

PROPOSED AMENDMENTS TO RULES 2.116 AND 2.119 OF THE MICHIGAN COURT RULES

Issue

Should the Representative Assembly submit a comment to the Michigan Supreme Court supporting the proposed amendments to MCR 2.116 and 2.119 published by the Court for comment in ADM Order 2015-24 and recommending that the briefing schedule be extended one week as originally proposed by the Representative Assembly?

Synopsis

Reply briefs for summary disposition motions are not explicitly provided for in the Michigan Court Rules. Courts differ in their willingness to accept and deadlines for filing reply briefs. Some courts allow reply briefs and set briefing schedules, other courts will accept reply briefs without briefing schedules, and other courts will refuse to accept reply briefs altogether. The rules should be amended to explicitly allow reply briefs and alter the briefing schedule to accommodate filing reply briefs. Creating clarity and uniformity by amending the court rules will benefit the moving party by giving that party the opportunity to reply to arguments contained in the response, the non-moving party by ensuring that it receives the reply brief sufficiently in advance of the hearing, and the courts by allowing them to consider reply arguments in advance of the hearing.

This proposal comes from the Civil Procedure & Courts Committee, which originally proposed amendments to MCR 2.116 and 2.119 to the Representative Assembly at its October 2015 meeting. The Civil Procedure & Courts Committee's original proposal to the Representative Assembly is attached hereto as Appendix A.

After some modifications by the Representative Assembly, it voted overwhelmingly in support of the proposal (77 to 20), which included, *inter alia*, limiting the scope and page length of reply briefs and extending the briefing schedule by one week as follows:

1. Reply briefs must be confined to rebuttal of the arguments in the nonmoving party or parties' response brief;
2. Reply briefs must be limited to 10 pages;¹
3. Motions must be filed no later than 28 days before the time set for the hearing (as opposed to 21 days);
4. Response briefs must be filed no later than 14 days before the time set for the hearing (as opposed to 7 days); and
5. Reply briefs must be filed at least 7 days before the hearing.

The Representative Assembly's proposal was presented to the Michigan Supreme Court on December 1, 2015. The letter to the Court is attached hereto as Appendix B.

On January 25, 2017, the Michigan Supreme Court published for comment proposed amendments to MCR 2.116 and 2.119. While these proposed rule amendments were based

¹ Civil Procedure & Courts had initially proposed limited the length of reply briefs to five pages.

on the proposal submitted by the Representative Assembly, “the Court was not persuaded at this time that the overall time period for motions for summary disposition should be extended.” Instead, the Court proposes keeping the current briefing schedule and allowing reply briefs to be filed at least 3 days before the scheduled hearing. Reply briefs are limited to 5 pages. The Court’s proposed rule amendments are attached hereto as Appendix C.

As currently proposed by the Court, the rule amendment is problematic because the briefing schedule does not allow adequate time to prepare and review reply briefs.² The proposed schedule gives the moving party only four days to review the response and prepare the reply brief, and it gives the non-moving party only three days to review the reply brief prior to the hearing. In addition, the proposed schedule is burdensome on the courts, as judges only have three days with all of the briefs to prepare for the hearing. This contracted briefing schedule will leave parties without adequate time to fully research and develop arguments in the reply brief and prepare for the hearing. Because of the significance of dispositive motions and their potential impact on the case, the parties and the court should be given adequate time to prepare for the hearing and the adjudication of the motion. Therefore, the Civil Procedure & Courts Committee recommends that the Representative Assembly support the rule amendment proposed by the Court and recommend that the briefing schedule be extended by one week as originally proposed by the Representative Assembly in its December 1, 2015 letter to the Court.

Opposition

None known. As of March 11, 2017, the Court has received three comments on ADM 2015-24. One commenter proposed extending the briefing schedule as originally proposed by the Representative Assembly. Jason Killips Comments attached hereto as Appendix D. Another commenter recommended extending the page limit for reply briefs to 10 pages, as originally proposed by the Representative Assembly. Jean Sieler Comments attached hereto as Appendix E. The third comment simply supported the rule without specifically addressing either the briefing schedule or the page limit. Dan Sharkey Comments attached hereto as Appendix F.

Prior Action by Representative Assembly

As discussed above, the Representative Assembly originally proposed amending MCR 2.116 and 2.119 in December 2015. When the Court published the rule amendment for comment in ADM 2015-24, the Court did not change the timing of briefing schedule as proposed by the Representative Assembly and limited reply briefs to five pages, rather than the 10 pages proposed by the Representative Assembly.

² The problems with the Court’s proposed briefing schedule have been noted by at least one commenter. As the Representative Assembly originally proposed, the commenter proposes adding a week to the briefing schedule, which would give parties a week to draft the reply brief and ensure that opposing parties have a week prior to the hearing to review the reply brief. Jason D. Killips Comment, attached hereto as Appendix D.

Fiscal and Staffing Impact on State Bar of Michigan

None known.

**STATE BAR OF MICHIGAN POSITION
By vote of the Representative Assembly on April 22, 2017**

Should the Representative Assembly submit a comment to the Court supporting the proposed amendments to MCR 2.116 and 2.119 published by the Court for comment in ADM Order 2015-24 and recommending that the briefing schedule be extended one week as originally proposed by the Representative Assembly?

(a) Yes

or

(b) No

Appendix A

PROPOSED AMENDMENTS TO RULES 2.116 AND 2.119 OF THE MICHIGAN COURT RULES

Issue

Should the Representative Assembly support amendments to Rules 2.116 and 2.119 of the Michigan Court Rules to adjust the timing of dispositive motions to allow for reply briefs, and to clarify that reply briefs are not allowed for any other motions unless leave is given by the Court?

Rule 2.116 Summary Disposition

(A) – Unchanged

(B) Motion

(1) - Unchanged

(2) A motion under this rule may be filed at any time consistent with subrule (D) and subrule (G)(1), but the hearing on a motion brought by a party asserting a claim shall not take place until at least ~~28~~35 days after the opposing party was served with the pleading stating the claim.

(C) – (F) – Unchanged

(G) Affidavits; Hearing.

(1) Except as otherwise provided in this subrule, *MCR 2.119* applies to motions brought under this rule.

(a) Unless a different period is set by the court,

(i) a written motion under this rule with supporting brief and any affidavits must be filed and served at least ~~21~~28 days before the time set for the hearing, and

(ii) any response to the motion (including brief and any affidavits) must be filed and served at least ~~7~~14 days before the hearing.

(iii) the moving party or parties may file a reply brief in support of the motion. Reply briefs must be confined to rebuttal of the arguments in the nonmoving party or parties' response brief and must be limited to 5 pages. The reply brief must be filed and served at least 7 days before the hearing.

(iv) no additional or supplemental briefs may be filed without leave of the court.

(b) If the court sets a different time for filing and serving a motion, ~~or~~ a response, or a reply brief, its authorization must be endorsed in writing on the face of the notice of hearing or made by separate order.

(c) A copy of a motion, ~~or~~ response (including brief and any affidavits), or reply brief filed under this rule must be provided by counsel to the office of the judge hearing the motion. The judge's copy must be clearly marked JUDGE'S COPY on the cover sheet; that notation may be handwritten.

Rule 2.119 Motion Practice

(A) Form of Motions

(1) – Unchanged

(2) A motion or response to a motion that presents an issue of law must be accompanied by a brief citing the authority on which it is based.

(a) Except as permitted by the court, the combined length of any motion and brief, or of a response and brief, may not exceed 20 pages double spaced, exclusive of attachments and exhibits.

(b) Except as permitted by the court or as otherwise provided in these rules, no reply briefs, additional briefs, or supplemental briefs may be filed.

(c) Quotations and footnotes may be single-spaced. At least one-inch margins must be used, and printing shall not be smaller than 12-point type.

(d) A copy of a motion or response (including brief) filed under this rule must be provided by counsel to the office of the judge hearing the motion. The judge's copy must be clearly marked JUDGE'S COPY on the cover sheet; that notation may be handwritten.

Synopsis

The proposal comes from the Civil Procedure & Courts Committee, which discussed the proposed amendment at its April 2015 meeting. The amendments are recommended to:

(1) set uniform standards for reply briefs in dispositive motions; the amendments add 7 days to the hearing and briefing deadlines for motions, which maintains the current rule giving the non-moving party a minimum of 14 days to respond to the dispositive motions, but providing the moving party with the opportunity to file and serve a 5 page reply brief no later than 7 days before the hearing; and

(2) clarify that reply briefs are not allowed on other motions absent leave of the court.

Uniformity is recommended because at present, reply briefs are not provided for under the Court Rules. However, some courts allow reply briefs and set briefing schedules, some courts will accept reply briefs without briefing schedules, and some courts refuse to accept reply briefs. Litigants may benefit from uniform standards on dispositive motions. The moving party should be given the opportunity to reply to arguments contained in responses, and the non-moving party should not be subject to receipt of reply briefs filed shortly before the hearing.

Opposition

None known.

Prior Action by Representative Assembly

None known.

Fiscal and Staffing Impact on State Bar of Michigan

None known.

**STATE BAR OF MICHIGAN POSITION
By vote of the Representative Assembly on October 8, 2015**

Should the Representative Assembly adopt the above resolution to support amendments to Rules 2.116 and 2.119 of the Michigan Court Rules to adjust the timing of dispositive motions to allow for reply briefs, and to clarify that reply briefs are not allowed for any other motions unless leave is given by the Court?

(a) Yes

or

(b) No

Appendix B



p 517-346-6300

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Michael Franck Building

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48933-2012

December 1, 2015

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

RE: Proposed Amendment of Rules 2.116 and 2.119 of the Michigan Court Rules

Dear Clerk Royster:

The Representative Assembly of the State Bar of Michigan recommends changes to the Michigan Court Rules to adjust the timing of dispositive motions to allow for reply briefs, and to clarify that reply briefs are not allowed for any other motions unless leave is given by the court. Developed by the State Bar's Civil Procedure & Courts Committee, these changes were approved by the Assembly at its meeting on October 8, 2015. We respectfully submit the changes, reflected below, for the Court's consideration:

Rule 2.116 Summary Disposition

(A) – Unchanged

(B) Motion

(1) - Unchanged

(2) A motion under this rule may be filed at any time consistent with subrule (D) and subrule (G)(1), but the hearing on a motion brought by a party asserting a claim shall not take place until at least ~~28-35~~ days after the opposing party was served with the pleading stating the claim.

(C) – (F) – Unchanged

(G) Affidavits; Hearing.

(1) Except as otherwise provided in this subrule, *MCR 2.119* applies to motions brought under this rule.

(a) Unless a different period is set by the court,

(i) a written motion under this rule with supporting brief and any affidavits must be filed and served at least ~~24-28~~ days before the time set for the hearing, and

(ii) any response to the motion (including brief and any affidavits) must be filed and served at least ~~7-14~~ days before the hearing.

(iii) the moving party or parties may file a reply brief in support of the motion. Reply briefs must be confined to rebuttal of the arguments in the nonmoving party or parties' response brief and must be limited to 10 pages. The reply brief must be filed and served at least 7 days before the hearing.

(iv) no additional or supplemental briefs may be filed without leave of the court.

(b) If the court sets a different time for filing and serving a motion, ~~or~~ a response, or a reply brief, its authorization must be endorsed in writing on the face of the notice of hearing or made by separate order.

(c) A copy of a motion, ~~or~~ response (including brief and any affidavits), or reply brief filed under this rule must be provided by counsel to the office of the judge hearing the motion. The judge's copy must be clearly marked JUDGE'S COPY on the cover sheet; that notation may be handwritten.

Rule 2.119 Motion Practice

(A) Form of Motions

(1) – Unchanged

(2) A motion or response to a motion that presents an issue of law must be accompanied by a brief citing the authority on which it is based.

(a) Except as permitted by the court, the combined length of any motion and brief, or of a response and brief, may not exceed 20 pages double spaced, exclusive of attachments and exhibits.

(b) Except as permitted by the court or as otherwise provided in these rules, no reply briefs, additional briefs, or supplemental briefs may be filed.

(c) Quotations and footnotes may be single-spaced. At least one-inch margins must be used, and printing shall not be smaller than 12-point type.

(d) A copy of a motion or response (including brief) filed under this rule must be provided by counsel to the office of the judge hearing the motion. The judge's copy must be clearly marked JUDGE'S COPY on the cover sheet; that notation may be handwritten.

The amendments are recommended to:

(1) set uniform standards for reply briefs in dispositive motions; the amendments add 7 days to the hearing and briefing deadlines for motions, which maintains the current rule giving the non-moving party a minimum of 14 days to respond to the dispositive motions, but providing the moving party with the opportunity to file and serve a 5 page reply brief no later than 7 days before the hearing; and

(2) clarify that reply briefs are not allowed on other motions absent leave of the court.

At present, reply briefs are not provided for in the Michigan Court Rules. However, some courts allow reply briefs and set briefing schedules, some courts will accept reply briefs without briefing schedules, and some courts refuse to accept reply briefs. Litigants would benefit from uniform standards on dispositive motions. The moving party should be given the opportunity to reply to arguments contained in responses, and the non-moving party should not be subject to receipt of reply briefs filed shortly before the hearing. And attorneys should be able to rely on a uniform standard in all state courts.

Thank you for your consideration. It is our hope that the Court will publish the proposed changes for comment and ultimately approve them as amendments to the Michigan Court Rules.

Sincerely,

A handwritten signature in blue ink, appearing to read 'Janet Welch', with a large, sweeping flourish on the left side.

Janet K. Welch
Executive Director

cc: Anne Boomer, Administrative Counsel, Michigan Supreme Court

Appendix C

Order

Michigan Supreme Court
Lansing, Michigan

January 25, 2017

Stephen J. Markman,
Chief Justice

ADM File No. 2015-24

Robert P. Young, Jr.
Brian K. Zahra

Proposed Amendment of
Rules 2.116 and 2.119 of the
Michigan Court Rules

Bridget M. McCormack
David F. Viviano
Richard H. Bernstein
Joan L. Larsen,
Justices

On order of the Court, this is to advise that the Court is considering an amendment of Rules 2.116 and 2.119 of the Michigan Court Rules. Before determining whether the proposal should be adopted, changed before adoption, or rejected, this notice is given to afford interested persons the opportunity to comment on the form or the merits of the proposal or to suggest alternatives. The Court welcomes the views of all. This matter also will be considered at a public hearing. The notices and agendas for public hearings are posted at [Administrative Matters & Court Rules page](#).

Publication of this proposal does not mean that the Court will issue an order on the subject, nor does it imply probable adoption of the proposal in its present form.

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

Rule 2.116 Summary Disposition

(A)-(F) [Unchanged.]

(G) Affidavits; Hearing.

(1) Except as otherwise provided in this subrule, MCR 2.119 applies to motions brought under this rule.

(a) Unless a different period is set by the court,

(i)-(ii) [Unchanged.]

(iii) the moving party or parties may file a reply brief in support of the motion. Reply briefs must be confined to rebuttal of the arguments in the nonmoving party or parties' response brief and must be limited to 5 pages. The reply brief must be filed and served at least 3 days before the hearing.

(iv) no additional or supplemental briefs may be filed without leave of the court.

- (b) If the court sets a different time for filing and serving a motion, ~~or a~~ response, or a reply brief, its authorization must be endorsed in writing on the face of the notice of hearing or made by separate order.
- (c) A copy of a motion, ~~or~~ response (including brief and any affidavits), or reply brief filed under this rule must be provided by counsel to the office of the judge hearing the motion. The judge's copy must be clearly marked JUDGE'S COPY on the cover sheet; that notation may be handwritten.

(2)-(6) [Unchanged.]

(H)-(J) [Unchanged.]

Rule 2.119 Motion Practice

(A) Form of Motions.

(1) [Unchanged.]

(2) A motion or response to a motion that presents an issue of law must be accompanied by a brief citing the authority on which it is based, and must comply with the provisions of MCR 7.215(C) regarding citation of unpublished Court of Appeals opinions.

- (a) Except as permitted by the court, the combined length of any motion and brief, or of a response and brief, may not exceed 20 pages double spaced, exclusive of attachments and exhibits.
- (b) Except as permitted by the court or as otherwise provided in these rules, no reply briefs, additional briefs, or supplemental briefs may be filed.

- (c) Quotations and footnotes may be single-spaced. At least one-inch margins must be used, and printing shall not be smaller than 12-point type.
- (d) A copy of a motion or response (including brief) filed under this rule must be provided by counsel to the office of the judge hearing the motion. The judge's copy must be clearly marked JUDGE'S COPY on the cover sheet; that notation may be handwritten.

(3)-(4) [Unchanged.]

(B)-(G) [Unchanged.]

Staff Comment: The proposed amendments would amend the rules regarding motions for summary disposition to allow for the filing of reply briefs only in summary disposition proceedings. The State Bar of Michigan Representative Assembly had submitted a proposal that would have extended the summary disposition time frame an additional 7 days to accommodate filing of a reply brief and make the practice uniform in trial courts. Under current local practices, some judges allow reply briefs and others do not. Although the Court was not persuaded at this time that the overall time period for setting a hearing for motions for summary disposition should be extended, it did agree to publish for comment proposed amendments that would explicitly allow the moving party to file a reply brief at least 3 days before the scheduled hearing, and limit the reply brief to no more than 5 pages in length.

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.

A copy of this order will be given to the Secretary of the State Bar and to the State Court Administrator so that they can make the notifications specified in MCR 1.201. Comments on the proposal may be sent to the Supreme Court Clerk in writing or electronically by May 1, 2017, at P.O. Box 30052, Lansing, MI 48909, or ADMcomment@courts.mi.gov. When filing a comment, please refer to ADM File No. 2015-24. Your comments and the comments of others will be posted under the chapter affected by this proposal at [Proposed & Recently Adopted Orders on Admin Matters page](#).



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.

January 25, 2017

Clerk

Appendix D

From: [Jason D. Killips](#)
To: [ADMcomment](#)
Subject: ADM File No. 2015-24
Date: Monday, February 06, 2017 11:07:56 AM

To whom it may concern:

I strongly support expressly allowing for reply briefs in support of summary-disposition motions. But I think that extending the overall schedule for MSDs is necessary to allow for them, particularly in Oakland County. I'll provide an example below to demonstrate.

Under the current rules, with only the addition of a reply due at least three days before the hearing

Timeline:

- Wednesday, February 1 – MSD is filed.
- Wednesday, February 15 – Response brief is due.
- Friday, February 17 – Reply brief is due.
- Wednesday, February 22 – hearing.

The problem I see here is that, strictly speaking, the reply is due Friday, two days after the response. I have heard people argue that “at least three days prior” should be interpreted to mean Monday, and certainly, many OCCC judges accept non-dispositive-motion responses filed on Monday. But that is no longer “at least three days prior” to the hearing. The “at least” language suggests that, if the due date falls on a weekend, the party should file earlier, not later.

Either scenario causes a problem. If the reply is due on Friday, that means the moving party has two days to prepare a reply. If the purpose of the reply is to be helpful to the judge, then a good reply should be encouraged. That can be difficult to do in two days.

But filing a reply on Monday also causes a problem. If it is filed at 4:30, that means the judge and her staff have one working day to review it, consider it, and prepare for the hearing on Wednesday morning. That, too, diminishes how helpful a reply can be.

A better schedule: add one week

The better schedule would be as follows:

- Wednesday, February 1 – MSD filed
- Wednesday, February 15 – response due
- Wednesday, February 22 – reply due

-
- Wednesday, March 1 – hearing

Under this schedule, the moving party has a week to write its reply, increasing the chances that it is a good reply. And the court has a full week with all of the papers to prepare for the hearing.

Sincerely,
Jason



JASON D. KILLIPS
BROOKS WILKINS SHARKEY & TURCO PLLC
401 South Old Woodward, Suite 400
Birmingham, Michigan 48009
Phone 248.971.1730
killips@bwst-law.com / www.bwst-law.com

Appendix E

From: [Sieler, Jean](#)
To: [ADMcomment](#)
Subject: ADM File No. 2015-24
Date: Thursday, January 26, 2017 4:35:39 PM
Attachments: [image001.png](#)

With respect to ADM File No. 2015-24 which would allow a Reply Brief in support of a Motion for Summary Disposition filed at least 3 days before the scheduled hearing of no more than 5 pages, I strongly support allowing a Reply Brief to be filed. However, I would advocate for allowance of 10 pages. I believe this is consistent with judicial efficiency and allows the issues to be well defined before hearing or decision. Moreover, the Court does not have to hear arguments and clarifications for the first time during the hearing process. Ten pages is a more realistic limit for complex litigation matters.

JEAN ANN S. SIELER

Attorney at Law

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Appendix F

From: [Dan Sharkey](#)
To: [ADMcomment](#)
Subject: comment re ADM File No. 2015-24
Date: Tuesday, January 31, 2017 11:24:36 AM

Dear Clerk of Court:

I favor this proposed amendment regarding reply briefs. The current practice is ad hoc, judge-by-judge, and all over the place, leaving litigators to guess when we can, can't, should, or shouldn't. Standardization is likely to help.

Dan



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