Speed the processing of applications for leave to appeal to the Michigan Court of Appeals by avoiding common

On the FA

When an application lacks necessary components, the court will send a "defect letter" to advise the appellant that additional documents must be filed within 21 days.

The chief judge may dismiss the application if the necessary documents are not submitted within this time.

The following help speed application processing: clear writing, an index to appendices, placing citations in the body text, and submitting the application as early as possible.

submission errors

ST

Fast Track Facts

Track

By the District Commissioners and Assistant Clerks of the Michigan Court of Appeals

Practitioners often must seek redress from the court of appeals by application. This article gives civil and criminal practitioners helpful tips for filing applications for leave to appeal.[1] Ideally, practitioners should aim to submit an application that is not deemed defective at the gate by the district commissioners or assistant clerks at the court of appeals—staff attorneys who review applications for defects and jurisdictional issues.[2] District commissioners work in each district office, including Detroit, Lansing, Grand Rapids, and Southfield. Contrary to past court practice, applications now are reviewed in each district, rather than only in Lansing. When an application lacks necessary components, the court will send a "defect letter" to advise the appellant that additional documents must be filed within 21 days.[3] The chief judge may dismiss the application if the defect is not corrected by the deadline.[4]

To facilitate the speedy and problem-free processing of an application, listed below are tips from the commissioners[5] for avoiding common application errors.

The Application

Generally, applications require the following:

(1) the filing fee,[6] which currently is $250 for *each* order appealed from,[7] or an order of appointment or a motion to waive fees

(2) the order appealed from[8]

(3) lower court docket entries *reflecting entry of the order appealed from*

(4) a proof of service with the *correct* address for counsel for all parties, not merely the parties who will be appellees, *and identifying each party represented by each counsel*[9]

(5) a copy of pertinent transcripts or evidence that they were ordered[10]

(6) an application conforming to MCR 7.212(B), (C), including, among other things[11]

- a 50-page limitation
- a font of 12-point type with double spacing
- a jurisdictional statement
- a table of contents
- an index of authorities
- a statement of questions presented
- the pertinent standards of review
- a statement of facts with specific page references to the transcript (if available), pleadings, or other documents filed with the trial court
- supporting authority in each argument
- the relief sought
- a signature

If an application is filed more than 21 days after the entry of the order appealed from, a statement explaining the delay in filing typically is required. Applications may not be filed more than 12 months after entry of the order of judgment on the merits, although certain exceptions exist for criminal cases.

In criminal cases where the application is filed more than 12 months after the entry of the order or judgment on the merits, in addition to filing a statement of reasons for delay, appellants must file an affidavit "stating the relevant docket entries, a copy of the docket or calendar entries or other documentation showing that the application is filed within the time allowed."[12]

If an application is filed while the lawsuit is still going on, the appellant must set forth facts showing how harm would result by waiting for the final judgment to take an appeal.[13]

Example: The appellant files an application without a proof of service. Without proof that the opposing parties have been served, the case will not be submitted to a panel. Instead, the court will send a defect letter to the appellant stating that the case will be subject to dismissal if the defect is not corrected within 21 days. Note that valuable time has been lost in the processing of the application, particularly if the opposing party must be served again.

The Order Appealed From

The order must exist in writing, must be signed, and must have been entered in the court below it.[14] This may seem self-evident, but commissioners frequently receive applications without the lower court's order, where the appellant apparently is anticipating that the court will sign a written order in accordance with its oral ruling. Remember that the order must not only be signed and dated, but also must have been entered. "Entry" for this purpose "means the placing of an order, judgment, or other document into the file and records of a lower court or the court of appeals by the clerk."[15]

Example: The appellant files an application for leave to appeal the decision of the circuit court and includes a signed order but fails to provide docket entries showing its entry. The commissioner calls the circuit court clerk's office and learns that the order has not yet been entered. The application will be dismissed as premature.

Example: The appellant files an application for leave to appeal an oral ruling made by the circuit judge during a hearing. Although the appellant has submitted a transcript reflecting the decision, no written order of the circuit court has been submitted, much less entered, on the circuit court's docket. The application will be dismissed as premature.

Example: The appellant files an application for leave to appeal the opinion issued by the circuit court. The opinion, however, is not labeled as an "opinion and order" and, moreover, it directs the parties to draft an order. The application will be dismissed as premature.

Updated Lower Court Docket Entries

The entries must show the entry of the order appealed from; entries that end several months before the order appealed from are neither sufficient nor helpful.

Example: The appellant files an emergency application with docket entries that had been printed five weeks earlier and do not reflect the order appealed from, which was entered the previous week. The commissioner reviewing the application may ask the appellant to return immediately with a copy of the current docket entries.

Transcripts

The appellant is responsible for providing a copy of the transcript to the court of appeals. The court reporter generally files a copy of the transcript with the lower court, not the court of appeals. The appellant is obliged to file the transcript with the court of appeals as soon as it is available; the court reporter does not have that responsibility.[16]

Although the court rule generally provides court reporters 91 days in which to file transcripts, court reporters may provide transcripts earlier if they are advised that the attorney needs the transcript sooner. Court reporters sometimes will produce the transcript of the trial court's bench ruling very quickly, even if they cannot complete the entire transcript. In any event, it is helpful to order the transcript as soon after the hearing as possible, rather than waiting the full 21 days and ordering it once the application has been drafted or, worse still, waiting until receiving a defect letter.

Applications conforming to the court rules and IOPs are processed more rapidly, which benefits both attorneys and their clients.

Orders That Say "For the Reasons Stated on the Record"

Provide the transcript as soon as possible, if not with the application. A commissioner might be reluctant to submit an application to the panel without the circuit court's statement of its reasoning. In this circumstance, the sooner the appellant provides the transcript, the sooner the application may be submitted. This may also be true when the court has provided no explanation for its decision on the face of the order.

Personal Service with Priority Applications

Serve the appellees before filing with the court, so that if the court calls to establish an answer date, the appellees have the pleadings in hand. Note to appellees: Appellees may assume that they have the full 21 days in which to answer under the pertinent court rule unless the court notifies them of an earlier deadline.

Example: The appellant files an emergency application with the court of appeals at 3:43 p.m. on Friday, asking for relief on the following Monday, with a proof of service stating that the application had been "personally served on Friday." The commissioner calls to notify the appellee of the answer deadline, but the appellee says he was not served. The appellant had left her office for the day, so could not confirm that she had personally served the appellee. On Monday, the appellee contends that he was never served. The appellant admits she "dropped it off in a box" at the appellee's office on Friday at 5:15 p.m. The appellant must serve the appellee and file a new proof of service. The application will not be submitted to the panel until the appellee is served, thus delaying the decision on the emergency.

Example: The appellant hurries into the court of appeals with a hand-delivered application and motion for immediate consideration, asking for action within two days. The appellant states that the court denied his motion for summary disposition but offers no reason for the perceived emergency. The commissioner reviewing the application notes that discovery is ongoing and trial will not occur for at least eight months. The commissioner may determine that the appellant has not sufficiently stated the need for immediate action and may allow the appellee the full 21 days in which to answer.

Statement of Facts

Support the statement of facts with citations to the appendices attached to the application. The court rules require briefs containing a concise statement of facts with specific page references to the record.[17] The court of appeals does not receive the lower court record, so if the statement of facts cites to a specific page in a record document, include that document as an attachment. References to transcripts, however, often cannot be included because a timely application must be filed before the court reporter's transcript deadline has expired under the court rule. In that event, the statement of facts may be based on documents—already filed with the lower court so that the record is not enlarged on appeal—and the writer's memory of any court hearing.

Example: The appellant files an application for leave in the court of appeals with citations to documents in the record but fails to attach any appendices. The court has no way of verifying the asserted facts since it does not receive the lower court record.

Applications from Orders Regarding Motions for Summary Disposition

Attach the motion and answer, along with any appendices, filed by the parties in the circuit court. The court of appeals does not receive the lower court record when considering an application for leave to appeal; the parties must provide the documents pertinent to the court's review. Attaching the motions, answers and appendices, and sometimes the complaint, will disclose the arguments presented to, and evidence available to, the lower court and will facilitate appellate review.

Example: The appellant files an application for leave in the court of appeals without the motion, answer, or attachments and the transcript has not yet been prepared. The order indicates that summary disposition was granted "for the reasons stated on the record." The appellee does not file an answer. The court of appeals has no way of knowing whether arguments raised in the application were raised below and no way of knowing whether the appendices to the

application were provided to the lower court. Although this deficiency may not rise to the level of a defect, it might impede the processing of the application, result in a dismissal without prejudice to the appellant filing another application with those documents attached, or result in a denial of the application.

Motions for Stay

MCR 7.209(A)(3) requires the filing of the trial court's order and the transcript denying the motion for stay. If either is unavailable, a motion to waive those requirements is required before the court will consider a motion for stay. Appellants may not file a motion for stay with the court of appeals unless an application or claim of appeal already is pending.

Example: The appellant rushes into the court of appeals with a motion for stay in a landlord-tenant matter on the same day that the circuit court declined to grant a stay. The appellant has not filed an application. The motion for stay, by itself, cannot be accepted for filing. Counsel must file an application for leave to appeal along with a motion to waive the requirements of MCR 7.209. Panels do not consider motions separately from applications, so the motion for stay must be considered along with an application.

Catch-all Hints

Although the following are not defects, they will help the commissioners in processing applications:

- Index—Provide an index to the appendices and attachments, particularly if they exceed more than a few in number (the party submitting the application with 55 exhibits attached would have saved time had an index accompanied those exhibits).
- Tabs—Put tabs on attachments so the commissioners and judges need not thumb through the entire submission to find Exhibit G, for example.
- Reply—Appellants have no right to file a reply to appellee's answer. Consequently, appellants desirous of filing a reply must file a motion to do so.[18]
- Late Answer—If the appellee's answer will be late, the appellee must file the proposed answer with the motion to file a late answer.[19] Commissioners will submit the application, the answer, and the motion to file a late answer to the panel at the same time.
- Multiple Orders—If the appellant is filing an application from more than one order, separate fees generally are required.
- District Offices—In emergency and priority situations, the commissioner generally advises that the appellee file the answer in a specific district office (for example, Southfield, Detroit, Lansing, or Grand Rapids).[20] Pay attention to the commissioner's instructions to ensure that the answer is filed in the designated district. This will help expedite the appeal and is very important in emergency situations.
- Questions Presented—Strive for brevity and clarity. Overly convoluted questions or those containing lengthy renditions of facts in multiple sentences, as some legal writing instructors advocate, are not favored.
- Emergency Applications—Act in a timely manner and be fair to opposing counsel. Appellants who know they have a trial date within 25 days of an adverse ruling should not wait 21 days to file their emergency application and motion for immediate consideration, only to ask the panel to decide the application the following day. The fact that the appellee will be forced to file an answer within hours will not go unnoted, as well as the fact that the court itself was given just hours to process and consider the application.
- Footnoted Citations—Court staff attorneys generally prefer citations to be included in the text so that they immediately may discern the name of the cited authority, its state of origin, and the year of its issuance. Some judges, however, have different preferences. (This article cites court rules in endnotes according to the style guide of the *Michigan Bar Journal*.)
- Faxes—The court generally does not accept filings by fax machine at this time.

Final Points to Remember

The court of appeals strictly prohibits its staff from providing legal advice. Commissioners may not advise practitioners whether to file an application or a claim, or whether a particular order is a "final order" under the court rules. Applications conforming to the court rules and IOPs are processed more rapidly, which benefits both attorneys and their clients. ✦

Footnotes

1. This article is not intended to address the subtle art of appellate advocacy, a topic beyond the scope of this piece. For such assistance, the reader may refer to the accompanying articles in this edition of the *Michigan Bar Journal* and to those that appeared in the earlier appellate advocacy issues in January 1991, January 1995, and January 1998.
2. See IOP 7.205-5. "IOP" refers to the court's Internal Operating Procedures, which are available via the court's website at http://courtofappeals.mijud.net/clerkiop.htm.
3. IOP 7.205-6.
4. MCR 7.201(B)(3).
5. The recommendations and opinions in this article are those of a majority of the commissioners and do not necessarily reflect the position of the judges of the court of appeals.
6. MCR 7.205(B)(7).
7. MCL 600.321(1)(a); IOP 7.205(B)(7)-1.
8. MCR 7.205(B)(2).
9. MCR 7.205(B)(6).
10. MCR 7.205(B)(4).
11. In reality, this document is a brief entitled "Application." It should not be in the format of a motion. The court will not accept a 50-page brief and a separate application.
12. MCR 7.205(F).
13. MCR 7.205(B)(1).
14. MCR 7.205(B)(2).
15. MCR 7.202(3).
16. MCR 7.205(B)(4).
17. MCR 7.205(B)(1); MCR 7.212(C)(6).
18. IOP 7.205(C)(3).
19. IOP 7.205(C)-1.
20. See IOP 7.201(B)(2).