

**State Bar of Michigan  
Representative Assembly  
September 27, 2007**

**SUMMARY OF PROCEEDINGS**

The following is a summary of proceedings of the State Bar Representative Assembly session held Thursday, September 27, 2007, at the DeVos Place in Grand Rapids, Michigan.

1. Call to order by Chairperson Edward L. Haroutunian.
2. Clerk Kathy Kakish declared a quorum (50) was present.
3. Upon a motion made and seconded, the revised calendar was adopted, as proposed.
4. As provided in Rule 4.8, the Summary of Proceedings of the April 21, 2007, meeting was deemed approved.
5. Elizabeth Johnson, Chair, Nominating and Awards Committee, addressed the Assembly in regards to filling vacancies for the current meeting. Upon a motion made and seconded, Ryan M. Edberg of Sandusky (24<sup>th</sup> Circuit), Eilisia G. Schwarz of Cadillac (28<sup>th</sup> Circuit), Josh Ard of Williamston (30<sup>th</sup> Circuit), and Darling Garcia of Battle Creek (37<sup>th</sup> Circuit) were appointed to fill immediate vacancies within their respective Circuits.
6. Edward Haroutunian, Chair, Representative Assembly announced that at the Annual Meeting luncheon the Michael Franck Award would be presented to William P. Hampton and Alan D. Kantor and that the Unsung Hero Award would be presented to the late Norris J. Thomas. Also the special resolution honoring the late President Gerald R. Ford would be presented to Marty Allen of the Ford Foundation.
7. Kim Cahill, President of the State Bar of Michigan made a few remarks to the Assembly.
8. Janet Welch, Executive Director of the State Bar of Michigan made a few remarks to the Assembly.
9. Steve Gobbo, Chair of the Special Issues Committee of the Representative Assembly introduced the members that were on the panel, as there was a panel discussion on the Unauthorized Practice of Law.
10. Chief Justice Clifford Taylor of the Supreme Court made a few remarks to the Representative Assembly on their 35 years of service.

11. Daniel Quick, member of the Representative Assembly and member of the Civil Procedure Committee reported on the consideration of the proposed amendments to the Michigan Court Rule 2.107 that would permit, upon stipulation of the parties, service by email. Below is a brief summary of the proposal that were approved.

In 2005, the Electronic Filing Task Force of the State Bar of Michigan ("SBM") submitted to the Representative Assembly a proposal that would amend MCR 2.107 by adding subsection (C)(4), which introduces the electronic service of papers by email. At its September 22, 2005 meeting, the Representative Assembly voted to recommend the amendment. On January 10, 2006, the SBM submitted proposed MCR 2.107(C)(4) to the Michigan Supreme Court. The Supreme Court made minor stylistic modifications to the proposed language and, on April 10, 2007, the Supreme Court published the proposed MCR 2.107(C)(4) for comments under ADM File No. 2007-12. The Supreme Court website received four comments. The deadline for submitting comments expired on August 1 and the Public Administrative Hearing scheduled to review this amendment was scheduled for September 26, 2007, one day before this Assembly's meeting.

The language of the **proposed amendment as previously approved by the Representative Assembly now reads as follows:**

(4) E-mail. Some or all of the parties may stipulate service of papers by e-mail.

(a) The stipulation of service by e-mail shall set forth the following:

(i) the e-mail addresses of all stipulating attorneys of record and any of their paralegals or assistants charged with receipt of the attorney's e-mail;

(ii) a subject line that identifies the case by party name and case number, along with the title or legal description of the document(s) being sent; and

(iii) the primary document format through which the parties shall send and receive documents by e-mail.

(b) The sending e-mail address shall allow for receipt of a reply e-mail.

(c) E-mail transmission after 4:00 p.m. Eastern Time shall be deemed to be served on the next day that is not a Saturday, Sunday, or legal holiday.

The Civil Procedure and Courts Committee has reviewed the previously approved proposed language and believes that it should be changed to cover the issues and problems that may arise from the limited language such as; the needs to specify whether e-mail service is treated as service by mail or by delivery, because different time limits can apply depending on which is chosen.

## II. DATE OF FILING WITH COURT DEFINED—MCR 2.107(G)

Also before the Representative Assembly meeting on September 22, 2005 was a proposed amendment to MCR 2.107(G), submitted by the Criminal Jurisprudence and Practice Committee of the State Bar of Michigan. Here, the proposal added new language to the existing rule, further defining the date in which pleadings are filed.

At its September 22, 2005 meeting, the Representative Assembly voted to recommend the amendment. On January 10, 2006, the SBM submitted proposed MCR 2.107(G) to the Michigan Supreme Court. The Michigan Supreme Court made no changes to the SBM's proposed language and, on April 10, 2007, the Supreme Court published the proposed MCR 2.107(G) for public comments under ADM File No. 2007-12. The deadline for submitting comments expired on August 1, and the Public Administrative Hearing scheduled to review this amendment was scheduled for September 26, 2007, one day before the Assembly's meeting. The proposed language was motion and seconded: If the clerk docket papers on a date other than the actual filing date, the clerk shall note the actual filing date on the register of actions.

The Representative Assembly adopts the alternative version of the amendment to MCR 2.107(C)(4), as proposed by the Civil Procedure and Courts Committee.

The Representative Assembly adopts the amendment to MCR 2.107(G) with the revision to the last sentence, as proposed by the Civil Procedure and Courts Committee.

12. Diane Akers and John Allen, Co-Chairs of the Attorney Client Privilege Task Force provided five proposals and the five proposals were all approved by a motion and then seconded. Below is a brief summary of the proposals that were approved.

### **PROPOSED RESOLUTION (1) – PRESERVATION OF ATTORNEY CLIENT PRIVILEGE AND WORK PRODUCT**

The State Bar of Michigan supports the preservation of the attorney-client privilege and work product doctrine as essential to maintaining the confidential relationship between client and attorney required to encourage clients to discuss their legal matters fully and candidly with their counsel so as to (1) promote compliance with law through effective counseling, (2) ensure effective advocacy for the client, (3) ensure access to justice, and (4) promote the proper and efficient functioning of the American adversary system of justice; and that the State Bar of Michigan opposes policies, practices and

procedures of governmental bodies that have the effect of eroding the attorney-client privilege and work product doctrine and favors policies, practices and procedures that recognize the value of those protections. That the State Bar of Michigan opposes a routine practice by government officials of seeking to obtain a waiver of the attorney-client privilege or work product doctrine through the granting or denial of any benefit or advantage.

**PROPOSED RESOLUTION (2) – ATTORNEY CLIENT PRIVILEGE/GOVERNMENTAL INVESTIGATION AND PROSECUTION**

That the State Bar of Michigan opposes government policies, practices and procedures that have the effect of eroding the constitutional and other legal rights of current or former employees, officers, directors or agents (“Employees”) by requiring, encouraging or permitting prosecutors or other enforcement authorities to take into consideration any of the following factors in making a determination of whether an organization has been cooperative in the context of a government investigation:

- (1) that the organization provided counsel to, or advanced, reimbursed or indemnified the legal fees and expenses of, an Employee;
- (2) that the organization entered into or continues to operate under a joint defense, information sharing and common interest agreement with an Employee or other represented party with whom the organization believes it has a common interest in defending against the investigation;
- (3) that the organization shared its records or other historical information relating to the matter under investigation with an Employee;  
or
- (4) that the organization chose to retain or otherwise declined to sanction an Employee who exercised his or her Fifth Amendment right against self incrimination in response to a government request for an interview, testimony, or other information.

**PROPOSED RESOLUTION (3) – DISCOVERY IN CLIENT REPRESENTATION AND MCR 2.302(B)**

That the State Bar of Michigan supports amendment of the Michigan Court Rules (MCR) to restrict the compelled production of information relating to a lawyer's representation of a client, or compelling testimony by a lawyer relating to a representation of a client, except upon a showing of exigent circumstances, or upon a showing of substantial need including exhaustion of efforts to obtain such

information from other sources; and mandating the requesting party's payment of the reasonable cost of production and testimony, including the value of any loss of working time; and that the State Bar of Michigan proposes the amendment of MCR 2.302(B) by adding subsection (B)(5) as follows:

(5) Lawyers and Lawyers' Files:

Compelling production of information relating to a lawyer's representation of a client, or compelling testimony by a lawyer relating to a representation of a client, shall not be ordered, except upon a showing of exigent circumstances, or upon a showing of substantial need including exhaustion of efforts to obtain such information from other sources.

The requesting party shall be responsible for payment to the lawyer for the reasonable cost of production and testimony, including the value of any loss of working time.

**PROPOSED RESOLUTION (4) – INADVERTENT WAIVER OF THE ATTORNEY-CLIENT PRIVILEGE**

That the State Bar of Michigan support the concepts contained in the American Bar Association (ABA) Resolution 120D on inadvertent waiver as adopted and that the issue be referred to the State Bar of Michigan Civil Procedure and Courts Committee for the drafting of appropriate rules in line with those concepts<sup>1</sup>, and report back to the Representative Assembly.

**PROPOSED RESOLUTION (5) – SELECTIVE WAIVER OF THE ATTORNEY-CLIENT PRIVILEGE**

That the State Bar of Michigan opposes the concept of "selective waiver" of the attorney-client privilege and work product doctrine; and that the State Bar of Michigan opposes policies, practices and procedures of governmental bodies that purport to authorize and encourage "selective waiver" of the attorney-client privilege and work product doctrine; and that the State Bar of Michigan opposes a routine practice by government officials of seeking to obtain a waiver of the attorney-client privilege or work product doctrine through the offering of a purported agreement that the disclosed protected information will not be disclosed to others; and that the State Bar of Michigan opposes the adoption of proposed Federal Rule of Evidence (FRE) 502(c) incorporating the concept of "selective waiver."

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<sup>1</sup> This analysis should also include consideration of the role of the expense of document review before production, especially in cases involving broad document requests, electronically stored information (EST), and other factors that materially increase the burdens on the producing party.

13. Upon a motion made and seconded, Elizabeth M. Johnson was unanimously elected Clerk of the Representative Assembly.
14. Robert C. Gardella was sworn in as 2007-2008 Chairperson of the Assembly by Hon. Michael Cavanagh, Justice, Michigan Supreme Court
15. Chairperson Gardella presented a plaque to Mr. Haroutunian for all his work over the past year as Assembly Chairperson.
16. Chairperson Gardella presented plaques to the 2006-2007 Committee Chairs for their work over the past year.
17. Chairperson Gardella presented certificates to the outgoing Assembly members whose terms of service expired at the end of the September 2007 Annual Meeting.
18. Adjournment