PROPOSED CHANGES CONCERNING
MCR 3.216 DOMESTIC RELATIONS MEDIATION

I am proposing changes to MCR 3.216 because I feel that the current rules are flawed. I am not an attorney, and do not know the historical facts concerning the how the current MCR 3.216 evolved, or the basis for the present rules. MCR 3.216 did not serve me well during my divorce in 2001.

REASONS MCR 3.216 SHOULD BE CHANGED AND OTHER FACTS

The facts in my case. The divorce proceedings were contentious, which counsel for both sides exploited in order to increase their billing time. Counsel would not work together to divide the marital assets according to law, which was not a very difficult legal, mathematical, or financial task. Therefore, the case was sent to mediation, MCR 3.216. Neither the plaintiff nor the defendant was at all familiar with the mediation process or who should be the mediator. The case already required several court appearances that resulted in lost work time. The two opposing attorneys indicated that it was not necessary for either party to be in court when the mediator was appointed. They would handle the matter in court. Furthermore, I did not know of anyone who did domestic relations mediation. Besides, the judge would appoint a mediator. After the court date I was told that a prominent mediator had been appointed.

At the first mediation session the mediator introduced himself as the dean and most experienced domestic relations mediator in Oakland County. He stated that he had a very long friendly relationship with both counsels. No cause for concern, he was not biased. Neither my ex-wife or myself should be angry at the other's counsel, because the attorneys were acting in the best interest of their client. The mediator had studied the mediation summaries, and he did charge us for his advanced preparation. The other side's mediation summary concerning the marital assets was riddled with errors. The mediator stated that the other side's listing of the marital assets was better, which indicated a lack of diligence and a lack of competence in preparing for mediation in the important area concerning marital assets. His conduct was unprofessional at times. My attorney knew the mediator well, and was not surprised by the mediator's behavior. He told me that some people do not like the mediator. After five inconclusive mediation sessions the mediator stated that we beat his previous record with one client by two sessions. My attorney wanted me to go back for a sixth session. He stated that the mediator was my only hope in order to avoid a trial. I had enough at five.

The mediator was not paid $2,850 for the last couple of sessions, because of his substandard work. About two months after the last mediation session the two opposing counsels were able to write the Judgement of Divorce. It was presented to the judge for his signature. At the time I did not know that the attorneys did not comply with MCR 3.216(J)(2)(b), which states the mediator was to be paid no latter than the entry of judgement. I did not know until 15 months later when the mediator tried to collect his fee from me. After I talked to him and informed him that I was not going to pay him, he wrote to both counsels informing them that they did not comply with the rules

Please see Golden v Attorney Grievance Commission,, Supreme Court #124899 for more complete details.

Why, did this happen to me? Obviously, both counsels and the mediator were at fault. Why could they do what they did? Flaws in MCR 3.216, Domestic Relations Mediation, is part of the answer.

MCR 3.216(E)(2) "The parties may stipulate to the selection of a mediator. A mediator selected by agreement of the parties need not meet the qualifications set forth in subrule (G). The court must appoint a mediator stipulated to by the parties,". Subrule (E)(4) later states when a mediator is to be assigned on a rotational basis from a list maintained by the ADR clerk. Subrule (F), List of Mediators, states the rules that the ADR clerk and court must maintain concerning the court's list of mediators. Subrule (G), Qualification of Mediators, states the required minimum qualifications that the mediator must meet or maintain.

The mediator in my case was selected by both counsels because he was their friend. The mediator's first loyalty was to the attorneys that selected him. My attorney's first loyalty was to the mediator, not to me his client. A violation of professional ethics. The mediator and the two counsels depended on each other for future business. A conflict of interests. The mediator's relationship with the attorneys should ideally be at an arms length, which was not in my case. My chance of getting the mediator would have been rather remote had he been assigned on a random basis. Judges are assigned on a random draw.

My mediator was able to circumvent subrule (F) and (G) by the method that he was selected under subrule (E). On March 26, 2004 the court's ADR clerk indicated that my mediator was not on the court's list of approved mediators. Who knows if my mediator has met the educational requirements of subrule (G). My chance of getting my mediator would have been nil had the selection been from the court's list of mediators, because he is not on the list.

It is of interest to note that the mediator in my case was a member of the Michigan Supreme Court Dispute Resolution Task Force that issued in January, 1999, Report to the Michigan Supreme Court/ Michigan Supreme Court Dispute Resolution Task Force. That report was used to re-write MCR 3.216 that was issued in the year 2000. My mediator has mediated a disproportionately large number of cases compared to his peers that would not have been possible had the preferred method of appointing a mediator been on a random basis. The report issued in January, 1999, does not state why the process specified in MCR 3.216(E)(2) takes precedent over the process specified in MCR 3.216(E)(4)

LACK OF INFORMATION

Did the court provide me with any information concerning the mediation process as mandated by MCR 3.216(B), Mediation Plan? No.

Did my lack of knowledge of the legal system enable the above to happen? Definitely yes.

PROPOSED CHANGES TO MCR 3.216

I have several proposed changes and additions to MCR 3.216 in order to improve the administration of justice, and to protect people like myself during divorce proceedings.

MCR 3.216 should mandate that the court provide basic information about domestic relations mediation to parties who are to undergo the process. The courts have had at least four years to comply with MCR 3.216 (B), Mediation Plan. Subrule (B) states that parties in the family division are to be provided information about mediation. A list of approved court mediators must be readily available. I cite as a precedent the mandated session known as the SMILE program that the Oakland County Circuit Court made me attend, and the literature provided at the SMILE program. It was good.

The mediator should initially be assigned on a random basis from the court's list of domestic relations mediators. All mediators on the list must be familiar with family law. They must meet current specified requirements in this area. The mediators on the list should be certified to perform evaluative mediation. The mediator's professional background and fees should be listed. The parties should be able to stipulate certain qualifications that the potential mediator must meet before his name can be placed on the assignment list. This would include a mediator's primary professional background or fees. Either party should be able to be somewhat selective concerning the appointment process. This would enable the parties to scrutinize the list. More about this to follow.

In subrule MCR3.216(G)(1)(a)(i), Qualification of Mediators, I would like forensic accountants added. Division of marital assets is probably a leading issue in domestic relations mediation. At my mediation I was impressed by the quality of the work of the opposing side's forensic accountant even though his conclusions were biased. I am sure that had he been acting as a neutral party his conclusions would have been enlightening to both parties. In cases where child custody is the main issue a psychologist or family therapist may be the most appropriate mediator.

Current subrule (II), Mediation Procedure, states that a mediation summary is to be submitted to the mediator no later than 3 business days before the mediation session. It does not state what the mediator is to do with the mediation summary. Presumably the mediator is to use the summary to prepare for mediation. What is considered proper preparation, and how much should the mediator be able to charge for preparation? In my case the mediator's statements at the first mediation session clearly indicated a lack of diligence and a lack of competence in preparing for mediation. Should the standard of preparation be defined or is it understood? Obviously, the more thorough the preparation, the higher the fee for preparation. What should govern the fee for preparation? Should the mediator be given one hour, and have to request additional time if needed?

The court has no mechanism for feedback to the ADR clerk from the client concerning the quality

of the mediator's work. In my case the opposing counsels prevented me from expressing my displeasure with the mediator to the judge by violating MCR 3.216(J)(2)(b).

The mediator's performance should be evaluated by the parties at the end of mediation by a standard form that is to be returned to the ADR clerk. These forms should be part of the public record, an attachment to the court's list of mediators. This would enable people entering the mediation process to get a more diverse opinion concerning individual mediators. The mediator would want to do his best if he knew his work was subject to public scrutiny. The mediator's current fee should be part of the public record in order to bring price competition to this type of work. The mediator's fee should be known prior to assignment.

My proposed changes would offer several benefits over the present system. First, if the mediator was assigned from a court list on a random basis it would greatly increase the chance that the mediator, involved parties, and counsels would be at an arms length. The potential for conflicts of interest would be reduced. Second, mediators could be more objective in their work if they did not have to appease certain attorneys in order to be selected for future mediation jobs. Third, MCR 3.216 (F)
and (G) could not be circumvented if the mediator had to be assigned from the court's list. Theoretically, the list would include quality mediators with public evaluations readily available. The involved parties could make a qualified selection from the list. Fourth, the mediation selection process would be more open to individuals who want to do this type of work.

SUMMARY OF THE MOST IMPORTANT PROPOSAL

The basic change that I propose is that random assignment from a list of approved mediators be the first and preferred method to select and appoint a mediator. At the present time this option is the last available as specified in MCR 3.216(E)(4). Previously this option could not have been used, because the courts lacked a mechanism for implementing it.

SPECIFIC PROPOSED CHANGES TO MCR 3.216(E) AS FOLLOWS:

MCR 3.216(E)(1) Domestic relations mediation will be conducted by a mediator selected as provided in this subrule.

(2) The ADR clerk will draw at random three mediators from the list of qualified mediators maintained under subrule (F). Prior to the draw if both parties are in agreement they may stipulate that a mediator drawn from the list meet certain specified criteria such as professional credentials or a certain range of fees. If specified criteria has been agreed upon by both parties prior to the draw the ADR clerk will draw at random until at least three mediators meet the specified criteria or the entire list has been drawn. Within 14 days after the mediation clerk sends the list of potential mediators to the involved parties, each party may send the mediation clerk a notice that the party exercises the right to strike the name of one mediator. Fifteen days after the mediation clerk has sent the list of potential mediators to both parties the mediation clerk must randomly assign as mediator one of the persons whose name has not been struck by either party. The mediation clerk may not

reveal the exercise of the right to strike a mediator. The judge must appoint the mediator assigned by this process unless the mediator is unable to serve, or there is just cause not to appoint the assigned mediator.

(a) Prior to the initiation of subrule (E)(2), with good cause shown by both parties, the judge may order the assignment process to proceed to subrule (E)(3).

(3) If a mediator cannot be appointed by MCR 3.216(E)(2) the parties may stipulate to the selection of a mediator. A mediator selected by agreement of the parties need not meet the qualifications set forth in subrule (G). The court must appoint a mediator stipulated to by the parties, provided the mediator is willing to serve within a time period that would not interfere with the court's scheduling of the case for trial.

(4) If the parties have not stipulated to a mediator, the judge may, after consultation with the parties and their counsels, recommend one, and then appoint one.

(5) The rule for disqualification of a mediator is the same as that provided in MCR 2.003 for the disqualification of a judge. The mediator must promptly disclose any potential basis for disqualification.

Note that subrules (2), (3), and (4) are completely rewritten, while subrules (1) and (5) are unchanged.

CONCLUSION

MCR 3.216(B), Mediation Plan, which has been in the MCR since at least the year 2000, states that "Each trial court that submits domestic relations cases to mediation under this rule shall include in its alternative dispute resolution plan adopted under MCR 2.410(B) provisions governing selection of domestic relations mediators, and for providing parties with information about mediation in the family division as soon as reasonably practical."

Enough time has lapsed since MCR 3.216(B) has been in place to mandate that it be fully operational. My proposed changes to MCR 3.216(E) would ensure that the provisions of MCR 3.216(B), Mediation Plan, MCR 3.216(F), List of Mediators, and MCR 3.216(G), Qualification of Mediators, are effective in protecting the integrity of the alternate dispute resolution process, and in protecting parties entering domestic relations mediation.

I would be happy to meet with you to discuss my proposals, or to provide further input.

Respectfully submitted,

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