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Ms. Anne Boomer
Michigan Supreme Court
925 W. Ottawa
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Lansing, MI 48909-7548

Re: Adm. File 2018-25

Dear Ms. Boomer:

The Court has published for comment proposed amendments to MCR 7.312. As the staff comment notes, these amendments "would incorporate into the Supreme Court rules the procedure to be followed for cases being argued on the application," the so-called MOAAs, procedures "previously included in orders granting argument on the application," with a "proposed new subrule (K) [that] would alert parties to the fact that they should argue the merits of the case even for motions being heard on the application."

Justice Viviano concurred in the order, observing that the publication of the proposed order provides "an opportune time to also consider whether MOAAs are serving their intended purpose—or any purpose—well or whether it is time to consider ending the practice altogether." I could not agree more. Justice Viviano concluded his statement by saying "I believe we should also consider the broader question of whether the MOAA procedure should be preserved and improved, or whether it no longer serves its intended purpose and the practice should be ended." I believe the Court should take up Justice Viviano's call and consider whether the MOAA practice should be ended; I firmly believe that it should, and strongly urge the Court to return to its historical practice of granting leave to appeal in cases justified by MCR 7.305(B),[1] with full oral argument, while only

[1] (1) the issue involves a substantial question about the validity of a legislative act;
(2) the issue has significant public interest and the case is one by or against the state or one of its agencies or subdivisions or by or against an officer of the state or one of its agencies or subdivisions in the officer's official capacity;
(3) the issue involves a legal principle of major significance to the state's jurisprudence;
(4) in an appeal before a decision of the Court of Appeals,
(a) delay in final adjudication is likely to cause substantial harm, or

occasionally exercising its authority to correct error through per curiam and memorandum opinions, and orders. I also suggest that in the latter category the Court consider in some cases an "order to show cause" to the appellee why the relief sought by the appellant should not be granted, something the Court has done in the past,[2] where the Court believes it appropriate to allow the appellee, who may well have concentrated the answer to the application on whether leave should be granted rather than the merits of the issue raised, an opportunity to more directly address the merits, with perhaps an opportunity for a brief response from the appellant. I wish to set out my views as concisely as I can, though this comment is longer than I would like.

MCR 7.305(H)(1) currently provides with regards to action by the Court on applications "The Court may grant or deny the application for leave to appeal, enter a final decision, direct argument on the application, *or issue a peremptory order*." Until 2003 the rule, then MCR 7.302(G)(1), provided "The Court may grant or deny the application, enter a final decision, or issue a peremptory order. There is no oral argument." Byway of comparison, Rule 16.1 of the United States Supreme Court rules provides that "After considering the documents distributed under Rule 15 [the petition for certiorari], the Court will enter an appropriate order. *The order may be a summary disposition on the merits*." In the United States Supreme Court though a disposition on the merits may be—and occasionally is—entered on the petition, there is no provision for oral argument on the petition without a grant, and such an argument never occurs, nor is there any supplemental briefing. The Court disposes of cases in this fashion in only a small number of cases each year—generally 10 or so—in what might fairly be described as error-correcting opinions, decided generally unanimously,

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(b) the appeal is from a ruling that a provision of the Michigan Constitution, a Michigan statute, a rule or regulation included in the Michigan Administrative Code, or any other action of the legislative or executive branches of state government is invalid;

(5) in an appeal of a decision of the Court of Appeals,
  (a) the decision is clearly erroneous and will cause material injustice, or
  (b) the decision conflicts with a Supreme Court decision or another decision of the Court of Appeals; or

(6) in an appeal from the Attorney Discipline Board, the decision is clearly erroneous and will cause material injustice.

[2] See *People v. Jones*, 459 Mich. 902 (1998), order vacated on reconsideration, 459 Mich. 959 (1999) ("By order of June 29, 1998, the prosecution was directed to show cause why the defendant's sentence in this case should not be deemed concurrent rather than consecutive to defendant's sentences in other cases"); *People v. Mayo*, 584 N.W.2d 923 (1998) ("we ORDER the prosecutor to show cause in writing, in this Court, within 28 days after the date of this order, why the defendant's conviction should not be reversed on the ground that the circuit judge's cross-examination of prosecution witness Beebe denied the defendant a fair trial"); *Friends of Crystal River v. Kuras Properties*, 572 N.W.2d 2 (1997) ("We ORDER that the plaintiff show cause in writing in this Court, within 28 days after the date of this order, why the issues raised in plaintiff's application are not moot"); and many others, almost always in criminal cases.

and with almost never more than three dissenters (there is a rule of four in the United States Supreme Court; it takes only four of the nine justices to grant certiorari, and thus four justices who dissent from a peremptory view of five justices can simply force a grant of certiorari), and in the rest there is full briefing and argument.

The MOAA procedure was created in 2003 in an amendment to MCR 7.302 (now MCR 7.305). Its creation itself was hotly debated within the Court, the order amending the rule decided 4-3. The majority observed that allowing oral argument on the application would "*not come at the expense of fuller oral argument*, but as an alternative to no oral argument at all" (emphasis supplied). Decision on the case after argument on the application would be in the ordinary fashion, by a majority of the Court, the decision no longer being considered, after the MOAA, a "peremptory' decision. The dissenting justices viewed this newly-created MOAA procedure as an "end run" around the Court's then twenty-year old internal policy that peremptory action requires a vote of a "super-majority" of at least five members of the Court (because Michigan does not have a "rule of three" for leave grants similar to the United States Supreme Court's rule of four, three justices who dissent from a MOAA order cannot block it by voting to grant leave). A review of statistics before the amendment of the rule reveals that the Court had often issued 5-2 peremptory decisions, and shortly before the amendment of then MCR 7.302 there became five votes for peremptory action in almost no cases, and so if a majority of four felt that the wrong thing had occurred below, its options were to grant or deny leave to appeal.[3]

The MOAA procedure was designed, then, for those error-correcting situations where a super-majority of the Court did not exist to render a peremptory decision, where the case would then be decided by a majority after supplemental briefing and a "mini-argument." But that purpose has long since vanished. The notion expressed by Justice Markman when the MOAA was created that allowing oral argument on the application would "not come at the expense of fuller oral argument" has disappeared over time. The MOAA has instead captured the Court's docket. Justice Viviano points out that "In the past six terms, our Court has ordered 20, 16, 23, 36, 41, and 53 MOAAs, respectively. By contrast, we have ordered 45, 46, 26, 27, 17, and 17 grants, respectively." And in the *current* term, including the cases on the May call, 51 of the cases argued are MOAAs, and only *seven* are leave grants (and on the leave grants, in all but one oral argument was limited to 20 minutes per side, a practice by the Court that is becoming almost *de rigeur*). The Court also now as a matter of routine directs the filing of appendices in the same fashion as on a leave grant when issuing an order for a MOAA, something the proposed rule amendment would formally establish. The difference between a MOAA and a leave grant for the *litigants* is thus now five fewer minutes of argument and a somewhat shorter briefing time, as well as a much more substantial possibility that no decision will be rendered on the merits than with a leave grant case. The difference for the *Court* is that a MOAA is simply further consideration of an application, which is not limited to decision

[3] In 2002, the term proceeding the creation of the MOAA, the Court had issued 26 memorandum or per curiam opinions by my count, 10 of which were decided 5-2. In 1976, the year I first argued in the Michigan Supreme Court, there were 11 memorandum or per curiam opinions issued on the application and answer, only one of which contained a dissent.

after argument within the Court's term,[4] and where denial of leave, rather than an order dismissing as leave improvidently granted, remains possible, and often occurs. A denial of leave after a MOAA is simply a denial of leave like any other, whereas a LIG (leave improvidently granted) of a granted case is essentially viewed as an error in case selection, absent some change in circumstances that causes the LIG. The proposed amendments would codify this in the rules. That otherwise there is no real difference between the two procedures is made clear by proposed subsection (K): "For cases argued on the application, parties should focus their argument on the merits of the case, and not just on whether the Court should grant leave."

That a MOAA remains simply a pending application, which may be denied after oral argument in the same fashion as any application, is demonstrated by the Court's frequent denial of leave after a MOAA. Justice Viviano notes that "by one account, the Court has issued denials in 50 of the 150 MOAAs it has considered during the past five terms." In the current term, the Court has already denied leave to appeal after eight MOAAs. With all respect, putting the attorneys, the litigants, and the Court through the process of briefing (with appendices) and argument, all to no end, seems an enormous waste of resources. There is a reason why the United States Supreme Court rarely dismisses after argument on the ground that certiorari was improvidently granted; namely, that expending the resources of the parties and the Court without an opinion is viewed as an error by the Court in case selection.[5] Thus, that Court dismisses a writ as improvidently granted generally only when it discovers that the case does not actually present the question on which certiorari was granted, or because some legal impediment to its decision has been discovered in the process. The decision on granting certiorari is made by the Court with the assistance, of course, of the justices law clerks, each justice having, as in Michigan, four law clerks. A memorandum is prepared by a law clerk in each case; seven justices participate in a "cert pool," and so the 8000 or so petitions are divided among 28 law clerks for these justices, while the other two justices law clerks must divide the petitions between the four clerks for each justice. There is no other screening mechanism.

The Michigan Supreme Court has an additional screening mechanism on consideration of applications for leave—the professional staff of the Commissioner's Office, where a commissioner reviews the application and answer and prepares a report for the justices.[6] After the report is sent

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[4] Thankfully, the Court has rarely gone outside the term to decide a MOAA, and when it has done so it has decided the case almost always within a matter of days after the end of the term.

[5] See Gressman et al *Supreme Court Practice* (9th Edition), § 5.15, regarding reasons for dismissal of a writ of certiorari after argument as improvidently granted, which is viewed as something of an embarrassment. Timothy S. Bishop, Jeffrey W. Sarles, Stephen J. Kane, "Tips on Petitioning for and Opposing Certiorari in the U.S. Supreme Court," LITIGATION, WINTER 2008, at 26, 30.

[6] "[E]ach application is assigned to a commissioner for a report. . . . he primary function of a commissioner's report is to analyze the legal issues involved in the case and to recommend a

to the justices, each justice has his or her own procedure of clerk review. Particularly given this layer of professional staff review before the Court takes any action on the application, I respectfully submit that the current high level of leave denial in MOAA cases is indicative of some problem in case selection. Because I believe that grants or denials (with some dispositive error-correcting opinions and orders) should be the ordinary course, I believe that, in line with the practice of the United States Supreme Court and other states, case selection for review should almost always result in an opinion, or at least an order from the Court of some sort on the merits of the case.

In 1995 Justice Boyle wrote an article for the Michigan Bar Journal, "The Michigan Supreme Court: Are We Dancing as Fast as We Can?"[7] The article was a response to a law review by Wayne State University Law School Professor Maurice Kelman[8] suggesting the Court's granting of applications was "miserly," resulting in a "paucity" of opinions. Justice Boyle's article included a table demonstrating that though the number of cases decided by opinion had decreased in 1992 and 1993 to 75 and 90 respectively from an annual average in 1980 through 1990 of 99 opinions, the Court had also decided 87 cases by order in 1992 and 66 by order in 1993,[9] along with denying applications in 2161 and 2391 cases respectively. For the past decade the Court has averaged approximately 36 opinions per year, while disposing of somewhat under 2000 applications for leave

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course of action to the Court. This process generally begins with a review of the parties' briefs and the lower court record. The report includes a summary of the facts and proceedings, a summary of the parties' arguments and the Court of Appeals opinion (if any), a legal analysis of the issues raised by the parties, and a recommended course of action. The commissioner's report will also address any motions that have been filed by the parties, and recommend a disposition for each one. . . . The average length of a commissioner's report is from 10 to 20 pages, although substantially longer reports may be required if the issues raised by the parties require extended analysis or the case is factually complicated. After the reporting commissioner completes a report, it is made available to the rest of the Commissioners' Office for review. Over the course of a week, other commissioners may offer comments or suggestions to the reporting commissioner. Occasionally, a commissioner will disagree with a report's recommendation or analysis. When that happens, the second commissioner may draft a comment or dissent, setting forth a contrary point of view for the justices' consideration. The comment or dissent then becomes part of the commissioner's report. After the internal review process is completed, the commissioner's report is printed and forwarded to the justices for their consideration." Shari M. Oberg, Daniel C. Brubaker, "Supreme Review Insights on the Michigan Supreme Court's Consideration of Applications for Leave to Appeal," MICH. B.J., February 2008, at 30, 31.

[7] 74 MICH. B.J. 24 (1995).

[8] Kelman, "Case Selection by the Michigan Supreme Court: The Numerology of Choice," 1992 Det C L Rev 1.

[9] I suspect that not all of these orders were dispositive orders; that is, that these figures include such things as remands to the Court of Appeals to consider as on leave granted.

to appeal per year. It has also disposed of a number of cases by order; in fact, it disposes of a number of MOAAs each year by a "merits" or dispositive order. Consideration of many current MOAA cases as leave grants would be consistent with historical practice (and with the important questions presented in many MOAAs).

Conclusion

As one who has practiced in the Court for going on 45 years, I understand that my views may be considered a "return to the good old days," or "get off my lawn" approach. But I think there is are sound reasons why "no other state's rules emulate Michigan's approach to summary decision on the merits of non-emergency application as an alternative to its grant or denial."[10] I do not suggest that the Court abandon all peremptory opinions and orders. MCR 7.305(B)(5)(a) includes as a ground for review that "the decision [of the Court of Appeals] is clearly erroneous and will cause material injustice," which is a specific rule for error correction (though one that is unusual in state courts).[11] Some error correction is appropriate, I believe, even for the State's highest Court, and is engaged in even in the United States Supreme Court. But I suggest that the Court return to the practice of granting leave to appeal in at least 50 or so cases—surely at least that many fall within the grounds enumerated in MCR 7.305(B), and one can readily point to questions presented in MOAA cases that are significant to the jurisprudence of the State—with full argument of 30 minutes (litigants will often not use their full time, and if argument becomes repetitive, the Chief Justice can manage the situation). It is also appropriate, and consistent with historical practice, for the Court to issue a handful of opinions on the application and answer, as done in the United States Supreme Court, with also a small quantity of error-correcting peremptory orders. I *do* think that the practice indulged in by the Court on some occasions in the past of issuing an order to show cause to the appellee why the relief sought by the appellant should not be granted in an error-correction situation might well be appropriate going forward, where the appellee has concentrated on whether leave should be granted rather than on the merits, or the Court believes it may well be missing something in its initial view that the appellee should be given the opportunity to clarify, with perhaps some specific direction in the order as to that which should be addressed. Formalizing *that* procedure makes sense to me. But otherwise, I believe the Court should return to its historic pre-2003 practice of granting or denying leave to appeal (and in far more cases than now; certainly more than the seven this term), and issuing dispositive error-correcting opinions and orders in a modicum of cases, as it has done in the past as well.

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[10] Gary M. Maveal, "Michigan Peremptory Orders: A Supreme Oddity," 58 WAYNE L. REV. 417, 459 (2012).

[11] Maveal, citing "Bernard G. Barrow, "The Discretionary Appeal: A Cost-Effective Tool of Appellate Justice," 11 GEO MASON L. REV. 31, 42 n.74 (1988-89) (survey citing MCR. 7.305(B)(5)'s 'erroneous and will cause material injustice' as the only such error correction rule among state supreme courts with intermediate courts of appeal)."

I thank the Court for its consideration.

Sincerely,

/S/TIMOTHY A. BAUGHMAN

Appendix: draft of "show cause" language

MCR 7.305 (H) Decision.

(1) Possible Court Actions. The Court may grant or deny the application for leave to appeal, enter a final decision, ~~direct argument on the application~~, direct the appellee to show cause why the relief sought by the appellant should not be granted, or issue a peremptory order. There is no oral argument. The answer to an order to show cause shall be filed within 28 days of the order; the appellant may file a response to the answer within 21 days after the answer is filed. The answer and response each may not exceed 15 pages. The clerk shall issue the order entered and provide either a paper copy or access to an electronic version to each party and to the Court of Appeals clerk.