

APPELLATE PRACTICE SECTION
Respectfully submits the following position on:

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Proposed Amendments on MCR 7.205

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The Appellate Practice Section is not the State Bar of Michigan itself, but rather a Section which members of the State Bar choose voluntarily to join, based on common professional interest.

The position expressed is that of the Appellate Practice Section only and is not the position of the State Bar of Michigan.

To date, the State Bar does not have a position on this matter.

The total membership of the Appellate Practice Section is 667.

The position was adopted after discussion and vote at a scheduled meeting. The number of members in the decision-making body is 21. The number who voted in favor to this position was 17. The number who voted opposed to this position was 0.

Report on Public Policy Position

Name of section:

Appellate Practice Section

Contact person:

Liisa R. Speaker

E-Mail:

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Regarding:

Section Proposed Amendments to Michigan Court Rule 7.205

Date position was adopted:

June 23, 2011

Process used to take the ideological position:

Position adopted after discussion and vote at a scheduled meeting.

Number of members in the decision-making body:

21

Number who voted in favor and opposed to the position:

17 Voted for position

0 Voted against position

0 Abstained from vote

4 Did not vote

Position:

Support

The text of any legislation, court rule, or administrative regulation that is the subject of or referenced in this report.

<http://coa.courts.mi.gov/rules/documents/1Chapter7AppellateRules.pdf>.

Explanation of the position, including any recommended amendments:

See attached letter.

APPELLATE PRACTICE SECTION

October 31, 2011

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Corbin R. Davis
Clerk of the Court
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Re: Proposed Amendment to MCR 7.205.

Dear Mr. Davis:

The Council of the Appellate Practice Section of the State Bar of Michigan proposes amending MCR 7.205 to provide appellants the right to file a reply when seeking leave to appeal. It is a fundamental tenet of our adversarial system that a party should have the opportunity to respond to the adversary's position. Accordingly, the standard rule and practice across every level of our judicial system is to afford a proponent – who typically carries the burden of persuasion – the opportunity to rebut counter-arguments, either in writing or orally at a subsequent hearing.

The opportunity for appellants to file a written reply is most critical at the application stage for several reasons. First, there is no hearing, i.e., no opportunity for oral rebuttal. Second, the burden of persuading the court to grant leave is relatively high. Third, the court lacks access to the record, which means that it cannot critically evaluate the appellees' factual assertions.

This amendment would not only bring the application phase in the Court of Appeals into conformity with foundational principles of our adversarial system, but would also promote consistency with the appellate procedure followed in the Michigan Supreme Court, where a reply brief at the application stage is standard. *See* MCR 7.302. Accordingly, the Council proposed the following language – which is identical to MCR 7.302(E) – for insertion into MCR 7.205 as subparagraph (D):

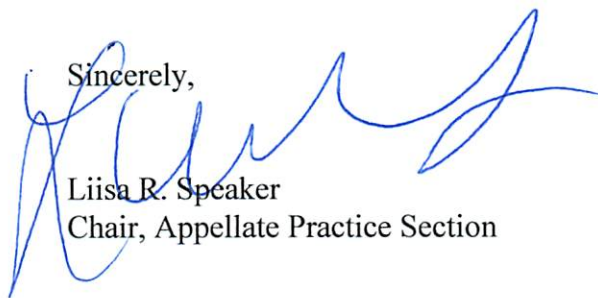
(D) Reply Briefs. A reply brief may be filed as provided by MCR 7.212(G).

As a matter of practice in the Michigan Supreme Court, it is understood that this reference to MCR 7.212(G) means, among other

things, that reply briefs are limited to 10 pages and must be filed within 21 days after the appellee's answer to the application is filed. We expect that by using the same language as MCR 7.302(E) those same limitations would apply in the Michigan Court of Appeals.

Thank you for considering the Council's request.

Sincerely,



Liisa R. Speaker
Chair, Appellate Practice Section