

Civil Procedure & Courts Committee  
May 18, 2013 - 10 a.m.  
Dickinson Wright PLLC Office  
Troy, Michigan

MINUTES

Committee Members in Attendance: Thomas H. Bannigan, Richard D. Bisio, Hon. Rae Lee Chabot, Sean F. Crotty, Robert J. Ehrenberg, Lori J. Frank, Sean P. McNally, Martha D. Moore, Daniel D. Quick, George M. Strander, Alan R. Sullivan, Matthew A. Tarrant  
SBM Staff: Peter Cunningham

1. Call to Order
2. Minutes from the March 2, 2013 Meeting – The minutes from the March meeting were unanimously approved.
3. Items before Representative Assembly, April 27 meeting
4. New Items

A. [2011-26 - Proposed Amendment of Rule 2.403 of the Michigan Court Rules](#)

The proposed amendment of MCR 2.403(O)(8) would add a reference to 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]), as well as a reference to other postjudgment motions to toll the period of time in which a party may file a request for case-evaluation sanctions.

Issued: March 20, 2013

Comment period expiration: July 1, 2013

**The committee voted to support with modification.**

- **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.**

B. [2011-31 - Proposed Amendment of Rules 7.105, 7.111 and 7.205 of the Michigan Court Rules](#)

The proposed changes would 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. The proposed changes were submitted by the Appellate Practice Section of the State Bar of Michigan.

Issued: March 20, 2013

Comment period expiration: July 1, 2013

**The committee voted to support.**

C. [2012-06 - Proposed Amendment of Rule 9.221 of the Michigan Court Rules](#)

The proposed amendment of MCR 9.221 would add a new subrule (I) that would require 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 would not apply to a dismissal with explanation.

Issued: May 1, 2013

Comment period expiration: September 1, 2013

**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.**

D. [2012-30 - Proposed Amendments of Rule 2.621 and Rule 2.622 of the Michigan Court Rules](#)

The proposed amendments of MCR 2.621 and MCR 2.622 were submitted to the Michigan Supreme Court on behalf of the "Receivership Committee" (a committee created because of a need identified by the Debtor/Creditor Rights Committee of the Business Law Section of the State Bar of Michigan) to expand and update the rules regarding receivership proceedings.

Issued: May 1, 2013

Comment period expiration: September 1, 2013

**The committee voted to support with modification.**

**The Committee was honored to be joined by representatives of the "Receiver Committee" which drafted the proposed rule. The Committee appreciates that various issues which the proposal attempts to balance. Given that the proposed rule is of general application to any number of receiver contexts, the Committee makes the following recommendations:**

- **Delete the first sentence of MCR 2.622(A); as written it is confusing whether it is granting a substantive right (the drafters state this is not the intent). The Receivership Committee supported this change.**
- **The Committee opposes the 2<sup>nd</sup> sentence of MCR 2.622(A) as stating a substantive rule of law which the Committee did not believe was universally true and in any event would provide a platform for confusion of the proceedings and perhaps even claims against the receiver. With the sentence**

deleted, existing law would continue to define the scope of the receiver's duties.

- **Insert instead the following: “The provisions of this rule apply unless other provisions of statute or rule specifically apply to the subject receivership.”** The drafters noted that there are numerous types of receivers, some of which have specific statutory guidance. There was perceived to be a risk of confusion between those subject-specific statutes or rules and this rule of general application, absent this clarifying statement. The Receivership Committee supported this change.
- **Change “petitioner’s” to “movant’s” in (C)(1).** The Receivership Committee supported this change.
- **(C)(2) would prohibit a moving party or its counsel from “assisting” the receiver. In certain scenarios, such assistance may permit the most efficient manner for the receiver to carry out certain duties. This seems to be the spirit behind (C)(3), but the carve-out of the general prohibition of (C)(2) seems too narrow. The Committee suggests deletion of “or in any other professional capacity representing or assisting the receiver” and instead rely upon normal rules and the court’s oversight regarding conflicts of interest.**
- **Subrule (D) should be prefaced with “Unless the Court otherwise orders:” or words to that affect. Some receiverships will not require all of the types of reports listed in this subrule, but the rule is mandatory. The Receivership Committee supported this change.**
- **Existing subrule (A)(3) has been deleted. The Committee believes that a general right of receiver to continue the business of the estate, including entering in to leases as deemed necessary, should be expressly stated. The Receiver Committee thought the power was implied.**
- **The Committee supports the preservation of existing subrules (C) and (D).**

E. [2013-02 - Amendments of Rules 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 of the Michigan Court Rules](#)

This proposal incorporates provisions of the newly enacted Michigan Indian Family Preservation Act into specific provisions within various rules relating to child protective proceedings and juvenile status offenses.

Issued: March 20, 2013

Comment period expiration: July 1, 2013

Effective: Immediately (pending public comment period and public hearing)

**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 changes by reference, although perhaps there is some unique consideration as applied to a child protection statute that calls for not following this general suggestion.**

F. [2013-12 - Proposed Amendment of Rule 7.313 of the Michigan Court Rules](#)

The proposed amendments would 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: April 10, 2013

Comment period expiration: August 1, 2013

**The committee voted to support.**

G. [2013-18 - Proposed New Rules 2E.001 et seq. of the Michigan Court Rules](#)

This series of proposed new “2E” rules contains court rules regarding e-filing in Michigan courts. Please note that this proposed order is part of a group of documents in this file that has been published for comment, including a proposed administrative order regarding e-filing rules and the proposed e-filing standards.

Issued: May 1, 2013

Comment period expiration: September 1, 2013

[2013-18 - Proposed Administrative Order No. 2013-](#)

This proposed administrative order would require the State Court Administrator to promulgate e-filing standards, and would require courts that offer e-filing to comply with those standards. Please note that this proposed order is part of a group of documents in this file that has been published for comment, including proposed e-filing rules and proposed e-filing standards.

Issued: May 1, 2013

Comment period expiration: September 1, 2013

[2013-18 - Draft Standards for E-filing](#)

These proposed standards provide additional guidance for courts planning for implementation of e-filing in their jurisdiction. The proposed standards are published to provide a context for the proposed e-filing rules and proposed administrative order that have also been published for comment in this file.

Issued: May 1, 2013

Comment period expiration: September 1, 2013

**As to the e-filing proposals:**

**The Committee was honored to be joined by a representative of SCAO who drafted the proposed rule. SCAO noted that the provision is still subject to ongoing discussion, likely is going to be changed (and expanded as applied to service), and still subject to large-scale decisions (such as whether there will be a unified e-filing system state wide [which the Committee unanimously favors]). As such, our comments are more by ‘advisory’ given the incomplete nature of the process.**

- Generally there is opposition to a system which permits a review of filings before they are accepted. The Federal PACER system permits all filings; if there are problems, the clerk issues the notice the next day and gives a time for it to be corrected. This avoids the problem created by the proposed rule, where something is filed but then rejected for some inadequacy. The filing would now be late or time-barred absent a *nunc pro tunc* order of the court, an extra step which simply represents unnecessary motion practice.
- The Committee was advised of the significant debates regarding the assessment of fees by the courts and pending legislation. The Committee thus notes only that the transaction fees should be defined as taxable costs.
- Rule 2E.006(B): delete “them” and insert “copies and make originals available for inspection”
- If Rule 2E.008 is to stay, it should permit discretion of the court with consideration of the listed factors. As written, it suggests satisfaction of each factor is mandatory.
- A major advantage of electronic filing is 24/7 access. As such, the Committee does not favor a 5:00 p.m. deadline in 2E.101(A). Assuming service is accomplished automatically and simultaneously with filing, as in PACER, this should not present a problem for courts or practitioners.

[2013-18 - Proposed Amendments of Rules 3.210, 3.215, and 6.104 of the Michigan Court Rules and Proposed New Rule 8.124 of the Michigan Court Rules](#)

The new court rule would allow courts to use videoconferencing in court proceedings upon request of a participant or *sua sponte* by the court, subject to specified criteria and standards published by the State Court Administrative Office (SCAO). Amendments of MCR 3.210, MCR 3.215, and MCR 6.104 would be necessary to include references to the new court rule. If the new rule is ultimately adopted, MCR 3.904, MCR 5.738a, and MCR 6.006, and Administrative Order No. 2007-01 would be rescinded. To provide context for consideration of the proposed rule, the proposed standards for the use of videoconferencing are attached below. In addition, the proposal includes a draft administrative order that would require SCAO to adopt videoconferencing standards, and require courts to comply with those standards.

Issued: May 1, 2013

Comment period expiration: September 1, 2013

[2013-18 – Proposed Administrative Order No. 2013-](#)

This proposed administrative order would require the State Court Administrator to establish videoconferencing standards and would require that the appellate and trial courts conform to those standards. Please note that this proposed administrative order is part of a group of documents in this file that has been published for comment, including proposed videoconferencing rules that would amend MCR 3.210, 3.215, and 6.104, and would adopt

MCR 8.124, a new rule, and draft videoconferencing standards, which are attached at the end of that order.

Issued: May 1, 2013

Comment period expiration: September 1, 2013

**As to videoconferencing:**

**Oppose absent revision.**

- **The Committee is mindful of widespread debate among academics, jurists and attorneys as to the tradeoffs inherent in widespread use of videoconferencing. *See, e.g.,*:**
  - [http://schakowsky.house.gov/index.php?option=com\\_content&view=article&id=1032:1020&catid=19&Itemid=132](http://schakowsky.house.gov/index.php?option=com_content&view=article&id=1032:1020&catid=19&Itemid=132)
  - [http://articles.philly.com/2012-08-28/news/33426031\\_1\\_video-hearings-video-technology-guilty-pleas](http://articles.philly.com/2012-08-28/news/33426031_1_video-hearings-video-technology-guilty-pleas)
- **The Committee defers to the Criminal Law Section and other subject-matter specialists for considerations unique to those arenas.**
- **For civil litigation, the Committee unanimously favors application of the “extraordinary circumstances” standard for either telephonic or videoconferencing, thus requiring revision of proposed MCR 3.210(A)(4). “Testimony must be taken in person, except that the court may in extraordinary circumstances allow testimony to be taken by telephone or under MCR 8.124.” With that change, most of the proposed 8.124 is acceptable.**
- **The Committee could not determine the purpose of exempting videoconferencing motions from normal motion fees, per proposed MCR 8.124(D)(3).**

H. [HB 4570](#)(Cotter) **Courts**

Courts, juries; Higher education, students. Courts; juries; eligibility to postpone jury service of students; expand to include full-time higher education students under certain circumstances. Amends sec. 1335 of 1961 PA 236 (MCL 600.1335).

Status: 04/16/13 Referred to House Judiciary

**The committee voted to support.**

I. [HB 4704](#) (Pettalia) **Counties; financing; challenging an approved budget; clarify.** Amends secs. 16 & 18 of [1968 PA 2](#) (MCL [141.436](#) & [141.438](#)).

Status: 05/07/13 Referred to House Judiciary

**The committee voted to oppose as stated in the Committee’s position statement on Substitute HB5076 (dated 10/13/12).**

- J. [HB 4083](#) (Lori) Law enforcement; other; Michigan crime stoppers act; create, and provide for criminal assessments to fund crime stopper activities. Creates new act.

**No position other than oppose as to proposed mechanism for fee collection and disbursement.**

**The proposal would impose significant burden upon the courts to collect and disburse funds, as noted in the letter from the SCAO. The Committee deems it inadvisable to turn the clerk in to a tax collector and fund disbursing.**

5. Good of the Order
6. Adjournment