

Order

Michigan Supreme Court
Lansing, Michigan

May 20, 2009

Marilyn Kelly,
Chief Justice

ADM File No. 2005-32

Proposed Amendment of Rules 2.112,
2.113, 3.101, and 8.119 of the
Michigan Court Rules

Michael F. Cavanagh
Elizabeth A. Weaver
Maura D. Corrigan
Robert P. Young, Jr.
Stephen J. Markman
Diane M. Hathaway,
Justices

On order of the Court, this is to advise that the Court is considering amendments of Rules 2.112, 2.113, 3.101 and 8.119 of the Michigan Court Rules. Before determining whether the proposal should be adopted, changed before adoption, or rejected, this notice is given to afford interested persons the opportunity to comment on the form or the merits of the proposal or to suggest alternatives. The Court welcomes the views of all. This matter also will be considered at a public hearing. The notices and agendas for public hearings are posted at www.courts.michigan.gov/supremecourt.

Publication of this proposal does not mean that the Court will issue an order on the subject, nor does it imply probable adoption of the proposal in its present form.

[Additions are indicated by underlining and deletions are indicated by strikeover.]

Rule 2.112 Pleading Special Matters

(A)-(M) [Unchanged.]

(N) Consumer Debt Cases. A party whose cause of action is to collect a consumer debt as defined in the Michigan Debt Collection Act (MCL 445.251[a] and [d]) must also include the following information in its pleading: the name of the creditor on the alleged default date; the final four digits of the account number or identification number on the alleged default date or, if none is available, information sufficient to identify the alleged debt; and the balance due to date. A complaint in a consumer debt action must be substantially in the form approved by the state court administrator.

Rule 2.113 Form of Pleadings and Other Papers

(A)-(G)[Unchanged.]

(H) Supporting Documentation. In a consumer debt case as defined in MCL 445.251, the court may require additional documentation to verify any reassignment of debt after the date of filing; amounts for interest and costs stated in judgment documents; and amounts for interest, costs, and payments stated in postjudgment documents.

Rule 3.101 Garnishment After Judgment

(A)-(C) [Unchanged.]

(D) Request for and Issuance of Writ. The clerk of the court that entered the judgment shall issue a writ of garnishment if the writ complies with these rules and the plaintiff, or someone on the plaintiff's behalf, makes and files a statement verified in the manner provided in MCR 2.114(A) stating:

- (1) that a judgment has been entered against the defendant and remains unsatisfied;
- (2) the amount of the judgment; the total amount of the postjudgment interest accrued to date; the total amount of the postjudgment costs accrued to date; the total amount of the postjudgment payments made to date and the amount remaining unpaid;
- (3) [Unchanged.]

(E)-(T)[Unchanged.]

Rule 8.119 Court Records and Reports; Duties of Clerks

(A)-(B)[Unchanged.]

(C) Filing of Papers. The clerk of the court shall endorse on the first page of every document the date on which it is filed. Papers filed with the clerk of the court must comply with the Michigan Court Rules, requirements contained in the Michigan statutes and the Michigan Supreme Court records standards. The clerk of the court may reject papers which do not conform to MCR 2.113(C)(1) and MCR 5.113(A)(1).

(D) Rejection and Return of Documents. A chief judge may, in the best interests of the administration of justice, authorize court clerks to screen and reject documents that have been received for filing that do not comply with subsection (C) above. Authorization and the standards for screening and rejecting documents shall be in writing and shall be made available upon request. The party shall be notified of the nature of the noncompliance in writing. A party who has had documents returned under this section is entitled to prompt judicial review of the clerk's determination upon request. If the case has not been accepted for filing, the chief judge or another judge designated by the chief judge shall make the determination. A motion fee shall not be required.

(D)-(G)[Re-lettered (E)-(H), but otherwise unchanged.]

CORRIGAN, J. (*dissenting*). I respectfully dissent from the Court's order publishing the proposed amendment of Michigan Court Rule 8.119 for comment. I believe that publication is premature in light of significant issues regarding the propriety of the proposed rule's delegation of judicial authority. The proposal by the 46th District Court would revise MCR 8.119(C) to require that documents filed with court clerks comply with "requirements contained in the Michigan statutes." If an authorized court clerk determines that a filing does not comply with the requirement in MCR 8.119(C), the clerk would be entitled to reject and return it under the proposed new language in MCR 8.119(D). In our order in *In re Credit Acceptance Corp.*,¹ this Court held that returning deficient writs constitutes a sanction that must be ordered by a judge. The text of the proposed rule flatly contradicts our order and radically departs from the traditional ministerial functions performed by court clerks. To the extent that the proposed rule authorizes court clerks to reject pleadings, it improperly delegates judicial authority, in violation of the Michigan Constitution and caselaw. Because courts, and not court clerks, are entrusted with performing adjudicative functions and because basic questions concerning the merits of this proposal remain unanswered, I oppose publishing the proposed amendment of MCR 8.119 for comment.

The 46th District Court submitted its proposed amendment after an attorney brought an action for superintending control against the 46th District Court for rejecting the attorney's pleadings. Although the trial court dismissed the plaintiff's action, the Court of Appeals reversed the trial court's decision and concluded that MCR 3.101(D) does not allow a court to require that a judgment creditor provide information or documentation in addition to the verified statement required by that rule before the court issues a writ of garnishment.² The Court of Appeals explained, "MCR 8.119(C) does not give court clerks broad discretion to reject pleadings. Rather, it authorizes clerks to reject pleadings that fail to conform only to the caption requirements set forth in MCR 2.113(C)(1) and MCR 5.113(A)(1)."³ On appeal, this Court affirmed, noting that "[t]he court's authority to sanction parties cannot be delegated to the court clerks."⁴

Our decision in *In re Credit Acceptance Corp.* is not unique to the facts presented in that case. Judicial power is vested in the courts under our state constitution.⁵

¹ *In re Credit Acceptance Corp.*, 481 Mich 883 (2008).

² *In re Credit Acceptance Corp.*, 273 Mich App 594, 595 (2007).

³ *Id.* at 600 n 2.

⁴ *In re Credit Acceptance Corp.*, 481 Mich 883, quoting *In re Huff*, 352 Mich 402, 415 (1958) (holding that the contempt power is "inherent and a part of the judicial power of constitutional courts"); Const 1963, art 3, § 2; Const 1963, art 6, § 1 ("The judicial power of the state is vested exclusively in one court of justice . . .").

⁵ *Johnson v Kramer Bros Freight Lines, Inc.*, 357 Mich 254, 258 (1959).

The judicial power of the state is vested *exclusively* in one court of justice which shall be divided into one supreme court, one court of appeals, one trial court of general jurisdiction known as the circuit court, one probate court, and courts of limited jurisdiction that the legislature may establish by a two-thirds vote of the members elected to and serving in each house. [Const 1963, art 6, § 1 (emphasis added).]

The Michigan Constitution also empowers the Supreme Court to “authorize persons who have been elected and have served as judges to perform judicial duties for limited periods or specific assignments.”⁶ In contrast, no constitutional authority grants a chief judge the power to authorize court clerks to perform adjudicative functions. Moreover, in *Carson Fischer Potts & Hyman v Hyman*,⁷ the trial court appointed an “expert witness” to make “findings of fact, conclusions of law and a final recommendation and proposed judgment.” The Court of Appeals held that the trial court lacked constitutional authority to delegate its judicial power to an expert witness.⁸ The Court explained that “there is no constitutional authority for the trial court to delegate specific judicial functions to an ‘expert witness.’”⁹ Instead, “[i]t is within the peculiar province of the judiciary to adjudicate upon and protect the rights and interests of citizens and to construe and apply the laws.”¹⁰ In light of our state constitution and established caselaw, I question our rush to publish this proposed amendment.

We posed questions at the April 9, 2009, conference concerning the merits of this proposal. At conference, Judge William J. Richards appeared on behalf of the 46th District Court to discuss the proposed amendment of MCR 8.119. Judge Richards subsequently issued a thoughtful memorandum regarding this proposal on behalf of the entire 46th District Court.¹¹ I am grateful to Judge Richards for appearing at conference and for his ongoing input on this proposal. Nevertheless, I continue to have significant reservations about the proposed amendment of MCR 8.119. As an initial matter, the 46th District Court has not adequately explained why MCR 8.119 should be broadly amended to address the narrow problem identified by the court regarding garnishment requests. In my view, the 46th District Court would be well-advised to instead consider proposing amendments of MCR 3.101, which specifically involves garnishments after judgment. Similarly, careful consideration should be given about adopting language

⁶ Const 1963, art 6, § 23.

⁷ *Carson Fischer Potts & Hyman v Hyman*, 220 Mich App 116, 121 (1996).

⁸ *Id.* at 121-122.

⁹ *Id.* at 121.

¹⁰ *Id.*

¹¹ See Appendix A for a copy of Judge Richards April 28, 2009, memorandum.

analogous to the language currently found in MCR 7.201(B)(2) and (3) such that attorneys could correct initial filing deficiencies within a set period, thereby lessening the likelihood of wrongful dismissals and malpractice claims.

Myriad questions remain about this proposal, and I believe that those questions should be answered before we solicit the public's reaction. Although I acknowledge that releasing a proposal for public comment does not bind the Court to adopt it, I disagree with publishing proposals without sufficient scrutiny. I would ask the 46th District Court to answer the following questions regarding its proposal:

- Do the difficulties described by the 46th District Court about managing approximately 9,700 requested garnishments each year mirror the experiences of trial courts across the state? If so, what techniques have other courts implemented? If the 46th District Court is an anomaly, why should we revise our existing court rule to accommodate a single district?
- Why should the proposed amendment of MCR 8.119 apply to all cases, and not only requests for garnishment? On what basis did the 46th District Court conclude that clerks should be authorized to reject and return all documents received for filing? Why not limit the remedy to the problem identified, that is, the large number of garnishments filed in the 46th District Court?
- Are there specific flaws in the current language of MCR 8.119? If not, why depart from the present rule, which unambiguously states that clerks “may reject papers which do not conform to MCR 2.113(C)(1) and MCR 5.113(A)(1)”?
- What effect will the proposed amendment have on attorneys who file pleadings in multiple courts? Is it not likely that attorneys would face varying standards in different districts concerning the screening and rejection of documents? Why should we encourage the development of inconsistent practices? Moreover, why make the standards adopted by each court available only upon request? Why not post the written standards so that attorneys are more likely to be aware of them?
- Has either the Michigan Creditors Bar Association (MCBA) or any other interested party voiced its support for this proposed amendment? How does the 46th District Court respond to those objections already raised by the MCBA?
- How would the “prompt judicial review of the clerk’s determination” under the proposed new language in MCR 8.119(D) take place? Can an attorney

immediately appeal the clerk's decision to the judge? Must an attorney make a formal motion in order to appeal? What if there is no judge available to hear the appeal? Is it possible that some filings later determined to be sufficient could nevertheless be late under the statute of limitations as the proposal is written now? What burdens will an automatic review process place on court resources?

- If the Court is asked to adopt a statewide court rule, would it not make more sense to conduct a comprehensive study of what court clerks may screen, and then revise MCR 8.119(C) to provide clerks with a specific list of minimum filing requirements? Further, what are the pitfalls in resolving problems concerning writs of garnishment in MCR 3.101, as opposed to granting broad authority to allow clerks to reject pleadings? Does not the broad approach favored by the 46th District Court invite inconsistency and variable enforcement?

I recognize that a court has inherent powers to manage its own affairs so as to achieve the orderly and expeditious disposition of cases. Moreover, in light of my own experience with managing the “housekeeping docket” as Chief Judge for the Court of Appeals, I empathize with the 46th District Court regarding its burdensome workload. Nevertheless, I am concerned that in attempting to dispose of requests for garnishment in an orderly fashion, the 46th District Court would grant its clerks and all clerks across the state overly broad authority, thereby allowing clerks to exercise an adjudicative function. Historically, this Court has refused to adopt proposed amendments that would delegate too much authority to clerks.¹² I see no appreciable distinction between such past proposals and the 46th District Court's current proposal. Additionally, I believe that further scrutiny of this proposal before publication would have yielded a less troubling

¹² See, e.g., ADM File No. 1993-46, concerning the Court of Appeals backlog. This Court did not adopt proposed MCR 7.201(B), which would have allowed the Court of Appeals clerk to dismiss appeals if the appellant failed to file required documents within 21 days of being notified. Similarly, we voted against adopting proposed MCR 7.217, which would have granted the Court of Appeals clerk discretion to dismiss appeals if the appellant failed to prosecute the appeal in accordance with the rules and failed to correct defects after being notified. Indeed, the current versions of both MCR 7.201(B) and MCR 7.217 expressly state that “[t]he Chief Judge or another designated judge may dismiss the appeal.”

product that satisfies my concerns about the improper delegation of judicial authority to clerks. Because I cannot support the Court's order publishing the proposed amendment of MCR 8.119 for comment prematurely, I respectfully dissent.

MARKMAN and YOUNG, JJ., concur with CORRIGAN, J.

Staff Comment: These proposed amendments reflect in substantial part a proposal submitted by the 46th District Court to require more specific pleading in debt collection cases than in other types of cases, and to allow a chief judge to authorize court clerks to screen pleadings in all cases and to reject them if they do not comply with the Michigan Court Rules, Michigan statutes, or the Michigan Supreme Court records standards. A party whose documents were rejected would be entitled to a prompt judicial review upon request. Further, the proposal would require that a request for a writ of garnishment include information regarding the total amount of postjudgment interest and costs accrued to date, and the total amount of postjudgment payments made to date.

The staff comment is not an authoritative construction by the Court

A copy of this order will be given to the Secretary of the State Bar and to the State Court Administrator so that they can make the notifications specified in MCR 1.201. Comments on this proposal may be sent to the Supreme Court Clerk in writing or electronically by September 1, 2009, as P.O. Box 30052, Lansing, MI 48909, or MSC_clerk@courts.mi.gov. All comments will be posted on the Court's website. When filing a comment, please refer to ADM File No. 2005-32.



I, Corbin R. Davis, Clerk of the Michigan Supreme Court, certify that the foregoing is a true and complete copy of the order entered at the direction of the Court.

May 20, 2009

Corbin R. Davis

Clerk

APPENDIX A



STATE OF MICHIGAN
46th DISTRICT COURT

DISTRICT JUDGES

The Honorable
SHELLA R. JOHNSON
248-796-5810

The Honorable
SUSAN M. MOISEEV
248-796-5820

The Honorable
WILLIAM J. RICHARDS
248-796-5830

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248-796-5800

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PARKING DIVISION
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MISDEMEANOR/
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April 29, 2009

Justice Maura D. Corrigan
Michigan Supreme Court
P.O. Box 30052
Lansing, Michigan 48909

Commissioner Samuel R. Smith
Michigan Supreme Court
P.O. Box 30052
Lansing, Michigan 48909

Re: ADM File 2005-32

Maura
Dear Justice ~~Corrigan~~ and Commissioner Smith:

Enclosed please find my memorandum concerning the proposed court rules recently published for comment. I have shared this memo with both my colleagues on the bench, received their approval, and have incorporated their edits. Therefore, the memo does speak for the entire 46th District Court. I look forward to continuing our dialogue.

Very truly yours,

A handwritten signature in cursive script that reads "Bill Richards".

William J. Richards
District Judge

WJR: wkf

cc: Hon. Susan M. Moiseev
Hon. Shelia R. Johnson

APPENDIX A

Memorandum

To: Justice Maura Corrigan and Commissioner Sam Smith

From: Judge Bill Richards, 46th District Court

Re: ADM File 2005-32

Introduction

In this Memo, I will address yours of April 3, 2009. I am grateful for this opportunity and thank you for your openness to additional information and clarification. As a new Judge in the 46th District Court, I bring a unique perspective to this issue. Because I am new, I am not wedded to the court's existing policies. In my short judicial tenure, I have already advocated changes in our court's practices where I thought they could be improved.

Yet, for two years I have worked on the "front lines" of District Court. I know what our clerks do. So, from everyday experience on the district court bench, I have some personal knowledge to offer. I have also followed the *Credit Acceptance Corporation v. 46th District Court* lawsuit. From this experience, I have come away dismayed at the misunderstandings revealed in the briefs and, inevitably, in the courts' opinions.

To summarize my perspective: Acting under the authority of both the court rule and the 46th District Court judges, our court clerks have been reviewing garnishments on their own for over two decades. They issue most requested garnishments, and return others for correction. Where the plaintiffs can correct the error, they do so, re-file the request, and our clerks then issue the garnishment. On the other hand, some requested garnishments are fatally flawed, and our clerks identify those errors when returning them. Few, if any, lawyers have objected to this long-standing practice. But one lawyer, acting without his client's knowledge, sued our court over this practice. He spun our clerks' actions into a vivid tale of loose cannons who "sanction parties," "reject pleadings," and exercise non-delegable judicial power in defiance of court rules and the Constitution.

How did we ever reach this breathtaking misconception? We are not delegating our judicial power at all, much less improperly delegating it. The court rule already gives to clerks the power to issue a garnishment. Even when a clerk's review reveals an error and she returns the request for correction, that decision is preliminary, not final. If the plaintiff disagrees, he can immediately appeal the clerk's decision to the judge.

Tradition vs. Departure

Let me start by addressing your issues. First, you characterize the proposed court rules as permitting a "radical departure from the traditional ministerial functions performed by court clerks." I disagree on two points. First, **far from departing from tradition, the proposed court rules would continue tradition. The proposed rules would formally permit**

APPENDIX A

what our clerks and other clerks across the state have done without controversy for two decades.¹ Moreover, our informal survey reveals that many district court clerks do what our clerks do; they review all requested garnishments, issue those that are in order, and return those that are flawed for correction, all without direct judicial action. So the 46th District Court practice embodies a long-standing, well accepted, statewide clerical practice, not some aberration in Southfield or a radical departure from tradition.

Adjudicative vs. Ministerial Decision-Making

Second, in our view, our clerks are indeed performing ministerial functions. They are not acting as judges; they are not exercising judicial discretion; they are not sanctioning lawyers; they are not acting in ultra vires fashion. They are doing what MCR 3.101(D) contemplates by deciding whether or not to issue a requested post-judgment garnishment. MCR 3.101(D) gives this authority to the “clerk of the court,” not to the “judge” or even to the “court.”²

In carrying out their authority under the court rule, the clerks are checking to see that the ducks are in order. Is there a judgment in the court file? Is there a judgment against the defendant against whom a garnishment is being requested? Does that judgment remain unsatisfied? Is there a bankruptcy court stay order in effect? Is there an installment payment order on file?³ Are there any glaring mistakes in the numbers, e.g., does the amount of the judgment recited in the request for garnishment match the judgment amount in the court file, and does the “amount remaining unpaid” appear correct?⁴ Do the amounts charged as costs and interest appear correct?⁵

None of these decisions requires judicial discretion. If there is no judgment on file, the request for garnishment must be denied. If the court file reflects that the judgment has been satisfied, the request for garnishment must be denied. If there is a bankruptcy court stay order on file, the request for garnishment must be denied. Inspecting the court file to determine whether these fundamental requirements for a garnishment exist demands nothing more than ministerial decision-making. Recognizing that only a ministerial decision is needed, the rule drafters clearly expressed their intent that the “clerk of the

¹Both Chief Judge Susan Moiseev and our Court Administrator Donna Beaudet have worked in the 46th District Court for over 20 years, and they are my source of information for the historical practice at the Court.

²MCR 3.101(D) provides that “*the clerk of the court that issued the judgment shall issue a writ of garnishment if the plaintiff makes and files a statement verified...*” in a defined manner (emphasis supplied). The verified statement must provide that a judgment has been entered, that the judgment is against the defendant against whom a garnishment is sought, that the judgment remains unsatisfied, etc.

³If so, Michigan law stays the issuance of a writ of garnishment for work and labor. M.C.L. §600.6215(2). See also MCR 3.101(N) (1).

⁴MCR 3.101(D) (2) requires the verified statement to recite the amount of the judgment and the amount remaining unpaid.

⁵MCR 3.101(R) (2) prohibits plaintiff from recovering costs of an *unsuccessful* garnishment.

APPENDIX A

court,” not the judge, issue a post-judgment garnishment. The language of the rule differs for issuance of *pre-judgment* garnishments. Only judges can issue those.⁶

Some will argue that the words “shall issue” mean that the clerk can never deny a garnishment. But the rule does not say “the clerk shall issue every requested garnishment.” If the drafters had intended that, they could have said so. They didn’t, because such language or a like interpretation would make the entire rule superfluous. Under that scenario, plaintiffs could just issue their own garnishment. So, while the rule does say “shall issue,” it also sets out conditions that have to be met before the clerk shall issue a garnishment.

Impact on the Administration of Justice

Let us consider the consequences on the administration of justice in shifting the decision-making responsibility for issuing each requested garnishment to the judge. The 46th District Court received over 9700 requested garnishments last year. In a three-judge court, that is over 3200 garnishments per year per judge. The prospect of shifting responsibility for the review of 9700 requested garnishments per year from the clerks to the judges startles us. We are already a hard-working court that accepted over 52,000 new cases last year, well over the state average per district judge.

In citing these numbers, we are not, as Justice Young asserts, trying to excuse legal requirements because of “exigencies.” Rather, we seek to empirically support our position that changing established statewide practice to shift these thousands of ministerial decisions per year to the judges would enormously complicate our court’s practice. It would serve only to create unnecessary delay. The impact would be untenable.

The Current Court Rule and Practice

The current court rule does not require this complication. MCR 3.101(D) expressly places the decision-making responsibility for issuing post-judgment garnishments in the clerks’ laps. By placing the court between the judgment creditor and the issuance of a garnishment, the drafters appear to have intended to give the court a screening role. We take that role seriously.

Since the court rule requires that only a court, not a private party, can issue a garnishment, the garnishment carries the court’s imprimatur. The issuance of a garnishment also places significant burdens on innocent businesses like banks and employers as garnishees. Once the court issues the writ of garnishment, the plaintiff then serves it like a lawsuit on the garnishee.⁷ The garnishee must file a disclosure with the

⁶ MCR 3.102(B) governs pre-judgment garnishments. It provides that if the plaintiff files an ex parte motion with a verified statement showing certain facts exist, “*the judge* to whom the case is assigned may issue the writ” (emphasis supplied).

⁷ MCR 3.101 (M) (2) provides that “the verified statement acts as the plaintiff’s complaint against the garnishee, and the disclosure serves as his answer.”

APPENDIX A

court.⁸ Then the court rule obligates the garnishee to undertake numerous steps to comply with the writ, including paying no obligation to the defendant unless allowed by law, withholding earnings, and providing information to the parties about the withholdings.⁹

Thus, it would be irresponsible for the court to ignore bedrock requirements and issue a flawed garnishment even when a clerk of the court can readily see that the request is flawed. Issuing unfounded garnishments would unfairly burden the business community and cause the wrongful withdrawal of thousands of dollars from defendants' bank accounts or wages. Therefore, our clerks screen requested garnishments to make sure that fundamental requirements are met.

Clerical Powers

Some will argue that the significant power to issue a writ of garnishment should only be entrusted to judges. But that is not what the rule on post-judgment garnishments says. And clerks of the court exercise similar power in other areas. Clerks issue a summons after reviewing the complaint to insure that all basic requirements are met.¹⁰ Clerks decide whether to issue defaults and default judgments, after reviewing the request to make sure that bedrock requirements are satisfied.¹¹ Clerks can dismiss a case for lack of service.¹² In exercising these other powers, clerks are making ministerial decisions similar to those made in deciding whether to issue a garnishment. For those who oppose "giving" clerks the power to return a garnishment for fear they will abuse it, here is the reality: a court clerk can already process a civil case from cradle to grave, from issuing the summons and complaint, to issuing a default and default judgment, to issuing writs of garnishment, without a judge ever touching the file. It happens all the time.

This considerable power already vested in clerks of the court is the short answer to those who raise the specter of "granting" clerks the power to return garnishments. Given all the money riding on the decision and the potential burden on innocent garnishees, the power to issue a garnishment dwarfs the decision to return one. In contrast, a clerk's decision not to issue a flawed garnishment is only preliminary; the plaintiff can readily appeal her decision to the judge. Thus, clarifying the court rule to expressly allow a clerk of the court to return an unfounded garnishment should cause no one to shudder. Returning a

⁸ MCR 3.101(E) (3) (b).

⁹ MCR 3.101(E) (3), and 3.101(1).

¹⁰ MCR 2.102(A).

¹¹ MCR 2.603(A) (1) and (B) (2). Under (A) (1), the clerk must enter a default when a party "has failed to plead or otherwise defend as provided by these rules, and that fact is made to appear by affidavit or otherwise." Thus, the clerk is making a ministerial decision about whether the party has "failed to plead or otherwise defend." Under (B) (2), the clerk may enter a default judgment at the request of the plaintiff supported by an affidavit, "if the claim... is for a sum certain... and "the defendant failed to appear" and "the defaulted defendant is not an infant or incompetent person." Here again, the clerk is making ministerial decisions about whether the affidavit makes the required showing.

¹² MCR 2.101(E) (2) empowers the clerk to dismiss the case after "examining the court records" to determine that a defendant "has not been served with process." As with garnishments, the clerk is inspecting the court file and making a ministerial judgment about service of process.

APPENDIX A

garnishment merely represents the flip side of the power the clerk has already to issue one.

Constitutional Considerations

The proposed rules conform to Michigan constitutional principles. By continuing the status quo and not shifting thousands of ministerial decisions to the judges, the rules would simplify our practice and procedure. That is a perfectly constitutional goal. The Michigan Constitution requires the Supreme Court to “simplify the practice and procedure in all courts of this state.”¹³

None of the authorities cited in your memorandum requires all judicial power to be exercised by judges. We embrace the basic constitutional concept that all judicial power is vested *in the courts*.¹⁴ But court clerks are part of the court. Unlike the Court of Appeals case cited in your memorandum, we are not delegating judicial power to a non-court entity like an expert witness.¹⁵ Indeed, in light of the rule’s language that expressly gives the power to issue a garnishment to the “clerk of the court,” we are not delegating any power to the court clerks; they already have it. If the argument prevails that only judges should issue garnishments, the clerks will have to “delegate” their current authority to us.

Clarifying the Clerical Role

One of the failings in this debate is the use of language. We have too loosely characterized our clerks’ authority as the authority to “sanction parties” or “reject pleadings.” This inaccurate language has crept into the courts’ opinions.

To clarify, we do not believe that our clerks have or should have the authority to sanction parties or lawyers. But we do not regard the mere return of a lawyer’s filing (and filing fee) for correction as a “sanction.” The dictionary defines “sanction” as a detriment, a loss of reward, or coercive intervention annexed to a violation of law as a means of enforcing the law.¹⁶ Imposing a detriment on a lawyer, for example, by referring his conduct to the Attorney Grievance Commission, is a serious step that in these circumstances should only be taken by a judge. That is exclusively the province of judges because it requires judicial discretion to determine whether a lawyer has breached the Michigan Rules of Professional Conduct.

We return filings for correction rather than use valuable judicial resources and attorney time on show cause orders in every questionable case. We realize that most of the errors our clerks catch are oversights or inadvertent mistakes. Somehow, in returning filings to

¹³ Const 1963, art VI, sec 6 provides that “the supreme court shall by general rules establish, modify, amend, and simplify the practice and procedure in all courts of this state.”

¹⁴ Const 1963, art VI, sec 1 provides that “the judicial power of the state shall be vested exclusively in one court of justice...”

¹⁵ *Carson Fischer Potts & Hyman v Hyman*, 220 Mich App 116 (1996).

¹⁶ Merriam-Webster On-line Dictionary.

APPENDIX A

lawyers for review, supplementation, and correction rather than impose a “sanction” on them, our practice became misunderstood as clerks issuing sanctions.

Likewise, we do not believe that our clerks have or should have the final authority to reject a pleading or any other filing. “Reject” connotes finality. “Return for correction” better describes a clerk’s authority. If a clerk returns a lawyer’s filing for correction, the lawyer has the options of either correcting the mistake and re-filing, or appealing the clerk’s decision to a judge. That is our practice. Lawyers may trigger this kind of appeal by simply asking the clerk to bump the decision to the judge.¹⁷ We do not require any motion or brief or extra filing fee. In short, our clerks’ decisions are not final. The clerks work for the court, and judges run the court.

Conclusion

In proposing the new court rules, we seek to preserve and clarify the traditional clerk of the court role. Shifting the reviewing function over garnishments from clerks of the court to judges would needlessly complicate debt collection practice. It would also harm the administration of justice. Nothing in the Constitution requires this shift in decision-making responsibility.

Permitting a clerk of the court to *return* a flawed request for garnishment for correction is consistent with the clerk’s current role in *issuing* requests for garnishments. In carrying out this function, the clerk of the court is exercising a ministerial decision-making role. The efficient administration of justice weighs in favor of conserving judges’ resources for decisions that require adjudicative skills.

Thank you again for this opportunity to address these important issues. We share the Court’s commitment to improve the administration of justice in our great State.

Bill Richards
District Judge
April 28, 2009

¹⁷ Proposed Rule 8.119(D) would codify our practice.