

STATE BAR OF MICHIGAN  
CIVIL PROCEDURE AND COURTS COMMITTEE

Minutes  
October 20, 2007

The Committee met at the State Bar Building at 10:00 a.m. Attendance was taken and recorded by Chair Greco.

Present in person or by telephone:

Curt Benson  
Richard Bisio  
Janet Brandon  
Hon. Nanci Grant  
Frank Greco  
Sara Lachman  
Hon. David Lawson  
Sean McNally  
Thaddeus Morgan  
John Mulcrone  
Joey Niskar  
Jules Olsman  
Daniel Quick  
Karen Safran  
Victoria Valentine  
Peter Webster

Also present was Elizabeth Lyon, State Bar Director of Governmental Relations and the Bar's staff liaison to the Committee

Absent:

Kaveh Kashef  
Ray Kethledge  
Ronald Longhofer  
Gary Peterson

1. The Committee welcomed new member Sara Lachman of Grand Rapids, and Elizabeth Lyon, the State Bar's staff liaison to the Committee.
2. The Minutes of May 19, 2007 meeting were approved with one change. On Item 6, regarding HB 4578, John Mulcrone should be shown as having abstained.

Old Business

3. Daniel Quick reported on the Supreme Court's action in adopting amendments to MCR 3.602, the arbitration rule. File 2005-31. The proposal to do so had originally been developed by the Committee. A question was raised about the provisions regarding the time for certain motions – sometimes 21 days and sometimes 91. Frank Greco will check with former Chair Longhofer about what the original proposal said.
4. The Committee noted the Supreme Court's adoption of the amendment to MCR 7.306 (File 2006-44) regarding amicus curiae briefs, which the Committee had supported last year.
5. The Committee noted the Supreme Court's amendment of MCR 2.107 to provide for electronic service of papers. File 2007-12. The Court adopted most of the suggestions that the Committee had submitted for changes in the proposal (which had originally come from the Representative Assembly).
6. 2002-37 Electronic Filing.

There was discussion of the electronic filing proposals, which were on the agenda for the Supreme Court's September 26 public hearing. Several actions were taken.

First, the Committee voted unanimously to send several general comments to the State Bar, supporting the idea of providing for electronic filing, but urging that care taken to assure that certain key issues are adequately addressed in whatever plan is adopted. Specifically:

- A. Maximize uniformity in procedure. The proposal published for comment by the Supreme Court seems designed to permit each local court to develop its own electronic filing scheme. This creates the potential for disastrous confusion. The Committee believes that the better approach is a standard state-wide system, with appropriate flexibility for unique local situations. This would be consistent with the approach taken by the federal courts, where a standard system is provided by the Administrative Office of United States Courts. And it would be desirable to have the state system be as similar to the federal one as is practical. [Judge Lawson said that he believes that federal officials are considering whether to license the system developed for the federal courts to states.]
- B. Role of State Court Administrative Office. The published proposal requires that local plans be in a form developed by the State Court Administrator, and that the Administrator approve plans before they can be put in place. The Committee believes that the role of the State Court Administrative Office is critical in the process. Every effort must be made to assure that the form developed requires local plans to address the essential issues and that the review of local plans be rigorous.
- C. Mandatory versus voluntary system. The Committee concluded that the ultimate goal is a mandatory electronic filing system, but that there should be a gradual process of moving to such a system. And at the initial stages, it is desirable to have

parallel electronic and paper filing systems as a transition, as was done in the federal courts.

- D. Pro Se litigants. As shown by the comments of the Justice Initiatives Committee, which the State Bar forwarded to the Supreme Court, there are a number of difficult issues regarding adapting electronic filing systems to the peculiar situations of pro se litigants. Any proposal ultimately adopted must satisfactorily address these issues.
- E. Confidentiality. Any plan adopted should carefully address various issues about confidentiality of information that is electronically filed. [The pending amendments of the federal rules to adapt to the E-Government Act of 2002, especially FRCP 5.2 might provide a starting point.
- F. Accessibility of Records. Any plan adopted must adequately provide for access by the public to records that have been filed electronically.

Second, the Committee noted the State Bar's conversion of its E-Filing Task force into a new standing Technology Committee. While the Civil Procedure Committee believes it can make useful comments on any proposals regarding electronic filing, a subject-specific group such as the Technology Committee is likely to be more effective in developing and evaluating proposals. Frank Greco will contact the Technology Committee and monitor its work. A subcommittee of Joey Niskar, Rick Bisio David Lawson, and Frank Greco will watch for other developments and keep the Committee apprised. Dan Quick is a member of the committee that is advising on the implementation of the Oakland Circuit pilot program and will keep the subcommittee informed about developments there.

#### New Business

- 6. 2006-06 Proposed amendment of MCR 7.215 – resolution of conflict in COA opinions.

The Committee voted unanimously to support the proposed amendment.

- 7. HB 4931-4934 – Expansion of Jury Pools (BOC requests comments by 10/31/07). [HB 4755 and 4859 have similar provisions.]

The Committee voted unanimously to support the concept of expanding the pool of potential jurors. It took no position on whether the additional sources of potential jurors identified in the current bills are sound. But the Committee was concerned that the current bills do not adequately deal with certain issues. Among them are minimizing the administrative burdens on state agencies providing the supplemental lists and the local offices responsible for administering the jury selection process, and taking into consideration the burden on those called for service.. The potential need to review multiple lists for duplication, and the mechanics of requesting only a limited number of names from supplemental sources need to be clarified. The Committee urges the State Bar to take an active role in the consideration of these proposals and to provide whatever assistance it can

to the Legislature in conjunction with other interested groups that would be affected by this legislation.

8. HB 4723 and 4724 – expert witnesses in medical malpractice cases. (BOC requests comments by 9/24/07).

The Committee voted unanimously to oppose these bills. Among the reasons were

- A. There is no problem in this area that needs to be addressed.
  - B. It is inappropriate to single out a single class of cases for a rule such as this.
  - C. The procedure for implementing the limited license requirement is very unworkable.
  - D. It is questionable whether this is an appropriate subject for legislation. This is a procedure that should be governed by the rules of evidence and implemented by trial courts in individual cases.
9. HB 4650 – enforcement of foreign judgments. (BOC requests comments by 9/24/07). This bill would adopt the revised uniform enforcement of foreign judgments act, replacing Michigan’s version of the previous uniform act. MCL 691.1151-691.1159. The bill passed the House (103 to 0) on 6/19/07.

The committee voted unanimously to support the bill.

10. SB 817 – codification of “discovery rule” for Statute of Limitations purposes. (Introduced 9/26/07; no BOC reference yet).

The committee discussed the proposal, which apparently arises out of the Supreme Court’s July 25, 2007, decision in *Trentadue v Buckler Automatic Lawn Sprinkler Co.*, essentially holding that the statutory limitation of actions provision abrogates the common law discovery rule.

The committee voted 11 to 1, (with 1 abstention) to take no position on the bill.

11. HB 4953 and 5037 – Assessment of attorney fees against DEQ in environmental actions. (BOC requests comments by 10/31/07).

The Committee voted 7 to 2 (with 4 abstentions) to oppose the bills, essentially because of disagreement with adopting a one-sided “loser pays” principle in this specific kind of case.

Second, the committee voted unanimously that if the bills are adopted (a) they should not mandate the imposition of attorney fees, but rather give the court discretion to award them, and (b) HB 4953 should refer to “actual reasonable attorney fees”, as HB 5037 already does.

12. HB 5060 – Repeal of MCL 600.2102 (Affidavit signed in another state or country). (BOC requests comments by 10/31/07).

The Committee voted unanimously to support the repeal.

13. The next meeting of the Committee will be at 10:00 a.m. on December 15, 2007, in Oakland County, tentatively at Ray Kethledge's office, 3001 W. Big Beaver Rd, Suite 600.

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