

## **REVISE MEDIATION PROCEDURES FOR CIVIL AND MEDICAL MALPRACTICE ACTIONS**

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**House Bill 5073 as introduced**  
**Sponsor: Rep. Klint Kesto**  
**1st Committee: Judiciary**  
**2nd Committee: Law and Justice**  
**Complete to 10-23-17**

### **BRIEF SUMMARY:**

HB 5073 would amend the Revised Judicature Act to provide for the mediation of certain nondomestic relations disputes in state courts. The bill would make revisions and add a section to, as well as, rename Chapter 49 of the act, which currently regulates the mediation of actions alleging medical malpractice. It would repeal Chapter 49A of the act, which regulates the mediation of civil actions based on tort in which claimed damages exceed \$10,000 and which would be replaced with the revised process proposed under Chapter 49. Under HB 5073, Chapter 49 would be titled "Mediation and Case Evaluation."

### **DETAILED SUMMARY:**

#### Scope of Mediation

The bill would require the following actions to be referred to mediation, absent an objection:

- A civil nondomestic relations action in which claimed damages exceed \$25,000.
- A contested probate court proceeding.

In order to refer an action to mediation, the county would be required to have an alternative dispute resolution plan adopted by the State Court Administrative Office.

An action involving any of the following could not be referred to mediation:

- A party to the action is subject to a protection order protecting another party.
- A party to the action is seeking entry of a protection order against another party.
- A party to the action is involved in an abuse or neglect proceeding.
- There is an allegation that a party to the action abused another party.
- There is a request for investigation of a party to the action with the Department of Health and Human Services (DHHS).

However, these restrictions would not apply in either of the following circumstances:

- The court determined that mediation of the action is appropriate.
- The protected party, party seeking protection, or party who is allegedly the victim of abuse requests mediation.

### Mediation Standards

A judge would be required to refer an action to mediation within 30 days after a response to the complaint is filed, unless an objection is timely filed.

The mediator would be required to facilitate communication between parties, assisting in reaching agreements including settlement, narrowing of issues, defining discovery parameters, and establishing any deadlines. Additional mediation sessions could be held, if agreed to by all parties.

Mediation would be required to be conducted in accordance with Michigan standards of conduct for mediators, or successive standards, and applicable Michigan court rules.

### Objection to Mediation

To object, a party must notify the court that the matter is not appropriate for mediation, as provided in law, or file a written objection containing facts to establish good cause, including any of the following:

- Child abuse or neglect.
- Domestic abuse.
- Inability of 1 or both mediation parties to negotiate for themselves.
- Reason to believe any mediation party's health or safety would be endangered by participation in mediation.
- Inability to afford the fees and costs of mediation.
- Lack of jurisdiction or improve venue.
- Stipulation of all mediation parties.
- Mediation is unnecessary because the matter is resolved.
- The matter was assigned to another alternative dispute resolution process.

A copy of the objection would be required to be filed with the court and served on all attorneys of record and pro se parties within 14 days after the entry of an order assigning the action to mediation. The motion to remove the action from mediation would be required to be set for hearing within 14 days after being filed. Such a motion would be required to be heard before the action is mediated.

### Mediation Proceedings

Mediation proceedings would be private, with all communications confidential and privileged. Except as provided below, privileged mediation communication would not be subject to discovery or be admissible in any proceeding. A mediator, mediation party, and any other individual involved in mediation would not be competent to testify to confidential mediation communications.

Mediation communications could be disclosed in any of the following circumstances:

- All parties agree in writing to disclosure.
- A statute or court rule requires disclosure.
- The mediation communication is part of the mediator's report approved under court rules.
- The disclosure is necessary for a court to resolve disputes about the mediator's fee.

- The disclosure is necessary for a court to consider ordering sanctions under for rules for a party's failure to attend.
- The disclosure is made during a mediation session that is or required by law to be public.
- Court personnel reasonably require disclosure to administer and evaluate the mediation program.
- The mediation communication is a threat to inflict or plan bodily harm or commit a crime.
- If the disclosure involves a claim of abuse or neglect, is included in a report about the claim, and is made to a governmental agency or law enforcement official responsible for protection against such conduct.
- The disclosure is included in a report of professional misconduct.
- The communication occurs in an action out of which a claim of malpractice arises.
- The disclosure is in a proceeding to enforce, rescind, reform, or avoid liability on a document signed by the mediation parties or acknowledged verbally.

All of the following would apply to a disclosure of mediation communication:

- Only the portion of communication necessary to meet one of the above situations may be disclosed.
- Disclosure does not render the communication subject to disclosure for another reason.
- Evidence or information that is otherwise admissible or subject to discovery does not become inadmissible or protected from discovery solely because of its disclosure.

#### Mediation for Medical Malpractice

The bill would make language changes to the mediation for medical malpractice, generally changing forms of the verb “mediate” to forms of “evaluate.” It would rename a “mediation clerk” an “ADR [alternative dispute resolution] clerk.”

The bill would define the term “case evaluation” as a process in which 3 neutral attorneys are appointed by the court to review the facts and law in a court case, hear positions, and render an award that can be accepted or rejected by the parties and is governed by Michigan court rules.

#### **FISCAL IMPACT:**

Fiscal note is in progress.

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