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Senate Bill 635 (Substitute S-1 as passed by the Senate)

Sponsor: Senator John F. Kelly

Committee: Judiciary

Date Completed: 3-7-90

RATIONALE

As a means of relieving the backlogged dockets of Michigan's trial courts, where several years can elapse before a case is heard, and allowing parties to a civil dispute to have their case resolved quickly outside of the trial court system, it has been suggested that Michigan establish an alternative forum in which parties could select a former or retired judge to hear and decide the action.

CONTENT

The bill would amend the Revised Judicature Act to do the following:

- Establish a new procedure under which the parties to a nonjury civil action could stipulate to the assignment of a "senior judge" (a former judge or justice not currently holding judicial office) to hear and decide the case.
- Require the stipulation to be approved both by the chief or presiding judge of the court in which the action was pending and by the Supreme Court.
- Establish a stipulated assignment fund in each circuit court, and require the parties to pay into the fund a \$100 fee, the trial costs, the senior judge's compensation, transcript costs, and filing fees.
- Provide for a total or partial waiver of fees and costs if a party were indigent, the court's fund contained

at least \$25,000 in fees, and other criteria were met.

- Authorize the Michigan Supreme Court to assign a judge of any court to serve in any other court.

The bill would take effect January 1, 1991.

Assignment Stipulation

In any nonjury civil action pending in any court in this State, with the consent of all of the parties to the action, the parties could stipulate to the assignment of a senior judge to hear and decide the action. "Senior judge" would mean a former Supreme Court justice or a former judge of the Court of Appeals, circuit court, recorder's court, district court, probate court, common pleas court, or municipal court, who met all of the following requirements:

- Was a member in good standing of the State Bar.
- Was once elected to judicial office in this State.
- At the time of assignment did not hold a judicial office by appointment or election. This requirement would not be met if the reason that the judge or justice no longer held a judicial office was that he or she had been suspended, removed, or retired from office for cause, in the manner provided by law.

A stipulation would have to name two senior judges, agreed upon by all the parties, selected

S.B. 635 (3-7-90)

from a list approved by the Supreme Court. It would have to specify the hourly rate of compensation the parties agreed to pay the senior judge for his or her services, and estimate realistically the number of judicial hours needed to hear the action and to perform all the functions required of the senior judge. The hourly rate could not exceed an hourly rate that, if computed on a daily basis, would be more than the daily salary paid to a judge of the court in which the action was pending. The stipulation also would have to estimate realistically the costs of trial, including the services of a court reporter, the rental of an appropriate site to hold the trial if a regular courtroom were not available, and necessary expenses of the senior judge and support staff, including travel, lodging, and meals.

The stipulation and a receipt for the deposit of required fees and costs would have to be filed with the chief or presiding judge of the court in which the action was pending. Upon that judge's approval, the stipulation would have to be forwarded to the Supreme Court for approval and assignment of the senior judge.

If neither of the senior judges selected by the parties were designated, or if the designated judge could not hear the action for any reason, the parties could either select two other senior judges and resubmit the stipulation, or withdraw the stipulation. Otherwise, a stipulation could not be withdrawn except with the consent of the senior judge assigned to hear the action. Upon withdrawal, the action would regain the same status it had before the stipulation was filed or as ordered by the chief or presiding judge of the court in which the action was pending.

Senior Judge Authority

If the Supreme Court directly or through the State Court Administrator approved the stipulation and assigned a senior judge named in the stipulation, the senior judge would assume jurisdiction upon entry of that order. The senior judge would be authorized to perform all judicial duties required in the action and would exercise the same powers and duties of a judge sitting without a jury in the court in which the action was pending. The senior judge would have the same immunity from criminal and civil liability in connection with

the exercise of his or her powers and duties as judge, as a judge of that court.

While hearing and deciding an action, a senior judge would be prohibited from holding a nonjudicial office to the same extent as a judge of the court in which the action was pending, pursuant to Section 2, Article III of the State Constitution. The senior judge could be censured, suspended, removed, or retired to the same extent and for the same reasons as a judge of that court. In addition, while hearing and deciding an action, a senior judge would be subject to the provisions of the Code of Judicial Conduct prohibiting a judge from practicing law for compensation.

A transcript of the proceedings and the evidence and other papers filed with the senior judge would have to be filed in the court in which the action was pending. Except for good cause shown to the chief or presiding judge, a final judgment would have to be entered by the senior judge within 21 days after all the parties had submitted their closing proofs and arguments. If an order, decision, or judgment were entered by a senior judge, the findings of fact made by the judge would be conclusive, in the absence of fraud. The Court of Appeals and Supreme Court would have the power to review questions of law involved with any order, decision, or judgment of the senior judge if the aggrieved party applied in the manner provided by the Michigan Court Rules for appellate review of orders, decisions, or judgments from the court in which the action was pending.

A trial conducted by a senior judge would have to be a public trial held within the venue of the court where the action was pending. Unless the trial were held in a facility provided by the court, notice of the site of the trial would have to be entered upon the court file and published by the court clerk in a legally designated newspaper circulating within the court's jurisdiction not less than seven days before the trial date.

Costs and Fees

In each circuit court, a stipulated assignment fund would be established for the receipt of the following:

- A nonrefundable stipulated assignment fund fee of \$100 payable by each party to the action.
- An amount equal to the following estimated costs: compensation that would be due the senior judge for his or her services and expenses; costs of the trial; and the cost of preparing and filing a transcript and filing evidence and other papers.
- Such other funds as provided by law or court rule.

Upon the filing of a detailed statement of services rendered and costs incurred, and after approval of the statement by the chief or presiding judge, a senior judge would have to be reimbursed for actual and necessary expenses and compensated for services according to the hourly rate provided for in the stipulation. Before the trial concluded, the senior judge could file for interim payments.

If at any time the chief or presiding judge believed that the parties had not deposited a sufficient sum to cover the senior judge's compensation or the costs of the trial, the chief or presiding judge could order the parties to deposit an additional amount, and could adjourn the trial until that amount was paid. If the additional amount were not paid within 10 days after it was ordered, the chief or presiding judge could take appropriate action including dismissal of the action for failure to comply with the order.

Money deposited in the assignment fund in excess of the actual compensation and costs of the trial and the parties' assignment fund fee would have to be refunded to the parties within a reasonable time after all appeals or times for appeal had expired.

Unless otherwise stipulated by the parties, the prevailing party could be awarded costs (have them paid or reimbursed by the other party) according to the rules governing the taxing and awarding of costs and attorney fees in the court in which the action was pending.

Senior judges would not be subject to the section of the Act that establishes the salary of retired judges performing judicial service.

Indigent Waivers

Upon motion by an indigent party, the chief or presiding judge could provide for a total or partial waiver of the fees and costs otherwise required if the court found all of the following:

- The moving party was indigent. Indigency would have to be determined according to rules governing waiver or suspension of fees and costs for indigent persons in the court in which the action was pending.
- All the parties consented to the appointment of a senior judge.
- It was in the best interest of justice for the action to be heard by a senior judge.
- The stipulated assignment fund contained at least \$25,000 in fees and the amount over \$25,000 that was not earmarked for compensation and costs in another action was enough to pay the estimated compensation and costs.
- The indigent party agreed in writing to reimburse the fund when the party was able to do so.

The chief or presiding judge would have to require the indigent party to deposit in the fund the fees and costs that the court determined the party was capable of paying without undue hardship.

Judicial Transfers

Under the Act, the Supreme Court may direct a judge to serve in any court in which he or she "is authorized to act as judge", and municipal court and district court judges may serve as judges of the Detroit Recorder's Court. Under the bill, however, the Supreme Court could assign a judge of any court to serve as a judge in any other court in the State. An assigned judge would have to perform the duties of the judicial office in the same manner as if he or she were elected to that office. An assignment would have to be for a limited period or specific assignment. If possible, judges within the county in which a court was located would have to be designated to serve as judges of that court.

The bill also would apply to all judges, instead of merely to district judges transferred to the recorder's court, the current requirement that

a transferred judge be paid as a salary for each day served 1/250 of the amount by which the salary of the judgeship to which he or she is transferred exceeds his or her total salary.

MCL 600.225 et al.

FISCAL IMPACT

The bill would have an indeterminate fiscal impact on State and local units of government. Cost savings to the State and local units could result from use of the provisions that would allow parties to stipulate to a senior judge assignment, by reducing case backlogs without using State and local funds. The amount of savings would depend on the number of individuals who would use the provision.

ARGUMENTS

Supporting Argument

The bill would create a flexible and efficient alternative to adjudication in which the parties to a nonjury civil dispute could elect to have their case heard privately and quickly by a senior judge of the parties' own choosing, instead of waiting years for the case to come before a court and trusting the luck of the draw in the assignment of a trial judge. This proposal would relieve crowded dockets while taking advantage of the wealth of talent and experience of Michigan's retired judges.

The opportunity to select a senior judge having a particular expertise would be especially valuable in a complex commercial case, in a dispute involving difficult technical questions, or in a case simply involving a large amount of money or a vital aspect of a company's business. And, because the parties would likely attach greater credibility to the decision of someone they had a role in choosing, the proposed system could result in fewer appeals.

In addition, parties stipulating to the assignment of a senior judge would avoid the problems inherent in a lengthy delay, when legal counsel often can do nothing to break out of the judicial logjam but wait and hope that witnesses do not die or forget their testimony. Instead, the parties could schedule the trial for a convenient time and place and be certain of those arrangements.

Supporting Argument

The bill's provisions pertaining to the transfer and assignment of judges would give the Supreme Court maximum flexibility to assign judges where they are needed the most. Allowing any judge to be assigned to serve in any court would codify the actual practice of the past 15 or so years, would emphasize the constitutional precept that Michigan has one court of justice, and would facilitate the assignment of judges based on their expertise or background.

Opposing Argument

Although the proposed senior judge assignment system would have the trappings of an official court, the bill actually would create a private system of justice that would be paid for by and available to wealthy parties only. While the bill would provide for a waiver of fees and costs for indigent parties under specific circumstances, many middle-income individuals could not afford to deposit in advance the estimated sum of a senior judge's fee, which would amount to hundreds of dollars per day, depending upon the salary of the sitting judge. More importantly, the criteria that would have to be met make it unlikely that a waiver ever would be granted. Because a stipulated assignment fund would have to contain at least \$25,000, at the rate of a \$100 deposit in the fund per party, at least 125 cases would have to be heard before even one indigent waiver could be granted. In a number of circuits that could take years. The bill also would require all of the parties to agree to the appointment of a senior judge before a waiver could be made. Since indigent--hence, uncollectible--parties are not usually sued, an indigent party would typically be the plaintiff, and, because time is money in a defendant's pocket, the defendant would have little incentive to consent to the assignment. In addition, the proposed "waiver" would not be a true waiver, since the indigent party would have to agree to reimburse the stipulated assignment fund when he or she was able to do so.

Opposing Argument

Although the bill provides that indigency would be determined "according to rules governing waiver or suspension of fees and costs for indigent persons in the court in which the action is pending", it is not clear what those rules are or whom they would cover. The

Michigan Court Rules do not appear to define "indigency", and the application of local court rules governing indigency, if any, could create a patchwork of standards throughout the State. Further, it is not clear whether financially troubled businesses or other entities would be eligible for a waiver, or whether the waiver provisions would apply only to natural persons.

Opposing Argument

While some might argue that trial court dockets would still be relieved even if only affluent individuals and large businesses used the senior judge system, removing those cases would in fact have little impact on the dockets. In the circuit court, family law cases constitute approximately 44% of the calendar, and civil damages cases--in which the plaintiffs usually want a jury--constitute some 20%. Most of the remaining civil cases, then, involve large corporations, which would be the parties taking advantage of the senior judge system. These parties already can go to private arbitration if they choose not to litigate; they do not need a separate forum created for them. Family law cases, on the other hand, would continue to suffer from and fill up a crowded docket. Rather than creating a private forum that spent the talent and expertise of senior judges on commercial disputes, it would be far more advantageous if the Supreme Court simply exercised its existing authority to assign visiting judges to backlogged dockets to clear up the pending family law cases.

Response: Although it may be true that the cases in which the parties would stipulate to a senior judge assignment comprise only a fraction of the total civil cases, a complex commercial case or complicated divorce dispute may take years to resolve. Simply in terms of time that could be saved, removing these cases from the trial courts could have a significant positive impact on the court calendar. Moreover, it can be argued that commercial disputes between private litigants unfairly consume the scarce resources of the judicial system and have no place in the courts at all.

Opposing Argument

The bill provides that a senior judge would be subject to removal to the same extent and for the same reasons as a sitting judge, but it does not address the parties' recourse in the event that a senior judge did not fulfill his or her responsibilities under what would amount to a

contract between the parties and the judge; that is, whether the parties would be entitled to a refund of fees they had deposited in the stipulated assignment fund, and whether the judge would be obligated to reimburse interim payments already made to him or her. Conversely, the bill could be strengthened by expressly authorizing a senior judge to delay entering a final order until the parties themselves had fulfilled all of their obligations.

Legislative Analyst: S. Margules

Fiscal Analyst: F. Sanchez

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This analysis was prepared by nonpartisan Senate staff for use by the Senate in its deliberations and does not constitute an official statement of legislative intent.



**House
Legislative
Analysis
Section**

JUN 26 1990

Manufacturer's Bank Building, 12th Floor
Lansing, Michigan 48909
Phone: 517/373-6466

SENIOR JUDGE ASSIGNMENTS

Senate Bill 635(Substitute H-3)
First Analysis (5-17-90)

Sponsor: Senator John F. Kelly
Senate Committee: Judiciary
House Committee: Judiciary

THE APPARENT PROBLEM:

As a means of relieving the backlogged dockets of Michigan's trial courts, where it can take years before a case is heard, and allowing parties to a civil dispute to have their case resolved quickly outside of the trial court system, it has been suggested that Michigan establish an alternative forum in which parties could select a former or retired judge to hear and decide the action.

THE CONTENT OF THE BILL:

The bill would amend the Revised Judicature Act to establish procedures under which parties to a nonjury civil action could stipulate to — and pay for — the assignment of a "senior judge" (a former judge or justice who had been elected to office) to hear and decide the case. Service as a senior judge would not constitute service for purposes of retirement in any public retirement system in Michigan. The bill also would make certain amendments regarding other judicial assignments.

Use of Senior Judges. To obtain the assignment of a senior judge, all parties would have to agree to a stipulation which would also have to receive the approval of the chief or presiding judge of the court in which the action was pending. The stipulation would name two senior judges selected from a list of senior judges approved by the supreme court, specify the hourly rate of compensation for the judge (which could not exceed the rate of compensation paid to a judge of the court where the action was pending), and estimate costs and the number of judicial hours required. The stipulation also would mention who was to be responsible for various costs, and estimate the action's cost to the local unit of government for administering the senior judge civil action fund to be created by the bill. Fees and estimated costs would be deposited with the clerk of the court. Upon the chief judge's approval, the stipulation would be sent to the supreme court for approval and designation of the senior judge.

The designated judge would have the same powers and duties as a judge sitting without a jury in the relevant court. The trial would be public and held in the local county or district, and notice of its site would be published in a newspaper. Transcripts and evidence would be filed in the court in which the action was pending. Except for good cause shown to that court's chief judge, the senior judge would have to enter a final judgment within 21 days after closing arguments. The decision of the senior judge would be conclusive, and appeal would not be available to any party.

Two funds would be established in each judicial circuit. The stipulation assignment fee fund would receive the nonrefundable fee of \$250 to be paid by each party to the action. All the money in this fund would have to be distributed annually and used to provide civil legal services through the Legal Aid and Defender Association of Detroit

or through existing legal services and legal aid programs funded by the Legal Services Corporation.

The civil action fund would be used to pay the senior judge's compensation and the costs of the action. The fund would receive the money paid for such expenses, including estimated costs of trial and estimated costs to the local unit of government, along with any other money provided by law or court rule. The senior judge would be compensated from the fund after filing a detailed statement that was approved by the chief or presiding judge. The senior judge could demand interim payments on compensation and expenses. The chief or presiding judge could order parties to deposit additional money if it appeared at any time that the money already deposited would be insufficient. He or she could adjourn the trial until the additional amount was deposited, and if it was not deposited within ten days, he or she could return the action to its pre-stipulation status or take other measures considered necessary. Money paid in excess of what the actual compensation and costs turned out to be would be refunded to the parties within a reasonable time after final judgment.

If neither of the two judges chosen by the parties was designated by the supreme court, or if the designated senior judge was unable to hear the action, the parties could select two other judges and resubmit the stipulation to the supreme court without having to pay another stipulation assignment fee; any party could instead elect to withdraw the stipulation and all deposits other than the stipulation assignment fee would be refunded. The only other circumstance under which the parties could withdraw the stipulation would be if the senior judge consented. Upon withdrawal, the action would regain the same status it had prior to the stipulation, unless the chief or presiding judge ordered otherwise.

Other Judicial Assignments. The act says that the supreme court may assign a sitting judge to service in any court in which he or she is authorized to act as judge, and that municipal and district court judges may serve in the Detroit Recorder's Court. The bill would instead provide that a judge of any court could be assigned to serve in any other court. If possible, a judge would be assigned to serve in the same county where he or she ordinarily served. The bill also would extend to all judges provisions establishing daily compensation at the greater of \$25 or 1/250 of the amount by which the salary of the assigned judgeship exceeds the assigned judge's regular salary (district judges assigned to the recorder's court are at present limited to the 1/250 amount).

MCL 600.225 et al.

HOUSE COMMITTEE ACTION:

The House Judiciary Committee adopted a substitute that differed from the Senate-passed bill primarily in barring appeals from the decision of a senior judge hearing a case

under stipulation (the Senate version allowed appeals on questions of law); in setting a \$250 stipulation assignment fee (the Senate version specified \$100); and in not providing for waiver of fees in indigency cases where the parties want appointment of a senior judge (the Senate version provided for fees to be waived when the stipulated assignment fund reached a minimum amount). Other changes include the establishment of separate funds for stipulation assignment fees and anticipated costs, rather than a single pooled fund, and the amendment or repeal of various provisions dealing with judicial assignment, thus improving consistency with the general assignment provisions proposed by the bill. Unlike the Senate-passed bill, the House committee version does not specify an effective date.

FISCAL IMPLICATIONS:

The House Fiscal Agency reports that the fiscal implications of the bill are indeterminable at this time. However, to the degree that the bill diverted cases from publicly-funded courts, the bill could result in reduced costs for the state and local units of government (5/15/90)

ARGUMENTS:

For:

The bill would create a flexible and efficient alternative to adjudication in which the parties to a nonjury civil dispute could elect to have their case heard privately and quickly by a former judge of their own choosing, instead of waiting years for the case to come before a court and trusting the luck of the draw in the assignment of a trial judge. This proposal would relieve crowded dockets while taking advantage of the wealth of talent and experience of Michigan's retired judges.

The opportunity to select a senior judge having a particular expertise would be especially valuable in a complex commercial case, in a dispute involving difficult technical questions, or in a case simply involving a large amount of money or a vital aspect of a company's business. The alternative could also be appealing in domestic disputes where a speedy resolution is desired. Parties stipulating to the assignment of a senior judge would avoid the problems inherent in a lengthy delay of a civil trial, where legal counsel can often do nothing to break out of the judicial logjam but wait and hope that witnesses do not die or forget their testimony. Instead, the parties could schedule the trial for a convenient time and be certain of those arrangements.

Against:

Although the proposed senior judge assignment system would have the trappings of an official court, the bill actually would create a private system of justice, using judges trained in publicly-funded courts that would be paid for by and available to only wealthy parties. Most people could not afford to deposit in advance the sums demanded by the bill. While the bill laudably would channel \$250 stipulation assignment fees to Legal Aid (and not, it is hoped, at the expense of funding from other sources), this assistance to legal programs for the poor would do nothing to make the bill's "rent-a-judge" alternative accessible to them. If more judges are needed to relieve crowded dockets, then money should be found to finance additional judgeships.

Response: The bill does not ignore the problems faced

by indigent litigants. It provides money directly for civil legal services, and is an improvement on earlier proposals that would have limited access to funds to litigants in counties where accumulated stipulated assignment fees reached \$25,000.

Against:

While some might argue that trial court dockets would still be relieved even if only affluent individuals and large businesses used the senior judge system, removing those cases would in fact have little impact on the dockets. Domestic relations cases make up about half of total circuit court caseload, with various sorts of civil cases constituting another 25 percent. Of the non domestic civil cases, about half involve civil damages actions of the sort where plaintiffs are likely to want a jury. It is the remaining civil cases that include those involving the large corporations who appear to be the litigants most likely to take advantage of a senior judge system. However, these parties can already go to private arbitration if they choose not to litigate; they do not need a separate forum created for them. Family law cases, on the other hand, likely would continue to suffer from and fill up a crowded docket. Rather than creating a private forum that spent the talent and expertise of senior judges on commercial disputes, it would be better if the supreme court simply exercised its existing authority to assign visiting judges to backlogged dockets to clear up the pending family law cases.

Response: Although it may be true that the cases in which the parties would stipulate to a senior judge assignment would be only a fraction of the total civil cases, a complicated commercial case or divorce dispute may take years to resolve. Simply in terms of time that could be saved, removing these cases from the trial courts could have a significant positive impact on the court calendar. Moreover, it can be argued that commercial disputes between private litigants unfairly consume the scarce resources of the court system and have little place in the courts at all.

For:

The bill's provisions pertaining to the transfer and assignment of judges would give the supreme court maximum flexibility to assign judges where they are needed the most. The bill would codify actual practice, would emphasize the constitutional precept that Michigan has one court of justice, and would facilitate the assignment of judges based on their expertise or background.

Response: The bill apparently means to consolidate the various provisions on various types of assignments involving sitting (as opposed to retired) judges. While the bill would delete and repeal some inconsistent language, it overlooks other sections of the Revised Judicature Act that deal with transferred municipal judges (MCL 600.225a) and visiting circuit judges (MCL 600.558). These sections provide for compensation in amounts inconsistent with that proposed by the bill. It appears that these inconsistencies should be removed and the act carefully examined for additional inconsistencies that may yet be hidden.

Against:

By barring appeals from the decision of a senior judge hearing a case under stipulation, the bill would discourage litigants from making use of this alternative, thus limiting the bill's effectiveness in relieving crowded dockets. The Senate-passed version allowed appeals on issues of law, and justice and common sense suggest that such appeals

be allowed.

Response: There is nothing wrong with requiring parties who voluntarily seek a special expedited process to also have to give up rights to appeal. To do otherwise would be to risk overburdening the court of appeals with a plethora of appeals brought from stipulated assignment cases, thus offsetting the efficiencies claimed for the concept. In addition, it would be unfair for cases being brought up through the regular system to have to endure the usual delays while allowing swift access to appeals to those who can purchase stipulated assignment.

Against:

If, as its proponents suggest, the bill would tend to remove certain types of cases from the civil legal system, then it also could have some curious effects on the development of case law, particularly as appeals would be forbidden in stipulated assignment cases. For example, some types of issues could tend to be underrepresented in the body of case law, and Michigan case law could lag behind developments elsewhere.

Against:

The bill should limit the assignment of sitting municipal judges to municipal courts. Experience gained in the half-dozen municipal courts does not necessarily qualify a person for assignment to a higher court. Current supreme court policy is to limit assignment of municipal judges to municipal courts and to performing marriages in other courts. The bill should reflect this.

Response: It would be overly rigid to statutorily limit the assignment of sitting municipal judges to municipal courts. The decision of an individual judge's qualifications for a given assignment is best left to the supreme court. There are municipal judges with trial court experience, and the state should be able to utilize those skills in easing crowded trial dockets.

Against:

The bill would limit a senior judge's daily compensation to that received by sitting judges, which would make it unnecessarily difficult for parties to find a senior judge willing to hear their dispute. With that limitation, former judges now in private practice understandably will be reluctant to accept the lower rate of compensation demanded by the bill. The state does not have a legitimate interest in limiting the rate of compensation that private parties are willing to pay, and the bill should be amended to remove the limitation.

POSITIONS:

The Michigan Judges Association supports the bill. (5-15-90)

The Michigan Retired Judges Association supports the bill. (5-15-90)

The Michigan Trial Lawyers Association supports the bill. (5-16-90)

The State Bar of Michigan supports the bill. (5-15-90)