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June 03, 2015

Larry Royster, Clerk
Michigan Supreme Court
P.O. Box 30052
Lansing, MI 48909

**Re: ADM File No. 2014-09
Proposed Revision of MCR 7.215**

Dear Mr. Royster:

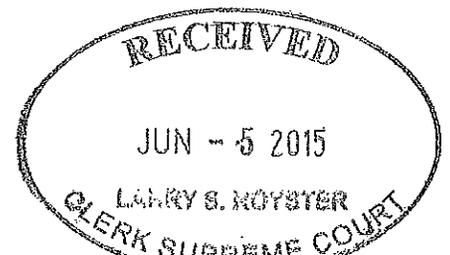
These are my comments concerning the above-captioned subject.

1. As a federal district judge regularly required to rely on Michigan law in deciding diversity cases, I look to Michigan case law; this includes unreported opinions.

2. As a practicing lawyer, I followed the procedural complexities of the manner in which the Supreme Court reviewed cases. For example, in 1977, I commented in a letter-to-the-editor of the State Bar Journal (September 1977, p. 742), regarding the practice of the high court in peremptorily deciding cases on applications for leave to appeal.

3. The concerns over the proliferation of judicial opinions is not new. For example, sometime prior to 1935, Justice James McReynolds of the United States Supreme Court said:

In my view, multiplied judicial utterances have become a menace to orderly administration of the law. Much would be gained if three-fourths (maybe nine-tenths) of those published in the last twenty years were utterly destroyed. Thousands of barren dissertations have brought confusion, and often contempt. . . . Hurried opinions and long dictated ones, when not laboriously revised, generally, have no proper place except in the wastebasket.



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See, 19 *Journal of the American Judicature Society* No. 3, p. 67 (October 1935).

4. Concern over unpublished opinions of the Michigan Court of Appeals is long-standing. Richard D. Toth called it to the attention of the lawyers of Michigan in an article published in the *Michigan Bar Journal* in its October 1979 issue (p. 653), *The Way I See It. A Critique of the Unpublished P.C.*

5. Criticism of the proposed rule change by Justice Markman in his dissent is well taken, as are the comments of Timothy Baughman and the Real Property Law Section of the State Bar. Each gives good reasons not to adopt the proposed change in the rule.

6. Historically, proposed amendments to Michigan Court Rules by the Supreme Court have been preceded by consideration and recommendation of a committee or commission of lawyers and judges. This process is described in the essay, *History of Michigan Court Rules* by Justice Walter H. North in Honigman's 1949 Michigan Court Rules Annotated, in the Preface to Honigman and Hawkins Michigan Court Rules Annotated, Second Edition, 1962, and in the Comments to Rule 1.101, Longhofer's Michigan Court Rules Practice, Sixth Edition, 2012.

7. The Bench and Bar would be better served if the process followed to amend the Michigan Court Rules followed the way in which amendments to the local rules for the Eastern District of Michigan are considered.

Local Rule 83 states:

LR 83.1 Amendments to Local Rules; Effective Date

(a) When the court proposes an amendment to or amends these rules, it must provide public notice of the proposal or amendment on its website and via other sources that will reach a wide audience.

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(b) An amendment to these rules takes effect on the first day of the month following adoption unless otherwise ordered by the court.

LR 83.2 Reporters and Advisory Committee

The Chief Judge of this Court shall appoint one or more reporters who shall be empowered to recommend amendments to these Rules. The reporters shall collect material relevant to proposed changes. The Chief Judge of this Court shall also appoint an advisory committee composed of members of the Bar who will assist the reporters in these functions. This provision does not limit the authority of the Judges of this Court to adopt amendments independent of the reportorial process.

8. Copies of the following are attached:

- Letter to the editor (Cohn, J.), *Michigan Bar Journal*, September, 1977 (see ¶2);
- *The Way I See It. A Critique of the Unpublished P.C.* (Toth, Richard D.), *Michigan Bar Journal*, October, 1979 (see ¶4);
- *History of Michigan Court Rules* (North, J.), Preface to Honigman's 1949 Michigan Court Rules Annotated (see p. vii)
- *History and Nature of New Procedural Laws*, Preface to Honigman and Hawkins' Michigan Court Rules Annotated, 2d Ed, 1962; and

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- Comments to Rule 1.101, Longhofer's Michigan Court Rules Practice, 6th Ed, 2012

Very truly yours,


Avern Cohn

AC:lvh
Enclosures

Opinion & Dissent

ON APPEAL APPLICATIONS

To the Editor:

Harold Hoag's article in the July Journal on applications for leave to appeal to the Supreme Court is a worthwhile contribution to an understanding of the Court's operations. It is in keeping with the Justices' letter to the Governor and Legislature declaring 1976 PA 267 (The Open Meetings Act) inapplicable to the judicial branch when they indicated the desire to obtain wider public participation in their work. Unfortunately Mr. Hoag, not being a Justice, is unable to do little more than cite GCR 1963, 833.2(4) in discussing peremptory disposition of applications for leave to appeal. One aspect of these dispositions should cause the Bar some concern. Statistics from Mr. Hoag's office indicate that in 1973 the Court only twice disposed of such applications peremptorily with an opinion. They did it three times in 1974, twenty-eight times in 1975 and twenty-two times in 1976.

The Court Administrator indicates in his 1975-1976 Report that use of peremptory disposition of such applications generally developed because of the increasing work load of the Court and its desire to avoid the need for briefing, oral argument and opinion writing. However, if the Court continues to follow this practice, lawyers will be constrained not only to deal with the criteria for granting or refusing leave when they oppose an application but also with the merits of the question involved, not knowing what approach the Court will take. (See: *Spartan Asphalt Paving Company v Grand Ledge Mobil Home Park*, 400 Mich 184, 1977)

I suggest that the Justices, in keeping with the spirit of their letter to the Governor and Legislature, consider better articulating the standards for when an application for leave to appeal will be treated as a claim of appeal and the brief in support treated as an appellant's brief, etc. Not only will the public be better informed but fewer lawyers will suffer the shock, and indeed sometimes the embarrassment, of having one of their cases decided without benefit of the briefing and oral argument they looked forward to if the high court chose to grant review.

Avern Cohn
Detroit

OPPOSES JUDICIAL APPOINTMENT

To the Editor:

Appellate as well as trial judges should be elected to office, not appointed. The two basic concerns in the controversy are competence and attitude. The first is unreasonable and serves as a mantle of good intention for the second, more predominant concern.

The talents of good legislators, administrators and executives are more elusive and harder to define than those of judges, whose knowledge and ability are related to success in the practice of law. Competence among elected officials is primarily promoted in the nomination and selection of candidates. It is a complex, dialectical process that integrates the standard of ability of persons running for office with the public weal and will. The people's voice should not be excluded from the judicial branch.

When final selection is delegated to a committee the predominant effect is to bias selection through the attitudinal lens which characterizes its members and distinguishes the politics of their elite. The subject of any election or appointment to office is political attitude and philosophy. This subject prevails over competence. Choice of attitude is paramount in politics and will be made by an elite of vested interests in any absence or default of popular participation. Further, prescience of competence is often an illusion in politics and becomes a facile cloak for self-serving interests and views. Typically, such prescience is strongly voiced by the apologists for an elite, whose asserted special knowledge is inherent self-justification.

Regarding the selection of judges, the vested interests are predictable, including creditors, land owners, the faction in any dichotomy which pays the most money to lawyers, the wealthy and the powerful, and excludes the disadvantaged. As the nature of the controversy implies, the opponents of election include those who fear the consequences of general franchise and who distinguish their political lot, and interests before the courts, from those of the common man.

Andrew Tierman
Saginaw

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The Way I See It

A Critique of the Unpublished P.C.

by Richard D. Toth

In 1972, GCR 821 was amended to provide for nonpublication of per curiam or memorandum opinions of the Michigan Court of Appeals unless the Supreme Court Reporter was otherwise directed by one of the judges on the case.¹ Members of the Michigan Bar who have had occasion to appeal cases to the Court of Appeals have since become accustomed to the "pink" decision — a decision printed on pink paper² — which conveys, in addition to the Court's opinion, its conviction that the issue decided is so insubstantial as to be unworthy of immortality in the reports of the Court.

In addition, such pink decisions of the Court of Appeals are not to be cited as precedent.³ Attorneys who argue before the Court are frequently admonished not to support their contentions with previously decided but unpublished cases, perhaps as a matter of fairness to an opposing party who may not have had equal access to the decision.

Thus the Court of Appeals has been permitted to create a body of law which is not quite law, since it is unpublished, yet not quite not-law, since it binds receptive parties to its decisions.

This practice, justified as an economic measure to save the cost of printing terse and insignificant opinions, is a practice which should cause concern to the bench and bar of this state. What is said here is not meant as criticism of the Court of Appeals nor of its individual judges, nor should it be taken as a reflection upon the quality of the Court's decisions, pink or yellow, but is stated as merely a historical observation on the publication of legal reports in general.

The common law, that sacred trust of Anglo-American lawyers, is a law whose lifeblood is experience, as Justice Holmes pointedly observed. Unlike

European law, founded upon a cold, sterile, and unchanging Code, the common law is evolutionary law. The allusion to Darwin is apt; for our law reflects the selective process of survival. Legal principles which over time are shown to be inappropriate to the needs of Society are abandoned while needed fresh concepts are allowed to grow from hybrid seeds (e.g. products liability law). These changes, as we know, come about through case by case decisions.

But if the law were all change and no stability, Society would be in a constant state of anarchy. While each case decision resolves in a dispute arising in the past, it lays down a rule for the future. Decisions rendered by our courts, together with our constitutions, statutes, and administrative rules, are official guidelines for behavior, setting forth the parameters of what citizens may and may not do.

Thus from the earliest hours of the common law there has been a need for the decisions of the highest Courts to be uttered and published. Publication of such decisions plays a significant a role in the administration of the common law as does the power of the court to decide issues of law. If a court may only resolve the dispute before it, without establishing a precedent; then its decision-making is a hollow act. Only by publishing its decision is the voice of the court heard and only by publication can the court's decision be re-echoed in subsequent similar cases.

In examining a legal question, lawyers will most often expend their time "searching" for the law in the published reports of the highest tribunals. This is not unique to our generation; it has been the practice for several hundred years. Centuries before Coke's Reports⁴ circulated the first systematic collection of Court decisions,

the truffle-hunting for the one precedent that made or unmade a case had set common law lawyers apart from the rest of humanity.

Coke's Reports were not the first attempt to systematically collect and publish the decisions of the Courts, but they did set a precedent for publication which has continued since his day. Following the American Revolution almost every state adopted the practice of setting aside some of the funds appropriated to the judicial branch in order to compensate a Court Reporter. The men chosen for this task were usually modest individuals, apologetic for the faults of their ambitious endeavors; although there were exceptions, like Mr. Pike of Arkansas, who complained:

"The meager compensation allowed the Reporter for his labor in preparing five hundred volumes for the State, and the limited sale to be anticipated for the first Reports of a new State in the first years of her existence, have not permitted this Reporter to devote his time and energy to the correction of proofs, in exclusion of his daily avocation as an attorney."⁵

Many of these reporters were themselves practicing attorneys; probably because it was assumed that an attorney would be better able to digest the legal principles involved. Some of these reporters would rise to prominence in their own right, as did our own Justice Cooley who was Reporter of the Michigan Reports from 1858 until 1864.

Clearly men of talent were appointed to this task in recognition of the serious endeavor to which they were engaged. Frequently these Reporters prefaced their works with apologies for their imperfections; with the most common excuse being the haste with

which the Reports were published in response to the "urgent need" for their availability.⁶

Indeed, the tradition of published reports is so long-standing that a strong argument may be made that it is yet another aspect of due process. If we are entitled to a learned judge to hear and to competent counsel to try our case (and we are so entitled), it follows that due process demands the publication of judicial decisions as a means of enriching the bench and bar with the wisdom of the law.

Through the publication of judicial decisions, the common law grows, expands, changes and enriches our lives. Remove *Marbury v Madison*⁷ from circulation and it becomes a mere exercise in Constitutional thought. Tear the pages of *McPhearson v Buick Motor Company*⁸ from our books, and implied warranty theory takes two giant steps backwards. If Mrs. Palsgraf alone had been privy to the thoughts of Justice Cardozo, the feasibility of proximate cause might still be obscured.⁹ Leave *Miranda*,¹⁰ *Mapp*,¹¹ and *Gideon*¹² unpublished, and the rights of the accused would flounder in the nebulousity of the law.

This is not to say that every case which comes before an appellate court, especially an appellate court to which appeals are by right, presents monumental issues worthy of the scholarship of a Pound or the clarion opining of a Talbot Smith. Many appeals raise redundant or unsubstantial issues. Yet even these cases play their part, for whenever the court speaks, no matter how petty the issue of the case, it adds another tiny stone to the foundation of the law. The words and wisdom of the court are important, both to the parties before it, and to *all others similarly situated*.

Which brings us back to this critique of the unpublished P.C., an insidious creature which is a throwback to Roman law and Star Chamber practices, and which has no legitimate place in our system of common law. In allowing the Court of Appeals to make law for one case which is not precedent for another, the unpublished P.C. adopts a concept in conflict with the basic principle of our law: The principle of *stare decisis*, out of which the law of our lives flows.

If the wisdom of the Court, however mundane the particular case, does

not circulate among bench and bar, then the development of the law staggers from the strange malady of precedential malnutrition.

Three specific criticisms of the unpublished P.C. merit discussion. The first is that the present Court Rule leaves unbridled discretion to the judges of the Court of Appeals to determine what is worthy and what is unworthy of publication. By slapping the label "memorandum opinion" or "per curiam" upon a decision, the judges automatically consign it to the pink sheets. The decision can only be rescued from this limbo if one of the judges calls it forth, like Lazurus, from the tomb.

Yet no guidance is given the judges as to when such a decision merits publication, and attorneys or other interested parties have little opportunity to persuade the Judges of their view respecting the merits of publication. An attorney who has a number of similar cases with a common, unresolved, question of law, may well have pursued an appeal for the singular purpose of establishing a precedent to be followed in his other actions. Receiving a pink decision in his favor resolves his one dispute but, having no precedential value, gives him only a Pyrrhic victory.

A proposed amendment to GCR 821 states definite standards for publication and would allow "any person" to request publication. But such request must be filed, with reasons, in the Court, and it would still be left to the deciding panel whether to honor the request.¹³

The proposed rule is as unsatisfactory as the present rule in this respect; in fact it is even more so, since it would make publication the exception in each case rather than the rule. Under our present rule all opinions, unless labeled "memorandum opinions" or "per curiam" opinions, are to be published. Under the proposed rule no opinion would be published (whatever its label) unless a judge signing the opinion finds that a "standard for publication" has been met.

This discretion given to the judges of the Court of Appeals to publish or not, to create precedent or not, cannot be well exercised no matter how sincere the effort. True, there are many memorandum and per curiam decisions which are short, and which neither elaborate upon the facts of the

case nor augment the law. But there are also many such opinions, labeled "per curiam" (which, strictly speaking, is only a designation that the opinion is an opinion of the bench as a whole, rather than of a particular judge), which are in fact quite lengthy and well reasoned. They are in many instances indistinguishable in form and substance from signed and published decisions.

That the judges do not always exercise proper discretion in designating certain of their opinions as "per curiam" is manifested by the growing number of Supreme Court decisions which review the unpublished decisions of the Court of Appeals. In the April 1979 advance sheets of the Supreme Court, at least five of the Supreme Court's Opinions (including *Placek v City of Sterling Heights*¹⁴) are from appeals from unpublished decisions of the Court of Appeals. That's five out of 25 or 20 percent, not counting the Court's summary actions.

Here then we have at least five cases which the Court of Appeals judges felt were of such little significance as to be pink-sheeted, whereas the Supreme Court concluded that they were worthy of extensive review.

If this trend is not recognized and strongly criticized by the bench and bar it will continue, and the number of unpublished decisions will increase, at the discretion of the judges, with a consequent diminution of the corpus of our common law.

The second criticism must be stated with caution so as not to offend or affront the present members of the Court of Appeals. However, it must be plainly acknowledged that a major reason for concern about the trend toward unpublished appellate decisions is that it limits the accountability of judges to the bench and bar.

A published decision can be discussed, criticized, distinguished, and generally commented upon. Attorneys can read the advance sheets and: (1) smile, (2) shake their heads in despair, or (3) be numbed by what the appellate courts have ruled. Regardless

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of their reaction, the importance of a published decision is that it may be responded to.

If the court has made a fool of itself there will be battalions of commentators to set it right. If it has startled us with newfangled law, the interpreters of the law will soon explain it to us (and back to the court) in reasoned articles. If the published decision conflicts with other decisions or excites a great deal of adverse comment, it cannot be ignored, but must be reviewed by the Supreme Court or altered by the Legislature.

But decisions which are not published do not have to measure up to the higher standards which exposure to publicity and comment demands. A higher court will not feel as pressing a need to review a poor decision if it affects only the parties before the court, and if no bad precedent is created. A questionable decision will not be subjected to open criticism. Trends in the law may be obscured, errors may creep into the law unseen, expediency may replace care, and judges may hide all the faults of their reasoning behind the shield afforded by the label "per curiam."

This is not to suggest that these legal horrors have occurred or are even imminent. It merely raises the spectre of what could result from the lack of accountability fostered by the privilege of not publishing judicial decisions.

This desire for accountability, to publicize judicial decisions so that the court would have to answer to the bench and bar for the quality of its decisions, was one of the reasons inspiring the publication of reports initially. Mr. Cranch, one of the earlier Reporters of the United States Supreme Court, noted in his preface to the same volume in which *Marbury v Madison* is found:

"In a government which is emphatically stiled a government of laws, the least possible range ought to be left to the discretion of the judge. What ever tends to render the laws certain, equally tends to limit that discretion, and perhaps nothing conduces more to that object than the publication of reports. Every case decided is a check upon the judge. He can not decide a similar case differently, without strong reasons, which for his own justification, he will wish to make public. The avenues to corruption are thus obstructed and the sources of litigation closed."¹⁵

Finally, and most important, the unpublished P.C., as already stated, conflicts with the basic principle of *stare decisis*. Appellate courts have not been established merely to decide cases — we have trial courts for that — but to review, make, break, or reaffirm the law. This must be understood as their principal function.

No case, even if appealed by right and raising the most inane issue, is totally unimportant. Each raises its own set of facts, and each decision contributes to our common law, which is merely the collected wisdom of judicial decisions in all types of cases over the past thousand years.

All who litigate know the importance of the facts of each case. The word "distinguishable" is the first word in a lawyer's vocabulary, the indomitable six-shooter we holster in our repertoire of tricks when we enter into any courtroom. Whenever a decision of an appellate court turns upon the nature of the facts of the case, it is vital that the decision be published in order for judges of the lower courts and attorneys to determine whether a pending case is "distinguishable," or so identical as to be governed by the same rule of law. Each new published decision narrows doubts concerning the law or opens new avenues in the law. Even the simple statement: "We find this case indistinguishable from X and affirm," serves the purpose of reaffirming a principle of law which has been previously stated in "X."

The only justification to be offered in support of non-publication is economic expediency. By not publishing the "less important" (By whose standards?) cases, the state and its taxpayers conceivably save some money. Yet upon analysis even this justification fails, for as unpublished cases are not precedent and are not generally available, litigants often find themselves treading the same ground, arguing the same issues and pursuing the same appeal as may have been already resolved by the Court of Appeals in an unpublished decision.

One example among many: Recently the Court of Appeals rendered an unpublished decision declaring that a wife living apart from her husband for economic reasons was not an insured under her husband's uninsured motorist insurance policy.¹⁶ Will husbands and wives and insurers in the fu-

ture have the benefit of this case to guide their future action? Will this case forestall future litigation in our courts respecting spouses' insurance rights? Will this case be commented upon or criticized in the Bar Journals?

The answer is "No" because this decision is a mere bubble of law that bursts into the void once it has served its limited purpose of resolving one case. Thus, by saving the few cents it would cost to print this three-page per curiam opinion, the Court of Appeals leaves open the door to future expensive litigation in other similar cases.

Stare decisis literally means "let the decision stand." Unpublished opinions do not stand for anything. They are only economic expedients that in the long run cost the bench and bar of this state far more than the few cents saved. They constitute a subtle but significant depreciation of the value of the common law.

Our law is too important to be discounted. Decisions of the appellate courts which are unpublished and hence unprecedential represent a blatant discounting of our law for the sake of unjustified economics. The present Court Rule, and the proposed amendment, (even worse than the present rule) serves no legitimate purpose. In fact it diminishes the accountability of the Court of Appeals and restrains the full development of the law. But unless the bench and bar can be persuaded that this represents a real danger which deserves serious discussion and criticism, this trend toward unpublished decision-making is likely to grow.

This article is meant to identify the problem and suggest a renewed look at this trend before the trend itself becomes a precedent we are unable to shed. ■

Footnotes

1. The legislature has left the publication of Court of Appeals decisions to the rule making power of the Supreme Court. MCLA 600.313; MSA 27A.313.
2. Decisions which are to be published are released initially on yellow paper.
3. A proposed amendment to GCR 821 would definitely establish that unpublished cases are without precedential value. See 400 Mich 1036.
4. 1600-1615.
5. Preface to Volume 1 of Arkansas Reports (1837).
6. See, eg, Henry Minors "Introductory Notice" in his first Reports in Alabama (1829). One of his

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letters delineating defendant's conduct while in prison.

The Court of Appeals ruled that a defendant's prison conduct is a proper consideration at resentencing, and such consideration does not usurp executive power to commute sentences. Since the lower court was apprised of the defendant's prison conduct and indicated the weight given thereto, failure to include that conduct in the presentence report was not prejudicial.

In *People v Moore* (CA 78-4651; 7/10/79), resentencing was completed on the basis of the original 1967 presentence report plus oral comments from defense counsel concerning defendant's conduct and progress towards rehabilitation.

The Court of Appeals remanded for resentencing, on grounds that it was not clear that the resentencing court considered the oral information concerning defendant's prison conduct in resentencing defendant to the same prison terms he had received more than 10 years before.

In light of the court's statement that defendant was being sentenced nunc tunc, it is possible that the judge ignored defendant's prison conduct altogether. An updated report would have assured due consideration of defendant's prison conduct.

STATE BAR GRIEVANCE BOARD

A hearing panel of the State Bar Grievance Board suspended an attorney from the practice of law for two years. Respondent had failed to answer requests for investigation and did not appear at a hearing on charges brought against him. After the 20-day period for appeal to the Grievance Board expired, respondent filed a "delayed petition for rehearing," claiming illness at the time of the disciplinary proceedings. The Board denied without explanation.

The grievance administrator argued that the Attorney Discipline Board does not have power to grant rehearings or set aside a hearing panel order after it becomes final. The general court rules are silent as to authority to consider a delayed motion for review.

The Supreme Court held that for the same reasons that it created the opportunity to file delayed appeals, the Attorney Discipline Board should now have the authority to entertain a delayed motion for review. The case was remanded for consideration of the motion's merits. *State Bar v Lane* (SC 61717; 7/26/79).

TAXATION

In *Konfal v Township of Delhi* (CA 77-5047; 7/9/79) a township adopted a special tax assessment roll to construct a sanitary sewer. Plaintiff land owner within

the special assessment district filed in the Michigan Tax Tribunal (MTT) to restrain the township from proceeding. Prior to a show-cause hearing the parties met in chambers and decided that the matter would be heard on the merits. After receiving an adverse decision plaintiff appealed.

The Court of Appeals ruled that since the parties manifested consent to a hearing on the merits, the MTT did not err in expanding the original scope of the hearing and plaintiff was not prejudiced thereby. Further, there was no error in the fact that only three of seven Tax Tribunal members participated in the decision since the statute defines "entire tribunal" to mean three or more of the members appointed and serving.

Plaintiff appealed from a decision of the Michigan Tax Tribunal (MTT) that adopted the township's valuation of plaintiff's electric generating plant for property tax purposes. The township's valuation method was based on current reproduction cost less depreciation.

Plaintiff argued that a more accurate assessment of true cash value would result from: (1) Capitalizing the entire system's earnings and allocating a portion thereof to the plant, or (2) using depreciated original cost less economic obsolescence.

The Court of Appeals said it is the duty of the MTT to weigh the values produced by various valuation methods and to adopt the method that most closely approaches true cash value. The MTT may reject valuations it finds too speculative. *Consumers Power Co v Port Sheldon Township* (CA 78-589; 7/9/79).

WORKERS' COMPENSATION

In *Alexander v Director, Bureau of Workers' Compensation* (SC 61064; 7/12/79) a law firm successfully represented a class of disabled workers against the Director of the Workmen's Compensation Bureau in an action arising out of adjustments in the workers' weekly benefit rates. The firm then petitioned for attorney fees, which the director denied.

In a per curiam opinion the Supreme Court noted that attorney fees are not ordinarily recoverable as costs, but that exceptions to this rule have developed in situations involving overriding considerations. In this case, the Court said, the class members received benefits which could be cumulated into an "equitable fund" or "common fund." Therefore, the class members should contribute equally to the litigation expenses. The Court reversed the denial of fees and remanded to the Workmen's Compensation Bureau as the best forum for determining the amount and method of payment.

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Successors, B. F. Porter, found the "urgent demand" for the Reports still pressing six years later, as noted in his "Advertisement" prefacing his first volume of the Alabama Reports (1835).

1. 1 Cranch 137; 2 L Ed 60 (1803).
2. 217 NY 382, 111 NE 1050 (1916).
3. *Palsgraf v Long Island Ry Co.*, 248 NY 339, 162 NE 99 (1928).
4. *Miranda v Arizona*, 384 US 436, 86 S Ct 1602, 16 L Ed 2d 694 (1966).
5. *Mapp v Ohio*, 367 US 643, 81 S Ct 1684, 6 L Ed 2d 1081 (1961).
6. *Gideon v Wainwright*, 372 US 335, 83 S Ct 792, 9 L Ed 2d 799 (1963).
7. 400 Mich 1035-36.
8. 405 Mich 638 (1979). The other four are *Socha v Passino*, 405 Mich 458 (1979); *Bode v Roseville School District*, 405 Mich 517 (1979); *Ins. Co. of North America v Southeastern Electric Co., Inc.*, 405 Mich 554 (1979); and *Rodger v Colonial Federal Savings & Loan Ass'n of Grosse Pointe Woods*, 405 Mich 607 (1979).
9. Preface to 1 Cranch Reports, 1804.
10. *Ritchey v Michigan Mutual Insurance Company*, Court of Appeals Docket #78-1601, released.

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contained in GCR 968 to have a receiver appointed to protect clients when an attorney "drops out" or disappears will be exercised in appropriate cases.

Our aim, in summary, is to demonstrate to the public and the Bar that effective self-policing of and by the legal profession, affording protection against misconduct and due process for those accused of it, is alive and well in Michigan. ■

History of Michigan Court Rules

By

HON. WALTER H. NORTH,
Justice of Supreme Court of Michigan

The history of the Michigan Court Rules dates from the era of the Government of the Michigan Territory. Closely following the organization of the Michigan Territorial Government, the Governor and Judges of Michigan acting as a legislature provided by the Act of July 24, 1805, that the Supreme Court Judges "shall direct the forms of writs" and that the Court "make, record, and establish all such rules and regulations, with respect to the admission of counsel and attorneys, and all other rules respecting modes of trial and the conduct of business, as the discretion of the court shall dictate." The Governor and Judges of the Michigan Territory thus assumed that, as a legislature, they had the authority to regulate the powers and duties of the court, and they were probably correct in this assumption as the legislatures of the older territories had already established such a precedent.

The Supreme Court consisted of three judges, and, while a majority of the three judges controlled the Court's rule-making power, one judge might, in the absence of the other two, hold a session of court at which a rule was adopted. Statutes had to be adopted by a majority of the Governor and judges. If all the members of the legislature were present at a session, the vote of three of the four members was necessary for the passage of a measure. It was, thus, possible for two judges acting in their judicial capacity to promulgate a court rule, and then, in their legislative capacity, defeat any attempts to adopt a statute conflicting with the rule. However, as the Governor and Judges had an agreement among themselves that a statute could be adopted by a majority of a quorum of three, when one of the legislators failed to attend a session, the Governor and one Judge could adopt a statute conflicting with a court rule made by the other two judges, if one of the latter were absent from a session of the legislature. Pursuant to this agreement among the legislators, a judge present at a session of the legislature, but voting against the measure conflicting with a court rule, was bound to sign the statute which he opposed. Thereafter, for the sake of consistency, he would, in all probability, vote for the rescission of the conflicting court rule.

The first rule was promulgated by the Supreme Court of Michigan at a session of the court held by Judge Bates alone, on October 6, 1806, more than a year after the court began to function. It set the return dates for writs and process in the Supreme Court, and also provided

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for the holding of a "Short Court" on certain dates. This first Rule was, however, doomed to a short life, for it was in conflict with a legislative enactment of 1805, and was rescinded by Judges Griffin and Woodward at a session of the Supreme Court held on December 15, 1806. One other rule was adopted by the Supreme Court in 1806, and 26 rules were recorded in the following two years:

In 1809, the Act of July 24, 1805, was repealed by an enactment which empowered the Supreme Court to make rules "for conducting business in said Court," but neglected to authorize the Court to control the form of writs or admission of attorneys. The Act of 1809 was repealed in the ensuing year, and thereupon, the provisions of the Act of July 24, 1805, were deemed revived.

During the period of 1805 through 1818, the Supreme Court made and recorded fifty-six rules, while, in October, November, and December, of 1819, the Court recorded one hundred and sixty-eight rules. Many rules which were in effect for a short time were rescinded upon being enacted into statute. In 1820 and 1821, one hundred and forty-nine rules were so rescinded.

On April 12, 1821, Governor Cass, Judge Woodward and Judge Griffin signed an Act providing for the first printed set of Supreme Court rules. Pursuant thereto, the first Digest of Court Rules was published in 1821. As a number of the rules had been superseded by statute, and were consequently rescinded by the Court, the Digest contained only sixty-nine rules. It is apparent that, though the Territorial Supreme Court exercised a rule-making power, its rules were considered subordinate to the statutes of the Territorial legislature.

Although Michigan was not admitted into the Union as a State until 1837, the first Michigan Constitution went into effect in the latter part of 1835. The Constitution of 1835 provided that the judicial power of the State be "vested in one Supreme Court, and in such other Courts" as the legislature might establish from time to time. In 1836, the State legislature set about to establish the judicial system, and in so doing, abolished all the Territorial Courts. The Judges of the State Supreme Court were appointed on July 18, 1836, and immediately undertook their judicial duties.

In January, 1837, the State Supreme Court adopted the rules and practice of the Supreme Court of the late Territory of Michigan, and in the following year, the Court was directed by the legislature to formulate rules for practice in both the Supreme Court and Circuit Courts as to all matters not expressly provided by law. During this period, the rule-making power of the court paralleled that of the Territorial Supreme Court.

The Michigan Constitution of 1850 provided that "the Supreme Court shall, by general rules, establish, modify and amend the practice

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in such court, and in the circuit courts, and simplify the same." Art. VI, § 5. Clothed with this new grant of power, the Supreme Court adopted a set of Supreme Court rules, Circuit Court rules, and Chancery rules, which took effect April 1, 1853.

In June, 1858, a new set of Court Rules was promulgated. Thereafter, revisions were infrequent. The next general revision took place in 1896. (Court Rules of 1897). The 1897 Rules, with some amendments, remained in force until the adoption of the 1916 Rules. This set of Rules, while continuing in force the former Supreme Court Rules with some amendments, repealed the former Law and Chancery Rules, and initiated one set of Circuit Court Rules governing both Law and Chancery cases.

During the period from 1853 to 1930, the legislature enacted many statutory provisions pertaining to court practice and procedure. The validity of these statutes under the Constitution was never subjected to a judicial test, although the 1908 Constitution extended the powers of the Supreme Court to the control of the practice in all courts of record. Art. VII, § 5.

In 1927, a bill was enacted by the legislature providing for the appointment by the Governor of a commission of five attorneys to consult with the Justices of the Supreme Court for the purpose of revising the rules of practice and procedure in that court and all other courts of record, and also, to simplify appellate procedure (Act No. 377, Laws 1927). Great effort was devoted to the task of redrafting the rules by the appointed Commission of attorneys, and the Legal Research Institute of the University of Michigan. The proposed rules were submitted to the Supreme Court, and after considerable redrafting, they were adopted, in October 1930, to take effect on January 1, 1931. The 1931 revision combined the rules governing the Supreme Court, Circuit Court, Recorder's and Superior Courts, into one set, and made substantial changes in pleading, trial and appellate practice.

Need for changes in the 1931 Rules soon became apparent, and in 1933, a new set of rules was adopted. Though there were numerous additions and changes, the most important pertained to appellate procedure. The 1933 Rules underwent minor revision in 1939.

The current 1945 Court Rules were enacted after study and consultation with the State Bar Committee on Civil Procedure, a Special Committee of the Michigan Judges' Association, the Michigan Committee of the American Bar Association on Improving the Administration of Justice, several individual members of the Bench and Bar of Michigan, and the Justices of the Supreme Court.

While many additions, changes, and amendments in the rules were suggested by the various committees and associations, the Court de-

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cided against any wholesale redrafting, but, though the revision is not radical, many changes and amendments were made. To mention just a few of the additions and changes, the 1945 Court Rules incorporate the subject matter of Rule 23(a) of the Federal Rules of Civil Procedure governing Class actions and Fiduciary Proceedings (Rule 16, § 1). Provision is made for the extensive use of the Pre-Trial procedure which has been so successful in Wayne County (Rule 35, § 4). The method of taking defaults is simplified (Rule 28, § 3). The Rules permit the use in civil actions of a jury of less than twelve, or a verdict of a stated majority (Rule 37, § 14), and the reference of chancery suits to circuit court commissioners for the taking of testimony is prohibited except under certain conditions (Rule 46, § 5).

Too frequent or inconsequential alteration of Court Rules is concededly undesirable; and it is hoped that the present rules may, for some considerable time, adequately serve the needs of the Bench and Bar of Michigan. While great strides have been made in the direction of achieving a single Code of Court practice and procedure, the practice in courts of record in Michigan is still governed by both statutes and Court Rules. It is, consequently, imperative that the statutes, as well as the Court Rules, be complied with in matters of procedure. In correlating the statutes and Rules governing procedure, the Comment and Annotations herein should be of great aid to the profession.

PREFACE

PART I. HISTORY AND NATURE OF NEW PROCEDURAL LAWS

History of Adoption

An entirely new set of procedural laws become effective January 1, 1963. The Legislature enacted a complete revision of the procedural statutes which are designated as the Revised Judicature Act of 1961 (Act No. 236, P.A.1961). The Supreme Court of Michigan adopted a completely new set of court rules which are designated as the General Court Rules of 1963. Both the statutes and rules become effective January 1, 1963.

The enactment of these rules and statutes represents the first full revision of the procedural laws since adoption of the Judicature Act of 1915. Principal credit for the preparation of the subject matter of the rules and statutes belongs to the Joint Committee on Michigan Procedural Revision. This Committee was appointed in 1956 by the joint action of the State Bar, the Supreme Court and the Legislature. The Committee consisted of some thirty men, lawyers, judges and legislators, who served long and devotedly in the course of this task during a period of some four years.

The initial draftsmanship was prepared by Professor Charles W. Joiner, of the University of Michigan Law School, and members of his staff. These drafts were in turn submitted to the members of the Committee for study. Frequent meetings of the Committee were held to resolve many divergent views before acceptance of proposed revisions. After the Committee prepared its preliminary draft, it was printed in the Michigan State Bar Journal and promulgated to the procedure committees of the many local bar associations throughout the state. After considering many hundreds of amendments, several hundred of them were adopted before final recommendation to the Legislature and the Supreme Court. A number of amendments were made by the Legislature before adopting the statutes. In turn, many amendments were made by the Supreme Court in the course of a number of meetings with a sub-committee of the Joint Committee, headed by Jason L. Honigman, before final adoption of the Rules. As a result of comments

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from members of the judiciary and bar and further work of the subcommittee, a number of amendments were made in the Rules after their initial adoption but prior to their effective date. The Rules as printed are in their amended state as of the effective date.

Full cooperation of members of the Supreme Court and of the Legislature was given towards effectuating this monumental task. As Chairman of the Joint Committee, Professor Joiner carried the brunt of the labor and is entitled to principal credit for the basic concepts of the new procedural laws. They represent a major milestone in the improvement of the administration of justice in this state.

Nature of Changes

In addition to the many important changes incorporated in these new laws, of major significance are (1) the integration of the Rules and Statutes; (2) the codification of many procedural practices; and (3) the simplification of procedural laws by the elimination of many technical requirements.

A basic facet of our procedural laws is that they are necessarily the joint product of laws passed by the Legislature and rules adopted by the Supreme Court in the exercise of its constitutional powers over procedural matters. This twin-headed source of power is inevitably intertwined as a result of the inter-relation between substantive laws, which the Legislature controls, and the means of their enforcement, which is the province of the Supreme Court. Moreover, it is difficult in many areas to clearly delineate between what is procedural and what substantive.

In the course of many years of regulation of procedure by both statutes and rules, many inconsistencies and much confusion were created. After enactment of the 1915 Judicature Act, literally hundreds of amendments were added in the intervening years, not always consistent with each other or the original Act. At the same time, the Supreme Court adopted court rules of ever widening scope and often without particular heed to statutory provisions in the same area of procedure. From the welter of applicable rules, statutes and common law decisions, the courts and lawyers often found great difficulty in apprehending the true state of the law. Thus, the integration of the statutes and rules and the concomitant codification of many specified procedures is perhaps the greatest single boon of the revision.

Towards this end, a basic concept was acceptance of the principle that the primary responsibility for the enactment of procedural laws rests with the Supreme Court, rather than with the Legislature. Sub-

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stantive rights and powers are clearly the province of the Legislature. The means of enforcement of such rights are the province of the Supreme Court through its enactment of the rules. To achieve the aim of integration, the statutes spell out the rights enacted and generally provide for enforcement by methods to be covered by court rules. With this approach, the areas of conflict between the rules and statutes have been minimized. It is inevitable, however, that the delineation between procedural and substantive rights will in the future leave areas of doubt which can only be resolved by the mutual respect which must be accorded each other by the Supreme Court and the Legislature as coordinate and equal branches of the government.

In the course of the revision of the statutes, a total of some 1,400 sections were eliminated from the Judicature Act. About 900 of these sections covered subject matter which is now incorporated in the rules, while some 500 sections were combined with other portions of the statutes, to improve clarity and eliminate redundancy.

The codification of the procedural laws is primarily to be found in the Rules. Many areas of procedural laws were codified and put in one easily accessible place which heretofore could be ascertained only by a search through scattered statutes, separate court rules, common law decisions, local rules and practical procedures evolved from common usage. The problem of ascertainment and compliance with procedural requirements has thereby been simplified, with resultant benefits in saving of time and expense in the rendition of legal services.

Despite the many changes appearing in the new procedural laws, the vast majority of the pre-existing procedural practices remain unchanged. For the most part, the changes are not innovations. Where material changes have been made, they are often adaptations from federal or other state court practice. After a study of procedural systems throughout the country, many tested procedural improvements were incorporated into the framework of the new procedural laws of this state.

Simplification of procedural laws has been further enhanced by the elimination of many cumbersome and time consuming procedures, with primary emphasis upon attainment of substantive justice. Hindrances, delays and pitfalls attributable to the niceties and technicalities of procedural requirements have been mitigated. Throughout the rules are admonitions for their liberal construction with direction to disregard procedural mistakes which do not affect the substantive rights of the parties. See Rules 13, 102.3, 110.3, 118 and 529.

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The changes in the Rules and Statutes have produced many significant changes in the procedural practice of this state. Among these are:

(1) Combining Law and Equity.

Elimination of procedural distinctions between law and equity is one of the major changes. On its face this concept may seem awesome and revolutionary in the light of the basic differences of law and equity jurisdiction that permeate our entire legal structure. It must be borne in mind, however, that the area of change affects only the procedural distinctions.

The admonition to abolish distinctions between law and equity appeared in our State Constitution in 1850 and was repeated in our present Constitution which was enacted in 1908. Some thirty states and the federal courts have already adopted the elimination of the procedural differences between law and equity. No change in the substantive rights which call for equitable relief are involved. Nor is there any elimination of the right of trial by jury. In all issues which under pre-existing law were to be tried by jury, the right to trial by jury remains.

Instead of chancery actions and law actions, all actions are designated as "civil actions". There will still be law and equitable actions in the sense of the nature of the claim as well as the relief which is sought.

While the initial pleading in a chancery suit was formerly designated a "bill of complaint" and in a law action a "declaration", we now have the single designation "complaint", which is applicable to all civil actions whether seeking relief of legal or equitable nature. The determination of whether legal or equitable relief is warranted remains dependent, as it has always been, on the nature of the rights asserted and the relief sought which are the subject of the complaint. The term "decree" will no longer be used. Instead, the final order in an action involving law or equitable rights is designated as a "judgment".

Certain significant consequences do flow, however, from the elimination of the procedural separation of law and equity. Law claims may now be joined with equity claims in a single complaint. For example, you may sue for damages for trespass and in the same case seek injunctive relief against continuance of the trespass in the future. Instead of the pre-existing requirement of a law action for damages for past trespass and an equity suit for injunction against future trespass,

SUBCHAPTER 1.200 AMENDMENT OF MICHIGAN COURT RULES

Rule 1.201 Amendment Procedure

§ 1201.1 In General

§ 1201.2 Public Participation

SUBCHAPTER 1.100 APPLICABILITY; CONSTRUCTION

Rule 1.101 Title; Citation

These rules are the “Michigan Court Rules of 1985.” An individual rule may be referred to as “Michigan Court Rule _____”, and cited by the symbol “MCR _____”. For example, this rule may be cited as MCR 1.101.

[Effective March 1, 1985.]

COMMENTS

1985 Staff Comment

MCR 1.101 corresponds to the second paragraph of GCR 1963, 11.1.

The Michigan Court Rules of 1985 are based on the proposal of the Committee To Revise and Consolidate the Court Rules, which was originally published in 1978. See 402A Mich. Revisions were made in response to comments received, and additional proposals were developed that had not been included in the earlier publication. On July 29, 1983, the Supreme Court ordered that the revised draft be published for comment. See 417A Mich. A committee of judges and lawyers was appointed to review the comments and to advise the Court as to whether further modifications should be made. After the submission of the committee report, the Supreme Court again considered the rules and adopted them in the present form.

These rules replace the General Court Rules of 1963, the Rules of the Court of Claims, the District Court Rules, the Probate Court Rules of 1972, and the Juvenile Court Rules of 1969. They take into account all amendments of the former rules through July 31, 1984. The Michigan Court Rules do not replace the Michigan Rules of Evidence, the Code of Professional Responsibility and Canons, the Code of Judicial Conduct, the Rules Concerning the State Bar, and the Rules for the Board of Law Examiners.

The notes [staff comments] that follow each rule were prepared by the Supreme Court staff to assist the reader in identifying the substantive changes that the rules make from prior Michigan practice. They have not been approved by the Supreme Court, and should not be considered an authoritative construction of the rules.

Research References

West's Key Number Digest
Courts ¶81

Legal Encyclopedias
C.J.S., Courts § 178