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July 29, 2015

Larry S. Royster
Clerk of the Court
Michigan Supreme Court
Michigan Hall of Justice
925 W. Ottawa, P.O. Box 30052
Lansing, MI 48909

Re: ADM File No. 2013-26 – Appellate Practice Section Comment on Proposed Amendments of 7.209 of the Michigan Court Rules

Dear Mr. Royster:

Thank you for the opportunity to comment on the proposed amendments of Michigan Court Rule 7.209. The Council for the SBM Appellate Practice Section appreciates the Court's efforts to clarify this Court Rule and offers the following comments for the Court's consideration.

The Section supports the proposed amendments to MCR 7.209 in "Alternative B" with the suggested additional changes that appear in blue underline in the enclosed attachment. The Section also proposes an amendment to the stay rule of MCR 2.614 (see attached). These changes reflect several concerns, including the following.

MCR 7.209(E)(2)(a): Similar to the circuit court appeals rule, MCR 7.108(B)(2)(a), the Section believes that it would be beneficial to have an amount of bond stated in MCR 7.209. The circuit court appeals rule, MCR 7.108(B)(2)(a), requires 125% the amount of the judgment or order being enforced, including any costs, interest, attorney fees, and sanctions assessed to date of filing the bond. We propose a lesser amount of 110%, based on the shared experiences of several of our members that this amount is generally sufficient, and recognizing that MCR 7.209(G)(1)(f) would permit the trial court to set the amount of the bond in a greater or lesser amount for good cause shown.

MCR 7.209(E)(2)(b) and (c) and proposed MCR 7.209(E)(3): These suggested changes would recognize a trial court's authority to issue an order permitting another form of security, such as a liability policy (see MCL 500.3036) or irrevocable letter of credit.

MCR 7.209(G): The term "service of bond" was preferred as being more specific than "notice of bond" or "service of notice of bond."

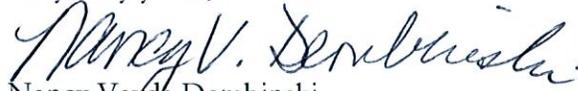
MCR 7.209(G)(1)(c): This proposed change would make subsection (c) consistent with MCR 7.208(F), which provides a trial court continuing authority over stays and bond. Under MCR 7.208(F), jurisdiction continues to be vested in the trial court over stays and bonds, and a trial court is not deprived of the ability to review a stay and/or bond until the appeal is resolved.

APPELLATE PRACTICE SECTION

Lastly, the Section proposes an amendment (see attached) to the stay rule found in **MCR 2.614** for purposes of consistency, and concern that an interlocutory order not be immediately enforceable.

Thank you again for offering us the opportunity to provide input on this proposal.

Very truly yours,



Nancy Vayda Dembinski
Chair, Appellate Practice Section

Enclosure

APPELLATE PRACTICE SECTION
Respectfully submits the following position on:

*

ADM File No. 2013-26

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The Appellate Practice Section is not the State Bar of Michigan itself, but rather a Section which members of the State Bar choose voluntarily to join, based on common professional interest.

The position expressed is that of the Appellate Practice Section only and is not the position of the State Bar of Michigan.

The State Bar position on this matter is to support Alternative B.

The total membership of the Appellate Practice Section is 816.

The position was adopted after discussion and vote at a scheduled meeting. The number of members in the decision-making body is 23. The number who voted in favor to this position was 14. The number who voted opposed to this position was 0.

Report on Public Policy Position

Name of section:

Appellate Practice Section

Contact person:

Nancy Vayda Dembinski

E-Mail:

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Proposed Court Rule or Administrative Order Number:

[ADM File No. 2013-26 - Proposed Amendment of Rule 7.209 of the Michigan Court Rules](#)

These alternative proposed amendments relate to stay bonds. MCR 7.209 is ambiguous whether filing a stay bond automatically stays enforcement proceedings, or whether a stay of proceedings is wholly within the discretion of the trial court and Court of Appeals. In this administrative file, the Court is publishing for comment two alternative proposals. Alternative A would clarify the rule so that it is clear that only a trial court judge or the Court of Appeals may order a stay of proceedings. Alternative B, modeled loosely on the recent revisions of the circuit court appeals rule (specifically MCR 7.108), would amend the rule to establish the principle that, like appeals to circuit court, filing a bond automatically stays further proceedings in a case, including enforcement of a judgment or order.

Date position was adopted:

July 21, 2015

Process used to take the ideological position:

Position adopted after discussion and vote at a scheduled meeting.

Number of members in the decision-making body:

23

Number who voted in favor and opposed to the position:

14 Voted for position

0 Voted against position

0 Abstained from vote

9 Did not vote (absent)

Position:

Support Alternative B with Amendments.

Explanation of the position, including any recommended amendments:

The Section preferred Alternative B, which is more consistent with the circuit court appeals rule. The Section offers suggested changes that provide, among other things, for a specific amount of bond (110%) unless the court orders otherwise, and the provision for other security in lieu of bond, such as an irrevocable letter of credit.

APS Court Liaison/Rules Comment Committee Proposed Changes to Alternative B: Would Amend the Rule to Allow a Party to Stay Proceedings Merely by Filing a Bond and Would Provide an Opportunity for Objection by the Opposing Party

Rule 7.209 Bond; Stay of Proceedings

(A) Effect of Appeal; Prerequisites.

- (1) Except for an automatic stay pursuant to MCR 2.614, or except as otherwise provided under this rule, an appeal does not stay the effect or enforceability of a judgment or order of a trial court unless the trial court or the Court of Appeals otherwise orders. An automatic stay under MCR 2.614(D) operates to stay any and all proceedings in a cause in which a party has appealed a trial court’s denial of the party’s claim of governmental immunity.

(2)-(3) [Unchanged.]

(B) Responsibility for Setting Amount of Bond in Trial Court.

- (1) Civil Actions. Unless determined by law, or except as otherwise provided by this rule, the dollar amount of a stay or appeal bond in a civil action must be set by the trial court in an amount adequate to protect the opposite party.

(2) [Unchanged.]

(C)-(D) [Unchanged.]

(E) Stay of Proceedings by Trial Court.

- (1) ~~Except as otherwise provided by law or rule, the trial court may order a stay of proceedings, with or without a bond as justice requires. Unless otherwise provided by rule, statute, or court order, an execution may not issue and proceedings may not be taken to enforce an order or judgment until expiration of the time for taking an appeal of right.~~

(2) An appeal does not stay execution unless:

- (a) ~~When the stay is sought before an appeal is filed and bond is required,~~ With respect to a money judgment, the party seeking the stay shall file with the court a bond in compliance with MCR 3.604 and in an amount not less than 110% of the judgment or order being enforced, including any costs, interest, attorney fees, and sanctions assessed to the date of filing the bond, with the party in whose favor the judgment or order was entered as the obligee, by which the party promises to
 - (i) perform and satisfy the judgment or order stayed if it is not set aside or reversed; and
 - (ii) prosecute to completion any appeal subsequently taken from the judgment or order stayed and perform and satisfy the judgment or order entered by the Court of Appeals or Supreme Court, ~~or~~
- (b) ~~If a stay is sought after an appeal is filed, any bond must meet the requirements set forth in subrule 7.209(F). The trial court grants a stay with or without bond, or with a reduced bond, as justice requires or as otherwise provided by statute (see MCL 500.3036).~~
- ~~(e) When the bond in subsection (E)(2)(a) is filed, the judgment or order shall automatically be stayed pending entry of a final order under subsection (G).~~
- ~~(c) The court may order, on stipulation or otherwise, other forms of security in lieu of the bond in subsection (E)(2)(a), including but not limited to an irrevocable letter of credit.~~

~~(3) When the bond or other security in subsections (E)(2)(a)-(c) is filed, the judgment or order shall automatically be stayed pending entry of a final order under subsection (G).~~

(2)-(4) [Renumbered as (34)-(56), but otherwise unchanged.]

(F) Conditions of ~~Appeal~~ Stay Bond.

(1)-(2) [Unchanged.]

(G) Sureties and Filing of Bond; ~~Notice Service~~ of Bond; Objections; Stay Orders. Except as

otherwise specifically provided in this rule, MCR 3.604 applies. A bond must be filed with the clerk of the court ~~which~~ that entered the order or judgment to be stayed.

- (1) Civil Actions. ~~A bond in a civil action need not be approved by a court or clerk before filing but is subject to the objection procedure provided in MCR 3.604.~~
- (a) A copy of a bond and any accompanying power of attorney or affidavit must be promptly served on all parties in the manner prescribed in MCR 2.107. At the same time, the party seeking the stay shall file a proposed stay order pursuant to MCR 2.602(B)(3). Proof of service must be filed promptly with the trial court in which the bond has been filed.
 - (b) Objections shall be filed and served within 7 days after service of the ~~notice of~~ bond. Objections to the amount of the bond are governed by MCR 2.602(B)(3). Objections to the surety are governed by MCR 3.604(E).
 - (c) If no timely objections to the bond, surety, or stay order are filed, the trial court shall promptly enter the order staying enforcement of the judgment or order pending all appeals. ~~Unless otherwise ordered, the stay shall continue until otherwise ordered by the trial court or an appellate court. jurisdiction is again vested in the trial court or until further order of an appellate court.~~
 - (d) Any stay order must be promptly served on all parties in the manner prescribed in MCR 2.107. Proof of service must be filed promptly with the trial court.
 - (e) All hearings under this rule may be held by telephone conference as provided in MCR 2.402.
 - (f) For good cause shown, the trial court may set the amount of the bond in a greater or lesser amount adequate to protect the interests of the parties.
 - (g) A bond may be secured under MCL 600.2631. (2)

[Unchanged.]

(H)-(I) [Unchanged.]

APS Council Court Liaison/Rules Comment Committee
Proposed Amendment of MCR 2.614(A)

Rule 2.614 Stay of Proceedings to Enforce Judgment

(A) Automatic Stay; Exceptions: Injunctions, Receiverships, and Family Litigation.

- (1) ~~Except as provided in this rule, execution may not issue on a judgment and proceedings may not be taken for its enforcement until 21 days after a final judgment (as defined in MCR 7.202(6)) is entered in the case.~~ ~~Except as provided in this rule, execution may not issue on a judgment and proceedings may not be taken for its enforcement until the expiration of 21 days after its entry.~~ If a motion for new trial, a motion for rehearing or reconsideration, or a motion for other relief from judgment is filed and served within 21 days after entry of the judgment or within further time the trial court has allowed for good cause during that 21-day period, execution may not issue on the judgment and proceedings may not be taken for its enforcement until the expiration of 21 days after the entry of the order deciding the motion, unless otherwise ordered by the court on motion for good cause. Nothing in this rule prohibits the court from enjoining the transfer or disposition of property during the 21-day period.

(2) [Unchanged.]

(B)-(G) [Unchanged.]

The text of any legislation, court rule, or administrative regulation that is the subject of or referenced in this report.

http://courts.mi.gov/Courts/MichiganSupremeCourt/rules/court-rules-admin-matters/Court%20Rules/2013-26_2015-04-29_formatted%20order.pdf