

**Public Policy Position
ADM File No. 2019-29**

The Appellate Practice Section is a voluntary membership section of the State Bar of Michigan, comprised of 791 members. The Appellate Practice Section is not the State Bar of Michigan and the position expressed herein is that of the Appellate Practice Section only and not the State Bar of Michigan. The State Bar's position on this matter to support ADM File No. 2019-29 and authorize the Appellate Practice Section to submit its position to the Court.

The Appellate Practice Section has a public policy decision-making body with 24 members. On June 5, 2020, the Section adopted its position after an electronic discussion and vote. 21 members voted in favor of the Section's position on ADM File No. 2019-29, 0 members voted against this position, 0 members abstained, 3 members did not vote.

Support with Recommended Amendments

Explanation

We support the proposal overall, but object to the hyperlink requirement in proposed MCR 7.212(J)(2)(b)(iii), as well as the index requirement and single transcript page requirement in proposed MCR 7.212(J)(3)(c).

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July 1, 2020

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Ms. Anne M. Boomer
Administrative Counsel, Michigan Supreme Court
Michigan Hall of Justice
P.O. Box 30052
Lansing, MI 48909

Re: ADM File No. 2019-29

Dear Ms. Boomer:

The Michigan Supreme Court has invited comments on ADM File No. 2019-29. By a unanimous vote, the Appellate Practice Section Council has adopted the following comment in support of these proposed amendments, with certain exceptions.

The proposed amendments of MCR 7.212 and 7.312 would revise the appendix requirements in the Court of Appeals and Supreme Court. The Council shares the courts' interest in adopting a revised, uniform appendix rule, but has concerns about a few of the proposed requirements that the Council believes impose unnecessary access-to-justice hurdles:

- Proposed MCR 7.212(J)(2)(b)(iii) would require the table of contents of an electronically-filed appendix to “link to the documents contained in the appendix or in that volume of the appendix.” This is a time-consuming process and is beyond the technical capabilities of many practitioners and pro se parties. Moreover, the proposed rule already requires appendixes to be bookmarked—which is far easier for practitioners and, we believe, more useful for readers. Bookmarks can be viewed at any point in the pdf, whereas the reader would have to scroll back to the beginning of the pdf to use links in the table of contents. The requirement to provide links in the table of contents is redundant, seems unnecessary, and places an undue burden on the parties.
- Proposed MCR 7.212(J)(3)(c) would require that complete transcripts include an index. In practice, many transcripts do not include an index, and retroactively creating one from the paper or PDF transcript received from the court reporter is not feasible using Adobe Acrobat or similar software. We propose that an index only be required if one has been provided by the court reporter. Consideration should be given to requiring court reporters to file an index with each transcript. If reporters were required to prepare an index and file it with each transcript, there would be no impediment to requiring parties to include the index with each transcript in the appendix.

- Subsection (J)(3)(c) would also require that transcripts “contain only a single transcript page per document page, not multiple pages combined on a single document page.” In many cases, transcripts procured during the course of a case are in “mini-script” format. Obtaining copies of those transcripts in full-page format at the appellate stage (which can be a year or more later) is expensive and time-consuming. We propose that transcripts in full-page format only be required if readily available. Consideration should be given to requiring court reporters to prepare and file only full-page transcripts instead of “mini-scripts.” Once full-page transcripts from reporters are required, there would be no impediment to requiring parties to include only full-page transcripts in the appendix.

In addition to these specific concerns, the Council sees an opportunity to streamline the appendix requirements. To that end, below is a proposed version of MCR 7.212(J) that the Council believes would result in an effective appendix in the Court of Appeals. If the Supreme Court prefers the published proposal over our own, we hope the Court will at least reject the proposed MCR 7.212(J)(2)(b)(iii) (TOC hyperlink requirement), and incorporate the following changes to the proposed MCR 7.212(J)(3)(c) (our suggestions in **bold/red**):

- (c) The relevant pages of any transcripts cited in support of the ~~argument~~appellant’s position on appeal. ~~When~~re appropriate, pages that precede or follow the appellant may attach pages preceding and succeeding the cited page should be included~~if helpful~~ to provide context to the citation. Submitting entire transcripts is discouraged unless necessary for the understanding of an argument. If a complete trial, deposition, or administrative transcript is filed, ~~an~~the index to such transcript must be included **if one was provided by the court reporter. If possible, transcripts must should** contain only a single transcript page per document page, ~~not multiple pages combined on a single document page~~. Only noncompressed (one sheet to a page) transcripts may be filed;

As for the proposed amendments to MCR 7.312 regarding appendixes in the Supreme Court, the Council supports the concept of making appendixes in the Court of Appeals and Supreme Court uniform. Another way to accomplish that goal, as well enhance access to justice, is to give parties the option of simply relying on their Court of Appeals appendix in the Supreme Court, supplemented with the Court of Appeals opinion or order being appealed. The Council believes that this idea has merit, and would like to propose it to the Supreme Court.

We thank you for this opportunity to comment.

Very truly yours,

s/Bradley R. Hall
Chair, Appellate Practice Section

Proposed language on following page

Proposed Alternate MCR 7.212(J)

(J) **Appendix.**

(1) *When required.* An appendix is required in all appeals, except appeals from:

- (a) criminal proceedings;
- (b) proceedings involving the protection of children;
- (c) delinquency proceedings under Chapter XIII A of the Probate Code;
- (d) adoption proceedings under Chapter X of the Probate Code;
- (e) involuntary mental-health treatment proceedings under the Mental Health Code;
- (f) proceedings before the Michigan Public Service Commission; and
- (g) proceedings before the Michigan Tax Tribunal.

(2) *Content.*

(a) *Appellant's appendix.* An appellant's appendix must include the following content in the following order:

- (i) a title page;
- (ii) a table of contents;
- (iii) the judgment or order(s) on appeal, including any written opinion, memorandum, or findings of fact and conclusions of law forming the basis for the judgment or order(s) on appeal;
- (iv) the register of actions;
- (v) a copy of the presentence report, if the appeal challenges the sentence imposed in a criminal action;
- (vi) each of the following documents cited in the party's principal brief if necessary for the court to decide the appeal:
 - [A] each pleading, paper, or exhibit filed in the trial court;
 - [B] each transcript. Unless unavailable, transcripts shall be formatted one transcript page per document page, and shall include an index if one was provided by the court reporter.

- (vii) a copy of each contested jury instruction.
 - (b) *Appellee's appendix.* An appellee may file an appendix only if the appellant's appendix does not include part of the record that the appellee believes is necessary for the court to decide the appeal.
 - (c) *Joint appendix.* Parties are encouraged to file a joint appendix conforming to subrule (J)(2)(a)–(b) whenever possible.
- (3) *Format.* An appendix must conform to the following format:
- (a) *Title page.* The title page must bear the caption of the case, the docket numbers assigned by the appellate court(s) and the trial court or tribunal, and identify the appendix as the appellant's appendix, the appellee's appendix, or a joint appendix.
 - (b) *Table of contents.* An appendix must contain a table of contents that identifies each document with reasonable specificity and indicates the page of the appendix on which the first page of a document begins.
 - (c) *Pagination.* An appendix must be numbered sequentially in a prominent location at the bottom of the pages to facilitate pincites to the record in the parties' briefs. Joint appendixes must use "J.A." before the page number.
 - (d) *eAppendix.* All litigants, except pro se litigants, must file their appendix electronically as a separate PDF from the party's principal brief. Each document in an appendix must be bookmarked and text searchable.
 - (e) *Paper Appendix.* Pro se litigants may file an appendix in paper form. The appendix must be bound separately from the brief and in a manner that allows for the appendix to be easily dismantled for scanning.
 - (f) *Multiple Volumes.* An appendix filed electronically must be filed as a single volume, unless the file size is too large for the efilings system to accept, in which case the appendix should be divided into separate volumes. Whether filed in paper or electronic form, if an appendix consists of multiple volumes, then each volume must include a title page and a volume-specific table of contents. Pagination must continue sequentially from one volume to the next. For electronic appendixes with multiple volumes, the page number of the PDF must be modified to match the appendix page number at the bottom of the PDF.