Report on Public Policy Position

Name of Committee:
Justice Policy Initiatives

Contact Person:
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Regarding:
HB 5518 (Green) Civil procedure; evictions; manner of serving summons and complaint in summary proceedings; revise. Amends sec. 5732 of 1961 PA 236 (MCL 600.5732) & adds sec. 5736.

Date position was adopted:
February 16, 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
1 Abstained

Position:
Oppose

Explanation of the position:
Justice Policy Initiatives opposes house bill 5518 because its section 5736 ("the section") violates the due process clause of the 14th Amendment of U.S. Constitution as applied by the U.S. Supreme Court in mandating minimum requirements for service of process. Specifically, the section violates due process because it disregards the "reasonably calculated" standard recited in MCR 2.105, which governs the manner of service in conformity with the due process clause. If enacted, the section will allow plaintiffs to circumvent the provisions of MCR 2.105 relating to service of process to individuals and will defeat the central goal of service: informing defendants of pendency of proceedings against them.

More specifically, under the section, plaintiffs can elect subsections (A) and B(ii) to serve individual defendants. As explained below, both subsection (A) and subsection B(ii) are not "reasonably calculated to give the defendant actual notice of the proceedings and an opportunity to be heard." MCR 2.105(I)(1).

Subsection (A) is inconsistent with MCR 2.105(A). While the latter requires sending process "by registered or certified mail, return receipt requested, and delivery restricted to the addressee," the former requires mailing the process merely by "first class mail." Further, while the latter requires "[a] copy of the return receipt signed by the defendant" as proof of service, the former requires plaintiffs to merely obtain "a certificate of mailing," which is not the same as defendant's acknowledgement of receipt of the mail. Indeed, mailing by first class mail and obtaining a certificate of mailing under the section is not service at all since MCR 2.105(A) unambiguously defines service as follows: "Service is made when the defendant acknowledges receipt of the mail." Thus, subsection (A) is not reasonably calculated to give the defendant actual notice of the proceedings and an opportunity to be heard as the due process clause requires and therefore should not become law.

Subsection B(ii) also violates the due process clause because it does not require any attempts of personal service or service by mail as prescribed by MCR 2.105 prior to its election. Further, it does not provide "leaving a copy of [the process] at the individual's dwelling or usual place of abode with someone of suitable age and discretion who resides there." See FRCP Rule 4(e)(2)(B). Therefore, subsection B(ii) is not reasonably calculated to give the defendant actual notice of the proceedings and an opportunity to be heard and should not become law.

Additionally, subsection B(ii) is inconsistent with MCR 2.105(I)(1). While the latter allows the court to order other forms of service, the former requires no court order. Further, while the court may issue an order only "[o]n a showing that service of process cannot reasonably be made as provided by [MCR 2.105]," subsection B(ii) requires no such showing before choosing the alternate form of service. Indeed, although subsection B(ii) recites "[a]fter diligent attempts of personal service have been made," the section requires no personal service at all before electing subsection B(ii). Therefore, the recitation is superfluous. Furthermore, while MCR 2.105(I)(1) allows the court to prescribe other means of service, it limits the court's discretion by requiring that the other means must be "reasonably calculated . . . ." Accordingly, even the court cannot order service in the manner prescribed in subsection B(ii) since it does not meet the prerequisites of MCR 2.105 and violates due process. In contrast, as explained above, the election of the form of service prescribed in subsection B(ii) is unrestricted. Thus, subsection B(ii) is inconsistent with MCR 2.105 and should not become law.

Finally, by providing plaintiffs a choice between subsection B(ii) and subsection B(i), which provides for service according to court rules, the section allows plaintiffs to disregard MCR 2.105 altogether.

In sum, section 5739 should not become law because it violates due process.

The text of the legislation that is the subject of this report: http://legislature.mi.gov/doc.aspx?2009-HB-5518

FOR LEGISLATIVE ISSUES ONLY:
This position falls within the following Keller-permissible category:

- **The regulation and discipline of attorneys**
- ✓ **The improvement of the functioning of the courts**
- ✓ **The availability of legal services to society**
- **The regulation of attorney trust accounts**
- **The regulation of the legal profession, including the education, the ethics, the competency, and the integrity of the profession**