee believed that the use of a mediation communication affecting abuse and neglect should not hinge on whether a protective services agency is a party, and thus did not adopt the UMA limitation.

Second, the committee adopted the terminology of Michigan’s Social Welfare Act¹² in using “protected” and “vulnerable” in reference to adults. The committee concluded that “vulnerable” adults may not necessarily be “protected,” in the sense that they do not need “protective services,” but nevertheless because of physical impairments or advanced age should be afforded the same protection as adults who do require protective services.

Subrule (C)(6) states that mediation communications may be disclosed in proceedings to prove or disprove a claim or complaint of professional misconduct or malpractice filed against a mediation participant related to professional misconduct. This subrule is based on the following UMA provision:

Section 6. Exceptions to Privilege.

- (a) There is no privilege under Section 4 for a mediation communication that is:
 - (1)-(4) [Omitted.]
 - (5) sought or offered to prove or disprove a claim or complaint of professional misconduct or malpractice filed against a mediator
 - (6) except as otherwise provided in subsection (c),¹³ sought or offered to prove or

¹² 1939 PA 280, MCL 400.1 *et seq.* MCL 400.11 provides the relevant definitions.
400.11 Definitions.
Sec. 11.

As used in this section and sections 11a to 11f:

- (a) “Abuse” means harm or threatened harm to an adult’s health or welfare caused by another person. Abuse includes, but is not limited to, nonaccidental physical or mental injury, sexual abuse, or maltreatment.
- (b) “Adult in need of protective services” or “adult” means a vulnerable person not less than 18 years of age who is suspected of being or believed to be abused, neglected, or exploited.
- (c) “Exploitation” means an action that involves the misuse of an adult’s funds, property, or personal dignity by another person.
- (d) “Neglect” means harm to an adult’s health or welfare caused by the inability of the adult to respond to a harmful situation or by the conduct of a person who assumes responsibility for a significant aspect of the adult’s health or welfare. Neglect includes the failure to provide adequate food, clothing, shelter, or medical care. A person shall not be considered to be abused, neglected, or in need of emergency or protective services for the sole reason that the person is receiving or relying upon treatment by spiritual means through prayer alone in accordance with the tenets and practices of a recognized church or religious denomination, and this act shall not require any medical care or treatment in contravention of the stated or implied objection of that person.
- (e) “Protective services” includes, but is not limited to, remedial, social, legal, health, mental health, and referral services provided in response to a report of alleged harm or threatened harm because of abuse, neglect, or exploitation.
- (f) “Vulnerable” means a condition in which an adult is unable to protect himself or herself from abuse, neglect, or exploitation because of a mental or physical impairment or because of advanced age.

¹³ UMA Section 6(c): “A mediator may not be compelled to provide evidence of a mediation communication referred to in subsection (a)(6) or (b)(2).”

disprove a claim or complaint of professional misconduct or malpractice filed against a mediation party, nonparty participant, or representative of a party based on conduct occurring during a mediation; or
(7) [Omitted.]

The committee believed that communications relevant to claims and defenses of misconduct or malpractice should not be cloaked in confidentiality just because they occurred in mediation, as opposed to occurring in other settlement negotiations, case evaluation, or other litigation contexts. In proposing the adoption of (C)(6), the committee is recognizing, and putting parties on notice that, communications surrounding claims or complaints of professional misconduct or malpractice do not have an added protection simply because they arose within the context of mediation. The committee further noted that the Michigan Rules of Professional Conduct (MRPC) may require an attorney acting as a mediator to report a violation of the code by other attorneys in the mediation.¹⁴ Nonattorney mediators are under no such obligation, however, thus this subrule, which would govern the actions of both attorney and nonattorney mediators, does not include a reference to “reporting” professional misconduct.

Proposed subrule (C)(7) permits the limited use of mediation communications in proceedings to enforce, rescind, reform, or avoid liability on a document that is signed by the parties or acknowledged by the parties on an audio or video recording. Through a threefold balancing test, applied following an in camera hearing, a party must show that: (1) the evidence is not otherwise available; (2) the need for the evidence substantially outweighs the interest in protecting confidentiality; and (3) the need for the evidence substantially outweighs the interest in protecting the integrity of the mediation process.

With the exception of the “integrity of the mediation process” prong of the test, the remainder of the subrule is based on the UMA.¹⁵ In early committee discussions, to some

¹⁴ MRPC 8.3(a) “A lawyer having knowledge that another lawyer has committed a significant violation of the Rules of Professional Conduct that raises a substantial question as to that lawyer’s honesty, trustworthiness, or fitness as a lawyer shall inform the Attorney Grievance Commission.”

¹⁵ Section 6. Exceptions To Privilege

(a) Omitted.

(b) There is no privilege under Section 4 if a court, administrative agency, or arbitrator finds, 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, that there is a need for the evidence that substantially outweighs the interest in protecting confidentiality, and that the mediation communication is sought or offered in:

committee members, this provision appeared to “open the barn door” for litigants with “buyers remorse” to easily set aside agreements. After several members provided examples of cases in which critical evidence required to rescind and reform mediated agreements was not accessible under the current MCR 2.411 confidentiality provisions, the committee agreed that some formulation of the UMA approach was appropriate. Committee members also emphasized that the sole purpose of this exception was to address evidence not otherwise discoverable related to documents signed by the parties or acknowledged by the parties on an audio or video recording, and not to any other aspect of mediation proceedings.

The committee also discussed whether the UMA’s limitation of the in camera review should be limited to “a *contract* arising out of the mediation.”¹⁶ [Emphasis added.] Committee members concluded that because the mediation process may occur over extended periods and may involve numerous signed subagreements along the way, such as in resolving contested discovery matters, the rule should apply more broadly than to just the final settlement “contract.” The recommended substitute language, “document signed by the parties or acknowledged by the parties on an audio or video recording” is drawn from MCR 3.216(H)(7):

If a settlement is reached as a result of the mediation, to be binding, the terms of that settlement must be reduced to a signed writing by the parties or acknowledged by the parties on an audio or video recording.

Another component of this subrule, not included in the UMA formulation, requires a judge to consider the “integrity of the mediation process” in balancing whether a mediation communication should be disclosed. A majority of committee members believed that a judge should consider the impact to the overall practice of mediation, as established in the court rules, in making a decision in a particular case. One committee member did not support adding this test, believing that it is unduly vague, restrictive, and unnecessary, inasmuch as the exception

the interest in protecting confidentiality, and that the mediation communication is sought or offered in:

- (1) a court proceeding involving a felony [or misdemeanor]; or
- (2) except as otherwise provided in subsection (c), a proceeding to prove a claim to rescind or reform or a defense to avoid liability on a contract arising out of the mediation.

(c) A mediator may not be compelled to provide evidence of a mediation communication referred to in subsection (a)(6) or (b)(2).

¹⁶ UMA, Section 6(b)(2). See footnote 14, above.

already calls for (1) an in camera hearing; (2) a finding that the evidence is not otherwise available; and (3) a showing that the need for the evidence substantially outweighs the interests in protecting confidentiality.

An additional consideration related to a court's holding an in camera hearing was whether mediators could be compelled to testify. The UMA specifically exempts mediators from testifying.¹⁷

In early discussions, a number of committee members strongly argued against having mediators testify, chiefly citing as reasons for their objection mediators' neutrality and their specifically being retained *not* to be engaged in the litigation process. Other members believed that if the in camera process was to have sufficient meaning, it may be the perspective of the mediator that could best resolve the issues presented by the parties. Committee members ultimately concluded that, notwithstanding mediators' concerns over neutrality and confidentiality, the mediation process and the in camera review should serve to benefit the parties in resolving their dispute. As a result, it should be up to the parties and the judge – not the mediator – to determine whether a mediator must testify.

Subrule (D) outlines the scope of disclosure of mediation communications. The proposed language follows:

(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.

These provisions are drawn from the UMA:

Section 6(d) If a mediation communication is not privileged under subsection (a) or (b), only the portion of the communication necessary for the application of the exception from

¹⁷ UMA, Section 6(c). See footnote 14, above.

nondisclosure may be admitted. Admission of evidence under subsection (a) or (b) does not render the evidence, or any other mediation communication, discoverable or admissible for any other purpose.

Section 4(c) 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.

These provisions were not controversial and generated little discussion. Collectively, the provisions limit the application of the exceptions enumerated in subrule (C), meanwhile underscoring the implication that merely because a communication is made in mediation, it cannot be protected if otherwise discoverable.

The committee also discussed a recommendation submitted in a comment letter that the rule specify that settlement agreements are confidential. Some committee members believed that settlement agreements should be considered confidential, and cited as problematic a trial court's requesting copies of settlement agreements to verify that a mediation had successfully resulted in an agreement. Although in this example the court indicated that it would maintain the documents in a confidential file, committee members queried whether the practice would sufficiently protect the interests of the litigants in keeping their resolution private. Other committee members noted that in mediations involving public bodies settlement agreements could rarely be confidential and that a rule indicating that settlement agreements were confidential would be inconsistent with various state statutes.

A final draft of the rule prepared for committee review included the following provision:

(E) Settlement Agreements. For purposes of this rule, settlement agreements are not confidential communications.

In response to the draft, several committee members believed that it would be incongruous to have mediation communications occurring prior to the written agreement maintained as confidential, but not the agreement arising out of those communications. Further, one committee member believed that not defining "settlement agreement" and "confidential communications" was problematic and would open the door to extensive litigation. This, together with the notion that litigants are entitled to have confidential settlements suggested to the committee member that the proposed provision would create more confusion than lend clarity to the operation of confidentiality in mediation.

Because additional concern over this provision emerged subsequent to the committee's final meeting, and because an earlier reached consensus on its inclusion appeared to erode, the provision has been withdrawn from the final recommended rule. The merits of including such a provision can be revisited should the Michigan Supreme Court publish the proposed rule for comment.

Mediator Standards of Conduct

As part of the committee's original charge, a subcommittee was convened to assess whether the Mediator Standards of Conduct adopted by the State Court Administrator pursuant to MCRs 2.411(G) and 3.216(K) in 2000 should be revised in light of revisions to the American Bar Association Mediator Standards of Conduct adopted in 2005. Noted above, a review of the Standards of Conduct was incorporated into the study of court rule confidentiality provisions because the current Standards of Conduct include confidentiality provisions mirroring the court rule provisions.

The subcommittee¹⁸ recognized that there were, in fact, two sets of national mediator standards of conduct. The "Model Standards of Conduct for Mediators," (1994, rev. 2005) were jointly adopted by the American Bar Association, American Arbitration Association, and the Association for Conflict Resolution. The "Model Standards of Practice for Family and Divorce Mediation," (2000) have been adopted by the American Bar Association,¹⁹ the Association of Family and Conciliation Courts, as well as numerous other organizations. While both were approved by the American Bar Association, one pertains to general civil mediation, and one pertains to domestic relations mediation. This appeared to the subcommittee to assume that mediators were either mediating in one area or the other, however in practice, many mediators provide mediation services in both general civil and domestic relations cases. Additionally, cases frequently involve both general civil and family case components, e.g., in family business dissolutions. In questioning the need for two sets of standards, and the extent to which mediation

¹⁸ Members of the subcommittee included Anne Bachle Fifer, Susan Butterwick, Barbara Johannessen, and Zena Zumeta.

¹⁹ The Standards were developed by the Symposium on Standards of Practice and approved by the ABA House of Delegates in February 2001.

standards *should* differ whether mediating with business or family litigants, the subcommittee undertook an effort to combine the substantive components of both sets into one set of standards.

This novel approach suggested to the SCAO staff that the effort to devise a set of standards for both general civil and domestic relations mediators deserved its own special focus. The SCAO staff recommended to the committee that the subcommittee complete its work in combining the two standards of conduct, but that in lieu of considering the resulting document in the current committee, a successor committee be appointed to specifically review the recommended revised standards of conduct and to provide recommendations for their adoption to the State Court Administrator.

The committee adopted this recommendation. As a result, the subcommittee’s work appears in a separate report, “Proposal for Revising Michigan’s Standards of Conduct for Mediators.”²⁰

Amendments to MCRs 2.403, 2.411, and 3.216

The following amendments would be required to implement proposed MCR 2.412:

MCR 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.

(K)-(O) [Unchanged]

Discussion: The reference to proposed MCR 2.412 reflects that settlement negotiations arising out of the context of confidential mediation communications should not be disclosed to a case evaluation panel.

²⁰ <http://courts.michigan.gov/scao/resources/publications/reports/ODR-ProposalforRevisingMSCM.pdf>

MCR 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.]

Discussion: The reference to proposed MCR 2.412 reflects that confidentiality would be managed by proposed MCR 2.412.

MCR 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.]

Discussion: The reference to proposed MCR 2.412 reflects that confidentiality would be managed by proposed MCR 2.412.

Conclusion

The Mediation Confidentiality and Standards Committee recommends that the Michigan Supreme Court adopt the rule proposals presented in this report. Further, it recommends that the work of its subcommittee addressing the Mediator Standards of Conduct be continued through a successor committee convened to focus exclusively on the topic of mediator standards of conduct.

UNIFORM MEDIATION ACT

(Last Revised or Amended in 2003)

Drafted by the

NATIONAL CONFERENCE OF COMMISSIONERS
ON UNIFORM STATE LAWS

and by it

APPROVED AND RECOMMENDED FOR ENACTMENT
IN ALL THE STATES

at its

ANNUAL CONFERENCE
MEETING IN ITS ONE-HUNDRED-AND-TENTH YEAR
WHITE SULPHUR SPRINGS, WEST VIRGINIA
AUGUST 10–17, 2001

AMENDMENTS APPROVED

at its

ANNUAL CONFERENCE
MEETING IN ITS ONE-HUNDRED-AND-TWELFTH YEAR
IN WASHINGTON, DC
AUGUST 1-7, 2003

WITHOUT PREFATORY NOTE AND COMMENTS

Approved by the American Bar Association
Philadelphia, Pennsylvania, February 4, 2002

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By

NATIONAL CONFERENCE OF COMMISSIONERS
ON UNIFORM STATE LAWS

December 10, 2003

Uniform Mediation Act (UMA)

Drafted by:

National Conference of Commissioners on Uniform State Laws (NCCUSL)
211 E. Ontario Street, Suite 1300, Chicago, IL 60611, 312-915-0195, www.nccusl.org

Brief description of act:

The **Uniform Mediation Act** provides a statute applicable to all mediations that prescribes precise rules about how the mediation communications of the parties, non-party participants, and mediator may be used. At its core, the act provides that each participant in a mediation proceeding is the holder of a privilege concerning his or her own mediation communications, and may prevent those communication from being disclosed or used in a subsequent formal proceeding. The parties to a mediation hold the additional power to block the disclosure or use of any participant's mediation communication. There are of course exceptions to this broad rule. There is no privilege for ongoing or future crimes, threats of bodily injury, evidence concerning the abuse or neglect where a protective services agency is a participant, and other circumstances. Evidence that is otherwise admissible does not become inadmissible simply because it is referenced or repeated in a mediation communication. The **2003 Amendment to the Uniform Mediation Act** provides for adoption of the UNCITRAL Model Act on Commercial Conciliation by incorporating it by reference in the Uniform Mediation Act. The Model Law was adopted by UNCITRAL in 2002, and provides for the appointment of conciliators (mediators) and the conduct of a conciliation between international commercial disputants. Conciliation and mediation are virtually synonymous for the purposes of these acts.

Questions about UMA?

For further information contact the following persons:

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Notes about NCCUSL Acts:

For information on the specific drafting rules used by NCCUSL, the Conference *Procedural and Drafting Manual* is available online at www.nccusl.org.

Because these are uniform acts, it is important to keep the numbering sequence intact while drafting.

In general, the use of bracketed language in NCCUSL acts indicates that a choice must be made between alternate bracketed language, or that specific language must be inserted into the empty brackets. For example: "An athlete agent who violates Section 14 is guilty of a [misdemeanor] [felony] and, upon conviction, is punishable by []."

A word, number, or phrase, or even an entire section, may be placed in brackets to indicate that the bracketed language is suggested but may be changed to conform to state usage or requirements, or to indicate that the entire section is optional. For example: "An applicant for registration shall submit an application for registration to the [Secretary of State] in a form prescribed by the [Secretary of State]. [An application filed under this section is a public record.] The application must be in the name of an individual, and, except as otherwise provided in subsection (b), signed or otherwise authenticated by the applicant under penalty of perjury."

The sponsor may need to be consulted when dealing with bracketed language.

UNIFORM MEDIATION ACT

SECTION 1. TITLE. This [Act] may be cited as the Uniform Mediation Act.

SECTION 2. DEFINITIONS. In this [Act]:

(1) “Mediation” means a process in which a mediator facilitates communication and negotiation between parties to assist them in reaching a voluntary agreement regarding their dispute.

(2) “Mediation communication” means a statement, whether oral or in a record or verbal or nonverbal, that occurs during a mediation or is made for purposes of considering, conducting, participating in, initiating, continuing, or reconvening a mediation or retaining a mediator.

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

(4) “Nonparty participant” means a person, other than a party or mediator, that participates in a mediation.

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

(6) “Person” means an individual, corporation, business trust, estate, trust, partnership, limited liability company, association, joint venture, government; governmental subdivision, agency, or instrumentality; public corporation, or any other legal or commercial entity.

(7) “Proceeding” means:

(A) a judicial, administrative, arbitral, or other adjudicative process, including related pre-hearing and post-hearing motions, conferences, and discovery; or

(B) a legislative hearing or similar process.

(8) “Record” means information that is inscribed on a tangible medium or that is stored in an electronic or other medium and is retrievable in perceivable form.

(9) “Sign” means:

(A) to execute or adopt a tangible symbol with the present intent to authenticate a record; or

(B) to attach or logically associate an electronic symbol, sound, or process to or with a record with the present intent to authenticate a record.

SECTION 3. SCOPE.

(a) Except as otherwise provided in subsection (b) or (c), this [Act] applies to a mediation in which:

(1) the mediation parties are required to mediate by statute or court or administrative agency rule or referred to mediation by a court, administrative agency, or arbitrator;

(2) the mediation parties and the mediator agree to mediate in a record that demonstrates an expectation that mediation communications will be privileged against disclosure; or

(3) the mediation parties use as a mediator an individual who holds himself or herself out as a mediator or the mediation is provided by a person that holds itself out as providing mediation.

(b) The [Act] does not apply to a mediation:

(1) relating to the establishment, negotiation, administration, or termination of a collective bargaining relationship;

(2) relating to a dispute that is pending under or is part of the processes established by a collective bargaining agreement, except that the [Act] applies to a mediation arising out of a dispute that has been filed with an administrative agency or court;

(3) conducted by a judge who might make a ruling on the case; or

(4) conducted under the auspices of:

(A) a primary or secondary school if all the parties are students or

(B) a correctional institution for youths if all the parties are residents of that institution.

(c) If the parties agree in advance in a signed record, or a record of proceeding reflects agreement by the parties, that all or part of a mediation is not privileged, the privileges under Sections 4 through 6 do not apply to the mediation or part agreed upon. However, Sections 4 through 6 apply to a mediation communication made by a person that has not received actual notice of the agreement before the communication is made.

Legislative Note: To the extent that the Act applies to mediations conducted under the authority of a State's courts, State judiciaries should consider enacting conforming court rules.

**SECTION 4. PRIVILEGE AGAINST DISCLOSURE; ADMISSIBILITY;
DISCOVERY.**

(a) Except as otherwise provided in Section 6, a mediation communication is privileged as provided in subsection (b) and is not subject to discovery or admissible in evidence in a proceeding unless waived or precluded as provided by Section 5.

(b) In a proceeding, the following privileges apply:

(1) A mediation party may refuse to disclose, and may prevent any other person from disclosing, a mediation communication.

(2) A mediator may refuse to disclose a mediation communication, and may prevent any other person from disclosing a mediation communication of the mediator.

(3) A nonparty participant may refuse to disclose, and may prevent any other person from disclosing, a mediation communication of the nonparty participant.

(c) 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.

Legislative Note: The Act does not supersede existing state statutes that make mediators incompetent to testify, or that provide for costs and attorney fees to mediators who are wrongfully subpoenaed. See, e.g., Cal. Evid. Code Section 703.5 (West 1994).

SECTION 5. WAIVER AND PRECLUSION OF PRIVILEGE.

(a) A privilege under Section 4 may be waived in a record or orally during a proceeding if it is expressly waived by all parties to the mediation and:

(1) in the case of the privilege of a mediator, it is expressly waived by the mediator; and

(2) in the case of the privilege of a nonparty participant, it is expressly waived by the nonparty participant.

(b) A person that discloses or makes a representation about a mediation communication which prejudices another person in a proceeding is precluded from asserting a privilege under Section 4, but only to the extent necessary for the person prejudiced to respond to the representation or disclosure.

(c) A person that intentionally uses a mediation to plan, attempt to commit or commit a crime, or to conceal an ongoing crime or ongoing criminal activity is precluded from asserting a privilege under Section 4.

SECTION 6. EXCEPTIONS TO PRIVILEGE.

(a) There is no privilege under Section 4 for a mediation communication that is:

(1) in an agreement evidenced by a record signed by all parties to the agreement;

(2) available to the public under [insert statutory reference to open records act] or made during a session of a mediation which is open, or is required by law to be open, to the public;

(3) a threat or statement of a plan to inflict bodily injury or commit a crime of violence;

(4) intentionally used to plan a crime, attempt to commit or commit a crime, or to conceal an ongoing crime or ongoing criminal activity;

(5) sought or offered to prove or disprove a claim or complaint of professional misconduct or malpractice filed against a mediator;

(6) except as otherwise provided in subsection (c), sought or offered to prove or disprove a claim or complaint of professional misconduct or malpractice filed against a

mediation party, nonparty participant, or representative of a party based on conduct occurring during a mediation; or

(7) sought or offered to prove or disprove abuse, neglect, abandonment, or exploitation in a proceeding in which a child or adult protective services agency is a party, unless the

[Alternative A: [State to insert, for example, child or adult protection] case is referred by a court to mediation and a public agency participates.]

[Alternative B: public agency participates in the [State to insert, for example, child or adult protection] mediation].

(b) There is no privilege under Section 4 if a court, administrative agency, or arbitrator finds, 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, that there is a need for the evidence that substantially outweighs the interest in protecting confidentiality, and that the mediation communication is sought or offered in:

(1) a court proceeding involving a felony [or misdemeanor]; or

(2) except as otherwise provided in subsection (c), a proceeding to prove a claim to rescind or reform or a defense to avoid liability on a contract arising out of the mediation.

(c) A mediator may not be compelled to provide evidence of a mediation communication referred to in subsection (a)(6) or (b)(2).

(d) If a mediation communication is not privileged under subsection (a) or (b), only the portion of the communication necessary for the application of the exception from nondisclosure may be admitted. Admission of evidence under subsection (a) or (b) does not render the

evidence, or any other mediation communication, discoverable or admissible for any other purpose.

Legislative Note: If the enacting state does not have an open records act, the following language in paragraph (2) of subsection (a) needs to be deleted: “available to the public under [insert statutory reference to open records act] or”.

SECTION 7. PROHIBITED MEDIATOR REPORTS.

(a) Except as required in subsection (b), a mediator may not make a report, assessment, evaluation, recommendation, finding, or other communication regarding a mediation to a court, administrative agency, or other authority that may make a ruling on the dispute that is the subject of the mediation.

(b) A mediator may disclose:

(1) whether the mediation occurred or has terminated, whether a settlement was reached, and attendance;

(2) a mediation communication as permitted under Section 6; or

(3) a mediation communication evidencing abuse, neglect, abandonment, or exploitation of an individual to a public agency responsible for protecting individuals against such mistreatment.

(c) A communication made in violation of subsection (a) may not be considered by a court, administrative agency, or arbitrator.

SECTION 8. CONFIDENTIALITY. Unless subject to the [insert statutory references to open meetings act and open records act], mediation communications are confidential to the extent agreed by the parties or provided by other law or rule of this State.

**SECTION 9. MEDIATOR'S DISCLOSURE OF CONFLICTS OF INTEREST;
BACKGROUND.**

(a) Before accepting a mediation, an individual who is requested to serve as a mediator shall:

(1) make an inquiry that is reasonable under the circumstances to determine whether there are any known facts that a reasonable individual would consider likely to affect the impartiality of the mediator, including a financial or personal interest in the outcome of the mediation and an existing or past relationship with a mediation party or foreseeable participant in the mediation; and

(2) disclose any such known fact to the mediation parties as soon as is practical before accepting a mediation.

(b) If a mediator learns any fact described in subsection (a)(1) after accepting a mediation, the mediator shall disclose it as soon as is practicable.

(c) At the request of a mediation party, an individual who is requested to serve as a mediator shall disclose the mediator's qualifications to mediate a dispute.

(d) A person that violates subsection [(a) or (b)][(a), (b), or (g)] is precluded by the violation from asserting a privilege under Section 4.

(e) Subsections (a), (b), [and] (c), [and] [(g)] do not apply to an individual acting as a judge.

(f) This [Act] does not require that a mediator have a special qualification by background or profession.

[(g) A mediator must be impartial, unless after disclosure of the facts required in subsections (a) and (b) to be disclosed, the parties agree otherwise.]

SECTION 10. PARTICIPATION IN MEDIATION. An attorney or other individual designated by a party may accompany the party to and participate in a mediation. A waiver of participation given before the mediation may be rescinded.

SECTION 11. INTERNATIONAL COMMERCIAL MEDIATION.

(a) In this section, “Model Law” means the Model Law on International Commercial Conciliation adopted by the United Nations Commission on International Trade Law on 28 June 2002 and recommended by the United Nations General Assembly in a resolution (A/RES/57/18) dated 19 November 2002, and “international commercial mediation” means an international commercial conciliation as defined in Article 1 of the Model Law.

(b) Except as otherwise provided in subsections (c) and (d), if a mediation is an international commercial mediation, the mediation is governed by the Model Law.

(c) Unless the parties agree in accordance with Section 3(c) of this [Act] that all or part of an international commercial mediation is not privileged, Sections 4, 5, and 6 and any applicable definitions in Section 2 of this [Act] also apply to the mediation and nothing in Article 10 of the Model Law derogates from Sections 4, 5, and 6.

(d) If the parties to an international commercial mediation agree under Article 1, subsection (7), of the Model Law that the Model Law does not apply, this [Act] applies.

Legislative Note. The UNCITRAL Model Law on International Commercial Conciliation may be found at www.uncitral.org/en-index.htm. Important comments on interpretation are included in the Draft Guide to Enactment and Use of UNCITRAL Model Law on International Commercial Conciliation. The States should note the Draft Guide in a Legislative Note to the Act. This is especially important with respect to interpretation of Article 9 of the Model Law.

SECTION 12. RELATION TO ELECTRONIC SIGNATURES IN GLOBAL AND NATIONAL COMMERCE ACT. This [Act] modifies, limits, or supersedes the federal Electronic Signatures in Global and National Commerce Act, 15 U.S.C. Section 7001 et seq., but this [Act] does not modify, limit, or supersede Section 101(c) of that Act or authorize electronic delivery of any of the notices described in Section 103(b) of that Act.

SECTION 13. UNIFORMITY OF APPLICATION AND CONSTRUCTION. In applying and construing this [Act], consideration should be given to the need to promote uniformity of the law with respect to its subject matter among States that enact it.

SECTION 14. SEVERABILITY CLAUSE. If any provision of this [Act] or its application to any person or circumstance is held invalid, the invalidity does not affect other provisions or applications of this [Act] which can be given effect without the invalid provision or application, and to this end the provisions of this [Act] are severable.

SECTION 15. EFFECTIVE DATE. This [Act] takes effect

SECTION 16. REPEALS. The following acts and parts of acts are hereby repealed:

(1)

(2)

(3)

SECTION 17. APPLICATION TO EXISTING AGREEMENTS OR REFERRALS.

(a) This [Act] governs a mediation pursuant to a referral or an agreement to mediate made on or after [the effective date of this [Act]].

(b) On or after [a delayed date], this [Act] governs an agreement to mediate whenever made.

APPENDIX A

(Model Law as adopted by the United Nations Commission on International Trade Law -- UNCITRAL at its 35th session in New York on 28 June 2002 and approved by the United Nations General Assembly on November 19, 2002)

UNCITRAL Model Law on International Commercial Conciliation

Article 1. Scope of application and definitions

- (1) This Law applies to international¹ commercial² conciliation.
- (2) For the purposes of this Law, “conciliator” means a sole conciliator or two or more conciliators, as the case may be.
- (3) For the purposes of this Law, “conciliation” means a process, whether referred to by the expression conciliation, mediation or an expression of similar import, whereby parties request a third person or persons (“the conciliator”) to assist them in their attempt to reach an amicable settlement of their dispute arising out of or relating to a contractual or other legal relationship. The conciliator does not have the authority to impose upon the parties a solution to the dispute.
- (4) A conciliation is international if:
 - (a) The parties to an agreement to conciliate have, at the time of the conclusion of that agreement, their places of business in different States; or
 - (b) The State in which the parties have their places of business is different from either:
 - (i) The State in which a substantial part of the obligations of the commercial relationship is to be performed; or
 - (ii) The State with which the subject matter of the dispute is most closely connected.

¹ States wishing to enact this Model Law to apply to domestic as well as international conciliation may wish to consider the following changes to the text:

- Delete the word “international” in paragraph (1) of article 1; and
- Delete paragraphs (4), (5) and (6) of article 1.

² The term “commercial” should be given a wide interpretation so as to cover matters arising from all relationships of a commercial nature, whether contractual or not. Relationships of a commercial nature include, but are not limited to, the following transactions: any trade transaction for the supply or exchange of goods or services; distribution agreement; commercial representation or agency; factoring; leasing; construction of works; consulting; engineering; licensing; investment; financing; banking; insurance; exploitation agreement or concession; joint venture and other forms of industrial or business cooperation; carriage of goods or passengers by air, sea, rail or road.

(5) For the purposes of this article:

(a) If a party has more than one place of business, the place of business is that which has the closest relationship to the agreement to conciliate;

(b) If a party does not have a place of business, reference is to be made to the party's habitual residence.

(6) This Law also applies to a commercial conciliation when the parties agree that the conciliation is international or agree to the applicability of this Law.

(7) The parties are free to agree to exclude the applicability of this Law.

(8) Subject to the provisions of paragraph (9) of this article, this Law applies irrespective of the basis upon which the conciliation is carried out, including agreement between the parties whether reached before or after a dispute has arisen, an obligation established by law, or a direction or suggestion of a court, arbitral tribunal or competent governmental entity.

(9) This Law does not apply to:

(a) Cases where a judge or an arbitrator, in the course of judicial or arbitral proceedings, attempts to facilitate a settlement; and

(b) [...].

Article 2. Interpretation

(1) In the interpretation of this Law, regard is to be had to its international origin and to the need to promote uniformity in its application and the observance of good faith.

(2) Questions concerning matters governed by this Law which are not expressly settled in it are to be settled in conformity with the general principles on which this Law is based.

Article 3. Variation by agreement

Except for the provisions of article 2 and article 6, paragraph (3), the parties may agree to exclude or vary any of the provisions of this Law.

Article 4. Commencement of conciliation proceedings³

(1) Conciliation proceedings in respect of a dispute that has arisen commence on the day on which the parties to that dispute agree to engage in conciliation proceedings.

(2) If a party that invited another party to conciliate does not receive an acceptance of the invitation within thirty days from the day on which the invitation was sent, or within such other period of time as specified in the invitation, the party may elect to treat this as a rejection of the invitation to conciliate.

Article 5. Number and appointment of conciliators

(1) There shall be one conciliator, unless the parties agree that there shall be two or more conciliators.

(2) The parties shall endeavour to reach agreement on a conciliator or conciliators, unless a different procedure for their appointment has been agreed upon.

(3) Parties may seek the assistance of an institution or person in connection with the appointment of conciliators. In particular:

(a) A party may request such an institution or person to recommend suitable persons to act as conciliator; or

(b) The parties may agree that the appointment of one or more conciliators be made directly by such an institution or person.

(4) In recommending or appointing individuals to act as conciliator, the institution or person shall have regard to such considerations as are likely to secure the appointment of an independent and impartial conciliator and, where appropriate, shall take into account the advisability of appointing a conciliator of a nationality other than the nationalities of the parties.

(5) When a person is approached in connection with his or her possible appointment as conciliator, he or she shall disclose any circumstances likely to give rise to justifiable doubts as to his or her impartiality or independence. A conciliator, from the time of his or her appointment

³ The following text is suggested for States that might wish to adopt a provision on the suspension of the limitation period:

Article X. Suspension of limitation period

(1) When the conciliation proceedings commence, the running of the limitation period regarding the claim that is the subject matter of the conciliation is suspended.

(2) Where the conciliation proceedings have terminated without a settlement agreement, the limitation period resumes running from the time the conciliation ended without a settlement agreement.

and throughout the conciliation proceedings, shall without delay disclose any such circumstances to the parties unless they have already been informed of them by him or her.

Article 6. Conduct of conciliation

(1) The parties are free to agree, by reference to a set of rules or otherwise, on the manner in which the conciliation is to be conducted.

(2) Failing agreement on the manner in which the conciliation is to be conducted, the conciliator may conduct the conciliation proceedings in such a manner as the conciliator considers appropriate, taking into account the circumstances of the case, any wishes that the parties may express and the need for a speedy settlement of the dispute.

(3) In any case, in conducting the proceedings, the conciliator shall seek to maintain fair treatment of the parties and, in so doing, shall take into account the circumstances of the case.

(4) The conciliator may, at any stage of the conciliation proceedings, make proposals for a settlement of the dispute.

Article 7. Communication between conciliator and parties

The conciliator may meet or communicate with the parties together or with each of them separately.

Article 8. Disclosure of information

When the conciliator receives information concerning the dispute from a party, the conciliator may disclose the substance of that information to any other party to the conciliation. However, when a party gives any information to the conciliator, subject to a specific condition that it be kept confidential, that information shall not be disclosed to any other party to the conciliation.

Article 9. Confidentiality

Unless otherwise agreed by the parties, all information relating to the conciliation proceedings shall be kept confidential, except where disclosure is required under the law or for the purposes of implementation or enforcement of a settlement agreement.

Article 10. Admissibility of evidence in other proceedings

(1) A party to the conciliation proceedings, the conciliator and any third person, including those involved in the administration of the conciliation proceedings, shall not in arbitral, judicial or similar proceedings rely on, introduce as evidence or give testimony or evidence regarding any of the following:

(a) An invitation by a party to engage in conciliation proceedings or the fact that a party was willing to participate in conciliation proceedings;

(b) Views expressed or suggestions made by a party in the conciliation in respect of a possible settlement of the dispute;

(c) Statements or admissions made by a party in the course of the conciliation proceedings;

(d) Proposals made by the conciliator;

(e) The fact that a party had indicated its willingness to accept a proposal for settlement made by the conciliator;

(f) A document prepared solely for purposes of the conciliation proceedings.

(2) Paragraph (1) of this article applies irrespective of the form of the information or evidence referred to therein.

(3) The disclosure of the information referred to in paragraph (1) of this article shall not be ordered by an arbitral tribunal, court or other competent governmental authority and, if such information is offered as evidence in contravention of paragraph (1) of this article, that evidence shall be treated as inadmissible. Nevertheless, such information may be disclosed or admitted in evidence to the extent required under the law or for the purposes of implementation or enforcement of a settlement agreement.

(4) The provisions of paragraphs (1), (2) and (3) of this article apply whether or not the arbitral, judicial or similar proceedings relate to the dispute that is or was the subject matter of the conciliation proceedings.

(5) Subject to the limitations of paragraph (1) of this article, evidence that is otherwise admissible in arbitral or judicial or similar proceedings does not become inadmissible as a consequence of having been used in a conciliation.

Article 11. Termination of conciliation proceedings

The conciliation proceedings are terminated:

(a) By the conclusion of a settlement agreement by the parties, on the date of the agreement;

(b) By a declaration of the conciliator, after consultation with the parties, to the effect that further efforts at conciliation are no longer justified, on the date of the declaration;

(c) By a declaration of the parties addressed to the conciliator to the effect that the conciliation proceedings are terminated, on the date of the declaration; or

(d) By a declaration of a party to the other party or parties and the conciliator, if appointed, to the effect that the conciliation proceedings are terminated, on the date of the declaration.

Article 12. Conciliator acting as arbitrator

Unless otherwise agreed by the parties, the conciliator shall not act as an arbitrator in respect of a dispute that was or is the subject of the conciliation proceedings or in respect of another dispute that has arisen from the same contract or legal relationship or any related contract or legal relationship.

Article 13. Resort to arbitral or judicial proceedings

Where the parties have agreed to conciliate and have expressly undertaken not to initiate during a specified period of time or until a specified event has occurred arbitral or judicial proceedings with respect to an existing or future dispute, such an undertaking shall be given effect by the arbitral tribunal or the court until the terms of the undertaking have been complied with, except to the extent necessary for a party, in its opinion, to preserve its rights. Initiation of such proceedings is not of itself to be regarded as a waiver of the agreement to conciliate or as a termination of the conciliation proceedings.

Article 14. Enforceability of settlement agreement⁴

If the parties conclude an agreement settling a dispute, that settlement agreement is binding and enforceable ... *[the enacting State may insert a description of the method of enforcing settlement agreements or refer to provisions governing such enforcement]*.

⁴ When implementing the procedure for enforcement of settlement agreements, an enacting State may consider the possibility of such a procedure being mandatory.

**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.

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Mediation Communications Disclosure Rule
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Title V JUDICIAL BRANCH

Chapter 44 MEDIATION ALTERNATIVES TO JUDICIAL ACTION

44.401 Mediation Confidentiality and Privilege Act.--Sections 44.401-44.406 may be known by the popular name the "Mediation Confidentiality and Privilege Act."

History.--s. 4, ch. 2004-291.

44.402 Scope.--

(1) Except as otherwise provided, ss. 44.401-44.406 apply to any mediation:

- (a) Required by statute, court rule, agency rule or order, oral or written case-specific court order, or court administrative order;
- (b) Conducted under ss. 44.401-44.406 by express agreement of the mediation parties; or
- (c) Facilitated by a mediator certified by the Supreme Court, unless the mediation parties expressly agree not to be bound by ss. 44.401-44.406.

(2) Notwithstanding any other provision, the mediation parties may agree in writing that any or all of s. 44.405(1), s. 44.405(2), or s. 44.406 will not apply to all or part of a mediation proceeding.

History.--s. 4, ch. 2004-291.

44.403 Mediation Confidentiality and Privilege Act; definitions.--As used in ss. 44.401-44.406, the term:

- (1) "Mediation communication" means an oral or written statement, or nonverbal conduct intended to make an assertion, by or to a mediation participant made during the course of a mediation, or prior to mediation if made in furtherance of a mediation. The commission of a crime during a mediation is not a mediation communication.
- (2) "Mediation participant" means a mediation party or a person who attends a mediation in person or by telephone, videoconference, or other electronic means.
- (3) "Mediation party" or "party" means a person participating directly, or through a designated representative, in a mediation and a person who:
 - (a) Is a named party;
 - (b) Is a real party in interest; or

(c) Would be a named party or real party in interest if an action relating to the subject matter of the mediation were brought in a court of law.

(4) "Mediator" means a neutral, impartial third person who facilitates the mediation process. The mediator's role is to reduce obstacles to communication, assist in identifying issues, explore alternatives, and otherwise facilitate voluntary agreements to resolve disputes, without prescribing what the resolution must be.

(5) "Subsequent proceeding" means an adjudicative process that follows a mediation, including related discovery.

History.--s. 4, ch. 2004-291.

44.404 Mediation; duration.--

(1) A court-ordered mediation begins when an order is issued by the court and ends when:

(a) A partial or complete settlement agreement, intended to resolve the dispute and end the mediation, is signed by the parties and, if required by law, approved by the court;

(b) The mediator declares an impasse by reporting to the court or the parties the lack of an agreement;

(c) The mediation is terminated by court order, court rule, or applicable law; or

(d) The mediation is terminated, after party compliance with the court order to appear at mediation, by:

1. Agreement of the parties; or

2. One party giving written notice to all other parties in a multiparty mediation that the one party is terminating its participation in the mediation. Under this circumstance, the termination is effective only for the withdrawing party.

(2) In all other mediations, the mediation begins when the parties agree to mediate or as required by agency rule, agency order, or statute, whichever occurs earlier, and ends when:

(a) A partial or complete settlement agreement, intended to resolve the dispute and end the mediation, is signed by the parties and, if required by law, approved by the court;

(b) The mediator declares an impasse to the parties;

(c) The mediation is terminated by court order, court rule, or applicable law; or

(d) The mediation is terminated by:

1. Agreement of the parties; or
2. One party giving notice to all other parties in a multiparty mediation that the one party is terminating its participation in the mediation. Under this circumstance, the termination is effective only for the withdrawing party.

History.--s. 4, ch. 2004-291.

44.405 Confidentiality; privilege; exceptions.--

(1) Except as provided in this section, all mediation communications shall be confidential. A mediation participant shall not disclose a mediation communication to a person other than another mediation participant or a participant's counsel. A violation of this section may be remedied as provided by s. 44.406. If the mediation is court ordered, a violation of this section may also subject the mediation participant to sanctions by the court, including, but not limited to, costs, attorney's fees, and mediator's fees.

(2) A mediation party has a privilege to refuse to testify and to prevent any other person from testifying in a subsequent proceeding regarding mediation communications.

(3) If, in a mediation involving more than two parties, a party gives written notice to the other parties that the party is terminating its participation in the mediation, the party giving notice shall have a privilege to refuse to testify and to prevent any other person from testifying in a subsequent proceeding regarding only those mediation communications that occurred prior to the delivery of the written notice of termination of mediation to the other parties.

(4)(a) Notwithstanding subsections (1) and (2), there is no confidentiality or privilege attached to a signed written agreement reached during a mediation, unless the parties agree otherwise, or for any mediation communication:

1. For which the confidentiality or privilege against disclosure has been waived by all parties;
2. That is willfully used to plan a crime, commit or attempt to commit a crime, conceal ongoing criminal activity, or threaten violence;
3. That requires a mandatory report pursuant to chapter 39 or chapter 415 solely for the purpose of making the mandatory report to the entity requiring the report;
4. Offered to report, prove, or disprove professional malpractice occurring during the mediation, solely for the purpose of the professional malpractice proceeding;
5. Offered for the limited purpose of establishing or refuting legally recognized grounds for voiding or reforming a settlement agreement reached during a mediation; or
6. Offered to report, prove, or disprove professional misconduct occurring during the mediation, solely for the internal use of the body conducting the investigation of the conduct.

(b) A mediation communication disclosed under any provision of subparagraph (a)3., subparagraph (a)4., subparagraph (a)5., or subparagraph (a)6. remains confidential and is not discoverable or admissible for any other purpose, unless otherwise permitted by this section.

(5) Information that is otherwise admissible or subject to discovery does not become inadmissible or protected from discovery by reason of its disclosure or use in mediation.

(6) A party that discloses or makes a representation about a privileged mediation communication waives that privilege, but only to the extent necessary for the other party to respond to the disclosure or representation.

History.--s. 4, ch. 2004-291.