

**State Bar of Michigan
Representative Assembly
April 18, 2009**

SUMMARY OF PROCEEDINGS

The following is a summary of proceedings of the State Bar Representative Assembly session held Saturday, April 18, 2009, at the Lansing Community College West Campus in Lansing, Michigan. Call to order by Chairperson Katherine Kakish.

1. Clerk Victoria Radke declared a quorum (50) was present.
2. Upon a motion made and seconded, the revised calendar was adopted, as proposed.
3. As provided in Rule 4.8, the Summary of Proceedings of the September 18, 2008, meeting was deemed approved.
4. Michigan Supreme Court Chief Justice Marilyn J. Kelly spoke to Assembly members, thanking the Assembly for its proposal on MCR 8.126 (pro hac vice), which became effective in June 2008; the proposal on dues waiver for State Bar members in full-time military service, which became effective in October 2008; the Assembly's proposal on rules regarding electronic service, and other proposals. Chief Justice Kelly informed the Assembly that the Supreme Court opened its administrative conferences to the public and through Michigan Government Television broadcasts. She explained the process involved in public hearings for court rule changes and spoke about the proposed judicial recusal policy. Chief Justice Kelly explained that the comment period for this proposed policy will expire on August 1st, and will not provide the Assembly an opportunity to comment as a body, but she encouraged individual members to submit their personal views through the comments part of the Supreme Court's website. She said that the U.S. Supreme Court decision in *Caperton* was expected to be decided in June, and is expected to provide some guidelines on the matter.¹

With respect to developments in the administration of justice, Chief Justice Kelly spoke about a new pilot project for mental health courts and other technological initiatives. She also spoke about the dire need for alternatives to incarceration, particularly in light of the economic situation of this and other States. She explained the work of the therapeutic court movement, designed to provide nonviolent, low risk offenders with services that would help curb recidivism and save taxpayer money, particularly the 89 drug and sobriety courts now established in Michigan. But funding such initiatives has become a challenge in light of budget cuts.

5. Jeff Nellis, Chair, Nominating and Awards Committee, addressed the Assembly in regards to filling vacancies for the current meeting. Upon a motion made and

¹ The decision was subsequently issued on June 8, 2009. *Caperton v A T Massey Coal Co*, 129 S Ct 2252; 173 L Ed 2d 1208 (June 8, 2009).

seconded, Sean McNally (3rd Circuit); Lauren Rousseau (3rd Circuit); Lisa Screen (3rd Circuit); Dustin Lane (3rd Circuit); Patrick McLain (3rd Circuit); Scott Wolfson (6th Circuit); Richard Morley Barron (7th Circuit); Jeff Scott (10th Circuit); Ryan Edberg (24th Circuit); Rhonda Clark-Kreuer (29th Circuit); Catherine McClure (30th Circuit); John Jarema (33rd Circuit); Susan Thorman (35th Circuit); Victor Fitz (43rd Circuit); Dennis Brewer (44th Circuit); Anne McNamara (47th Circuit); Peter Mekas (49th Circuit); Tami Salens (52nd Circuit) were appointed to fill immediate vacancies within their respective Circuits.

6. Katherine Kakish, Chair of the Representative Assembly spoke of three matters that will be of concern of the Assembly in the near future—the impact of the economy on the profession; the issue of the constitutional due process rights of indigent defendants; and future trends for the membership of the State Bar. She also spoke about the SBM's Strategic Plan, the upcoming reception for the pictorial display at the SBM of past Assembly chairs; and the role of Assembly members in coordinating with the Bar sections and committees.
7. Edward Pappas, President of the State Bar of Michigan spoke on the initiatives taken to address priorities within the core values of the profession, namely, *Access to Justice*, the independence of the judiciary, the rule of law, diversity and law-related education. He spoke about a pilot program to be launched in May at Cooley Law School related to professionalism orientation for law students. He also spoke about several programs the SBM is implementing to assist lawyers through the difficulties of the current economy, such as a program in conjunction with ICLE to help lawyers diversify and expand their specializations to include new areas of law such as energy, a program operated by the Practice Management Resource Center to help lawyers learn of the more efficient use of latest technological advancements; and plans to establish a centralized job bank for lawyers. He also spoke about *A Lawyer Helps*, a new outreach campaign established by the SBM.
8. Janet Welch, Executive Director of the State Bar of Michigan reported that the SBM's finances and fiscal management remain sound in the face of the economy. She spoke about the three goals that were added to the Strategic Plan, namely to assist Michigan lawyers in adapting to the changing economic conditions, and the technology and regulatory changes that are expected to occur in the next five to ten years; to advocating public policy issues at the national level that promote the interest of the legal profession and the public in Michigan, such as advocating to the Legal Services Corporation for increasing legal aid in the national appropriations; and to adopt measures within the SBM that are environmentally sustainable. She also provided detailed information on *A Lawyer Helps* Campaign, and how it integrates community and pro bono services with Access to Justice.
9. Elizabeth Lyon, Director of Governmental Relations of the State Bar of Michigan updated the Assembly on the latest efforts to reform legal services for indigent criminal defendants. She reported that the Michigan Campaign for Justice, a new nonprofit in Michigan whose sole purpose is to reform the indigent criminal defense system, was established in February with consultants comprising of social justice representatives, investigators, lawyers, and local Bar associations. She

reported several activities that occurred in March 2009. First, the legislature appointed a special committee on indigent defense. The Representatives appointed to this committee are tasked with reviewing the problem and drafting legislation. The SBM is working with this committee. Second, the SBM cosponsored with the Michigan State University Institute for Public Policies and Social Research a forum on public defense that was attended by about 70 legislators, legislative staff and policy professionals. Third, the SBM was one of the organizers of a U.S. congressional hearing before the House Judiciary Staff Committee on Crime, Terrorism, and Homeland Security, entitled *Representation of Indigent Defendants in Criminal Cases, a Constitutional Crisis in Michigan and Other States*. Five Michigan witnesses appeared at the hearing: the SBM was represented by two past SBM presidents, Dennis Archer and Nancy Diehl. The issue of juvenile representation was also a focus of that hearing. Another congressional hearing is expected to take place in either May or in June, 2009, to start drafting legislation to address the issues. Ms. Lyon invited Assembly members to attend on May 21 a three-day conference in Lansing on public defense that the State Bar of Michigan is cosponsoring, the theme of which is *Reforming Michigan's Public Defense System: The Economic, Social and Human Benefits*.

Following Ms. Lyon's report, comments were made by members regarding the underlying systemic problem in indigent criminal defense and the different problems indigent defense attorneys and prosecutors encounter in both large and small circuit court districts; and questions related to the funding of any proposed indigent defense system.

10. Jeff Nellis, Chair, Nominating & Awards Committee addresses the Assembly in regards to the 2009 Award Nominations. Upon a motion made and seconded the Representative Assembly unanimously approved the 2009 Award Recipients in that the Michael Franck Award be presented to Dan Bonner from Muskegon, and the Unsung Hero Award be presented to Kelly Burris from Ann Arbor and Brian Barkey from Flint.
11. Elizabeth Sadowski, member of the Representative Assembly and past chair of the Family Law Section, gave an informational report on behalf of the Family Law Council on a proposed amendment to MRPC 7.3 (Attorney Solicitation) to address the issue of lawyer solicitation of known persons who have been named in a divorce action but before they have been served with process in the action. She explained that some lawyers are trolling the court filings and are mailing letters to defendants who have not yet been served, informing them they are being sued and that their legal rights are in jeopardy. These letters go to households where there well may be a domestic violence impact, where there are ex parte orders that are pending. These actions are recipes for parents kidnapping their children, domestic violence, and financial abuse, and with the economic crisis the problems are expected to worsen. Ms. Sadowski stated that any proposed amendment must take into consideration and comport with the U. S. Supreme Court decision in

Shapero v Kentucky Bar Ass'n,² as the Family Law Section would like to draft a rule or amendment to the Michigan Rules of Professional Conduct so that they can prevent problems from happening.

12. William Dunn, chair of the SBM's Professional Ethics Committee, participated in the informational report. He stated that the Ethics Committee will meet to deliberate on the question whether such proposed amendment should be made to the Michigan Court Rules or to the Michigan Rules of Professional Conduct. The Committee will also address other concerns. He stated that if the proposed amendment is designed to address spousal abuse, then it expressly state that. He stated that the *Shapero* decision must be closely studied to see whether a proposed amendment to bar solicitation prior to the service of process is acceptable. He compared the proposed amendment to Ohio's Rule 7.3, which also has a similar waiting period. Unlike Ohio's Rule 7.3, the proposed amendment does not accept assisting or prior client relationships, personal friendships, business relationships of the past or other persons with whom the lawyer may already have a client-attorney relationship. He questioned why trolling appears to be permitted after service of process and what state interest it would serve to allow trolling.
13. Kristen Robinson, a family law council member and vice chair of the Oakland County Family Court Committee, also participated in the informational report. She had conducted research into the issue on behalf of the Oakland County Bar and stated that there are constitutional concerns, and that the Family Law Section was well aware of these concerns. She spoke about the problems that are occurring by attorney solicitation before process of service in divorce actions and stated that the Family Law Council would like to see this addressed. She said that the Council will be flexible in drafting a Court Rule or an amendment to the Michigan Rules of Professional Conduct to prevent the harm that's happening.
14. Victoria Kremski from the Thomas M. Cooley Law School, also participated in the informational report. She stated that a rule is needed because of the existence of a significant interest. She believes that the rule should be a Rule of Professional Conduct. She also stated that the proposal as written is overbroad and would not withstand constitutional scrutiny. Instead, it should be narrowly tailored to encompass the specific situations that are of concern, allegations in cases where there are allegations of domestic violence, allegations where perhaps one of the potential defendants is mentally or emotionally unstable and could do harm to themselves or others. She offered to help draft a proposal that would withstand constitutional muster.
15. Anne Vrooman, Director of Research & Development of the State Bar of Michigan made a few remarks on the Changing Face of the State Bar of Michigan, and a look at the changing demographics of the membership of the State Bar.

² The decision in *Shapero v Kentucky Bar Ass'n*, 486 US 466; 108 S Ct 1916; 100 L Ed 2d 475 (1988) holds that lawyer advertising is in the category of constitutionally protected commercial speech.

16. Dan Quick, member of the Civil Procedures and Courts Committee and also a member of the Representative Assembly, introduced for consideration of proposed amendment of MCR 8.115, cell phone usage in court facilities. The Civil Procedure and Courts Committee asked for the Assembly's permission to advocate its own position on a proposal that the Assembly voted the previous year, on April 12, 2008. The Committee's position expands on the Assembly's position by inserting the below underlined language and striking other language from the Assembly's proposed amendment of MCR 8.115, regarding use of electronic devices in the courthouse:

(C) Electronic Devices. Lawyers may carry cell phones or other portable electronic devices, including but not limited to those with photographic, video or audio recording capabilities, into any court facility. ~~Cell phone or other portable electronic~~ Such devices may be used ~~shall be allowed~~ anywhere outside the courtroom. When in any courtroom, all phones or other portable electronic devices shall either be turned off or silenced. If silenced, counsel shall make certain that any transmissions do not interfere with court proceedings. Individuals shall not verbally initiate or answer any calls while court is in session without the consent of the court. No photographs may be taken inside any courtroom without permission of the court. No photographs may be taken of any jurors or witnesses. ~~Individuals shall not initiate or answer any calls while court is in session without the consent of the court.~~ Nothing in this subrule limits the court's authority to impose other reasonable limitations on use of electronic devices where necessary to maintain conditions conducive to the orderly conduct of proceedings. Failure to comply with this ~~subrule section~~ may result in a fine, incarceration, or both for contempt of court.

After a motion was made, seconded, and discussion, the Assembly granted permission to the Civil Procedure and Courts Committee to advocate its position.

17. John Reiser, member of the Representative Assembly, introduced for consideration an amendment to MCR 2.516 regarding instructions to the jury. The following is the alternative draft language proposed amendment of MCR 2.516 (B) regarding instructions to the jury:

MCR 2.516 Instructions to the Jury

(B) Instructing the Jury.

(1) After the jury is sworn and before evidence is taken, the court shall give such preliminary instructions regarding the duties of the jury, trial procedure, and the law applicable to the case as are reasonably necessary to enable the jury to understand the proceedings and the evidence. MCR 2.516(D)(2) does not apply to

such preliminary instructions. The court shall specifically instruct the jurors that they shall not:

(a) discuss the case with others, including other jurors except as otherwise authorized by the court;

(b) read or listen to any news reports about the case;

(c) use a computer, cellular phone, or other electronic device with communication capabilities while in attendance at trial or during deliberation;

(d) use a computer, cellular phone, other electronic device with communication capabilities, or any other means to obtain or disclose information about the case.. As used in this subsection, information about the case includes, but is not limited to, the following:

(i) seeking information about a party, , witness, or attorney involved in the case;

(ii) reviewing news accounts of the case;

(iii) conducting research on any topics raised or testimony offered by any witness;

(iv) researching any other information the juror might think would be helpful.

(e) Any juror who observes or has reason to believe that another juror has violated this rule shall immediately inform the court of the violation.

After motions were made, seconded, and discussion, the Assembly approved the proposal.

18. Richard Morley Barron, member of the Representative Assembly introduced for consideration support for adoption in Michigan the Revised Uniform Arbitration Act (RUAA) as drafted by the National Conference of Commissioners on Uniform State Laws (ULC) and supported with amendment by the Alternative Dispute Resolution Section of the State Bar of Michigan. After motions were made, seconded, and discussion, the Assembly referred the proposal to the Special Issues Committee of the Assembly.

19. Adjournment