Order

Michigan Supreme Court
Lansing, Michigan

February 13, 2019

ADM File No. 2018-25

Proposed Amendment of
Rule 7.312 of the Michigan
Court Rules

Bridget M. McCormack,
Chief Justice

David F. Viviano,
Chief Justice Pro Tem

Stephen J. Markman
Brian K. Zahra
Richard H. Bernstein
Elizabeth T. Clement
Megan K. Cavanagh,
Justices

On order of the Court, this is to advise that the Court is considering an amendment of Rule 7.312 of the Michigan Court Rules. Before determining whether the proposal should be adopted, changed before adoption, or rejected, this notice is given to afford interested persons the opportunity to comment on the form or the merits of the proposal or to suggest alternatives. The Court welcomes the views of all. This matter also will be considered at a public hearing. The notices and agendas for public hearings are posted at Administrative Matters & Court Rules page.

Publication of this proposal does not mean that the Court will issue an order on the subject, nor does it imply probable adoption of the proposal in its present form.

[Additions to the text are indicated in underlining
and deleted text is shown by strikeover.]

Rule 7.312 Briefs and Appendixes in Calendar Cases and Cases Argued on the Application

(A) Form and Length. Briefs in calendar cases and cases to be argued on the application must be prepared in conformity with MCR 7.212(B), (C), (D), and (G) as to form and length. If filed in hard copy, ~~B~~briefs shall be printed on only the front side of the page of good quality, white unglazed paper by any printing, duplicating, or copying process that provides a clear image. Typewritten, handwritten, or carbon copy pages may be used so long as the printing is legible.

(B)-(C) [Unchanged.]

(D) Appendixes.

(1) Form. Appendixes must be prepared in conformity with MCR 7.212(B), and shall be similarly endorsed as briefs under MCR 7.312(C) but designated as an appendix (e.g., "Appellant's Appendix," "Appellee Appendix," "Joint Appendix"). If submitted in hard copy, ~~A~~appendixes must be printed on both sides of the page and, if they encompass more than 20 sheets of paper, must also be submitted on electronic storage media in a file format that can be opened, read, and printed by the Court.

(2) Appellant's Appendix. The appellant must file ~~A~~an appendix in calendar cases and in cases to be argued on the application. The appendix ~~filed by the appellant must be entitled "Appellant's Appendix,"~~ must be separately bound~~,~~ and numbered separately from the brief with the letter "a" following each page number (e.g., 1a, 2a, 3a). Each page of the appendix must include a header that briefly describes the character of the document, such as the names of witnesses for testimonial evidence or the nature of the documents for record evidence. The appendix must include a table of contents and, when applicable, must contain:

(a)-(e) [Unchanged.]

The items listed in subrules (D)(2)(a) to (e) must be presented in chronological order.

(3) Joint Appendix.

(a) The parties may stipulate to use a joint appendix~~, so designated,~~ containing the matters that are deemed necessary to fairly decide the questions involved. A joint appendix shall meet the requirements of subrule (D)(2) and shall be separately bound and served with the appellant's brief.

(b) [Unchanged.]

(4) Appellee's Appendix. ~~An appendix, entitled "Appellee's Appendix," may be filed.~~ The appellee's appendix, if any, must comply with the provisions of subrule (D)(2) and be numbered separately from the brief with the letter "b" following each page number (e.g., 1b, 2b, 3b). Materials included in the appellant's appendix or joint appendix may not be repeated in the appellee's appendix, except to clarify the subject matter involved.

(E) Time for Filing. Unless the Court directs a different time for filing,

(1) the appellant's brief and appendixes, if any, are due

(a) within 56 days ~~after~~of the order granting the application for leave to appeal ~~is granted;~~, or

(b) within 42 days of the order directing the clerk to schedule oral argument on the application;

(2) the appellee's brief and appendixes, if any, are due

(a) within 35 days after the appellant's brief is served on the appellee in a calendar case, or

(b) within 21 days after the appellant's brief is served on the appellee in a case being argued on the application; and

(3) the reply brief is due

(a) within 21 days after the appellee's brief is served on the appellant in a calendar case, or

(b) within 14 days after the appellee's brief is served on the appellant in a case being argued on the application.

(F) [Unchanged.]

(G) Cross-Appeal Briefs. The filing and service of cross-appeal briefs are governed by subrule (F). An appellee/cross-appellant may file a combined brief for the primary appeal and the cross-appeal within 35 days after service of the appellant's brief in the primary appeal for both calendar cases and cases being argued on the application. An appellant/cross-appellee may file a combined reply brief for the primary appeal and a responsive brief for the cross-appeal within 35 days after service of the cross-appellant's brief for both calendar cases and cases being argued on the application. A reply to the cross-appeal may be filed within 21 days after service of the responsive brief in a calendar case and within 14 days after service of the responsive brief in a case being argued on the application.

(H) Amicus Curiae Briefs and Argument.

(1) An amicus curiae brief may be filed only on motion granted by the Court except as provided in subsection (2) or as directed by the Court.

(2) [Unchanged.]

(3) An amicus curiae brief must conform to subrules (A), (B), (C) and (F), and.

(4) Unless the Court directs a different time for filing, an amicus brief must be filed

(a) within 21 days after the brief of the appellee has been filed or the time for filing such brief has expired in a calendar case, or

(b) within 14 days after the brief of the appellee has been filed or the time for filing such brief has expired in a case being argued on the application~~, or at any other time the Court directs~~.

(~~4~~5) An amicus curiae may not participate in oral argument except by Court order.

(I)-(J) [Unchanged.]

(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.

Staff Comment: The proposed amendment of MCR 7.312 would incorporate into the Supreme Court rules the procedure to be followed for cases being argued on the application. These rules have been previously included in orders granting argument on the application. A proposed new subrule (K) would alert parties to the fact that they should argue the merits of the case even for motions being heard on the application.

The staff comment is not an authoritative construction by the Court. In addition, adoption of an amendment in no way reflects a substantive determination by this Court.

A copy of this order will be given to the Secretary of the State Bar and to the State Court Administrator so that they can make the notifications specified in MCR 1.201. Comments on the proposal may be sent to the Supreme Court Clerk in writing or electronically by June 1, 2019, at P.O. Box 30052, Lansing, MI 48909, or ADMcomment@courts.mi.gov. When filing a comment, please refer to ADM File No. 2018-25. Your comments and the comments of others will be posted under the chapter affected by this proposal at Proposed & Recently Adopted Orders on Admin Matters page.

VIVIANO, J. (*concurring*). I concur in the Court's order publishing for comment proposed changes to MCR 7.312 that are designed to standardize and make uniform the filing procedures for cases argued on the application (commonly referred to as "MOAAs," an acronym derived from "mini oral arguments on the application"). I write separately because this seems 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.

The MOAA procedure was created in 2003 in an amendment to MCR 7.302 (now MCR 7.305).[1] According to a statement signed by the four justices who voted in support of the amendment, the purpose of the amendment was "to afford something beyond summary review to more cases being appealed to this Court."[2] The statement asserted 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."[3] In recent years, while the number of MOAAs has increased, the number of cases in which the Court has granted leave to appeal has decreased significantly.[4] Therefore, it appears that MOAAs may no longer be serving their intended purpose.

Rather than functioning to allow substantive consideration and resolution of more cases, it appears that MOAAs primarily serve two purposes. First, MOAAs give us the option of hearing a case but limiting oral argument to 15 minutes per side, as opposed to the traditional 30 minutes per side in cases where leave to appeal is granted.[5] Second, they give the Court the option of disposing of a case after arguments without a decision on the merits by simply denying leave, instead of our traditional practice following a grant of leave to appeal, i.e., entry of an order vacating the grant order and denying leave (thereby implicitly recognizing that leave was improvidently granted).[6]

---

[1] See MCR 7.302, 469 Mich cxlv. The amendment added the following underlined language to MCR 7.302(G)(1):

> The Court may grant or deny the application, enter a final decision, or issue a peremptory order. There is no oral argument on applications unless ordered by the Court. The clerk shall issue the order entered and mail copies to the parties and to the Court of Appeals clerk.

[2] MCR 7.302, 469 Mich cxlvi (MARKMAN, J., concurring).

[3] *Id.*

[4] 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.

[5] See MCR 7.314(B).

[6] This appears to be happening with increasing frequency—by one account, the Court has issued denials in 50 of the 150 MOAAs it has considered during the past five terms.

Beyond the question of whether the MOAA is serving the purpose intended by the Court at the time of its adoption, it appears that MOAAs have also become a source of frustration and confusion to the appellate bar.[7] The members of this Court frequently field questions about MOAAs—why we do them, how they are different from grants, how arguments should be presented, etc. Parties have also expressed confusion over the fact that MOAAs are nominally intended to address "whether to grant leave to appeal," when in reality our Court will regularly decide a case on the merits following a MOAA. Some practitioners have argued that MOAAs are ill-suited to decide significant issues because the truncated briefing schedule does not allow time for full-merits briefing and amicus involvement. And MOAAs certainly present a unique challenge to the advocates, who must argue in a compressed time frame both why the case is jurisprudentially significant (such that we should not simply deny leave) and why the issue presented should be resolved in their client's favor.

The proposed changes are intended to address some of these concerns. However, in contemplating whether to adopt them, 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.

---

[7] In fact, the 2019 Michigan Appellate Bench Bar Conference is scheduled to include two breakout sessions entitled "Michigan Supreme Court Mini-Oral Arguments (MOAs)—How Are They Working?" Michigan Appellate Bench Bar Conference Foundation, *Michigan Appellate Bench Bar Conference*, available at <https://benchbar.org/wp-content/uploads/2019/01/MABBCF-Brochure-1-22-19-2.pdf> (accessed February 6, 2019), pp 4, 6 [https://perma.cc/7K5A-YVW8]. According to the event brochure, the session will include "a candid discussion of the costs and benefits derived from the increased use of MOAs in recent years." *Id.*