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March 25, 2013

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Clerk of the Court

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Michigan Supreme Court

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Lansing, MI 48909

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48933-2012

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

Dear Clerk Davis:

At its March 12 meeting, the Executive Committee of the State Bar of Michigan considered the above rule amendment published for comment. In its review, the Committee considered recommendations from the Civil Procedure & Courts Committee, the Domestic Violence Committee, and the Family Law Section.

The Committee voted unanimously to support the proposed amendments to MCR 3.210 as drafted by following individuals: Hon. Kathleen Feeney, 17th Judicial Circuit Court Family Division; Hon. Joan Young, 6th Judicial Circuit Family Division; and James J. Harrington, III, chair-elect of the Family Law Section. Their amended proposal is enclosed.

The Board was concerned that the original proposed amendments would (1) allow batterers to manipulate the process and delay entry of final judgments by permitting defaulted parties to participate in the case; and (2) permit the court to consider inadmissible evidence when entering a final judgment. The amended proposal addresses those concerns.

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
Bruce A. Courtade, President

Rule 3.210 Hearings and Trials

(A) [Unchanged.]

(B) Default Cases.

(1) ~~Default cases are governed by MCR 2.603, Application. This subrule applies to the entry of a default and a default judgment in all cases governed by this subchapter. See MCR 3.201(A)(1) and (2).~~

~~(a) If a default is requested for failure to plead or otherwise defend as provided by these rules, subrule (B)(2) applies.~~

~~(b) If a default is ordered as a sanction under other rules, the order shall specify what actions the sanctioned party is prohibited from taking, and all other rights provided by law and these rules remain unrestricted.~~

~~(c) A default establishes (i) the requesting party's right to relief, (ii) the truth of well-pled material facts, and (iii) entitles the requesting party to proceed to entry of a default judgment.~~

(2) ~~A judgment of divorce, separate maintenance, or annulment may not be entered as a matter of course on the default of the defendant because of failure to appear at the hearing or by consent. Every case must be heard in open court on proofs taken, except as otherwise provided by statute or court rule. Entry of Default.~~

~~(a) A party may request the entry of a default of another party for failure to plead or otherwise defend. Upon presentation of an affidavit by a party asserting facts setting forth service and failure to plead or otherwise defend, the clerk must enter a default against the party.~~

~~(b) The party who requested entry of the default must provide prompt notice that the default has been entered to the defaulted party and all other parties and persons as provided by MCR 3.203, and file a proof of service.~~

~~(c) Once the default of a party has been entered, and before entry of the default judgment, that party may not file any pleadings, but may file a motion to set aside the default under subrule (B)(3).~~

~~(d) A party in default may appear in a case under this subchapter by filing an appearance or motion, or by participating in any scheduled court proceedings, referee hearings, mediations, arbitrations, or other ADR proceedings. A party who has appeared in a case under this subchapter must be served with a copy of every paper later filed in the case.~~

- (e) If the default of a party has been entered for failure to plead or otherwise defend, that party may (1) the Court may permit that party to participate in all discovery as provided in Subchapter 2.300; may file motions; and that party is entitled to notice of and participation in all scheduled court proceedings, referee hearings, mediations, arbitrations, other ADR proceedings, and friend of the court investigations and participation in same only in the manner as the Court may allow; and trial.
- (f) If a default is ordered as a sanction under other rules, the court may impose limitations on the defaulted party's right to participate in the action.
- (3) If a party is in default, proofs may not be taken unless the judgment fee has been deposited with the court clerk and the proposed judgment has been given to the court. **Setting Aside Default.** A default may be set aside, before the entry of the default judgment, upon verified motion of the defaulted party showing good cause, or that the court lacks jurisdiction over the defendant or over the subject matter.
- (4) If the court determines that the proposed judgment is inappropriate, the party who prepared it must, within 14 days, present a modified judgment in conformity with the court's opinion. **Notice of Hearing and Motion for Entry of Default Judgment.**
- (a) A party moving for default judgment must schedule a hearing and serve the motion, notice of hearing, and a copy of the proposed judgment upon the defaulted party at least 14 days before the hearing on entry of the default judgment, and promptly file a proof of service.
- (b) Notice shall be served in the manner provided by MCR 3.203 or by any manner permitted by the court which is reasonably calculated to give the defaulted party actual notice of the proceedings and an opportunity to be heard.
- (c) If the default is entered for failure to appear for a scheduled trial or hearing, notice under this subrule is not required.
- (5) If the court determines not to enter the judgment, the court must direct that the judgment fee be returned to the person who deposited it. **Entry of Default Judgment.**
- (a) A judgment of divorce, separate maintenance, or annulment may not be entered as a matter of course on the default of a party because of failure to appear at the hearing on entry of the requested default judgment, or by consent, and the case must be heard in open court on proofs taken, except as otherwise provided by statute or court rule.
- (b) Proofs for a default judgment may not be taken unless the judgment fee has been deposited with the court clerk and the proposed judgment has been given to the court. **Nonmilitary affidavits** required by law must be filed before a default judgment is entered in

cases in which the defendant has failed to appear. A default judgment may not be entered against a minor or an incompetent

person unless the person is represented in the action by a conservator or other representative, except as otherwise provided by law.

- (c) The moving party must present evidence sufficient to satisfy the court that the terms of the proposed judgment are in accordance with law. The court may consider relevant and material affidavits, testimony, documents, exhibits, or other evidence not otherwise admissible.
- (d) In cases involving minor children, the court may take testimony and receive or consider relevant and material affidavits, testimony, documents, exhibits, or other evidence not otherwise admissible from either party, as necessary, to make findings concerning the award of custody, parenting time, and support of the children.
- (e) If the court does not approve the proposed judgment, the party who prepared it must, within 14 days, submit a modified judgment in conformity with the court's ruling pursuant to MCR 2.602(B)(3), or as otherwise directed by the court.
- (f) Upon entry of a default judgment, the moving party must serve a copy of the judgment as entered by the court on the defaulted party within 7 days after it has been entered, in accordance with MCR 3.203, and promptly file a proof of service.

(6) Setting Aside Default Judgment.

- (a) A motion to set aside a default judgment, except when grounded on lack of jurisdiction over the defendant, lack of subject matter jurisdiction, failure to serve the notice of default as required by subrule (B)(2)(b), or failure to serve the proposed default judgment and notice of hearing for the entry of the judgment under subrule (B)(4), shall be granted only if the motion is filed within 21 days after the default judgment was entered and if good cause is shown.
- (b) In addition, the court may set aside a default judgment or modify the terms of the judgment in accordance with statute or MCR 2.612.

- (7) Costs. An order setting aside the default or default judgment must be conditioned on the defaulted party paying the taxable costs incurred by the other party in reliance on the default or default judgment, except as prescribed in MCR 2.625(D). The order may also impose other conditions the court deems proper, including a reasonable attorney fee.

(C)-(D)[Unchanged.]

(E) Consent Judgment.

ATTACHMENT B
PROPOSED MCR 3.210 - May 7, 2012

- (1) At a hearing, a A party, or all parties, may present to the court for entry a

judgment approved as to form and content eonsent and signed by all parties and their attorneys of record.

- (2) If the court determines that the proposed consent judgment is not in accordance with law, the parties shall submit a modified consent judgment in conformity with the court's ruling within 14 days, or as otherwise directed by the court.
- (3) Upon entry of a consent judgment, the moving party must serve a copy of the judgment as entered by the court on all other parties within 7 days after it has been entered, in accordance with MCR 3.203, and promptly file a proof of service.