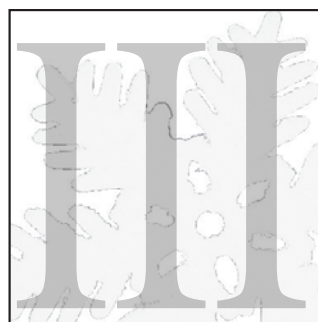

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Appellate Practice Report

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New Rules Governing Exhibits in the Michigan Court of Appeals

Until recently, parties could submit exhibits to the Michigan Court of Appeals any way they chose. Some advocates took the lack of governing rules as an opportunity to think creatively about how best to present their cases. But some advocates chose not to submit exhibits at all, apparently assuming judges could rely on the official, paper record in each case.

This state of affairs often left the Court of Appeals with a problem. There's only one paper record, so only one of the three judges on a panel could have access to the record at a time. When parties didn't submit important records as exhibits, two judges from each panel had to rely on the briefs until their chambers got an opportunity to review the paper record.¹

The Michigan Supreme Court adopted a new rule to eliminate this problem. Effective September 1, 2018, Michigan Court Rule 7.212(J) requires parties in most civil cases to submit appendices with appeal briefs. (Child-protection proceedings and noncriminal delinquency proceedings are exempt, and there are different rules for appeals from the Michigan Public Service Commission and the Michigan Tax Tribunal.)

Required Content

The appellant's appendix must include:

- The orders at issue in the appeal, along with any transcripts of findings of fact and conclusions of law;
- The trial-court docket;
- The relevant pages of transcripts, along with any surrounding pages that might provide context;
- Copies of any challenged jury instructions, relevant transcript pages, and requests for the instruction at issue; and
- Anything else that's relevant—although parties can exclude copies of lower-court briefs unless they're necessary for a preservation issue.

Appellees aren't required to submit an appendix but they can submit one if they're dissatisfied with the appellant's. The new rule cautions appellees not to include materials found in the appellant's appendix. The rule also encourages joint appendices when there are multiple parties on one side of the "v."

Submitting Appendices

Michigan Court Rule 7.212(J) contains a number of specifications for formatting and submitting appendices:

- It limits appendices to 250 pages. If you need to submit more than 250 pages of exhibits, you'll need to submit separate volumes.
- Parties must submit transcripts in full-page form rather than condensed, four-pages-to-a-sheet form.
- An appendix must have a cover with "Appellant's Appendix" or "Appellee's Appendix" in bold.
- An appendix must have a table of contents that lists the volume and page number of each relevant document.



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- If you're submitting a paper appendix, you must tab and bind each volume separately. You'll need to submit five copies.
- If you're submitting an appendix electronically, each appendix must be an independent PDF. You also need to bookmark each document.

Consequences for Failure to Comply

When the Michigan Supreme Court sought comments before adopting these amendments, the draft rule granted the Court of Appeals authority to sanction attorneys who didn't submit an appropriate appendix. The draft stated: "Failure to comply with any part of this rule may result in monetary sanctions against the attorney that failed to comply."²

That was a bit harsh. As the State Bar of Michigan's Appellate Practice Section stated in its comments to the proposed rule, it makes more sense for the court to use its usual notice-and-opportunity-to-cure procedure.³ That is, the court should issue one of its standard notices of defect and give the party 21 days to fix the problem.

The Michigan Supreme Court evidently agreed with the Appellate Practice Section. It eliminated the proposed monetary-sanctions rule. Michigan Court Rule 7.212(J) is now silent about remedies for nonconforming appendices (or failure to file an appendix). It's likely, however, that the Court will follow its usual practice for nonconforming briefs, giving parties 21 days to fix any problems.

Best Practices

There's much to like about the new rule. Having to submit exhibits will make it a little harder for appellants to make unsupported claims about the record. We should also see more precision and uniformity in citations to the record in the Court of Appeals.

The rule's only real burden is that parties will have to finalize briefs a little earlier. It used to be possible to completely finish a Court of Appeals brief before assembling exhibits. Now, attorneys will need to complete a draft, prepare an appendix, and then return to the draft to add references to appendix page numbers. That will involve a little more planning. But that's surely a small price to pay for

ensuring that each Court of Appeals judge has the records he or she needs to prepare for argument.

Appealability of Dismissals "Without Prejudice"

A fundamental rule of appellate jurisdiction is the need for a "final" decision. In Michigan, a final judgment or order is typically "the first judgment or order that disposes of all the claims and adjudicates the rights and liabilities of all the parties." MCR 7.202(6)(a)(i). So what about dismissals "without prejudice," i.e., dismissals that permit the action potentially to be refiled later? Are those orders immediately appealable as a matter of right? It depends.

On the one hand, the Michigan Court of Appeals has strongly rebuked the notion that stipulated orders dismissing claims "without prejudice" may be appealed, even if they also dismiss other claims involuntarily. Since an order dismissing less than all of the claims of all of the parties is not a "final order" for the purpose of bringing an appeal as of right, it is tempting to consider stipulating to the dismissal of the remaining claims or counterclaims "without prejudice" or with some other language preserving the ability to reinstate those claims in the event of an appellate reversal. But the Court of Appeals rejected that approach in *City of Detroit v Michigan*, 262 Mich App 542; 686 NW2d 514 (2004). The Court explained that dismissing claims without prejudice creates the possibility of "piecemeal" appeals, which the court rules are designed to prevent:

The parties' stipulation to dismiss the remaining claims without prejudice is not a final order that may be appealed as of right; it does not resolve the merits of the remaining claims and, as such, those claims are "not barred from being resurrected on that docket at some future date." *Wickings v Arctic Enterprises, Inc*, 244 Mich App 125, 136; 624 NW2d 197 (2000). The parties' stipulation to dismiss the remaining claims was clearly designed to circumvent trial procedures and court rules and obtain appellate review of one of the trial court's initial determinations without

precluding further substantive proceedings on the remaining claims. This method of appealing trial court decisions piecemeal is exactly what our Supreme Court attempted to eliminate through the "final judgment" rule.

Id. at 545.

On the other hand, the Court has distinguished situations involving dismissals "without prejudice" that are involuntary. In *MLive Media Group v City of Grand Rapids*, 321 Mich App 263; 909 NW2d 282 (2017), the city of Grand Rapids filed a declaratory action in federal court seeking a determination of its rights and obligations with respect to recordings made of calls to a non-public police department telephone line. While that case was pending, the Grand Rapids Press, which had requested copies of the recordings under Michigan's Freedom of Information Act, filed a complaint in the Kent County Circuit Court seeking to compel disclosure of the recordings. The trial court dismissed the claim without prejudice, deferring to the federal action under the doctrine of comity. On appeal, the city argued that the Court of Appeals lacked jurisdiction over the appeal, citing *Detroit* and arguing that the dismissal without prejudice rendered the trial court's order non-final. The Court of Appeals disagreed, reasoning that *Detroit* was distinguishable because it involved claims dismissed by stipulation:

[T]he trial court entered an order denying MLive's motion for summary disposition and dismissing MLive's only claim without prejudice after reviewing both parties' opposing arguments. Therefore, the order is final, MCR 7.202(6)(a)(i), and *Detroit* is distinguishable on the facts. [*Id.* at 268.]

The Court of Appeals has reached a similar result in cases involving dismissals without prejudice in favor of arbitration, so long as the trial court does not retain jurisdiction. See *Rooyaker & Sitz, PLLC v Plante & Moran, PLLC*, 276 Mich App 146; 742 NW2d 409 (2007) ("[B]ecause there was nothing left for the trial court to decide and it did not state that it was retaining jurisdiction [when it dismissed the case in favor of arbitration], we

conclude that the trial court’s order was a final order appealable as of right.”).

The same goes for cases dismissed under the doctrine of primary jurisdiction (i.e., where a case must initially be decided by an administrative agency). See *Attorney General v Blue Cross Blue Shield of Michigan*, 291 Mich App 64, 75-76; 810 NW2d 603 (2010) (“[T]here was nothing left for the trial court to decide regarding count II after its decision to refer the claim to the OFIR Commissioner, and the trial court did not state in the October 6, 2008, order dismissing that count without prejudice that it was retaining jurisdiction of that count. . . . Therefore, here as in *Rooyakker*, there was nothing left for the trial court to decide, and all claims were finally ‘disposed’ of within the meaning of MCR 7.202(6)(a)(i).”).

As cases like *MLive*, *Rooyaker*, and *Attorney General* demonstrate (and likely others), dismissing a case “without prejudice” does not necessarily prevent an order from being appealed as a matter of right. So long as the dismissal order was not stipulated to, and the trial court did not retain jurisdiction, there is an argument that the order is final and may be appealed.

Endnotes

1 See generally the Court of Appeals’ January 30, 2018 comments to ADM 2016-25, Proposed Amendment of MCR 7.2122 Requires Appellants to File an Appendix with the Court of Appeals, available at: https://courts.michigan.gov/Courts/MichiganSupremeCourt/rules/court-rules-admin-matters/Comments%20library%204%20recvd%20from%20Sept%202017%20and%20beyond/2016-25_2018-01-30_CommentFromCOA.pdf (last visited September 15, 2018).

2 Proposed Amendment of MCR 7.212, available at: https://courts.michigan.gov/Courts/MichiganSupremeCourt/rules/court-rules-admin-matters/Court%20Rules/2016-25_2017-10-17_Formatte-dOrder_PropAmendtOf7.212.pdf (last visited September 15, 2018).

3 Appellate Practice Section Public Policy Position, available at: https://courts.michigan.gov/Courts/MichiganSupremeCourt/rules/court-rules-admin-matters/Comments%20library%204%20recvd%20from%20Sept%202017%20and%20beyond/2016-25_2018-01-30_CommentFromAPS.pdf (last visited September 15, 2018).



MDTC Schedule of Events

2018

- October 17-20** DRI Annual Meeting - Marriott, San Francisco
- November 8** MDTC Board Meeting – Sheraton, Novi
- November 8** Past Presidents Dinner – Sheraton, Novi
- November 9** Winter Conference – Sheraton, Novi
- December 18** Executive Committee Meeting

2019

- March 14** Legal Excellence Awards – Gem, Detroit
- June 21-22** Annual Meeting & Conference – Shanty Creek, Bellaire
- September 13** Golf Outing – Mystic Creek
- September 24-26** SBM Annual Meeting - Suburban Collection Showplace, Novi
- September TBA** SBM Awards Banquet - Respected Advocate Award
- October 16-19** DRI Annual Meeting – New Orleans