SBM STATE BAR OF MICHIGAN

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, 2017

Larry Royster
Clerk of the Court
Michigan Supreme Court
P.O. Box 30052
Lansing, MI 48909

RE: ADM File No. 2016-40: Proposed Amendment of Rules 2.625 and 3.101 of the Michigan Court Rules

Dear Clerk Royster:

At its February 21, 2017 meeting, the Executive Committee of the State Bar of Michigan (the Committee) considered the above-referenced proposed amendments published by the Court for comment.[1] In its review, the Committee considered recommendations from the Civil Procedure & Courts Committee, the Consumer Law Section, the Justice Policy Initiative, as well as the Michigan Creditors Bar Association. In addition, the Public Policy Committee reviewed the rule proposals and made recommendations to the Committee.

After this review, the Committee voted unanimously to support the proposed amendments to MCR 2.625(E), 3.101(B)(1)(a)(i), 3.101(B)(1)(c), 3.101(G)(2), 3.101(I)(3), 3.101(I)(5), 3.101(J)(2), 3.101(J)(6), 3.101(K)(1), 3.101(K)(2)(g), as these amendments effectuate changes to the statutory language set forth in MCL 600.4012. The Committee, however, voted unanimously to oppose the proposed amendments to MCR 2.625(F), 2.625(K), 3.101(D)(2), 3.101(J)(6)(e), 3.101(R)(2), as these amendments create or change parties' substantive rights and reduce the amount of information required to be provided by garnishees.

As discussed in more detail below, while these proposed rule amendments were intended to "clarify the authority and process for recovering post judgment costs" and "provide clearer procedure for garnishment proceedings," these proposed rules go beyond clarifying procedure and affect the substantive rights and obligations of the parties in postjudgment proceedings. Because the Committee could find no support in either statute or case law for these changes to the parties' substantive rights, the Committee opposes the proposed amendments to (1) MCR 2.625(K); (2) MCR 2.625(F); (3) MCR 3.101(R)(2); (4) MCR 3.101(D)(2); and (5) MCR 3.101(J)(6)(e).

1. **MCR 2.625(K)**

The proposed amendment to MCR 2.625(K)(1) provides that a judgment creditor "is entitled to recover from the judgment debtor(s) the taxable costs and fees expended after a judgment is entered, including all taxable filing fees, service fees, certification fees, and any other costs,

[1] Under Article III, §9 of the State Bar of Michigan Bylaws, "[t]he Executive Committee may take a position on a proposed Court Rule if the deadline for a response does not allow for consideration by the Board, provided the position is not inconsistent with policies adopted by the Board or Representative Assembly."

fees, and disbursements associated with postjudgment actions as provided by law." This proposed change is problematic for a number of reasons.

First, the use of "is entitled" appears to remove any judicial discretion to determine whether and to what extent the taxable costs and fees sought are appropriate. While the Committee recommends that the Court wholly reject the proposed change to MCR 2.625(K), to the extent that the Court approves proposed subsection (K)(1), the Committee recommends that "is entitled" be amended to "may be entitled" to ensure that courts retain their ability to exercise their discretion.

Second, the Committee is concerned that the use of the general term "fees" in the itemized list of taxable fees and costs in proposed subsection (K)(1), may be interpreted to mean that judgment creditors are entitled to recover postjudgment attorney's fees without the court being able to review those fees or exercise its discretion as to the reasonableness of those fees. It is the Committee's understanding that currently postjudgment attorney's fees are only awarded after a judgment creditor makes a separate request and the court determines that the judgment creditor is entitled to postjudgment attorney's fees by contract or law and that the fees requested are reasonable. The Committee believes that the current process should remain in place. Because the proposed amendment could potentially be interpreted to alter this process, the Committee further opposes the proposed amendment to subsection (K)(1).

Third, currently MCR 2.625(F)(2) and (G) place the burden of demonstrating a right to recover costs on the judgment creditor. Proposed subsection (K)(2), however, appears to shift that burden from the judgment creditor to the judgment debtor to establish that the creditor is not entitled to collect such costs and fees. This is a substantive shift that the Committee believes is not consistent with basic tenets of our adversarial system, limits access to justice by unsophisticated debtors, and implicates substantive policy questions that are more appropriately resolved through legislation rather than amending the court rules.

For these reasons, the Committee opposes the proposed amendments to MCR 2.625(K).

2. **MCR 2.625(F)**

Because the Committee opposes the proposed changes to MCR 2.625(K) in their entirety, the Committee also opposes the proposed changes to MCR 2.625(F), which appear only to provide clarity to proposed subrule (K).

3. **MCR 3.101(R)(2)**

Like the amendments proposed in MCR 2.625(K), the amendments proposed in MCR 3.101(R)(2) go beyond clarifying court procedures. Proposed MCR 3.101(R)(2) modifies the parties' substantive rights concerning when a judgment creditor is entitled to collect garnishment costs. MCR 3.101(R) currently provides that a judgment creditor may only collect costs associated with a garnishment if and when that garnishment is successful:

> If the garnishee is not indebted to the defendant, does not hold any property subject to garnishment, and is not the defendant's employer, the plaintiff is not entitled to recover the costs of that garnishment.

The proposed amendment to MCR 3.101(R)(2), however, changes the timing for when a judgment creditor may collect garnishment fees, providing:

> Within 28 days after receipt of the disclosure filed pursuant to subrule (H) by a garnishee of a periodic garnishment disclosing that it does not employ the defendant and is not otherwise liable for periodic payment, or from a garnishee of a nonperiodic garnishment disclosing that it does not hold property subject to garnishment and the defendant is not indebted to the garnishee, the plaintiff shall deduct any costs associated with that garnishment that may have been added to the judgment balance pursuant to MCR 2.625(K), unless the court otherwise directs.

This proposed amendment alters the substantive rights of judgment creditors and debtors by allowing a judgment creditor to add garnishment costs upfront and only back out such costs after it determines that the garnishment is not successful. Allowing judgment creditors to tax costs upfront may incentivize judgment creditors to file numerous garnishments in the hopes of one being successful, rather than focusing its collection efforts on those that are reasonably likely to succeed. While the rules require the judgment creditor to back out the costs of unsuccessful garnishments, the burden is on the judgment debtor to discover and object to costs that are improperly taxed. As a whole, judgment debtors are in the weakest position to object to improperly taxed costs because many judgment debtors are unsophisticated, not represented by counsel, and unfamiliar with postjudgment rules and procedures. Therefore, the Committee believes that this change fails to adequately protect the public and implicates substantive policy questions that are more appropriately resolved through legislation rather than amending the court rules.

The Committee further opposes the rule change because the alleged ambiguity regarding the timing of taxation of costs addressed by this amendment is the focus of pending litigation.[2] The staff comment indicates the proposed amendment merely "clarif[ies] the authority and process for recovering postjudgment costs." Therefore, should the Court implement this change, a judgment creditor may be able to successfully argue in these pending cases that this new rule should be used as guidance in interpreting the postjudgment collection rules that were previously in place. This would be inappropriate because, for the reasons discussed above, proposed MCR 3.101(R)(2) substantively alters the parties' right and obligations with respect to the timing of taxing postjudgment costs and therefore does more than merely clarify the postjudgment process.

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[2] *See, e.g., Verburg v Weltman, Weinberg & Reis Co, LPA, et al.*, No. 1:13cv1328 (W.D. Mich) (most recent order issued March 15, 2017); *Pryor v Law Offices of Timothy E. Baxter & Assoc, PC, et al.*, No. 1:13cv1330 (W.D. Mich) (most recent order issued March 22, 2017); *Walker v Leikin, Inger & Winters, PC, et al.*, No. 1:14cv18 (W.D. Mich) (most recent order issued March 15, 2017).

To the extent that clarification is required for the process of taxing postjudgment costs and fees, the Committee proposes the following alternative rule amendment to MCR 2.625(F):

> When costs are to be taxed by the clerk, the party entitled to costs must present to the clerk, within 28 days after the judgment is signed, or within 28 days after entry of an order denying a motion for new trial, a motion to set aside the judgment, a motion for rehearing or reconsideration, ~~or~~ a motion for other postjudgment relief except a motion under MCR 2.612(C), **or after the success of any postjudgment collection effort allowable by law.**

This alternative makes clear the procedure for taxing postjudgment costs and fees after a garnishment is determined to be successful, while preserving (a) the existing process of providing a plaintiff-submitted bill of costs and (b) the existing process in MCR 3.101(K) that allows debtors to object.

4. MCR 3.101(D)(2)

For the reasons that it opposes MCR 3.101(R)(2), the Committee also opposes the proposed changes to MCR 3.101(D)(2). The proposed changes affect the parties' substantive rights and obligations with respect to the taxation of postjudgment costs and fees.

5. MCR 3.101(J)(6)(e)

The Committee also opposes the proposed amendments to MCR 3.101(J)(6)(e), which eliminate the requirement that the garnishee disclose in its final statement "the difference between the amount stated in the verified statement requesting the writ and the amount withheld." Aside from administrative convenience for the garnishee, there appears to be no basis to reduce the information that is required to be provided in the garnishee's final statement. The Committee believes that the public is best protected by requiring garnishees to provide this information in their final statements. Therefore, the Committee opposes the proposed amendment to MCR 3.101(J)(6)(e).

We thank the Court for the opportunity to convey the State Bar's position.

Sincerely,

Janet K. Welch
Executive Director

cc: Anne Boomer, Administrative Counsel, Michigan Supreme Court
Lawrence P. Nolan, President