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Clerk's Office
Michigan Supreme Court
Post Office Box 30052
Lansing, MI 48909 April 9, 2003

RE: ADM File Number: 2002-13, Proposed Amendment of MCR 3.210

I urge the Supreme Court to adopt the proposed amendment of Rule 3.210 as published on January 22, 2003.

I have reviewed, among other things, the letter from Allan Falk, and while Mr. Falk appears to be an excellent lawyer, I find that I am in substantial disagreement with what he said. The reasons for my disagreement are the differences in our personal experiences, I believe.

First of all, as a District Judge, I was not required to record small claims hearings. There was no need to preserve them for appellate purposes, because there was no appeal. The rules do not require recording. Nevertheless, District Judges learned very quickly that a majority of all complaints to the Judicial Tenure Commission were arising from small claims hearings simply because there was no authoritative way to refute allegations made by a disappointed litigant. We therefore, though it was not required, began recording all such proceedings. When complaints arose we simply said we had tape recording of the entire proceeding. The complainants almost always withdrew charges immediately. They ceased to be a significant source of workload for the Judicial Tenure Commission. The recording of these in camera interviews therefore is a good idea, not for the assistance for the attorneys or the clients in the case, who should not have access to them, but for the protection of the judges. Obviously if a judge does engage in improper, over-reaching, abusive or improper conduct of any sort in Chambers, a verbatim recording could be useful for the Judicial Tenure Commission.

As a Circuit Judge, having to interview children in divorce cases, I found that the interviews were, to a shocking extent, far more useful and valuable than I would have believed. Early on, a small child asked me if I was going to tell his Daddy what he said in my office. I told him, and in all subsequent cases told all children, that I was going to go back to the courtroom afterward and report to the clients and attorneys that every child said "I love Mommy and I love Daddy". I told the children in each case that everything else that they said there was going to stay there and would not be repeated to either of their parents or to either of the attorneys. This

was a source of enormous relief to the children!

In some cases, children explicitly told me that they had been threatened with being beaten with a belt until they couldn't stand up if they didn't the tell the judge that they wanted to live with the person making the threat. In other cases, children came in and started out by saying I want to live with Daddy, and when asked why said, because my Daddy promised me a pony if I told the judge that.

In most cases, the most useful information was obtained not by asking a direct question, or listening to the children's' pre-programmed speech, but rather asking them innocent sounding questions such as: "What do you do when you are with (parent)?" "What do you eat when you are staying with (parent)?" "Who takes care of you when (parent) has to go out?" "Do you get to play when you are with (parent)?" "Where do you sleep when you are with (parent)?" "Where do you eat when you are with (parent)?" In each case, the question is asked with regard to each parent in turn.

In every case the questions must be non-leading, non-suggestive and non-biased. Children, even more so than adults, want to please, and they therefore may often try to say to you what they think you want to hear, or sometimes they will tell you what others have told them to say. If the judge is careful to ask evenly balanced questions and not show any partiality whatsoever toward either of the parties, the children pretty quickly loosen up and tell you all sorts of useful information.

Another very useful thing for the children is to give them a sheet of paper and a pencil and ask them to draw a picture of their family. Since small children are ordinarily not too gifted it is sometimes necessary to ask who the persons are in the picture and when you see a child with a down-turned mouth and a person standing over them and ask "who's the small person" and they say "that's me" and "why do you look unhappy", "because Daddy is hitting me with a belt", it tells you something about the situation. The gamut of responses derived from this DAP (Draw a Picture) test is really quite surprising.

After all, we are supposed to be looking at the children's reasonable preference. This includes not only the preference, but the reason for it, whether that preference is the product of bribery (e.g. the pony) or threats of dire punishment (e.g. the whipping with a belt).

The lawyers are there representing their clients. The clients, in these contested custody situations, are combatants, and not likely to be inclined to follow any Marquis of Queensbury or any other sort of rules, including the Geneva Conventions. Too often, there is no one there to speak for the children. The Friend of the Court investigators ordinarily do not interview

the children early on unless they know that there will be a custody contest, though she is in the room while I interview. I realize that there is a statute, MCL 552.45, under which the Prosecutor can step in, (see also Berg v Berg (1953) 336 Mich 284), but that statute is very rarely used. The current changes to the Friend of the Court offices will make them into only another bill-collector, with no other purpose or function. CSES, and efforts to fix it, are having a terrible effect.

The bottom line is this, if we are interested in trying to protect children, especially in contested custody divorce cases, the judges have to take some responsibility to try to assure themselves that the children will be properly and adequately cared for, and that they will not be punished for talking to the judge. If interpreted in that manner, the proposed Rule will be a help, not a hindrance.

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