

STATE BAR OF MICHIGAN
CIVIL PROCEDURE AND COURTS COMMITTEE

Minutes
November 5, 2011

The Committee met at Dickinson Wright PLLC, Troy, MI at 10:00 a.m. Attendance was recorded by chair Quick.

Present in person or by telephone:

Thomas Bannigan
Richard Bisio
Sean Crotty
Frank Greco
Hon. David Lawson
Gary Peterson
Victoria Valentine
Peter Webster
Kaveh Kashef
Randy Wallace
Daniel Quick
George Strander
Maureen Kinsella
Pamela Dausman
Karen Safran

Absent:

Lori Frank
Martha Moore
Joey Niskar
Curt Benson
Ronald Longhofer (Advisor)
Thaddeus Morgan
Sean McNally (Advisor)
Janet Brandon (Advisor)
Dennis Barnes (Liason)
Elizabeth Lyon (SBM)

- 1. The June 2011 minutes were approved.**
- 2. Members wanted to continue to receive the hardcopy books from SBM, although they were introduced to the new SBM Portal**
- 3. Meeting Locations will continue to be held in SE Michigan**
- 4. Old Items**

- a. Service on business entities and referral to other bar committees is ongoing; Business Law Section should have final position by early December 2011.
- b. Service of Process – Proposed Amendment of MCR 2.105(D)(2)

The proposal by R Wallace passed unanimously, with modification, as follows:

Add the following language as MCR 2.105(D)(5):

“sending a summons and a copy of the complaint by registered or certified mail, return receipt requested, and delivery restricted to the designated individual described in MCR 2.105(D)(1)-(3). Service is made when the individual acknowledges receipt of the mail. A copy of the return receipt signed by the individual must be attached to proof showing service under this subrule.”

This proposal was passed along to the Business Law Section and will be integrated in to the broader reform package on services of businesses rather than independently forwarded.

- c. An update was provided on the last Representative Assembly session during which the Committee’s recommendation regarding discovery only depositions was passed and the proposal regarding the Supreme Court term was tabled for Bar consultation with the Court (E. Lyon to follow up).

5. New Items

a. **2004-55 Proposed Amendment of Rule 3.211 of the Michigan Court Rules**

No position, unanimous vote.

b. **2010-25 Proposed Amendment of Rule 7.210 of the Michigan Court Rules**

The Committee was unclear of the purpose of this proposed amendment and sought input from the Appellate Law Section of the Bar. That section is meeting November 18. Barring something that forces a reconsideration, the Committee’s position is as follows:

The Committee opposes (unanimous vote) this proposed amendment on the following grounds: (a) there is not a known issue generally with the maintenance and forward of exhibits such that a rule of general application needs to be modified; (b) the proposal would impose costs and burden upon the courts, which are already over-burdened; (c) the proposal creates a potential conflict with MCR 2.518 and existing file management standards. The Committee also notes that (i) a similar rule exists for appeals to circuit court, MCR 7.109(c); and (ii) if the perceived problem relates to appointed counsel for indigent parties, a more targeted solution might be a better solution, such as requiring the delivery of all trial exhibits to appellate counsel before fees are approved.

c. **HB 4844 (Pettalia) Protection Orders**

The Committee opposes (unanimous vote) the bill for the following reasons: (a) establishing a public forum for court-issued orders will inevitably lead to increased activity for the courts (e.g., a victim who does not want the fact that she is being harassed made part of an easily available public website), which are already over-burdened; and (b) because many PPOs are issued either ex parte or with minimal due process (especially when compared to the due process involved for the analogous public posting of convictions for sex offenders), there is a concern with a public posting given unclear public interest in such orders and the significant burden of various local agencies to both post and then also update all PPO information, which can be rather voluminous, with ever-changing expiration dates.

The Committee took no position regarding the portions of the proposal dealing with the LEIN system.

d. English as an Official State Language

HB 4906 (Kurtz) Official Language
SB 0638 (Kahn) English

The Committee takes no position on the proposed bills, although notes that English-only requirements may adversely impact efforts to attract diverse and international businesses to Michigan, which in turn would decrease the amount of legal activity in the State. The vote was unanimous but for 1 opposing vote (Wallace) and 1 abstention (Lawson).

e. Correct Document Errors

HB 4928 (Cotter) Correct Document Errors
SB 0684 (Emmons) Property Records

No position.

f. HB 4998 (Heise) Court Procedures

Civil procedure, evictions; Civil procedure, service of process; Civil procedure, other;

The Committee opposes (unanimous vote with Lawson abstaining) the proposed bill.

As to Section 5732: The Committee generally favors deference to local courts to manage their own dockets, subject to oversight by the Supreme Court. The mandate of this provision would overrule local autonomy.

As to Section 5736: Oppose because the subject-matter of the legislation is procedural and should be left to regulation by the Michigan Supreme Court via the Michigan Court Rules (which already addresses the topic, see MCR 4.201(D)).

As to Section 5739(2): Oppose because this is already the subject of a Court Rule, MCR 4.201(G)(1)(b) and should be regulated as a procedural matter, not by statute. Moreover, given the summary nature of “summary” proceedings, there are due process concerns with

adjudicating future rent claims, including how applicable defenses (including mitigation) will be addressed.

g. Perjury & Foreign Declarations

SB 0688 (Schuitmaker) Perjury
SB 0689 (Schuitmaker) Foreign Declarations

By unanimous vote, the Committee takes the following positions:

As to Section 2102: Should the statute be amended, it should simply be eliminated, as the subject matter is already addressed by Michigan law, MCL 565.261, per the ruling in *Apsey v Memorial Hospital*, 477 Mich 120 (2007). Otherwise, the Committee urges consideration of adopting a statute analogous to 28 U.S.C. § 1746, allowing unsworn declarations if made upon penalty of perjury.

As to Chapter 21A: The Committee supports the bill, but suggests that (a) “oath” as used in 2182(F) be defined so as to include affirmations of truth under penalty of perjury, and (b) consistent with 2184(2)(E), an exemption be made for decedent estate administration forms (which under current practice are sworn when signed). In this regard, the Committee notes that MCR 113(A)(1)(c) requires use of SCAO forms, and many SCAO forms call for a sworn signature. If this rule is adopted, many of those forms will have to be modified to comply with the statute. Alternatively, should the Legislature adopt a statute analogous to 28 U.S.C. 1746, the issue would become moot.

h. SB0774

The Committee opposes the proposed bill because permitting lawyers to participate in small claims court is inconsistent with the core of that proceeding. If the Legislature believes that small claims court should simply no longer exist, then it could simply eliminate it and submit all matters to normal district court jurisdiction. Otherwise, eliminating this key distinguishing feature between small claims and normal district court proceedings would decrease access to justice for parties who feel compelled to have an attorney should the other party retain one.

i. SB0707

The Committee supports the proposed legislation. The Committee urges consideration of a new section to sec. 2203 (modeled upon New York statute CPLR 3119(b)(4)), which would provide as follows:

Notwithstanding paragraph one of this subdivision, if a party to an out-of-state proceeding retains an attorney licensed to practice in this state, and that attorney receives the original or a true copy of an out-of-state subpoena, the attorney may issue a subpoena in accordance with MCR 2.506.

This would eliminate administrative burden upon the clerk of the court and be more efficient.

Also, the Committee notes that, upon adoption of this legislation, the Supreme Court should modify MCR 2.506 so as to establish a procedure for how an action to enforce or quash a subpoena shall be handled (since there likely is no existing court file in existence and the process of filing a Complaint would seem overly cumbersome).

6. The Committee expects to schedule its next meeting in late January or February.