CIVIL PROCEDURE AND COURTS COMMITTEE
Respectfully submits the following position on:

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ADM Files No. 2005-05 and 2006-20

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The Civil Procedure and Courts Committee is comprised of members appointed by the President of the State Bar of Michigan.

The position expressed on the following pages is that of the Civil Procedure and Courts Committee. The State Bar of the Michigan authorized the Civil Procedure and Courts Committee to advocate its position. To date, the State Bar itself has not taken a position on this proposal.

The position was adopted after a discussion and vote at a scheduled meeting. The number of members in the decision-making body is 17. The number who voted in favor to this position was 10 (9 as to one issue). One member abstained. The other 6 members were not present at the meeting and did not vote.

March 30, 2009

Corbin R. Davis
Clerk, Michigan Supreme Court
PO Box 30052
Lansing, MI, 48909

RE: ADM File Nos. 2005-05 and 2006-20 Proposed Amendment of Rules 2.403, 2.404, 2.410, 2.411 and 3.216 of the Michigan Court Rules

Dear Mr. Davis:

This is a comment on behalf of the State Bar Civil Procedure and Courts Committee regarding the ADM Files referenced above.

The published proposals would amend numerous provisions of the rules governing the various alternative dispute resolution procedures. The great majority of the proposals, which were developed by a committee appointed by the Supreme Court (the Dispute Resolution Rules Committee) are noncontroversial and reasonable. The Civil Procedure and Courts Committee makes the following 6 suggestions for changes. [Except as noted, the votes were unanimous or there was unopposed consensus on each position.]

1. As a general principle the Committee concluded that there should be increased emphasis on individual consideration of cases to determine whether submission to ADR procedures is appropriate. Too often cases are submitted as a matter of course, without any individualized consideration. For example, many cases with equitable claims are submitted to case evaluation where that is completely inappropriate. ADR procedures are often criticized for their low success rates, but much of the reason is the inappropriate submission of cases. Particularly with the proposed doubling of the fees for case evaluation we need to minimize pointless submission of inappropriate cases. So the Committee opposes the proposed amendment of MCR 2.410(C)(1), which would eliminate the requirement that the decision to submit a case be made after consultation with the parties. Input from counsel for the parties, who know the case best, can help to guard against inappropriate submission of cases.

2. For the same reasons, the Committee recommends that the parties be allowed to remove a case from case evaluation by stipulation, with appropriate time limits and language requiring them to explain why case evaluation is inappropriate, subject to the court's authority to order other alternative dispute resolution procedures. The parties are far more familiar with the particular circumstances of the case. Particularly where the court directs case evaluation automatically without individual consideration, giving the parties the ability to stipulate to remove the case will avoid pointless evaluation hearings. The court can direct other alternative dispute resolution procedures if it finds that would be productive. This could be done by amending MCR 2.403(C) as follows:

(C) Objections to Case Evaluation.

(1) To object to case evaluation, a party must file a written motion to remove from case evaluation and a notice of hearing of the motion and serve a copy on the attorneys of record and the ADR clerk within 14 days after notice of the order assigning the action to case evaluation. The motion must be set for hearing within 14 days after it is filed, unless the court orders otherwise. A timely motion must be heard before the case is submitted to case evaluation.

(2) ~~A timely motion must be heard before the case is submitted to case evaluation.~~ Within the time for objecting to case evaluation, the parties may stipulate to removal of the action from case evaluation. The stipulation must set forth the reasons that case evaluation is inappropriate in the particular circumstances of the action. Such a stipulation does not prevent the court from ordering other alternative dispute resolution procedures that it finds would be appropriate to the action.

3. The proposed amendment of MCR 2.403(A)(2) and (3) would allow submission of part of an action to case evaluation. The Committee concluded that this may occasionally be appropriate, but that it should only be done with the agreement of the parties. The problem is that partial submission is rarely likely to lead to settlement of the entire case. Further, submission of only part of the case can lead to complications when the award is rejected and sanctions are considered after verdict. It may be difficult to determine whether a party has improved its position over the evaluation award where the award covered only part of the case. The Committee recommends that the rule provide that the subject of how sanctions will be affected by partial submission be covered in the stipulation or order directing partial submission.

4. Submission of district court actions to case evaluation without careful consideration is particularly problematic, especially with the increased fees proposed in the published rules. Given the smaller amounts in controversy, the expense of case evaluation can be a substantial burden on the litigants. The Committee recommends that MCR 2.403(A)(3) [renumbered in the published proposals as (A)(4)] be changed to read as follows:

> "Cases filed in district court may be submitted to case evaluation under this rule on motion for good cause shown, by stipulation of the parties, or by the court if it finds after meaningful consultation with the parties that case evaluation of that action or part thereof would be appropriate. The time periods set forth in subrules (B)(1), (G)(1), (L)(1), and (L)(2) may be shortened at the discretion of the district judge to whom the case is assigned."

5. The Court published for comment alternative proposals for MCR 2.401(M)(1,) covering the subject of unaccrued claims. Each alternative would say that a judgment or dismissal does not dispose of claims that have not accrued as of the date of the case evaluation hearing. Alternative A would apply that principle to all claims; Alternative B would limit the application to first-party no-fault cases. The Committee preferred Alternative B. Applying the principle to all cases would open the way to many disputes about whether acceptance of an award disposes of the entire claim.

The Committee further notes that in 2005 it developed a proposal on this subject, which the State Bar Representative Assembly approved and submitted to the Court. The Committee believes that the language of that proposal is superior to that found in the published proposal and urges that it be adopted instead of the published proposal. The 2005 proposal read:

> "In a case alleging a claim for personal protection insurance benefits under MCL 500.3101, et seq., the award is limited to expenses claimed in the action that were incurred prior to the case evaluation hearing. The trial court may enter an order further limiting the scope of case evaluation. A judgment or dismissal based on mutual acceptance of the award does not dispose of any claims in the action that seek declaratory relief for future benefits, or for reimbursement of expenses that were incurred after the case evaluation hearing."

This language could be added at the end of current subrule (M)(1), or added as a separate subrule (M)(2), with appropriate renumbering of the other subrules.

Concerns were also expressed about problems in PIP cases where the plaintiff's lawyer may not even be aware of expenses that were incurred shortly before the case evaluation hearing. No language was recommended to deal with this. But note that the 2005 language would allow the judge to further limit the scope of the evaluation, which might provide a way to deal with this problem.

6. The published proposal for MCR 2.411(B)(4) seeks to further reduce the role of the judge in influencing mediator selection. It would read:

> "The court shall not appoint, recommend, direct or otherwise influence a party's or attorney's selection of a mediator except as provided pursuant to this rule. The court may recommend or advise parties on the selection of a mediator only upon request of all parties by stipulation in writing or orally on the record."

The general scheme for appointment of mediators is that the parties have a specified time to agree to a mediator, and if they don't, the ADR clerk is to assign one as provided the ADR plan "on a rotating basis." The idea seems to be to prevent the judge from pressuring the parties to agree to someone who is a favorite of the judge. This is reasonable, but, on the other hand, a rotating assignment system may not pick someone suitable for the case. The Committee was concerned that further restricting the judge's involvement will decrease the likelihood of selection of an appropriate mediator and (with one dissenting vote) recommends that that provision not be adopted.

If the Court has any questions regarding any of these suggestions, feel free to contact me. The Civil Procedure and Courts Committee very much appreciates the opportunity to comment on these important proposals.

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