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FAMILY LAW SECTION

April 1, 2019

Mr. Larry Royster
Clerk of the Court
Michigan Supreme Court
P.O. Box 30052
Lansing, MI 48909

RE: Family Law Section Position on ADM File No. 2018-13 Friend of the Court ADR

Dear Clerk Royster:

Please accept this letter as the position of the SBM Family Law Section regarding the development of Friend of the Court ADR processes (ADM File No. 2018-13). The Family Law Council discussed this proposed amendment at great length and while Council is supportive in principle of the concept of Friend of the Court ADR, we oppose the rules as drafted unless the following concerns are sufficiently addressed:

a. Attorneys must have the ability to be present at and *participate* in any type of FOC ADR process.

While attorneys are technically allowed to be present at FOC conciliation conferences and mediation under the current rules, it has been the experience of many practicing attorneys that attorney presence at these meetings is not just frowned upon by FOC, it is discouraged. The examples given ranged from attorneys being asked to sit in the hallway outside the conference room to attorneys being allowed in the conference room but directed or told not to speak.

This is particularly troublesome in counties where *ex parte* orders regarding temporary custody, parenting time and child support are generated if parties cannot agree, and the conferences are scheduled so early in the case that some defendants have not even received notice that an action has been filed, let alone had an opportunity to consult with counsel. Council feels it is imperative that any FOC ADR process resulting in the immediate issuance of an order is clear that attorneys are not only permitted to attend these conferences or meetings, but they are able to *participate* in the process and the conversation on behalf of their clients.

b. There are sufficient domestic violence screening, training and protocols contained in the new rule.

The proposed rule as written addresses domestic violence and, among other things, references the use of the DV screening protocol. However, this aspect of the rule is general and discretionary in its application, with the discretion being left in the hands of FOC employees with no clear articulation of what training they will be required to take, if any.

Council discussed the education and experience level of some FOC employees (i.e., recent high school graduates, even some college students, etc.) who are given authority to assess the "inability of one or both parties to negotiate for themselves at the ADR" or have "reason to believe that one or both parties' health or safety would be endangered by ADR." With all due respect to and appreciation for FOC employees, as we recognize how difficult their work is, the subtleties of DV are complex and often missed or misunderstood by some parties' *own counsel.* It is unrealistic to expect an inadequately trained employee to recognize many of the warning signs without a clear mandate for DV training and express standards for screening. This issue is something that was quite troublesome to members of Council.

c. Confidentiality provisions should be consistent in the new rule (as there are different confidentiality mandates depending on the type of meeting).

This concern also relates to the experience and training of FOC employees. There are different confidentiality rules for different types of ADR meetings in the proposed rule. It seems likely there would be confusion among FOC employees and clients alike on what rules are in play for what meeting, and when information gained in one process may be used in a later one.

d. The language regarding an automatic order being generated should be stricken from the new rule.

As it stands now, some counties generate *ex parte* orders following conciliation conferences—the same conciliation conferences where attorney participation is discouraged and where the conference may take place prior to defendants being served with initial pleadings. These orders can have a major impact on families and the trajectory of a particular case.

With the conferences being held so early in the process, the question was posed: "What if your client has a bad day?" or "What if, for whatever reason, the FOC employee gets a negative impression of your client?" The importance of being prepared for these conferences cannot be overstated. Especially where one or both parties are represented, Council is very concerned about an automatic order coming from any FOC ADR process other than by fully informed consent.

If parties consent to be the subject of orders, that is one thing; if there is no consent, however, then Council is of the opinion that expediency of getting court orders in place sooner rather than later is far outweighed by the real life consequences of these decisions being left to FOC employees, not judges, and the importance of clients having adequate representation at and before the time of these types of conferences, if they so desire.

The consensus of Council was that automatic orders should never be issued in circumstances where parties do not reach agreements. Child support disputes may need to be an exception, however, considering there can be significant delays in scheduling judicial hearings to establish support orders.

Thank you for providing our Council with the opportunity to weigh in on this very important potential change in FOC ADR processes across Michigan.

Sincerely,

Jennifer L. Johnsen
Peter Kulus-Dominguez
Co-Chairs, Court Rules & Ethics Committee
Family Law Council

JLJ/av

cc: Carrie Sharlow
Robert Treat