PROPOSED AMENDMENT OF MCR 2.403(G)(1) [CASE EVALUATION]

Issue

Should the Representative Assembly recommend the adoption of the following amendment to MCR 2.403(G)(1):

Rule 2.403 Case Evaluation

(G) Scheduling Case Evaluation Hearing.

(1) The ADR clerk shall set a time and place for the hearing and send notice to the case evaluators and the attorneys at least 42 days before the date set. The notice shall also contain the names of the case evaluators. If, for any reason, the ADR Clerk appoints a replacement case evaluator after the date the notice is sent, then the ADR Clerk shall send an amended notice to the case evaluators and the attorneys, including the name of the replacement evaluator, within a reasonable time but in any event before the hearing.

Synopsis

A proposal to amend MCR 2.403 to address advance notice of disqualification of case evaluators.

Background

As it stands, the rule for disqualification of a case evaluator is the same as that provided in MCR 2.003 for the disqualification of a judge. MCR 2.403(E). Pursuant to 2.003(D)(1)(a), in trial courts, all motions for disqualification must be filed within 14 days of the discovery of the grounds for disqualification. If the discovery is made within 14 days of the trial date, the motion must be made forthwith.

That rule works well in most counties where the names of the panelists are sent to all parties long before the scheduled hearing (in fact, in most counties, an amended notice is also sent if the identity of one of the evaluators changes after the initial notice is sent). However, in Wayne County (for many years now) and in Oakland County (just recently) the policy is to not provide the names of the case evaluation hearing panelists until the day of the hearing. In Wayne and Oakland Counties, even when the parties arrive at the hearing and agree that there is a conflict, a number of problems can arise, including the inability of the ADR clerk to find a replacement panelist, replacement panelists who do not have time to adequately review the materials before the case evaluation hearing, 2 person panels, etc. In cases where the parties and the panel to do not agree that there is a conflict, the objecting party is left filing a motion after the hearing has occurred, which in addition to being unfair for due process reasons, leaves that party with the inherent perception that it is the amount of the case evaluation award with which he/she is actually unhappy (as opposed to the process).

One relatively recent example of this problem is the case of *Sherman v Sherrod*, unpublished opinion per curiam of the Court of Appeals, issued May 30, 2013) (Docket No. 299045), where the parties showed up to case evaluation in Wayne County only to find that counsel for the third party defendant in that case was on the panel. That lawyer recused himself; however, the ADR Clerk was, apparently, not able to get an alternate, the evaluation hearing was held with two panel members, and the losing party subsequently objected to case evaluation sanctions on the basis that the two member panel was defective.

An easy remedy to this problem would be to amend MCR 2.403(G)(1) by adding language:

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Opposition

None known.

Prior Action by Representative Assembly

None known.

Fiscal and Staffing Impact on State Bar of Michigan

None known.

STATE BAR OF MICHIGAN POSITION
By vote of the Representative Assembly on April 26, 2014

Should the Representative Assembly recommend the adoption of the foregoing amendment to Michigan Court Rule 2.403(G)(1)?

(a) Yes

or

(b) No