



Michigan Supreme Court

State Court Administrative Office

Friend of the Court Bureau

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Steven D. Capps
Director

MEMORANDUM

DATE: August 13, 2018

TO: Friends of the Court
cc: Chief Circuit Judges
Presiding Family Division Judges
Circuit Court Administrators
Family Division Administrators

FROM: Steven D. Capps

RE: FOCB Memorandum
MCR 3.208 – Initiating Show Cause by Friend of the Court Notice

The State Court Administrative Office (SCAO), and specifically SCAO's Friend of the Court Bureau, develops guidelines for the conduct, operations, and procedures of all the friend of the court (FOC) offices. Each FOC must take all necessary steps to adopt office procedures to implement the recommendations of the bureau. [[MCL 552.503\(7\)](#)]

This memorandum provides guidelines for domestic relations judges, referees, and FOC staff on amendments to MCR 3.208, specifically the show cause notice and exempting cases from enforcement.

If court or friend of the court staff have any questions, or would like additional information or clarification regarding this memorandum, please contact Paul Gehm or Bill Bartels at gehmp@courts.mi.gov, bbartels@courts.mi.gov, or (517) 373-5975.

Summary of Changes:

MCR 3.208 was amended effective January 1, 2018, to implement 2014 PA 378 and 2014 PA 381. The amendments permit alternate procedures to set contempt proceedings to reduce the steps necessary to schedule a hearing, clarify when the FOC must participate in a contempt hearing, and allows the friend of the court to refrain from enforcing child support orders in situations in which it is inappropriate.

A. Initiate Show Cause Through Notice

The recent amendments added a new way to initiate a contempt action. Before the amendment, the FOC could only initiate show cause proceedings by a petition for an order to show cause. Under the amended rule, that method of setting a contempt hearing remains, but the amendment allows the FOC to set the show cause hearing by notice of hearing (notice).¹ The notice approach is only available to enforce child support. A court should choose which process it will use and not change processes on a case-by-case or judge-by-judge basis.²

1. Process and Form

This notice approach is a more efficient process to schedule contempt hearings and is more flexible. The scheduling process is simpler because the court does not have to review and sign the order to show cause, and return it for further processing. The notice process allows the FOC representative to sign the notice and serve and file it with the court.

2. Form

SCAO created a new form (Notice of Contempt Hearing for Failure to Pay Support [FOC2b](#)) to meet the rule's requirements.³

3. Who May Sign the Notice

The court rule's intent was to allow FOC personnel (like staff in other court offices) to notice court hearings, and not limit authority to only FOC directors or staff attorneys. Local court policy should indicate which positions in the office are authorized to sign the notice. The rule provides that only the person who signs the notice may excuse the payer's appearance.⁴

A signature is one that complies with MCR 1.109(E) (effective 9/1/2018).⁵

¹ “[a]lternatively, in nonpayment of support cases and as allowed by the court, the friend of the court may schedule a hearing before a judge or referee for the party to show cause why the party should not be held in contempt.”

² A court should choose the process most likely to produce timely hearings and most likely to result in a just result in light of other procedures the court and FOC use in conjunction with the contempt hearing.

³ The form will be released within the existing show cause order chain in MiCSES in August 2018.

⁴ If the person who signs a notice is no longer employed by the court or is otherwise unavailable, local policy should clearly indicate who may act in his or her absence to excuse a payer's appearance. Otherwise, the court should order that the hearing be adjourned or set aside.

⁵ The rule incorporates MCL 8.3q.

4. **Scheduling**

When scheduling the hearing, FOCs should allow a reasonable period of time for the payer to make arrangements (e.g., transportation, child care, etc.) to appear for the hearing as well as time to allow the payer to come into compliance with the order.⁶

The hearing must not be held sooner than seven days after the notice is personally served on the party, or nine days after a notice is sent by ordinary mail.

5. **Notice Can Require a Meeting Prior to Hearing**

As part of the notice approach, the FOC may set a prehearing conference with a caseworker before the hearing. This provides the flexibility and authority for offices that already use a triage process to attempt to resolve nonpayment issues before having a formal hearing. During this conference, staff can further assess the payer's ability to pay or ability to comply with the order, discuss payment plans or other outcomes (FOC referral to work activity or review and modification), and assess whether the payer should be excused from appearing at the hearing.⁷ If a payer fails to appear at a prehearing meeting, there is no authority to issue a bench warrant, but the court may issue a warrant for the payer's failure to appear at the contempt hearing.

6. **Bench Warrants**

If the payer fails to appear after receiving a notice of hearing or order to show cause, the statute provides that a bench warrant may issue to ensure the payer's appearance.

The process for entering a bench warrant for failure to appear is the same for both an order to show cause and notice proceeding. The court enters a [Support Enforcement Order \(e.g., FOC6\)](#) finding that the respondent failed to appear, directs that a bench warrant shall issue, and sets a cash performance bond. Following entry of the order, the FOC office prepares and submits a bench warrant to the court for entry.

7. **Relief From Hearing**

Although the payer must appear for the hearing set by notice, the payer may be excused in writing by the worker who issued the notice. Under the order to show cause approach, only the judge may excuse a payer by dismissing or adjourning the hearing. The notice process gives the FOC authority to cancel a hearing if it is satisfied that the hearing is no longer necessary.

The FOC's authority to "relieve" a person from appearing is not a grant of judicial discretion to allow the FOC to impose conditions on the payer. The FOC may only cancel the hearing. Only the court should adjourn hearings based on conditions the

⁶ For example, in the event that during the screening an office discovers a recent hire, the office should consider setting the hearing further out to allow for an IWN to become effective.

⁷ The court may not issue a bench warrant if a payer fails to appear at a prehearing conference. The statute only allows the court to issue a warrant for failure to appear at the hearing.

respondent must meet.⁸ If the intent is to provide the payer time to follow through with an agreement (through a consent enforcement order) or referral to services, the FOC can set a new hearing through a new show cause notice.⁹

B. FOC Appearance at Court Show Cause Hearings

The court rule clarifies that FOC staff are not required to attend show cause hearings. MCL 552.603(13) provides that reports and information from MiCSES “are *prima facie* authentic and may be admitted into evidence without extrinsic evidence of authenticity.” Therefore, FOC staff are not required to lay the foundation for admitting MiCSES records, and the court may choose to rely on that evidence instead of foundational testimony from the FOC staff. Unless the payer disputes owing any past-due support, the main issues to decide are whether the payer has the current ability to pay on the arrears, how much the payer can pay, and what the payer has the capacity to pay in the future. While the FOC has information from which a preliminary determination can be made that the payer has the ability to pay, most specific information is usually obtained at the hearing and can be elicited by the court questioning the payer. If the court does not require the FOC to appear at a hearing, and a party presents evidence that requires the court to receive further information from FOC records, the court may require the FOC’s appearance. Staff could be made available by being on “standby” (by phone/video conferencing, or being available to come to the courtroom for the hearing).

There are numerous factors to consider when determining whether to have FOC staff appear at the hearing. FOC staff are often asked to present the case history to the court and to confirm information provided by the payer. The court may also require the FOC to draft enforcement orders. In addition to helping the court, it may be helpful to the caseworkers to attend so that they have up-to-date information and can understand why the court is making the particular ruling (which may help with further enforcement needs on the case by the office).

If the court or office determines to have the FOC present at the hearing, be cautious. The U.S. Supreme Court in *Turner v. Rogers*, 564 US 431 (2011), discussed protections against the appearance of advocacy. These considerations are also related to principles of procedural justice. FOCs should not or must not advocate (or appear to advocate) for a specific finding or outcome. This means that the court should refrain from asking the office for a recommendation about how to rule or which sanction to apply, or what sanctions the court should impose to compel compliance.

Guarding against the *appearance* of advocacy is just as important. Caseworkers presenting information to the court could appear to be laying the groundwork for the court to find the party in contempt. One way to protect against this is to use standardized reports. Another option is to have a different caseworker than the one assigned available to provide the standard case information and history.

⁸ The FOC may renote a hearing but the renote should not be conditional.

⁹ The goal of any court hearing is to resolve an issue that cannot be resolved without the court making a decision. Serial adjournments or renotes of hearings in order to maintain the threat of judicial action tie up valuable docket space and the same result can be achieved through other remedies such as FOC supervision.

C. Exempting Cases from Enforcement – Administrative FOC Case Closure

MCR 3.208(D) allows the FOC to administratively handle the issue of a closed IV-D case where the FOC case has remained open.¹⁰ Under the revised rule, FOCs now have the authority to inactivate the FOC case if the IV-D case has closed. When the IV-D case closes, the FOC choice to inactivate the FOC case is optional and not mandatory.

Upcoming SCAO policy on case closure will provide the details of closing FOC cases under MCR 3.208.

¹⁰ The FOC administrative closure does not affect the underlying domestic relations case in the circuit court.