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TO: All Chief Circuit Judges
cc: Family Division Judges
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Family Division Administrators
Circuit Court Administrators
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FROM: John D. Ferry, Jr., State Court Administrator

SUBJ: SCAO Administrative Memorandum 2004-01
MCR 3.221 Implementation

This administrative memorandum explains how circuit courts should implement MCR 3.221 (Hearings on Support and Parenting Time Enforcement Act Bench Warrants). Trial courts should adopt a local administrative order to implement this Administrative Memorandum within twenty eight days.

Section 19 of the Friend of the Court Act (MCL 552.519) requires the Friend of the Court Bureau within the State Court Administrative Office, to develop guidelines for friend of the court operations, and procedures. The Act also requires that each friend of the court adopt procedures that implement the Act, Supreme Court rules, and the policies and procedures recommended by the Friend of the Court Bureau. MCL 552.503(6).

Courts and friends of the court should direct questions concerning this memorandum to Steve Capps at 517-373-4835 cappss@courts.mi.gov.

MCR 3.221 Implementation

Effective June 1, 2003, 2002 PA 567 amended several sections of the Support and Parenting Time Enforcement Act, MCL 552.601 et seq.

In response, the Supreme Court promulgated a complimentary new MCR 3.221, effective August 1, 2003.

This memorandum summarizes those new provisions and answers some interpretation questions that have arisen.

The 2002 PA 567 amendments allow courts to order a defaulting support payer to show cause why the payer should not be held in contempt. If the payer does not appear at the show-cause hearing, the court may issue a bench warrant for the payer's arrest.

The court that issues the bench warrant must set a performance bond equal to at least 25% of the support arrearage¹ and not more than 100% of the arrearage plus any costs² of the show-cause hearing.

When the payer is arrested on the bench warrant, unless the payer posts bond, the court must hold either an expedited contempt hearing or a bond-review hearing within 48 hours of the arrest. Weekends and holidays³ do not count as part of the 48-hour period. If an arrested payer posts bond, the court must hold a contempt hearing on the merits within 21 days.⁴

A. Cash Performance Bond [MCR 3.221(A)].

If arrested on a warrant for nonpayment of support, the payer must post a cash performance bond in order to be released. The bond secures payment of the accrued support obligation. The court must set bond for at least 25% of the

¹ MCL 552.631(2). "Arrearage" is not defined in the Act. Although friends of the court also collect service fees and court costs, in common usage among child support workers, "arrearage" refers only to the amount of unpaid child or spousal support.

² MCL 552.631(3) allows the court to assess costs for the hearing, the issuance of the warrant, the arrest on the warrant, and further hearings when a bench warrant is issued due to a person's failure to appear for the show-cause hearing.

³ MCL 552.632(1). "Holiday" is not defined in the statute. Therefore, see MCR 8.110(D)(2) as modified by any local administrative order.

⁴ MCL 552.632(1) and MCR 3.221(B).

arrearage and costs, or \$500, whichever is greater.⁵ The bond may be as much as 100% of the arrearage plus any costs.

The payer may post the bond with cash or a cash equivalent that is acceptable to the agency⁶ receiving the payment. Possible cash equivalents include a money order, cashier's check, or a debit or credit card.

B. Hearing on the Merits [MCR 3.221(B)].

1. When the payer posts a performance bond.

When a payer posts a performance bond, the court must hold a contempt hearing within 21 days of the date of arrest [MCR 3.221(B)] unless the court has already ruled on the contempt issue. If the court has already made a decision on contempt, the hearing will address related issues (such as the payer's compliance with conditions the court imposed at the contempt hearing, or subsequent events that may affect the court's decision).

2. When the payer does not post a performance bond.

When the payer does not post a performance bond, the court must hold a contempt hearing within 48 hours of the payer's arrest. [If the court determines that it cannot hold the contempt hearing within 48 hours of the arrest, the court must hold a bond review hearing without unnecessary delay. See MCR 3.221(C).]

C. Bond Review Hearing [MCR 3.221(C)-(H)].

1. Who conducts the bond review hearing?

A judge, a district court magistrate, or a referee, (the "hearing officer") may preside over the bond review hearing [MCR 3.221(C)].

2. Where is the bond review hearing held?

The circuit court that issued the warrant should conduct the bond review hearing. If a payer is arrested in another circuit, the arresting agency⁷ must

⁵ MCL 552.631(2)

⁶ "Agency" refers to a sheriff, clerk of the court, or any other person with whom the bond may be posted.

⁷ The sheriff in the arresting county is required to keep the payer in custody until the payer appears before a court (MCL 600.1735). In practice, the sheriff of the arresting county

make arrangements to promptly transport the payer to the court specified in the warrant.⁸ If prompt transportation cannot be arranged, the court in the jurisdiction holding the payer may conduct the bond review hearing. The court may use remote access (see section H) to obtain information for the bond review hearing [MCR 3.221(D)].

3. Conduct of the Bond Review Hearing.

a. Record [MCR 3.221(E)].

The hearing officer must make a verbatim record or transcript of the hearing. MCR 8.108 and 8.109 address record requirements.

b. Advice to Payer [MCR 3.221(E), MCL 552.633, and MCL 552.635].

At the beginning of the bond review hearing, the hearing officer must advise the payer regarding the purpose of a contempt hearing. At a minimum, the advice should include:

- 1) The amount of support that the friend of the court (FOC) states is owed.
- 2) That the contempt hearing will determine whether the payer has disobeyed the court's support order by failing to pay support out of the payer's assets or by failing to exercise due diligence to obtain assets sufficient to pay the support.
- 3) That the possible penalties for contempt include incarceration for 45 days for a first offense and 90 days for a second offense.
- 4) That the court may suspend a driver's license, hunting license, recreational license, or any combination of those licenses if the payer does not obey an order to pay the arrearage.
- 5) That the court may order the payer to participate in a community corrections program established as provided in

relies on the county that issued the bench warrant to send officers to the arresting jurisdiction to take custody and transport the payer.

⁸ The hearing is conducted in whichever jurisdiction holds the individual because only a judge of that jurisdiction may issue orders to the local support staff and court officers. For example, although the hearing could be conducted by a judge in the issuing jurisdiction by electronic means, that judge could not issue orders to court officers in the arresting jurisdiction (e.g., ordering the sheriff in the arresting jurisdiction to transport a prisoner).

the community corrections act, MCL 791.401 to 791.414, if such programs are available within the court's jurisdiction.

- 6) That the payer may be ordered to participate in a work program.
- c. Review of Performance Bond Requirement [MCR 3.221(C)- H), MCL 552.631, and MCL 552.632].

The statutes allow a payer to post a cash performance bond. If the payer does not post the performance bond and is not given a contempt hearing within 48 hours, the court must conduct a bond review hearing and may modify the performance bond based on certain factors.

Performance bonds ensure that the support arrearage will be paid, and performance bond money may be used to pay an obligation. Appearance bonds ensure that a person will appear for a hearing. Appearance bond money must be returned when the person appears. There are additional procedural requirements for forfeiting an appearance bond. Neither the statute nor the court rule converts the performance bond into an appearance bond. Rather, the court rule allows the court to require a separate appearance bond as a condition of release until a contempt hearing can be held.

At a bond review hearing, the first issue the hearing officer must consider is whether to modify the performance bond requirement. If the payer has the ability to post any performance bond, the hearing officer may reduce the performance bond to an amount that the payer has the financial ability to post.

The hearing officer may reduce the cash performance bond to the highest amount between zero and the original amount that the payer can post in order to be released. In addition, the hearing officer may impose other conditions to ensure the payer's subsequent appearance. If the hearing officer determines that an appearance bond is necessary, the hearing officer may require the payer to post a separate appearance bond. The hearing officer should consider the following factors to determine whether to reduce the performance bond and whether to require an appearance bond:

- 1) Whether the payer has the financial ability to post any performance bond.

- 2) Whether the hearing officer will also require an appearance bond.

d. Appearance Factors [MCR 3.221(F) and (H)].

When the hearing officer determines that the performance bond should be reduced, and regardless of whether a monetary appearance bond is set, the hearing officer must decide whether to set additional requirements to ensure the payer's appearance at future hearings [MCR 3.221(F)]. The hearing officer should consider the following:

- 1) The payer's record for reporting information to the FOC and complying with court orders [MCR 3.221(H)(1)(a)].

Payers are required to report certain information to the FOC, including: licensing information, changes of address, and changes of employment or other income sources [MCL 552.603(c-f)]. The court may have ordered a payer to do other things in the case. A payer's record for complying with these requirements reflects the payer's reliability.

- 2) The payer's record of appearance or nonappearance at court proceedings [MCR 3.221(H)(1)(b)].

Payers who have appeared only when arrested are less likely to appear voluntarily in the future.

- 3) The payer's history of substance abuse or addiction [MCR 3.221(H)(1)(c)].

Payers with a history of substance abuse or addiction are less likely to appear for future hearings unless the court obtains special appearance guarantees.

- 4) The amount of support owed [MCR 3.221(H)(1)(d)].

The greater the amount of support owed, the less likely it is that the individual will appear. But there may have been special circumstances that created a large arrearage but do not lessen the individual's likelihood of appearance. A large retroactive order is one example. The hearing officer should consider both the amount in arrears and any evidence that the arrearage did not accrue wholly due to the payer's inattentiveness. The payer's recent payment record may also

reveal the payer's willingness to abide by court orders, including an order to appear at future hearings.

- 5) The payer's current and past employment and financial status insofar as those factors relate to the ability to post bond [MCR 3.221(H)(1)(e)].

A payer who is employed may have the ability to post a performance bond, and there may be less need to set an appearance bond or impose other release conditions.

A payer who is unemployed may be able to post only a small bond. In that situation, appearance guarantees in addition to the small performance bond should be required. If other appearance factors are not favorable to the payer, the hearing officer may decide that an unemployed payer's performance bond should be reduced to zero and that a small cash appearance bond should be used instead.

- 6) Availability of responsible members of the community who will vouch for or monitor the payer [MCR 3.221(H)(1)(f)].

If responsible people will vouch for or monitor the payer, additional safeguards to ensure appearance are less necessary. The performance bond may be reduced to a level that the payer can pay without the need for an appearance bond.

- 7) A payer's connections to the community, including family ties, other relationships, and length of residence [MCR 3.221(H)(1)(g)].

A payer who has family members and other ties to the local community is less likely to flee. The hearing officer may consider the payer's frequency of moves, current employment, and membership in organizations and clubs.

- 8) Other factors bearing on the risk of nonappearance [MCR 3.221(H)(1)(h)].

Among the other factors that may be considered are statements that the payer has made about appearing in court, incentives the payer may have to flee, whether the payer is subject to other law enforcement holds or reporting requirements (such as probation or parole holds), and whether the payer holds foreign or dual citizenship.

4. Appearance Conditions.

If the hearing officer determines that the payer cannot post the original or a reduced performance bond, the hearing officer must release the payer on condition that the payer appear for a contempt hearing. The hearing officer may set conditions to ensure the payer's appearance. The hearing officer must consider imposing the following conditions:

a. Reporting Conditions [MCR 3.221(F)(1)].

The payer could be required to report to the court, the friend of the court, or a work program such as the Non-custodial Parent Workfirst program. The payer's past record for reporting to the friend of the court and complying with court orders [MCR 3.221(H)(1)(a)] are relevant considerations in determining whether requiring reporting will ensure the payer's appearance at a subsequent hearing.

b. Restrictive Conditions [MCR 3.221(F)(2, 3, and 4)].

These conditions restrict a payer's movement so that the payer is less likely to leave the court's jurisdiction. Examples:

- 1) Limit the payer's contacts with other individuals, the places where the payer may live, the places a payer may be employed, or the payer's right to travel [MCR 3.221(F)(2)]. Examples include ordering the payer not to leave the state or county, or ordering the payer not to associate with a person who might discourage the payer from appearing. A payer who has a substance abuse problem might be ordered not to go to bars or associate with other people who are substance abusers.
- 2) Surrender driver's license or passport [MCR 3.221(F)(3)]. The payer may be required to surrender a driver's license or passport to keep the payer from fleeing the jurisdiction.
- 3) Comply with a specified curfew [MCR 3.221(F)(4)]. This could be combined with other limitations on the payer's freedom such as electronic monitoring.

c. Stabilizing Conditions [MCR 3.221(F)(5) and (6)].

When the hearing officer determines that a payer is likely to appear at future hearings but may not appear if the payer's employment is

altered, the hearing officer can require that the payer take steps to ensure continued employment. Examples:

- 1) Continue or seek employment or participate in a work program such as the Non-custodial Parent Workfirst program [MCR 3.221(F)(5)].
- 2) Continue or begin an educational program [MCR 3.221(F)(6)].

- d. Third party monitoring [MCR 3.221(F)(7)].

The hearing officer may require that a payer live with or be closely monitored by a responsible member of the community who will report any violation of a release condition to the court.

- e. Appearance bond [MCR 3.221(F)(8)].

The hearing officer may require the payer to post an appearance bond when other means of insuring the payer's appearance would not be sufficient. The appearance bond can be executed by the payer, another person who secures the bond by a cash deposit for the full bond amount, or a surety. The hearing officer must state the reasons for requiring an appearance bond on the record [MCR 3.221(H)(2)].

- f. Discrimination [MCR 3.221(H)(3)].

While a hearing officer must set conditions that will ensure the payer's appearance, the court rule cautions that the hearing officer may not set conditions based on improper considerations. Thus, the hearing officer may consider a person's employment as a basis for finding ties to the community or ability to post bond, but may not require a bond solely because the person is indigent.

D. Review of Release Decision [MCR 3.221(I)(1)].

A party seeking review of a release decision may file a motion in the court that has appellate jurisdiction over the hearing officer. When a judge makes the decision, the court with appellate jurisdiction over that judge's court should review the decision. When a district court magistrate makes the decision, the district court or circuit court should review the decision. When a referee makes the decision, the circuit court should review the decision.

If a district court magistrate or referee made the decision, a party is entitled to a new hearing before the reviewing judge. No motion fee is charged for requesting a new bond review hearing before a judge after a referee or district court magistrate has set bond.

If a judge made the decision, the reviewing court may not stay, vacate, modify, or reverse the release decision except on finding an abuse of discretion.

E. Emergency Release [MCR 3.221(I)(2)].

When jail overcrowding requires a payer's release, the release must be subject to conditions likely to ensure the payer's future appearance. The court must inform the payer of the release conditions on the record or by furnishing to the payer or the payer's lawyer a copy of the release order that states the conditions.

F. Terminating Release Order [MCR 3.221(J)].

The court should terminate the release order at the time of the contempt hearing, either by finding that the payer has satisfied the terms of the release order, or by finding that the payer has violated its terms.

1. When the payer appears at the contempt hearing.

When the payer appears for the contempt hearing, the court should find that the requirement to appear has been satisfied. Ordinarily the court will include a reference to the payer's appearance in the findings of the order disposing of the matter. The court should vacate the release order.

2. When the payer fails to appear at the contempt hearing.

When the payer fails to appear for the contempt hearing, the court will need to take additional action. The court may find that there is no need to hold a contempt hearing (when an obligation is paid in full), that the payer's appearance is necessary (in which case a new bench warrant usually will be issued), or that the payer's presence is not necessary but a contempt action for violating the terms of the release order is appropriate.

3. When the payer violates any condition of the release order, regardless of whether the payer appears at the contempt hearing.

When a payer doesn't satisfy all of the release conditions, the court may issue a show cause order or authorize an arrest warrant.

- a. Before finding the payer has failed to satisfy release conditions, the court should schedule a hearing and provide notice of the time and date of the hearing to the payer and any individual who has posted bond or agreed to monitor the payer.
- b. At the time of the violation hearing, the court must make findings and take action appropriate to the facts of the case.

G. Disposition of Bond After Terminating Release Order.

When the court terminates a release order, it must dispose of the previously posted bonds.

1. Performance Bonds.

The court may forfeit or return performance bonds. The court should not return a performance bond when there is an arrearage.

2. Appearance Bonds.

- a) When the payer appears at the contempt hearing and has fully complied with the release order:
 - i) The court should discharge a third party who has posted the appearance bond, and return the full amount to the third party.
 - ii) When the payer posted the appearance bond and still owes support, the court may forfeit the bond to pay support, fines, fees, costs, and sanctions.
- b) When the payer fails to appear or violates a release order:
 - i) When a payer owes support and has posted an appearance bond, the court may forfeit the bond to pay support, fines, fees, costs, and sanctions.
 - ii) When a third party posted the appearance bond, the court may forfeit the bond to compensate the court for its expenses and to pay support.
 - iii) When the court revokes the release order and forfeits the bond, the court (or FOC at the court's direction) should mail a notice to the payer who violated the terms of release and (if applicable) to the person who posted the bond. Either may

contest the court's finding, or the payer may satisfy the court by appearing as required.

- 1) The court must mail notice of a release revocation order immediately to the payer at the payer's last known address and, if forfeiture of bond has been ordered, to whoever posted the bond. SCAO has developed a new form for this purpose: CC 88 "Order Revoking Release and Forfeiting Bond, Notice of Intent to Enter Judgment".
- 2) The payer must appear before the court within 28 days after the revocation date. If the revocation resulted from the payer's failure to comply with conditions of the release order, the payer must, within the same 28 days, surrender, show that there was compliance with the conditions, or show that compliance was impossible through no fault of the payer.

If the payer does not surrender, demonstrate compliance with the release order, or demonstrate that the payer could not comply with the order, the court may continue the revocation order and enter a judgment forfeiting the bond and assessing costs against the payer and whoever posted the bond. SCAO has developed a new form for this purpose: CC 89 "Judgment After Bond Forfeiture".

H. Plan for Remote Bond Hearings [MCR 3.221(K)].

When an arrest occurs in a county other than the one that issued the warrant, and the payer cannot immediately be transported back to that county, the court in the arresting county will need information from the friend of the court in the issuing county to make a release determination. All courts should develop technology to present evidence from its own location to other courts. Teleconferencing, video conferencing, and the Internet can save money for courts and law enforcement officials. MCR 3.221(K) requires each trial court with jurisdiction over domestic relations cases to adopt and file a plan for conducting bench warrant hearings for payers who are incarcerated in another jurisdiction [MCR 3.221].⁹

Courts should adopt their plans by local administrative orders within twenty eight days of the date of this Administrative Memorandum. The SCAO will publish

⁹ The requirement is limited to hearings on bench warrants to keep it within the scope of MCR 3.221. By extending the technology it may become possible for the court that issued the warrant to hold its hearings on the merits using audio and video conferencing equipment.

each circuit's plan so that other circuits will know what technology can be used to conduct remote hearings under MCR 3.221. A model LAO is attached as appendix A. Plans should include:

1. Contact Person.

Each court should designate a contact person for coordinating remote hearings.

2. Teleconferencing.

Teleconferencing can be used to send and receive evidence in the arresting jurisdiction. Teleconferencing is not a preferred method because it does not allow the hearing officer to observe the demeanor of witnesses and it allows the witness to receive unobserved improper assistance from another person. It also makes the inspection of documents impossible. Because entitlement to bond is a collateral matter and a bond hearing is not dispositive of the merits, determining demeanor of witnesses or observing assistance they may receive from others is not as important as it would be at a trial.

The method used for teleconferencing should provide sufficient audio to allow a complete record of the proceedings.

3. Videoconferencing.

Videoconferencing eliminates most of the concerns associated with teleconferencing. Document handling is still a problem. Split-screen technology allows documents to be viewed while a witness testifies. The SCAO has developed pilot-court standards for using interactive video technology to conduct involuntary commitment, child protective, and juvenile delinquency hearings. Other courts should use these standards in formulating their plans. The standards are located at:

http://courts.michigan.gov/scao/resources/standards/ivt_stds.pdf.

4. Internet.

Internet conferencing has many of the characteristics of videoconferencing. With proper equipment, documents can be displayed clearly. Courts using internet videoconferencing should follow the same standards that apply to videoconferencing.

5. Fax.

Facsimile equipment can transmit information from one location to another. Although it may not be possible to authenticate a document, bond review hearings are exempt from the evidence rules [MRE 1101].

6. E-Mail.

E-Mail can be used to transmit documents electronically. It may be difficult to authenticate documents, but that should not be necessary because bond review hearings are exempt from the evidence rules.

7. MiCSES.

Each friend of the court office has access to most current support records from other jurisdictions. The local friend of the court office can obtain information from another county's FOC records and provide that information to the hearing officer who is conducting the bond review hearing.

8. Inter-Circuit cooperation on remote contempt hearings.

As stated earlier, a circuit court cannot issue orders to another county's officers. As a result, and in contrast to bond review hearings, it may not be possible to conduct a contempt hearing for a payer who is incarcerated in a different county. However, if the two circuits and all the parties agree, it will be possible to conduct an entire contempt hearing by remote access. This would make remote hearings possible in two ways:

- a. The contempt hearing could be held in the court of original jurisdiction with the payer appearing through technology. By agreement between the circuits, the court of original jurisdiction could issue orders to court officers of the holding jurisdiction.
- b. The hearing on the merits could be held in the holding jurisdiction with evidence presented through technology by the FOC of the original jurisdiction. By agreement between the circuits, the court of the holding jurisdiction could issue orders to court officers of the original jurisdiction.

APPENDIX A

[Model Local Administrative Order](#)

APPENDIX B

Forms [CC 88](#) and [CC 89](#)