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Lansing, MI

48933-2012

RE: ADM File No. 2013-36 – Proposed Amendments of Subchapter 7.300 of the Michigan Court Rules

Dear Clerk Royster:

At its January 16 meeting, the Board of Commissioners of the State Bar of Michigan considered the above proposed amendments of Subchapter 7.300 published for comment. In its review, the Board considered recommendations from the Civil Procedure & Courts Committee, the Criminal Jurisprudence & Practice Committee, and the Appellate Practice Section.

The Board voted unanimously to support the proposed amendments to Subchapter 7.300, and to support the following amendments submitted by the Civil Procedure & Courts Committee, the Criminal Jurisprudence & Practice Committee, and the Appellate Practice Section. I am providing their comments for your consideration:

The Civil Procedure & Courts Committee:

MCR 7.305(C)(2)(b) and MCR 7.305(C)(5)

The Committee notes that both proposed rules refer to a motion for rehearing in the Court of Appeals. There does not appear to be such procedure in Subchapter 7.200; therefore, the Committee suggests deleting the reference to a motion for rehearing in its entirety and replacing it with a motion for reconsideration. Alternatively, the Committee proposes that MCR7.305(C)(5)(b) be revised to read, “the Court of Appeals order denying a timely filed motion for rehearing or reconsideration of a decision remanding the case,” which will bring the rule into conformity with MCR 7.305(C)(2)(b).

MCR 7.305(C)(3)

The Committee recommends that this section be rewritten as follows: “In an appeal from an order of discipline or dismissal entered by the Attorney Discipline Board, the application must be filed within the time provided in MCR 9.122(A)(1).”

This change is suggested because MCR 9.122(A)(1) presently sets forth the time period for filing the application for leave to the Supreme Court. The

proposed rule as written does not fully track MCR 9.122(A)(1) and could result in unintended conflicts between the rules.

If the proposed amendments to the Rules governing procedure in the Supreme Court are adopted, the Committee recommends that MCR 9.122(A)(2) be amended as well, as it currently references a Court Rule that will not be applicable if the rules are renumbered as proposed.

MCR 7.316(A)(6)

The Committee is concerned that giving the Court the authority to draw inferences of fact could conflict with well-established precedent that prohibits fact-finding by inference when ruling upon certain matters, such as motions for summary disposition. Although the current version of MCR 7.316(A)(6) and MCR 7.216(A)(6) presently provide that the Court of Appeals and Supreme Court may draw inferences of fact, the Committee recommends that these sections be modified to clarify that the court may only draw inferences of fact when appropriate under controlling law.

MCR 7.318

The Committee has concerns regarding the second sentence, “the Court may deny the stipulation if it concludes that the matter should be decided notwithstanding the stipulation.” If parties resolve a pending dispute, there is no longer a case or controversy that is ripe for adjudication. Requiring parties no longer wishing to maintain an action to continue with the case and be subject to a potentially adverse rulings, interferes with the parties’ Constitutional right to contract, subjects the parties to additional costs associated with litigation, and could discourage settlement. Although similar language is present in the current version of MCR 7.310, insofar as the rules are presently under review, the Committee suggests that the consideration be given to removing this sentence from the rule.

The Criminal Jurisprudence & Practice Committee:

MCR 7.305(F)

The Committee recommends amending MCR 7.305(F) as below:

Nonconforming Pleading. On its own initiative or on a party’s motion, the Court may order a party who filed a pleading that does not substantially comply with the requirements of this rule to file a conforming pleading within a specified time or else it may strike the nonconforming pleading. The submission to the clerk of a nonconforming pleading does not satisfy the time limitation for filing the pleading where the pleading has not been corrected within the specified time.

(Please note that this recommendation was also supported by the Civil Procedure & Courts Committee.)

The Appellate Practice Section:

MCR 7.305(A)(2)

The Section suggests that this subsection be renumbered to MCR 7.305(A)(1)(g), consistent with the current MCR 7.302(A)(1)(g).

MCR 7.305(F)

The Section has concerns about the following language: "The submission to the clerk of a nonconforming pleading does not satisfy the time limitation for filing the pleading." This is new language that currently is found only in MCR 7.309(A)(2), which applies to briefs and appendixes. Including this language in the rule concerning applications for leave to appeal suggests that a nonconforming application could be found not to meet the jurisdictional filing deadline, which is not subject to a motion to extend time. The language is also problematic as applied to briefs (including merits briefs and opposing and reply briefs at the application stage) because it encourages a proliferation of motions to extend time. The Section recommends that this language be modified to clarify that nonconforming applications and briefs will be considered timely if they are corrected within the time specified in the Clerk's defect notice and not stricken, similar to the practice in the Court of Appeals. A corresponding change should be made to the identical language in MCR 7.306(F) (original proceedings).

MCR 7.307(B)

The Section thanks the Court for adopting its proposal for clarifying when cross-appeals are required, and recommends that the new language be incorporated into MCR 7.207 (cross-appeals in the Court of Appeals).

MCR 7.312(D)(2)

This subrule revises language concerning appendix headers, providing that "[e]ach page of the Appendix must include a header that briefly describes the character of the appendix, such as the names of witnesses for testimonial evidence or the nature of the documents for record evidence." The Section believes that it is awkward to refer to individual pages of an appendix as an "appendix," and suggests revising this language as follows: "Each page of the Appendix must include a header that briefly describes the character of the ~~appendix~~ document, such as the names of witnesses for testimonial evidence or the nature of the documents for record evidence."

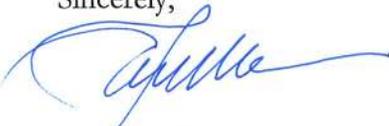
MCR 7.312(G)

The Section recommends that the Court adopt a briefing schedule for cross-appeals similar to that in the Federal Rules of Appellate Procedure. See FR App P 28.1 (F) (providing that the appellee's response brief and principal brief on cross-appeal both be filed after the appellant's principal brief, as opposed to the appellant's principal brief and appellee's principal brief on cross-appeal being filed simultaneously).

(All of the recommendations from the Appellate Practice Section were also supported by the Civil Procedure & Courts Committee.)

We thank the Court for the opportunity to comment on the proposed amendments.

Sincerely,



Janet K. Welch
Executive Director

cc: Anne Boomer, Administrative Counsel, Michigan Supreme Court
Thomas C. Rombach, President