Order

Michigan Supreme Court
Lansing, Michigan

February 2, 2022

Bridget M. McCormack,
Chief Justice

Brian K. Zahra
David F. Viviano
Richard H. Bernstein
Elizabeth T. Clement
Megan K. Cavanagh
Elizabeth M. Welch,
Justices

ADM File No. 2018-25

Amendment of Rule
7.312 of the Michigan
Court Rules

On order of the Court, notice of the proposed changes and an opportunity for comment in writing and at a public hearing having been provided, and consideration having been given to the comments received, the following amendment of Rule 7.312 of the Michigan Court Rules is adopted, effective May 1, 2022.

[Additions to the text are indicated in underlining
and deleted text is shown by strikeover.]

Rule 7.312 Briefs and Appendixes in Calendar Cases and Cases~~Oral~~ Argued~~ments~~ on the Application

(A) Form and Length. Briefs in calendar cases and cases to be argued on the application must be prepared in conformity with MCR 7.212(B), (C), (D), and (G) as to form and length. If filed in hard copy, ~~B~~briefs shall be printed on only the front side of the page of good quality, white unglazed paper by any printing, duplicating, or copying process that provides a clear image. Typewritten, handwritten, or carbon copy pages may be used so long as the printing is legible.

(B)-(D) [Unchanged.]

(E) Time for Filing. Unless the Court directs a different time for filing,

(1) the appellant's brief and appendixes, if any, are due

(a) within 56 days ~~after~~of the order granting the application for leave to appeal~~ is granted;~~, or

(b) within 42 days of the order directing the clerk to schedule oral argument on the application;

(2) the appellee's brief and appendixes, if any, are due

(a) within 35 days after the appellant's brief is served on the appellee in a calendar case, or

(b) within 21 days after the appellant's brief is served on the appellee in a case being argued on the application; and

(3) the reply brief is due

(a) within 21 days after the appellee's brief is served on the appellant in a calendar case, or

(b) within 14 days after the appellee's brief is served on the appellant in a case being argued on the application.

(F) [Unchanged.]

(G) Cross-Appeal Briefs. The filing and service of cross-appeal briefs are governed by subrule (F). An appellee/cross-appellant may file a combined brief for the primary appeal and the cross-appeal within 35 days after service of the appellant's brief in the primary appeal for both calendar cases and cases being argued on the application. An appellant/cross-appellee may file a combined reply brief for the primary appeal and a responsive brief for the cross-appeal within 35 days after service of the cross-appellant's brief for both calendar cases and cases being argued on the application. A reply to the cross-appeal may be filed within 21 days after service of the responsive brief in a calendar case and within 14 days after service of the responsive brief in a case being argued on the application.

(H) Amicus Curiae Briefs and Argument.

(1) An amicus curiae brief may be filed only on motion granted by the Court except as provided in subsection (2) or as directed by the Court.

(2) A motion for leave to file an amicus curiae brief (in both calendar cases and cases being argued on the application) is not required if the brief is presented by the Attorney General on behalf of the people of the state of Michigan, the state of Michigan, or an agency or official of the state of Michigan; on behalf of any political subdivision of the state when submitted by its authorized legal officer, its authorized agent, or an association representing a political subdivision; or on behalf of the Prosecuting Attorneys Association of Michigan or the Criminal Defense Attorneys of Michigan.

(3) An amicus curiae brief must conform to subrules (A), (B), (C) and (F), and,

(4) Unless the Court directs a different time for filing, an amicus brief must be filed

(a) within 21 days after the brief of the appellee has been filed or the time for filing such brief has expired in a calendar case, or

(b) within 14 days after the brief of the appellee has been filed or the time for filing such brief has expired in a case being argued on the application~~, or at any other time the Court directs~~.

(4)-(5) [Renumbered (5)-(6) but otherwise unchanged.]

(I)-(J) [Unchanged.]

(K) For cases argued on the application, parties should focus their argument on the merits of the case, and not just on whether the Court should grant leave.

Staff Comment: The amendment of MCR 7.312 incorporates into the Supreme Court rules the procedure to be followed for cases being argued on the application. These rules have been previously included in orders granting argument on the application. A new subrule (K) alerts parties to the fact that they should argue the merits of the case even for motions being heard on the application.

The staff comment is not an authoritative construction by the Court. In addition, adoption of an amendment in no way reflects a substantive determination by this Court.

[Concurring and dissenting statements begin on next page.]

MCCORMACK, C.J. (*concurring*). I concur in the order amending MCR 7.312 to incorporate our "mini oral argument on the application" (MOAA) process into the court rules. I write separately to explain why I believe retaining the MOAA procedure improves our administration of justice.

The Court first adopted the MOAA process in 2003, and we have greatly increased its use in recent years. Despite that fact, until today we had not amended our court rules to provide uniform timelines for filing briefs in MOAAs; rather, the Court set such timelines in individual MOAA orders. Today's amendments simplify that process.

The MOAA procedure serves an important purpose independent of granting leave to appeal—it allows the Court to hear oral argument in more cases, including cases that might not otherwise receive closer attention. Or to hear oral argument in a case where the Court of Appeals' decision appears erroneous, but is not so clearly erroneous as to warrant peremptory reversal. It thus broadens the scope of the Court's docket in a way that the grant leave/take peremptory action/deny leave framework did not allow.

I believe the MOAA procedure has served this Court well and will continue to do so in the future. Others think so too. After we published this proposal for public comment, the Court received positive feedback about the MOAA procedure. For example, the State Appellate Defender Office, which represents indigent criminal defendants in their appeals regularly in this Court, had this to say:

> An extraordinary number of leave applications the Court receives are from criminal appellants. Having a simpler, less time-consuming avenue of review available gives those parties—most of whom are incarcerated and poor—a better chance at having their cases examined at a level beyond the commissioners' reports or the Court's weekly conferences than the all-or-nothing scenario that previously existed. It gives the Court greater flexibility to order peremptory and more discre[te] forms of relief in individual cases, despite that the Court is not an error-correcting body. And it provides counsel better and more opportunities to educate and enlighten the justices regarding recurring problems and trends within the system. On balance, the Court, the parties, and the system have benefited from the MOAA procedure.

I respectfully disagree with Justice VIVIANO's view that the MOAA process has "diminished" or "devalued" oral argument. In recent years, we have limited most full grants to 20 minutes of argument per side, rather than the traditional 30. Thus, the grant and MOAA processes effectively now allow for roughly the same amount of argument. And we have lots of company in limiting oral arguments to less than 30 minutes. See, e.g., Supreme Court of Ohio, *Jurisdiction & Authority* <https://www.supremecourt.ohio.gov/SCO/jurisdiction/> (accessed January 27, 2022) [https://perma.cc/JY37-A6LF] (providing for 15 minutes of oral argument per side except

in death penalty cases); Texas Judicial Branch, *Supreme Court Oral Arguments* <https://www.txcourts.gov/supreme/oral-arguments/> (accessed January 27, 2022) [https://perma.cc/AA2X-4QMV] (providing for 20 minutes of oral argument per side); Florida Supreme Court, *A Visitor Guide to Oral Argument* <https://www.floridasupremecourt.org/Oral-Arguments/Visitor-Guide-to-Oral-Arguments> (accessed January 27, 2022) [https://perma.cc/N6AK-BFPA] (same). Some courts offer even less. See, e.g., State of Nebraska Judicial Branch, *Supreme Court Call* <https://supremecourt.nebraska.gov/courts/supreme-court/call> (accessed January 27, 2022) [https://perma.cc/6WES-PDMX] (providing for 10 minutes of oral argument per side). I know of no evidence that our sister courts' processes are diminished or their advocates frustrated by their shorter oral argument times.[1]

Finally, that other state supreme courts don't have a MOAA process isn't a reason to assume it is a vice rather than a virtue. Merit isn't measured by popularity. I believe that our MOAA procedure, while not without its imperfections, has proven to be a helpful tool in this Court's administration of justice. For these reasons, I am pleased to concur with the Court's amendment of MCR 7.312.

VIVIANO, J. (*dissenting*). When we published for comment the present changes to MCR 7.312, I suggested that the time had come to reconsider hearing cases argued on the application, or "mini oral arguments on the application" (MOAAs).[1] After receiving thoughtful comments on this topic, I now conclude that we should eliminate our MOAA procedure and return to the traditional practice of either granting or denying leave to appeal and occasionally resolving cases on a peremptory basis.

As I explained in my earlier statement, the MOAA procedure began in 2003 as a way to expand our consideration of cases. The four justices supporting the procedure envisioned it as a supplementary process that would not detract from our ability to hear and

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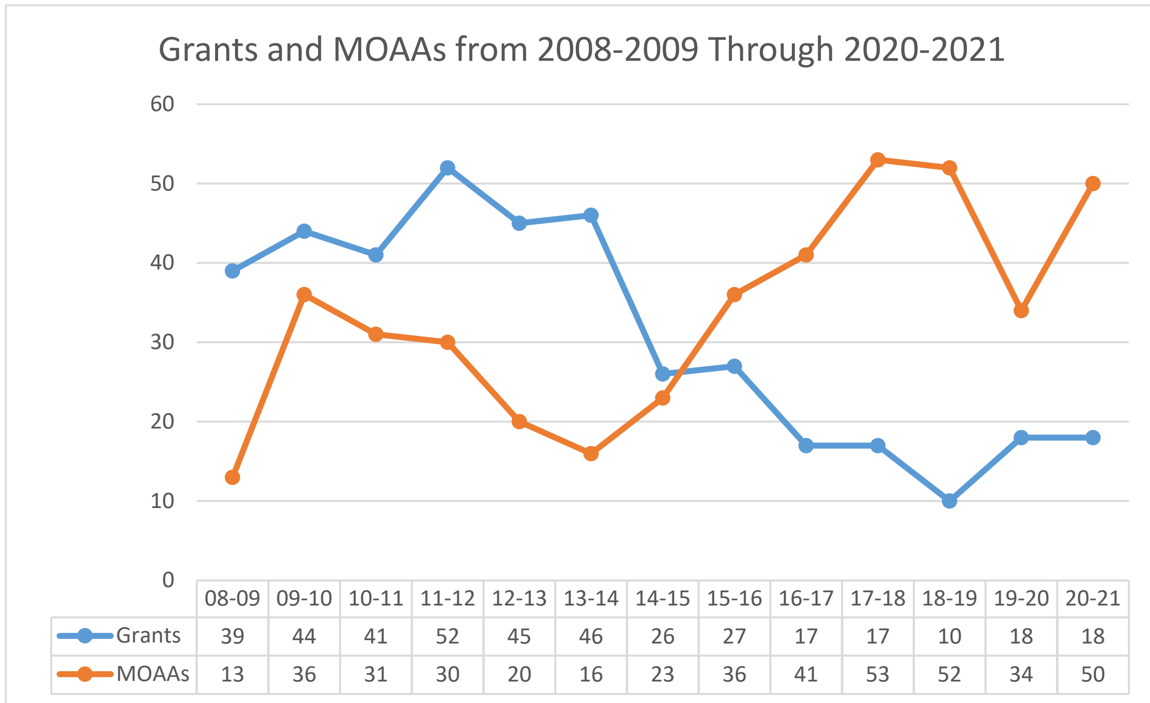
[1] Moreover, our court rules allow for the Chief Justice to extend the time for oral argument. MCR 7.314(B)(2). And arguments frequently stretch beyond the time allotted when the Court believes additional time is needed to fully engage all the issues presented. For just one recent example, see Michigan Supreme Court, Oral Arguments in *Detroit Caucus v Independent Citizens Redistricting Comm*, <https://www.youtube.com/watch?v=HwG2A9ajayU&t=58s> (accessed January 27, 2022).

[1] Proposed Amendment of MCR 7.312, 503 Mich 1303, 1305 (VIVIANO, J., concurring).

decide cases in which we granted leave to appeal.[2] But this prediction has not turned out to be true—at least not in recent years. Beginning in our 2014–2015 term, the number of cases in which we have granted leave to appeal has plunged, and starting with our 2015–2016 term, we began to hear many more cases as MOAAs than grants. In the 2016–2017 term, for example, we heard 41 MOAAs as compared to 17 grants. The following term, it was 53 MOAAs to 17 grants. The gap has remained about the same since that time.[3]



The results have not been good. One of the most significant problems is that we end up denying leave in a substantial portion of cases heard on MOAAs. A MOAA "give[s] the Court the option of disposing of a case after arguments without a decision on the merits by simply denying leave, instead of our traditional practice following a grant of

[2] MCR 7.302, 469 Mich cxlv, cxlvi (MARKMAN, J., concurring) (predicting that allowing oral argument on the application would "not come at the expense of fuller oral argument, but as an alternative to no oral argument at all.").

[3] In the 2018–2019 term, there were 52 MOAAs and 10 grants; in the 2019–2020 term, there were 34 MOAAs and 18 grants; and in the 2020–2021 term, we heard 50 MOAAs and 18 grants. Thus, during the past five terms, we averaged 46 MOAAs and 16 grants per term. By comparison, during the five terms before that, we averaged 25 MOAAs and slightly over 39 grants per term.

leave to appeal, i.e., entry of an order vacating the grant order and denying leave . . . ."[4] As Timothy Baughman, one of the commenters on the present proposal, noted, vacating a grant order on the ground that leave was improvidently granted (LIG) "is essentially viewed as an error in case selection, absent some change in circumstances that causes the LIG." Perhaps because of the perception that a LIG amounts to an admission of error, the prospect of a LIG is generally viewed as less appealing than a simple denial. But our LIG orders do not say that leave was improvidently granted—as noted, we simply vacate the order granting leave and then deny the application. Consequently, the results and even the labels are the same in cases denying leave after MOAAs and initial grants.

Nonetheless, the apparent belief that MOAAs offer an easier exit ramp has unfortunate side effects. It decreases the cost of poor case selection and thereby diminishes the incentive for our Court to be more careful in our initial case selection. This creates a feedback loop in which the ease of denying leave after oral argument leads to us investing more time on cases that will eventually result in denials (and, consequently, less time on those that do not). It should come as no surprise that we deny leave in MOAAs much more frequently than we LIG in grant cases.[5] And as we have heard more cases as MOAAs and denied leave in many of them, our opinion output has plummeted.[6]

A related issue is the predicament MOAAs cause for practitioners. For one thing, there has been some understandable confusion about whether the briefing in MOAA cases should focus on the substantive merits of the case or on convincing the Court to hear the case as a grant. The current order attempts to clear that up. Yet ambiguity persists, as there are no standards for determining whether a case deserves a MOAA or a grant order and whether opting for one path over the other reveals the scope of the Court's ambition in a

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[4] Proposed Amendment of MCR 7.312, 503 Mich at 1306 (VIVIANO, J., concurring).

[5] In my last statement, I noted that "by one account, the Court has issued denials in 50 of the 150 MOAAs it has considered during the past five terms." *Id*. at 1306 n 6. In the 2018–2019 term, we denied leave in 17 of the 52 MOAAs and did not issue LIGs in any of the 10 grant cases. In our 2019–2020 term, we denied leave in 10 of the 34 MOAAs, and we issued LIGs in 2 of the 18 grants. Last term, in 2020–2021, we denied leave in 12 of 50 MOAAs and issued one LIG in our 18 grants.

[6] In the 1960s, we issued 194 opinions per year; in the 1980s, we issued 99 opinions per year. Boyle, *Michigan Supreme Court: Are We Dancing as Fast as We Can?*, 74 Mich B J 24, 27-28 (1995). As Mr. Baughman observes, over roughly the past decade, we have averaged 36 opinions per term. Although there are also other reasons for the diminishing output, see *id.* at 28, the MOAA procedure undoubtedly is a contributing factor. While more opinions might not always be better, I fear that our limited numbers fail to provide sufficient guidance in all the areas of the law that need our attention.

case. Practitioners might well believe that a MOAA order, as opposed to a grant, means we hope not to change or disturb the law in a particular area. Nothing, however, prevents the Court from doing so. For example, the mere fact that we have chosen to hear a case as a MOAA does not necessarily signal that we are unwilling to reexamine our precedent applicable to that case.

With so many MOAAs resulting in denials, the side that won below will, even after the present changes, retain the incentive to argue that we should simply deny leave and let the lower court decision remain in place. Such arguments are often successful. But they do not help us articulate the law in a manner that offers the guidance and finality that only this Court, as the last word on Michigan law, can provide. MOAAs require practitioners and parties to commit considerable resources to a case that has a more than fair chance of simply being denied. The practitioners who come before our Court are dedicated and able, and it does neither them, their clients, nor the Court a service to ask for such an investment when it bears a diminished prospect of advancing the law.

Lastly, the MOAA process has diminished oral argument in our Court. As I noted in my earlier statement, "MOAAs give us the option of hearing a case but limiting oral argument to 15 minutes per side, as opposed to the traditional 30 minutes per side in cases where leave to appeal is granted."[7] Thus, we are giving the parties half the time to cover not only how we should rule on the merits of the case, but also whether we should do so at all or simply deny leave. This, in my view, devalues oral argument in our Court and frustrates practitioners who do not and cannot know where they should focus their argument in this truncated time frame.[8]

No other state supreme court has a MOAA process. While ours may have started as an admirable experiment to increase productivity and give more cases the opportunity

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[7] Proposed Amendment of MCR 7.312, 503 Mich at 1306 (VIVIANO, J., concurring).

[8] A majority of this Court has further devalued oral argument over the past two years by choosing to hold our regular case calls by Zoom rather than by traditional in-person oral arguments in our vast courtroom at the Hall of Justice. Our poor example in this area has made oral argument during the compressed time we allow for MOAAs even less engaging, less substantive, and more frustrating for practitioners and the members of this Court who believe in-person proceedings are essential to the administration of justice. See generally Administrative Order, Rescission of Administrative Orders, ADM No 2020-08 (July 26, 2021) (VIVIANO and BERNSTEIN, JJ., concurring in part and dissenting in part) (discussing the problems with virtual court proceedings).

for full argument before we resolve them, the MOAA has not achieved these objectives. It has, instead, led to fewer opinions and much seemingly wasted effort. Our reliance on the procedure has nonetheless become an unhealthy addiction, one with seemingly little benefit but substantial costs. I would rip off the band-aid and end the MOAA process today. For these reasons, I dissent.

I, Larry S. Royster, Clerk of the Michigan Supreme Court, certify that the foregoing is a true and complete copy of the order entered at the direction of the Court.

February 2, 2022

Clerk