

## Report on Public Policy Position

**Name of Committee:**

Justice Policy Initiatives

**Contact Person:**

Lorray S.C. Brown

Michael J. Blau

**E-mail:**

lorrayb@umich.edu

mblau@sambernstein.com

**Proposed Court Rule or Administrative Order Number:**

[2005-32 - Proposed Amendments of Rules 2.101, 2.102, 2.113, 2.603, 3.101, and 8.119 of the Michigan Court Rules](#)

This proposal, recommended by a workgroup authorized by the Supreme Court, would establish specific rules for court clerks to screen documents that are submitted to a court for filing and return those documents that do not conform to certain minimum filing requirements.

**Date position was adopted:**

July 13, 2010

**Process used to take the ideological position:**

Position adopted after discussion and vote at a scheduled meeting via conference call.

**Number of members in the decision-making body:**

19

**Number who voted in favor and opposed to the position:**

10 Voted for position

0 Voted against the position

0 Abstained

9 Did not vote

**Position:**

Oppose

**Explanation of the position:**

The Justice Policy Initiative opposes the proposed amendments. The proposed rules authorize the clerks to reject pleadings based on decisions that should be reached by a judge. As such, the proposed rules improperly delegate judicial authority to the clerks. This violates Michigan constitution and case law. Further, a clerk has neither the legal training nor expertise to make these decisions. A clerk's error can hinder the access to justice and open the possibility of a flood-gate of appeals. JPI agrees with the position taken by the Civil Procedure and Courts Committee. JPI therefore adopts the position of the Civil Procedure and Courts Committee as set out below:

The [Civil Procedure and Courts] Committee opposes the proposed amendments. They would vest significant authority in clerks to make decisions about the validity of filings that should be left to a judge. Clerks are not judicial officers. They have not been elected as such, and the state constitution does not invest them with the power to make judicial decisions. The decision whether or not to accept a paper for filing transcends the ministerial and on occasion requires considerations of substance. Cf. FR Civ P 5 (d)(4): “The clerk must not refuse to file a paper solely because it is not in the form prescribed by these rules or by a local rule or practice.”

Specific problems with these proposals include the following:

1. Proposed MCR 2.102(B)(2)(b) would insert a new requirement to plead venue and allow a clerk to reject a noncomplying complaint. MCR 2.102(A), MCR 8.119(C)(2). But venue is not required to be pled as an element of a claim and is waivable. MCR 2.221(C). The RJA permits cases to be tried where venue is not proper and makes judgments valid despite venue defects. MCL 600.1645, 600.1651.
2. The proposals would require the clerk to determine jurisdiction [MCR 8.119(C)(1)(f)] and to reject a noncomplying complaint. MCR 8.119(C)(2). In cases of questionable jurisdiction (i.e., is a contested amount in controversy enough to get into circuit court or too much to be in district court; is a claim for equitable relief sufficient to confer circuit court jurisdiction), the clerk should not be making the first call on jurisdiction and rejecting documents on that basis.
3. The proposal includes a rule that when there is more than one filing date stamped on a document, the filing date is the latest date. MCR 8.119(C)(3). Thus, although a document is timely filed as shown by an initial date stamping, if for some reason a later date gets stamped on it, it could be deemed untimely.
4. A clerk could automatically reject reply briefs on motions, since the court rules do not provide for them and the clerk could view that as noncompliance with the court rules. MCR 8.119 (C).
5. A clerk must reject a filing that the clerk determines is untimely. MCR 8.119(D)(1)(c). This would remove the discretion of a judge to consider an untimely filing. See MCR 2.108(E), 2.116(D)(4); *Arrington v Detroit Osteopathic Hospital*, 196 Mich App 1992).
6. The proposal does not clearly address the effect on the statute of limitations of a clerk's reject of a filing.
7. The proposal allows judicial review of a clerk’s decision regarding defaults and garnishments. MCR 8.119(D)(3). But there is no provision for any review of a clerk’s decision to reject other categories of filings. MCR 8.119(C)(2).

JPI also agrees with the position taken by the Consumer Law Council and adopts the below comments expressed by the Consumer Law Council:

The Consumer Law Council unanimously opposes the adoption of this rule and urges the State of Michigan to join in opposition. This rule would require the clerk of a court to “determine that the . . .”

(f) documents [submitted for filing] are filed in the court of proper jurisdiction  
 .... Determining the court of proper jurisdiction requires much more knowledge. For example,

ICLE's *Court Rules of Michigan Annotated* cites over thirty appellate holdings on summary disposition motions claiming lack of subject matter jurisdiction. If appellate review is frequently required to determine jurisdictional matters, we could not expect a clerk, who may have no legal training, to make accurate decisions. In fact, making such a decision requires "the use of legal discretion and profound legal knowledge," which is, of course, the type of decisions the Michigan Supreme Court has ruled are to be restricted to licensed attorneys. *Dressel v Ameribank*, 468 Mich 557, 664 NW2d 151 (2003).

It is JPI's position that these rules should not be adopted statewide or locally as these rules are illegal and unconstitutional. In fact, currently, there are reports that some local courts are currently rejecting pleadings based on similar reasons as set out in these proposed rules. This has created problems for attorneys in filing there pleadings. Therefore, JPI would oppose any suggestion that the local courts implement similar rules.

Finally, JPI is concerned about the impact these proposed rules will have on pro se litigants. The State Bar and the Michigan Supreme Court are undertaking efforts to ensure that the unrepresented gain unfettered access to the courts. These proposed rules are inconsistent with those efforts and instead create more barriers for the unrepresented. JPI notes that the Michigan Supreme Court recently created a "Solutions on Self-Help" Task Force to promote coordination and quality of support for the self-represented. There is a workgroup on court rules and regulatory changes. JPI suggests that there should be some coordination with this group to develop court rules that address the perceived problems that gave rise to these proposed court rules.

**The text of any legislation, court rule, or administrative regulation that is the subject of or referenced in this report:**

<http://courts.michigan.gov/supremecourt/Resources/Administrative/2005-32-04-27-10.pdf>