Junking the Ole Jalopy

Under New Rules, Circuit Court Appeals Enter a New Era

By Gaëtan Gerville-Réache

Change rarely comes easily. Just ask those tasked in 2001 with overhauling the circuit court's 50-year-old appellate process. As the decade rolled on and they despaired the sheer magnitude of their mission, this group officially known as the "Circuit Court Appellate Rules Revision Committee" eventually chose the less auspicious title, "Ark of the Damned."[1] And yet, their ark has finally landed! Change has come. After a decade of arduous work and diplomacy, this committee of dedicated judges and practitioners just gave deliberative birth to one of the most comprehensive overhauls of Michigan judicial procedure in the last three decades.[2]

On December 8, 2011, the Michigan Supreme Court officially adopted the committee's proposed amendment to subchapter 7.100 of the Michigan Rules of Court, effective May 1, 2012.[3] We will now harvest the fruit of countless hours spent researching every avenue for judicial review, consulting with judges and clerks who struggled under the old rules, debating the most finicky details, and negotiating with various sections of the State Bar. This amendment marks the end of a painfully arcane and rudimentary set of rules, and the dawn of a new age in circuit court appellate practice.

The circuit courts have heard appeals from inferior courts and tribunals since the adoption of Michigan's Constitution of 1850.[4] But in the last half century, myriad government agencies sprang to life through enabling statutes, some of which prescribe bizarre and wildly inconsistent rules for judicial review. The legislature typically puts the onus on the circuit court to conduct that review, but sadly, the rules currently governing review have received little maintenance since their debut in 1963. When the rules governing the Michigan Court of Appeals and Michigan Supreme Court were revamped in 1985, the circuit courts' appellate rules were not, leaving the circuit courts quite out of step with the higher appellate courts.

Not only were the circuit court appellate rules procedurally outdated, they were structurally flawed as well. Far from comprehensive, the rules ignored an array of administrative appeals—even the ubiquitous zoning appeal. The old rules' so-called "general provisions" were actually designed for appeals from district and probate courts and then clumsily used as default rules for a select set of administrative appeals. Applying those provisions to agencies (a term that includes municipalities)[5] was like trying to put a saddle on a duck. And where tailored rules for administrative appeals actually did exist, they were sometimes woefully inconsistent with the statutes authorizing judicial review. Other problems abounded, but why beat a dead horse (or duck)?

Out with the old and in with the new! The recent amendments to subchapter 7.100 finally bring circuit court appellate procedure into close conformity with the higher appellate courts, particularly the Court of Appeals. The amendments provide, for instance, a set of truly general provisions, which are modeled after the 7.200 series. These provisions are designed to serve not only as a complete set of procedures for appeals from district, probate, and municipal courts, but also as default rules for all circuit court appeals. The amendments still contain a set of agency-specific rules, reflecting the random procedures mandated by various statutes authorizing review.[6] But even those rules have been revised or drafted with an eye toward imitating Court of Appeals procedures. Finally, the committee expanded the set of agency-specific rules, so that subchapter 7.100 now covers the full gamut of administrative appeals that a circuit court can expect to encounter.[7]

Three Objectives of the New 7.100 Rules

The committee drafted these rules with three objectives in mind. First, it endeavored to create a comprehensive set of rules to govern all circuit court appeals. Accordingly, the new subchapter 7.100 contains default rules to cover every situation.[8] Second, except where a statute or the special nature of an appeal dictated otherwise, the committee aimed for uniformity of the appellate process across all levels of appellate review. As previously stated, the new rules are modeled after the Court of Appeals' rules wherever possible. Third, the committee worked tirelessly to clarify and explicate the process to minimize uncertainty and confusion. Though some may bemoan the fact that this made the new subchapter 7.100 three times longer, the benefits

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promise to far outweigh this cost. The gaps in the old rules allowed inconsistent procedure and practice and prompted procedural disputes that wasted judicial time and resources. The new rules, by contrast, leave a lot less room for parties to argue about how the court should conduct the appeal.

The General Provisions

The most comprehensive changes to existing court procedure lie in the general provisions, Rules 7.101 through 7.115. Absent an applicable court rule or statutory provision, these general provisions govern *all* circuit court appeals.[9] As their first order of business, the general provisions dispense with outdated and inconsistent nomenclature. "Petitions for review," like a too-snug polyester, bell-bottom leisure suit, have been discarded.[10] The days of "petitioner" and "respondent" are over. Everything is now an "appeal," and only the classic monikers of "claim of appeal," "appellant," and "appellee" will do.[11] The surcharge for entering the appellate dance is gone too. Unless required by statute, no "bond for costs" is required to file an appeal.[12]

The next bold move was to trim the circuit court's appellate jurisdiction. Before this amendment, the circuit courts could accept late and interlocutory applications in any administrative appeal.[13] No longer. The circuit court now lacks jurisdiction to grant late applications in any administrative appeal without express authorization from the legislature.[14] It also lacks jurisdiction to hear an interlocutory appeal when an appeal of right from the final decision is not available or the appellant cannot show that "waiting to appeal of right would not be an adequate remedy."[15]

Also noticeable is the completely overhauled application process, which now resembles that of the Court of Appeals. For instance, appellees now have the right to answer the application.[16] (Imagine that!) And the requirement for oral argument has been eliminated.[17] As an added bonus, circuit courts (absent good cause) must now decide an application within 35 days of the application's filing date.[18]

In a welcomed coup, the new rules take away from the lower trial courts the control over the appellate process that they previously were given. Trial courts used to have authority to extend the time to file briefs in the circuit court, and even to dismiss the appeal if the appellant did not timely file the claim of appeal or transcripts in the trial court.[19] MCR 7.107 now vests all control in the circuit court, unless "otherwise provided by law." Perhaps more importantly, the circuit court's control now expressly includes the power to grant the usual (and unusual) forms of appellate relief.[20] Among other things, the circuit court may peremptorily reverse or affirm, dismiss the appeal, or grant immediate consideration of a motion or application.[21]

When it came to record production, the old rules left much to be desired. The new instructions, modeled after MCR 7.210, are thorough, detailed, and precise. Particularly helpful is the new rule defining what belongs in the "record."[22] Another favored addition is the rule requiring appellants to serve a full copy of the record—including transcripts and exhibits—on the appellee.[23] And when the record is filed in the circuit court, the circuit court now must "immediately send *written* notice to the parties."[24] This new obligation is of critical importance because it starts the clock for the filing of briefs.[25]

Finally, the procedures for briefing, oral argument, and final decision now align with the procedures in the Court of Appeals. Parties may seek a 14-day extension of the briefing deadline by "stipulation and order,"[26] which should be entered as a matter of course. This provision may prove very useful (should courtesy prevail), as the briefing timelines are still relatively short (28 days for the appellant and 21 days for the appellee)[27] and the penalty for an untimely or nonconforming briefing can be harsh, even fatal.[28] As for oral argument, parties will preserve it by filing a timely brief that states "ORAL ARGUMENT REQUESTED" in bold or all capital letters on the cover page,[29] but MCR 7.114(A) now permits the circuit court to dispense with oral argument altogether under certain circumstances. Finally, a circuit court's judgment is no longer effective until after expiration of the period for filing a timely application for leave to appeal or, if one is filed, at the conclusion of all subsequent appeals.[30] However, the circuit court does have discretion to override this default rule and give its decision immediate effect.[31]

The Special Agency Rules

The committee put tremendous effort into updating and revising the agency-specific rules and expanding the set with new rules to address administrative appeals that are all-too-common but were nonetheless forsaken by the former subchapter 7.100.[32] This effort largely involved dusting off the old statutory procedures, not only to update the former agency-specific rules but also to create new rules where no corresponding court rules existed. Rules 7.116 through 7.119 give former MCR 7.104 and former MCR 7.105 a fresh look, plug some gaps here and there, and provide more detailed instructions. Rules 7.120 and 7.121 are new and give life to existing statutory provisions for licensing appeals under the Michigan Vehicle Code and for appeals from concealed weapons licensing boards. These agency-specific rules often duplicate or cross-reference the statutory procedures, making the court rules

a veritable one-stop-shop for the applicable procedures. The committee did not create a new rule for every oddball statute authorizing judicial review. For arcane appeals, it just was not worth the effort. So the committee instead inserted a "catch-all" rule, MCR 7.123, to fill any procedural gaps that may persist.

After much debate and diplomacy, there is also a brand-new sheriff in town, a rule created out of necessity rather than statutory authority—one that should be of particular interest to municipalities, circuit courts, and counsel who litigate zoning disputes. Zoning appeals have been common fare in the circuit courts for decades. But until now, that appellate process was a guessing game because few, if any, procedural rules officially governed.[33] The Court of Appeals had instructed circuit courts to follow the procedures in former MCR 7.101 and former MCR 7.103 where applicable.[34] But those rules were tailored for trial court appeals and ill-suited for appeals from the zoning decisions of municipal officers, commissions, boards, or zoning boards of appeals. In fact, the SBM Appellate Practice Section cited this problem in 2001 as one of the principal reasons for asking the Michigan Supreme Court to revise subchapter 7.100. At long last, local governments, counsel, and courts now have a customized set of procedures to follow in new Rule 7.122.

Rule 7.122 is unique in that it starts by addressing a persistent and troublesome issue in zoning law.[35] As explained in subparagraph (A)(1), this rule's procedures are intended to govern only determinations made "under" a zoning ordinance.[36] They do not apply to "legislative" decisions to enact, amend, or repeal a zoning ordinance.[37] Correspondingly, the rule imposes a unique (but familiar) requirement on the claim of appeal, carried over from the bygone days of "petitions for review."[38] The appellant must provide the "grounds on which relief is sought, stated in as many separate paragraphs as there are separate grounds alleged."[39] No provision exists for answering these allegations because the purpose is not to plead one's case. Rather, it is intended to reveal from the outset whether the asserted claims belong in an appeal or an original action, as zoning appeals are fraught with confusion and uncertainty over this issue.[40]

In general, if Rule 7.122 does not apply—i.e., because the action is "legislative"—then the claim probably does not belong in an appeal.[41] That said, counsel must be cautious. Discerning what is a legislative action and what municipal decisions should be appealed is not always obvious,[42] which is why some counsel likely will continue to file both a claim of appeal and a complaint, just in case.[43]

Conclusion

The committee's amendments to subchapter 7.100 should usher in a more sophisticated and professional era of circuit court appellate practice, as they provide the uniformity, clarity, and consistency of procedure that this practice area has long yearned for. The committee members cannot be thanked enough for their tireless efforts and wonderful success in improving the practice of law in the realm of circuit court appeals. The author especially thanks committee co-chair Donald M. Fulkerson and committee member Ann M. Byrne for their insights into this rulemaking process. For a wealth of additional information on other key changes and potential pitfalls that attend the subchapter 7.100 amendments, look for the full version of this article in the Winter 2012 issue of the *Michigan Appellate Practice Journal,* available online at www.michbar.org/appellate. ■

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FOOTNOTES

1. Lundberg, *"Ark of the Damned" ends its decade-long rule assignment,* Mich Lawyers Weekly, January 3, 2012, pp 1, 21.
2. The last comprehensive overhaul of a chapter since 1985 was the revision to the Rules of Probate Court, spawned by the enactment of the Estates and Protected Individuals Code in 2000.
3. Administrative Order No. 2010-19.
4. See Const 1850, art 6, § 8; see also Const 1908, art 7, § 10; Const 1963, art 6, § 13.
5. See MCR 7.102(1). Any rule cited in this article as a former rule refers to those which are still applicable until the new rules become effective May 1, 2012. All others refer to those new rules not yet in effect.
6. See MCR 7.116 to MCR 7.119.
7. See MCR 7.120 to MCR 7.123.
8. MCR 7.101 to MCR 7.115; MCR 7.123.
9. MCR 7.101; see also *Muci v State Farm Mut Auto Ins Co,* 478 Mich 178, 191; 732 NW2d 88 (2007) ("[T]he [statutory] provisions [at issue], because they do not concern court administration, are substantive, not procedural, and are supreme over the court rule. . . .").
10. Compare MCR 7.119(B)(2) with former MCR 7.105(C).
11. MCR 7.102(2).
12. Compare MCR 7.104(E)(3) with former MCR 7.101(C)(2)(b).
13. See, e.g., *Schlega v Detroit Bd of Zoning Appeals,* 147 Mich App 79, 82; 382 NW2d 737 (1986).
14. MCR 7.103(B)(4).
15. MCR 7.103(B)(3).
16. MCR 7.105(C).
17. MCR 7.105(D)(1).
18. MCR 7.105(D)(2).
19. Former MCR 7.101(G) and (J).
20. MCR 7.110; MCR 7.112.
21. See MCR 7.110 (incorporating by reference MCR 7.211(C)); MCR 7.105(E).
22. MCR 7.109(A).
23. MCR 7.109(F).
24. MCR 7.109(G)(3) (emphasis added).
25. See MCR 7.111(A)(1)(a).
26. MCR 7.111(A)(1), (D).
27. MCR 7.111(A).
28. MCR 7.111(A)(5) and (C); MCR 7.114(A).
29. *Id.*
30. MCR 7.114(C).
31. *Id.*
32. MCR 7.120 to MCR 7.122.
33. See generally MCL 125.3606.
34. *Schlega,* 147 Mich App at 81–82.
35. See, e.g., *Krohn v City of Saginaw,* 175 Mich App 193, 196–197; 437 NW2d 260 (1989) (dismissing the plaintiff's complaint for failure to file a timely appeal).
36. MCR 7.122(A)(1).
37. See *id.*
38. See former MCR 7.105(C).
39. MCR 7.122(C)(2)(v).
40. See, e.g., *Houdini Properties, LLC v City of Romulus,* 480 Mich 1022; 743 NW2d 198 (2008) (explaining that constitutional takings claims against a zoning authority must be brought as an original action in the circuit court).
41. See generally *Sun Communities v Leroy Twp,* 241 Mich App 665, 669; 617 NW2d 42 (2000) (explaining the difference between legislative and administrative decisions of a zoning authority).
42. See *Houdini,* 480 Mich at 1022.
43. See, e.g., *Shelby Oaks, LLC v Shelby Charter Twp,* unpublished opinion per curiam of the Court of Appeals, issued February 5, 2004 (Docket Nos. 241135; 241253).