Supreme Review

Insights on the Michigan Supreme Court's Consideration of Applications for Leave to Appeal

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Practitioners seeking review of a Michigan Court of Appeals ruling must file an application for leave to appeal in the Michigan Supreme Court. This article provides a window into the Supreme Court's method of reviewing applications for leave to appeal, information about how and when applications are decided, and some helpful tips for filing effective applications and responses.

How an Application Moves through the Court

After being filed in the Supreme Court Clerk's Office, applications for leave to appeal are reviewed by a Supreme Court commissioner. Commissioners are the Supreme Court's permanent research staff; they provide legal research, writing, and analysis for the Court. The commissioners come from a variety of legal backgrounds, including former prosecutors, criminal defense attorneys, and civil practitioners. There are currently 19 commissioners who report to the chief commissioner.

Each application for leave to appeal that is filed with the Supreme Court is forwarded to the Commissioners' Office for an initial screening. An application is first screened so that the Commissioners' Office can identify related cases, previous appeals in the same case, issues that are pending in other appeals, and cases that might require special treatment for other reasons.

Once this initial screening has been completed, each application is assigned to a commissioner for a report. The Commissioners' Office reports on all the applications for leave to appeal, both civil and criminal, that are filed with the Supreme Court, including those filed on an emergency basis. For the most part, commissioners do not specialize by subject matter, but groups of similar cases may be assigned to the same commissioner.

As a general matter, an application is assigned for a report shortly after the notice date, on a first-in first-out basis. But certain applications may be assigned sooner, either because of their subject matter (for example, cases involving the termination of parental rights or child custody issues are expedited) or because there is an impending deadline in the case and the appellant has established a need for immediate consideration.

The primary function of a commissioner's report is to analyze the legal issues involved in the case and to recommend a course of action to the Court. This process generally begins with a review of the parties' briefs and the lower court record. The report includes a summary of the facts and proceedings, a summary of the parties' arguments and the Court of Appeals opinion (if any), a legal analysis of the issues raised by the parties, and a recommended course of action. The commissioner's report will also address any motions that have been filed by the parties, and recommend a disposition for each one. The Court of Appeals decision is attached to the commissioner's report, along with relevant lower court rulings and other significant exhibits. The average length of a commissioner's report is from 10 to 20 pages, although substantially longer reports may be required if the issues raised by the parties require extended analysis or the case is factually complicated.

After the reporting commissioner completes a report, it is made available to the rest of the Commissioners' Office for review. Over the course of a week, other commissioners may offer comments or suggestions to the reporting commissioner. Occasionally, a commissioner will disagree with a report's recommendation or analysis. When that happens, the second commissioner may draft a comment or dissent, setting forth a contrary point of view for the justices' consideration. The comment or dissent then becomes part of the commissioner's report.

After the internal review process is completed, the commissioner's report is printed and forwarded to the justices for their consideration. On average, the Commissioners' Office reports on more than 200 applications for leave to appeal each month.

The justices consider most of the reports on an "order to enter" (OTE) basis. This means that, unless one of the justices objects to the recommended order by that month's specified deadline, the order recommended by the commissioner will enter. Examples of the types of reports that are considered on an OTE basis include those in which the recommendation is a denial of leave, a remand to the Court of Appeals for consideration as on leave granted, or an abeyance for the Court's ruling in another case. Unless a case requires expedited treatment, the justices will have no fewer than 12 days to consider a commissioner's report that recommends entry of an order on an OTE basis.

Approximately one-quarter to one-third of the applications filed with the Supreme Court are discussed at one of the Court's conferences. Conferences are generally held every Wednesday, except during the weeks when oral arguments are scheduled and during the months of February and August. The average conference agenda consists of 25 to 40 cases. Cases in which an order is scheduled to enter on an OTE basis are considered at conference if at least one justice requests conference consideration by the OTE deadline. Certain other cases are automatically sent to conference, including those in which the commissioner's recommendation is to grant leave to appeal, grant peremptory relief, or issue a

Fast Facts:

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In 2007, 2,612 new cases (approximately 30 percent civil, 70 percent criminal) were filed with the Court. In the same time period, the Court disposed of 2,625 cases.

Be a "court watcher." Orders and statements from the Court reveal emerging issues and the justices' methods of interpreting statutes and prior case law.

It is impossible to overstate the value of a thorough and balanced statement of the case's facts. Try to avoid witness-by-witness summaries of the evidence; as a general rule, this is not an effective way to present the facts. Support each representation of fact with a citation to the record.

per curiam opinion. Before conferences, the justices often circulate memoranda expressing their views on the cases and, occasionally, requesting supplemental reports on a legal issue from the reporting commissioner. Considerable discussion about the cases on a conference agenda typically takes place between the justices formally in conference and informally outside conference.

At conference, the justices decide what action should be taken on an application. Most applications for leave to appeal are denied. Less often, the Supreme Court will issue a peremptory order, ask the opposing party to respond, hold the case in abeyance for another case, issue a per curiam opinion, direct the clerk of the Court to place the case on a session calendar for oral argument on the application, or grant leave to appeal.

Sometimes the Supreme Court decides to take action that will require further consideration by the Court; for example, holding an application in abeyance for a decision in another pending case, or remanding the case to the Court of Appeals and retaining jurisdiction. When this happens, a supplemental report is prepared by the commissioner after the anticipated event occurs, to update the justices on the status of the case before they reconsider it.

Similarly, motions for reconsideration, in which a party asks the Supreme Court to reconsider the decision made on an application, are also assigned to a commissioner for a report. Such motions are generally not assigned to the same commissioner who prepared the report on the application for leave to appeal.

Disposition of Applications

The Supreme Court maintains statistics on a calendar-year basis. In 2007, 2,612 new cases were filed with the Supreme Court.[1] The vast majority of these cases were applications for leave to appeal; the Supreme Court also received 31 complaints for superintending control, 6 applications that originated at the Supreme Court, and 4 judicial tenure matters. Of the 2,612 new cases filed in 2007, approximately 30 percent were civil cases and 70 percent were criminal cases. Forty-four percent of the time, the case was filed by retained counsel; 56 percent of the time, the case was filed in pro per.

In the same time period, the Supreme Court disposed of 2,625 cases. The Court issued 56 opinions, on cases in which leave had been granted or oral argument on the application had been ordered. The remaining 2,569 cases (including 20 cases in which leave to appeal had been granted) were disposed of by order.[2] In December 2007, the average time from the date the application for leave to appeal was filed to the Court's disposition of the case was just over six months.

From 1997 through 2007, the Court has granted leave to appeal in anywhere from 4 percent to 1.7 percent of the cases filed. From 2004 to present, the grant rate has not exceeded 2 percent. The Supreme Court granted leave in 1.7 percent of the cases filed in 2007.

There are likely many factors that play a role in the number of orders granting leave to appeal that are issued by the Supreme Court over the course of a year. But one explanation for the current grant rate may be the Supreme Court's 2003 decision to begin hearing oral argument on applications for leave to appeal (also referred to as "MOAAs," which stands for mini-oral argument on the application). This relatively new procedure gives the Supreme Court the opportunity to further explore the issues involved in a case without the full briefing and submission that follow a grant of leave to appeal. The argument time is typically shortened to 15 minutes a side, and the parties are often invited (and sometimes directed) to file supplemental briefs. At the time this article is being written, nearly 140 such cases have been decided by the Court (with another 10 having been dismissed at the stipulation of the parties). The Supreme Court denied leave in 23.2 percent of the cases in which oral argument was held on the application, and granted leave to appeal in 9.4 percent of the cases. An opinion was issued in 34.8 percent of the cases, while the remaining 32.6 percent of the cases were decided by peremptory order.

Helpful Hints for Filing Effective Applications

Be a "court watcher." Review the orders and statements that are issued by the Supreme Court for hints about emerging issues. Review the Court's opinions to pick up on the justices' methods of interpreting statutes and prior case law. Identify in your brief whether any of the Court of Appeals decisions that you rely on are being reviewed by the Supreme Court (or are the subject of pending applications), and whether there are any pending cases for which your case should be held in abeyance.

The statement of questions involved is included, verbatim, in the commissioner's report. While this is an area that is subject to individual preference, as a general rule, the statement of questions involved should be short and to the point, providing just enough factual detail to provide a context for the legal issue. Keep in mind that overlong statements can be incomprehensible.

Connect the "grounds" for appeal listed in MCR 7.302(B) to the case. Each stated issue should be the subject of a separate argument section.

It is impossible to overstate the value of a thorough and balanced statement of the case's facts. Try to avoid witness-by-witness summaries of the evidence; as a general rule, this is not an effective way to present the facts. Support each representation of fact with a citation to the record.

When discussing issues in your analysis section, explain how each issue was preserved for Supreme Court review by being raised in the trial court and in the Court of Appeals. State the standard of review, and cast your argument in terms of that standard.

Use the Michigan Uniform System of Citation. In addition, it is helpful if you add "[no Supreme Court appeal]" to a Court of Appeals citation, where appropriate.

For the Appellant

There is a 50-page limit for applications.[3] Given the workload of the Supreme Court, effective applications are as concise as possible. Requests to exceed the 50-page limit will very seldom be granted, and such a request should only be made if there are truly compelling reasons for it.

Keep in mind the burdens on the Supreme Court, and be specific in stating why relief is merited and what relief you would like. Anticipate the possibility of peremptory relief.

When seeking immediate consideration, make clear when you would like the Supreme Court's response, and why. Also, make every effort to give your opposing counsel and the Supreme Court as much time as possible to respond to your application.

For the Appellee

While the Supreme Court traditionally has not strictly enforced the requirement that opposing briefs must be filed before the application's notice of hearing date, appellees are strongly advised to meet that deadline. In many cases, applications are being submitted to the justices for decision shortly after the notice date.

As a general rule, an appellee should respond issue-by-issue to the appellant's arguments. If you need to restructure the argument (for example, because an appellant has overlooked a controlling and dispositive issue), alert the reader to what you are doing.

Appellees who wish to obtain sanctions against an appellant for filing an allegedly frivolous appeal will more clearly present their case if the request is made in a separate motion as opposed to being raised, for the first time, in the prayer for relief.

Record and Exhibits

The Supreme Court generally has both the trial court record and the Court of Appeals file (except in rare emergency or interlocutory situations). But the Supreme Court is not routinely provided with the parties' trial exhibits (unless the exhibits were also attached to motions or other pleadings). If you want the Supreme Court to see a trial exhibit, you may wish to attach it to your application (and provide a citation to the record to establish that it was admitted into evidence).

Remember to attach a copy of the Court of Appeals opinion or order as well as the lower court order that is being appealed.[4]

Supplemental Briefs

As mentioned earlier, the Supreme Court sometimes requests supplemental briefs when it directs the clerk of the Court to schedule oral argument on an application. When preparing such a brief, focus on the issues (if any) identified in the Supreme Court's order. Do not simply repeat the arguments made in your application or response.

In Conclusion

A general description of how cases are processed within the Supreme Court can be found in the Court's internal operating procedures (IOPs), which are available on the Court's website at http://courts.michigan.gov/supremecourt/2003-48_02-03-05.pdf. Practitioners who frequently file applications with the Supreme Court may find useful information in the IOPs. ■

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FOOTNOTES

1. State Court Administrative Office, *Published Summary Reports—Annual Report for Michigan State Courts* <http://courts.michigan.gov/scao/resources/publications/reports/summaries.htm> (accessed January 16, 2008).
2. A more specific breakdown of the 2007 data was not available when this article was prepared. In 2006, the Supreme Court disposed of 2,543 cases. In 43 of those cases, leave to appeal had been granted; the Supreme Court issued 33 opinions and 10 orders to resolve those 43 cases. The remaining 2,500 cases were resolved at the application stage. Seventeen opinions were issued, along with 2,483 orders. The 2,483 orders can be broken down as follows: leave to appeal was denied in 2,238 cases, a remand to the Court of Appeals occurred in 42 cases, a remand to the Court of Appeals as on leave granted occurred in an additional 48 cases, and a remand to the trial court occurred in 38 cases. There were 54 orders of peremptory reversal, and administrative or stipulated dismissals in the remaining 63 cases.
3. See MCR 7.302(A)(1).
4. See 7.302(A)(1)(f), (g).