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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 29, 2012

Corbin Davis
Clerk of the Court
Michigan Supreme Court
P.O. Box 30052
Lansing, MI 48909

RE: ADM File No. 2010-32 – Proposed Amendment of Rule 3.210 of the Michigan Court Rules

Dear Clerk Davis:

At its March 27 meeting, the Executive Committee of the State Bar of Michigan considered this amendment. The Committee reviewed recommendations from the Civil Procedure & Courts Committee and Domestic Violence Committee (enclosed), and voted to oppose the amendment.

We thank the Court for the opportunity to comment on the proposed amendments.

Sincerely,

Janet K. Welch
Executive Director

cc: Anne Boomer, Administrative Counsel, Michigan Supreme Court
Julie I. Fershtman, President

Report on Public Policy Position

Name of committee:
Civil Procedure and Courts Committee

Contact person:
Daniel D. Quick

E-Mail/Phone:
dquick@dickinsonwright.com

Proposed Court Rule or Administrative Order Number:
ADM 2010-32 Proposed Amendment of Rule 3.210 of the Michigan Court Rules
The proposed amendments of MCR 3.210 were submitted to this Court by the Michigan Judges Association after conclusion of its work and input from its Domestic Relations Committee. The proposal would govern the entry of default and default judgment in domestic relations cases and would cover and clarify related procedural issues. While this proposal adds provisions that may be found in Chapter 2 of the Michigan Court Rules, these proposed amendments of MCR 3.210 attempt to clarify procedures to be used in domestic relations cases. The proposed amendment of MCR 3.210 also would allow parties to reach agreement on issues related to property division, custody, parenting time, and support, and enter a consent judgment on those issues if the court approves it.

Date position was adopted:
February 18, 2012

Process used to take the ideological position:
Position was adopted after discussion and vote at a scheduled meeting.

Number of members in the decision-making body:
20

Number who voted in favor and opposed to the position:
14 Voted for position
0 Voted against position
0 Abstained from vote
6 Did not vote

Recommendation:
Oppose.

The Committee felt the revisions were a significant departure from default rules applicable to civil actions and, ideally, such provisions should remain consistent between the two courts. The proposal departs in a stark way from the existing rule and case law in a civil action and thus creates inconsistency in the court rules. If there is a rationale for creating a very different sort of 'default' for domestic relations actions, the rationale has not been provided and

is not apparent. Although MCR 3.201(C) does contemplate the different treatment of cases, the proposed amendment would likely provoke additional litigation, especially on the appellate level, over interpreting the new default rule since conventional jurisprudence has been applied up to this point.

Beyond the issue of the rule being different than the existing MCR 2.603, the rule as written prompts many questions. For example: how does one harmonize (B)(1)(b) and (c); given that the new rule may contemplate greater issue preclusion implications than under the existing default jurisprudence ((B)(1)(c)), should something more be required than the 'automatic' entry of a default upon presentation of an affidavit ((B)(2)(a)); how does one harmonize (B)(2)(c) with subsections (d) and (e); etc.

The Committee defers to the expertise of the Family Law Section as to whether the proposed amendment would promote efficient administration.

The text of any legislation, court rule, or administrative regulation that is the subject of or referenced in this report.
http://courts.michigan.gov/supremecourt/Resources/Administrative/2010-32_2011-12-21_order.pdf

Report on Public Policy Position

Name of committee:
Domestic Violence Committee

Contact person:
Ashley E. Lowe, co-chair
Sarah R. Prout, co-chair

E-Mail/Phone:
lowea@cooley.edu
proutsarah@yahoo.com

Proposed Court Rule or Administrative Order Number:
ADM 2010-32 - Proposed Amendment of Rule 3.210 of the Michigan Court Rules.
The proposed amendments of MCR 3.210 were submitted to this Court by the Michigan Judges Association after conclusion of its work and input from its Domestic Relations Committee. The proposal would govern the entry of default and default judgment in domestic relations cases and would cover and clarify related procedural issues. While this proposal adds provisions that may be found in Chapter 2 of the Michigan Court Rules, these proposed amendments of MCR 3.210 attempt to clarify procedures to be used in domestic relations cases. The proposed amendment of MCR 3.210 also would allow parties to reach agreement on issues related to property division, custody, parenting time, and support, and enter a consent judgment on those issues if the court approves it.

Date position was adopted:
January 24, 2012

Process used to take the ideological position:
Position adopted after an electronic discussion and vote.

Number of members in the decision-making body:
20

Number who voted in favor and opposed to the position:
13 Voted for position
0 Voted against position
0 Abstained from vote
7 Did not vote

Position:
This proposal would amend paragraph (B) and change the way default judgments are processed in divorce cases. A party who is defaulted for failure to plead may not file any pleadings (which include counterclaim or answer to a complaint) but may file a motion to set aside the default. A defaulted party may appear by filing an appearance or motion, participating in scheduled hearings or ADR proceedings and may participate in discovery. A motion for

entry of default judgment must be served on the defaulted party with a copy of the proposed judgment 14 days before the hearing. When making findings, the court may consider "evidence not otherwise admissible."

The committee was trouble by this proposal, which essentially eliminates the concept of default by permitting a defaulted party to participate in the action. The committee recognized the amendment could help or hurt DV survivors depending on whether they are a defaulted party or not. It could be harmful to survivors who are the moving party because the perpetrator could manipulate the court process by choosing when to participate or not and frustrate the survivor's ability to prove her case. On the other hand, it could be helpful to survivors who are defaulted, often because the perpetrator assures her that she doesn't need to answer, by allowing them to participate despite being defaulted. Of most concern were the provisions allowing the court to consider inadmissible evidence. For example, a perpetrator who was defaulted could do nothing except appear at the hearing to enter the judgment and present inadmissible evidence that the other party is mental ill or abusing the children, or other similar unsubstantiated claims.

Recommendation: Oppose, particularly the provisions in subparagraphs (B)(5)(c) and (d) that permit the court to consider inadmissible evidence.

The text of any legislation, court rule, or administrative regulation that is the subject of or referenced in this report.
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