

Subchapter 2.400 Pretrial Procedure; Alternative Dispute Resolution; Offers of Judgment; Settlements

Rule 2.401 Pretrial Procedures; Conferences; Scheduling Orders

(A) Time; Discretion of Court. At any time after the commencement of the action, on its own initiative or the request of a party, the court may direct that the attorneys for the parties, alone or with the parties, appear for a conference. The court shall give reasonable notice of the scheduling of a conference. More than one conference may be held in an action.

(B) Early Scheduling Conference and Order.

(1) Early Scheduling Conference. The court may direct that an early scheduling conference be held. In addition to those considerations enumerated in subrule (C)(1), during this conference the court should consider:

(a) whether jurisdiction and venue are proper or whether the case is frivolous,

(b) whether to refer the case to an alternative dispute resolution procedure under MCR 2.410,

(c) the complexity of a particular case and enter a scheduling order setting time limitations for the processing of the case and establishing dates when future actions should begin or be completed in the case, and

(d) discovery, preservation, and claims of privilege of electronically stored information.

(2) Scheduling Order.

(a) At an early scheduling conference under subrule (B)(1), a pretrial conference under subrule (C), or at such other time as the court concludes that such an order would facilitate the progress of the case, the court shall establish times for events the court deems appropriate, including

(i) the initiation or completion of an ADR process,

(ii) the amendment of pleadings, adding of parties, or filing of motions,

(iii) the completion of discovery,

(iv) the exchange of witness lists under subrule (I), and

(v) the scheduling of a pretrial conference, a settlement conference, or trial.

More than one such order may be entered in a case.

(b) The scheduling of events under this subrule shall take into consideration the nature and complexity of the case, including the issues involved, the number and location of parties and potential witnesses, including experts, the extent of expected and necessary discovery, and the availability of reasonably certain trial dates.

(c) The scheduling order also may include provisions concerning discovery of electronically stored information, any agreements the parties reach for asserting claims of privilege or of protection as trial-preparation material after production, preserving discoverable information, and the form in which electronically stored information shall be produced.

(d) Whenever reasonably practical, the scheduling of events under this subrule shall be made after meaningful consultation with all counsel of record.

(i) If a scheduling order is entered under this subrule in a manner that does not permit meaningful advance consultation with counsel, within 14 days after entry of the order, a party may file and serve a written request for amendment of the order detailing the reasons why the order should be amended.

(ii) Upon receiving such a written request, the court shall reconsider the order in light of the objections raised by the parties. Whether the reconsideration occurs at a conference or in some other manner, the court must either enter a new scheduling order or notify the parties in writing that the court declines to amend the order. The court must schedule a conference, enter the new order, or send the written notice, within 14 days after receiving the request.

(iii) The submission of a request pursuant to this subrule, or the failure to submit such a request, does not preclude a party from filing a motion to modify a scheduling order.

(C) Pretrial Conference; Scope.

(1) At a conference under this subrule, in addition to the matters listed in subrule (B)(1), the court and the attorneys for the parties may consider any matters that will facilitate the fair and expeditious disposition of the action, including:

- (a) the simplification of the issues;
- (b) the amount of time necessary for discovery;
- (c) the necessity or desirability of amendments to the pleadings;
- (d) the possibility of obtaining admissions of fact and of documents to avoid unnecessary proof;
- (e) the limitation of the number of expert witnesses;
- (f) the consolidation of actions for trial, the separation of issues, and the order of trial when some issues are to be tried by a jury and some by the court;
- (g) the possibility of settlement;

- (h) whether mediation, case evaluation, or some other form of alternative dispute resolution would be appropriate for the case, and what mechanisms are available to provide such services;
- (i) the identity of the witnesses to testify at trial;
- (j) the estimated length of trial;
- (k) whether all claims arising out of the transaction or occurrence that is the subject matter of the action have been joined as required by MCR 2.203(A);
- (l) other matters that may aid in the disposition of the action.

(2) Conference Order. If appropriate, the court shall enter an order incorporating agreements reached and decisions made at the conference.

(D) Order for Trial Briefs. The court may direct the attorneys to furnish trial briefs as to any or all of the issues involved in the action.

(E) Appearance of Counsel. The attorneys attending the conference shall be thoroughly familiar with the case and have the authority necessary to fully participate in the conference. The court may direct that the attorneys who intend to try the case attend the conference.

(F) Presence of Parties at Conference. If the court anticipates meaningful discussion of settlement, the court may direct that the parties to the action, agents of parties, representatives of lienholders, or representatives of insurance carriers, or other persons:

- (1) be present at the conference or be immediately available at the time of the conference; and
- (2) have information and authority adequate for responsible and effective participation in the conference for all purposes, including settlement.

The court's order may require the availability of a specified individual; provided, however, that the availability of a substitute who has the information and authority required by subrule (F)(2) shall constitute compliance with the order.

The court's order may specify whether the availability is to be in person or by telephone.

This subrule does not apply to an early scheduling conference held pursuant to subrule (B).

(G) Failure to Attend or to Participate.

- (1) Failure of a party or the party's attorney or other representative to attend a scheduled conference or to have information and authority adequate for responsible and effective participation in the conference for all purposes, including settlement, as directed by the court, may constitute a default to which MCR 2.603 is applicable or a ground for dismissal under MCR 2.504(B).
- (2) The court shall excuse a failure to attend a conference or to participate as directed by the court, and shall enter a just order other than one of default or dismissal, if the court finds that

- (a) entry of an order of default or dismissal would cause manifest injustice;
or
- (b) the failure was not due to the culpable negligence of the party or the party's attorney.

The court may condition the order on the payment by the offending party or attorney of reasonable expenses as provided in MCR 2.313(B)(2).

(H) Conference After Discovery. If the court finds at a pretrial conference held after the completion of discovery that due to a lack of reasonable diligence by a party the action is not ready for trial, the court may enter an appropriate order to facilitate preparation of the action for trial and may require the offending party to pay the reasonable expenses, including attorney fees, caused by the lack of diligence.

(I) Witness Lists.

(1) No later than the time directed by the court under subrule (B)(2)(a), the parties shall file and serve witness lists. The witness list must include:

- (a) the name of each witness, and the witness' address, if known; however, records custodians whose testimony would be limited to providing the foundation for the admission of records may be identified generally;
- (b) whether the witness is an expert, and the field of expertise.

(2) The court may order that any witness not listed in accordance with this rule will be prohibited from testifying at trial except upon good cause shown.

(3) This subrule does not prevent a party from obtaining an earlier disclosure of witness information by other discovery means as provided in these rules.

Rule 2.402 Use of Communication Equipment

(A) Definition. "Communication equipment" means a conference telephone or other electronic device that permits all those appearing or participating to hear and speak to each other.

(B) Use. A court may, on its own initiative or on the written request of a party, direct that communication equipment be used for a motion hearing, pretrial conference, scheduling conference, or status conference. The court must give notice to the parties before directing on its own initiative that communication equipment be used. A party wanting to use communication equipment must submit a written request to the court at least 7 days before the day on which such equipment is sought to be used, and serve a copy on the other parties, unless good cause is shown to waive this requirement. The requesting party also must provide a copy of the request to the office of the judge to whom the request is directed. The court may, with the consent of all parties or for good cause, direct that the testimony of a witness be taken through communication equipment. A verbatim record of the proceeding must still be made.

(C) Burden of Expense. The party who initiates the use of communication equipment shall pay the cost for its use, unless the court otherwise directs. If the use of communication equipment is initiated by the court, the cost for its use is to be shared equally, unless the court otherwise directs.

Rule 2.403 Case Evaluation

(A) Scope and Applicability of Rule.

- (1) A court may submit to case evaluation any civil action in which the relief sought is primarily money damages or division of property.
- (2) Case evaluation of tort cases filed in circuit court is mandatory beginning with actions filed after the effective dates of Chapters 49 and 49A of the Revised Judicature Act, as added by 1986 PA 178.
- (3) A court may exempt claims seeking equitable relief from case evaluation for good cause shown on motion or by stipulation of the parties if the court finds that case evaluation of such claims would be inappropriate.
- (4) Cases filed in district court may be submitted to case evaluation under this rule. The time periods set forth in subrules (B)(1), (G)(1), (L)(1) and (L)(2) may be shortened at the discretion of the district judge to whom the case is assigned.

(B) Selection of Cases.

- (1) The judge to whom an action is assigned or the chief judge may select it for case evaluation by written order after the filing of the answer
 - (a) on written stipulation by the parties,
 - (b) on written motion by a party, or
 - (c) on the judge's own initiative.
- (2) Selection of an action for case evaluation has no effect on the normal progress of the action toward trial.

(C) Objections to Case Evaluation.

- (1) To object to case evaluation, a party must file a written motion to remove from case evaluation and a notice of hearing of the motion and serve a copy on the attorneys of record and the ADR clerk within 14 days after notice of the order assigning the action to case evaluation. The motion must be set for hearing within 14 days after it is filed, unless the court orders otherwise.
- (2) A timely motion must be heard before the case is submitted to case evaluation.

(D) Case Evaluation Panel.

- (1) Case evaluation panels shall be composed of 3 persons.
- (2) The procedure for selecting case evaluation panels is as provided in MCR 2.404.
- (3) A judge may be selected as a member of a case evaluation panel, but may not preside at the trial of any action in which he or she served as a case evaluator.
- (4) A case evaluator may not be called as a witness at trial.

(E) Disqualification of Case Evaluators. The rule for disqualification of a case evaluator is the same as that provided in MCR 2.003 for the disqualification of a judge.

(F) ADR Clerk. The court shall designate the ADR clerk specified under MCR 2.410, or some other person, to administer the case evaluation program. In this rule and MCR 2.404, "ADR clerk" refers to the person so designated.

(G) Scheduling Case Evaluation Hearing.

(1) The ADR clerk shall set a time and place for the hearing and send notice to the case evaluators and the attorneys at least 42 days before the date set.

(2) Adjournments may be granted only for good cause, in accordance with MCR 2.503.

(H) Fees.

(1) Each party must send a check for \$75 made payable in the manner and within the time specified in the notice of the case evaluation hearing. However, if a judge is a member of the panel, the fee is \$50. If the order for case evaluation directs that payment be made to the ADR clerk, the ADR clerk shall arrange payment to the case evaluators. Except by stipulation and court order, the parties may not make any other payment of fees or expenses to the case evaluators than that provided in this subrule.

(2) Only a single fee is required of each party, even where there are counterclaims, cross-claims, or third-party claims. A person entitled to a fee waiver under MCR 2.002 is entitled to a waiver of fees under this rule.

(3) If one claim is derivative of another (e.g., husband-wife, parent-child) they must be treated as a single claim, with one fee to be paid and a single award made by the case evaluators.

(4) Fees paid pursuant to subrule (H) shall be refunded to the parties if

(a) the court sets aside the order submitting the case to case evaluation or on its own initiative adjourns the case evaluation hearing, or

(b) the parties notify the ADR clerk in writing at least 14 days before the case evaluation hearing of the settlement, dismissal, or entry of judgment disposing of the action, or of an order of adjournment on stipulation or the motion of a party.

If case evaluation is rescheduled at a later time, the fee provisions of subrule (H) apply regardless of whether previously paid fees have been refunded.

(5) Fees paid pursuant to subrule (H) shall not be refunded to the parties if

(a) in the case of an adjournment, the adjournment order sets a new date for case evaluation and the fees are applied to the new date, or

(b) the request for and granting of adjournment is made within 14 days of the scheduled case evaluation, unless waived for good cause.

Penalties for late filing of papers under subrule (I)(2) are not to be refunded.

(I) Submission of Summary and Supporting Documents.

(1) Unless otherwise provided in the notice of hearing, at least 14 days before the hearing, each party shall

(a) serve a copy of the case evaluation summary and supporting documents in accordance with MCR 2.107, and

(b) file a proof of service and three copies of a case evaluation summary and supporting documents with the ADR clerk.

(2) Each failure to timely file and serve the materials identified in subrule (1) and each subsequent filing of supplemental materials within 14 days of the hearing, subjects the offending attorney or party to a \$150 penalty to be paid in the manner specified in the notice of the case evaluation hearing. An offending attorney shall not charge the penalty to the client, unless the client agreed in writing to be responsible for the penalty.

(3) The case evaluation summary shall consist of a concise summary setting forth that party's factual and legal position on issues presented by the action. Except as permitted by the court, the summary shall not exceed 20 pages double spaced, exclusive of attachments. Quotations and footnotes may be single spaced. At least one inch margins must be used, and printing shall not be smaller than 12-point font.

(J) Conduct of Hearing.

(1) A party has the right, but is not required, to attend a case evaluation hearing. If scars, disfigurement, or other unusual conditions exist, they may be demonstrated to the panel by a personal appearance; however, no testimony will be taken or permitted of any party.

(2) The rules of evidence do not apply before the case evaluation panel. Factual information having a bearing on damages or liability must be supported by documentary evidence, if possible.

(3) Oral presentation shall be limited to 15 minutes per side unless multiple parties or unusual circumstances warrant additional time. Information on settlement negotiations not protected under MCR 2.412 and applicable insurance policy limits shall be disclosed at the request of the case evaluation panel.

(4) Statements by the attorneys and the briefs or summaries are not admissible in any court or evidentiary proceeding.

(5) Counsel or the parties may not engage in ex parte communications with the case evaluators concerning the action prior to the hearing. After the evaluation, the case evaluators need not respond to inquiries by the parties or counsel regarding the proceeding or the evaluation.

(K) Decision.

(1) Within 14 days after the hearing, the panel will make an evaluation and notify the attorney for each party of its evaluation in writing. If an award is not unanimous, the evaluation must so indicate.

(2) Except as provided in subrule (H)(3), the evaluation must include a separate award as to each plaintiff's claim against each defendant and as to each cross-claim, counterclaim, or third-party claim that has been filed in the action. For the purpose of this subrule, all such claims filed by any one party against any other party shall be treated as a single claim.

(3) The evaluation may not include a separate award on any claim for equitable relief, but the panel may consider such claims in determining the amount of an award.

(4) In a tort case to which MCL 600.4915(2) or MCL 600.4963(2) applies, if the panel unanimously finds that a party's action or defense as to any other party is frivolous, the panel shall so indicate on the evaluation. For the purpose of this rule, an action or defense is "frivolous" if, as to all of a plaintiff's claims or all of a defendant's defenses to liability, at least 1 of the following conditions is met:

(a) The party's primary purpose in initiating the action or asserting the defense was to harass, embarrass, or injure the opposing party.

(b) The party had no reasonable basis to believe that the facts underlying that party's legal position were in fact true.

(c) The party's legal position was devoid of arguable legal merit.

(5) In an action alleging medical malpractice to which MCL 600.4915 applies, the evaluation must include a specific finding that

(a) there has been a breach of the applicable standard of care,

(b) there has not been a breach of the applicable standard of care, or

(c) reasonable minds could differ as to whether there has been a breach of the applicable standard of care.

(L) Acceptance or Rejection of Evaluation.

(1) Each party shall file a written acceptance or rejection of the panel's evaluation with the ADR clerk within 28 days after service of the panel's evaluation. Even if there are separate awards on multiple claims, the party must either accept or reject the evaluation in its entirety as to a particular opposing party. The failure to file a written acceptance or rejection within 28 days constitutes rejection.

(2) There may be no disclosure of a party's acceptance or rejection of the panel's evaluation until the expiration of the 28-day period, at which time the ADR clerk shall send a notice indicating each party's acceptance or rejection of the panel's evaluation.

(3) In case evaluations involving multiple parties the following rules apply:

(a) Each party has the option of accepting all of the awards covering the claims by or against that party or of accepting some and rejecting others.

However, as to any particular opposing party, the party must either accept or reject the evaluation in its entirety.

(b) A party who accepts all of the awards may specifically indicate that he or she intends the acceptance to be effective only if

(i) all opposing parties accept, and/or

(ii) the opposing parties accept as to specified coparties.

If such a limitation is not included in the acceptance, an accepting party is deemed to have agreed to entry of judgment, or dismissal as provided in subrule (M)(1), as to that party and those of the opposing parties who accept, with the action to continue between the accepting party and those opposing parties who reject.

(c) If a party makes a limited acceptance under subrule (L)(3)(b) and some of the opposing parties accept and others reject, for the purposes of the cost provisions of subrule (O) the party who made the limited acceptance is deemed to have rejected as to those opposing parties who accept.

(M) Effect of Acceptance of Evaluation.

(1) If all the parties accept the panel's evaluation, judgment will be entered in accordance with the evaluation, unless the amount of the award is paid within 28 days after notification of the acceptances, in which case the court shall dismiss the action with prejudice. The judgment or dismissal shall be deemed to dispose of all claims in the action and includes all fees, costs, and interest to the date it is entered, except for cases involving rights to personal protection insurance benefits under MCL 500.3101 *et seq.*, for which judgment or dismissal shall not be deemed to dispose of claims that have not accrued as of the date of the case evaluation hearing.

(2) If only a part of an action has been submitted to case evaluation pursuant to subrule (A)(3) and all of the parties accept the panel's evaluation, the court shall enter an order disposing of only those claims.

(3) In a case involving multiple parties, judgment, or dismissal as provided in subrule (1), shall be entered as to those opposing parties who have accepted the portions of the evaluation that apply to them.

(N) Proceedings After Rejection.

(1) If all or part of the evaluation of the case evaluation panel is rejected, the action proceeds to trial in the normal fashion.

(2) If a party's claim or defense was found to be frivolous under subrule (K)(4), that party may request that the court review the panel's finding by filing a motion within 14 days after the ADR clerk sends notice of the rejection of the case evaluation award.

(a) The motion shall be submitted to the court on the case evaluation summaries and documents that were considered by the case evaluation panel. No other exhibits or testimony may be submitted. However, oral argument on the motion shall be permitted.

(b) After reviewing the materials submitted, the court shall determine whether the action or defense is frivolous.

(c) If the court agrees with the panel's determination, the provisions of subrule (N)(3) apply, except that the bond must be filed within 28 days after the entry of the court's order determining the action or defense to be frivolous.

(d) The judge who hears a motion under this subrule may not preside at a nonjury trial of the action.

(3) Except as provided in subrule (2), if a party's claim or defense was found to be frivolous under subrule (K)(4), that party shall post a cash or surety bond, pursuant to MCR 3.604, in the amount of \$5,000 for each party against whom the action or defense was determined to be frivolous.

(a) The bond must be posted within 56 days after the case evaluation hearing or at least 14 days before trial, whichever is earlier.

(b) If a surety bond is filed, an insurance company that insures the defendant against a claim made in the action may not act as the surety.

(c) If the bond is not posted as required by this rule, the court shall dismiss a claim found to have been frivolous, and enter the default of a defendant whose defense was found to be frivolous. The action shall proceed to trial as to the remaining claims and parties, and as to the amount of damages against a defendant in default.

(d) If judgment is entered against the party who posted the bond, the bond shall be used to pay any costs awarded against that party by the court under any applicable law or court rule. MCR 3.604 applies to proceedings to enforce the bond.

(4) The ADR clerk shall place a copy of the case evaluation and the parties' acceptances and rejections in a sealed envelope for filing with the clerk of the court. In a nonjury action, the envelope may not be opened and the parties may not reveal the amount of the evaluation until the judge has rendered judgment.

(O) Rejecting Party's Liability for Costs.

(1) If a party has rejected an evaluation and the action proceeds to verdict, that party must pay the opposing party's actual costs unless the verdict is more favorable to the rejecting party than the case evaluation. However, if the opposing party has also rejected the evaluation, a party is entitled to costs only if the verdict is more favorable to that party than the case evaluation.

(2) For the purpose of this rule "verdict" includes,

(a) a jury verdict,

(b) a judgment by the court after a nonjury trial,

(c) a judgment entered as a result of a ruling on a motion after rejection of the case evaluation.

(3) For the purpose of subrule (O)(1), a verdict must be adjusted by adding to it assessable costs and interest on the amount of the verdict from the filing of the complaint to the date of the case evaluation, and, if applicable, by making the adjustment of future damages as provided by MCL 600.6306. After this adjustment, the verdict is considered more favorable to a defendant if it is more than 10 percent below the evaluation, and is considered more favorable to the plaintiff if it is more than 10 percent above the evaluation. If the evaluation was zero, a verdict finding that a defendant is not liable to the plaintiff shall be deemed more favorable to the defendant.

(4) In cases involving multiple parties, the following rules apply:

(a) Except as provided in subrule (O)(4)(b), in determining whether the verdict is more favorable to a party than the case evaluation, the court shall consider only the amount of the evaluation and verdict as to the particular pair of parties, rather than the aggregate evaluation or verdict as to all parties. However, costs may not be imposed on a plaintiff who obtains an aggregate verdict more favorable to the plaintiff than the aggregate evaluation.

(b) If the verdict against more than one defendant is based on their joint and several liability, the plaintiff may not recover costs unless the verdict is more favorable to the plaintiff than the total case evaluation as to those defendants, and a defendant may not recover costs unless the verdict is more favorable to that defendant than the case evaluation as to that defendant.

(c) Except as provided by subrule (O)(10), in a personal injury action, for the purpose of subrule (O)(1), the verdict against a particular defendant shall not be adjusted by applying that defendant's proportion of fault as determined under MCL 600.6304(1)-(2).

(5) If the verdict awards equitable relief, costs may be awarded if the court determines that

(a) taking into account both monetary relief (adjusted as provided in subrule [O][3]) and equitable relief, the verdict is not more favorable to the rejecting party than the evaluation, or, in situations where both parties have rejected the evaluation, the verdict in favor of the party seeking costs is more favorable than the case evaluation, and

(b) it is fair to award costs under all of the circumstances.

(6) For the purpose of this rule, actual costs are

(a) those costs taxable in any civil action, and

(b) a reasonable attorney fee based on a reasonable hourly or daily rate as determined by the trial judge for services necessitated by the rejection of the case evaluation, which may include legal services provided by attorneys representing themselves or the entity for whom they work, including the time and labor of any legal assistant as defined by MCR2.626.

For the purpose of determining taxable costs under this subrule and under MCR 2.625, the party entitled to recover actual costs under this rule shall be considered the prevailing party.

(7) Costs shall not be awarded if the case evaluation award was not unanimous. If case evaluation results in a nonunanimous award, a case may be ordered to a subsequent case evaluation hearing conducted without reference to the prior case evaluation award, or other alternative dispute resolution processes, at the expense of the parties, pursuant to MCR 2.410(C)(1).

(8) A request for costs under this subrule must be filed and served within 28 days after the entry of the judgment or entry of an order denying a timely motion

- (i) for a new trial,
- (ii) to set aside the judgment, or
- (iii) for rehearing or reconsideration.

(9) In an action under MCL 436.1801, if the plaintiff rejects the award against the minor or alleged intoxicated person, or is deemed to have rejected such an award under subrule (L)(3)(c), the court shall not award costs against the plaintiff in favor of the minor or alleged intoxicated person unless it finds that the rejection was not motivated by the need to comply with MCL 436.1801(5).

(10) For the purpose of subrule (O)(1), in an action filed on or after March 28, 1996, and based on tort or another legal theory seeking damages for personal injury, property damage, or wrongful death, a verdict awarding damages shall be adjusted for relative fault as provided by MCL 600.6304.

(11) If the "verdict" is the result of a motion as provided by subrule (O)(2)(c), the court may, in the interest of justice, refuse to award actual costs.

Rule 2.404 Selection of Case Evaluation Panels

(A) Case Evaluator Selection Plans.

(1) Requirement. Each trial court that submits cases to case evaluation under MCR 2.403 shall adopt by local administrative order a plan to maintain a list of persons available to serve as case evaluators and to assign case evaluators from the list to panels. The plan must be in writing and available to the public in the ADR clerk's office.

(2) Alternative Plans.

- (a) A plan adopted by a district or probate court may use the list of case evaluators and appointment procedure of the circuit court for the circuit in which the court is located.
- (b) Courts in adjoining circuits or districts may jointly adopt and administer a case evaluation plan.
- (c) If it is not feasible for a court to adopt its own plan because of the low volume of cases to be submitted or because of inadequate numbers of available case evaluators, the court may enter into an agreement with a

neighboring court to refer cases for case evaluation under the other court's system. The agreement may provide for payment by the referring court to cover the cost of administering case evaluation. However, fees and costs may not be assessed against the parties to actions evaluated except as provided by MCR 2.403.

(d) Other alternative plans must be submitted as local court rules under MCR 8.112(A).

(B) Lists of Case Evaluators.

(1) Application. An eligible person desiring to serve as a case evaluator may apply to the ADR clerk to be placed on the list of case evaluators. Application forms shall be available in the office of the ADR clerk. The form shall include an optional section identifying the applicant's gender and racial/ethnic background. The form shall include a certification that

(a) the case evaluator meets the requirements for service under the court's selection plan, and

(b) the case evaluator will not discriminate against parties, attorneys, or other case evaluators on the basis of race, ethnic origin, gender, or other protected personal characteristic.

(2) Eligibility. To be eligible to serve as a case evaluator, a person must meet the qualifications provided by this subrule.

(a) The applicant must have been a practicing lawyer for at least 5 years and be a member in good standing of the State Bar of Michigan. The plan may not require membership in any other organization as a qualification for service as a case evaluator.

(b) An applicant must reside, maintain an office, or have an active practice in the jurisdiction for which the list of case evaluators is compiled.

(c) An applicant must demonstrate that a substantial portion of the applicant's practice for the last 5 years has been devoted to civil litigation matters, including investigation, discovery, motion practice, case evaluation, settlement, trial preparation, and/or trial.

(d) If separate sublists are maintained for specific types of cases, the applicant must have had an active practice in the practice area for which the case evaluator is listed for at least the last 3 years.

If there are insufficient numbers of potential case evaluators meeting the qualifications stated in this rule, the plan may provide for consideration of alternative qualifications.

(3) Review of Applications. The plan shall provide for a person or committee to review applications annually, or more frequently if appropriate, and compile one or more lists of qualified case evaluators. Persons meeting the qualifications specified in this rule shall be placed on the list of approved case evaluators. Selections shall be made without regard to race, ethnic origin, or gender.

(a) If an individual performs this review function, the person must be an employee of the court.

(b) If a committee performs this review function, the following provisions apply.

(i) The committee must have at least three members.

(ii) The selection of committee members shall be designed to assure that the goals stated in subrule (D)(2) will be met.

(iii) A person may not serve on the committee more than 3 years in any 9 year period.

(c) Applicants who are not placed on the case evaluator list or lists shall be notified of that decision. The plan shall provide a procedure by which such an applicant may seek reconsideration of the decision by some other person or committee. The plan need not provide for a hearing of any kind as part of the reconsideration process. Documents considered in the initial review process shall be retained for at least the period of time during which the applicant can seek reconsideration of the original decision.

(4) Specialized Lists. If the number and qualifications of available case evaluators makes it practicable to do so, the ADR clerk shall maintain

(a) separate lists for various types of cases, and,

(b) where appropriate for the type of cases, separate sublists of case evaluators who primarily represent plaintiffs, primarily represent defendants, and neutral case evaluators whose practices are not identifiable as representing primarily plaintiffs or defendants.

(5) Reapplication. Persons shall be placed on the list of case evaluators for a fixed period of time, not to exceed seven years, and must reapply at the end of that time in the manner directed by the court.

(6) Availability of Lists. The list of case evaluators must be available to the public in the ADR clerk's office.

(7) Removal from List. The plan must include a procedure for removal from the list of case evaluators who have demonstrated incompetency, bias, made themselves consistently unavailable to serve as a case evaluator, or for other just cause.

(8) The court may require case evaluators to attend orientation or training sessions or provide written materials explaining the case evaluation process and the operation of the court's case evaluation program. However, case evaluators may not be charged any fees or costs for such programs or materials.

(C) Assignments to Panels.

(1) Method of Assignment. The ADR clerk shall assign case evaluators to panels in a random or rotating manner that assures as nearly as possible that each case evaluator on a list or sublist is assigned approximately the same number of cases over a period of time. If a substitute case evaluator must be assigned, the same or similar assignment procedure shall be used to select the substitute.

The ADR clerk shall maintain records of service of case evaluators on panels and shall make those records available on request.

(2) Assignment from Sublists. If sublists of plaintiff, defense, and neutral case evaluators are maintained for a particular type of case, the panel shall include one case evaluator who primarily represents plaintiffs, one case evaluator who primarily represents defendants, and one neutral case evaluator. If a judge is assigned to a panel as permitted by MCR 2.403(D)(3), the judge shall serve as the neutral case evaluator if sublists are maintained for that class of cases.

(3) Special Panels. On stipulation of the parties, the court may appoint a panel selected by the parties. In such a case, the qualification requirements of subrule (B)(2) do not apply, and the parties may agree to modification of the procedures for conduct of case evaluation. Nothing in this rule or MCR 2.403 precludes parties from stipulating to other ADR procedures that may aid in resolution of the case.

(D) Supervision of Selection Process.

(1) The chief judge shall exercise general supervision over the implementation of this rule and shall review the operation of the court's case evaluation plan at least annually to assure compliance with this rule. In the event of noncompliance, the court shall take such action as is needed. This action may include recruiting persons to serve as case evaluators or changing the court's case evaluation plan.

(2) In implementing the selection plan, the court, court employees, and attorneys involved in the procedure shall take all steps necessary to assure that as far as reasonably possible the list of case evaluators fairly reflects the racial, ethnic, and gender diversity of the members of the state bar in the jurisdiction for which the list is compiled who are eligible to serve as case evaluators.

Rule 2.405 Offers to Stipulate to Entry of Judgment

(A) Definitions. As used in this rule:

(1) "Offer" means a written notification to an adverse party of the offeror's willingness to stipulate to the entry of a judgment in a sum certain, which is deemed to include all costs and interest then accrued. If a party has made more than one offer, the most recent offer controls for the purposes of this rule.

(2) "Counteroffer" means a written reply to an offer, served within 21 days after service of the offer, in which a party rejects an offer of the adverse party and makes his or her own offer.

(3) "Average offer" means the sum of an offer and a counteroffer, divided by two. If no counteroffer is made, the offer shall be used as the average offer.

(4) "Verdict" includes,

(a) a jury verdict,

(b) a judgment by the court after a nonjury trial,

(c) a judgment entered as a result of a ruling on a motion after rejection of the offer of judgment.

(5) "Adjusted verdict" means the verdict plus interest and costs from the filing of the complaint through the date of the offer.

(6) "Actual costs" means the costs and fees taxable in a civil action and a reasonable attorney fee for services necessitated by the failure to stipulate to the entry of judgment.

(B) Offer. Until 28 days before trial, a party may serve on the adverse party a written offer to stipulate to the entry of a judgment for the whole or part of the claim, including interest and costs then accrued.

(C) Acceptance or Rejection of Offer.

(1) To accept, the adverse party, within 21 days after service of the offer, must serve on the other parties a written notice of agreement to stipulate to the entry of the judgment offered, and file the offer, the notice of acceptance, and proof of service of the notice with the court. The court shall enter a judgment according to the terms of the stipulation.

(2) An offer is rejected if the offeree

(a) expressly rejects it in writing, or

(b) does not accept it as provided by subrule (C)(1).

A rejection does not preclude a later offer by either party.

(3) A counteroffer may be accepted or rejected in the same manner as an offer.

(D) Imposition of Costs Following Rejection of Offer. If an offer is rejected, costs are payable as follows:

(1) If the adjusted verdict is more favorable to the offeror than the average offer, the offeree must pay to the offeror the offeror's actual costs incurred in the prosecution or defense of the action.

(2) If the adjusted verdict is more favorable to the offeree than the average offer, the offeror must pay to the offeree the offeree's actual costs incurred in the prosecution or defense of the action. However, an offeree who has not made a counteroffer may not recover actual costs unless the offer was made less than 42 days before trial.

(3) The court shall determine the actual costs incurred. The court may, in the interest of justice, refuse to award an attorney fee under this rule.

(4) Evidence of an offer is admissible only in a proceeding to determine costs.

(5) Proceedings under this rule do not affect a contract or relationship between a party and his or her attorney.

(6) A request for costs under this subrule must be filed and served within 28 days after the entry of the judgment or entry of an order denying a timely motion

(i) for a new trial,

- (ii) too set aside the judgment, or
- (iii) for rehearing or reconsideration.

(E) Relationship to Case Evaluation. Costs may not be awarded under this rule in a case that has been submitted to case evaluation under MCR 2.403 unless the case evaluation award was not unanimous.

Rule 2.406 Use of Facsimile Communication Equipment

(A) Definition. "Facsimile communication equipment" means a machine that transmits and reproduces graphic matter (as printing or still pictures) by means of signals sent over telephone lines.

(B) Use. Courts may permit the filing of pleadings, motions, affidavits, opinions, orders, or other documents by the use of facsimile communication equipment. Except as provided by MCR 2.002, a clerk shall not permit the filing of any document for which a filing fee is required unless the full amount of the filing fee is paid or deposited in advance with the clerk.

(C) Paper. All filings must be on good quality 8½ by 11-inch paper, and the print must be no smaller than 12-point type. These requirements do not apply to attachments and exhibits, but parties are encouraged to reduce or enlarge such documents to 8½ by 11 inches, if practical.

(D) Fees. In addition to fees required by statute, courts may impose fees for facsimile filings in accordance with the schedule that is established by the State Court Administrative Office for that purpose.

(E) Number of Pages. Courts may establish a maximum number of pages that may be sent at one time.

(F) Hours. Documents received during the regular business hours of the court will be deemed filed on that business day. Documents received after regular business hours and on weekends or designated court holidays will be deemed filed on the next business day. A document is considered filed if the transmission begins during regular business hours, as verified by the court, and the entire document is received.

(G) Originals. Documents filed by facsimile communication equipment shall be considered original documents. The filing party shall retain the documents that were transmitted by facsimile communication equipment.

(H) Signature. For purposes of MCR 2.114, a signature includes a signature transmitted by facsimile communication equipment.

Rule 2.407 Videoconferencing

(A) Definitions. In this subchapter:

(1) "Participants" include, but are not limited to, parties, counsel, and subpoenaed witnesses, but do not include the general public.

(2) "Videoconferencing" means the use of an interactive technology that sends video, voice, and data signals over a transmission circuit so that two or more individuals or groups can communicate with each other simultaneously using video codecs, monitors, cameras, audio microphones, and audio speakers.

(B) Application.

- (1) Subject to standards published by the State Court Administrative Office and the criteria set forth in subsection (C), a court may, at the request of any participant, or sua sponte, allow the use of videoconferencing technology by any participant in any court-scheduled civil proceeding.
- (2) Subject to State Court Administrative Office standards, courts may determine the manner and extent of the use of videoconferencing technology.
- (3) This rule does not supersede a participant's ability to participate by telephonic means under MCR 2.402.

(C) Criteria for Videoconferencing.

In determining in a particular case whether to permit the use of videoconferencing technology and the manner of proceeding with videoconferencing, the court shall consider the following factors:

- (1) The capabilities of the court's videoconferencing equipment.
- (2) Whether any undue prejudice would result.
- (3) The convenience of the parties and the proposed witness, and the cost of producing the witness in person in relation to the importance of the offered testimony.
- (4) Whether the procedure would allow for full and effective cross-examination, especially when the cross-examination would involve documents or other exhibits.
- (5) Whether the dignity, solemnity, and decorum of the courtroom would tend to impress upon the witness the duty to testify truthfully.
- (6) Whether a physical liberty or other fundamental interest is at stake in the proceeding.
- (7) Whether the court is satisfied that it can sufficiently control the proceedings at the remote location so as to effectively extend the courtroom to the remote location.
- (8) Whether the use of videoconferencing technology presents the person at a remote location in a diminished or distorted sense that negatively reflects upon the individual at the remote location to persons present in the courtroom.
- (9) Whether the use of videoconferencing technology diminishes or detracts from the dignity, solemnity, and formality of the proceeding

and undermines the integrity, fairness, or effectiveness of the proceeding.

- (10) Whether the person appearing by videoconferencing technology presents a significant security risk to transport and be present physically in the courtroom.
- (11) Whether the parties or witness(es) have waived personal appearance or stipulated to videoconferencing.
- (12) The proximity of the videoconferencing request date to the proposed appearance date.
- (13) Any other factors that the court may determine to be relevant.

(D) Request for videoconferencing.

- (1) A participant who requests the use of videoconferencing technology shall ensure that the equipment available at the remote location meets the technical and operational standards established by the State Court Administrative Office.
- (2) A participant who requests the use of videoconferencing technology must provide the court with the videoconference dialing information and the participant's contact information in advance of the court date when videoconferencing technology will be used.
- (3) There is no motion fee for requests submitted under this rule.

(E) Objections. The court shall rule on an objection to the use of videoconferencing under the factors set forth under subsection C.

(F) Mechanics of Videoconferencing. The use of any videoconferencing technology must be conducted in accordance with standards published by the State Court Administrative Office. All proceedings at which videoconferencing technology is used must be recorded verbatim by the court with the exception of hearings that are not required to be recorded by law.

Rule 2.410 Alternative Dispute Resolution

(A) Scope and Applicability of Rule; Definitions.

- (1) All civil cases are subject to alternative dispute resolution processes unless otherwise provided by statute or court rule.
- (2) For the purposes of this rule, alternative dispute resolution (ADR) means any process designed to resolve a legal dispute in the place of court adjudication, and includes settlement conferences ordered under MCR 2.401; case evaluation under MCR 2.403; mediation under MCR 2.411; domestic relations mediation under MCR 3.216; and other procedures provided by local court rule or ordered on stipulation of the parties.

(B) ADR Plan.

(1) Each trial court that submits cases to ADR processes under this rule shall adopt an ADR plan by local administrative order. The plan must be in writing and available to the public in the ADR clerk's office.

(2) At a minimum, the ADR plan must:

(a) designate an ADR clerk, who may be the clerk of the court, the court administrator, the assignment clerk, or some other person;

(b) if the court refers cases to mediation under MCR 2.411, specify how the list of persons available to serve as mediators will be maintained and the system by which mediators will be assigned from the list under MCR 2.411(B)(3);

(c) include provisions for disseminating information about the operation of the court's ADR program to litigants and the public; and

(d) specify how access to ADR processes will be provided for indigent persons. If a party qualifies for waiver of filing fees under MCR 2.002 or the court determines on other grounds that the party is unable to pay the full cost of an ADR provider's services, and free or low-cost dispute resolution services are not available, the court shall not order that party to participate in an ADR process.

(3) The plan may also provide for referral relationships with local dispute resolution centers, including those affiliated with the Community Dispute Resolution Program. In establishing a referral relationship with centers or programs, courts, at a minimum, shall take into consideration factors that include whether parties are represented by counsel, the number and complexity of issues in dispute, the jurisdictional amount of the cases to be referred, and the ability of the parties to pay for dispute resolution services. The plan must preserve the right of parties to stipulate to the selection of their own mediator under MCR 2.411(B)(1).

(4) Courts in adjoining circuits or districts may jointly adopt and administer an ADR plan.

(C) Order for ADR.

(1) At any time, after consultation with the parties, the court may order that a case be submitted to an appropriate ADR process. More than one such order may be entered in a case.

(2) Unless the specific rule under which the case is referred provides otherwise, in addition to other provisions the court considers appropriate, the order shall

(a) specify, or make provision for selection of, the ADR provider;

(b) provide time limits for initiation and completion of the ADR process; and

(c) make provision for the payment of the ADR provider.

(3) The order may require attendance at ADR proceedings as provided in subrule (D).

(D) Attendance at ADR Proceedings.

(1) Appearance of Counsel. The attorneys attending an ADR proceeding shall be thoroughly familiar with the case and have the authority necessary to fully participate in the proceeding. The court may direct that the attorneys who intend to try the case attend ADR proceedings.

(2) Presence of Parties. The court may direct that the parties to the action, agents of parties, representatives of lienholders, representatives of insurance carriers, or other persons:

(a) be present at the ADR proceeding or be immediately available at the time of the proceeding; and

(b) have information and authority adequate for responsible and effective participation in the conference for all purposes, including settlement.

The court's order may specify whether the availability is to be in person or by telephone.

(3) Failure to Attend.

(a) Failure of a party or the party's attorney or other representative to attend a scheduled ADR proceeding, as directed by the court, may constitute a default to which MCR 2.603 is applicable or a ground for dismissal under MCR 2.504(B).

(b) The court shall excuse a failure to attend an ADR proceeding, and shall enter a just order other than one of default or dismissal, if the court finds that

(i) entry of an order of default or dismissal would cause manifest injustice; or

(ii) the failure to attend was not due to the culpable negligence of the party or the party's attorney.

The court may condition the order on the payment by the offending party or attorney of reasonable expenses as provided in MCR 2.313(B)(2).

(E) Objections to ADR. Within 14 days after entry of an order referring a case to an ADR process, a party may move to set aside or modify the order. A timely motion must be decided before the case is submitted to the ADR process.

(F) Supervision of ADR Plan. The chief judge shall exercise general supervision over the implementation of this rule and shall review the operation of the court's ADR plan at least annually to assure compliance with this rule. In the event of noncompliance, the court shall take such action as is needed. This action may include recruiting persons to serve as ADR providers or changing the court's ADR plan.

Rule 2.411 Mediation

(A) Scope and Applicability of Rule; Definitions.

(1) This rule applies to cases that the court refers to mediation as provided in MCR 2.410. MCR 3.216 governs mediation of domestic relations cases.

(2) "Mediation" is a process in which a neutral third party facilitates communication between parties, assists in identifying issues, and helps explore solutions to promote a mutually acceptable settlement. A mediator has no authoritative decision-making power.

(B) Selection of Mediator.

(1) The parties may stipulate to the selection of a mediator. A mediator selected by agreement of the parties need not meet the qualifications set forth in subrule (F). The court must appoint a mediator stipulated to by the parties, provided the mediator is willing to serve within a period that would not interfere with the court's scheduling of the case for trial.

(2) If the order referring the case to mediation does not specify a mediator, the order shall set the date by which the parties are to have conferred on the selection of a mediator. If the parties do not advise the ADR clerk of the mediator agreed upon by that date, the court shall appoint one as provided in subrule (B)(3).

(3) The procedure for selecting a mediator from the approved list of mediators must be established by local ADR plan adopted under MCR 2.410(B). The ADR clerk shall assign mediators in a rotational manner that assures as nearly as possible that each mediator on the list is assigned approximately the same number of cases over a period of time. If a substitute mediator must be assigned, the same or similar assignment procedure shall be used to select the substitute.

(4) The court shall not appoint, recommend, direct, or otherwise influence a party's or attorney's selection of a mediator except as provided pursuant to this rule. The court may recommend or advise parties on the selection of a mediator only upon request of all parties by stipulation in writing or orally on the record.

(5) The rule for disqualification of a mediator is the same as that provided in MCR 2.003 for the disqualification of a judge. The mediator must promptly disclose any potential basis for disqualification.

(C) Scheduling and Conduct of Mediation.

(1) Scheduling. The order referring the case for mediation shall specify the time within which the mediation is to be completed. The ADR clerk shall send a copy of the order to each party and the mediator selected. Upon receipt of the court's order, the mediator shall promptly confer with the parties to schedule mediation in accordance with the order. Factors that may be considered in arranging the process may include the need for limited discovery before mediation, the number of parties and issues, and the necessity for multiple sessions. The mediator may direct the parties to submit in advance, or bring to the mediation, documents or summaries providing information about the case.

(2) Conduct of Mediation. The mediator shall meet with counsel and the parties, explain the mediation process, and then proceed with the process. The mediator shall discuss with the parties and counsel, if any, the facts and issues involved. The mediation will continue until a settlement is reached, the mediator determines that a settlement is not likely to be reached, the end of the first mediation session, or until a time agreed to by the parties. Additional sessions may be held as long as it appears that the process may result in settlement of the case.

(3) Completion of Mediation. Within 7 days after the completion of the ADR process, the mediator shall so advise the court, stating only the date of completion of the process, who participated in the mediation, whether settlement was reached, and whether further ADR proceedings are contemplated.

(4) Settlement. If the case is settled through mediation, within 21 days the attorneys shall prepare and submit to the court the appropriate documents to conclude the case.

(5) Confidentiality in the mediation process is governed by MCR 2.412.

(D) Fees.

(1) A mediator is entitled to reasonable compensation commensurate with the mediator's experience and usual charges for services performed.

(2) The costs of mediation shall be divided between the parties on a pro-rata basis unless otherwise agreed by the parties or ordered by the court. The mediator's fee shall be paid no later than

(a) 42 days after the mediation process is concluded, or

(b) the entry of judgment, or

(c) the dismissal of the action,

whichever occurs first.

(3) If acceptable to the mediator, the court may order an arrangement for the payment of the mediator's fee other than that provided in subrule (D)(2).

(4) The mediator's fee is deemed a cost of the action, and the court may make an appropriate order to enforce the payment of the fee.

(5) If a party objects to the total fee of the mediator, the matter may be scheduled before the trial judge for determination of the reasonableness of the fee.

(E) List of Mediators.

(1) Application. To appear on a roster, an applicant, which may be an individual or organization may apply to the ADR clerk to be placed on the court's list of mediators. Application forms shall be available in the office of the ADR clerk.

(a) The form shall include a certification that

- (i) the applicant meets the requirements for service under the court's selection plan;
 - (ii) the applicant will not discriminate against parties or attorneys on the basis of race, ethnic origin, gender, or other protected personal characteristic; and
 - (iii) the applicant will comply with the court's ADR plan, orders of the court regarding cases submitted to mediation, and the standards of conduct adopted by the State Court Administrator under subrule (G).
- (b) The applicant shall indicate on the form the applicant's rate for providing mediation services.
- (c) The form shall include an optional section identifying the applicant's gender and racial/ethnic background.
- (d) An applicant Community Dispute Resolution Program center must select only mediators who meet the qualifications of this rule or training requirements established by the State Court Administrator to mediate cases ordered by the court.

(2) Review of Applications. The court's ADR plan shall provide for a person or committee to review applications annually, or more frequently if appropriate, and compile a list of qualified mediators.

- (a) Applicants meeting the qualifications specified in this rule shall be placed on the list of approved mediators. Approved mediators shall be placed on the list for a fixed period, not to exceed seven years, and must reapply at the end of that time in the manner directed by the court.
- (b) Selections shall be made without regard to race, ethnic origin, or gender. Residency or principal place of business may not be a qualification.
- (c) The approved list and the applications of approved mediators, except for the optional section identifying the applicant's gender and racial/ethnic background, shall be available to the public in the office of the ADR clerk.
- (d) An applicant may attach a résumé or biographical information to the application.

(3) Rejection; Reconsideration. Applicants who are not placed on the list shall be notified of that decision. Within 21 days of notification of the decision to reject an application, the applicant may seek reconsideration of the ADR clerk's decision by the Chief Judge. The court does not need to provide a hearing. Documents considered in the initial review process shall be retained for at least the period during which the applicant can seek reconsideration of the original decision.

(4) Removal from List. The ADR clerk may remove from the list mediators who have demonstrated incompetence, bias, made themselves consistently unavailable to serve as a mediator, or for other just cause. Within 21 days of

notification of the decision to remove a mediator from the list, the mediator may seek reconsideration of the ADR clerk's decision by the Chief Judge. The court does not need to provide a hearing.

(F) Qualification of Mediators.

(1) Small Claims Mediation. District courts may develop individual plans to establish qualifications for persons serving as mediators in small claims cases.

(2) General Civil Mediation. To be eligible to serve as a general civil mediator, a person must meet the following minimum qualifications:

(a) Complete a training program approved by the State Court Administrator providing the generally accepted components of mediation skills;

(b) Have one or more of the following:

(i) Juris doctor degree or graduate degree in conflict resolution; or

(ii) 40 hours of mediation experience over two years, including mediation, co-mediation, observation, and role-playing in the context of mediation.

(c) Upon completion of the training required under subrule (F)(2)(a), observe two general civil mediation proceedings conducted by an approved mediator, and conduct one general civil mediation to conclusion under the supervision and observation of an approved mediator.

(3) An applicant who has specialized experience or training, but does not meet the specific requirements of subrule (F)(2), may apply to the ADR clerk for special approval. The ADR clerk shall make the determination on the basis of criteria provided by the State Court Administrator. Service as a case evaluator under MCR 2.403 does not constitute a qualification for serving as a mediator under this section.

(4) Approved mediators are required to obtain 8 hours of advanced mediation training during each 2-year period. Failure to submit documentation establishing compliance is ground for removal from the list under subrule(E)(4).

(5) Additional qualifications may not be imposed upon mediators.

(G) Standards of Conduct for Mediators. The State Court Administrator shall develop and approve standards of conduct for mediators designed to promote honesty, integrity, and impartiality in providing court-connected dispute resolution services. These standards shall be made a part of all training and educational requirements for court-connected programs, shall be provided to all mediators involved in court-connected programs, and shall be available to the public.

Rule 2.412 Mediation Communications; Confidentiality and Disclosure

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

(B) Definitions.

- (1) "Mediator" means an individual who conducts a mediation.
- (2) "Mediation communications" include statements whether oral or in a record, verbal or nonverbal, that occur during the mediation process or are made for purposes of retaining a mediator or for considering, initiating, preparing for, conducting, participating in, continuing, adjourning, concluding, or reconvening a mediation.
- (3) "Mediation party" means a person who or entity that participates in a mediation and whose agreement is necessary to resolve the dispute.
- (4) "Mediation participant" means a mediation party, a nonparty, an attorney for a party, or a mediator who participates in or is present at a mediation.
- (5) "Protected individual" is used as defined in the Estates and Protected Individuals Code, MCL 700.1106(v).
- (6) "Vulnerable" is used as defined in the Social Welfare Act, MCL 400.11(f).

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

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

- (1) All mediation parties agree in writing to disclosure.
- (2) A statute or court rule requires disclosure.
- (3) The mediation communication is in the mediator's report under MCR 2.411(C)(3) or MCR 3.216(H)(6).
- (4) The disclosure is necessary for a court to resolve disputes about the mediator's fee.
- (5) The disclosure is necessary for a court to consider issues about a party's failure to attend under MCR 2.410(D)(3).
- (6) The disclosure is made during a mediation session that is open or is required by law to be open to the public.
- (7) Court personnel reasonably require disclosure to administer and evaluate the mediation program.
- (8) The mediation communication is
 - (a) a threat to inflict bodily injury or commit a crime,
 - (b) a statement of a plan to inflict bodily injury or commit a crime, or
 - (c) is used to plan a crime, attempt to commit or commit a crime, or conceal a crime.
- (9) The disclosure
 - (a) Involves a claim of abuse or neglect of a child, a protected individual, or a vulnerable adult; and

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

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

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

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

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

(12) The disclosure is in a proceeding to enforce, rescind, reform, or avoid liability on a document signed by the mediation parties or acknowledged by the parties on an audio or video recording that arose out of mediation, if the court finds, after an in camera hearing, that the party seeking discovery or the proponent of the evidence has shown

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

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

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

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

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

(3) Evidence or information that is otherwise admissible or subject to discovery does not become inadmissible or protected from discovery solely by reason of its disclosure or use in a mediation.

Rule 2.420 Settlements and Judgments for Minors and Legally Incapacitated Individuals

(A) Applicability. This rule governs the procedure to be followed for the entry of a consent judgment, a settlement, or a dismissal pursuant to settlement in an action brought for a minor or a legally incapacitated individual person by a next friend, guardian, or conservator or where a minor or a legally incapacitated individual is to receive a distribution from a wrongful death claim. Before an action is commenced, the settlement of a claim on behalf of a minor or a legally incapacitated individual is governed by the Estates and Protected Individuals Code.

(B) Procedure. In actions covered by this rule, a proposed consent judgment, settlement, or dismissal pursuant to settlement must be brought before the judge to whom the action is assigned, and the judge shall pass on the fairness of the proposal.

(1) If the claim is for damages because of personal injury to the minor or legally incapacitated individual,

(a) the minor or legally incapacitated individual shall appear in court personally to allow the judge an opportunity to observe the nature of the injury unless, for good cause, the judge excuses the minor's or legally incapacitated individual presence, and

(b) the judge may require medical testimony, by deposition or in court, if not satisfied of the extent of the injury.

(2) If the next friend, guardian, or conservator is a person who has made a claim in the same action and will share in the settlement or judgment of the minor or legally incapacitated individual, then a guardian ad litem for the minor or legally incapacitated individual must be appointed by the judge before whom the action is pending to approve the settlement or judgment.

(3) If a guardian or conservator for the minor or legally incapacitated individual has been appointed by a probate court the terms of the proposed settlement or judgment may be approved by the court in which the action is pending upon a finding that the payment arrangement is in the best interests of the minor or legally incapacitated individual, but no judgment or dismissal may enter until the court receives written verification from the probate court, on a form substantially in the form approved by the state court administrator, that it has passed on the sufficiency of the bond and the bond, if any, has been filed with the probate court.

(4) The following additional provisions apply to settlements for minors.

(a) If the settlement or judgment requires payment of more than \$5,000 to the minor either immediately, or if the settlement or judgment is payable in installments that exceed \$5000 in any single year during minority, a conservator must be appointed by the probate court before the entry of the judgment or dismissal. The judgment or dismissal must require that payment be made payable to the minor's conservator on behalf of the minor. The court shall not enter the judgment or dismissal until it receives written verification, on a form substantially in the form approved by the state court administrator, that the probate court has passed on the sufficiency of the bond of the conservator.

(b) If the settlement or judgment does not require payment of more than \$5,000 to the minor in any single year, the money may be paid in accordance with the provisions of MCL 700.5102.

(5) If a settlement or judgment provides for the creation of a trust for the minor or legally incapacitated individual, the circuit court shall determine the amount to be paid to the trust, but the trust shall not be funded without prior

approval of the trust by the probate court pursuant to notice to all interested persons and a hearing.