STATE OF MICHIGAN
COURT OF APPEALS

WILLIAM C. WHITBECK
CHIEF JUDGE

925 W. OTTAWA STREET
P.O. BOX 30022
LANSING, MICHIGAN 48909-7522
TELEPHONE (517) 373-3834
FAX (517) 373-3837
E-MAIL WWHITBECK@COURTS.MI.GOV

October 21, 2003

Chief Justice Maura D. Corrigan
Michigan Supreme Court
P. O. Box 30052
Lansing, MI 48909

Re: Court of Appeals Delay Reduction
ADM File 2002-34
Amendment of MCR 7.204, 7.210 and 7.212

Dear Chief Justice Corrigan:

I am writing to respond, briefly, to the letter of October 15, 2003 from Victor Valenti, the Chair of the Appellate Practice Section, to you commenting on the Court of Appeals' proposed court rule changes and presenting a "compromise" proposal for your consideration. I will address Mr. Valenti's points in the order that he set them out in his letter.

The American Bar Association Standards

Mr. Valenti's apparent purpose in reciting these standards is to make the point that, while the ABA recommends a "design team consisting of all participants in the process" to develop delay reduction plans, "[r]egrettably, this recommendation does not describe the development of the Michigan Court of Appeals' 2002 delay-reduction proposal." I agree that the Delay Reduction Work Group, which then Chief Judge Bandstra and I appointed and which I chaired, consisted solely of Judges and staff of the Court of Appeals. I do not agree that this was at all regrettable. The report and recommendations of the Work Group have been publicly available for well over a year and a half and have undergone the widest possible public scrutiny. There has been almost universal support for our overall delay reduction plan, from the state's major newspapers, to the Michigan Legislature, to the Supreme Court, to the State Bar itself. We have published quarterly reports on our progress, in the process making ourselves publicly accountable for our efforts. The *only* opposition to our delay reduction plan has been *solely* concerned with our proposals to reduce briefing times on appeal and to eliminate stipulated extensions. The implication that the composition of our Work Group somehow diminished the quality of our delay reduction plan or the success that we have achieved to date is, I suggest, myopic.

Appellate Practice in Ohio

If I understand Mr. Valenti's outline correctly, the situation in Ohio is as follows: appellate practitioners have very short time periods[1] within which to file their briefs, with extensions thereafter routinely granted by the Ohio District Court of Appeals. *In other words, there are no automatic stipulated extensions of time and the Ohio Court, not the lawyers who practice before it, controls its own docket.* This is exactly what we have proposed for our Court in Michigan, albeit with considerably longer times for the filing of appellants' and appellees' briefs. Therefore, I fail to see how the situation in Ohio argues for the proposition that automatic stipulated extension of time remain a good idea; the situation in Ohio argues exactly to the contrary.

The 1997 Differentiated Case Management Proposal

Mr. Valenti attempts to distinguish between "just in time briefing" and differentiated case management in order to express the Appellate Practice Section's dismay at the perception that it was not supportive of the 1997 proposal for differentiated case management that you, as the then Chief Judge of the Court of Appeals, made to the Supreme Court. I am not sure, in context, that I understand the distinction but there is, fortunately, a record on this point and I am attaching the August 6, 1998 letter from Joseph Firestone, then Chair of the Appellate Practice Section, to the Clerk of the Supreme Court. I note that in that letter the Section opposed your proposal for three reasons:

- It was "unnecessary to achieve the ends desired;"
- It was "too risky and too likely to operate unfairly at times;" and
- It "detrimentally alters the roles of the Clerk and practitioners in scheduling appellate brief preparation, leaving no role whatever for those who know the most about the cases."[2]

To my eye, this all looks remarkably familiar: with some variation, these are the same litany of complaints that have been presented in opposition to our current rule change proposals. In 1998, not only did the Appellate Practice Section oppose just in time briefing, it also categorized the differentiated case management proposal as one that would "work a radical change in the way civil appellate briefs are scheduled in the Court of Appeals"[3] and stated that "[t]he current availability of 56 extension days to each side in a typical civil appeal is a useful tool in adjusting for both transcript problems and problems caused by seriously defective briefs."[4] I believe it fair to say that there has been very little change in the position of the Appellate Practice Section from 1998 to the present day: the Section opposes any change in the

[1] 20 days for the appellant to file its brief after the trial court record has been filed; thereafter, 20 days for the appellee to file its brief.
[2] Firestone letter, p 6.
[3] Firestone letter, p 8.
[4] Firestone letter, p 9.

procedures of the Court of Appeals that will shorten the length of time to file briefs or that will eliminate automatic stipulated extensions of time.

The Appellate Practice Section's Compromise Proposal

On the morning of October 9, 2003, I received a copy of a letter from Scott Brinkmeyer to you asking the Court to consider a proposal authorized, "reluctantly" according to Mr. Valenti, by the Appellate Practice Section. I thereafter discussed this proposal by telephone with Mr. Brinkmeyer. While I considered these discussions with Mr. Brinkmeyer to be in the nature of settlement negotiations and in essence privileged, apparently Mr. Valenti does not as he has now conveyed to you that I responded that "Items 2-5 [of the proposal] were acceptable but Item 1 was not." This is not an accurate statement of my response. I responded to Mr. Brinkmeyer orally, and then in writing, with a counter-proposal, in which I stated that we could join with the State Bar in proposing that the Supreme Court, in an administrative order, adopt the following changes to MCR 7.212, in non-expedited cases, for one year :

1. Amend MCR 7.212(A)(1)(a)(iii) and MCR 7.212(A)(2)(a)(ii) to eliminate stipulated extensions.
2. Amend MCR 7.212(A)(1)(a)(iii) to reduce the time to file appellant's brief in civil cases from 56 days to 42 days; amend MCR 7.212(G) to the reduce time to file appellant's reply brief from 21 days to 14 days.
3. Allow either party to move for an additional extension of time not to exceed 21 days.
4. Specify that the motion to extend time be freely granted.
5. Amend the Court of Appeals internal operating procedures to conform to the above changes.[5]
6. Adopt a mailbox rule.

As I stated to Mr. Brinkmeyer, I generally favor sunset provisions in which an agency or entity must come forward after a reasonable period of time to justify the continuation of changes that it has proposed, I have no problems with motions to extend time, and I agree with the mailbox rule as Mr. Baughman proposed it. With that said, however, I cannot agree that simply reducing the automatic stipulated extensions of time from 28 days per side to 21 days is anything approaching a workable compromise. The net effect of this change, at best, would be to reduce the time in the Intake phase, on average, by seven days. By contrast, our proposal would save, on average, 22 days in the Intake phase and would put the Court, not the litigants, fully in charge of this critical stage in the appellate judicial process. As I have said before, removing the automatic stipulated extensions of time from the Michigan Court Rules is not only important to our delay reduction effort, it is essential to proper court administration and docket control. I

[5] I have corrected a non-substantive typographical error in this sentence.

sincerely hope that the Supreme Court will agree with this conclusion and eliminate the automatic stipulated extensions of time.

Sincerely,

William C. Whitbeck
Chief Judge
Michigan Court of Appeals

Enclosure
cc: Supreme Court Justices
Court of Appeals Judges
Mr. Corbin Davis/Ms Linda Mohney Rhodus
Mr. Scott Brinkmeyer
Mr. Victor Valenti

APPELLATE PRACTICE SECTION

STATE BAR OF MICHIGAN

CHAIRPERSON
JOSEPH H. FIRESTONE
24300 SOUTHFIELD RD., #101
SOUTHFIELD 48075-2856

CHAIRPERSON-ELECT
TIMOTHY K. McMORROW
416 HALL OF JUSTICE
GRAND RAPIDS 49503

SECRETARY
ROSEMARY A. GORDON
377 FISHER RD., STE. J
GROSSE POINTE 48230-1600

TREASURER
NOREEN L. SLANK
4000 TOWN CENTER, #909
SOUTHFIELD 48075-1473

COUNCIL
SCOTT G. BASSETT
TROY
FRED E. BELL
LANSING
PATRICK J. BURKETT
SOUTHFIELD
GARY L. FIELD
LANSING
DONALD M. FULKERSON
WESTLAND
DEBORAH A. HEBERT
ROYAL OAK
ANGELA J. NICITA
DETROIT
TAMMY J. REISS
SOUTHFIELD
ROSALIND H. ROCHKIND
DETROIT
PATRICK L. ROSE
LANSING
EVELYN C. TOMBERS
TROY

EX-OFFICIO
MARY MASSARON ROSS
DETROIT
(1996-1997)
BRIAN G. SHANNON
DETROIT
(1995-1996)

COMMISSIONER LIAISON
THOMAS J. RYAN
SYLVAN LAKE

August 6, 1998

Corbin R. Davis
Supreme Court of Michigan
P.O. Box 30052
Lansing, MI 48909

Re: Supreme Court File No. 97-57
Proposed Amendments to MCR 7.211,
7.212 and 7.213 (Civil Briefing Schedules)

Dear Mr. Davis:

The Appellate Practice Section, through its Council and its Rules Comment Committee, has been considering since 1996 the Court of Appeals' proposal to institute radical changes in the way all civil appellate briefs are scheduled. Although the concept is intriguing and the innovative spirit that prompts the proposal is admirable, the Section has concluded that the proposal itself is seriously flawed and should not be adopted. The Section considered recommending certain changes, mentioned later, but they merely palliate the problems that lead the Section to oppose the proposal.

Chief Judge Maura Corrigan shared with the Section an early draft of the proposal in August 1996. From the beginning the Section was concerned about the proposal's complete inflexibility with respect to briefing deadlines, as well as the heightened sanctions for missing those deadlines. At the same time, the Section shares the goals that led the Court of Appeals to make the proposal—reducing appellate delay, avoiding "stale" briefs, and affording greater predictability of timing. The last few years, however, have shown that substantial progress towards these goals is possible without briefing schedules. That progress is ongoing.

The Section obtained the views of as many appellate practitioners as possible before taking a final position on the proposal. The proposed text submitted to the Supreme Court in December 1997 was published for comment in the February 1998 Appellate Practice Section Newsletter, which circulates to nearly 600 of the practitioners who would be most directly

affected by it. Comments were requested and received. The proposal also was discussed at length by practitioners, judges and court staff attending the second Michigan Appellate Bench-Bar Conference in April 1998. As you know (because you and Frank Greco were there), Chief Judge Corrigan and Judge Joel Hoekstra engaged in a useful dialogue with practitioners of all stripes concerning the proposal. The Section's Court Liaison/Rules Comment Committee considered the proposal at meetings in February and June 1998, and the APS Council devoted substantial attention to the proposal in May and June, arriving at the decision reflected in this letter on June 19.

Before discussing in detail the basis for the Section's opposition to the proposal, it may be helpful to compare current practice in Michigan with practice in the United States Court of Appeals for the DC Circuit, which, as Judge Corrigan noted in her December 19, 1997 letter transmitting the proposal to your Court, is the model for the briefing schedule proposal. Several federal circuits use briefing schedules, but it appears that only the DC Circuit sets the panel and the argument date in the briefing schedule order. There are some striking differences between the two courts that cast doubt on how well the DC system may translate to Michigan.

The DC system compared

One obvious difference is volume. Another is the absence of anything like Michigan's prehearing report in the DC Circuit. A third is the DC Circuit's hyperactive motion practice, which eliminates 40 percent of filings before the point at which briefing schedules are issued.

For the 12-month period ending September 30, 1997, the DC Circuit (a 15-judge court) had 1,531 filings and terminated 1,833 cases, but only 732 of those terminations were on the merits following oral hearing or submission on the briefs. And of those, only 344 were terminated on the merits after oral hearing. (These case statistics and many more are available on the internet at uscourts.gov, under "What's New" and then "Judicial Business".) The DC Circuit handles the largest proportion of agency appeals in the country (791 of the 1,833 terminations noted above were administrative appeals). The Clerk of the DC Circuit, Mark Langer, reports that these appeals lend themselves to consolidation, so that several filings may wind up as one merit disposition. The DC Circuit also hears criminal appeals and these (as is proposed here) are not subject to the briefing schedule system. The result of all this is that the DC Circuit issues only a few hundred briefing schedule orders per year.

In contrast, the Michigan Court of Appeals has a much higher volume of filings and would be issuing a much greater volume of briefing schedules if the proposal were adopted. Based on the current level of civil filings in our 28-judge intermediate appellate court, and adjusting for early terminations on jurisdictional grounds, it appears that the annual number of briefing schedules in Michigan would be measured in thousands rather than hundreds, perhaps 10 times the volume of the DC Circuit.

In the DC Circuit, briefs go directly to the judges when they are filed, with no staff intervention. There is nothing like the Court of Appeals' research division and no prehearing report. Consequently, there is no need to allow time for such reports to be prepared. In the past, the DC Circuit has scheduled oral argument to follow briefing by about 30 days, but beginning in the September 1998 term (the DC Circuit does not hear cases in July and August), that period will be extended to 50 days. The main reason for this is that the judges want more time with the briefs, but Mr. Langer notes that this will also make it more practical to accommodate short extension requests from practitioners.

In Michigan, the Court of Appeals contemplates a 90-120 day period between briefs and argument if the proposal is adopted. This is the shortest time the Court estimates it must have to process appeals through the research division. The longer period increases somewhat the odds that intervening new authority will require supplemental briefing. Supplemental briefs were apparently perceived to be a significant problem in the DC Circuit, and were one of the main reasons the system was adopted in 1986. The Section's view is that "stale briefs" are not at all a significant problem in Michigan, and are adequately addressed by MCR 7.212(F). In the rare case when it is not enough merely to cite the new authority, the ability to file a motion for permission to do more is sufficient.

By rule in the DC Circuit, the parties are required to file dispositive motions within 45 days of docketing. This includes motions for summary reversal, summary affirmance, transfer and dismissal. Briefing schedules are not issued until these motions have been decided. As noted earlier, about 40 percent of filings are disposed of at this stage, which explains the statistics given at the beginning of this comparison and why so few briefing schedules are issued.

In contrast, the proposal before this Court would not amend the present motion practice rules (except for motions to remand). An appellee

still could not file a motion to affirm until after the appellant's brief was filed (MCR 7.211(C)(3)), even though a case in which "it is manifest that the questions sought to be reviewed are so unsubstantial as to need no argument or formal submission" should not be assigned to a panel and slotted for argument. A motion to dismiss ((C)(2)) still could be filed at "any time before it is placed on a session calendar," but that would have a very different meaning in a case with a briefing schedule. A motion for peremptory reversal ((C)(4)) still could be filed at any time, so it could be presented to a motion panel after a merits panel already had been scheduled to hear the case.

Under a briefing schedule system, motions to dismiss on jurisdictional grounds ((C)(2)(a)) should be presented as early as possible, so it might be a good thing to require such motions before a briefing schedule is issued (although the requirement should be explicit, not inferential). But the unintended consequences to motions under (C)(2)(b) and (c) seem less desirable. It would no longer be possible for appellees to point out in a short motion that the appeal had become moot after the briefing schedule issued, or that the appeal was not being pursued in conformity with the rules. But it would remain possible to have a motion panel considering peremptory reversal on the eve of oral argument because it is "manifest" that the appeal should not be submitted to the panel. This, of course, is a largely theoretical point, since no experienced practitioner would expect a motion panel to take an appeal away from a merits panel that had already prepared to hear it, but the point is that such motions, like motions to dismiss on jurisdictional grounds, should be brought as early as possible. Under a briefing schedule system, this has to be required to prevent the allocating of panel time, months in advance, to appeals that should not be submitted at all. And yet motions to affirm under the present proposal *could not* be filed until it was already too late.

Under a briefing schedule system, it is inevitable that panels will have, perhaps on short notice, open slots in their calendars. Parties settle or default, or serious emergencies arise that require rescheduling. The higher the volume, the more of these there will be. The DC Circuit, with its relatively small volume, attempts to address this problem with "on call" cases—cases that have been briefed but, for one reason or another, don't have an argument date. It is unclear how the Court of Appeals, with its much higher volume, would address the problem in Michigan.

Complicating matters in Michigan is the Court's summary panel system, which presently selects some screened cases (what the Court calls "1-2 day" cases) and some unscreened cases (termination of parental rights cases) to be decided by a panel without oral argument. The proposal does not explain how these cases would be handled (*i.e.*, whether they would get a briefing schedule without an argument date, despite the contrary text of the proposal, or whether the summary panel would be scrapped and all civil appeals would get oral argument, whether or not it was warranted). If the summary panel is retained, presumably the Court also would retain the present practice of transferring cases to a regular panel when the summary panel does not unanimously agree. The need to schedule argument long after briefing could result in unfortunate delay for parties if the volume of such cases exceeded the capacity of panels to absorb them.

Presently in Michigan, the time available to practitioners to brief appeals is not entirely reflected in the court rules themselves. As the draft Internal Operating Procedures circulated at the recent Bench-Bar Conference make clear (draft IOP 7.212(A)(1) and (2)), a party in a civil case not involving custody has 56 extension days available by stipulation and motion, or by motion alone in the absence of a stipulation. In a custody case, the appellant generally has 28 extension days available by motion and the appellee has 21. Appellate lawyers knew long before this policy was put in writing that these extensions were nearly "automatic" if requested, and so they have long relied on the time to space their workloads and to accommodate unforeseen events.

"Unforeseen events" is a broad category that may encompass almost anything, but a few examples that will be familiar to this Court include:

- The Court of Appeals decision that arrives unexpectedly in the mail, leaving fewer than 21 days in which to seek rehearing or leave to appeal;
- The unexpected application for leave to appeal to the Court of Appeals that arrives in the mail, leaving perhaps fewer than 21 days in which to respond (a deadline "strictly enforced" by the Court of Appeals);
- The Court of Appeals or Supreme Court order granting leave to appeal that arrives unexpectedly in the mail, adding another briefing deadline (one that may be expedited) to the attorney's schedule;
- The unanticipated order of a trial or appellate court that requires the prompt filing of or response to some substantive motion, accompanied by a motion for immediate consideration.

- The unexpected arrival of an early appellant's brief or an early transcript, requiring that a planned deadline be moved up.

For the appellate practitioner who also has responsibilities at the trial court level, the number of unexpected and urgent developments increases exponentially. Appellate practitioners need to set aside substantial blocks of time to research, analyze and write an appellate brief, and cannot readily accommodate an unanticipated briefing task into their schedules without some adjustment to existing deadlines.

Even in the Sixth Circuit, where extension motions are officially disfavored (Sixth Circuit Rule 10(k)), appellate practitioners know in civil cases that two-week extensions are granted routinely, and that additional extensions are available for any reasonable cause.

REASONS WHY THE PROPOSAL SHOULD NOT BE ADOPTED

With this background information in mind, the Section believes that the current proposal should not be adopted because:

- It is unnecessary to achieve the ends desired;
- It is too risky and too likely to operate unfairly at times; and
- It detrimentally alters the roles of the Clerk and practitioners in scheduling appellate brief preparation, leaving no role whatever for those who know the most about the cases.

The Court's interest in docket management and planning is served primarily by reductions in delay, however those reductions are achieved. The "stale brief problem," to the limited extent it is a problem, likewise would be ameliorated by reduced delay in either the briefing interval or the following research division interval. The ability of an appellate lawyer to predict for a client when an appeal will be decided (the "certainty" factor) is improved generally by any reduction in delay, from transcript preparation through opinion writing. The shorter the whole process becomes, the smaller the margin of uncertainty will be.

The proposal, however, focuses only on the period in which briefs are prepared. It is a given that the research division must have a three or four month period. The three months that court reporters are entitled to also is a given, as is the undefined post-submission period. The main impact of the proposal would come in the 112 day period that an appellant typically has to

file a brief after the transcript is filed, and the 91 day period that an appellee typically has to respond. Under the proposal, the same appellant would not have less than 56 days, and might have 112 or more days, depending on factors entirely outside his or her control. It would depend on when the briefing schedule order was issued and how the Clerk evaluated the appeal in terms of difficulty and numerous as-yet-undefined factors. The same appellee would not have less than 42 days, and might have 91 or more, depending again on how the Clerk evaluated the appeal. The Court is contemplating a 32-track system for evaluating appeals, but does not plan to undertake the task of specifically defining those tracks unless the proposal is approved.

The proposal does not inherently reduce delay, since it primarily shifts briefing from one point in the post-transcript, pre-research-division period to a different point in the same period. In the D.C. Circuit, it appears that parties typically have three to five months' notice of their deadlines (although it can be much less). Under such a system an appellant's lawyer has little incentive to prepare a brief early, even when possible to do so, and *no* incentive to file it early. Early filing merely increases an appellee's available response time. In some appeals, then, delay may actually be fostered. As for appellees, there is only so much that can be done without appellant's brief in hand. What the proposal does in the name of "just-in-time" briefing is remove a block of time that parties rely on for needed flexibility—and that appellants and appellees otherwise would share equitably—and instead dissipates that block of time too early in the process, where it is of less use to the parties and practically useless to appellees.

Currently, the Court uses a pool of ready-to-submit appeals (*i.e.*, cases already worked up by the research division or by a commissioner) to fill monthly panel calendars. The Section believes it should be practical to schedule cases for oral argument shortly after briefing is complete, building in the staff time needed for research and writing, along with any time required by the residual backlog. This would enhance the Court's ability to plan its sessions months in advance. As the Court's backlog approaches zero, the time should come when the current interval between the end of briefing and the date of argument is reduced to approximately the same interval needed for research. At this point the Court would have substantially accomplished everything it hopes to gain from briefing schedules, without the schedules. Planning and management would be enhanced, stale briefs would be reduced, and lawyers would be able to give their clients an oral argument date much earlier in the process.

The proposal would work a radical change in the way civil appellate briefs are scheduled in the Court of Appeals. Much would depend on the accuracy with which the Clerk's office assessed the time needs of particular cases and particular parties. Because of the Court's strict enforcement policy, mistakes would be likely to have consequences not easily remedied. In light of the high volume, some mistakes would be inevitable. It would be scant consolation to the parties and lawyers involved in one of those mistakes that they were in a minority.

Under the current system, which has been in effect since the Court of Appeals was created, practitioners have a voice in determining how long briefing should take. They not only know their own schedules best, but they also know their own cases best. The kinds of information available to the Court of Appeals—the lower court opinion, the size of the record, the appellant's docketing statement, etc.—cannot tell the whole story. A complex issue of first impression can be hidden in a small record, a cursory opinion, or a hastily written docketing statement. No final assessment of the screening criteria can yet be made, because many of the criteria and their interrelationships remain undefined at this time. But it is no insult to the Clerk's office to say that it will inevitably allot too much briefing time in some cases and too little in others.

The Section has no doubt that mistakes of this kind occasionally occur in the DC Circuit as well. But that Court's much lower volume (and its more specialized practice) tends to reduce the impact of such mistakes. A private practitioner is unlikely to receive more than a very few DC Circuit scheduling orders in a year (if that). The same cannot be said in Michigan, where lawyers with an active appellate practice would receive many such orders annually if the proposal were adopted here. This makes it relatively much more important in Michigan that lawyers not lose the input they have always had in determining when their appellate briefs are written and filed. It is no answer to suggest that lawyers practicing in other court systems have learned to live without extensions. First, the premise is largely untrue. Most appellate courts, including the Sixth Circuit, grant extensions. Second, the specialized, low-volume DC Circuit (where limited extensions will become more available this year) is simply not comparable for the reasons discussed earlier.

Under the proposal, appeals are subject to dismissal if the appellant's brief is not timely filed, on the motion of either the appellee or the Court

itself. Proposed MCR 7.212(A)(2)(f). If the appellee's brief is late, the Court may order the case submitted on the appellant's brief alone. Currently, a late brief triggers only the less serious sanction of loss of oral argument. MCR 7.212(A)(4). The Section believes that these heightened sanctions have been included primarily to terrorize practitioners into meeting their deadlines because of the adverse consequences to the Court's scheduling needs if the deadlines are missed, and that the new sanctions in fact would seldom be imposed. But the mere existence of these sanctions in the rule would have adverse consequences.

Considering the Court's volume, it is safe to say that many deadline violations will occur regardless of the sanctions. Appellees, especially those represented by inexperienced or contentious appellate counsel, will promptly move to dismiss. These motions, which would most closely resemble MCR 7.211(C)(2)(b) motions (except for the incongruity, noted earlier, that such motions cannot be filed after the case is placed on a session calendar), will presumably go to a motions panel, perhaps creating new jurisprudence along the lines of trial court default judgment practice. This would not be a salutary development, to say the least. Nor does the Section perceive how it would ever be advantageous for the Court to refuse to look at a late brief of appellee in a case where reversal was a possibility. And if it gratuitously announces that it will not consider an appellee's brief in a case it affirms, it simply invites the client not to pay the lawyer. From the practitioner's viewpoint, the proposed sanctions create unwarranted new malpractice concerns.

The current availability of 56 extension days to each side in a typical civil appeal is a useful tool in adjusting for both transcript problems and problems caused by seriously defective briefs. Although the Court does not propose to issue the briefing schedule until the transcript is filed, it regularly happens for a variety of reasons that the transcript appears to be filed before it is actually complete. This may cause the scheduling order to issue while important testimony remains to be transcribed. Moreover, experienced appellate practitioners have all had the experience, as appellees, of receiving a horrendously deficient brief of appellant and, as appellants preparing a reply brief, of receiving a similarly deficient brief of appellee. Motions to strike such briefs (or issuance of a defect letter by the Court on its own) do not toll the response time. If a motion to strike is granted, the entire schedule is likely to need revision. If it is denied to preserve the schedule (or the Court requires a new filing without altering deadlines), an injustice may be

done. And if a motion to strike is not even brought because of time constraints, the result may be that some parties will be prejudiced and the Court may be saddled with deficient briefs that are a byproduct of the proposed new system.

Michigan's rules, like most appellate court rules, allow the appellant more time than the appellee to write. This reflects the fact that the appellee won below, usually has a court opinion to defend, and only has to write on the issues selected by the appellant. But Michigan, again like most jurisdictions, strikes a balance by providing appellants with only *slightly* more time to write (currently, 112 days for appellants and 91 for appellees). As noted earlier, one effect of the proposal would be to give appellants even more time and appellees even less. Appellants will have whatever time the scheduling order provides, plus any time that passes between the filing of the transcript and issuance of the schedule. Appellees, on the other hand, could lose more than half their present response time, or up to seven weeks (91-42=49 lost days). Appellees also are more significantly at risk because of the "bad brief" problem discussed a moment ago. And if an appellant is granted an extension of time under the proposed system, appellee's deadline will change too, perhaps frustrating the advance planning of counsel. At a minimum, it likely would become even harder for the appellee to obtain a short extension, no matter how compelling the reason. The Section sees no sufficient reason for so seriously altering the balance struck in the current rules with respect to the time afforded to each side for briefing.

Michigan's Court of Appeals is one in which an extraordinary variety of appeals are briefed as a matter of right by an equally diverse bar. The Section believes that these appeals already are being briefed at a rate that will permit the Court to continue narrowing the interval between briefs and oral argument. If it is important for the Court's budgeting purposes to schedule oral arguments several months in advance, that can be accomplished now without briefing schedules. The theoretical ability to set panels even further into the future by issuing argument dates before (rather than after) briefing, seems very unlikely to work in practice in Michigan. Nor does it seem worth the potential disruption to both the Court and practitioners.

For all the reasons previously discussed, what may work reasonably well in a low-volume, specialized court is unlikely to work so well here. It is worth repeating that the DC Circuit disposes of 40 percent of its filings by motion before briefing schedules are ever issued. The absence of anything

comparable in Michigan practice leads the Section to fear that case calls scheduled too far in advance may wind up resembling the meat counter where the butcher has to call out number after number before reaching one held by a customer who is present. If the Court ultimately has to reshuffle case calls until they bear little resemblance to the call as originally scheduled, the anticipated advantages of the proposal will be illusory.

The Section also is concerned with how extension requests under the proposal would be addressed, and by whom. The Court's volume guarantees that attorneys will be presenting what they believe to be "extraordinarily compelling reasons" in extension motions that now are handled administratively by the Clerk's office and then submitted to the Chief Judge for signature under MCR 7.211(E). What guidelines will the Clerk's office use in assessing these motions, which by definition should be presenting "extraordinary" grounds? It seems impossible (and wasteful of judicial resources) that a motions panel should weigh them individually. Yet the Clerk's office would need some test that could be easily stated and applied, and no such test can hope to do the job well. Moreover, the Section fears that the Court's strict enforcement policy would simply compound the problem.

The Section is eager to cooperate with the Court of Appeals in reducing appellate delay and streamlining procedures where possible for the good of all. Nothing the Section has said here should be construed as unwillingness to consider shortening the total amount of time available to the parties to brief their appeals. Reducing the base periods somewhat and scaling back the available extension time proportionately, coupled with improvements by the Court of Appeals in its own handling of cases, could go a long way towards improving the statistics that matter to the Legislature.

What *does* matter to the Section is that its members not be deprived of the important role they have always played in determining how much time is needed to brief particular cases. It is important to them personally, and it is important to them professionally. In discussions of these issues over the last few months, the stereotype of the lawyer-as-procrastinator has sometimes been invoked to suggest that serious brief writing will not occur until a "hard" deadline is reached. But any nugget of truth in the stereotype is far outweighed by the larger truth that business and professional reasons spur most lawyers to prepare their briefs as expeditiously as possible. The chief failing of the proposal is that, in one sudden stroke, it would make a lawyer's knowledge of his or her case and practice completely irrelevant for scheduling purposes, and place the decision entirely in the hands of someone

who knows far less about either. Added to that, the decision would be made months beforehand, rather than at the time all the facts are known.

Before instituting a completely new system for civil appeals, it would only be prudent for the Court of Appeals to try setting case calls several months in advance, using cases that have been briefed but not yet processed by staff. No rule change is needed for this experiment, which may provide valuable insights concerning some of the pitfalls foreseen in this letter. If the practice, after some fine-tuning, proves workable, there would then be a foundation to consider further changes that presently does not exist. Any model for briefing schedules, however, should build in enough available extension time so that practitioners continue to have a voice in the process.

The Section will appear before this Court on September 24, 1998 to address the proposal further and answer any questions the Court may have. In the meantime, copies of this letter are being sent to Chief Judge Corrigan and Judge Hoekstra. While some of the matters discussed here are familiar debating points between the Court of Appeals and the Section, a number of other matters are new and may spur fresh discussions. The Section prizes these exchanges and hopes they will continue.

Respectfully submitted,

Joseph H. Firestone
Chair, Appellate Practice Section

cc: Chief Judge Maura D. Corrigan
Judge Joel P. Hoekstra

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