

Civil Procedure & Courts Committee  
November 16, 2013 - 10 a.m.  
Dickinson Wright PLLC Office  
Troy, Michigan

MINUTES

Committee Members: Thomas H. Bannigan, Sean F. Crotty, Pamela C. Dausman, Michael J. Distel, Robert J. Ehrenberg, Lori J. Frank, Elisa M. Gomez, Hon. David M. Lawson, Gary R. Peterson, Daniel D. Quick, Thomas Daniel Siver, George M. Strander, Alan R. Sullivan, Matthew Arthur Tarrant, Victoria A. Valentine, Randy J. Wallace, Peter H. Webster.

SBM Staff: Peter Cunningham

1. Call to Order
2. Minutes from the July 18, 2013 Meeting – The minutes were unanimously approved.
3. Old Business

A. Representative Assembly Items

B. Items Before the Michigan Supreme Court

i. [ADM File No. 2011-26 - Amendments of MCR 2.403, 2.405, and 2.625](#)

The amendments of MCR 2.403(O)(8), MCR 2.405(D)(6), and MCR 2.625(F)(2) add language that references a motion for rehearing or reconsideration (consistent with the Court of Appeals opinion in *MEEMIC Ins Co v DTE Energy Co*, 292 Mich App 278 [2011]) to the list of motions that toll the period of time in which a party may file a request for case-evaluation sanctions.

Issued: October 2, 2013

Effective: January 1, 2014

Civil Procedure supported with recommended amendments:

- Insert “denying a timely motion:” to (O)(8) after “order” so it modifies all subparts, and delete that language from (O)(8)(1).
- The Committee proposes the deletion of subparagraph (iv). The concern is that a party could file a very belated or frivolous post-judgment motion simply in order to resurrect an otherwise time-barred motion for case evaluation sanctions. Given subparagraphs (i)-(iii), the Committee could not come up with a scenario where this sort of provision would be necessary. It is recognized that MCR 2.625(F) on taxation of costs includes such language, but the dollar value between costs and fees suggests less likelihood of manipulation of the cost rule.
- Similar changes should be made to the offer of judgment rule and MCR 2.625(F) should have rehearing/reconsideration added.

ii. [ADM File No. 2011-31 - Amendments of MCR 7.105, 7.111, and 7.205](#)

These amendments permit the filing of a reply brief in support of an application for leave to appeal in the circuit court and the Court of Appeals, and following the filing of a claim of appeal in the circuit court.

Issued: October 2, 2013

Effective: January 1, 2014

Civil Procedure supported the amendments.

iii. [ADM File No. 2012-06 - Amendment of MCR 9.221](#)

The amendment of MCR 9.221 adds a new subrule (I) that requires the Judicial Tenure Commission to notify a court's chief judge if a referee or magistrate is subject to a corrective action that does not rise to the level of a formal complaint, including a letter of caution, a conditional dismissal, an admonishment, or a recommendation for private censure. The new requirement does not apply to a dismissal with explanation.

Issued: October 2, 2013

Effective: January 1, 2014

Civil Procedure took no position, although the Committee believed that simply having the Commission both notify the chief judge and send the written notice of disposition was more efficient than the proposed, bifurcated procedure.

iv. [ADM File No. 2013-02 - Retention of Amendments of MCR 3.002, 3.800, 3.802, 3.807, 3.903, 3.905, 3.920, 3.921, 3.935, 3.961, 3.963, 3.965, 3.967, 3.974, 3.977, and 5.402, and Adoption of Additional Amendment of MCR 3.965](#)

The amendment of MCR 3.965 allows a slightly longer adjournment period in cases that involve Indian children to accommodate the statutory provisions that require notice to be provided at least ten days before the hearing.

Issued: October 2, 2013

Effective: Immediately

Civil Procedure took no position, although as a general drafting point, the Committee notes that the proposal repeats definitions from the statute. This creates potential confusion or unnecessary revision when the statutory definitions change and is generally redundant. The Committee prefers simply incorporating the statutory definitions by reference, although perhaps there is some unique consideration as applied to a child protection statute that calls for not following this general suggestion.

v. [ADM File No. 2013-12 - Amendment of MCR 7.313](#)

The amendments of MCR 7.313 clarify that the decision whether to grant rehearing or reconsideration in the Michigan Supreme Court should be made consistent with the standard incorporated in MCR 2.119(F)(3), similar to the reference for consideration of such motions in the Court of Appeals contained in MCR 7.215(I)(l).

Issued: October 2, 2013

Effective: January 1, 2014

Civil Procedure supported the amendments.

#### 4. New Items

A. [2013-28 - Proposed Amendment of Rule 2.510 of the Michigan Court Rules](#)

The proposed amendments of MCR 2.510 would allow courts to authorize prospective jurors to complete and return questionnaires electronically, and would allow courts to create and maintain them electronically (i.e., in any medium authorized by court rules pursuant to MCR 1.109). The proposed change also would delete language in MCR 2.501(D) to clarify that the chief judge is responsible for initiation of the court's policies for summoning prospective jurors.

Issued: September 18, 2013

Comment period expiration: January 1, 2014

**The committee voted unanimously to support the proposed amendment. The committee supports the proposed amendment as a modernization of the courts, but notes that a uniform practice across the state is preferred. Further, the committee suggests that "completed" in (c)(3) be "returned" in order to match the language of (c)(1).**

B. [ADM File No. 2013-03 - Proposed Amendment of MCR 2.302](#)

The proposed amendment would clarify that discovery is available in postjudgment proceedings in domestic relations matters.

Issued: November 6, 2013

Comment period expiration: March 1, 2014

**The committee voted unanimously to take no position, but express a concern that unregulated discovery after a judgment could lead to abuses. It might be more advisable to require a status conference and something akin to a scheduling order so that runaway discovery does not become a problem.**

C. [ADM File No. 2013-19 - Proposed Amendment of MCR 3.602](#)

The proposed changes of MCR 3.602 would apply to all other forms of arbitration that are not described in the newly adopted Revised Uniform Arbitration Act, MCL 691.1681 *et seq.*

Issued: November 6, 2013

Comment period expiration: March 1, 2014

**The committee voted unanimously to support the proposed amendment.**

D. [H.R. 2509](#) and [S. 1224](#): Civil Justice Tax Fairness Act of 2013

These two identical bills amend the Internal Revenue Code to allow: (1) an exclusion from gross income for amounts received (whether by judgment or settlement, as lump sums or periodic payments) on account of a claim of unlawful discrimination; (2) income averaging for backpay and frontpay amounts received from such claims; and (3) an exemption from the alternative minimum tax (AMT) for any tax benefit resulting from the income averaging of amounts received from an unlawful discrimination claim.

**The committee decided not to take a position.**

- E. [HB 4913](#) (McMillin) Civil procedure; civil actions; strategic lawsuits against public participation; limit. Amends 1961 PA 236 (MCL 600.101 - 600.9947) by adding sec. 2978.

**The committee voted unanimously to oppose the bill. The Committee appreciates the intent behind anti-SLAPP legislation. However, the better course may be for courts to utilize MCR 2.114 and perhaps a new Michigan analog to 28 USC 1927 rather than this sort of mechanism. As written, the statute is extremely broad and could easily be used against the very class of individuals anti-SLAPP statutes are designed to protect. Moreover, the statute would cause significant changes to existing jurisprudence in areas such as defamation; e.g., this statute would (under 2978(2)(A)) impose a knowledge component which is a higher standard of proof than currently exists for some types of defamation.**

- F. [HB 5153](#) (Walsh) Courts; judges; salary formula for judges; modify. Amends secs. 304, 555 & 821 of [1961 PA 236](#) (MCL [600.304](#) et seq.).

**The committee unanimously supported the bill.**

- G. [HB 5156](#) (Shirkey) Courts; judges; court of claims exceptions to trial by court without jury; provide for under certain circumstances.

**The committee unanimously supported the bill.**

- H. [SB 0518](#) (Proos) Traffic Regulation  
Traffic control, traffic regulation; Courts, other. Traffic control; traffic regulation; use of vehicle boots for failure to satisfy certain court obligations; allow. Amends sec. 4803 of 1961 PA 236 (MCL 600.4803).

**The Committee voted unanimously to take a position of opposition on the bill in agreement with the reasons listed by the Criminal Jurisprudence & Practice Committee:**

**The committee voted unanimously to oppose SB 0518. While this gives the court another remedy to collect money owed, there are too many problems with this bill. First, the bill does not say who pays the cost of immobilization [the court or person owing the money] and how that will be paid. Second, what happens when the main driver of the vehicle is not the titled owner, and what about if a person has multiple vehicles? Finally, if a person depends on the vehicle to get to work, then the ability to pay the fine is removed when it is immobilized. This thwarts the whole intent of the bill.**

- I. [SB 0519](#) (Proos) Civil Procedure Fines  
Civil procedure, other; Courts, other; Crime victims, compensation; Criminal procedure, other; Family law, child support. Civil procedure; other; fines, costs, and other indebtedness to courts; require SCAO to establish a database, and require civil litigants to check database before paying

or collecting on a judgment. Amends 1961 PA 236 (MCL 600.101 - 600.9947) by adding sec. 1477.

**The committee voted unanimously to oppose the bill.**

**The Committee observed several potential problems if this bill became law.**

**First, we are skeptical as to the Court's ability to maintain an updated list as envisioned by 1477(1).**

**Second, we oppose the concept that a party advocate must first check the list before disbursing money to his or her own client. This presents potential conflicts of interest and increases the likelihood of disputes between clients and lawyers. Moreover, it places on counsel the burden of not only checking the list but making the 'proper' payment, which is unreasonable and fraught with potential liability issues.**

**Third, the concept behind the statute may frustrate the settlement of civil actions, which is contrary to existing public policy in this State.**

**Fourth, there are existing mechanisms for the Friend of the Court (as one party potentially interested in this statute) to lien assets; this statute would circumvent established procedures for attachment and the establishment of priorities among creditors, effectively giving the state super-priority. The potential claims of third party creditors against lawyers holding and disbursing funds is further reason to oppose the statute.**

J. [SB 0520](#) (Emmons) Restitution Orders

Crime victims, restitution; Crime victims, notices; Family law, child support. Crime victims; restitution; restitution orders for crime of nonpayment of support; clarify. Amends sec. 165 of 1931 PA 328 (MCL 750.165).

**The committee voted unanimously to oppose the bill.**

**The Committee was joined by Mr. Kent Weichmann of the Family Law Section for consideration of this bill. The Committee opposes the bill in its current form. The substitute bill hinges upon "personal jurisdiction" over the defendant. However, the court having personal jurisdiction over a defendant is not necessarily the same as the defendant having actual (or even constructive) notice of the support order. Absent such notice, the bill raises significant due process questions.**

K. [SB 0521](#) (Emmons) Friend of the Court

Family law, child support; Family law, parenting time; Courts, subpoenas; Courts, contempt. Family law; child support; authority of friend of the court to issue subpoenas for show cause and notice to appear; allow, and provide for other general amendments. Amends secs. 31, 32, 33, 37, 44 & 45 of 1982 PA 295 (MCL 552.631 et seq.) & adds sec. 36.

The Committee was joined by Mr. Kent Weichmann of the Family Law Section for consideration of this bill. The Committee takes no position but raises 3 issues for consideration: (1) There is no such thing as “Supreme Court Rules.” This should be replaced with a reference to the Michigan Court Rules. (2) 32(8) should clarify that the defendant is released from custody pending the hearing if the bond is posted. It is implicit now but should be made explicit. (3) The Committee opposes 44(9) as unproductive. The vehicle may be co-titled to someone else, thus depriving an innocent party of the use of the vehicle. Moreover, the defendant may need the vehicle to get to work which in turn is necessary for order compliance. The statute also ignores potential priority claims of secured creditors of the vehicle.

L. Conflicts of Interest on Case Evaluation Panels

The committee voted to support with amendment:

“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.”

5. Meeting adjournment