Michigan Creditors Bar Association

July 30. 2010

To: Michigan Supreme Court
From: Michigan Creditors Bar Association
Re: Comments regarding Supreme Court Order dated April 27, 2010 ADM File No. 2005-32 Proposed Amendments of Rules 2.101, 2.102, 2.113,2.603, 3.101, and 8.119 of the Michigan Court Rules
Date: July 30, 2010

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The Michigan Creditors Bar Association submits the following comments on regarding proposed amendments of rules 2.101, 2.102, 2.113, 2.603, 3.101 and 8.119.

MCBA agrees with the following statements of the July 13, 2010 "Report on Public Policy Position" issued by the Justice Policy Initiatives Committee of the State Bar of Michigan (including the comments of the State Bar Civil Procedure and Courts Committee and the Consumer Law Council):

> "The proposed rules authorize the clerk to reject pleadings based on decisions that should be reached by a judge. This violates Michigan Constitution and case law."
>
> The proposed amendments" "…improperly delegate judicial authority to the clerks…" because they would "…vest significant authority in clerks to make decisions about the validity of filings that should be left to a judge."
>
> "The decision whether nor not to accept a paper for filing transcends the ministerial and on occasion requires considerations of substance."

Since 2005, MCBA has raised these same concerns about a proposed rule permitting clerks to make legal decisions. Moreover, we have maintained throughout this process that MCR 2.114 is the proper remedy if a filer submits a signed document that is not well grounded in fact or not warranted by the law. Pursuant to this current rule, court clerks may present a questionable document to the judge for review. The judge can decide whether the document complies with the law and whether sanctions should be imposed. Return of any documents to a filer should be accompanied by an official signed court order and a refund of any applicable filing fee.

The genesis of this proposal authorizing clerks to return filings was a 2005 controversy between the 46th District Court Clerk and an attorney who was trying to file sixty nine garnishments with incorrect calculations. The attorney took issue with the clerk's return of the writs, and he eventually filed a suit for superintending control. The Michigan Supreme Court affirmed the Court of Appeals decision in the case of *Credit Acceptance Corporation v.46th District* Court, Order 133292, COA 262404, "Returning the plaintiff's writs constitutes an 'appropriate sanction' for the plaintiff's failure to provide a statement verified in the manner provided in MCR 2.114(A)" MCR 3.101(D), *if properly ordered by a judge under MCR 2.114(E)."* (emphasis added)

The current MCR 2.114 already provides the remedy when non-conforming documents are filed with the clerk. Accordingly, the Creditors Bar maintains any revisions to 8.119, 3.101 and 2.603 should be limited to mathematical calculations for garnishments and default judgments. If the sums do not add up, returning the form would be a permitted ministerial act, subject to judicial review per the proposed 8.119(D)(4). For default judgments, the court clerk could be also be permitted to check if the damages in the default judgment are no greater than the damages alleged in the complaint, and that the court costs are consistent with the records in the court file. However, the clerk should not be permitted to reject and return garnishments or default judgments based on an analysis of the underlying legal bases for the amount of the damages, costs or judgment interest. That is a judicial decision. Clerks should not return filings without a signed court order (MCR 2.602), nor should they be reviewing and returning complaints for compliance with venue and jurisdiction.

Notwithstanding all of the above, MCBA provides the following analysis and suggestions. Most of the proposed amendments to Chapters 2 and 3 interrelate to the new provisions in 8.119 that govern the court clerk's role and responsibilities regarding the examination, filing and return of documents submitted to the court by licensed attorneys. Accordingly, MCBA will first address its concerns and recommendations regarding this rule.

8.119

8.119 (C)(2) and (D)(2) do not provide for necessary judicial review:
These two sections allow a clerk to review documents and return them to the filing party. However, unlike section 8.119(D)(3) and (4), neither section (C)(2) nor (D)(2) have a provision allowing the party to request judicial review.

Although (C)(4) modifies (C)(2) by permitting a clerk to submit a questionable document to the judge for authorization to reject the "pleading" for "filing and return", it does not give the filer the option to ask for judicial review. Nor is there any provision for a court to issue an order which could be appealed. Moreover, subsection (C)(4) refers to "pleading" not "document", which creates confusion and lack of uniformity in the rule.

Subsection (D) (1) and (2) would allow a clerk to return motions, summons and complaints, proofs of service, consent judgments, stipulations, etc. because the clerk has decided that the filing is untimely (D)(1)(c) or "not accurate." These determinations are made without judicial oversight and do not provide the opportunity to challenge the decisions, unlike (D)(3) and (4).

Accordingly, sections (C)(2) and (D)(2) are unconstitutional provisions that increase the role of the clerk from ministerial to adjudicative. Accordingly, MCBA strongly urges the Supreme Court to eliminate section (C) and (D)(2) entirely. If clerks are going to be empowered to review and reject documents filed by licensed attorneys, the process should always be subject to judicial review without additional filing fees.

Jurisdiction: Although proposed 8.119(C) appears to address only "minimal filing requirements", it permits the clerk to make a legal judgment when determining whether a document is filed "in the court of proper jurisdiction." 8.119(C)(1)(f). Questions may arise regarding equitable vs. legal jurisdiction, subject matter or personal jurisdiction, and long arm jurisdiction. Jurisdictional questions are not ministerial issues and, therefore, should be decided by a judicial officer, not a clerk.

Statutes of limitations: 8.119(C)(3) creates a potential statute of limitations problem for filers who submit a summons and complaint just before the deadline baring claims. If the clerk returns the summons and complaint without accepting it for filing, a later filing may be barred if the limitation period has expired, especially since

the rules states "If a document contains more than one date indicating receipt by the court, the latest date is the filing date." If a clerk makes a mistake regarding "minimal filing requirements" and returns a summons and complaint to a filer, the filer may be barred by the statute due to the action of a court clerk.

Filer should not have to pay filing fees twice: 8.119(D)(3) states that "the clerk shall not issue a default judgment or writ of garnishment, shall retain the filing fee…" (There is no filing fee for default judgments.) The rule then provides that the clerk return the form, notify the filer of the reason for the return and inform the party of "… the right to file a request for judicial review with no additional fee *and that a new form may be filed along with the required filing fee."* (emphasis added)

The filer of a garnishment has already paid the filing fee. This doubles the amount of the filing fee because the court clerk assumes an error has been made. This would create confusion regarding whether this extra cost is taxable to the judgment debtor. The $15 filing fee for a garnishment is paid to the court to issue a writ. If it is returned, it should be returned with a refund of the filing fee since the writ was not issued.

2.603(B)(2)(d) and (e) should be reworded so that the clerk's action is ministerial only.

Sub-section (d) permits the clerk to sign a default judgment if "…the amount stated in the affidavit is not greater than the amount stated in the complaint." The term "amount" should be replaced with "damages" and the rule should reference the judgment also. MCBA recommends rewording the section to read: *"… the **damages** stated in the affidavit **and default judgment** are not greater than the amount **of damages** stated in the complaint."*

Sub-section (e) uses the words "amounts" and "appear", which are overbroad and permit discretion beyond the scope of a clerk's ministerial authority. This section would permit a clerk to determine if the "amounts" stated in a default judgment "appear to be correct." The court clerks may question whether or not plaintiff is legally entitled to the stated damages, court costs, or statutory interest rate set forth in the judgment. These are judicial decisions since they involve the interpretation and application of the judgment interest statute, MCL 600.6013.

MCBA suggests the rule be reworded as follows: *The sum of the damages, fees and costs stated in the default and affidavit are mathematically correct. Further, that the court costs stated therein do not exceed the amount allowed by statute or court rule.*

3.101 should be reworded so that the clerk's action is ministerial only.

Lack of judicial review. Currently, 3.101(D)(2) requires the judgment creditor to include financial data on the garnishment, however the new section 3.101(D)(3) permits a clerk to reject and return a request for garnishment if the clerk determines that the request does not comply with (D)(2). This would permit a non-judicial officer to question the legality of the "amount of the judgment, the total amount of the post judgment costs accrued to date; the total amount of the post-judgment payments paid to date…" etc.

Equally important, return of these garnishments is governed by 8.119(C)(2) which does not provide the filer with the option to request judicial review, unlike (D)(3) and (4).

3.101(D)(4) would allow the clerk to make legal decisions reserved only for judges. It states that the clerk "…shall determine that …the judgment has not expired." This is a question for a judge, not a clerk. It is a legal decision that may involve analysis of both law and facts. Although the statute, MCL 600.5809, states that judgments expire in 10 years, that limitation period may be tolled (MCL 600.6201 and MCL 600.6107(5)). Furthermore, the judgment may be renewed for an additional ten years by voluntary or involuntary payments by

the debtor *Wayne County Social Services Director v. Yates*, 261 Mich App 152, 681 NW2d 5 (2004), or "actions" taken by the judgment creditor , *Van Reken v. Darden, Neef & Heitsch,* 259 Mich App 454, 674 NW2d 731 (2003.) This "determination" regarding judgment expiration is not simply one of looking at a calendar. It is an adjudicative decision reserved for judges.

3.101(D)(4)(f) use of the terms "amounts" and "appear" are overbroad and beyond the scope of a clerk's ministerial authority. This section would permit a clerk to determine if the "amounts" stated in a request for garnishment "appear to be correct."

The clerk should not have decision making authority to determine if any of the "amounts" in the garnishment are correct. These amounts have been verified by the attorney for the judgment creditor and are subject to the sanctions of 2.114.

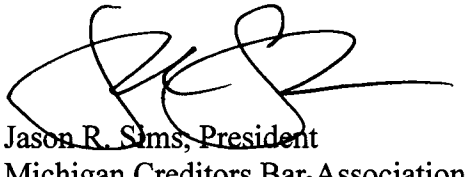
MCBA suggests instead that the wording of 3.101(D)(4)(f) be changed to reflect the ministerial role of a clerk, namely, *"The sum of the amounts stated in the request is mathematically correct."* The clerk could add up the figures on the form, but should not have the authority to question the accuracy of each separate amount. If the clerk has questions regarding the legality of the amounts, then he/she should ask the judge to review the same and the court can then consider sanctions under 2.114.

Other issues with 3.101

Naming only a single defendant creates problems where the judgment is joint and several: Proposed 3.101(C) requires that "Each form used in a garnishment proceeding may only name a single defendant." Often, judgments are obtained against two or more defendants jointly and severally. It is not uncommon for judgment debtors to hold assets jointly. Accordingly, garnishments should not be restricted to naming a "single defendant" when the judgment creditor is enforcing a joint and several judgment against assets held in common by more than one judgment debtor, e.g. joint bank account. Multiple garnishments would be unnecessary, wasteful and confusing to the garnishee

Separate filing fees for each garnishment is wasteful and outdated. 3.101(D)(1) requires a "separate filing fee" for each garnishment filed. Judgment creditors often simultaneously file multiple garnishments against different judgment debtors. This is especially true for Michigan Income Tax refund garnishments. Writing a separate check for each garnishment is wasteful and time consuming.

Respectfully submitted,



Jason R. Sims, President
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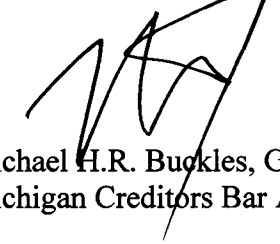

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