

Fast Action: Motions, Emergencies and Unusual Cases*

Joanne Swanson, co-moderator[†]
Larry J. Saylor, co-moderator[‡]
Patricia C. Schabath, reporter[§]

I. EMERGENCIES IN THE COURT OF APPEALS

A. Emergency Application For Leave to Appeal

Many of these tips apply as well to original actions and claims of appeal. Many also apply to matters that are not emergency filings.

1. Notify Court When Action is Needed.

State the date by which action is required if there is a firm date (e.g., trial), but do not provide an arbitrary date based on a desire to have the application decided faster.

Include the reason why urgent action is sought (e.g., a trial date) and why appellant will suffer substantial harm absent interlocutory appellate intervention.

A motion for immediate consideration is required if action is needed within 21 days. MCR 7.205(F)(2): “When an appellant requires a hearing on an application in less than 21 days, the appellant shall file and serve a motion for immediate consideration, concisely stating facts showing why an immediate hearing is required. A notice of hearing of the application and motion or a transcript is not required. An answer may be filed within the time the court directs. If a copy of the application and of the motion for immediate consideration are personally served under MCR 2.107(C)(1) or (2), the application may be submitted to the court immediately on filing. If mail service is used, it may not be submitted until the first Tuesday 7 days after the date of service, unless the party served acknowledges receipt. In all other respects, submission, decision, and further proceedings are as provided in subrule (E).”

A single motion for immediate consideration will trigger expedited treatment of all accompanying motions and the application/complaint.

File promptly; do not turn a priority into an emergency by waiting until action is required in 21 days to file it.

* We are grateful for the assistance of Dan Brubaker, Chief Commissioner, Michigan Supreme Court, and Clare Cylkowski, District Commissioner, Michigan Court of Appeals, in compiling this outline.

[†] Member, Kerr Russell

[‡] Senior Counsel, Miller, Canfield, Paddock and Stone, PLC

[§] Of Counsel, Kerr Russell

At this time, a 56-day priority does not require a motion for immediate consideration. MCR 7.205(F)(1): “If the order appealed requires acts or will have consequences within 56 days of the date the application is filed, appellant shall alert the clerk of that fact by prominent notice on the cover sheet or first page of the application, including the date by which action is required.”

2. Initial Review by District Commissioner

One of the Court’s nine District Commissioners will review the application/original action for jurisdiction and compliance with the Court Rules. See IOP 7.205(F)(1); IOP 7.205(F)(2)-1 Practice Note.

The matter will be docketed and the filer will be advised of any defects. Opposing counsel will be contacted for a response due date and, in a true emergency, will be advised that the panel may not wait for the answer before issuing an order. Counsel may be asked why the case is or is not an emergency, or to fill in gaps in information. The Commissioner will notify the assigned panel, and the application/action and motions will be submitted to that panel, typically with a commissioner’s report. The Commissioner’s Office will issue the resulting order and, in addition to mailing the order, may telephone the circuit court and litigants and forward the order via email.

3. Contact with the Court & Opposing Counsel

Court staff wants to help. Help staff to help you so that your emergency or priority may be submitted to a panel as smoothly and quickly as possible.

Call the Court in advance of filing an emergency (when action is requested in less than 7 days), or any time urgent action is requested.

Let opposing counsel know that an emergency will be filed as a courtesy before filing it with the Court of Appeals.

Make yourself available if Court staff needs to call you. If the lead attorney is unavailable, make available another attorney, preferably one who is familiar with the appeal.

Be aware that a District Commissioner may request that the appellee agree to refrain from doing something (such as initiating eviction proceedings or filing a motion to show cause) to permit the Court to process an appeal on a priority basis rather than an emergency basis.

Advise the Court if anything occurs after the application has been filed that will affect this Court’s consideration of the matter (such as that a case has settled, or a trial or motion date has been adjourned).

4. *Proof of Service*

Personally serve pleadings when action is requested in less than 7 days (e-service is considered personal service).

If pleadings are e-filed, make every effort to e-serve opposing counsel by choosing “Add Other Counsel” at the Case Details screen to search for opposing counsel who have registered on TrueFiling.

If pleadings are not e-served, include a proof of service detailing the date and manner of service of those parties not e-served.

Do not assume that dismissed parties need not be served—MCR 7.205(B)(5) requires that all parties to the lower court action be served. (See IOP 7.205(B)(6) for the two exceptions to that rule.)

Serve all named defendants in original actions and, for complaints for superintending control, serve any other parties involved in the action that gave rise to the complaint, per MCR 7.206(D)(1)(c).

Be aware that service by email, as of this writing, is insufficient absent an affidavit regarding an email service agreement per MCR 2.107(C)(4).

5. *Caption*

List all parties to the case—even those that have been dismissed—on the caption with their appropriate party designations in the lower court (e.g., plaintiff, defendant, cross-plaintiff etc.), along with appellate designations (appellant and appellee).

Do not use “et al.”

Do not list counter-claims in a separate caption; include the party designations in the main caption.

Do not strike-through parties, even if the circuit court has done so.

6. *Cover Page*

Indicate that immediate consideration is requested. Include the date, such as a trial date, by when action is needed, if applicable.

7. *Brief & Answer*

Include all components, including citations to the record in the Statement of Facts.

Set forth substantive arguments in the brief; do not merely refer the reader to arguments contained in pleadings filed below.

File the answer when requested; be aware that if an answer is needed within hours, the Court will not require that the answer be in the form required by the court rules.

File the brief as one PDF, separate from all the exhibits.

8. Exhibits

File the exhibits in PDFs that are separate from the brief. Include an Index of Exhibits listing exhibits and sub-exhibits (if any). Use clearly labeled electronic bookmarks if e-filing.

File transcripts separate from exhibits.

Divide e-filed exhibits into PDFs at logical breaking points, not in the middle of a document.

Remember that the lower court record generally is not forwarded to the Court of Appeals in the applications context, so file any exhibits necessary for review by the Court of Appeals.

Consider attaching your opponent's brief filed in the court below as an exhibit to expedite the Court's review.

9. Transcript

Order the transcript on an expedited basis and provide proof that it has been ordered.

Provide a copy of the transcript to the Court of Appeals and serve opposing counsel as soon as the transcript is ready.

Consider filing a motion to waive the transcript if it will not be ready before the time by which action is requested. IOP 7.205(B)(4): "If the appellant fears that the transcript will not be timely filed, a motion to waive the transcript or to expedite transcript production may be filed. . . ."

Be aware that the transcript is particularly helpful where the order appealed indicates relief is based on the reasons stated on the record. Absent an opinion or discussion of the court's reasoning, appellate review may be hampered.

10. Motions for Stay

"The Court will accept a motion for stay only if there is an appeal already pending in the Court. A motion for stay filed in conjunction with an application for leave to appeal will be submitted to a panel at the same time as the application." Practice Note to IOP 7.209(I).

“A motion for bond or for a stay pending appeal may not be filed in the Court of Appeals unless such a motion was decided by the trial court.” MCR 7.209(A)(2). See IOP 7.209(A)(2).

Be aware that a motion for stay requires both the hearing transcript and an order of the trial court granting or denying the stay. See MCR 7.209(A)(3).

File a motion to waive the requirements of MCR 7.209 if the transcript and/or stay order are not available. If no hearing was held, advise the Court of that fact. “If the moving party believes that a prior motion in the trial court would be futile or if the moving party cannot provide the trial court transcript and/or order denying stay or bond, a motion to waive those requirements must be filed with the motion for stay or bond in the Court of Appeals. A separate motion fee is required for the motion to waive the requirements of MCR 7.209(A)(2) or (3).” IOP 7.209(A)(3).

Advise the Court of the link between the need for a stay and the merits of the appeal.

Ex parte stays are possible, but disfavored. MCR 7.209(I), IOP 7.209(I) (“Court policy discourages the use of the ex parte stay rule.”).

11. Other Motion Tips

Note that motions are considered together with the application or original action. See IOP 7.205(F)(2)-2. Do not expect the Court of Appeals to consider a motion, such as for stay, by itself.

Be aware there is no provision in the court rules for the filing of a reply to a response to a motion. If a reply to an answer to a motion is filed, it must be accompanied by a motion to allow it.

Know that the Court has the authority to grant peremptory relief and other relief even if a motion for such relief is not filed. MCR 7.216(A)(7).

12. Fees

Provide the \$375 entry fee for each order appealed in an application where relief is sought on multiple orders (an additional fee is not required for an order denying reconsideration of the principal order appealed).

Note that the fee for a Motion for Immediate Consideration or Motion to Expedite is \$200; the fee for other motions is \$100.

B. Emergency Claim of Appeal

One of the Court’s four District Clerks will review the claim of appeal for jurisdiction and compliance with the Court Rules. The matter will be docketed and the filer will be advised of any defects. The only way to obtain a decision on the merits of a

claim of appeal on an expedited basis is to file a motion to expedite. A panel will decide the motion and, if granted, the resulting order will provide direction regarding submission on case call.

In regard to motions seeking immediate consideration of another motion in connection with a claim of appeal, see MCR 7.211(C)(6), opposing counsel will be contacted for a response due date if the motion answer period is to be shortened and, in a true emergency, will be advised that the panel may not wait for the answer before issuing an order. Counsel may be asked why the matter is or is not an emergency, or to fill in gaps in information. The Clerk's Office will issue the resulting order and, in addition to mailing the order, may telephone the circuit court and litigants and forward the order via email.

1. *Jurisdiction*

Consult the final order definitions in MCR 7.202(6) before filing a claim of appeal to ensure that the appeal is being taken from an order that is appealable of right. A claim of appeal filed from a non-final order will be dismissed for jurisdiction and the filing fee will not be refunded.

Check the trial court register of actions to verify that the order appealed has been entered by the clerk.

Timely file the claim of appeal. Failure to timely file is a jurisdictional defect that cannot be cured. An untimely claim of appeal will be dismissed for lack of jurisdiction and the filing fee will not be refunded.

2. *Claim Cover Page*

State in capital letters on the cover page of the claim of appeal that child custody is at issue or that a constitutional/statutory/rule provision was held invalid to ensure that the case is flagged for priority treatment. MCR 7.204(D)(3)(b).

3. *Motions for Immediate Consideration*

MCR 7.211(C)(6): "A party may file a motion for immediate consideration to expedite hearing on another motion. The motion must state facts showing why immediate consideration is required. If a copy of the motion for immediate consideration and a copy of the motion of which immediate consideration is sought are personally served under MCR 2.107(C)(1) or (2), the motions may be submitted to the court immediately on filing. If mail service is used, motions may not be submitted until the first Tuesday 7 days after the date of service, unless the party served acknowledges receipt. The trial court or tribunal record need not be requested unless it is required as to the motion of which immediate consideration is sought." IOP 7.211(C)(6)-1: "A motion for immediate consideration is not substantive, but is designed to expedite consideration of another accompanying or pending motion, application for leave, or original proceeding."

“A motion for immediate consideration is a 7-day motion if served by mail. It must be personally served before filing in the Court of Appeals if it is to be submitted in less than 7 days. Personal service is defined in MCR 2.107(C)(1) or (2), and interpreted to include electronic service through the ImageSoft TrueFiling system.”

Include the date, such as a trial date, by when action is needed, if applicable.

Include the reason why urgent action is sought and why appellant will suffer substantial harm absent appellate intervention. “The rule requires that the moving party specify why immediate consideration is required. Because such motions receive priority attention, movants are well advised to consider whether proper grounds exist.” IOP 7.211(C)(6)-1.

4. Motions to Expedite

See MCR 7.213(C)(7); IOP 7.211(C)(6)-2: “If a party seeks to expedite the submission and/or decision of an entire appeal on the merits, a motion to expedite must be filed.”

Indicate why the case should be afforded priority on the case call calendar pursuant to MCR 7.213(C)(7).

5. Contact with the Court & Opposing Counsel

Call the Court in advance of filing if immediate action will be requested, particularly if action is sought in less than 7 days.

Let opposing counsel know as a courtesy that an emergency will be filed before filing it with the Court of Appeals.

Advise the Court if, after the matter has been filed, events have occurred that moot immediate consideration.

Call the Court if you have questions; the Court appreciates the opportunity to clarify concerns, but remember that Court staff cannot give legal advice.

Promptly respond to a request from the Court to cure defects in filings. Failure to cure defects will result in dismissal of the appeal.

6. Proof of Service

Make every effort, if pleadings are e-filed, to e-serve opposing counsel by choosing “Add Other Counsel” at the Case Details screen to search for opposing counsel who have registered on TrueFiling.

Do not assume that dismissed parties need not be served—MCR 7.204(B)(5) requires that all parties to the lower court action be served.

Be aware that service by email, as of this writing, is insufficient absent an affidavit regarding an email service agreement per MCR 2.107(C)(4).

Personally serve pleadings when action is requested in less than 7 days (e-service is considered personal service).

7. *Brief*

List all parties to the case—even those that have been dismissed—on the caption with their appropriate party designations in the lower court (e.g., plaintiff, defendant, cross-plaintiff etc.), along with appellate designations (appellant/appellee). Do not use “et al.”

Do not list counter-claims in a separate caption; include the party designations in the main caption.

Do not strike-through parties, even if the circuit court has done so.

State whether or not oral argument is requested.

Include all components, including citations to the record in the Statement of Facts.

Set forth substantive arguments in the brief; do not merely refer the reader to arguments contained in pleadings filed below.

8. *Appendix*

Follow the requirements for the Appendix in MCR 7.212(J). The clerk’s office will send a defect letter if appellant’s brief does not include the required appendix.

Review the lower court record before submitting the appeal brief to ensure that all essential documents, including affidavits of service, are included.

Append copies of exhibits that are not contained in the lower court record and reference where in the transcript of the hearings the exhibits were admitted into evidence.

Do not attempt to expand the lower court record on appeal with documents not admitted into evidence below absent a motion to expand the record, and note that such a motion should be rare.

Include an Index of Exhibits listing exhibits and sub-exhibits (if any).

Use clearly labeled electronic bookmarks if e-filing.

Divide e-filed exhibits into PDFs at logical breaking points, not in the middle of a document.

9. *Transcript*

Timely order the transcript and promptly file a copy of the transcript order with the Court.

Monitor production of the transcript and promptly respond to warning letters regarding overdue transcripts.

10. *Motions for Stay/Abeyance*

File a motion to stay that fulfills all the requirements of MCR 7.209(A)(3) or file a motion to waive those requirements with the motion for stay.

File a motion for immediate consideration with a motion to stay if action is needed before the 14-day answer period runs. The motions must be personally served if action is needed within 7 days. MCR 7.211(C)(6).

File a “motion to hold appeal in abeyance,” rather than a motion to stay, if the desired result is staying progress of the appeal.

11. *Other Motion Tips*

Be aware there is no provision in the court rules for the filing of a reply to a response to a motion. If a reply to an answer to a motion is filed, it must be accompanied by a motion to allow it.

Know that the Court has the authority to grant preemptory relief and other relief even if a motion for such relief is not filed. MCR 7.216(A)(7).

12. *Fees*

Provide the \$375 entry fee.

Pay the required \$25 record transmittal fee to the circuit court to avoid delay in transmission of the record and possible dismissal of the appeal.

Note that the fee for a Motion for Immediate Consideration or Motion to Expedite is \$200; the fee for other motions is \$100.

C. Other “Special Motions” that Can Speed Consideration

1. *Motion to Remand*

MCR 7.211(C)(1)(a). “Within the time provided for filing the appellant's brief, the appellant may move to remand to the trial court.”

2. *Motion to Dismiss Appeal*

MCR 7.211(C)(2): “An appellee may file a motion to dismiss an appeal any time before it is placed on a session calendar . . .”

3. *Motion to Affirm*

MCR 7.211(C)(3): “After the appellant’s brief has been filed, an appellee may file a motion to affirm the order or judgment appealed from * * * The decision to grant a motion to affirm must be unanimous. An order denying a motion to affirm may identify the judge or judges who would have granted it but for the unanimity requirement of this subrule.”

4. *Motion for Peremptory Reversal*

MCR 7.211(C)(4): “The appellant may file a motion for peremptory reversal on the ground that reversible error is so manifest that an immediate reversal of the judgment or order appealed from should be granted without formal argument or submission. The decision to grant a motion for peremptory reversal must be unanimous.”

IOP 7.211(C)(4): “This type of motion is meant to expedite reversal and resolution of the appeal. The appellant may file a motion for peremptory reversal at any time in the appeal. In an emergency situation, a motion for peremptory reversal may be used with a motion for immediate consideration to prompt consideration of the merits shortly after the claim of appeal is filed or leave to appeal is granted. Although no time period is specified within which such a motion must be brought, a motion for peremptory reversal will have the most practical impact if brought as early as possible in the appeal, and well before the appeal has been placed upon the Court’s session calendar. The appellant also may file a motion for peremptory reversal in conjunction with an application for leave to appeal; the motion will be submitted to a panel at the same time as the application. * * * Under MCR 7.211(C)(4), a decision to grant a motion for peremptory reversal must be unanimous.”

5. *Briefs on Special Motions*

IOP 7.211.1(A)(3): “Briefs are generally required in support of motions to dismiss, to affirm, or for peremptory reversal. But see IOP 7.211(C)(3) concerning exceptions to the general rule when filing motions to affirm. Supporting briefs may be filed in support of other motions. The court rule contemplates that the brief must confirm to MCR 7.212(C) as much as possible.”

IOP 7.211.1(B)-2: “There is no provision in the court rules for the filing of a reply to an answer to a motion. The clerk’s office will return any reply to an answer that is not accompanied by a motion for leave to file it.”

II. MOTIONS TO EXPEDITE OR FOR IMMEDIATE CONSIDERATION IN THE SUPREME COURT

A. Motion for Immediate Consideration or to Expedite Proceedings

MCR 7.311(E): “A party may move for immediate consideration of a motion or to expedite any proceeding before the Court. The motion or an accompanying affidavit must identify the manner of service of the motion on the other parties and explain why immediate consideration of the motion or expedited scheduling of the proceeding is necessary. If the motion is granted, the Court will schedule an earlier hearing or render an earlier decision on the matter.”

Immediate or expedited consideration of an application for leave to appeal or a motion may be sought by motion for cause shown. A fee of \$150 must accompany the motion. Motions are immediately provided to the Commissioners’ Office to afford the Court an opportunity to determine whether it will give expedited consideration. A prosecuting attorney is exempt from payment of the fee in a criminal case in which defendant is represented by appointed criminal appellate defense counsel.

You will need to file a motion for immediate consideration any time you need a ruling in the near future (for example, within a couple of months). You can file the motion with the application or afterwards if a change of circumstances or the passage of time makes an expedited ruling on your case necessary.

An application accompanied by a motion to expedite or for immediate consideration will be reviewed on an expedited basis. If no such motion is filed, the application will not likely be reviewed until the submission date (i.e., after the reply brief has been filed or the deadline for filing one has expired) and the lower court records have been received.

Do file a motion if you need expedited review; do not rely solely on statements in your application describing the relevant time considerations.

In your motion, make clear the nature of the emergency and the consequences of delay. For example, if you are filing a criminal action, and there are double jeopardy issues, please set them out clearly in your filing.

If your matter is truly urgent – for example, trial begins within the next 48 hours and you are asking the Court to issue a stay the next day – call the Court to advise that you are filing an emergency application, and provide the Clerk’s Office with the Court of Appeals docket number.

B. Application and Answer

When the case is an emergency, file the application so that opposing counsel and the Court have as much time as possible to consider and act upon it. The appellee should do the same with the answer to the application. The Supreme Court Clerk’s Office is

open from 8:30 a.m. to 5:00 p.m. to accept your filing or you may wish to e-file. If you e-file while the Clerk's Office is open, your filing will be processed promptly. If you e-file after 5:00 p.m., your filing will be processed when the Clerk's office opens the next morning.

For the appellant, if you need a response from the Court in the immediate future, please file your emergency application as early in the day as possible.

Serve opposing counsel by the most expedited means possible, for example, by using e-service via TrueFiling (if appropriate) or hand-delivery.

As a general matter, the Court obtains the lower court records before beginning review of an application. As a result, an appellant is only required to attach the trial court and Court of Appeals decisions to an application. MCR 7.305(A)(2). However, certain emergency or interlocutory applications may need to be decided without the complete record. As a result, it is helpful if the appellant filing an emergency application attaches all of the record materials that the Court will need to consider. This will enable the Court to begin review of the application right away, and eliminate the delay of waiting for the lower court records.

For the appellant, if your opponent did not file a response in the Court of Appeals, it is helpful if you also attach a copy of your opponent's trial court response, if any. (If your opponent filed a response in the Court of Appeals, that response is available electronically and does not need to be attached to your application.) This may go against your nature as an advocate, but if the Court does not have your opponent's response, a ruling on the application may be delayed while the Court obtains the lower court records or awaits receipt of your opponent's answer to the application.

Practice tip: the timing of the filing may reflect negatively on the applicant. If an appellant waits for three weeks after the issuance of a Court of Appeals order and asks for a stay in the next three days, it will be apparent that the appellant contributed to the need for immediate action.

C. Bypass Application

MCR 7.305(B)(4) addresses appeal before decision by the Court of Appeals: the application "must" show that "delay in final adjudication is likely to cause substantial harm," or that "the appeal is from a ruling that a provision of the Michigan Constitution, a Michigan statute, a rule or regulation included in the Michigan Administrative Code, or any other action of the legislative or executive branches of state government is invalid."

D. Motion for Stay

Know whether you need to move for a stay. MCR 7.305(I): "MCR 7.209 applies to appeals in the Supreme Court. When a stay bond has been filed on appeal to the Court of Appeals under MCR 7.209 or a stay has been entered or takes effect pursuant to MCR 7.209(E)(4), it operates to stay proceedings pending disposition of the appeal in the Supreme Court unless otherwise ordered by the Supreme Court or the Court of Appeals."

MCR 7.305(C)(7): “If a party appeals a decision that remands for further proceedings as provided in subrule (C)(5)(a), the following provisions apply: (a) If the Court of Appeals decision is a judgment under MCR 7.215(E)(1), an application for leave to appeal stays proceedings on remand unless the Court of Appeals or the Supreme Court orders otherwise. (b) If the Court of Appeals decision is an order other than a judgment under MCR 7.215(E)(1), the proceedings on remand are not stayed by an application for leave to appeal unless so ordered by the Court of Appeals or the Supreme Court.”

MCR 7.215(F) governs the effectiveness and enforcement of Court of Appeals judgments. If you believe you need a stay, move for one. In your motion, clearly identify the scope of the stay that you are requesting (for example, state whether you moving for a stay of trial court proceedings or for a more limited stay of a specific trial court order), and explain why such a stay is necessary. The Supreme Court can issue a stay on its own motion, if conditions warrant, but this is not at all certain to happen.

Practice tip: On rare occasions, the Court has granted motions to stay the precedential effect of Court of Appeals judgments pending the Supreme Court’s review. This may be something to consider when it is clear that other panels will be relying on a significant published decision and, if that decision is reversed, it would be difficult or impossible to provide relief. MCR 7.215(C)(2). You may also ask for a stay of trial or other lower court proceedings pending the Supreme Court’s review.

Note that an appeal to the Supreme Court does not, by itself, operate to stay either the Court of Appeals or trial court decision. But MCR 7.215(F) operates to prevent the effectiveness of a Court of Appeals judgment pending the disposition of an application for leave to appeal to the Supreme Court. In addition, as noted above, MCR 7.305(I) provides that a stay or stay bond entered by the Court of Appeals remains in effect pending disposition of an application to the Supreme Court.