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

RE: Proposed Amendment of Rule 2.403 of the Michigan Court Rules

Dear Clerk Royster:

The Representative Assembly of the State Bar of Michigan recommends changes to the Michigan Court Rules to address advance notice of disqualification of case evaluators. Developed by the State Bar's Civil Procedure and Courts Committee, these changes were approved by the Assembly at its meeting on April 26, 2014. We respectfully submit the changes, reflected below, for the Court's consideration:

Rule 2.403 Case Evaluation

(G) Scheduling Case Evaluation Hearing.

(1) The ADR clerk shall set a time and place for the hearing and send notice to the case evaluators and the attorneys at least 42 days before the date set. The notice shall also contain the names of the case evaluators. If, for any reason, the ADR Clerk appoints a replacement case evaluator after the date the notice is sent, then the ADR Clerk shall send an amended notice to the case evaluators and the attorneys, including the name of the replacement evaluator, within a reasonable time but in any event before the hearing.

As it stands, the rule for disqualification of a case evaluator is the same as that provided in MCR 2.003 for the disqualification of a judge. MCR 2.403(E). Pursuant to 2.003(D)(1)(a), in trial courts, all motions for disqualification must be filed within 14 days of the discovery of the grounds for disqualification. If the discovery is made within 14 days of the trial date, the motion must be made forthwith.

That rule works well in most counties where the names of the panelists are sent to all parties long before the scheduled hearing (in fact, in most counties, an amended notice is also sent if the identity of one of the evaluators changes after the initial notice is sent). However, in Wayne County (for many years now) and in Oakland County (just recently) the policy is to not provide the names of the case evaluation hearing panelists until the day of the hearing. In Wayne and Oakland Counties, even when the parties arrive at the hearing and agree that there is a conflict, a number of problems can arise, including the inability of the ADR clerk to find a replacement panelist, replacement panelists who do not have time to adequately review the materials before the case evaluation hearing, 2 person panels, etc. In cases where the parties and the panel do not agree that there is a

conflict, the objecting party must then file a motion after the hearing has occurred, which in addition to being unfair for due process reasons, gives rise to a misperception that it is the amount of the case evaluation award with which the party is actually unhappy, as opposed to the process.

One relatively recent example of this problem is the case of *Sherman v Sherrod*, unpublished opinion per curiam of the Court of Appeals, issued May 30, 2013) (Docket No. 299045), where the parties showed up to case evaluation in Wayne County only to find that counsel for the third party defendant in that case was on the panel. That lawyer recused himself but, the ADR Clerk was, apparently, not able to get an alternate. The evaluation hearing was then held with two panel members, and the losing party subsequently objected to case evaluation sanctions on the basis that the two member panel was defective.

The Representative Assembly's proposal remedies the problems.

Thank you for your consideration. It is our hope that the Court will publish the proposed changes for comment and ultimately approve them as amendments to the Michigan Court Rules.

Sincerely,



Janet K. Welch
Executive Director

cc: Anne Boomer, Administrative Counsel, Michigan Supreme Court