



STATE OF MICHIGAN

NICHOLAS S. AYOUB
Judge

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Ms. Anne M. Boomer
Michigan Supreme Court
925 W. Ottawa
P.O. Box 30052
Lansing, MI 48909

Re: **ADM File No. 2018-25 – Proposed Amendment of Rule 7.312 of the Michigan Court Rules**

Dear Ms. Boomer:

I write to offer my personal observations and comments on the above-referenced proposal to amend MCR 7.312. In particular, I agree with Justice Viviano's concurring statement suggesting that the Court take the opportunity to more fully consider whether "MOAAs are serving their intended purpose – or any purpose – well or whether it is time to consider ending the practice altogether."

In the context of that review, I would highlight at least one additional potential, though often overlooked, purpose a MOAA may serve, in addition to the two discussed by Justice Viviano. Under the Court of Appeals' conflict resolution rule, a panel of the Court of Appeals may invoke polling by the chief judge for convening a special panel where it disagrees with another panel's prior published decision. MCR 7.215(J)(2) and (3). This conflict resolution process is not available, though, where "the Supreme Court has granted leave to appeal in the controlling case." MCR 7.215(J)(3)(b). However, where the Supreme Court has only granted MOAA in the controlling case, the rule does not preempt the Court of Appeals' conflict resolution process. Under the current rules, the Court of Appeals could, theoretically, convene a special panel to consider a case while the same case is pending before the Supreme Court on a MOAA.

It is not immediately clear whether this operation is by design, or is simply a product of oversight at the time that the original MOAA provisions were adopted. Either way, I think this begs an interesting question, which I would urge the Court to consider in the context of its examination of the MOAA procedure.

While our Supreme Court is the Court of last resort having the final word on questions of Michigan law, every Court of this State has an obligation, subject to the limitations posed by the doctrine of stare decisis, to analyze and decide questions of law that are properly before it. The hierarchal nature of our judicial system allows lower courts to participate in the greater task of shaping our State's jurisprudence. Ideally, by the time that difficult questions are presented to our Supreme Court for its final word, the Court will be presented with a thorough analytical record complete with the lower courts' thoughtful review of the given issue. More importantly, in my opinion our appellate courts should encourage lower courts to engage in the highest level of legal discernment on matters of first impression, regardless of the likelihood that the lower court's decision will not be the final word on the question.

One way that the Court can do this is by encouraging the Court of Appeals to use the conflict resolution procedure found in MCR 7.215. That, in turn, is served by leaving the MOAA procedure in place and allowing the Court of Appeals to declare a conflict in cases where the Supreme Court has only granted a MOAA. In practice, it may be very rare for the Court of Appeals to call a conflict panel where the Supreme Court has ordered oral argument on the application in the controlling case (and, indeed, I am not able to identify any case where that has occurred). However, in my opinion, a certain sense of comity is served by at least preserving that potential.

Of course, equally strong arguments can be made that an order for MOAA should stay any further tinkering with the controlling case by the Court of Appeals until the matter is completely disposed of by the Supreme Court. If that is the prevailing view of this Court, and the Court continues to employ the MOAA procedure as it has historically done, the Court may want to consider amending MCR 7.215 as follows in order to remove this distinction between MOAAs and granting leave as it relates to the Court of Appeals' authority to declare a conflict under the rule:

(b) Effect of Pending Supreme Court Appeal. No poll shall be conducted and a special panel shall not be convened if, at the time the Judge's are required to be polled, the Supreme Court has granted leave to appeal or ordered oral argument on the application in the controlling case.

I hope these observations and comments are useful to the Court. Thank you very much for your consideration.

Sincerely,



Nicholas S. Ayub

61st District Court Judge