SBM STATE BAR OF MICHIGAN

p 517-346-6300
p 800-968-1442
f 517-482-6248
www.michbar.org

306 Townsend Street
Michael Franck Building
Lansing, MI
48933-2012

March 26, 2019

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

RE: ADM File No. 2018-13 - Proposed New Rule 3.22X of the Michigan Court Rules

Dear Clerk Royster:

At its March 8, 2019 meeting, the State Bar of Michigan Board of Commissioners (Board) considered the above-referenced proposed new rule published by the Court for comment. As part of its review, the Board considered recommendations from the Access to Justice Policy and Civil Procedure & Courts committees and the Family Law Section.

After this review, the Board voted unanimously to support in principle expanding the availability of alternative dispute resolution (ADR) processes in Friend of the Court (FOC) proceedings. The Board opposes the rule as drafted, however, based on a number of concerns.

First, the rule should explicitly provide that attorneys may participate in any meeting where an order is generated. While subsection (A)(8) requires FOC ADR plans to "provide that attorneys of record will be allowed to attend all friend of the court ADR processes," in practice, many times attorneys are not welcome at these proceedings. Family law practitioners have reported that some FOC facilitators allow attorneys in the room but instruct them not to talk. Other FOC facilitators do not allow attorneys to be present at all, instructing them to wait in the hallway. This practice is particularly troublesome in conciliation counties where *ex parte* orders for temporary custody, parenting time, and support are generated early in the case, sometimes before the other party is even served with the pleadings. Therefore, the rule should explicitly provide that attorneys may be present and participate in any meeting where an order could be generated.

Second, the rule should require that FOC facilitators use the domestic violence screening protocol and require facilitators to have sufficient training on screening for domestic violence. As proposed, subsections (F)(1)(a), (G)(1)(a), and (H)(1)(a) require the FOC facilitator to conduct a "reasonable inquiry" whether there is a history of domestic violence between the parties. Although the domestic violence screening protocol is one form of reasonable inquiry, the rule allows the facilitator to use other methods as long as they constitute a reasonable inquiry. The rule language is vague and leaves too much discretion to the FOC facilitator with no assurance that the facilitator has received adequate training

to determine, for example, the "inability of one or both parties to negotiate for themselves at ADR" or that a party's "health or safety would be endangered by ADR." Given the subtleties involved with identifying domestic violence and making these types of determinations, the rule should require that FOC facilitators use the SCAO domestic violence screening protocol and require facilitators to receive adequate domestic violence screening training.

Third, as proposed, the rule has different confidentiality provisions for different types of meetings. For example, under subsection (G)(2), communications made during FOC domestic relations mediations are confidential, but under subsections (F)(2)(c) and (H)(2), communications made during information-gathering conferences and joint meetings are not confidential and may be used in court proceedings. To avoid confusion for parties and FOC facilitators, the confidentiality provision should be consistent for all FOC ADR proceedings.

Fourth, the rule should not allow FOC facilitators to generate proposed orders without the consent of both parties. As proposed, ADR facilitators may generate recommended orders following ADR proceedings, including conciliation conferences, and these orders can have major impacts on families and the trajectory of the case. This is particularly troubling because attorney participation has been discouraged at these proceedings, and some of these orders could be generated very early in the proceedings before the parties have had time to fully understand and develop their case. Therefore, the rules should not allow the FOC ADR facilitator to generate proposed orders, unless both parties consent.

Fifth, the language regarding protective orders in subsection (D)(1) should be clarified. As currently drafted, it is unclear whether the rule is intended to include: (a) all persons who have been subject to any protective order; (b) persons who have been subject to any protective order involving each other; or (c) persons who have been subject to a protective order concerning domestic abuse or abuse or neglect of a child.

Finally, subsection (D)(1) should be amended as follows (additions shown in bold underline; deletions shown in bold strikethrough):

> Parties who are**, or have been**, 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.

As proposed, (D)(1) is too narrow because it only applies to situations in which there is currently a protective order and would not apply to situations in which there is a past protective order between the parties. The history of having a protective order is a fairly strong indicator of a history of domestic violence; therefore, the Board recommends that

the rule be expanded to include both present and past protective orders. In addition, (D)(1) is too broad with respect to abuse and neglect proceedings. As currently proposed, the rule would apply to people who had an abuse and neglect proceeding wholly unrelated to domestic violence, making the process more onerous for parents for reasons that are not necessarily related to protecting victims of domestic violence. Therefore, the rule should only apply to present abuse and neglect proceedings.

We thank the Court for the opportunity to convey the Board's position on this rule proposal.

Sincerely,

Janet K. Welch
Executive Director

cc: Anne Boomer, Administrative Counsel, Michigan Supreme Court
Jennifer M. Grieco, President, State Bar of Michigan