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VIA EMAIL ONLY

April 30, 2015

Office of Administrative Counsel  
PO Box 30052  
Lansing, MI 48909

RE: ADM File No. 2013-26, Proposed Amendments of Rule 7.209 of the Michigan Court Rules

Dear Administrative Counsel:

The proposed rule changes, while intending to clarify bond and stay procedure, merely make the procedure more confusing. The undersigned offers a third alternative rule change that comprehensively revises the existing rules pertaining to stay bonds, and eliminates cross references to other rules.

**Current Court Rules:**

Under the current court rules, the filing of a bond operates to stay proceedings absent an objection as to the sufficiency of a surety. A bond on an SCAO-approved form complies with the requirements of MCR 7.209(F) and MCR 3.604(D)(1) and (2). Under MCR 7.209(G), a bond meeting these requirements must be filed with the clerk of court.

MCR 7.209(G)(1) makes clear that a bond need not be approved before filing; however, it is subject to the objection procedure in MCR 3.604. If a copy of the bond is served on opposing counsel in accordance with MCR 3.604(D)(3) and MCR 2.107, and no objection is filed within seven days in accordance with MCR 3.604(E) and (F), then all objections to the surety are waived. A stay bond filed before execution issues will stay execution under MCR 7.209(H)(1).

While MCR 7.209(E)(1) indicates that the court has discretion to grant a stay either with or without a bond, the remainder of the court rule makes clear that discretion is limited to whether a bond is required. See, for instance, MCR 7.209(E)(2), which states that a stay bond that substantially meets the requirements of MCR 7.209(F) is sufficient to stay proceedings of a subsequently filed appeal. See, also MCR 7.209(H)(1).

The current rules make sense. A stay bond protects the appellee's interest by assuring that the appellee will eventually be paid should the trial court ruling be

affirmed, while at the same time protecting the appellant's interest by protecting the appellant's assets in the event of a reversal. If a stay bond is not sufficient to stay proceedings, and a trial court has the discretion to deny the stay even though a stay bond is filed, then an appellant may be forced to pay a judgment to an appellee who may not be able to reimburse the judgment should the appeal result in reversal. Thus, while the appellant may technically still have the right to appeal, and may win on appeal, such a victory will be hollow if the appellant is unable to protect the subject matter of the appeal. While clarification of the current rules to reflect this Court's intent may be helpful, the proposed alternatives do not clarify.

**Alternative A:**

Alternative A is entitled, "Would Require a Court to Enter an Order Staying Enforcement on Appeal." The title is somewhat ambiguous. Does it mean that a stay bond is no longer sufficient and a court order is now required to stay proceedings? Or does it mean that the trial court *must* enter a stay order if a stay bond is filed? Regardless which interpretation is intended, the proposed rule change does not effectuate the intent. If a bond is no longer sufficient and a court order is now required to stay bond proceedings, the remainder of MCR 7.209 and potentially MCR 3.604 need to be changed to remove the waiver of objections to surety and automatic stay provisions. On the other hand, if the trial court *must* enter a stay order if a stay bond is filed, then the rule should explicitly state somewhere that the trial court *shall* enter a stay order if a stay bond is filed instead of simply stating "If a court enters an order . . ." as indicated in the proposed change. The proposed change merely muddies the water, making it less clear that a bond is sufficient to stay proceedings but not going so far as to say that there is no stay unless the court enters one.

**Alternative B:**

Alternative B states that it "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." No amendment is needed to effectuate this intent. This is already the procedure under the court rules. The proposed amendments, if intending to clarify this process, have fallen short of their intended goal. For instance:

- MCR 7.209(E)(2)(a) lists two promises by the appellant, which must be contained in the stay bond, whether civil or criminal. MCR 7.209(E)(2)(b) is amended to remove any requirement to comply with MCR 7.209(F). However, MCR 7.209(F) – re-labeled Conditions of "Stay" Bond – still remains as part of the rules. MCR 7.209(F)(1) contains five promises by the appellant, which must be contained in the stay bond in a civil case. MCR 7.209(F)(2) contains six promises by the appellant, which must be contained in the stay bond in a criminal case. Do the promises in MCR 7.209(F) still require compliance? Arguably, the removal of the compliance requirement in MCR 7.209(E)(2)(b) would indicate not.

- MCR 7.209(E)(2)(c) states that when a bond is filed, the judgment or order shall be stayed pending entry of a final order under subsection (G). However, subsection (G) does not refer to a final order. While MCR 7.209(E)(2)(c) states that the filing of the bond will stay proceedings, the language in MCR 7.209(G)(1), which used to permit filing of the bond without prior approval of the court, has now been stricken. If the bond can no longer be filed without court approval, does that mean that the judgment or order may not be stayed under MCR 7.209(E)(2)(c)?
- Proposed MCR 7.209(G)(1)(a) states that the party seeking a stay shall file a proposed stay order pursuant to MCR 2.602(B)(3). However, MCR 2.602(B)(3) refers to the seven-day notice provisions after granting of a judgment or order. And it only permits objections regarding the accuracy or completeness of the judgment or order. See MCR 2.602(B)(3)(b). If the court has not yet granted a judgment or order of stay, how does the appellant comply with the provisions of MCR 2.602(B)(3) by filing a proposed stay order within seven days? Seven days of what?
- Proposed MCR 7.209(G)(1)(b) relevantly states that objections to the amount of the bond are governed by MCR 2.602(B)(3). However, as previously noted, the only objections permitted under MCR 2.602(B)(3) are contained in MCR 2.602(B)(3)(b), which pertain to the accuracy or completeness of the judgment or order.
- Proposed MCR 7.209(G)(1)(b) relevantly states that objections to the amount of the bond are governed by MCR 2.602(B)(3), while objections to the surety are governed by MCR 3.604(E). Under MCR 2.602(B)(3), the objecting party must notice up a hearing and prepare an alternative proposed judgment (bond?). MCR 3.604(E) does not contain any provisions for objections; those provisions are contained in MCR 3.604(F), and they require the objecting party to move for a hearing on objections to the bond. Therefore, proposed MCR 7.209(G)(1)(b) could potentially result in two different procedures and two different hearings. This is not an efficient use of judicial resources or the parties' time.
- Proposed MCR 7.209(G)(1)(e) permits hearings on bonds to be conducted by telephone. However, MCR 7.209(A)(2) states that a motion for bond or stay may not be filed in the Court of Appeals unless such a motion was decided by the trial court, and MCR 7.209(A)(3) states that a motion for bond or stay in the Court of Appeals must include a copy of the trial court's opinion or order, and a copy of the transcript of the hearing on the motion in the trial court. It is unclear how a party is to obtain a copy of the

transcript of the hearing on the motion when the hearing is conducted by phone.

- Proposed MCR 7.209(G)(1)(f) provides that the trial court may set the amount of bond in a greater or lesser amount adequate to protect the interests of the parties. There are no guidelines in MCR 7.209 with regard to what that amount might be. MCR 7.108(B)(2)(a) offers a presumptively sufficient formula for setting the amount of a stay bond: “not less than 1-¼ times the amount of the judgment.” This amount makes sense as it provides for two years of 12 percent interest on the judgment, plus compounding of the interest. It would be helpful to bench and bar if a similar rule pertaining to presumptively sufficient amounts could be incorporated in MCR 7.209.
- While bonds and stays are under consideration, it is recommended that a pre-1990 case of the Court of Appeals, *McMillan v DAIIIE*, 96 Mich App 75; 292 NW2d 165 (1980), be effectively overruled by rule. It held that an insurer appealing a first-party judgment against it could not post the policy as bond under MCL 500.3036. This creates unnecessary busy work for courts and insurers and exposes insureds to taxable costs for a bond premium. A surety for an insurer adds no protection for an appellee.

#### **Newly Proposed Alternative:**

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 by 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.

(a) 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.

(b) If a government party files a claim of appeal from an order described in MCR 7.202(6)(a)(v), the proceedings shall be stayed during the pendency of the appeal, unless the Court of Appeals directs otherwise.

(2) A motion for ~~bond or for~~ a stay pending appeal may not be filed in the Court of Appeals unless such a motion was decided by the trial court.

(3) A motion for ~~bond or~~ a stay pending appeal filed in the Court of Appeals must include a copy of the trial court’s opinion and order, and a copy of the transcript of the hearing on the motion in the trial court.

**(B) Stay of Proceedings by Trial Court.**

(1) Except as otherwise provided by law or rule, the trial court may order a grant a motion to stay of proceedings, with or without a bond as justice requires.

(a) The trial court may order the party seeking a stay of proceedings to file a bond as a condition of the stay.

(b) When If the trial court orders a stay of proceedings conditioned upon the filing of a bond, stay is sought before an appeal is filed and a bond is required, the party seeking the stay shall file a bond, with the party in whose favor the judgment or order was entered, as the obligee, by which the party promises to which meets the standards set forth in subrules 7.209(D) and (E).

(2) The stay order must conform to any condition expressly required by the statute authorizing review.

**(C) Stay of Proceedings by Posting Bond**

(1) A party seeking a stay of proceedings may post a bond that meets the conditions of subrule 7.209(D) in lieu of filing a motion for stay. The bond must be filed with the clerk of the court which entered the order or judgment to be stayed, and served on the opposing party in the manner prescribed in MCR 2.107. Proof of service must be filed promptly with the court in which the bond has been filed.

(a) 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 subrule 7.209(E).

(b) Criminal Cases. A criminal defendant filing a bond after conviction shall give notice to the county prosecuting attorney of the time and place the bond will be filed. The bond is subject to the objection procedure provided in subrule 7.209(E).

(2) If a bond is filed before execution issues, execution is stayed. If the bond is filed after the issuance, and notice is given to the officer holding it, execution is suspended.

(3) A statute exempting a municipality or other governmental agency from filing a bond to stay execution supersedes the requirements of this rule.

**(D) Conditions of Appeal Bond.**

(1) A surety on a bond, except for a surety company authorized to do business in Michigan, must execute an affidavit that he or she has pecuniary responsibility and attach the affidavit to the bond. In alleging pecuniary responsibility, the surety must affirm that he or she owns assets not exempt from execution having a fair market value exceeding his or her liabilities by at least twice the amount of the bond.

(2) Civil Actions. In a bond filed for stay pending appeal in a civil action, the appellant shall promise in writing:

- (a) to prosecute the appeal to decision;
- (b) to perform or satisfy a judgment or order of the Court of Appeals or the Supreme Court;
- (c) to perform or satisfy the judgment or order appealed from, if the appeal is dismissed;
- (d) in an action involving the possession of land or judgment for foreclosure of a mortgage or land contract, to pay the appellee the damages which may result from the stay of proceedings; and
- (e) to do any other act which is expressly required in the statute authorizing appeal.

(3) Criminal Cases. A criminal defendant for whom bond pending appeal is allowed after conviction shall promise in writing:

- (a) to prosecute the appeal to decision;
- (b) if the sentence is one of incarceration, to surrender himself or herself to the sheriff of the county in which he or she was convicted or other custodial authority if the sentence is affirmed on appeal or if the appeal is dismissed;
- (c) if the judgment or order appealed is other than a sentence of incarceration, to perform and comply with the order of the trial court if it is affirmed on appeal or if the appeal is dismissed;
- (d) to appear in the trial court if the case is remanded for retrial or further proceedings or if a conviction is reversed and retrial is allowed;
- (e) to remain in Michigan unless the court gives written approval to leave; and
- (f) to notify the trial court clerk of a change of address.

#### **(E) Objections to Amount of Bond or Sufficiency of Surety**

(1). A party for whose benefit a bond is given may, within 7 days after service of a copy of the bond, serve on the officer taking the bond and the party giving the bond a notice that the party objects to the sufficiency of the surety or amount of the bond. Failure to do so waives all objections.

(2) Notice of objections must be filed as a motion for hearing on objections to the bond.

(a) On demand of the objecting party, the surety must appear at the hearing of the motion and be subject to examination as to the surety's pecuniary responsibility or the validity of the execution of the bond.

(b) After the hearing, the court may approve or reject the bond as filed or require an amended, substitute, or additional bond, as the circumstances warrant.

(3) The trial court may order an additional or different bond, set the amount, and approve or require different sureties

(4) Amount of Bond.

(a) In civil actions, a bond in the amount of not less than 1-¼ times the amount of the judgment or order being enforced, including any costs, interest, attorney fees, and sanctions assessed to the date of filing the bond, is in an amount presumptively sufficient to stay proceedings pending the appeal.

(b) An insurance company may post its policy in lieu of a bond as surety of either its insured's liability or its own liability. When the amount of the judgment is more than \$1000 over the insurance policy coverage or surety obligation, then the policy or obligation does not qualify to stay execution on the portion of the judgment in excess of the policy or bond limits. Stay pending appeal may be achieved by filing a bond in an additional amount adequate to protect the opposite party or by obtaining a trial court or Court of Appeals order waiving the additional bond.

(c) In a criminal case the granting of bond pending appeal and the amount of it are within the discretion of the trial court, subject to applicable law and rules. Bond must be sufficient to guarantee the appearance of the defendant. Unless bond pending appeal is allowed and a bond is filed with the trial court, a criminal judgment may be executed immediately, even though the time for taking an appeal has not elapsed.

#### **(F) Review by Court of Appeals.**

(1) Except as otherwise provided by rule or law, on motion filed in a case pending before it, the Court of Appeals may amend the amount of bond set by the trial court, order an additional or different bond and set the amount, or require different or additional sureties. The Court of Appeals may also refer a bond or bail matter to the court from which the appeal is taken. The Court of Appeals may grant a stay of proceedings in the trial court or stay of effect or enforcement of any judgment or order of a trial court on the terms it deems just.

(2) The Court of Appeals may stay or terminate a stay of any order or judgment of a lower court or tribunal on just terms.

**(G) Ex Parte Stay.** Whenever an ex parte stay of proceedings is necessary to allow a motion in either the trial court or the Court of Appeals, the court before which the motion will be heard may grant an ex parte stay for that purpose. Service of a copy of the proposed order, with a copy of the motion, any affidavits on which the motion is based, and notice of hearing on the motion, shall operate as a stay of proceedings until

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| the court rules on the [ex parte](#) motion unless the court supersedes or sets aside the order in the interim. Proceedings may not be stayed for longer than necessary to enable the party to make the motion according to the practice of the court, and if made, until the decision of the court.

Sincerely,

**Willingham & Côté, P.C.**

/s/ Kimberlee A. Hillock

KAH/nlh

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