

Civil Procedure & Courts Committee
October 13, 2012 - 10 a.m.
Dickinson Wright PLLC Office
Troy, Michigan

Draft - MINUTES

Committee Members: Thomas H. Bannigan, Richard D. Bisio, Pamela C. Dausman, Robert J. Ehrenberg, Lori J. Frank, Hon. David M. Lawson, Daniel D. Quick, George M. Strander, Alan R. Sullivan, Randy J. Wallace
Advisor: Peter H. Webster
SBM Staff: Janet K. Welch, Carrie A. Sharlow

1. Call to Order & Welcome to New Members
2. Old Items

Follow-Up on Committee Positions Reviewed by the Board of Commissioners – All of the below items will be removed from future agendas, having been discussed by the Committee.

- a. [2011-09 - Proposed Revision of Administrative Order No. 1989-1 \(rules regarding media access in the Court of Appeals and the Supreme Court\)](#)

The proposed amendment of Administrative Order No. 1989-1 adds new language that clarifies and expands the standards for allowing film or electronic media coverage of court proceedings in the Court of Appeals and the Supreme Court.

SBM Position: Takes no position, but sent Civil Procedure & Courts comment to MSC.

Committee Position: No position, but provided recommendations for clarification.

- b. In May of this year, the Committee on Justice Initiatives (CJI) created a Language Access Workgroup (Workgroup) to study and make recommendations on [2012-03 - Proposed Adoption of Rule 1.111 and Rule 8.127 of the Michigan Court Rules](#):

This proposal includes two separate proposed rules that relate to foreign language interpreters. The first proposed rule, MCR 1.111, would establish the procedure for appointment of interpreters, and establish the standards under which such appointment would occur. The proposed rule includes alternative language for subrules (B) and (F)(4).

The second proposed rule, MCR 8.127, would create a board to oversee certification of interpreters and other interpreter-related functions, and provide a procedure for imposing discipline upon interpreters who commit misconduct. The board's structure and responsibilities are similar to those of the Court Reporting and Recording Board of Review described in MCR 8.108.

The Workgroup studied the proposed court rules, met several times to discuss the rules, and unanimously adopted the recommendations. CJI met on June 25 to review

those recommendations. Eight of the ten CJI members were present at that meeting, and those eight members voted to approve the recommendations of the Workgroup.
SBM Position: Adopt the report of the Committee on Justice Initiatives.
Committee Position: The Committee is unable to support the proposal at this time w/additional comments.

- c. [2011-14 - Proposed Amendment of Rule 2.105 of the Michigan Court Rules \("diligent inquiry" would include an online search if the moving party has reasonable access to the Internet\)](#) The proposed amendment of MCR 2.105 would state that a "diligent inquiry" in support of a request for substituted service must include an online search if the moving party has reasonable access to the Internet.
SBM Position: Oppose w/amendment
Committee Position: Oppose w/amendment
- d. [2011-06 Proposed Amendment of MCR 2.603](#)
The proposed amendment of MCR 2.603 would clarify that a court clerk could enter a default judgment if the requested damages are less than the amount claimed in the original complaint, to reflect payments that may have been made or otherwise credited.
SBM Position: Support
Committee Position: Support
- e. [2011-08 - Proposed Amendment of Rule 2.116 of the Michigan Court Rules](#)
Inclusion of the revised proposed clarifying language in MCR 2.116(C)(7) would clarify the procedure for bringing a motion for summary disposition on the grounds of a forum selection clause.
SBM Position: Adopt the Civil Procedure & Courts Committee position with the removal of the "forum non conveniens".
Committee Position: Support w/amendments.

3. New Items

- a. [HB 5813](#) (Damrow) **Court Recordings**
Courts, other; Communications, technology. Courts; other; audio recording of court proceedings by parties; allow. Amends 1961 PA 236 (MCL 600.101 - 600.9947) by adding sec. 1488.
Referred to House Judiciary: August 15, 2012
Comment Period Expiration: October 29, 2012

The committee voted unanimously to oppose this bill on several matters. The Committee believes it best, as reflected in MCR 8.109, to leave these matters to the discretion of the court, which is in the best position to assess the particular circumstances of each case. A mandatory rule fails to take into consideration any number of factors which might militate against access in some cases, including PPO hearings, child custody matters or certain criminal proceedings. Moreover, to the extent the bill conflicts with the court rule, the proposal violates the principle stated in *McDougall v Schantz* and the court's right to govern its own proceedings.

b. [HB 5795](#) (Constan) **Digital Court Records**

Courts, records; Courts, other; Civil rights, public records. Courts; records; digital court records and electronically filing court papers; allow. Amends secs. 832, 859, 1427, 2137 & 8344 of 1961 PA 236 (MCL 600.832 et seq.); adds secs. 1426 & 1428 & repeals 1949 PA 66 (MCL 780.221 - 780.225).

Referred to House Judiciary: August 15, 2012

Comment Period Expiration: October 29, 2012

The committee voted unanimously to support HB 5795. The Committee thinks justice is best served in the State by having a common electronic filing and access system across the State, in accord with the Judicial Task Force recommendations of the Bar. However, in the absence of that, this bill is a step in the right direction in that it validates SCAO authority and its role in the process. The Committee notes that it should be reinforced that in-person access at terminals at the courthouse remains available. In addition, the Committee questioned the interplay of 1426(1) and (5)(C).

c. [SB 1296](#) (Schuitmaker) **Statute of Limitations**

Civil procedure, statute of limitations; Torts, nonmedical malpractice; Occupations, attorneys. Civil procedure; statute of limitations; statute of repose for actions against an attorney-at-law or a law firm; enact. Amends sec. 5838 of 1961 PA 236 (MCL 600.5838) & adds sec. 5838b.

Referred to Senate Judiciary: September 20, 2012

Comment Period Expiration: November 2, 2012

The committee voted 8 in favor, with one abstention and one in opposition, to oppose the bill. The Committee is unaware of the necessity to balkanize the statute of limitations for professionals and attach a significantly longer period as to attorneys.

d. Proposal to Amend MCR 2.306 – Jules Olsman

The committee voted unanimously to support adoption of proposed MCR 2.306(C)(5)(a) and (b), but changing the title from “Conferring” to “Communicating” and the word “confer” in (b), first line, to “communicate.” The Committee notes that these changes, which update established rules to address electronic communications, are consistent with other recent modifications to the Court Rules and Jury Instructions.

e. Proposal to Revise MRPC 7.1 – Jules Olsman

The committee voted in the majority in favor with one abstention to support this amendment with one further amendment:

(d) advertise the lawyer’s services under the heading of a phone number, image or icon without also including the full name of the lawyer or law firm. The Committee is aware of some lawyers advertising using mere “brands” or phone numbers without proper identification of the actual law firm or lawyer. Such practices create the potential for consumer confusion.

- f. Letter from Ms. Renee Smallwood Re: Need for Minor Reform to Appellate Procedural Law

The Committee believes that trial court (and Court of Appeals) discretion over how to handle its docket and various motions is best left to the particular court. The proposal creates the potential for mischief by the filing of frivolous or marginal motions to strike, thus delaying adjudication on the merits. While the Committee understands the purpose behind the proposal, whatever marginal good this rule change might do is far outweighed by the negatives.

The Committee suggests that the Bar send a letter to Ms. Smallwood thanking her for her interest and time to present this and explaining our rationale.

- g. Proposal for New MCR 2.602(B)(5)

After a lengthy discussion, the committee voted to send this proposal to a subcommittee within Civil Procedure & Courts for further revision.

- h. Proposal for New MCR 2.203(G) and Amend MCR 2.102(A)

The following new section of MCR 2.203 is unanimously supported:

(G) Joining Additional Parties

(1) **Persons Who May Be Joined.** Persons other than those made parties to the original action may be made parties to a counterclaim or cross-claim, subject to MCR 2.205 and 2.206.

(2) **Summons.** On the filing of a counterclaim or cross-claim adding new parties, the court clerk shall issue a summons for the new party in the same manner as on the filing of a complaint, as provided in MCR 2.102(A)-(C). Unless the court orders otherwise, the summons is valid for 21 days after the court issues it.

- i. [Substitute HB 5076 \(H-3\)](#) (Pettalia) **Budgets**
Local government; budgets; challenging an approved budget; clarify. Amends secs. 16 & 18 of 1968 PA 2 (MCL 141.436 & 141.438).
Referred to House Judiciary: October 13, 2011
Comment Period Expiration: October 19, 2012

The committee voted in the majority in favor with one abstention to oppose as to sections addressing the courts; take no position otherwise.

As to the sections addressing the courts, the Committee opposes the proposed legislation. First, the Committee questions the need for the legislation given existing law (as detailed in the Third Judicial Circuit memo) and existing procedures established by administrative order and administered through SCAO. Second, the Committee does not believe that the Court of

Appeals is properly equipped to adjudicate factual questions and that the trial courts remain the proper place for such matters. Third, as to section 18(5), the Committee believes that this provision raises serious constitutional concerns and the Committee continues to support the recognition of the separation of powers as held by the Supreme Court in *Judicial Attorneys Ass'n v State*, 459 Mich 291 (1998).

4. Good of the Order

5. Adjournment – The meeting adjourned shortly after noon.