

# Appellate Practice

Section Newsletter

Volume 8 Number 1  
Fall - Winter 2003-2004

## Registration now open for 2004 Michigan Appellate Bench Bar Conference

April 21, 2004, is approaching faster than you think. Why is that date important? It's the registration deadline for the 2004 Michigan Appellate Bench Bar Conference, held at the Sheraton Novi on April 28-30, 2004. Like its predecessors, this conference is a joint effort of the Michigan Supreme Court, the Michigan Court of Appeals, the Michigan Appellate Bench Bar Foundation, and the State Bar of Michigan's Appellate Practice Section.

The 2004 conference focuses on effective appellate advocacy. Plenary sessions include sessions covering what judges and practitioners view as effective advocacy, how today's new technologies might affect appellate advocacy, and how the courts are dealing with delay on appeal. As in the past, the breakout sessions will, among other things, expand on the plenary sessions and will provide practitioners from all areas of the law – criminal, civil, and family – with the opportunity to interact with judges and other practitioners.

The Conference starts on Wednesday night with informal dine-arounds with justices, judges, court staff, and attorneys. Participants in the dine-arounds will split the cost of dinner.

Why should you attend? The informal setting of the plenary and breakout sessions will allow you to learn:

- ◆ How to polish your advocacy skills;
- ◆ How to prepare an effective appeal;
- ◆ How to file effective applications for leave to appeal;
- ◆ How (and when) to file emergency appeals;
- ◆ How (and when) to obtain bonds and stays;
- ◆ How the court's rules and internal operating procedures work;
- ◆ About technology in your appellate practice;
- ◆ About the latest delay-reduction plans; and
- ◆ About advocacy preferences and procedural tips from appellate justices, judges, and court staff.

**Plus** – You'll be able to network informally with appellate justices, judges, and court staff.

Turn to the center of this newsletter for the Conference Schedule and a registration form. For more information, contact Mary Massaron Ross at (313) 983-4801 or Tim McMorrow at (616) 336-3577, or log on to our website: [www.benchbar.org](http://www.benchbar.org).

---

## Section Council

Chair—**Victor S. Valenti**

Chair-Elect—**J. Mark Cooney**

Secretary—**Barbara H. Goldman**

Treasurer—**Deborah A. Hebert**

### Council

*Term expires 2004*

**Janet M. Boes**, Saginaw

**Marcia L. Howe**, Farmington Hills

**Anica Letica**, Pontiac

**Gerald F. Posner**, Detroit

**Susan H. Zitterman**, Detroit

*Term expires 2005*

**Paul R. Bernard**, Detroit

**Brion J. Brooks**, Grand Rapids

**Joseph H. Firestone**, Southfield

**Kathleen McCree Lewis**, Detroit

**Rosalind H. Rochkind**, Detroit

**Michael L. Updike**, Farmington Hills

*Term expires 2006*

**John J. Bursch**, Grand Rapids

**Judith A. Curtis**, Grosse Pointe

**Ronald S. Lederman**, Southfield

**Mary Massaron Ross**, Detroit

**Timothy R. Noonan**, Troy

**James Edward Wyszynski**, Grand Ledge



## From the Chair

By Victor S. Valenti

“To Advance The Administration Of Justice In The Appellate Courts So That The Bench And Bar May Better Serve The Public Interest”

This statement from our Bylaws epitomizes the founding purposes of the Appellate Practice Section. To promote the skillful, efficient and effective practice of appellate law, Article 1, Section 1.2 also promises that the Section “will develop, report upon, recommend and distribute. . . policies and procedures for the efficient and effective operation of an appellate practice [and] to advance the productive and competent operation of the appellate courts.” These words, set forth nearly a decade ago when the Appellate Practice Section was formed, must continue today to be our lodestar.

For nearly two years, appellate lawyers have been confronted with the threat of draconian cuts in brief preparation time. Section members know that these proposed time cuts will not advance the efficient and effective operation of appellate practice. Instead, they would disserve the public interest and retard the administration of justice. But, we have mostly ignored the campaign of editorials and letters to our clients that have labeled us as part of the problem for saying so. Instead, we have focused our efforts on reasoned persuasion. We have done so because we cannot hope to “serve the public interest” by just reflexively reacting in kind.

As I write this column, we are in receipt of the Supreme Court’s Order directing the Court of Appeals “to develop a plan for the management of civil cases that includes ‘just in time’ briefing.” Since the plan is to be submitted to the Supreme Court by February 1, 2004, there is not much time. After consulting with the Section, State Bar President Scott Brinkmeyer has recommended four of our past Chairs along with other veteran Section members to meet with the Court of Appeals to help develop such a plan. The stakes now are very high. But, I am convinced that the Supreme Court’s Order offers the Section the best opportunity we could hope for to work with the Court of Appeals to achieve a mutual plan that will benefit appellate practitioners, help the Court to achieve “delay reduction,” and “most importantly, work to the advantage of those members of the public who avail themselves of the appellate courts.”

APS Newsletter  
Eileen Kavanagh, Editor

Continued on next page

You, our nearly 700 Section members, also continue to serve a vital role. Some of you have already answered my challenge to volunteer for behind-the-scenes work on our Section Committees. More volunteers are needed, and I renew that challenge to Section members now. Those who find Committee work satisfying and who are so inclined, can usually step into Council positions within a year or two.

Equally important, I urge you to continue your ongoing discussions on the Section listserv about ways to improve the appellate process whether by differentiated case management or by e-filing, or by some entirely novel concept. Just remember that the Section listserv is a semi-public forum that is also accessed by many of our appellate judges and court staff. Discourse should remain civil and constructive.

In challenging appellate lawyers “to do our best work and not just a workmanlike job,” past Chair Noreen Slank once stated in this column that, “as professional writers and first rate thinkers, appellate lawyers are uniquely positioned to affect the quality of justice.” Past Chair Gary Field later remarked that he was “constantly impressed by how hard appellate attorneys work, by their experience and wisdom and true dedication to improvement of appellate law.” I share Noreen’s and Gary’s convictions about you.

Through the strength of our members, I am confident that this Section will continue to advance the administration of appellate justice and to serve the public interest. Our courts and our clients are entitled to nothing less.

I look forward to my year as Chair of your AppellatePractice Section.

## Committees

*Michigan Court Practice*  
Co-Chairs

**Susan H. Zitterman**  
**Deborah H. Herbert**

*Federal Court Practice*  
**Paul Bernard, Chair**

*Court Liaison/Rules Comment*  
**Ronald S. Lederman, Chair**

*Publications*

**Marcia L. Howe, Chair**

*Economics of Appellate Practice*  
**Michael L. Uptide, Chair**

*Technology*

**Joseph H. Firestone, Chair**

*Legislative Liaison*  
**Chair Vacant**

*Bench-Bar Conference Liaison*  
**Mary Massaron Ross**

*Good Deeds*

**Linda Garbarino, Chair**

*Ad Hoc*

**Donald M. Fulkerson, Chair**

*Commissioner Liaison*  
**Hon. William B. Murphy**

*Ex-Officios*

**Gary L. Field, Lansing**  
**Donald M. Fulkerson, Westland**  
**Noreen L. Slank, Southfield**  
**Evelyn C. Tombers, Lansing**

## Annual Meeting Notes

At the Annual Meeting of the State Bar of Michigan, the Appellate Practice Section presented a program, “Appellate Vexation – The Use and Abuse of Requests for Sanctions in Michigan’s Appellate Courts” (panel discussion with Judges Talbot and O’Connell and Sandy Mengel). The Section’s annual meeting followed the program. The following is a summary of the business of the meeting:

1. Election of officers and members of Section Council.

All officers’ positions were unopposed; upon motion, the slate of nominees was accepted and elected by unanimous ballot. There were six candidates for six vacancies on the Section Council. By motion, the slate of nominees for members of the Section Council was accepted and a unanimous ballot cast for their election.

2. Report on the September 12, 2003 meeting of the Representative Assembly of the State Bar of Michigan.

Don Fulkerson and Tim McMorrow reported on the September 12, 2003 meeting of the Representative Assembly of the State Bar of Michigan, at which the assembly considered the Court of Appeals’ delay reduction proposal. Tim, representing the State Bar’s task force (the “Neckers committee”), stated that the Court of Appeals’ proposal would adversely affect the quality of briefs and decision-making. Don spoke on behalf of the Appellate Practice Section. Judge Whitbeck presented the position of the Court. Don’s impression was that Judge Whitbeck is committed to eliminating stipulated extensions of time to file briefs on appeal. He cited a statistic that 50% of appeals involve at least one stipulated extension but did not respond to the argument that

reducing briefing time will affect quality. Don emphasized that the Court’s proposal is premature, because the “warehouse” has not been eliminated. Scott Brinkmeyer, incoming President of the State Bar, made a similar statement.

Don made a motion from the floor to oppose the Court’s proposed changes to MCR 7.212. A hostile amendment was defeated. The Representative Assembly voted to oppose the proposed changes to MCR 7.212.

3. Supreme Court Administrative Hearing, September 25, 2003.

Vic Valenti and Don Fulkerson had a teleconference with Chief Justice Corrigan. She indicated that the Court is not willing to table consideration of the proposed changes to MCR 7.212. It is uncertain at this point how much time will be available for comments, but Don and Vic urged Section members to attend the hearing.

4. Presentation to incoming Chair.

Don Fulkerson described the past year as one of very hard work but great rewards. He expressed his respect for the integrity of the Section and its members and praised its efforts toward the betterment of the appellate process. Vic Valenti thanked Don on behalf of the Section for a job well done.

Don presented Vic with a gavel, in honor of his assuming the position of Chair of the Section.

After further discussion of scheduling future Council meetings, the meeting was adjourned.

*This summary was excerpted from minutes submitted by Barbara H. Goldman, Secretary*



## Shannon's Soapbox

(Note: This column was written last year concerning the “differentiated case scheduling” experiment that began January 31, 2003. The issue remains timely because, although the experiment was originally scheduled to expire on December 31, 2003, the Supreme Court issued an order on December 23, 2003, extending the experiment until December 31, 2004. The remaining question continues to be whether the experiment should become permanent via an amendment to MCR 7.213(C). The issue also remains timely because the Court of Appeals is currently considering a related proposal to “fast track” summary disposition appeals in new and unprecedented ways. The Section and the Bar are working with the Court in an effort to achieve a final version of the proposal that contains necessary safeguards to insure justice to the parties and quality decision-making.)

One thing that steams me, and always has, is when I’ve been standing in line for a long time, and somebody takes cuts in front of me. When I was a kid, I’d holler “no cuts!” My hope was to raise a hue and cry among those waiting their turn, until the cut-taker slunk to the back of the line. I still don’t think it’s “fair” to take cuts, but nowadays I’m more likely to settle for a withering look (hoping someone else will holler “no cuts!”).

So you won’t be surprised to hear that I didn’t warm immediately to Administrative Order 2002-5, “Differentiated Case Scheduling at the Court of Appeals,” entered December 23, 2002. This AO will be in effect until the end of 2003, and could become permanent as an amendment to MCR 7.213(C). Differentiated case scheduling is a fancy name for permitting large scale “cuts,” and all of us in the line should pay close attention to our progress this year towards the front of the line and oral argument of our appeals.

Depending on our cases, we may find ourselves stuck in line much longer, while others take cuts, or we may breeze to the front ourselves. Or both. I’m willing to wait and see how it works in practice before I start hollering “no cuts!” The point of the AO is to help the Court of Appeals with its “delay reduction” efforts, and no one can doubt that that’s a good cause.

My fear is that the AO will defeat the fundamental fairness policy underlying MCR 7.213(C). Generally, those who perfect their appeals first should be heard first. There are a few exceptions, which I’ll say more about in a moment. But putting the exceptions aside, there is no better assumption to make for everyone else than the assumption that underlies all lines—that those who have waited longest have the greatest claim to be served next.

That is why 7.213(C) begins by saying, “The priority of cases on the session calendar is in accordance with the initial filing dates of the cases, except . . .” That means, basically, “no cuts without one of the following good reasons.” The exceptions are all geared towards the needs of the parties, like the need children have for a prompt resolution of custody disputes, or the public’s need to have certain kinds of issues resolved quickly. But the AO is not about either of these things; instead, it is about the Court’s need to move cases faster, which benefits parties only incidentally and randomly, if their cases happen to look “easy” at the screening stage.

My fear is that the AO will repeat a mistake made in the past, which was to decide cases first that were easiest, to bolster the Court’s statistics. The dark side of this short-term improvement in the rate of decision-making is that eventually the price has to be paid. The hard cases are still there, waiting to eat up judicial resources when the boxes that house them eventually are opened. The Court itself has acknowledged that part of its current problem is too many complex, knotty cases in the mix. Why? Because past solutions trimmed the easy cases out of the backlog first, leaving a large indigestible lump of hard box cases for some future Court to deal with.

A number of appellate lawyers do not share my concerns. They view the issue as an administrative matter for the Court that is not really the advocate’s business. And I freely admit that I am not wholly altruistic here, because I expect to be the guy stuck in the line while others whiz past me. But the die is cast for 2003, so let’s see how it works. Just remember that AOs have a way of morphing into court

*Continued on next page*

rules. If your thoroughly briefed box case vanishes in the warehouse, apparently forever, you may owe it to the client to tell the Supreme Court that this experiment should be discontinued.

### **MCR 7.213(C)**

This seldom-cited rule grew out of old GCR 816.1, and went unchanged from 1985 to 2002, when three different amendments became effective. The old General Court Rule put appeals in line to be heard after the brief of appellee was due (whether it was filed or not). The Court's computers spit out a postcard to tell you that date. Under the Michigan Court Rule, before 2002, it worked the same way.

Since its inception, the current rule has said that precedence will be given to interlocutory criminal appeals and child custody cases. These are commonsense exceptions. I doubt anyone minds if a case is given cuts because it raises the question where and with whom a child will live. And if the Court has granted leave in a criminal case before trial, it would be inconsistent with the defendant's right to a speedy trial to have a two-year wait while the interlocutory issue is reviewed on appeal.

MCR 7.213(C) went largely uncited until 1996. In that year, then Judge Maura Corrigan urged the Supreme Court to amend 7.213(C) in *Meyers v Patchkowski*, 216 Mich App 513. *Meyers* was a recall election dispute that didn't reach the Court of Appeals until it was moot. Chief Justice Corrigan noted that this was a recurring problem, and opined that 7.213(C) should be amended to accord calendar preference to all cases involving recall election matters. *Id.* at 519.

Then, in July 2001, the Supreme Court decided *Michigan Coalition of State Employee Unions v Civil Service Comm'n*, 465 Mich 212. In this case, Circuit Judge James Giddings had granted a preliminary injunction blocking implementation of a civil service rule, and a year had passed before the Court of Appeals granted leave to appeal and stayed Judge Giddings' order. The Supreme Court appended to its opinion a proposed change in MCR 7.213(C) and two other rules, all directed to the prompt resolution of cases and appeals in which a preliminary injunction has been granted. The 7.213(C) proposal was to add "interlocutory appeals from the grant of a preliminary injunction" to the existing list.

### **The 2002 amendments**

Effective January 1, 2002, MCR 7.213(C) was amended so that cases were given precedence based on "the initial filing dates of the cases" rather than the due date

of the brief of appellee. I can't recall the request for this change, which came from the Court of Appeals. It sounds like it was intended to get older appeals heard before younger ones that were briefed faster, but I admit I'm guessing. I think another change was made at the same time to add expedited cases to the list of those given calendar preference. That makes sense—if the Court has made an individualized determination that a case should be expedited, then of course it must have precedence on the calendar.

In March 2002, the Supreme Court adopted the amendment it had proposed in *Michigan Coalition of State Employee Unions*. Now the list of exceptions had grown to four—interlocutory criminal appeals, child custody cases, expedited cases, and interlocutory appeals from granted preliminary injunctions. This change became effective September 1, 2002.

In May 2002, also effective September 1, the list grew to five exceptions (which for the first time were numbered). The new one, placed as number 4, required precedence for:

appeals of decisions holding 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 branch of state government is invalid.

I didn't like this proposal and don't much like the amendment, since I think it would be better to let the parties seek expedited treatment on an individualized basis if they think they need it. But I concede that it is not totally irrational.

### **AO 2002-5**

So that is where the rule stood when AO 2002-5 was entered, giving the Court of Appeals broad discretion to give precedence "to any appeals that the Court of Appeals determines are appropriate for differentiated case management." The AO explains what this means:

Specifically, the Court of Appeals may schedule such cases on the session calendar as soon as the time for filing the briefs has elapsed, the record has been received, and the matter has been prepared for submission in accordance with internal procedure.

It follows, I think, that any appeal may be scheduled for argument within two or three months of the due date for appellee's brief, if the Court of Appeals so desires.

As many of you no doubt recall, the Court of Appeals



*Continued from previous page*

recently asked the Supreme Court for an administrative order that would permit it to give calendar priority to summary disposition appeals. The main flaw in this request was that the underlying premise—that summary disposition appeals were easier and could be resolved faster—is demonstrably false. The size of the record is not a reliable indicator of an appeal’s difficulty. And now that summary disposition is no longer disfavored as it once was, numerous appeals arise from summary disposition proceedings, sometimes with very substantial records. And whether the record is large or small, the legal issues can be extremely difficult and time-consuming to resolve.

AO 2002-5, which applies to every case on the Court of Appeals’ docket, not just the summary disposition appeals, does answer my objections to the Court of Appeals’ original request. But at what cost?

Here we have a rule that the Court amended repeatedly last year, each time with the purpose of benefiting a particular class of case by awarding it calendar priority. Now, less than three months after two of the five exceptions were added to the rule, it is as though the Court had said, in effect, ah, what the hell, prioritize the appeals any way you want.

### Why you should care

AO 2002-5 is well intentioned, I’m sure, but at best it is a band-aid approach to “delay” reduction. It may cover up the problem for a while, but cannot heal it. Moreover, it runs counter to the purpose underlying every other exception to the general rule of MCR 7.213(C). It’s not just different from the other exceptions, but actually may damage them. That is, it may make the wait *longer* for the cases that really have a claim to expedited treatment. (The more cases that are expedited, the less it will mean to be expedited, unless the Court is careful to have degrees of priority based on need.) And AO 2002-5 surely will make the wait longer for parties whose cases *look* complex to the staff person at the Court of Appeals who does the screening and selects a “track” for the case to follow.

➤ If deciding a bunch of easy appeals in a short time would induce the Legislature to fund another eight prehearing slots in the Court of Appeals prehearing division, “differentiated case scheduling” might be worthwhile despite my quibbles. That could well be the motivation, but in the current fiscal climate, it seems unlikely to work. And whether it works or not, we should still consider the cost.

Cases that don’t look “easy” at the screening stage

will take longer, maybe a lot longer, to decide (even if they really are “easy”). In 2002 the Court of Appeals released figures showing the percentage of appeals decided by opinion within 2, 2 ½, 3, 3 ½, and 4 years of the filing of the claim of appeal. These figures were for opinions released in 2001. Only 63.3 percent of the appeals had opinions issued within 2 years, but that figure jumped to almost 91 percent within 2 ½ years, and over 98 percent within 3 years. The corollary of these figures is that, even under MCR 7.213(C)’s fairness-based priority rules, 9 percent of appeals were still undecided after 2 ½ years and 1.6 percent were still undecided after 3 years.

In 2003, without MCR 7.213(C)’s priority rules, it seems very likely that there will be more overall appeals decided, but also more than 9 percent that linger 2 ½ years before a decision and more than 1.6 percent that linger 3 years. What worries me is that it could be a *lot* more. It has happened before, and it can happen again. It is hard to wait 2 years for a decision, but *very* hard to wait 3 years.

There would be a cumulative effect, too. If AO 2002-5 became a permanent part of the court rules, I think that the duration of apparently “hard” appeals would keep growing longer and longer, year by year. There would no longer be any real “line,” with parallel shorter lines for expedited cases. There would just be a mob of appeals trying to squeeze through the gates, and only the little ones (the appeals with small records) would have much chance of getting through. Because there are new appeals filed all the time, there is a never-ending supply of “easy” cases to handle first.

Appeal duration will become more unpredictable. It will be hard to tell clients how long their appeals may take, even approximately (one year or three?).

Parties with a demonstrable need for priority decision-making will wind up waiting longer than they would without AO 2002-5. I’m speculating, of course, but it seems like a good bet. The Court could try to fill each month’s calendar with cases that are “really” priority cases first, before starting to add cases whose only priority comes from AO 2002-5, but the scheduling could get messy fast. Some cases will have priority status for more than one reason. Some “regular” cases will have to be added each month, or the Court will have to have special panels devoted to ancient appeals, the way it now has panels devoted to “complex” appeals.

*Continued on next page*

The Court will find a way to do it, of course. There are a lot of smart people at the Court of Appeals who will figure out how to keep the whole herd moving, more or less in the same direction. But it will all be much more subjective without the basic principle that should govern who gets picked to go next. The parties who have waited longest should go next, unless others in line have a greater need to be heard out of order. MCR 7.213(C) codifies this rule of fairness. Without it, there is a potential for abuse and cronyism. Even if there is no abuse in fact, some who wait too long will believe there has been abuse, placing the system in disrepute.

Parties will file more motions to expedite, because it will become more important to get out of the mob and join the "A" list. The Court will have to waste time on these motions that would be better spent resolving appeals.

If nothing like this comes to pass, fine. But those who practice in this field should be vigilant this year for signs of trouble. And if we see those signs, we should each of us ask the Supreme Court to end this experiment before the ill effects begin to multiply.

Brian Shannon

## Breaking News on Delay Reduction: Join the Listserv

As we went to press, the Court of Appeals and the Case Management Work Group were considering the court's proposal to expedite appeals in summary disposition cases (often referred to as the 90-90 plan). For the latest developments on this and other proposals and for all the debate on the issues that interest Appellate practitioners, join the listserv. Go to the Michigan State Bar Association web site, [www.michbar.org](http://www.michbar.org), and click on Sections. Then click on Appellate Practice from the list of sections. The section's page will come up and direct you from there to enter your email address and click on the button to join. It's that easy. There are a few guidelines to remember:

- ♦ To post a message or join in a discussion, the address is [appellate@lists.michbar.org](mailto:appellate@lists.michbar.org).
- ♦ In any communication, you must identify yourself by using your real name.
- ♦ Everyone participates on equal footing. All opinions are respected and encouraged.
- ♦ Participants on the listserv include Court of Appeals and Supreme Court staff, judges, and justices. In addition, your opposing counsel or a judge sitting on your case may be a participant. Be sure not to disclose information that is confidential or protected by the attorney-client privilege or the attorney work-product doctrine. Any issue presently pending should be discussed in hypothetical terms with identifying aspects of the case removed (e.g., names, county of origin, specific factual allegations, etc.).
- ♦ Discourse must be civil with participants refraining from personal insults or characterizations.
- ♦ Please do not post political or campaign solicitations.

# T. JOHN'S COURT

## A Reminiscence in the Form of a Book Review

A MATTER OF RIGHT: A HISTORY OF THE MICHIGAN COURT OF APPEALS, Charles E. Harmon, with foreword by Judge Richard A. Bandstra, 105 pages, produced by *Michigan History* magazine, 2002, hard cover, \$35.00

Reviewed by Norman Otto Stockmeyer, Professor of Law, Thomas M. Cooley Law School.

In the interest of full disclosure, in 1964 I wrote the first published article about the Michigan Court of Appeals.<sup>1</sup> This experience had two profound effects on my nascent legal career. It led to a twelve-year employment stint with the court, as a judicial law clerk, commissioner, and research director. And it introduced me to the thrill of seeing one's words in print, which has led to over 100 subsequent articles, book reviews, and columns.

Because I was there at the inception of the court, and have published several articles about aspects of its operation, I was excited to learn that the Michigan Court of Appeals is publishing a history of its first thirty-seven years. It's called A MATTER OF RIGHT: A HISTORY OF THE MICHIGAN COURT OF APPEALS and is available from the Publications Office of the Department of Management and Budget, 7150 Harris Drive, Dimondale, MI 48821 (enclose a check or money order for \$35 payable to the State of Michigan).

The author, Charles E. Harmon, is a retired political writer for the Booth Newspapers and former press secretary to Governor George Romney. The large, coffee-table size book contains over 100 pages of historical information, biographical squibs on all 67 past and present judges (through early 2002), annual caseload statistics, and wonderful historical photographs. I think Harmon succeeded admirably at what he saw as his biggest challenge: How to make it interesting? Relatively few lawyers practicing today can recall what it was like to pursue or defend against an appeal back before there was an intermediate appellate court in Michigan. Over the years the availability of the Court of Appeals (and the appeal of right) contributed to an increase in appeals out of all proportion to the increase in the general population or the number of lawyers. And the court's 250+ volumes of published opinions have contributed greatly to the jurisprudence of Michigan. Harmon's

book explains how this came to be.

More than any other individual, T. John Lesinski was responsible for what the Court of Appeals has become. As Lieutenant Governor, and thus the presiding officer in the state Senate, he oversaw passage of the 1964 enabling legislation. As the court's first chief judge, he picked the staff, developed the internal operating procedures, and even designed the offices and courtrooms. It was, by unanimous consent, T. John's court. (Fellow judges called him Ted, but to everyone else he was T. John.)

Lesinski's greatest innovation and most lasting legacy is the court's central research staff. To increase judicial productivity and consistency, every issue was worked up by staff before being placed before the judges. Procedural motions got a Clerk's Office memo; applications for leave were reviewed by Commissioners; appeals of right went through the Prehearing Division. No other appellate court in America had such a large and highly organized staff, and no other appellate judges produced the volume of opinions per judge that Michigan's Court of Appeals issued.

Lesinski was proud of his court's ability to keep abreast of heavy caseloads through efficient organization and a centralized research staff. Beginning in 1969 he lectured on the Michigan experience at annual Appellate Judges Seminars sponsored by the Institute of Judicial Administration. During 1972-73 Lesinski, Chief Clerk Ron Dzierbicki, and I spoke at a series of regional American Bar Association programs for appellate judges throughout the country (California, Florida, Louisiana, Nevada, and New Hampshire) on the court's procedures and research department. We put on similar presentations in Minnesota and Texas in 1976.

The proselytizing was not directed only at insiders. At Lesinski's urging, I wrote articles for lawyers and legal academics on our use of commissioners and prehearing research attorneys. They appeared in *Federal Rules Decisions* (1970),<sup>2</sup> the *American Bar Association Journal* (1973),<sup>3</sup> *Vanderbilt Law Review* (1973),<sup>4</sup> *Judicature* magazine (1976),<sup>5</sup> and in the 1974 book *Appellate Courts: Staff And Process In The Crisis Of Volume*.<sup>6</sup> By 1990, the *Vanderbilt* article, which I co-authored with Lesinski, had been excerpted, quoted, or cited in more than fifty books and articles on appellate-court productivity.

*Continued on next page*

Continued from previous page

The Michigan Court of Appeals' innovative use of a centralized research staff became a national model for other intermediate appellate courts with burgeoning dockets. Most were still laboring under the one judge-one law clerk staffing model, and attempting to issue traditional full-blown opinions in every appeal. A 1976 book, *Justice On Appeal*, correctly called the Michigan Court of Appeals research department the most fully developed central staff in the country.<sup>7</sup> In 1977 Bernard Witkin, long known as the dean of California jurisprudence, described the Michigan experience in these terms in his book *Manual On Appellate Court Opinions*:

The first successful use of central staff began in Michigan in 1968 in a newly created Court of Appeals with statewide jurisdiction. Under the Michigan system, a central staff attorney prepares a memorandum for every appeal. This memorandum, accompanied by the record and briefs, goes to the three-judge panel assigned to the case. The panel uses it to prepare for the oral argument and drafting of opinions. If the appeal seems suitable for routine disposition, a staff member drafts a recommended Per Curiam opinion, which the court may adopt, with or without editing.<sup>8</sup>

"The pioneer in the use of central staff by appellate courts was the Court of Appeals of Michigan," University of Virginia law professor Daniel Meador, a close observer of appellate courts for many years, wrote in 1983. "It quickly developed the largest and most effectively organized staff of any appellate court in the United States."<sup>9</sup>

There were detractors almost from the beginning, and almost all were academics. One of the first was University of Michigan law professor Paul Carrington, who warned of the dangers of judicial delegation in a 1971 article in *Federal Rules Decisions*.<sup>10</sup> In 1975, California appellate judge Robert Thompson acknowledged in the *California State Bar Journal* that over-reliance on staff research and draft decisions could lead to one-judge or no-judge appellate opinions.<sup>11</sup> University of Michigan law professor Joseph Vining criticized what he saw as the growing bureaucratization of the judiciary in a 1981 article in the *Michigan Law Review*.<sup>12</sup> And Michigan State University political science professor Harold Spaeth caused a stir when he labeled central research staff "the monster in the judicial closet" in a 1992 *Judicature* article.<sup>13</sup>

Defenders stepped forward to respond to the critics. Witkin fired back in 1979:

In brief, the critics' attack, reduced to simple terms, is not on central staff; it is in essence a charge that the appellate justices have abandoned their responsibilities by producing decisions which are not their own; and the charge is no less outrageous when it is leveled at the allegedly culpable staff rather than at the justices themselves.<sup>14</sup>

Federal appeals court judge Harry Edwards strongly disputed Vining's bureaucratization thesis in a 1981 speech printed in the *Michigan Law Review*.<sup>15</sup> Donald Ubell, a former Court of Appeals prehearing attorney and Michigan Supreme Court commissioner, offered an insider's perspective on the delegation issue in the *Thomas M. Cooley Law Review* in 1984.<sup>16</sup> David Brown, a former central staff attorney for the Kansas Court of Appeals, faced down the "monster in the closet" in a 1992 issue of *Judicature*.<sup>17</sup> The shortest retort may have been that of Patricia Wald, another federal appeals court judge, who responded to the bureaucracy charge with a pithy "Even Batman had Robin to help out in tight spots." (*Maryland Law Review*, 1983)<sup>18</sup>

By and large the judges of the Court of Appeals chose not to respond in print; perhaps they were too busy deciding appeals and issuing opinions. But they continued to subscribe to Lesinski's observation in a 1971 issue of the *Judges Journal*, and remained content to let him speak for them (or take the heat as some called it):

The day of the single, unassisted legal practitioner is over and so is the day of the unassisted judge. . . . [T]he use of supporting research personnel, functionally organized, can effect a significant increase in judicial output without derogation of the essential judicial function.<sup>19</sup>

Sol Wachtler tells the story of how, when he first became Chief Judge of New York's highest court, he proudly told his wife that he would be using Benjamin Cardozo's desk. She replied, "Yes, but remember in fifty years it will still be Benjamin Cardozo's desk."<sup>20</sup> In many ways that is true of the Michigan Court of Appeals: it's still T. John's court.

*Professor Stockmeyer was the first law clerk to Chief Judge Pro Tem John W. Fitzgerald, the court's first commissioner, and research director from 1969 to 1976. In the latter position he hired, trained, and helped place more than one hundred*



*prehearing research attorneys, some of whom became appellate judges, supreme court commissioners, and leading appellate practitioners. He teaches at the Thomas M. Cooley Law School.*

## ENDNOTES

1. N. O. Stockmeyer, Jr., *Michigan's New Court of Appeals: An Introduction*, 43 Mich. Bar J. 49 (August 1964).
2. N. O. Stockmeyer, Jr., et al., *The Office of Commissioner of the Michigan Court of Appeals and Its Role in the Appellate Process*, 48 Federal Rules Decisions 355 (1969).
3. N. O. Stockmeyer, Jr. *Rx for the Certiorari Crisis: A More Professional Staff*, 59 A.B.A. J 846 (1973).
4. T. John Lesinski & N. O. Stockmeyer, Jr., *Prehearing Research and Screening in the Michigan Court of Appeals: One Court's Method for Increasing Judicial Productivity* 26 Vand. L. Rev. 1211 (1973).
5. Stockmeyer and Stenger, *The Michigan Commissioner System*, 59 Judicature 389 (1976).
6. N. O. Stockmeyer, Jr., *Central Research Staff in the Michigan Court of Appeals*, in Meador, *APPELLATE COURTS: STAFF AND PROCESS IN THE CRISIS OF VOLUME*, Appendix B (1974).
7. Carrington, Meador, and Rosenberg, *JUSTICE ON APPEAL* 44, n. 4 (1976).
8. Witkin, *MANUAL ON APPELLATE COURT OPINIONS* 18 (California Center for Judicial Education and Research, 1977).
9. Daniel J. Meador, *Toward Orality and Visibility in the Appellate Process*, 42 Md. L. Rev. 732, 734 (1983).
10. Paul D. Carrington, *The Dangers of Judicial Delegation*, 52 Federal Rules Decisions 76 (1971).
11. Thompson, *One Judge and No Judge Appellate Decisions*, 50 Cal. St. B.J. 476 (1975).
12. Joseph Vining, *Justice, Bureaucracy and Legal Method*, 80 Mich. L. Rev. 248 (1981).
13. Mary Lou Stow & Harold J. Spaeth, *Centralized Research Staffs: Is There a Monster in the Judicial Closet?*, 75 Judicature 216 (1992).
14. Wright, *Witkin on Appellate Court Attorneys*, 54 Cal. St. B.J. 106, 107 (1979).
15. Harry T. Edwards, *A Judge's View on Justice, Bureaucracy and Legal Method*, 80 Mich. L. Rev. 259 (1981).
16. Ubell, *Evolution and Role of Appellate Court Central Staff Attorneys*, 2 Thomas M. Cooley L. Rev. 157 (1984).
17. David J. Brown, *Facing the Monster in the Judicial Closet: Rebutting a Presumption of Sloth*, 75 Judicature 291 (1992).
18. Patricia M. Wald, *The Problems with the Courts: Black-Robed Bureaucracy, or Collegiality under Challenge?*, 42 Md. L. Rev. 766 (1983).
19. T. John Lesinski, *Judicial Research Assistants: The Michigan Experience*, 10 Judges Journal 54, 55 (1971).
20. *NY Chief Judge Sol Wachtler Speaks at Wilson Graduation*, Cooley Benchmark (Vol. XII, No. 2) 44, 45.

# 2004 Michigan Appellate Bench Bar Conference Schedule

## Wednesday, April 28, 2004

5:30-6:30 p.m. Registration (St. Clair Room)  
7:00 p.m. Dine-Arounds

## Thursday, April 29, 2004

8:00-9:00 a.m. Registration  
9:00-9:30 a.m. Welcome and Opening Remarks  
9:30-10:15 a.m. Plenary: Advocacy: A View From the Bench – What Works and What Doesn't  
10:15-10:35 a.m. Break  
10:35-11:45 a.m. Breakouts: Advocacy: A Discussion of What Works and What Doesn't With Members of the Bench and Bar  
12:10-1:25 p.m. Lunch: Guest Speaker TBA  
1:45-2:45 p.m. Breakouts:  
    Civil:  
        Preparing the Appeal  
        The Application Process  
        Handling Emergencies  
    Criminal:  
        Update on the Law  
        Standards of Review and Waiver vs. Forfeiture  
        Ineffective Assistance of Counsel  
    Family Law  
3:00-4:00 p.m. Breakouts: Same as above breakouts plus  
    Criminal:  
        Oral Argument and Brief Writing  
        Under the Wire: Research, pleadings, clients, and the squeeze of appellate deadlines  
        Interlocutory Appeals and Bond Motions  
4:15-5:15 p.m. Plenary: Hot Tips & Pet Peeves  
6:00 p.m. Reception and Dinner – St. John's Conference Center

## Friday, April 30, 2004

7:30-8:30 a.m. Breakfast  
8:30-9:30 a.m. Plenary: The E-Case on Appeal: How Electronic Appeals Will Affect Practice  
9:30-11:00 a.m. Plenary: The Dilemma of Delay: What is it? What can we do about it? What should we do about it?  
11:15-12:15 p.m. Breakouts:  
    Bonds & Stays  
    Michigan Court Rules & Internal Operating Procedures  
    Technology – Electronic Appeals  
    Sneak preview of the proposed new rules for appeals to circuit courts  
12:30-2:00 p.m. Lunch: Tending Bridges: Maintaining Credibility, Communication, and Cooperation among the Judicial, Legislative, and Executive Branches. Scheduled panelists include Chief Justice Maura Corrigan, Chief Judge William Whitbeck, Senator Alan Cropsy, and Representative Jim Howell.

Cost for the conference is \$295, which includes all plenary and breakout sessions, Thursday's lunch, Thursday's reception and dinner, and Friday's lunch. Scholarships are available. You'll find a registration brochure in this issue of the newsletter. For more information on sessions, moderators, or presenters, check out our website at [www.benchbar.org](http://www.benchbar.org).

# 2004 Michigan Appellate Bench Bar Conference

www.benchbar.org

Conference Registration Deadline: April 21, 2004  
 Conference Fee \$ 295

The conference fee includes program materials, Wednesday's Pre-Conference reception, Thursday's luncheon at the conference, Thursday's reception and dinner at the St. John's Conference Center, and Friday's luncheon. No advance charge for Wednesday dine-arounds – pay at dinner.

**All conference participants will attend plenary sessions. Space for breakout sessions is limited. Please indicate your breakout session preference on this form.**

Name: \_\_\_\_\_  
 Firm Name: \_\_\_\_\_  
 Address: \_\_\_\_\_  
 City: \_\_\_\_\_ State: \_\_\_\_\_ Zip: \_\_\_\_\_  
 Phone: ( ) \_\_\_\_\_ Fax: ( ) \_\_\_\_\_  
 E-Mail Address: \_\_\_\_\_

### Breakout Session Preferences

Please indicate your first (1) and second (2) preferences for the following breakout sessions:

#### Thursday – 1:45-2:45 p.m.

*Civil:*

- Preparing the Appeal
- The Application Process
- Handling Emergencies

*Criminal:*

- Update on the Law
- Standards of Review and Waiver vs. Forfeiture
- Ineffective Assistance of Counsel

*Family Law*

- Double Session 1:45-4:00 p.m.

#### Thursday – 3:00-4:00 p.m.

*Civil:*

- Preparing the Appeal
- The Application Process
- Handling Emergencies

*Criminal:*

- Update on the Law
- Under the Wire: Research, pleadings, clients, and the squeeze of appellate deadlines
- Interlocutory Appeals and Bond Motions

#### Friday – 11:15-12:15

- Bonds & Stays
- Michigan Court Rules & Internal Operating Procedures
- Privacy Interests and Public Access in Electronic Appeals
- Sneak preview of the proposed new rules for appeals to circuit courts

Enclose your conference fee and return this form to:  
 Hope Curtin, P.O. Box 38, Allen Park, MI 48101-0038  
 Scholarship Request: Yes No  
**Make checks payable to Michigan Appellate Bench Bar Conference Foundation**  
 If yes, attach a letter addressing need for scholarship  
**Hotel Reservation Deadline: March 28, 2004.** A

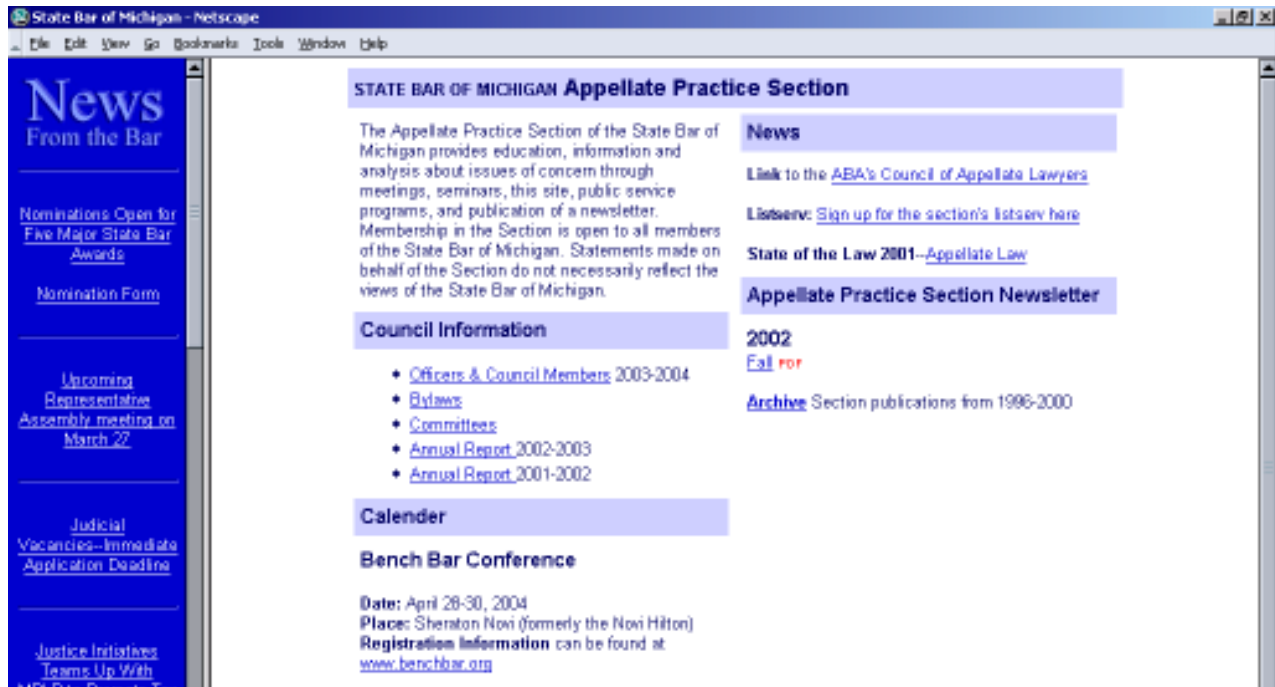
limited number of hotel rooms have been reserved for conference participants at a special rate of \$119 per night. Call 248-349-4000 for reservations.

I will attend the following events:

- Pre-Conference Reception April 28
- Dine-arounds (participants will split the bill at dinner) April 28  
*At area restaurants; groups w/judge or justice)*
- Luncheon April 29
- Reception & Dinner April 29  
*St. John's Conference Center*
- Luncheon April 30

Tending Bridges: Maintaining Credibility, Communication, and Cooperation among the Judicial, Legislative, and Executive Branches. **Scheduled panelists: Chief Justice Maura Corrigan, Chief Judge William Whitbeck, Senator Alan Cropsy, and Representative Jim Howell.**

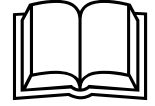
Check out the website



*[www.michbar.org](http://www.michbar.org)*



## Recommended Reading for the Appellate Lawyer



By Mary Massaron Ross

This issue reviews a treatise on Supreme Court practice and a fascinating history of the Fifth Circuit Court of Appeals and its role in the judicial implementation of the Supreme Court's desegregation decision, *Brown v Board of Education*.

### **Supreme Court Practice (5<sup>th</sup> ed, edited by Robert L. Stern & Eugene Gressman, et al, 2002)**

Few appellate lawyers argue before the United States Supreme Court in any given year. But many participate at the certiorari stage or by authoring amicus briefs. As a member of the American Bar Association Standing Committee on Amicus Curiae Briefs, it has been my privilege to work with some of the best appellate lawyers in the country as the committee provided oversight and assistance in the preparation of the ABA's amicus briefs this past year. Doing so has heightened my interest in the many unique aspects of practice before the United States Supreme Court. The ABA has filed briefs in significant cases this year, including *Republican Party of Minnesota v Kelly*, *Festo Corp v Shoketsu Kinzoku Kogyo Co*, *Washington Legal Foundation v Legal Foundation of Washington*, and *Victoria Moseley v V Secret Catalogue, Inc*. This experience has given me the opportunity to learn essential information about Supreme Court lore, the Court's traditions, and the Court's policies and procedures from former Supreme Court law clerks, a former solicitor general, and others who have participated in and are knowledgeable about the Supreme Court's traditions. Any appellate lawyer thinking about venturing into this territory will want to learn as much as possible about these matters before doing so.

The best place to start is with *Supreme Court Practice*, a newly revised treatise, which is justifiably characterized as the "indispensable tool for appellate lawyers." It provides detailed information about Supreme Court procedures, history, and advocacy. *Supreme Court Practice* contains a chart showing how the justices are seated when they are on the bench, the clerk's case-handling guides, checklists for processing cases, and maps of the Supreme Court building.

The authors provide a detailed discussion of the certiorari process, the statistics concerning the handling and decisions about the petitions, and an analysis of the Court's recently reduced docket. Any lawyer evaluating whether or not Supreme Court review is a realistic and worthwhile option will benefit from the wealth of statistical and analytical information about the Court's docket and workload.

The authors present an illuminating discussion of the factors that motivate the exercise of the Court's certiorari jurisdiction. For example, although the Court "now seems committed to giving the existence of a conflict less than decisive weight," the authors observe that it nevertheless grants certiorari in many cases "that do not appear to be 'cert worthy' for any reason other than the existence of a conflict, real or alleged." The number of cases accepted for plenary review by the Court has declined during the last decade; only approximately 3.5% of all petitions for certiorari are granted. But the solicitor general's rate of success is far greater, and petitions for certiorari with support from the solicitor general have been granted at rates as high as 50 to 60% in some terms. According to the authors, the Court also seems to be pursuing a "reversal strategy," granting certiorari in those cases in which it is troubled by the lower court decision.

The authors also discuss other aspects of the Court's jurisdiction including its jurisdiction to consider appeals from the Federal Court of Appeals, from district courts, from three-judge district courts, from the Federal Circuit and other specialized federal tribunals, and from decisions of state courts. Jurisdiction to review decisions of state courts requires finality, a decision by the highest state court, and a decision that is not based on independent and adequate state grounds. The authors explain the nuances of these doctrines and provide citations to appropriate authority. Readers can also learn how the Court handles certified questions, original cases, and cases on which the Court has granted certiorari. From briefing requirements, to motion practice, to the joint appendix, the treatise contains abundant information for any advocate appearing before the Court.

Even lawyers who never contemplate handling Supreme

*Continued on next page*

Continued from previous page

Court appeals will find useful tips for handling cases pending before the highest state appellate courts. For example, the authors explain the unique features of addressing a court of last resort during oral argument. They urge advocates to emphasize reasoning rather than authority. According to the authors, “Supreme Court Justices cast a skeptical eye on contentions that they are bound to reach a certain result because of prior decisions of other courts, or even of the Supreme Court itself, and for no other reason.” Although the Supreme Court Justices may base a decision on prior authorities, they are “more likely to do so if they are persuaded that the decision is right as a matter of principle.” The authors suggest how to discuss relevant new legal developments, flexibility in responding to questions, and the use of maps, charts, models, or motion pictures.

This treatise provides enough practical information about the practice of appellate law to make it a “must have” for any appellate advocate’s library.

**Unlikely Heroes: The Dramatic Story Of The Southern Judges Of The Sixth Circuit Who Translated The Supreme Court’s *Brown* Decision Into A Revolution For Equality.**

(Jack Bass, Simon & Schuster, 1981)

News accounts regarding Trent Lott’s ill-advised comments at a retirement event for Senator Strom Thurmond prompted many news programs to show film clips of the civil rights movement and the desegregation battles of the South. Since the focus of these battles was often implementation of judicial rulings, it renewed my interest in legal history of that era. For those whose memory of these events had dimmed and for the many who are too young to recall the desegregation battles of the South, *Unlikely Heroes* is worth reading. This out-of-print history of the Fifth Circuit Court of Appeals vividly depicts the battles over desegregation from the standpoint of the appellate judges who were forced to interpret and apply the Supreme Court’s desegregation decisions. The author interviewed hundreds of individuals who were involved, including judges, former law clerks, civil rights lawyers, academic observers, and four former U.S. attorneys general. The book has been aptly described as “a fascinating and inspiring story of the internal debates and conflicts of three decades,” decades in which judges Albert T. Puddle, John Minor Wisdom, John R.

Brown, Richard Taylor Rives, Frank M. Johnson, Jr., and Jay Skelly Wright reacted to the community hostility and obstruction of the Supreme Court’s basic school desegregation decision. According to the author, the judges on the Fifth Circuit Court of Appeals were mostly southern and Republican.

Bass wrote that the “interaction between essentially Republican judges and an activist Democratic Justice Department ... allowed civil rights cases in the South to be decided in a politically nonpartisan setting.” Judges Tuttle and Wisdom had “sat with the small group at the 1952 Republican convention that ratified Richard Nixon as the party’s vice-presidential candidate. But 17 years later when Nixon’s nomination of Clement Haynsworth to the Supreme Court was rejected and a moderate suggested Fifth Circuit Judge John Wisdom Minor as a possibility, Nixon’s Attorney General John Mitchell called him “a damn left winger.”

When faced with the difficult task of implementing the Supreme Court’s *Brown v Board of Education* decision, the Fifth Circuit judges were ostracized in their communities for decisions that were bitterly opposed by elected state officials. Legal battles included James Meredith’s effort to register and study at the University of Mississippi. The governor of Mississippi physically blocked the door to the registration office to prevent Meredith’s entry despite court orders allowing him to register and requiring the university to admit him. The governor took the position that the state could “interpose” the “sovereignty” of the state to nullify the federal court order.

The legal issues involving federal equal protection guarantees, federalism, and the use of injunctive relief remain fascinating. Understanding the factual and historical context within which many significant decisions were made will be useful to anyone seeking to understand the nuances of these doctrines today.

The book is worth reading for its discussion of the development of civil rights law, the use of injunctions, and the history of the civil rights movement. My own recollection of the events of the 1950’s and 1960’s had faded until I read this book. It reminded me of the news coverage of the past. It also provided a fascinating and largely unknown picture of appellate court operations in a time of legal and social tension. Although it is out of print, it is readily available in libraries or over the internet. I would highly recommend it.

# THE CROSS APPEAL REVISITED

By John J. Bursch

*“To Cross Appeal or Not Cross Appeal?”— That is the Question*

The confounding question of when to file a cross appeal has twice been the topic of excellent articles in this newsletter. As recently as 1999, some Michigan Court of Appeals judges still took the position that a cross appeal is necessary to preserve review of alternative bases to uphold a trial court judgment, a controversy that was well documented in Morley Witus' article in the August 1999 newsletter. In a follow-up article that appeared in the Fall 2000 newsletter, Mark Cooney continued to warn that “proceeding without a cross appeal may still be a risky endeavor.”

Mark Cooney's warning was well founded. In July 2000, a Michigan Court of Appeals panel declined to consider an argument that the trial court had rejected and that the appellee sought to advance in support of affirmance without filing a cross appeal. But in a summary opinion vacating that decision, the Michigan Supreme Court explicitly reaffirmed that “an appellee is not required to file a cross-appeal to advance arguments in support of a judgment on appeal that were rejected by the lower court.” *Cacevic v Simplimatic Eng'g Co*, 463 Mich 997, 997; 625 NW2d 784 (2001) (citing *Middlebrooks v Wayne Co*, 446 Mich 151, 166 n 41; 521 NW2d 774 (1994)); accord *Cox v Board of Hosp Managers for the City of Flint*, 462 Mich 859, 859; 613 NW2d 719 (2000) (“the [court of appeals] erred in refusing to review four arguments raised by defendant on the erroneous ground that defendant was required to file a cross-appeal to raise them”).

Fortunately, the controversy appears to have finally played itself out. Recent Michigan Court of Appeals panels have consistently followed the Michigan Supreme Court's 1994 pronouncement in *Middlebrooks* that cross appeals are unnecessary to urge alternative grounds for affirmance, even if the lower court specifically considered and rejected the alternative ground. See, e.g., *Burda Bros, Inc v Wayne Co*, 2003 WL 21978755, at \*4 (Mich Ct App, Aug 19, 2003); *Sayo, Inc v CTM Group, Inc*, 2003 WL 21246657, at \*5 (Mich Ct App, May 29, 2003); *Vandenberg v Vandenberg*, 253 Mich App 658, 663; 660 NW2d 341 (2002); *Gilmore v Parole Board*, 247 Mich App 205, 231 n 13; 635 NW2d 345 (2001); see also

*United States v American Ry Express Co*, 265 US 425, 435 (1924) (an appellee “may urge in support of a decree any matter appearing in the record, although his argument may involve an attack upon the reasoning of the lower court or an insistence upon matter overlooked, or ignored by it”).<sup>1</sup>

Although this resolution of one vexing cross appeal question will alleviate the need for cross appeals in many cases, the cross appeal is still an important tool in the appellate practitioner's toolbox. This article canvasses a number of situations where the tool might come in handy.

## *The Insatiable Appellee*

In the most obvious situation, a cross appeal remains necessary where the appellee seeks “to obtain a decision more favorable than that rendered by the lower tribunal.” *Estate of Walter B Herbach v Herbach*, 230 Mich App 276, 284; 583 NW2d 541 (1998); accord *McCardel v Smolen*, 404 Mich 89, 94-95; 273 NW2d 3 (1978) (appellees “may not obtain a decision more favorable to them than was rendered by the Court of Appeals” in the absence of a cross appeal); *Regnier v Payter*, 2003 WL 21246635, at \*7 (Mich Ct App, May 29, 2003) (rejecting appellee's attempt to attack the trial court's judgment in absence of a cross appeal); see also *American Railway*, 265 US at 435 (in the absence of a cross appeal, an appellee may not “attack the decree with a view either to enlarging his own rights thereunder or of lessening the rights of his adversary”). An appellee may have prevailed in large part in the trial court but be unsatisfied with anything less than overwhelming victory. If an appellee hopes to improve its position on appeal, rather than simply maintain it, a cross appeal is a necessity.

## *The JNOV/New Trial Quandary*

A cross appeal may also be necessary as a result of the interplay between motions for judgment notwithstanding the verdict and motions for new trial. Under MCR 2.610(A)(1), the losing party at trial may move for jnov or, alternatively, for a new trial. If the trial judge grants the motion for jnov, the court *must* also rule conditionally on the motion for new trial. MCR 2.610(C)(1). Thus, if the losing

*Continued on next page*

*Continued from previous page*

party at trial succeeds on its motion for jnov but loses on its motion for a new trial, that party may challenge the new trial ruling on appeal as appellee, just in case the appellate court reverses the trial court's jnov ruling. MCR 2.610(C). Alternatively, if both motions are denied, the prevailing party at trial may ask the appellate court, through a cross appeal, to order a new trial in the event the appellate court is inclined to reverse the jnov ruling. MCR 2.610(E)

#### *The New Trial/Remittitur Gambit*

Similarly, a cross appeal may be necessary as a result of the interplay between motions for new trial and remittitur/additur. Under MCR 2.611(E), if a trial court finds that the only error in a trial is the verdict's inadequacy or excessiveness, the court may deny a motion for new trial on condition that, within 14 days, the nonmoving party consent in writing to the entry of judgment in an amount the court finds the evidence will support. If the moving party appeals, claiming that a new trial is necessary, the party who accepted the "offer" of remittitur or additur in the trial court retains the right to argue on appeal that the original trial verdict was correct. MCR 2.611(E)(2).

#### *The Protective Cross Appeal*

Finally, it is sometimes prudent to file a protective cross appeal, which is a procedural device that allows a prevailing party to appeal issues on a contingent basis, in case the appellate court reverses or modifies the favorable judgment. *See, e.g., Hartman v Duffey*, 19 F3d 1459, 1465 (DC Cir, 1994) (stating that "[i]n a protective cross-appeal, a party who is generally pleased with the judgment and would have otherwise declined to appeal, will cross-appeal to insure that any errors against his interests are reviewed so that if the main appeal results in modification of the judgment his grievances will be determined as well."); *Council 31 v Ward*, 978 F2d 373, 380 (CA 7, 1992) (addressing cross-appellant's conditional cross appeal only after having reversed the district court); *Human Servs Plaza P'ship v Huntington Nat'l Bank*, 1996 WL 117510 (CA 6, Mar 15, 1996) (recognizing defendant's conditional cross appeal in case the court reversed the district court).

In the protective cross appeal situation, the appellate court need only reach a cross appeal issue if it agrees with the appellant's claim of error. *Central Benefits Mut Ins Co v Blue Cross & Blue Shield*, 1992 WL 393577 (CA 6, Dec 29, 1992) (stating that the "Association's cross-appeal is conditional; that is, it requests relief if and only if the case is remanded based on plaintiffs' claims of error. Because we

have rejected plaintiffs' claim of error, the Association's cross-appeal is rendered moot."'). For example, if a plaintiff prevails at trial despite bad evidentiary, jury instruction, or other rulings, the plaintiff may choose to file a cross appeal regarding those decisions, to be decided if and only if the appellate court decides to grant the appellate relief in the form of a new trial.

So why not always take a conditional appeal? Because there may also be strategic drawbacks. As one commentator has explained:

*[A] cross-appellant is in the peculiar position of arguing out of both sides of his or her mouth. On the one hand, as the appellee, he or she is urging that the district court's judgment be affirmed. On the other hand, he or she is admitting that the district court made mistakes because a cross-appeal was filed. Consequently, parties should consider whether having the position of solely affirming the trial court is the better strategy.*

Bradley C. Wright, *Ten Mistakes to Avoid at the Federal Circuit*, Intellectual Property Law Newsletter (Winter 1999) (emphasis added) (listing "cross-appealing when you won below" as one of the mistakes to avoid). In other words, an appellee may not want to posture the case in such a way that *both* sides appear to be asking for a new trial. The protective cross appeal therefore provides a true opportunity for appellate practitioners to exercise their tactical judgment.

Although nearly all of the case law discussing contingent or protective cross appeals is found in other jurisdictions, the concept has been implicitly acknowledged by the Michigan Court of Appeals. In *Levi v Crane & Equipment Rentals, Inc*, 2002 WL 522948 (Mich Ct App, Apr 5, 2002), the defendant appealed as of right from a jury verdict in a wrongful death action. On cross appeal, the appellees challenged the trial court's grant of summary disposition on one of the case's sub-issues. The Michigan Court of Appeals first affirmed the jury verdict; it then summarily disposed of the cross appeal, specifically noting the cross appeal's contingent status: "Plaintiffs only seek relief from the trial court's grant of summary disposition concerning respondeat superior if defendant succeeds on one of its requests for relief, which it did not." 2002 WL 522948, at \*3 n 7. Appellate review of the cross appeal is therefore "unnecessary." *Id.* at \*3. Accordingly, a protective cross appeal appears to be a valid subset of the general right to cross appeal in Michigan courts, notwithstanding the fact



that protective cross appeals are not specifically referenced in the Michigan Court Rules.

### Conclusion

Despite recent clarifications by the Michigan Court of Appeals and Michigan Supreme Court that obviate the need for cross appeals in situations where an appellee simply seeks to raise alternative arguments in support of a lower court judgment, the cross appeal remains a valuable and effective tool in a number of unique procedural situations. The crafty appellate practitioner does not neglect this tool by leaving it in the toolbox. The next time you receive a claim of appeal in the mail, do not automatically file it away and begin marking time in anticipation of appellant's initial appeal brief. You have 21 days in which to strategize a more creative response.<sup>2</sup>

*John J. Bursch is an attorney at Warner Norcross & Judd LLP, where he co-chairs the firm's Appellate Practice Group. Mr. Bursch is a member of the Appellate Practice Section Council,*

*and he serves as the D.C. Circuit Editor for the American Bar Association's Appellate Practice Journal. Mr. Bursch would like to acknowledge the invaluable research that Janet L. Ramsey contributed to this article regarding protective cross appeals are not specifically referenced in the Michigan Court Rules.*

<sup>1</sup> At first blush, it seems illogical that an appellant need not file a cross appeal to advance issues it raised and the trial court actually *rejected*. But such a rule makes sense when one considers that Michigan appellate courts routinely affirm lower court judgments that reached the right result, even if for the wrong reason. "Despite the trial court's error, reversal is not required. This Court will not reverse where the right result is reached for the wrong reason." *Phinney v Perlmutter*, 222 Mich App 513, 532; 564 NW2d 532 (1997). *Accord Molholland v DEC Int'l Corp*, 432 Mich 395, 411, n 10; 443 NW2d (1989) ("A trial court's ruling which reaches the right result, although for the wrong reason, may be upheld on appeal."); *Immoliare, Inc v Detroit*, 2003 WL 21246630, at \*3 (Mich Ct App, May 29, 2003) ("[W]e affirm the trial court's order denying plaintiff's motion for leave to amend the complaint, as the trial court reached the correct result, albeit for the wrong reason."); *Burke v Michigan Catastrophic Claims Ass'n*, 2003 WL 1879928, at \*2 (Mich Ct App, Apr 15, 2003) ("[W]e note that this Court will not reverse a circuit court's decision reaching the correct result for the wrong reason.") (citing *Phinney*).

<sup>2</sup> See MCR 7.207(B)(1).

## Appellate Practice Section 2002-2003 Annual Report

The purpose of the Appellate Practice Section is to promote the skillful, efficient and effective practice of appellate law. Our Section works to advance the administration of justice in the appellate courts so that the Bench and Bar may better serve the public interest. Section Bylaws, § 1.2. The Appellate Practice Section currently has over 660 members.

Throughout the past year, consistent with our purpose, the Section Council has:

1. Recommended policies and procedures to advance the administration and operation of the appellate courts;
2. Supported funding requests of the Supreme Court and Court of Appeals;
3. Commented on proposed amendments to the State Bar's Bylaws;
4. Conducted a program and seminar to improve the advocacy skills of appellate lawyers; and

5. Financially supported worthwhile causes such as the Hall of Justice's Learning Center, the first Michigan Conference on Racial and Ethnic Fairness in the Legal System, and the Michigan High School Mock Trial Tournament.

**Advancing administration and operation of the appellate courts.** Since its inception in 1995, a central mission of the Section Council has been to propose court rule changes and comment on proposed court rule amendments. Much of the Council's time during the past year centered on this mission, particularly relating to the Court of Appeals' "delay reduction" proposal.

After Chief Judge Whitbeck announced the Court of Appeals' delay reduction plan and proposed court rule amendments, in May 2002, the Section Council formed an ad hoc committee on Delay Reduction in the Court of Appeals. In September 2002, the Delay Reduction Committee

*Continued on next page*

*Continued from previous page*

issued a report on the plan and proposed amendments. The Council adopted and released this report, with some revisions, in November 2002.

In its eight-page “Report on the Court of Appeals’ Delay Reduction Plan and Proposed Court Rule Amendments,” the Section supported the overall goal of reducing delay in the Court of Appeals. It also supported court rule amendments reducing intake time for docketing statements, transcripts in some cases, and transmission of circuit court records. The Section, however, opposed the proposed amendments to MCR 7.212 that would cut filing times for appellants’ briefs and reply briefs, eliminate stipulated extensions, and eliminate motions for extension except on substantial showings of good cause. The Section opposed these amendments as unnecessary, premature, unduly disruptive to practitioners, and inimical to quality briefs and decision-making.

In mid-2002, the State Bar formed the Delay Reduction Task Force, chaired by past President Bruce Neckers. Among others, two past Appellate Practice Section chairs, Evelyn Tombers and Timothy McMorrow, served on the Task Force. In early 2003, the Delay Reduction Task Force issued its report. The report took essentially the same positions on the proposed court rule amendments as the Appellate Section had.

After issuance of the State Bar of Michigan’s Delay Reduction Task Force, the Court of Appeals agreed to extend the comment time for the proposed court rule amendments and table the issue from the Supreme Court’s June 19, 2003 public hearing. In the meantime, with consent of the Court of Appeals, the State Bar formed a new ad hoc committee, the Appellate Delay Intake Management Task Force Committee. As of June 2003, this committee, chaired by Scott Brinkmeyer and comprised of appellate lawyers and Court of Appeals representatives, is exploring options for reducing delay in the Court of Appeals.

In addition to the delay reduction issue, during the past year, the Section has commented on other proposed court rule changes that affect Michigan appellate practice. The Section Council and Council members also regularly met with representatives of the Supreme Court, Court of Appeals and State Bar. Through these meetings, Council members discussed issues and ideas on how to advance the administration and operation of our appellate courts.

**Support for the appellate courts’ funding requests.**

In March 2003, after a series of severe budget cuts, the Supreme Court and Court of Appeals presented its fiscal year 2004 budget requests. These included filing fee rate increases for both courts.

While the Section Council was concerned that increased filing fees may preclude access to appellate justice for some Michigan citizens, it reached the unavoidable conclusion that adequate funding of the Supreme Court and Court of Appeals is essential to the administration of justice in this state. The Council accordingly voted to support the Courts’ budget requests. In April 2003, the Section’s chair sent a mass mailing supporting the budget requests to members of the House and Senate.

**Comment on proposed amendments to the State Bar’s Bylaws.**

As an outgrowth of the Section Summit Advisory Group Report and Recommendations, the State Bar proposed amendments to Bylaws Articles VIII and IX. The Appellate Practice Section Council supported many portions of these proposed amendments that updated antiquated technology provisions. Others, such as the proposal requiring advanced web site posting of Section and Council positions, the Council opposed as unworkable.

**Improving Advocacy Skills.** In September 2002, at its annual meeting, the Section presented a program on “The Judicial View of Effective Advocacy and the Use of Precedent in the Supreme Court and Court of Appeals.” A panel of Supreme Court Justices and Court of Appeals Judges discussed several pertinent issues facing both the courts and practitioners.

In June 2003, the Section, Wolverine Bar Association, and the Eastern District of Michigan Chapter of the Federal Bar Association held a seminar titled “Sixth Circuit Appeals for Michigan Lawyers – From Basics to Best Practices.” Like past Section programs, this was a free seminar. It focused on handling Sixth Circuit appeals, with insights from representatives of the Sixth Circuit bench, Eastern District bench, Sixth Circuit’s Clerk’s office, as well as prominent Michigan practitioners.

**Financial support for worthwhile causes.** During 2002-2003, the Appellate Practice Section donated funds to support the Hall of Justice’s new Learning Center and Michigan’s first Conference on Racial and Ethnic Fairness in the Legal System. The Section also earmarked a contribu-



*Continued from previous page*

tion for September 2003 to support the Michigan High School Mock Trial Tournament, facilitated by the Center for Civic Education Through Law.

### **The Section Council**

The Section's Council consists of 17 Council members. The three immediate past chairs serve as ex-officio members. Four officers, the Chair, Chair-Elect, Secretary and Treasurer, complete the roster. The Council meets monthly.

### **Standing Committees**

The Section maintains four standing committees and six ad-hoc committees. Through its newsletter and listserv, the Section Council encourages section members to join committees and become more active in Section activities.

#### **Court Liaison/Rules Comment Committee**

Victor S. Valenti, current Chair; Ronald S. Lederman, incoming Chair

The Rules Committee continued throughout the past year to provide the Council and Section with research and comment on proposed court rule amendments involving appellate practice and procedure. This specifically included the issue of non-unanimous Court of Appeals decisions issued without oral argument and the proposed amendment of MCR 7.211 to require separate motion when seeking MCR 7.216(C) sanctions. Section members interested in joining this committee can contact Mr. Valenti at [vvalenti@voyager.net](mailto:vvalenti@voyager.net) or Mr. Lederman at [rlederman@swbta.com](mailto:rlederman@swbta.com).

#### **Federal Court Practice Committee**

Mark Cooney, Chairperson

In June 2003, the Federal Practice Committee, in conjunction with the Wolverine Bar Association and Eastern District of Michigan Chapter of the Federal Bar Association, presented the seminar "Sixth Circuit Appeals for Michigan Lawyers – From Basics to Best Practices." The Committee also continues to monitor issues affecting appellate practice in the federal court system, such as proposed rule changes and new court technology. New members are welcome and anyone interested in working on the Committee should contact Mark Cooney at [cooneym@cooley.edu](mailto:cooneym@cooley.edu).

### **Michigan Court Practice Committee**

Susan Zitterman & Deborah Hebert, Co-Chairs

The Michigan Court Practice Committee has continued working on its project on stays and bonds. After the Supreme Court expressed interest in clarifying the court rules, the Committee has continued working on proposed revisions to clarify and streamline the process.

Expanding on a prior project that addressed the question of what is a final order in various contexts, the Committee also looked into the impact of a dismissal without prejudice of a claim or party on the finality of an order for purposes of appeal. The Committee met with members of the Court of Appeals staff to identify the Court's common practice in dealing with dismissals without prejudice in a variety of hypothetical situations, in order to determine the existence and scope of possible pitfalls for practitioners. The Committee plans an article to shed light on the process. Section members interested in assisting The Michigan Court Practice Committee may contact either Ms. Zitterman at [zitts1@kitch.com](mailto:zitts1@kitch.com), or Ms. Hebert at [dhebert@Chl-pc.com](mailto:dhebert@Chl-pc.com).

#### **Publications Committee**

Marcia Howe, Chairperson

This committee continues to prepare and publish the Appellate Practice Section Newsletter under Tammy Reiss' editorship. Beginning next year, Mark Cooney will take over as our Newsletter editor. Anyone interested in assisting this committee may contact Ms. Howe at [mhowe@jrlaf.com](mailto:mhowe@jrlaf.com).

### **Ad Hoc Committees**

#### **Circuit Court Appellate Rules Revision Committee**

Don Fulkerson & Hon. Stephen C. Cooper, Co-Chairs

Created at the Chief Justice's request, this is a joint ad hoc committee of the Appellate Practice Section and the Michigan Judges' Association. This committee is composed of practitioners, judges, a law-school president and dean, a former Court of Appeals commissioner, and a SCAO representative. It is performing the much-needed task of updating and streamlining the court rules governing appeals to the circuit court. When its work is complete, the committee will send the Supreme Court a proposed revision of subchapter 7.100. New SCAO forms will likely follow. For more information, contact Mr. Fulkerson at [dfulkerson@voyager.net](mailto:dfulkerson@voyager.net) or Judge Cooper at [scoop@aol.com](mailto:scoop@aol.com).

*Continued on next page*

Continued from previous page

### **Delay Reduction in the Court of Appeals**

Victor S. Valenti, Chair

This ad hoc committee was formed in May 2002 to investigate and comment on Chief Judge Whitbeck's proposals to reduce delay in the Michigan Court of Appeals. It issued its report that the Section Council adopted in November 2002.

### **Economics of Appellate Practice Committee**

Michael L. Updike, Chair

This committee is exploring a seminar for the fall of 2003. Anyone with seminar suggestions or interested in working on the committee please contact Mike Updike at [mupdike@secrestwardle.com](mailto:mupdike@secrestwardle.com).

### **Good Deeds**

Linda M. Garbarino, Chair

In 2002-2003, the Appellate Practice Section was fortunate to be able to make several contributions to worthy causes and organizations. A contribution of \$1,000 was made to the Open Justice Commission as a sponsor for the First Michigan Conference on Racial and Ethnic Fairness in the Legal System. In addition, the Section contributed \$2,500 to the new Michigan Hall of Justice Learning Center for needed teacher training and educational resources. Finally, the Council approved a \$1,000 contribution to be made in September 2003 to the Michigan High School

Mock Trial Tournament, facilitated by the Center for Civic Education Through Law.

### **Legislative Liaison**

Gary Field, Chairperson

The Legislative Liaison Committee has reviewed pending bills that might affect appellate practice and made recommendations to the Council regarding whether to comment. In the past year, the Committee has not recommended to the Council that the Section pursue any legislative action or comment on any specific pending legislation that was reviewed. Members interested in assisting this committee may contact Mr. Field at [GLField@loomislaw.com](mailto:GLField@loomislaw.com).

### **Technology Committee**

Joseph Firestone & Patrick Rose, Co-Chairs

During the past year, the committee continued its work on electronic filing and related areas. Members interested in assisting this committee (or signing up for the Section's listserv) may contact either Mr. Firestone at [jfire@amflpc.com](mailto:jfire@amflpc.com) or Mr. Rose at [patrickrose@voyager.net](mailto:patrickrose@voyager.net)

Respectfully submitted,  
Donald M. Fulkerson,  
Section Chair

## **You may want to visit:**

<http://www.appellatelaw.net>

This site features 1500 e-mail legal discussion lists, over 60 of them dealing with appellate law issues at both the state and federal court levels. In addition to a general appellate discussion group, and one for the United States Supreme Court, a discussion group exists for almost every state, as well as each federal circuit. It also features information on the practice of appellate law, and links to webpages created by appellate attorneys from all over the country.

# SBM Partners With ICLE To Launch Michigan Law Online

Michigan Law Online — a new and free research service will soon be available to all active State Bar members. To be launched in March 2004, Michigan Law Online is the result of a collaborative endeavor between the State Bar of Michigan and the Institute of Continuing Legal Education. The new service will feature convenient round the clock daily access from any desktop to the following:

- Michigan Supreme Court opinions from 1942 to the present
- Michigan Court of Appeals published opinions from 1965 to the present
- Michigan Court of Appeals unpublished opinions from 2003
- Michigan Supreme Court orders from 1966 to the present
- Current Michigan Court Rules, and amending orders from 1995 to the present
- Michigan Rules of Professional Responsibility

Cases will be searchable by key word, date, docket number, case citation, party name and opinion author. Other features include links to the most recent cases as well as official citations.

“I’m very pleased that we can offer this new service to our members. This should be a cost effective research tool for many lawyers, especially small firm and solo practitioners, in their day-to-day practices,” said Scott S. Brinkmeyer, president of the State Bar of Michigan.

John T. Berry, the executive director of the State Bar, said the collaboration with ICLE significantly enhances the

range of services that the Bar provides to its members. “Michigan Law Online is a timely, cost-effective and valuable tool that will help lawyers at their desks. It’s a service that reflects the central theme of the Bar’s strategic plan, which is to support and help our members in their practices,” Berry said.

The Institute of Continuing Legal Education is a not-for-profit organization based in Ann Arbor that has served the educational needs of the Michigan bench and bar for well over 40 years. The institute’s director Lynn P. Chard said the organization was “excited to collaborate with the Bar to bring members Michigan Law Online, a significant expansion of our existing electronic practice resources. Collaboration allows us to offer this rich database free to Bar members — something only possible with the Bar’s support. We look forward to continued collaboration on behalf of Michigan Bar members.”

The University of Michigan Law School, Wayne State University Law School, and the State Bar of Michigan founded ICLE in 1959. It is also sponsored by Thomas M. Cooley Law School, Michigan State University Detroit College of Law, University of Detroit Mercy School of Law and Ave Maria School of Law.

More details about Michigan Law Online, including information on how to register, will be available soon. To review a sample page, please visit [www.icle.org/mlo](http://www.icle.org/mlo). For further information, please contact the State Bar Member Services Representative, Amy Pierce, toll-free at (800) 968-1442 or (517) 346-6322 or [APIERCE@mail.michbar.org](mailto:APIERCE@mail.michbar.org)

# Newsletter Articles and Ideas Needed

Please submit for publication in the Newsletter articles, commentaries, helpful hints, or anything else useful, interesting, or amusing to your fellow appellate practitioners. We prefer that you email submissions, in Word, WordPerfect, or RTF format. If that's a problem, contact the editor, and we'll find another format that works for you. We also welcome ideas for topics that you would like to see covered in a future issue of the Newsletter.

Eileen Kavanagh, Newsletter Editor  
Thomas M. Cooley Law School  
P.O. Box 13038  
Lansing, MI 48901  
(517) 371-5140 Ext. 2604  
Fax: 517-334-5781  
Email: kavanage@cooley.edu

Deadline for the Spring Newsletter is Friday, April 30, 2004.

## In This Issue

|   |           |
|---|-----------|
| <b>From the Chair</b> .....   | <b>2</b>  |
| <b>Annual Meeting Notes</b> .....   | <b>4</b>  |
| <b>Shannon's Soapbox</b> .....  | <b>5</b>  |
| <b>Breaking News On Delay Reduction</b> .....                             | <b>8</b>  |
| <b>T. John's Court: A Reminiscence in the Form of a Book Review</b> ..... | <b>9</b>  |
| <b>2004 Michigan Appellate Bench Bar Conference Schedule</b> .....        | <b>12</b> |
| <b>2004 Michigan Appellate Bench Bar Conference Form</b> .....            | <b>13</b> |
| <b>Recommended Reading for the Appellate Lawyer</b> .....                 | <b>15</b> |
| <b>The Cross Appeal Revisited</b> .....                                   | <b>17</b> |
| <b>Appellate Practice Section 2002-2003 Annual Report</b> .....           | <b>19</b> |
| <b>SBM Partners w/ ICLE to Launch Michigan Law Online.</b> .....          | <b>23</b> |

**SBM**

STATE BAR OF MICHIGAN

MICHAEL FRANCK BUILDING  
306 TOWNSEND STREET  
LANSING, MI 48933-2083  
www.michbar.org

NON-PROFIT  
U.S. POSTAGE PAID  
LANSING, MI  
PERMIT #191