

Order

Michigan Supreme Court
Lansing, Michigan

December 12, 2018

Stephen J. Markman,
Chief Justice

ADM File No. 2018-13

Proposed New Rule 3.22X of the
Michigan Court Rules (regarding
Friend of the Court ADR)

Brian K. Zahra
Bridget M. McCormack
David F. Viviano
Richard H. Bernstein
Kurtis T. Wilder
Elizabeth T. Clement,
Justices

On order of the Court, this is to advise that the Court is considering adoption of new Rule 3.22X relating to Friend of the Court ADR. Before determining whether the proposal should be adopted, changed before adoption, or rejected, this notice is given to afford interested persons the opportunity to comment on the form or the merits of the proposal or to suggest alternatives. The Court welcomes the views of all. This matter also will be considered at a public hearing. The notices and agendas for public hearings are posted at [Administrative Matters & Court Rules page](#).

Publication of this proposal does not mean that the Court will issue an order on the subject, nor does it imply probable adoption of the proposal in its present form.

[This is a proposed new rule]

Rule 3.22X Friend of the Court Alternative Dispute Resolution

- (A) Friend of the Court Alternative Dispute Resolution Plan. The chief judge of each circuit court shall submit a friend of the court alternative dispute resolution (ADR) plan to the State Court Administrative Office (SCAO) for approval as a local administrative order. The plan shall:
- (1) Require the use of the domestic violence screening protocol provided by the SCAO to identify domestic violence, the existence of a protection order as defined in MCL 552.513 between the parties or other protective order, child abuse or neglect, and other safety concerns. The plan shall provide a method to address those concerns.
 - (2) State the circumstances under which the friend of the court may exclude a case from friend of the court ADR under subrule (D)(2).
 - (3) Designate the matters each friend of the court ADR process will address, subject to subrule (C)(1).

- (4) Designate which friend of the court ADR processes are used in prejudgment or postjudgment friend of the court domestic relations cases.
 - (5) Designate the manner in which the friend of the court will conduct each process.
 - (6) Specify how cases are referred to friend of the court ADR.
 - (7) Address how the court complies with the training, qualifications, and confidentiality provisions for friend of the court ADR processes established by the SCAO pursuant to subrule (J).
 - (8) Provide that attorneys of record will be allowed to attend all friend of the court ADR processes.
 - (9) Set forth any additional procedures, standards, training, qualifications, and confidentiality requirements of any other friend of the court ADR process the court uses other than those processes set forth in this rule.
- (B) Definitions. When used in this rule, unless the context indicates otherwise:
- (1) “Domestic violence” means the presence of coercion or violence that would make friend of the court ADR physically or emotionally unsafe for any participant, or that would impede the achievement of a voluntary and safe resolution of issues.
 - (2) “Friend of the court ADR” means a process established under MCL 552.513 by which the parties are assisted to voluntarily agree to resolve a dispute concerning child custody, parenting time, or support that arises from a domestic relations matter. Friend of the court ADR includes friend of the court mediation, and may include facilitative and information-gathering conferences, joint meetings, and other friend of the court alternative dispute resolution services.
 - (3) “Friend of the court facilitative and information-gathering conference” is a process in which a facilitator assists the parties in reaching an agreement. If the parties fail to reach an agreement, the facilitator may prepare a report and/or recommended order.
 - (4) “Friend of the court domestic relations mediation” means a process in which a neutral third party facilitates confidential communication between parties to explore solutions to settle custody and parenting time or support issues for friend of the court cases. Friend of the court domestic relations

mediation is not governed by MCR 3.216, which relates to domestic relations mediation conducted without participation or supervision of the friend of the court.

- (5) “Joint meeting” means a process in which a person discusses proposed solutions with the parties to a custody or parenting time complaint or an objection to a friend of the court support recommendation.
- (6) “Protected party” means a person who has a personal protection order or other protective order against another party to the case or a person who, due to the presence of coercion or violence in a relationship with another party to the case, could be physically or emotionally unsafe.

(C) Friend of the Court ADR Referral.

- (1) On written stipulation of the parties, on written motion of a party, or on the court’s initiative, the court may order any contested custody, parenting time, or support issue in a domestic relations case, including postjudgment matters to the friend of the court by written order.
- (2) The court may, by an order or through its friend of the court ADR plan, provide that the parties are to meet with a person conducting ADR other than friend of the court domestic relations mediation concerning custody, parenting time, and support issues, unless otherwise provided by statute or court rule.

(D) Cases Exempt From Friend of the Court ADR.

- (1) Parties who are subject to a personal protection order or other protective order or who are involved in a past or present child abuse and neglect proceeding may not be referred to friend of the court ADR without a hearing to determine whether friend of the court ADR is appropriate. The court may order ADR if a protected party requests it without holding a hearing.
- (2) The friend of the court may exempt cases from ADR by the friend of the court on the basis of the following:
 - (a) child abuse or neglect;
 - (b) domestic abuse, unless the protected party submits a written consent and the friend of the court takes additional precautions to ensure the safety of the protected party and court staff;

- (c) inability of one or both parties to negotiate for themselves at the ADR, unless attorneys for both parties will be present at the ADR session;
 - (d) reason to believe that one or both parties' health or safety would be endangered by ADR; or
 - (e) for other good cause shown.
 - (3) The friend of the court shall notify the court when a friend of the court case has been exempted from friend of the court ADR.
 - (4) If the friend of the court exempts a case from ADR, a party may file a motion and schedule a hearing to request the court to order friend of the court ADR.
- (E) Objections to Friend of the Court ADR.
- (1) A party may object to ADR under this rule. An objection must be based on one or more of the factors in subrule (D)(2), and must allege facts in support of the objection.
 - (2) Objection to Mediation:
 - (a) To object to friend of the court domestic relations mediation, a party must file a written motion to remove the case from friend of the court mediation and a notice of hearing of the motion, and serve a copy on all parties or their attorneys of record within 14 days after receiving notice of the order. The motion must be set for hearing within 14 days after it is filed, unless the hearing is adjourned by agreement of counsel or the court orders otherwise.
 - (b) A timely motion must be heard before the case is mediated.
 - (3) Objection to Friend of the Court Facilitative Information-Gathering Conference:
 - (a) To object to a friend of the court facilitative and information-gathering conference, a party must include the objection within the pleading or postjudgment motion initiating the action, a responsive pleading or answer, or file the objection within seven days of the date that the notice is sent to the party. All objections must be filed with the court.

- (b) The objecting party must schedule the hearing, serve a copy of the objection and notice of hearing on all parties and/or attorneys of record.
 - (c) If a party timely objects, the friend of the court shall not hold a facilitative and information-gathering conference unless the court orders a conference after motion and hearing or the objecting party withdraws the objection.
- (4) Objection to Joint Meetings:
- (a) To object to a joint meeting, the party must file a written objection with the friend of the court and provide a copy to all parties and their attorneys of record before the time scheduled for the joint meeting.
 - (b) If a party files an objection, the friend of the court shall not hold a joint meeting unless the court orders a joint meeting following a hearing on motion of a party or the objecting party withdraws the objection.
- (F) Friend of the Court Facilitative and Information-Gathering Conference Procedure.
- (1) A friend of the court facilitative and information-gathering conference shall use the following procedure:
- (a) The conference may not begin until a reasonable inquiry has been made as to whether either party has a history of domestic violence with the other party. A reasonable inquiry includes the use of the domestic violence screening protocol provided by the state court administrative office as directed by the Supreme Court.
 - (b) If domestic violence is identified or suspected, the conference may not proceed unless the protected party submits a written consent and the friend of the court takes additional precautions to ensure the safety of court staff and the protected party. Throughout the facilitative and information-gathering conference process, the facilitator must make reasonable efforts to screen domestic violence that would make the conference physically or emotionally unsafe for any participant or that would impede achieving a voluntary and safe resolution of issues.
 - (c) At the beginning of the conference, the facilitator will advise the parties and their attorneys, if applicable, of the following:

- (i) the purpose of the conference and how the facilitator will conduct the conference and submit an order or recommendation to the court under(F)(2)(a);
 - (ii) how information gathered during the conference will be used;
 - (iii) that statements made during the conference are not confidential and can be used in other court proceedings;
 - (iv) that the parties are expected to provide information as required by MCL 552.603 to the friend of the court and the consequences of not doing so.
- (2) If the parties resolve all contested issues, the facilitator shall submit a report to the court as provided in subrule (I) and may provide a proposed order to the court setting forth the parties' agreements.
- (a) If the parties do not resolve all contested issues at the conference or the parties agree to resolve all or some contested issues but do not sign the proposed order, the facilitator shall submit a report as provided in subrule (I) and may do one of the following:
- (i) Prepare and forward a recommended order to the court within seven days from the date of the conference. The court may enter the recommended order if it approves the order and must serve it on all parties and attorneys of record within seven days after from the date the court enters the order. Accompanying the order must be a notice that a party may object to the order by filing a written objection to the court within 21 days after the date of service, and by scheduling a hearing on the objection. If there is a timely objection, the hearing must be held within 21 days after the objection is filed. If a party objects, the order remains in effect pending a hearing on a party's objection unless the court orders otherwise.
 - (ii) Prepare and serve a recommended order on the parties within seven days from the date of the conference along with a notice that the recommended order will be presented to the court for entry unless a party objects by filing a written objection within 21 days after the date of service, and by scheduling a hearing on the objection. If neither party files a timely objection, the court may enter the order if it approves.

- (iii) Submit a recommendation to the court for further action the court might take to help the parties resolve the remaining contested issues in the case, or alert the court there are contested issues that might require the court's immediate attention.
 - (b) A party may consent to entry of a recommended order by signing a copy of the order at the time of the conference or after receiving the recommended order. A party who consents to entry of the order waives the right to object to the order and must file a motion to set the order aside once it enters.
 - (c) Except for communications made during domestic violence screening under subrule (A)(1), (F)(1)(a), and (H)(1)(a), communications made during a friend of the court facilitative and information-gathering conference are not confidential and may be used in court proceedings.
- (G) Friend of the Court Domestic Relations Mediation Procedure.
 - (1) Domestic relations mediation will be conducted by a mediator selected by the friend of the court.
 - (a) The mediation may not begin until a reasonable inquiry has been made as to whether either party has a history of a coercive or violent relationship with the other party. A reasonable inquiry includes the use of the domestic violence screening protocol provided by the state court administrative office as directed by the Supreme Court.
 - (b) If domestic violence is identified or suspected, the mediation process may not continue unless the protected party submits a written consent and the friend of the court takes additional precautions to ensure the safety of the protected party and court staff. Throughout the mediation process, the mediator must make reasonable efforts to screen for the presence of coercion or violence that would make mediation physically or emotionally unsafe for any participant or that would impede achieving a voluntary and safe resolution of issues.
 - (c) At the beginning of the mediation, the mediator will advise the parties and their attorneys, if applicable, of the following:
 - (i) the purpose of mediation;

- (ii) how the mediator will conduct mediation;
 - (iii) except as provided for in MCR 2.412(D)(8), statements made during the mediation process are confidential and cannot be used in court proceedings.
 - (d) If the parties reach an agreement, the mediator shall submit a proposed order and a report pursuant to subrule (I) within seven days.
 - (e) If the parties do not reach an agreement within seven days of the completion of mediation, 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 additional friend of the court ADR proceedings are contemplated.
 - (2) With the exceptions provided for in MCR 2.412(D), communications during friend of the court domestic relations mediation process are confidential and cannot be used in court proceedings.
- (H) Joint Meeting Procedure.
- (1) Joint meetings shall be conducted as provided in this subrule:
 - (a) The joint meeting may not begin until a reasonable inquiry has been made as to whether either party has a history of a coercive or violent relationship with the other party. A reasonable inquiry includes the use of the domestic violence screening protocol provided by the as directed by the Supreme Court.
 - (b) If domestic violence is identified or suspected, the meeting may not proceed unless the protected party submits a written consent and the friend of the court takes additional precautions to ensure the safety of the protected party and court staff. Throughout the joint meeting, the person conducting the joint meeting must make reasonable efforts to screen for the presence of coercion or violence that would make the joint meeting physically or emotionally unsafe for any participant or that would impede achieving a voluntary and safe resolution of issues.
 - (c) At the beginning of a joint meeting, the person conducting the meeting shall do the following:

- (i) advise the parties that statements made during the joint meeting are not confidential and can be used in other court proceedings;
 - (ii) advise the parties that the purpose of the meeting is for the parties to reach an accommodation and how the person will conduct the meeting;
 - (iii) advise the parties that the person may recommend an order to the court to resolve the dispute; and
 - (iv) explain to the parties the information provided for in subrules (H)(1)(d)-(e).
- (d) At the conclusion of a joint meeting, the person conducting the meeting shall submit a report within seven days pursuant to subrule (I) and may do one of the following:
- (i) If the parties reach an accommodation, record the accommodation in writing and provide a copy to the parties and attorneys of record. If the accommodation modifies an order, the person must submit a proposed order to the court. If the court approves the order, the court shall enter it; or
 - (ii) Submit an order to the court stating the person's recommendation for resolving the dispute. The parties may consent by signing the recommended order and waiving the objection period in accordance with H(1)(e)(iii). If the court approves the order, the court shall enter it.
- (e) If the person conducting the joint meeting submits a recommended order within seven days to the court, the friend of the court must serve the parties and attorneys of record a copy of the order and a notice that provides the following information:
- (i) that the court may enter the recommended order resolving the dispute unless a party objects to the order within 21 days after the notice is sent;
 - (ii) when and where a written objection must be submitted;
 - (iii) that a party may waive the 21-day objection period by returning a signed copy of the recommended order; and

- (iv) if a party files a written objection within the 21-day limit, the friend of the court office shall set a court hearing before a judge or referee to resolve the dispute. If a party fails to file a written objection within the 21-day limit, the office shall submit the proposed order to the court for entry if the court approves it.
 - (2) Except for communications made during domestic violence screening, communications made during a joint meeting are not confidential and may be used in other court proceedings.
- (I) The SCAO shall develop forms for reports and orders that the friend of the court shall use in the ADR processes under this court rule.
- (1) A report form for a proposed consent order shall contain sufficient information to allow the court to make an independent determination that the proposed order is in the child's best interest.
 - (2) When the parties do not resolve some or all of the issues in a facilitative and information-gathering conference or when the friend of the court submits a proposed order following a joint meeting, the report shall contain the parties' agreed-upon and disputed facts and issues.
 - (3) A report under this subrule is not a friend of the court report entitled to consideration under MRE 1101(b)(9). In any contested hearing, the court may use the report to:
 - (a) decide the contested matter to the extent the parties do not dispute the issues or facts in the report or to the extent that the contested issues and facts are not material to the court's decision; or
 - (b) if the parties dispute any issues or facts in the report, the court must make an independent determination based on evidence and testimony presented at the hearing or a subsequent hearing.
 - (4) The court may, on its own motion, order the friend of the court to conduct an investigation and provide a report under MCL 552.505(1)(G).
- (J) Qualification of ADR Providers.
- (1) The SCAO shall establish training and qualification requirements for persons conducting each type of ADR under this court rule.
 - (2) The SCAO shall also provide a process for waiving training and qualification requirements when:

- (a) the trial court demonstrates a person who meets the requirements is not reasonably available and the court's proposed candidate has suitable qualifications equivalent to those established by the SCAO; or
- (b) the person will complete the requirements within a reasonable time determined by the SCAO.

Staff Comment: This proposal was developed by a workgroup facilitated by SCAO's Friend of the Court division to make more uniform the ADR processes used by Friend of the Court offices.

The staff comment is not an authoritative construction by the Court. In addition, adoption of an amendment in no way reflects a substantive determination by this Court.

A copy of this order will be given to the Secretary of the State Bar and to the State Court Administrator so that they can make the notifications specified in MCR 1.201. Comments on the proposal may be sent to the Supreme Court Clerk in writing or electronically by April 1, 2019, at P.O. Box 30052, Lansing, MI 48909, or ADMcomment@courts.mi.gov. When filing a comment, please refer to ADM File No. 2018-13. Your comments and the comments of others will be posted under the chapter affected by this proposal at [Proposed & Recently Adopted Orders on Admin Matters page](#).



I, Larry S. Royster, Clerk of the Michigan Supreme Court, certify that the foregoing is a true and complete copy of the order entered at the direction of the Court.

December 12, 2018

A handwritten signature in black ink, appearing to read "Larry S. Royster", is written over a horizontal line.

Clerk