**STATE OF MICHIGAN**
COURT OF APPEALS

WILLIAM C. WHITBECK
CHIEF JUDGE

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August 29, 2003

Mr. Corbin Davis
Clerk of the Michigan Supreme Court
Michigan Hall of Justice
P.O. Box 30052
Lansing, Michigan 48909

RE: ADM File No. 2002-34
Proposed Amendment of Rules 7.204, 7.210, 7.211, 7.212, and 7.216 of the Michigan Court Rules

Dear Mr. Davis:

I. Discussions With The State Bar Of Michigan

On July 16, 2002, the Court of Appeals submitted a number of proposed court rule changes to the Michigan Supreme Court as part of our on-going delay reduction effort. A copy of these proposed court rule changes is attached at Tab 1. By its order entered March 11, 2003, the Supreme Court published these proposed rules for comment, with the comment period expiring June 1, 2003 and with the item likely to appear on the agenda of the public hearing scheduled for June 19, 2003. Our proposed effective date for the court rule changes was September 1, 2003.

On April 25, 2003, however, I wrote to you to note that I had been engaged in a number of discussions with representatives of the State Bar of Michigan and with the Appellate Practice Section of the State Bar. These discussions opened up the possibility that we could arrive at a consensus position on some or all of our court rule change proposals. I therefore requested that the Supreme Court take the following actions: (1) extend the time for filing comments, (2) place this matter on the agenda for a public hearing in September, 2003, and (3) consider a revised effective date for the proposed rule changes. Thereafter, the Supreme Court extended the time for filing comments on the proposed rule changes until September 1, 2003. The public hearing is scheduled for September 25, 2003.

Our discussions with the representatives of the State Bar were, we believe, both extensive and informative. Basically, these discussions centered on the possibility of developing a

differentiated case management system at the Court of Appeals that might work to substantially reduce the time it takes to process an opinion case through the first phase of our processing, which we refer to as Intake. Ultimately—and most reluctantly—I reached the conclusion that it would not be possible for the Court of Appeals and the State Bar to make a joint proposal to the Supreme Court at this time. This does not mean that our Court has abandoned efforts to reach agreement with the State Bar on this most important subject. Our Court remains willing to consider a differentiated case management proposal from the State Bar in addition to, *but not in lieu of*, our court rule change proposals. To this end, we continue to share information with the State Bar and await a concrete proposal from that organization dealing with this subject. I am attaching at Tabs 2 and 3 an interchange of letters between Scott Brinkmeyer, President-Elect of the State Bar, and me that summarize the course of our discussions.

## II. Delay Reduction At The Court Of Appeals

As the Supreme Court is aware, in March of 2002 the Court of Appeals adopted a long-range goal of disposing of 95% of all appeals filed with it within 18 months of filing, commencing with those cases filed on and after October 1, 2003. To meet this long-range goal, the Court adopted two objectives:

- *First*, we determined that we would need to reduce the time to process an opinion case from its 2001 level of 653 days to approximately 497 days. We designed a number of actions, to take effect over the summer and fall of 2002 and through the commencement of FY 2004 on October 1, 2003, to meet this first objective.
- *Second*, we determined that we would then need to further reduce the time it takes to process an opinion case to approximately 300 days, commencing with appeals filed on and after October 1, 2003. This means that we must substantially reduce or eliminate the component in processing time that we call the "Warehouse."

To date, the results of this plan have been quite impressive. As shown below, the average number of days that it takes to decide an opinion case has declined dramatically:

| 2001 | 2002 | 2003 1st Six Months |
|---|---|---|
| 653 | 603 | 559 |

Our first efforts were directed at reducing the delay in the Judicial Chambers; we decided that the Judges of this Court must lead the way in any delay reduction effort. Consequently, we take some considerable pride in the fact that the decline in the time it takes to decide an opinion case has been particularly marked in the Judicial Chambers:

| 2001 | 2002 | 2003 1st Six Months |
|---|---|---|
| 61 | 40 | 30 |

We have also made considerable progress in reducing the delay that occurs in the "Warehouse," the term that we apply to the phase in processing in which cases that have come out of the Intake phase cannot be assigned to our Research Division due to lack of capacity in that Division:

| 2001 | 2002 | 2003 1st Six Months |
|---|---|---|
| 271 | 261 | 232 |

There has also been some reduction in the time an opinion case spends in the Intake phase. However, many of the opinion cases disposed of in 2002 and in the first six months of 2003 reached, and passed through, the Intake phase *before* the adoption of our delay reduction plan. Thus, while the reduction in time in Intake is a positive development, it cannot be fully ascribed to our delay reduction efforts to date. But this 22-day reduction has, as I will describe more fully below, allowed us to make some revisions to our rule change proposals.

| 2001 | 2002 | 2003 1st Six Months |
|---|---|---|
| 260 | 240 | 238 |

While we are most gratified with the improvements that we have made at the Court over the last 17 months, we recognize that considerably more needs to be done. Chart 1 summarizes the further progress that will be needed to meet the Court's first objective of reducing the average time it takes to dispose of an opinion case from the 2001 level of 653 days to 497 days commencing fully on October 1, 2003.

**Chart 1**
**October 2003 Objective**

| | 2001 | 2002 | 2003 First Six Months | Improvement To Date | First Objective | Improvement Needed To Meet First Objective |
|---|---|---|---|---|---|---|
| Intake | 260 | 240 | 238 | 22 | 173 | 65 |
| Warehouse | 271 | 261 | 232 | 39 | 217 | 15 |
| Research | 61 | 62 | 59 | 2 | 61 | (2) |
| Judicial Chambers | 61 | 40 | 30 | 31 | 46 | (16) |
| Total | 653 | 603 | 559 | 94 | 497 | 62 |

Chart 2 summarizes the additional progress that will be needed to meet the Court's second objective of reducing the average time it takes to dispose of an opinion case from the 2001 level of 653 days to approximately 300 days by September of 2004.

## Chart 2
## September 2004 Objective

| | 2001 | 2002 | 2003 First Six Months | Improvement To Date | Second Objective | Improvement Needed To Meet Second Objective |
|---|---|---|---|---|---|---|
| Intake | 260 | 240 | 238 | 22 | 173 | 65 |
| Warehouse | 271 | 261 | 232 | 39 | 0 | 232 |
| Research | 61 | 62 | 59 | 2 | 61 | (2) |
| Judicial Chambers | 61 | 40 | 30 | 31 | 46 | (16) |
| Total | 653 | 603 | 559 | 94 | 280 | 279 |

To relate these objectives to our overall goal, currently we are disposing of 70.41% of all of our cases within 18 months of filing. While we have dramatically increased the percentage of opinion case dispositions since 2001, we clearly also have to continue to make substantial improvement:

Percentage of Cases 18 Months Old Or Less At Disposition

| | 2001 | 2002 | 2003 YTD |
|---|---|---|---|
| Opinions | 25.03% | 33.33% | 49.64% |
| Orders | x[1] | 97.36% | 99.60% |
| Totals: | y[1] | 65.91% | 70.41% |

III. Eliminating Or Reducing The Delay In The Warehouse

As noted above, to achieve our overall goal of disposing of 95% of all of our cases within 18 months of filing, we must reduce our overall average processing time for opinion cases to approximately 300 days. This, among other things, means that the Court must drastically reduce or eliminate the Warehouse. The basic deterrent here is the capacity of the Research Division. The current staffing levels of the Research Division mean that it cannot, by itself, appreciably reduce the wait in the Warehouse, whose very existence derives from the fact that the Research Division is inadequately staffed. Conversely, if the Court were able to increase the number of attorneys in the Research Division, it would reduce the wait in the Warehouse. In our presentation of our budget request for FY 2004, we emphasized that, in order to meet our long-term goal, we must add attorneys to our Research Division to eliminate or drastically reduce the Warehouse.

[1] These data are not readily available from the Court's data base.

Fortunately, there was almost universal recognition of this urgent need. As part of an overall package of fee increase bills originated by the Supreme Court, supported by the Executive Branch, enacted by the Legislature, and signed by the Governor, the Court will receive approximately $525,000 more in revenues in FY 2004 from entry and motion fees than it received in FY 2003. These funds will allow the Court to increase its Research Division staff.

Indeed, the Court has already begun its build up of staff in the Research Division. In the second quarter of 2003, the total staffing level of the Research Division (Commissioners, Senior Research Attorneys and Prehearing Attorneys) remained fairly constant at approximately fifty-five attorneys, with approximately twenty-seven Prehearing Attorneys.[2] The Court anticipates that the new Prehearing Attorneys who began their employment in August of 2003 will push the average staff level to thirty-two to thirty-four Prehearing Attorneys for the third quarter of 2003. Beginning in the fourth quarter of 2003, the number of Prehearing Attorneys will again increase as a result the additional revenue generated from the increased filing fees, which will become effective on October 1, 2003. These actions will, we believe, allow us to eliminate or drastically reduce the time that an opinion case spends in the Warehouse.

## IV. Reducing The Delay In Intake

### A. The Court's Original Court Rule Change Proposals

As we build up our staff in the Research Division, we must also address the problem of the delay in Intake. As noted above, in 2001, an opinion case spent 260 days on average in Intake. In 2002, that time was 240 days on average and in the first six months of 2003 it was 238 days on average. The Court initially proposed to reduce the time a case spends in Intake to 173 days on average for those cases filed after October 1, 2003; these original court rule change proposals are contained at Tab 1.

### B. The APS Report And The Task Force Report

Since the time of our original proposals, we have had the opportunity to review the report of the Appellate Practice Section (the "APS Report") commenting on these proposals and the report of the State Bar of Michigan's Delay Reduction Task Force (the "Task Force Report"). While I will not comment extensively on these two documents, I do offer the following observations:

- The APS Report states that, "But as long as the warehouse exists at all (*i.e.* as long as the Court's backlog makes it necessary for briefed appeals to sit idle before the Court is able

[2] There was only a slight decrease in the number of Prehearing Attorneys that occurred as a result of the normal seasonal fluctuation. Because Prehearing is comprised primarily of recent law school graduates, the bulk of the new hires occur in March and August of each year (after the winter graduates take the February bar examination and the spring/summer graduates take the July bar exam, respectively). Between those two dates, the staffing level in Prehearing typically decreases slightly through attrition and stays low until the new hires start in March and August.

to work on them), shortening the time allowed for briefing will not shorten appeal duration." I agree; it was precisely for this reason that the Court pushed so hard for additional funding for the Research Division. Fortunately, while we did not receive all that we requested, we did receive sufficient additional funds to increase the staffing levels in our Research Division. Thus, commencing October 1, 2003, we will begin to eliminate the Warehouse or drastically reduce it. But even with such progress, we will not be able to meet our objective of processing opinion cases in 300 days on average. To do so, we must reduce the delay in the Intake phase.

- The APS Report states that, "In light of the warehouse, they (the Court's current extension policies which allow for stipulated extensions of 28 days, each, in the time for appellants and appellees to file their briefs) do not cause any 'delay' at all." Again, the fallacy is in the assumption that the Warehouse will continue to exist in its current form; it will not. And the practice of allowing stipulated extensions of time, *without the necessity for approval by the Court*, is simply bad court management. To our knowledge, no other court in Michigan has such a rule and few, if any, courts in the United States have such a rule or practice.

- The Task Force Report suggests that simply changing the definition of delay will solve part of the problem. The Report states that, "The court should start its clock when all briefs have been filed and the case is ready to go to one of the court's staff attorneys. And by redefining delay, the court cuts 263 days from its delay calculation." I emphatically do not agree. Those persons adversely affected by delay on appeal are not the lawyers; they are the litigants. To define the problem away does absolutely nothing to help these litigants, whose personal lives and business decisions will continue to be subject to considerable uncertainly because of delay on appeal. The Michigan judicial system places the Intake phase within the authority of the Court of Appeals. No other court has the authority to monitor the production of transcripts or the filing of appellate briefs. If the Court of Appeals does not manage this phase of the appellate process, it will not be managed at all. The net effect will be to greatly increase delay on appeal.

- The Task Force Report recommends a number of ways to accelerate the filing of transcripts. As the Supreme Court knows, the Chief Justice and I recently appointed a Record Production Work Group to address precisely this problem. I am hopeful that we can receive the legislative recommendations of that Work Group by mid-Fall so that those recommendations can be presented to the Legislature for consideration in this session. I do not, however, agree with the implicit suggestion that our proposed court rule changes should be placed on hold while this process is underway.

- Finally, the Task Force Report recommends that we "Change the culture of delay that afflicts every aspect of the appellate system. Until now, judges haven't really recognized the effect delay has on litigants." I could not agree more fully that we must change the culture of delay and I further agree that such a culture "afflicts" the appellate system. I respectfully note that it was the Judges of the Michigan Court of Appeals who in March of 2002 *unanimously* adopted a comprehensive delay reduction plan and it is the Judges of the Michigan Court of Appeals who have reduced the time an opinion case

spends in their Chambers by half while also significantly reducing the time in the Warehouse. I further respectfully suggest that it is now time for the lawyers who practice before this Court to recognize and take responsibility for the effect that delay in briefing has on the litigants who are, after all, their clients.

C. Revision To The Court Of Appeals' Proposed Rule Changes

We also have had the opportunity to review the comments that various persons and entities have submitted to the Supreme Court concerning our original court rule change proposals. Again, I do not propose to respond at length to these comments. In particular, however, I was struck with the comments made by Tim Baughman of the Wayne County Prosecutor's office, those made by the Prosecuting Attorneys Association of Michigan, as well as those made by several appellate criminal defense practitioners. While I obviously do not agree with all of their observations and recommendations, I do agree that, with criminal appeals, reducing the time for filing briefs may be counterproductive. But I hasten to add that this agreement extends only to the filing of the briefs and not to the portion of existing Rule 7.212 that allows for stipulated extensions of time.

With this in mind, we have made one revision to our proposals for changes in the court rules. Our revised court rule change proposals are contained at Tab 4. As is apparent, we continue to propose that the Supreme Court amend the rule to reduce the time to file the appellant's brief from 56 days to 42 days in *civil* matters, but we have eliminated that proposal for *criminal* matters. Most importantly, we continue to propose that stipulated extensions of time be eliminated altogether in both civil and criminal cases, while providing that the Court of Appeals may extend the time on motion but only for the specific time required and only for good cause shown.

The basic objection to the elimination of stipulated extensions of time appears to be that doing so will adversely affect the quality of all briefs filed with the Court. There might some merit to this argument if the practice of using such stipulations were universal. But it is not. Our data, attached at Tab 5, show the following percentage usage of such stipulations over the last three years:

| | 2001 | 2002 | 2003 | Three Years |
|---|---|---|---|---|
| Criminal | 63.76% | 63.70% | 63.15% | 63.65% |
| Civil | 55.75% | 54.15% | 57.03% | 55.20% |
| Family | 10.24% | 9.52% | 8.92% | 9.71% |
| Other | 45.45% | 56.46% | 55.81% | 53.38% |
| All Types | 52.97% | 52.31% | 52.56% | 52.61%[3] |

[3] Included within the category of "All Types" are two subcategories ("FA" and "Other") that are not included within criminal or civil cases.

Thus, while stipulations to extend time are used in almost two-thirds of criminal cases, the practice is certainly not universal even there. And when all types of cases are considered, stipulations to extend time are used in a little over fifty percent of all cases. So the suggestion that eliminating extensions, except for good cause, will drastically affect the quality of *all* of the briefs filed with the Court is simply not borne out by the data; on average, such stipulations are only used in about half of our cases.

V. Conclusion: Eliminating The Culture Of Delay In The Appellate Process

Overall, taking into account the revision to our proposed court rule changes and the data relating to the use of stipulations and motions to extend, we estimate that our revised changes will save approximately 54 days in the Intake phase:

**REVISED COURT RULE CHANGES**

| | Recommendation | Savings | |
|---|---|---|---|
| | | By Step | Aggregate |
| 1. | Reduce time for docketing statement from 28 to 14 days. | N/A | N/A |
| 2. | Reduce time for filing transcripts in summary disposition appeals from 91 to 42 days. | 10 Days | 10 Days |
| 3. | Delete stips to extend time to file appellant's brief by 28 days. | 11 Days[4] | 21 Days |
| 4. | Delete stips to extend time to file appellee's brief by 28 days. | 11 Days[4] | 32 Days |
| 5. | Allow extensions of time to file briefs for good cause only, not to exceed 14 days. | 7 Days[5] | 39 Days |
| 6. | Reduce time to file appellant's brief in civil cases from 56 days to 42 days. | 8 Days[6] | 47 Days |
| 7. | Reduce time to file lower court record from 21 days to 14 days. | 7 Days | 54 Days |
| 8. | Reduce time to file appellant's reply brief from 21 days to 14 days. | N/A | N/A |

The current time, on average, in Intake is 238 days. Adopting our revised court rule changes will reduce that time by 54 days, to 184 days. We believe that, when the reductions resulting from other actions are factored into the equation, a 54-day reduction will allow us to meet our overall goal of deciding 95% of our cases within 18 months of filing.

In closing, let me state my belief that the Judges at the Court of Appeals have done their job: the time in the Judicial Chambers has been cut in half and the time in the Warehouse has been reduced by 39 days through a variety of means, all of which involved more work in the Judicial Chambers. The Executive Branch and the Legislature have also done their job: commencing on October 1, 2003, we will have the necessary additional staff in our Research

[4] Derived from Summary for Stips, all types, days delay per case.
[5] Derived from Summary for Motions, all types, days delay per case.
[6] Sixty percent of the Court's dispositions by opinion are in civil cases. Eight days represents the proportional savings realized by reducing the briefing time by 14 days for civil cases.

Division to eliminate the Warehouse or reduce it dramatically. These actions take away the predicate for the opposition from some practitioners to our proposed court rule changes. Such court rule changes, these opponents contend, will not substantially reduce the overall time on appeal; rather, any shortening of the time in Intake will simply extend the time in the Warehouse. But if the Warehouse is eliminated or dramatically reduced, this contention falls of its own weight. Therefore, it is now time to directly address the delay in the Intake phase through changes to the court rules, particularly those relating to stipulated extensions of time. Simply put, these changes are essential to eliminating the culture of delay that has afflicted the appellate process for far too many years.

Sincerely,

William C. Whitbeck
Chief Judge, Michigan Court of Appeals

WCW/dp
cc: Justices of the Supreme Court
√Ms. Linda Mohney Rhodus (w/encl)
Mr. Scott Brinkmeyer (w/encl)

Enclosure

Proposed Amendment of Rules 7.204,
7.210, 7.211, 7.212, and 7.216
of the Michigan Court Rules

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[The present language would be amended as indicated below by underlining for new text and strikeovers for text that would be deleted.]

Rule 7.204 Filing Appeal of Right; Appearance(A) - (G)[Unchanged.]

(H ) Docketing Statement. In all civil appeals, within ~~28~~ 14 days after the claim of appeal is filed, the appellant must file ~~two copies~~ one copy of a docketing statement with the clerk of the Court of Appeals and serve a copy on the opposing parties.

(1) - (4) [Unchanged.]

Rule 7.210 Record on Appeal

(A) [Unchanged.]

(B) Transcript.

(1) Appellant's Duties; Orders; Stipulations.

(a)-(b) [Unchanged.]

(c) In an appeal from the circuit court in any action that relates solely to an order granting or denying summary disposition in whole or in part, or an order on motion for reconsideration thereof, only that portion of the transcript concerning the order appealed from need be filed. The appellee may file additional portions of the transcripts.

(c)-(e) [Renumbered (d)-(f), otherwise unchanged.]

(2) [Unchanged.]

(3) Duties of Court Reporter or Recorder.

(a) [Unchanged.]

(b) Time for Filing. The court reporter or recorder shall give precedence to transcripts necessary for interlocutory criminal appeals and custody cases. The court reporter or recorder shall file the transcript with the trial court or tribunal clerk within

(i)-(ii) [Unchanged.]

(iii) 42 days after it is ordered in any other interlocutory criminal appeal, ~~or~~ custody case, or appeal that relates solely to an order granting or denying summary disposition in whole or in part;

(iv) [Unchanged.]

The Court of Appeals may extend or shorten these time limits in an appeal pending in the Court on motion filed by the court reporter or recorder or a party.

(c)-(g) [Unchanged.]

(C) - (F) [Unchanged.]

(G) Transmission of Record. Within ~~21~~ 14 days after the briefs have been filed or the time for filing the appellee's brief has expired, or when the court requests, the trial court or tribunal clerk shall send to the Court of Appeals the record on appeal in the case pending on appeal, except for those things omitted by written stipulation of the parties. Weapons, drugs, or money are not to be sent unless the Court of Appeals requests. The trial court or tribunal clerk shall append a certificate identifying the name of the case and the papers with reasonable definiteness and shall include as part of the record:

(1)-(3) [Unchanged.]

(H)-(I) [Unchanged.]

Rule 7.211 Motions in the Court of Appeals

(A)-(B) [Unchanged.]

(C) Special Motions. [Unchanged.]

(1)-(7) [Unchanged.]

(8) Vexatious Proceedings. A party's request for damages or other disciplinary action under MCR 7.216(C) must be contained in a motion filed under this rule. A request that is contained in any other pleading, including a brief filed under MCR 7.212, will not constitute a motion under this rule. A party may file a motion for damages or other disciplinary action under

MCR 7.216(C) at any time within 21 days after the date of the order or opinion that disposes of the matter that is asserted to have been vexatious.

(D)-(E) [Unchanged.]

Rule 7.212 Briefs

(A) Time for Filing and Service.

(1) Appellant's Brief.

(a) Filing. The appellant shall file 5 typewritten, xerographic, or printed copies of a brief with the Court of Appeals within

(i)-(ii) [Unchanged.]

(iii) 56 days after the claim of appeal is filed, the order granting leave is certified, or the transcript is filed with the trial court or tribunal, whichever is later, in all other criminal cases. In a criminal case in which substitute counsel is appointed for the defendant, the time runs from the date substitute counsel is appointed or the transcript is filed, whichever is later. ~~The parties may extend the time within which the brief must be filed for 28 days by signed stipulation filed with the Court of Appeals.~~ The Court of Appeals may extend the time on motion, but only for the specific time required and only for good cause shown.

(iv) 42 days after the claim of appeal is filed, the order granting leave is certified, or the transcript is filed with the trial court or tribunal, whichever is later, in all other civil cases. The Court of Appeals may extend the time on motion, but only for the specific time required and only for good cause shown.

(b) [Unchanged.]

(2) Appellee's Brief.

(a) Filing. The appellee shall file 5 typewritten, xerographic, or printed copies of a brief with the Court of Appeals within

(i) [Unchanged.]

(ii) 35 days after the appellant's brief is served on the appellee, in all other cases. ~~The parties may extend this time for 28 days by signed stipulation filed with the Court of Appeals.~~

The Court of Appeals may extend the time on motion, but only for the specific time required and only for good cause shown.

(B)-(F)-(G)-(H)-(I) [Unchanged.]

Rule 7.216 Miscellaneous Relief

(A)-(B) [Unchanged.]

(C) Vexatious Proceedings.

(1) The Court of Appeals may, on its own initiative or the motion of any party filed under MCR 7.211(C)(8), assess actual and punitive damages or take other disciplinary action when it determines that an appeal or any of the proceedings in an appeal was vexatious because

(a)-(b) [Unchanged.]

(2) [Unchanged.]