AppellatePractice

Section Newsletter

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Hall of Justice to Open in October

As many of you know, the Michigan Hall of Justice opens this fall in Lansing. In her address to the annual meeting of the Michigan Supreme Court Historical Society, Chief Justice Maura Corrigan described the Hall of Justice as a symbol of "the spirit of justice…a testament to ordered liberty in our state."

On a more practical level, the Hall of Justice offers benefits to judicial branch and public alike: improved public services, greater efficiency, reduced expense. By consolidating six offices into one building, Michigan's judicial branch will save a substantial amount in rent—one conservative estimate placed the total saved at $203,995,977 over the next 25 years. Less easy to quantify, but just as real, are the benefits of having offices and staff located in one building: reduced mailing and transportation costs, less duplication of services (for example, maintenance, shipping and receiving, and storage), and better communication. In addition, the judicial branch's current Lansing facilities are not readily adaptable to wiring modifications required for current technology. The Hall of Justice has been constructed, not only to meet the demands of current technology, but with an eye to permitting future improvements.

The Hall of Justice also features more conveniences for attorneys and the public. For example, those of you who have argued before the Supreme Court or Court of Appeals in Lansing know that parking is often scarce and distant. The Hall of Justice, by contrast, will offer ample public parking next to the building. You will also be glad to hear that conference rooms and public restrooms will be available on floors where the Court of Appeals and Supreme Court courtrooms are located.

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Annual Section Meeting set for September 27

The Appellate Practice section will hold its annual meeting in conjunction with the State Bar's Annual meeting on Friday, September 27, 2002 at 2:00 p.m. at the Amway Grand in Grand Rapids.

The sections program is entitled "The Judicial View of Effective Advocacy and the Use of Precedent in the Supreme Court and Court of Appeals." The program will consist of a panel discussion based on a list of questions prepared by appellate practitioners. Panel members expected to participate include Court of Appeals Judges Joel Hoekstra and Janet Neff and Supreme Court Justice Stephen Markman and Marilyn Kelly.

The section's annual meeting and election of officer's will follow the program.

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APS Newsletter
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From the Chair

By Evelyn C. Tombers

Getting Involved in a Law Student's Education

My year as Chair of the Section's Council was moving smoothly until the Court of Appeals announced its delay reduction proposal. Since then, I've not only become involved in the Section's appraisal of the plan but I've also been involved in State Bar President Bruce Neckers's delay reduction task force. Add to that involvement in various committees at work, an amicus brief, and other work- and bar-related duties, and you have one very involved person. And I want to encourage all of you to get involved, too.

Get involved in State Bar activities; volunteer to participate in any one of its committees. Get involved in Appellate Practice Section Committees; contact any one of our council members for more information. Get involved in pro bono work. Opportunities for appellate practitioners really exist – just contact your local legal aid office.

Another way you can make a difference is by getting involved in a law student's education. "How?" I hear you ask. At least one of the state's law schools, Thomas M. Cooley, has an extensive externship program where students work with private practitioners for fifteen weeks for school credit. Volunteer attorneys supervise the students at their offices. Faculty members supervise the students through daily e-mail contact with them.

At this point, it's time for full disclosure. As some of you know, I teach at Thomas Cooley. (Yes, there really are people who call me professor.) But the other law schools in Michigan also have externship or internship programs in one form or another. They may not be as extensive as Cooley's, but they do provide opportunities for attorneys to mentor law students. Cooley places students in private firms, prosecutors' offices, public defenders' offices, and legal aid offices. Other law school's do not place students with private practitioners.

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From the Chair
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I've been supervising law student externships for the last two years and it's been extremely rewarding. I am able to see the students grow from law students to colleagues. I've watched them gain confidence in their practice skills. I've listened to the supervising attorneys compliment the students on their skills, attitudes, and above all, their professionalism.

Many of our students are interested in appellate advocacy as a practice specialty. Some of them find externships with appellate courts in Michigan or elsewhere. Some of them look for starting positions with appellate practitioners.

Are you mentor material? If so, get involved with a law student's education. Contact your local law school and ask about internship and externship programs. Visit the schools' web sites and surf the possibilities. The sites are:

Ave Maria School of Law
www.avemarialaw.edu

Michigan State University Detroit College of Law
www.dcl.edu

University of Detroit Mercy School of Law
www.law.udmercy.edu

University of Michigan Law School
www.law.umich.edu

Wayne State University Law School
www.law.wayne.edu

If you're in private practice and want to explore Cooley's program, you can visit its website at *www.cooley.edu*. Click on "Clinical" then click on "Externship Program."

Externship and internship programs are a bonus for all. Attorneys get students dedicated to the pursuit of knowledge, skills, and ethics. Students get attorney mentors and role models who are dedicated to helping the student succeed. It doesn't get any better.

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Hall of Justice
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Those of you making your way to the Hall of Justice for the first time will discover that the building, which is three blocks west of the Capitol, is easily accessible from I- 496 via the Martin Luther King Boulevard exit. From the exit, turn east on Allegan to park in the visitor lot in front of the building.

A 3,400-square-foot Learning Center and a conference center are located on the first floor. The conference center will be used for continuing education by judges from across the state, as well as court staff and others who work in the judicial branch.

The second floor will house the Court of Appeals Clerk's office and courtroom, along with Court of Appeals research offices and information systems. The State Court Administrative Office for Region II (an area that comprises southwestern and south central Michigan) will also be located on the second floor. The third floor features the Court of Appeals judicial chambers and a library, along with a judges' conference room.

On the fourth floor, the Supreme Court Commissioners, Board of Law Examiners, Supreme Court Clerk's Office, and Supreme Court Reporter of Decisions offices will be located, as will the Supreme Court Crier's office. The fifth floor will house the Chief Justice and staff, the State Court Administrative Office, Finance Department, and Human Resources. The sixth floor will include the Supreme Court's judicial chambers, the Justices' conference room, and the Supreme Court courtroom.

Of course, the move to the Hall of Justice, which is scheduled for October, will affect filings. **Please take note:** The Supreme Court Clerk's office will accept filings at the G. Mennen Williams Building until 5 p.m. on Friday, October 18. Starting **Monday, October 21** at 8:30 a.m., Supreme Court filings must go to the Hall of Justice. The Court of Appeals Clerk's Office will also begin accepting filings at the Hall of Justice on October 21.

The Hall of Justice will officially open with a dedication ceremony on Tuesday, October 8 at noon, following a judicial procession from the Capitol building to the Hall of Justice. A black-tie fundraiser for the Learning Center is planned for October 12; the event, which will take place at the Hall of Justice, is sponsored by the State Bar of Michigan and the Michigan Supreme Court Historical Society. For more information about the Learning Center fundraiser, contact Historical Society Executive Director Angela Bergman at (517) 346-6419.

A Competitive Appellate Advantage

Bench Bar Handbook on Sale

At last year's Appellate Bench Bar Conference, Justice Young stated that he believed that anyone who had a copy of the Bench Bar Handbook (and used it) had a competitive advantage over someone who did not have the Handbook. Justice Young also said that the Handbook alone was worth the entire price of the Conference—which was $255. (Justice Young's statements are quoted with his permission).

A few dozen Handbooks are left over from the conference. Rather than keep them in closet, the Bench Bar Foundation is now offering them for sale at the significantly reduced price of $25 per volume. The price *includes* $7.70 of postage and actually is slightly less than the cost of printing each book.

To request a copy send an e-mail to *glfield@loomislaw.com* with your name and address. The Handbook will be mailed to you and you will be invoiced at that time. Or, mail your order to Gary L. Field, Loomis, Ewert, Parsley, Davis & Gotting, P.C., 232 So. Capitol Ave, Suite 1000, Lansing, MI 48933.

Shannon's Soapbox

There is a classic episode of a classic show, I Love Lucy, in which Lucy and Ethel go to work at a chocolate factory. They are standing at a conveyor belt, trying to wrap chocolates as they come down the line. Just when they think they have the hang of it, the line starts speeding up. They fall further and further behind, stuffing chocolates everywhere, including their mouths, to hide their inability to keep up.

The Court of Appeals has just sent the Supreme Court proposed amendments to MCR 7.212 that would speed up the appeal assembly line by slashing the time allowed for briefing. If adopted, the consequences will be a lot less funny than Lucy and Ethel in the chocolate factory.

At present, with reduced resources, the Court is able to decide only a few more cases each year than the number filed during the year. It has been more than five years since the Court had the resources to decide significantly more cases than were filed. If briefing times are slashed, the effect will be to speed up the assembly line. The judges will be as helpless as Lucy and Ethel to keep up, and the result will be an overflowing warehouse. The Court's goal of reducing the warehouse will not be met; indeed, the likely result will be a larger warehouse.

Don't get me wrong. Delay reduction is an unqualifiedly desirable end, in the same league, say, as wanting cases to be decided in opinions of the highest possible quality. Justice delayed is often justice denied. Justice rushed is also often justice denied. Speaking for myself (as I do in this column), I want the same thing my clients want—well-reasoned decisions that are made expeditiously by the Court of Appeals. My clients, like most people, know very little about the Court of Appeals. Their eyes usually widen in surprise when I tell them their appeals are going to take roughly two years to be decided.

Still, they would rather wait two years for a decision that makes sense than get a quick but incomprehensible decision that simply foments further litigation. Some matters, like custody disputes and termination of parental rights cases, obviously must be decided sooner, but in most cases it is more important to be right than to be fast.

Ideally, decisions from the Court of Appeals should be both right and fast. Because of this, I support portions of the delay reduction program developed by the Court of Appeals Delay Reduction Work Group, approved by the judges at their March 2002 meeting, and announced by Chief Judge William Whitbeck.

The name "delay reduction," however, is not entirely satisfactory. With insignificant exceptions, no one involved in the appellate process is "delaying." It is only the outcome that is "delayed," and then only by comparison to the length of time it takes to process a case in a hypothetical ideal appellate court. The Court's goal is to dispose of 95 percent of its cases within 18 months of filing. It has simply borrowed a label used by others in choosing to refer to the gap between this goal and reality as "delay."

But the judges are working hard, the Court's research attorneys are working hard, and appellate attorneys certainly are working hard. Appeals take too long to decide, not because of "delay," but because there is a bottleneck at the decision-making end of the process. The trick is to find a way to increase the Court's production without sacrificing the quality of decisions.

A better label for a program to do this might be "production increase" instead of "delay reduction." Whatever the label, I favor measures that increase production. I oppose changes that do not reduce delay at all, but merely change the court rules in ways that guarantee more procedural defaults, lower quality briefs, and more work for the Court of Appeals on collateral issues.

The proposed rule amendments

By now you should already know the broad outline of the Court's proposed plan. It has been hot news for months. It was the front-page story in the last APS Newsletter, and was prominently featured by Michigan Lawyers Weekly in print and in MLW's first "on line" forum on May 9, 2002. It was also the topic of Bar President Bruce Neckers' column in the May Bar Journal. Judge Whitbeck has discussed the plan in person with the APS Council (in April) and in other speeches around the state. There have been newspaper editorials on the topic.

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Shannon's Soapbox
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Just recently, however, the Court of Appeals took an important step by sending a set of proposed court rule amendments to the Supreme Court. At this writing, the Supreme Court has not yet published the proposals for comment. Because the potential impact on appellate practitioners and the quality of appellate advocacy is so great, the Section is not waiting for the official comment period to begin. Instead, the proposals are printed in this Newsletter so that all Section members can begin thinking about them immediately.

In May, while these proposals were still in draft form, President Neckers formed an ad hoc committee to make recommendations on the issue to the Bar's policy committee. APS Chair Evelyn Tombers and Council Member Tim McMorrow are on that committee, which is finalizing its report as I write this.

The APS Council formed its own ad hoc committee later in May, with an indefinite but longer time-line, to consider the Court of Appeals' plan and other alternatives as well, and to make recommendations to the Council concerning what position the APS should take and what recommendations it should make. The ad hoc committee's first-phase report on the Court of Appeals' rule proposals is nearing completion, but Council will not be able to take up the issue again until its October meeting.

I am a member of the ad hoc committee, but I do not speak for it here. My opinions are my own. I will say, however, that the views of appellate advocates of every stripe on this issue seem remarkably uniform. I think I'm in the mainstream of practitioner opinion on the big issues.

The proposed MCR 7.212 changes

Changes are proposed to MCR 7.204 and 7.210, but I'm not going to write about them here. I doubt they will cause appeals to be decided more quickly, but they do not cause any real harm, either. The proposed changes to MCR 7.212, however, are a very different story. The MCR 7.212 changes would take a block of "intake" time, where useful activity is (or should be) taking place in an appeal, and move that time (without lengthening or shortening it) to the "warehouse," where nothing useful happens and the only activity is waiting. This proposal is all downside and no upside. It will not—cannot—accomplish the goal of "delay reduction," but can—and will, if adopted—have a number of significant adverse consequences.

It is my hope that the ad hoc committee will urge the APS Council to make every possible effort to convince the Court of Appeals that the proposed amendments to MCR 7.212 should be withdrawn from consideration by the Supreme Court and not published for comment and possible adoption. It is in the self-interest of every appellate lawyer, for the sake of the attorney and the attorney's clients, to participate in this effort.

Chief Judge Whitbeck has been a good friend to the Section, and has kept its leadership informed about the Court's delay reduction initiatives. He has explained the Court's reasoning and solicited the Section's support. If the Section concludes (as I hope and believe it will) that it must actively oppose the proposed amendments to MCR 7.212, it owes Judge Whitbeck and the other judges of the Court of Appeals an explanation as detailed and forthcoming as the explanation it has been given for the same amendments. Both explanations require some definition of terms.

The "warehouse"

The Court of Appeals, for purposes of its delay reduction plan, breaks an appeal down into four phases—intake, warehouse, research, and judicial chambers. "Intake" is everything from the filing of the claim until the record is transmitted to the Court of Appeals, after briefing. The "warehouse" is the stage where nothing whatsoever happens in the appeal, while the briefs wait to be read by a research attorney in the prehearing division (unless that step is bypassed, as with cases on the summary disposition docket)."Research" is the stage where the pre-hearing report is prepared and the case lines up for submission to a panel. The last stage, "judicial chambers," takes the case from oral argument to decision.

Two of the stages are short. In 2001, the average processing time in "research" was 61 days and the average time in chambers was 64 days. Two of the stages are long. In 2001 the average "intake" time was 263 days and the average "warehouse" time was 266 days.

These averages are for all kinds of appeals. If you look at specific types, the figures vary quite a bit, especially in the "warehouse." Appeals involving custody issues and termination of parental rights spend only 38 days on average in the warehouse, while "non-expedited" cases average 330 days in the warehouse. The Court breaks it down in other

ways, too. "Regular/Complex" appeals average 288 warehouse days, as compared with 190 days for summary appeals and 49 days for expedited appeals. Any way you slice it, the warehouse is obviously the prime target for delay reduction, because it is both big and useless. By itself a reduction here could be big enough for the Court to achieve its stated goal of deciding 95 percent of all cases filed within 18 months. And it is completely dead time, so it is the perfect time to eliminate. To eliminate it, however, one must first understand it.

The bottleneck

The warehouse does not exist because it was designed or planned for. It exists because there is a bottleneck at the end of the process. When appeals are briefed faster than they can be decided, some of them have to wait. The warehouse is where they wait. I don't know enough to be sure whether the narrowest spot is in the research stage or in chambers, but there is certainly evidence pointing to research.

The Court of Appeals has had 28 judges since 1995, when four were added (six were added in 1989). Back when the warehouse was even worse than it is now, the backlog was substantially reduced with aggressive use of visiting judges (1994 through 1996 were the peak years for visiting judges). Filings of new appeals were reduced with new laws (*e.g.*, tort reform and the constitutional change that made guilty pleas appealable only by application) and rules (*e.g.*, eliminating most circuit court discretion to make non-final orders immediately appealable).

During the same years, however, the Court of Appeals lost research staff. Judge Whitbeck reported in our last newsletter that the authorized staffing level in the prehearing division, which was 60 in 1994, is only 30 now. The Court has a number of staff attorneys in other positions too, including slots for more experienced lawyers. On its face, though, the lower numbers of prehearing attorneys would seem to be a likely cause of the bottleneck that is making the warehouse grow.

The Court's own efforts

The Court has been working the last several months to reduce the time cases spend in chambers after submission. The average figure in 2001 was 64 days. Judge Whitbeck has just sent the APS Council a progress report from the Court of Appeals Delay Reduction Work Group dated August 15, 2002. The statistics for the first six months of 2002 show that time in chambers has been reduced from 64 days to 44 days, exceeding the Court's own target goal. This is an overall average for opinion cases. Regular/complex cases take longer; summary/expedited cases are decided faster.

If the judges have been able to complete opinions more quickly without any loss of quality, they are to be congratulated. Time saved beyond the warehouse stage really is "delay reduction," because the decision in the average opinion case actually is being rendered 20 days earlier.

In contrast, time "saved" during the intake phase merely means that cases are entering the warehouse earlier and, in consequence, staying longer. There is an old Army phrase for this—"hurry up and wait." The more you hurry, the longer you wait. The warehouse can only be reduced at the output end.

The Court, however, having shown that it can work faster, now wants appellate lawyers to work faster, too, under shortened briefing deadlines. Only if this is done, the Court fears, will the Legislature agree to appropriate more funding for research attorneys so that the real problem can be addressed. This is an essentially unprovable proposition. In any event, other approaches to legislative relief need to be tried first, because the costs associated with a drastic change in briefing times are just too steep.

The adverse effects on advocacy

The proposals just sent to the Supreme Court would reduce the base time for the appellant's brief from 56 to 42 days, eliminate stipulated extensions entirely, and eliminate extensions by motion except "for good cause shown." Although the phrase is undefined, Judge Whitbeck has given some examples of what he thinks would and would not qualify as "good cause," and the bottom line appears to be that extensions would be very, very limited while he is the chief judge. The time for reply briefs would be reduced from 21 to 14 days.

Under the current Internal Operating Procedures, the total time for briefing (not including the optional reply brief, which doesn't count because the case is "at issue" once the due date for the brief of appellee passes) is 203 days. This is the sum of 112 days for the appellant (56 + 28 + 28) and 91 days for the appellee (35 + 28 + 28). The proposed amendments to MCR 7.212 would reduce this time from 203 days to 77 days, except when there is "good cause" for a few additional begrudgingly granted days.

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Shannon's Soapbox
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The briefing portion of the "intake" period is undoubtedly less than 203 days in the average appeal, because parties do not always avail themselves of the allowable extension time. Still, even if briefing time now averages 160 days and the time, as sought to be amended, were to average 80 days (allowing for the occasional "good cause" extension), the proposals would essentially cut briefing time in half.

As appellate advocates, you know what this would mean in practice. It would be a calamity, both for practitioners and the Court. Briefing extensions are an essential time-management tool for appellate lawyers, who cannot make their schedules work without them. Because of the inflexibility of all other appellate deadlines, briefing extensions, whether used regularly or rarely, are necessary for the unexpected events—personal and professional—that afflict us all. Lawyers preparing cases for trial can fine-tune their schedules in a variety of ways, but appellate specialists essentially have only one scheduling tool, and it is this important tool that is now at risk. It is a small tool, really, in terms of the entire appellate process, but it is all that stands between many of us and utter chaos. Often it is the Court of Appeals itself that creates a scheduling crisis.

I know this has happened to you, if you've been doing appeals for any length of time. You set aside a block of time to work on a major brief. Then someone mails you an application for leave without warning, leaving you 18 days to get a response filed (no extension available). A few days later, you get a Court of Appeals opinion in the mail, and your clock starts ticking on a motion for rehearing or application for leave to appeal (no extensions available). Then your partner gets sick and you have to cover an oral argument for her. Then you get sick.

You can substitute the scheduling problems of your choice, because there are plenty of others to choose from. If you have a 28-day extension readily available, you can juggle your schedule and make it all work. If you don't, you are up that well-known tributary without a paddle.

Sometimes you just need an extension so that you can do a better job with the brief. It is in the client's best interests for you to file the best brief you can write, and it is in the Court's interest, too. I think that judges of the Court of Appeals, even those who used to practice, occasionally forget some of the reasons why it takes longer to write a brief than it does to write an opinion.

By the time the judges see the appellate issues, the record of the case has been distilled and refined in the appellate briefs and in the prehearing report. The appellate advocate must begin with the raw record and analyze what the real issues are, and then present them. In a fact-intensive case, a good statement of facts is worth its weight in gold, but takes forever to write (think how long it takes to pin down those record cites at the end of each sentence). All this is hard enough for the appellate lawyer who was present at trial, but is even more time-consuming for the lawyer new to the case (the norm in criminal appeals).

If there were no stipulated extensions, and if the Court had to devote judicial resources to the task of assessing the merits of good-cause extension motions, the inevitable result would be a diversion of those judicial resources from the real job of judging to collateral issues. It is far preferable, as the Court has long realized, to have standardized administrative guidelines for extensions so that the Court's staff, not the chief judge, is handling the scheduling.

The proposed amendments, however, are a sure bet to increase the volume and complexity of extension motions. For obvious reasons, the motions would be opposed more often. Disputed issues of fact would arise, which the Court of Appeals is ill-equipped to resolve and, in any case, should not be in the business of resolving.

An inevitable result of the proposed amendments to MCR 7.212 is that many more untimely briefs would be filed, leading to many more motions for permission to argue in the weeks preceding submission. Panels could choose between enforcing the brief deadlines vigorously or availing themselves of the help that appellate advocates may be able to provide at oral argument.

I hesitate to suggest this, since I think it would be a mistake to do, but the Court does not even need a rule amendment to modify its policies on extensions. The Court could simply modify its Internal Operating Procedures to provide, for example, that only 14-day extensions will be routinely granted without a special showing of good cause. A change of this kind makes no real sense as long as the warehouse exists, for the reasons I've already given. Speeding up the assembly line to stuff the warehouse should not impress the Legislature and will not improve appellate advocacy in Michigan.

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Court of Appeals Proposed Rule Amendments

Rule 7.204 Filing Appeal of Right; Appearance
(A)–(G) (Unchanged.)
(H) Docketing Statement. In all civil appeals, within ~~28~~ 14 days after the claim of appeal is filed, the appellant must file ~~two copies~~ one copy of a docketing statement with the clerk of the Court of Appeals and serve a copy on the opposing parties.
(1)–(4) (Unchanged.)

Staff Comment. This change is requested by the Court of Appeals as part of its delay reduction program. The Court anticipates that the shortened time will enable its settlement office to evaluate each case earlier in the appeal, thus reducing the time and money expended by the Court and the parties before possible settlement.

Rule 7.210 Record on Appeal
(A) (Unchanged.)
(B) Transcript.
(1) *Appellant'S Duties; Orders; Stipulations.*
(a)–(b) (Unchanged.)
(c) In an appeal from the circuit court in any action that relates solely to an order granting or denying summary disposition in whole or in part, or an order on motion for reconsideration thereof, only that portion of the transcript concerning the order appealed from need be filed. The appellee may file additional portions of the transcripts.
(d)–(f) Renumbered from (c)–(e).
(2)(Unchanged.)
(3) *Duties of Court Reporter or Recorder.*
(a) (Unchanged.)
(b) Time for Filing. The court reporter or recorder shall give precedence to transcripts necessary for interlocutory criminal appeals and custody cases. The court reporter or recorder shall file the transcript with the trial court or tribunal clerk within
(i)–(ii) (Unchanged.)
(iii) 42 days after it is ordered in any other interlocutory criminal appeal, ~~or~~ custody case, or appeal that relates solely to an order granting or denying summary disposition in whole or in part;
(iv) (Unchanged.)
The Court of Appeals may extend or shorten these time limits in an appeal pending in the court on motion filed by the court reporter or recorder or a party.
(c)–(g) (Unchanged.)
(C)–(F) (Unchanged.)
(G) Transmission of Record. Within ~~21~~ 14 days after the briefs have been filed or the time for filing the appellee's brief has expired, or when the court requests, the trial court or tribunal clerk shall send to the Court of Appeals the record on appeal in the case pending on appeal, except for those things omitted by written stipulation of the parties. Weapons, drugs, or money are not to be sent unless the Court of Appeals requests. The trial court or tribunal clerk shall append a certificate identifying the name of the case and the papers with reasonable definiteness and shall include as part of the record:
(1)–(3) (Unchanged.)
(H)–(I) (Unchanged.)

***Staff Comment*.** These changes are requested by the Court of Appeals as part of its delay reduction program. Summary disposition appeals involve a minimal number of relatively short transcripts while comprising about 20% of the Court's caseload. Shortening the time to produce these transcripts will pose a minimal burden on the court reporters while positively impacting a substantial portion of the Court's caseload. Shortening the time to forward lower court records from 21 to 14 days will positively impact every appeal pending before the Court.

Rule 7.212 Briefs
(A) Time for Filing and Service.
(1) *Appellant's Brief.*
(a) Filing. The appellant shall file 5 typewritten, xerographic, or printed copies of a brief with the Court of Appeal within
(i)–(ii) (Unchanged.)
(iii) ~~56~~ 42 days after the claim of appeal is filed, the order granting leave is certified, or the transcript is filed with the trial court or tribunal, whichever is later, in all other cases. In a criminal case in which substitute counsel is appointed for the defendant, the time runs from the date substitute counsel is appointed or the transcript is filed, whichever is later. ~~The parties may extend the time within which the brief must be filed for 28 days by signed stipulation filed~~

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Shannon's Soapbox
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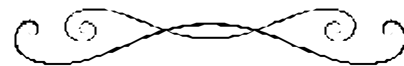
Appellate lawyers and judges must work together with the resources available to do what is possible now, but speed alone is not the only goal to focus on. The real goal is well-reasoned decisions, promptly rendered. Appellate lawyers want to be part of the solution, not part of the problem. But it would be irresponsible to stand by silently while a doomed, counter-productive fix is proposed for the very real problem that appeals take too long to be decided.

In the May 2002 Bar Journal (which, ironically, was an appellate law theme issue), President Neckers' column used the unfortunate phrase "dilatory appellate lawyers" in a list of the reasons for appellate delay. I don't think President Neckers would use that phrase today, thanks to his work on the Bar's ad hoc committee that studied the delay reduction proposals.

Sure, there are a small handful of appellate lawyers who are lazy or who stall for tactical reasons. For that matter, it's no secret that there are a couple of appellate judges who don't pull their own weight. Practitioners and judges are people, after all. In both cases the overall impact on the appellate process is too small to worry about. These few individuals did not create the warehouse, and getting rid of them would not eliminate the warehouse.

It appears from the Court of Appeals' August progress report that measurable progress is indeed being made. As practicing appellate lawyers, we should applaud the Court's efforts and do all that we can to help. Don't clutter up the assembly line with anything that shouldn't be there. Write the best, most user-friendly briefs possible. Remember always that Lucy and Ethel are standing at the other end of the assembly line, trying their best to wrap up each appeal correctly.

Brian Shannon



Court of Appeals Proposed Rule Amendments
Continued from page 9

~~with the Court of Appeals.~~ The Court of Appeals may extend the time on motion, but only for the specific time required and only for good cause shown.
(b) (Unchanged.)

(**2)** ***Appellee's Brief***.
(a) Filing. The appellee shall file 5 typewritten, xerographic, or printed copies of a brief with the Court of Appeals within
(i) (Unchanged.)
(ii) 35 days after the appellant's brief is served on the appellee, in all other cases. ~~The parties may extend this time for 28 days by signed stipulation filed with the Court of Appeals~~. The Court of Appeals may extend the time on motion, but only for the specific time required and only for good cause shown.
(B)–(F) (Unchanged.)

(G) Reply Briefs. An appellant or a cross-appellant may reply to the brief of an appellee or cross-appellee within ~~21~~ 14 days after service of the brief of the appellee or cross-appellee. Reply briefs must be confined to rebuttal of the arguments in the appellee's or cross-appellee's brief and must be limited to 10 pages, exclusive of tables, indexes, and appendices, and must include a table of contents and an index or authorities. No additional or supplemental briefs may be filed except as provided by subrule (F) or by leave of the Court.
(H)–(I) (Unchanged.)

Staff Comment. These changes are requested by the Court of Appeals as part of its delay reduction program. The amended rules will shorten the time for filing appellant's brief from 56 to 42 days, delete the provision of a stipulation to extend time to file either appellant's or appellee's brief, allow extensions of time by motion only for the specific time required and only for a maximum of 14 days in all but the most extraordinary cases, and restrict the time for filing reply briefs to 14 days (consistent with the time for forwarding the lower court record).

Ten Tips from the Other Side of the Appellate Bench

By John J. Bursch

Prior to entering private practice, I spent one year clerking for the Honorable James B. Loken on the United States Court of Appeals for the Eighth Circuit. Through countless discussions in chambers and on our triweekly 7-mile runs, Judge Loken shared his considerable experience from private practice at a large Minneapolis law firm and seven years on the Eighth Circuit bench. Here are ten practical tips for appellate practice that I extrapolated from our conversations. These points are of general applicability, but they are specifically aimed at those attorneys who have limited experience in the court of appeals:

1. Limit the Number of Appellate Issues

One of the first appeal briefs I reviewed for the Judge involved a criminal conviction and sentencing. Defendants' counsel raised a laundry list of appeal issues, twelve in all. My initial reaction was that a meticulous job had been done on the brief. Judge Loken's initial reaction was exactly the opposite: "Trial judges are smart, competent individuals. They make mistakes from time to time, but they will never make twelve of them in a single trial or hearing. Too many attorneys make the kitchen-sink mistake; they include every possible appellate argument, even the ones that lack merit. As a practical matter, I rarely see anything meaningful raised after the third or fourth claimed error."

Forget the kitchen sink arguments. There is a one-in-a million chance that issue number six will carry the day, and by raising it on appeal, you severely damage both your credibility and likelihood for success on the issues that may actually be winnable. Except in the extraordinary case, try to limit the number of errors you claim to three or four. Just as importantly, do *not* save the "good stuff" for the end of the brief. An appellate brief is not a novel, which should conclude with a surprise, for dramatic effect. Your strongest and best points should appear first and be given the most space.

If you are feeling particularly bold, limit your appellate argument to the single issue that gives you the greatest chance to win. This is a risky approach, and you may need to have several discussions with the client to secure approval. But the court will appreciate your focus, and it gives you the greatest chance of getting the court's attention in the midst of its sea of appellate briefs.

2. Be Meticulous in your "Record" Keeping

It is a common myth that appellate judges do not have time to read and consider the factual record on appeal. In Judge Loken's chambers, nothing could be further from the truth. The Judge insisted that in each draft opinion, citations to the record had to support each and every factual recitation, even though the citations would be deleted for the final, published opinion. He then went to the record itself and verified that the support existed. Unsurprisingly, then, an appellate brief that accurately and consistently cites to the record for *every* fact will endear you to the court.

Just as importantly, do not exaggerate what the record says. You will be caught. Appellate judges and clerks are not easily fooled, and your credibility will evaporate the first time they discover that you "shaded" a witness's testimony to appear more favorable to your position, or conveniently substituted ellipses for an unfavorable statement. Once that discovery is made, any presumption of accuracy in the brief will be lost, and every single page of the record will be reviewed to see what other creative liberties have been taken. It should go without saying that such scrutiny is not worth the risk.

3. Do Not Go Outside the Record

This point is closely related to the previous one. Long before you file a notice of appeal, consider what trial court evidence is essential to your case and make sure it is in the record that goes up on appeal. For example, in a *McDonnell-Douglas* employment discrimination case, the firing letter and the reasons for the firing had better appear in the record! Judge Loken suggested that a catalogue be kept of important documents, with an index that notes where a given document can be found in the record, and specifying how the document was admitted.

If, in desperation, you are considering the inclusion on appeal of a non-record document, rethink that strategy. At

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best, the appellate panel will simply ignore the evidence and you will lose credibility; at worst, your opponent will move to strike your brief, and you will have to spend time and the client's money to re-file a brief that limits itself to record evidence. Avoid the problem altogether by thinking about the record from the day the Complaint and Answer are filed.

4. Tell a Compelling Story

Appellate practice is not solely about law and policy. Facts are still important. You want an appellate panel to feel compelled to "right a wrong," just as you hope a jury will do the same. As Judge Loken asked, "How does a claim 'feel' without the legal analysis?"

Unfortunately, there is no easy formula to getting this right. One approach would be to view more movies, attend theater, and read novels. In doing so, look for trends in thematic material and how it is presented, than find analogies for your own cases. Once you have focused on a theme, try it out on other lawyers, your spouse, and your six-year-old. If the story rings true for them, there is a good chance it will for the court as well.

5. Non-binding Caselaw is Just That - Nonbinding

There is a tendency to defer to facially well-reasoned decisions handed down in other jurisdictions, particularly where the decision has been validated by a number of subsequent opinions in still other jurisdictions. Do not fall into that trap. A non-binding decision may, or may not, be outcome determinative in your case; that is what makes it "non-binding."

This lesson was apparent in a complex civil case in which Judge Loken was on the panel. One of the main legal issues in dispute had been previously addressed by a federal court in another circuit. The prior court's opinion read well, and it had been followed by several other courts. Both of our parties assumed the prior opinion was good law, and treated it as such. Accordingly, they limited themselves to arguing over whether the facts in our case were similar or distinguishable from the other case. Judge Loken's opinion (correctly) followed an approach that neither party had taken. The opinion challenged the precedent head on and concluded it was wrong. Most surprising, this need for the Judge to "re-litigate" the case in chambers, to make up for a lapse by counsel, happened in several of our cases.

Do not force the court to be your client's best advocate. Look for creative opportunities to persuade, even when that means disagreeing with the result in other cases, particularly those in foreign jurisdictions.

6. Read the Whole Case

In the first opinion that I drafted during my clerkship, Judge Loken sent me back to re-research the case I cited for the standard of review. The case accurately stated the standard. But the Judge observed that in the cited case, summary judgment was reversed, whereas his decision affirmed. The Judge emphasized that in each of his opinions, the precedent cited should reach the same outcome as the opinion itself. Moreover, the precedent cited should involve the same subject matter addressed by the opinion, if possible. These rules applied to every case cited in the opinion, even something as basic as the standard of review.

This rule also applies to appellate briefs. You are asking the court to rule a certain way. The last thing you want to do is offer up a case in which the court ruled a different way, regardless of how well that court sets forth your rule of law (although in extreme cases, it may be unavoidable). In addition, by carefully citing only to cases that reach the same result for which you are advocating, you avoid the embarrassment of seeing your cases turned against you in your opponent's brief: "*Smith v. Jones*, one of the cases cited by appellant, rejects the very result that appellant now advances." Read every case carefully, and watch what you cite.

7. Be Concise

Appellate judges, like trial court judges, suffer from overloaded dockets and a lack of time. The last thing they want is to be bogged down reading over-length briefs that never reach "critical" points of the argument.

Judge Loken read every page of every brief prior to an oral argument. He even wrote his own bench memos. But his preparation and questions were focused on the 1-5 cases that were most important to resolving the most difficult issue. Follow the same focused approach when deciding how to whittle down that 100-page draft appellate brief. The court will appreciate every effort at achieving brevity, clarity, and grace in your brief writing.

8. Prepare for "Odd" Hypotheticals

It is always important to remember the effect that an appellate decision has on other cases. In addition to binding lower courts facing disputes with facts like your case, the holding and reasoning will be used (and manipulated) by attorneys in many other types of cases, sometimes in ways that are not immediately apparent.

Judge Loken tried to anticipate future problems by carefully considering before oral argument the ways a certain decision might affect other fact iterations and areas of the law. In fact, one of his strengths was reasoning by analogy to (facially) unrelated substantive areas. As a result, attorneys were often confronted with "odd" hypotheticals — questions that on the surface appeared to have little to do with the case in controversy, but that had much broader implications.

The only way to prepare for such questions is to spend some time conjuring up your own odd hypotheticals. Use common sense. For example, ask how practical your rule of law will be in the real-life business world. How might your reasoning be applied in other cases? What if all the facts except "X" remained the same, and "X" changed to "Y"? Even if you fail to anticipate the precise question that the panel asks, simply having gone through the mental gymnastics beforehand will help you better understand the strengths and weaknesses in your case, placing you in the best possible position to respond with a compelling answer.

9. Answer the Questions You Are Asked

This rule may seem obvious, but I saw it violated so many times at oral argument that it bears repeating. Oral argument is not the time to impress the panel with advocacy skills or even with your commanding knowledge of the law and factual record. It is the time to win your case. Again, Judge Loken: "Oral argument is the one chance you have to get inside the panel's head, to see what the judges are thinking or to address the things that concern them. Listen carefully to the questions they ask, and then answer them!"

There are several lessons to be gleaned here. Do not evade questions from the bench. Do not give the court a line of bunk. Do not put the court's question off until later in your presentation because you think there is another, more important point that has to be made first. The most important point is the one that answers the question you have just been asked.

10. Know When to Sit Down

If you are lucky enough to be an appellee at counsel's table while opposing counsel is being skewered by a panel that clearly understand the facts and applicable law, do not feel compelled to stand up and make an argument at all. Following an argument where counsel failed to heed that advice and then paid for it, Judge Loken remarked: "When things are going well, do not take the risk of triggering a question from the bench that will unravel your case. Before you know it, you will have snatched defeat from the jaws of victory."

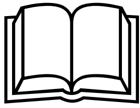
This is equally true of issues that the appellant does not address in oral argument. If the appellant wants to leave an issue to the briefs, then so should the appellee. The presumption is that the appellant will address at argument those parts of the case that need the most attention. Unless the forgotten issue is absolutely critical to your case, and you are sure you can answer all the questions you will be asked, let it go. And when victory is at hand, forget your prepared remarks and simply offer the panel an opportunity to ask any remaining questions it might have. Then sit down.

Conclusion

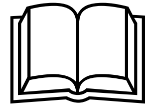
Litigation is often compared to chess. In both arenas, you must anticipate your opponent's moves and strategize to defeat them. As Judge Loken liked to point out, however, litigation is also very *unlike* chess, because the pieces can be unexpectedly "reset" in the middle of play when a new piece of evidence is discovered or when a new legal argument is introduced.

The appellate process is a good time to step back, reevaluate, and determine if the pieces on your board have been reset (or should be). As many of Judge Loken's "tips" suggest, that means stripping everything down to the one or two fundamental points on which you plan to make your case, wrapping them up in a compelling story, and supporting everything with an established record. And while there is no magic formula to winning an appeal, remember that placing yourself in the shoes of the panel throughout the appellate process will best position you and your client for an appellate victory.

Mr. Bursch is an attorney at Warner, Norcross & Judd, LLP in Grand Rapids, Michigan.



Recommended Reading for the Appellate Lawyer



By Mary Massaron Ross

This issue contains a review of Justice Harlan's wife's memoir, a look at a study of the craft of judicial opinion writing, and a discussion of a collection of essays about the United States Supreme Court. Each sheds light on the deliberative process of being a judge at the appellate level, the activities of appellate courts, and the culture of the appellate judiciary. Reading these materials may prompt reflection on the adversary system and the importance of advocates presenting the parties' positions to thoughtful judges with the time and interest to grapple with the issues presented. Recently, I read a law review article on appellate *sua sponte* decisions by Adam A. Milani and Michael R. Smith that discussed the importance of "the adversary process in which trained advocates present the parties' facts and arguments to neutral decision makers." *Playing God: A Critical Look at Sua Sponte Decisions By Appellate Courts*, 69 Tenn L Rev 245 (2002). Milani and Smith's emphasis is on the importance of the role of advocates in ensuring the highest quality of decision making. They argue that deciding issues not briefed by the parties is contrary to the tradition of an adversarial justice system and the rationale on which it is based. Perhaps too often we take that critical aspect of the appellate process for granted. In contrast to an inquisitorial or bureaucratic decision making system, ours is one predicated on the notion that the truth is best determined and the outcome is best decided by a panel of thoughtful, learned, and fair judges who decide the legal issues presented on appeal after careful consideration of the presentations made by the parties through their advocates. Milani and Smith argue that without the advocates input and briefing, the courts have diverged from the procedures necessary for a true adversary system, that is, that the advocates for the parties present their arguments to the court.

The great jurists depicted in the books reviewed in this issue illustrate appellate judging at its best. We see them immersing themselves in the records, briefs, and legal issues presented when deciding cases. Malvina Shanklin Harlan's portrait of her husband pouring over papers and struggling with the great decisions that he wrote, essays by great justices and students of the Supreme Court, and the statistical and historical study presented by Domnarski all underscore the importance of the adversary process and the need for close attention by the judiciary to the facts and arguments as presented by the parties.

I read these books at the same time that I received a copy of the Court of Appeals delay reduction proposal. Reading them together prompted me to reflect on how much we may lose if our appellate courts become too dependent on staff attorneys rather than an independent review of the record (or an appendix) in connection with a close reading of the parties' briefs and study of the relevant precedent. The pressures of volume have always pushed our intermediate appellate court to adopt a staff-intensive model that may be at odds with this tradition. It is not unthinkable that as these pressures increase, at some point, what began as an adversarial system of appellate process and judging will become more akin to an administrative hearing process.

I recommend these books with the thought that they may cause us all to consider what makes a jurist great, what procedures and approaches detract from the quality of judging in our appellate courts, and what procedures and approaches may hinder the advocates' ability to do their job. Bench and bar are, and should be, devoted to the rule of law and interested in working to improve the administration of appellate justice in Michigan's appellate courts. When deciding upon a strategy to address difficult issues such as the problem of volume and delay in our appellate courts, thoughtful reflection on the past can provide helpful insight into the options that may be available and the considerations involved in choosing one over another. Since this is not a soapbox but a series of book reviews, I will not add my own analysis of the specific of the delay reduction proposal but will only urge that it be evaluated in light of these broader questions.

Some Memories of a Long Life
1854-1911
by Malvina Shanklin Harlan
The Modern Library 2002

In a charming memoir recently published through the efforts of Justice Ginsburg and the United States Supreme Court Historical Society, Malvina Harlan describes her life

with the great dissenting justice, Justice John Marshall Harlan. Linda Greenhouse reported that Malvina Harlan, "[l]ike Abigail Adams a century before her"..."used astute powers of observation and a natural gift with words to leave a written legacy... that illuminated not only her own life and that of her famous husband, Justice John Marshall Harlan, but the momentous times in which they lived." Those of you who are members of the United States Supreme Court Historical Society have perhaps already read the memoir, which was published in that journal last year. But Justice Ruth Bader Ginsburg has written a foreword describing her efforts to persuade a university or commercial press to publish the document the she and her law clerk discovered housed in the Library of Congress. Although it was written many years ago, it was never published during Malvina Harlan's lifetime. Justice Ginsburg thought others "would find the manuscript as appealing as she did."

As interesting as the memoir itself is, Justice Ginsburg's introduction is also worth reading. She sets Malvina Harlan's story in context by describing the changes to be seen in the spouses of today's justices. Ginsburg points out that today two of them are men and when they lunch together "rotating cooking responsibility," "[o]ne member favored as a co-caterer is my husband, superchef Martin D. Ginsburg."

The slender volume also contains an afterward by historian, Linda Przybyszewski and an epilogue by Amelia Newcomb, the great-granddaughter of Justice Harlan and the granddaughter of the second Justice John Marshall Harlan. The New York Times Book Review has given the volume a "thumbs up" calling it a "resonant tale" that depicts a wife of Harlan's time and recounts Malvina Harlan's "struggles with independence, with its seductions and terrors." Reviewer Drew Gilpin Faust explans that "Harlan's depiction of the perils, as well as the lures, of change remind us, however, not just of the courage of those like Justice Ginsburg who have turned new opportunity into extraordinary achievement." It also shows use "the powerful obstacles to transformation lodged in women's own fears, in the force of tradition operating at the heart of their understandings of themselves."

Malvina Harlan's description of Justice Harlan at work provides an intimate and inspiring picture of the appellate judging process. In contrast to the sometimes rushed and staff-intensive appellate judging of today, Justice Harlan's dissent in *Dred Scott v Sanford*, according to his wife, "cost him several months of absorbing labor, his interest and anxiety often disturbing his sleep." She explained that "[m]any times he would get up in the middle of the night in order to jot down some thought or paragraph which he feared might elude him in the morning." The process of thinking through the decision completely involved him. Malvina Harlan wrote "[h]e seemed to be in a quagmire of logic, precedent, and law." Seeing his difficulty, Malvina Harlan put the inkstand used for Justice Taney's infamous *Plessy v Ferguson* decision in his study as a way of inspiring him to complete his dissent. This process eventually resulted in a "decision in which the black man's claim to equal civil rights was as powerfully and even passionately asserted as it was in my husband's dissenting opinion in the famous 'Civil Rights' case."

Through the eyes of Malvina Harlan we are presented with a fascinating view of the times. Social calls, cooking and household arrangements, the ambiguities of racial attitudes, and the changing opportunities and attitudes of women, are all illuminated by Malvina Harlan's remarkable account of her life with Justice Harlan. For an uplifting picture of a loving couple and their life together, I would highly recommend this book.

In the Opinion of the Court
by William Domnarski
University of Illinois Press 1996

In a comprehensive study of judicial opinions, William Domnarkski seeks to examine the style of judicial opinions. He examines who writes appellate decisions, how they are written, and how they are reported and published. He also seeks to discuss "three overarching themes[,]... the connection between judges and their audiences on the one hand and judicial opinions and their functions on the other[,]... the path of the judicial opinion process, from writing to dissemination[, and] the evolution in judicial opinion style and substance as a function of court business, dominant personalities, and the influence of law clerks." Domnarski traces the shift in who writes opinions from the early days of the Supreme Court when each justice carefully crafted his own opinions. Some, such as Justice Holmes, describe the writing process as an integral part of their exploration of the legal principles involved.

Domnarski describes the writing habits of a number of jurists including Brandeis, Black, Frankfurter, and Douglas. Domnarski also recounts the evolution of the appellate process toward the situation today when judicial decisions are often written by law clerks. Appellate judges advise that they rely on law clerks for reading the record, conducting

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research, and drafting decisions. This has led to changes in the nature of the opinions. Despite what some perceive as a decrease in the quality of opinions, Domnarksi discusses several judges whose prose style is unique and whose decisions are influential due to the force of the writing. These include Posner, Easterbrook, Selya, and Kozinski, each of whom has a different style and approach but all of whom are worth reading.

Domnarski suggests that a change in who writes opinions and how they are reported has an impact on the style and substance of judicial decisions. His theory is thought-provoking. And, in this age of increasing volume at the intermediate appellate level, causes this reader to reflect on the loss to quality due to some of these changes.

The Supreme Court and its Justices
edited by Jesse H. Choper
American Bar Association 1987

Anyone with an interest in Supreme Court practice or history will enjoy this book of essays. The collection begins with a masterful essay on *Marbury v Madison* and the power of judicial review. It ends with two essays on lawyering before the Supreme Court, one giving ten rules for seeking certiorari and the other suggesting how to effectively present a case if certiorari is granted. In between, the book includes a series of portraits of past justices, essays on the court as the center of controversy, discussions of the court's internal operations, and contrasting views on the appointment process.

Yale Kamisar said of the book, "Among the contributors are some of the most illuminating and insightful analysts of the Court." And he was right. Authors include numerous former and current justices, well-known scholars, and expert appellate advocates. The first essay, like many in the book, is authored by a former justice of the Court, Harold Burtin. He published *Marbury v Madison: The Cornerstone of Constitutional Law* in the ABA Journal in 1950 and it is reprinted here. Burton sets *Marbury* within the political context of the times. He notes that the significance at the time was not the principle of judicial review but rather whether the court would interfere with the midnight appointment of over 50 judges. The judges had been nominated by President Adams in the waning hours of his administration and were likely to create problems for the new administration.

Justice Tom C. Clark authored another essay about his colleague, Felix Frankfurter. Clark explained that Frankfurter was a "storehouse of information on Court precedents". Clark lauded Frankfurter for sticking to principle while showing willingness to accommodate the views of others on the Court. His essay reveals Clark's views on the qualities of great jurists and provides insight into Frankfurter's philosophy and approach.

Justice Frankfurter wrote an essay considering the qualifications and experience that the great jurists had when they were appointed. Frankfurter thought that this review would illuminate possible criteria that could be used for judicial appointments to the Court. Frankfurter concluded that the increasing reliance on sitting judges (on lower courts or state courts) as nominees to the Supreme Court was not necessarily a beneficial change. According to Frankfurter, "It would indeed be a surprising judgment that would exclude Marshall, William Johnson, Storey, Taney, Miller, Field, Bradley, White, ... Holmes, Hughes, Brandeis, and Cardozo in the roster of distinction...."

Frankfurter pointed out that greatness is "not a standardized quality" but may "manifest itself through the power of penetrating analysis exerted by a trenchant mind as in the case of Bradley", or "it may derive from a coherent judicial philosophy expressed in pungency and brilliance... as was true of Holmes." Frankfurter concluded that the qualities needed for the court include "capacious minds and reliable powers for disinterested and fair-minded judgment", ... the "habit of curbing any tendency to reach results agreeable to desire or to embrace the solution of a problem before exhausting its comprehensive analysis." He also believed great jurists require "a disposition to be detached and withdrawn." Frankfurter criticized those judges who were "wooden, in uncritically resting on formulas, in assuming the familiar to be necessary, in not realizing any problem can be solved if only one principle is involved but that unfortunately all controversies of importance involve if not a conflict at least an interplay of principles."

Collectively and individually, these essays provide a fascinating picture of the Supreme Court, its personalities and its workings. Anyone with an interest in the Court or in appellate advocacy or in history will learn from this book.

Appellate Practice Section 2001-2002 Annual Report

The Appellate Practice Section's Bylaws state that our purpose is "to promote the skillful, efficient, and effective practice of appellate law." In 2001-2002 the Section continued to fulfill this purpose. Throughout this past year the Section Council "recommend[ed] and distribute[d]: 1) information to aid appellate practitioners in improving advocacy skills; 2) policies and procedures for the efficient and effective operation of an appellate practice; and 3) policies and procedures to advance the administration and operation of the appellate courts."

Improving advocacy skills: In December 2001, the Section and the Michigan Court of Appeals sponsored a program informing practitioners on how to avoid errors that could "sink" their appeals. A panel consisting of the Clerk of the Court of Appeals, the Chief of the Court's Research Division, Court of Appeals Commissioners, and Court of Appeals District Clerks shared their views about fatal procedural errors, annoying errors that can cause delays, and ways that practitioners can simply make life easier for the court's staff.

Operating an appellate practice: Our **Economics of Appellate Practice Committee**, chaired by Norman Zemke, published the results of its survey of appellate practitioners. The survey included information about hourly rates, firm size, and attorney income. Survey results were published in the Section's Winter 2001 newsletter.

Advancing administration and operation of the appellate courts: As it has since its start in 1995, the Section Council again proposed court rules changes and commented on proposed court rule amendments. For example, when the Supreme Court proposed a change to MCR 7.213(A)(1) that would require a party or representative with *full settlement authority* to attend a settlement conference, the Section suggested that the term "full settlement authority" could lead to problems with deciding who has full authority. The Section suggested that the amendment read "representatives with settlement authority." The Court adopted the Section's recommendation.

The Section commented on several other proposed court rules changes that would affect appellate practice in Michigan. In addition, the Section opposed the repeal of the minimum standards for indigent criminal appellate defense services. The Supreme Court also adopted the Section's suggestions for making the proposed amendments to MCR 6.302 consistent with MCLA 770.3a. And through its **Federal Practice Committee,** the Section commented on proposed changes to the Sixth Circuit's Local Rules.

Judges and other representatives of the of the Supreme Court and Court of Appeals have regularly met with the Section Council. Through these meetings the Council members have exchanged ideas with the members of the courts and have informally discussed how to improve court administration.

Through its **Technology Committee** the Section sponsored a workshop on e-filing in the Michigan Court of Appeals. Practitioners learned about e-filing, and those responsible for that technology in the Court of Appeals learned about practitioners' anticipated needs in this arena.

The Section Council

The Section's Council consists of 17 members. 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 five 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, Chairperson

This committee continues to analyze proposed court rules amendments. As its name implies, the committee is our liaison with the appellate courts. The committee has been instrumental in suggesting rules amendments, and in suggesting support for or against proposed amendments. Section members interested in joining this committee can contact Mr. Valenti, via email, at *vvalenti@voyager.net*.

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Federal Court Practice Committee
Mark Cooney, Chairperson

This committee, as already noted, analyzed proposed amendments to the Sixth Circuit Court of Appeals' local rules and prepared written comments that were submitted to the Clerk of the Court. These proposed amendments concerned brief and joint-appendix issues.

The committee also continues to plan a mock oral argument program with Sixth Circuit Judges to take place in Wayne State University's new courtroom-style auditorium. The committee sponsored a similar program (together with Wayne State's faculty) a few years ago which was a hit with law students and practitioners alike. The program is scheduled to take place in October 2002, and a number of Sixth Circuit Judges have been asked to participate. Anyone interested in joining this committee may contact Mr. Cooney, via email, at Mark.Cooney@cefu-law.com.

Michigan Court Practice Committee
Susan Zitterman & Deborah Hebert, Co-Chairs

This committee continues to move forward with its project on stays and bonds. Following an indication of interest by the Supreme Court in clarifying the court rules, the Committee has begun working on proposed revisions to the rules. The Committee hopes to develop a proposal which will address the concerns which were identified during its examination of the "maze" of stay and bond rules last year. This includes, for example, streamlining the procedure to secure a stay of execution by providing for an "automatic" stay upon posting a bond in the amount of one and 1/4 times the judgment, subject to a larger bond being set upon court order if that amount proves inadequate.

The Committee also investigated whether it would be beneficial for Michigan to adopt a procedure, similar to that in place under the federal rules, which would allow prematurely filed claims of appeal to "ripen" and avoid dismissal for prematurity under some circumstances. The Committee initially believed such a procedure might be beneficial to avoid unnecessary dismissals (and pitfalls for the practitioner) when the final order was entered while the premature claim of appeal was still pending in the Court of Appeals. However after further consideration of the relatively narrow scope of the Federal rule, and very helpful insight from Court of Appeals staff, the Committee concluded that implementation of such a rule in Michigan would be administratively very difficult, and would likely "save" relatively few appeals. Section members interested in assisting this committee may contact either Ms. Zitterman, via email, at zitts1@kitch.com, or Ms. Hebert, via email, at dhebert@Chl-pc.com.

Publications Committee
Marcia Howe, Chairperson

This committee continues to prepare and publish the Appellate Practice Section Newsletter under Tammy Reiss's able editorship. The committee will again publish its annual State of the Law update in conjunction with the Institute of Continuing Legal Education for distribution at the bar's annual meeting. The 2001 State of the Law update for Appellate Practice can be found at the bar's website, www.michbar.org, by clicking on member resources, then on committees and sections, and then on appellate practice. Anyone interested in assisting this committee may contact Ms. Howe, via email, at mhowe@jrlaf.com.

Ad Hoc Committees

Delay Reduction in the Court of Appeals
Victor S. Valenti, Chairperson

This ad hoc committee is the Section's newest committee. It was formed in May 2002 to investigate and comment on Chief Judge Whitbeck's proposals to reduce delay in the Michigan Court of Appeals. Those interested in working with this committee should contact Mr. Valenti, via email, at vvalenti@voyager.net.

Economics of Appellate Practice Committee
Norman Zemke, Chairperson

As noted earlier, this committee published its survey results in the Winter 2001 Appellate Practice Section Newsletter. The committee is always open to suggestions regarding projects it can undertake. Fax your suggestions to Mr. Zemke at 248-489-1453.

Legislative Liaison
Gary Field, Chairperson

The committee continues to evaluate proposed legislation and to report its recommendations to the Council. Members interested in assisting this committee may contact Mr. Field, via email, at GLField@loomislaw.com.

Technology Committee
Joseph Firestone & Patrick Rose, Co-Chairs

For the 2001-2002 year this committee concentrated on exploring electronic filing as part of appellate practice. Initially, the committee considered an array of questions related to "e-filing," including its effects on standards of review, privacy implications, equipment and software problems, intellectual property issues, and integrating trial and appellate records. The committee also examined the merits and drawbacks of e-filing systems already in place in some federal and state courts.

After Chief Judge Whitbeck suggested that the Michigan Court of Appeals would soon move toward e-filing, however, the committee decided to concentrate on matters of immediate concern to the Michigan bar. With the help of the court's information systems staff and representatives of the State Bar of Michigan, the committee presented "Are You Ready for the Future: E-Filing in the Michigan Court of Appeals" on February 15, 2002. The session covered the Court of Appeals' view on why e-filing is important and the court's own "vision" of how it can be accomplished. Other presentations covered the trial court perspective and the problem of document verification or "electronic signature." Participants also exchanged views and pooled information on items as diverse as document conversion programs, electronic fee payments, and "e-service" of pleadings.

In the coming year the committee will continue its work on electronic filing and related areas. Members interested in assisting this committee may contact either Mr. Firestone, via email, at jfire@amflpc.com or Mr. Rose, via email, at *patrickrose@voyager.net.*

Appeals to the Circuit Court
Don Fulkerson, Chair

This committee, composed of practitioners, judges, and a law-school President and Dean, continues to suggest amendments to the appellate rules at the circuit court level. Its goal is to suggest rule amendments that will simplify and streamline appeals from the district courts and various agencies. The committee's charge includes suggesting improvements in appeals from zoning boards of appeal and similar municipal agencies. For more information contact Mr. Fulkerson, via email, at *dfulkerson@voyager.net*.

Respectfully submitted,
Evelyn C. Tombers
Chairperson

Annual Conference of Appellate Lawyers/ Appellate Practice Institute in Reno, October 4-6, 2002

The second annual meeting of the Council of Appellate Lawyers will be held in Reno, Nevada on October 4-6, 2002 in conjunction with the 13th Appellate Practice Institute. This meeting will draw together some of the most skillful appellate advocates and articulate judges from all over the country. Participants can attend one or both seminars. The event is sponsored by the Appellate Judges Conference.

This Conference will offer building blocks for the appellate lawyer - from the bricks and mortar of appellate practice management - to professional skills development - to the higher reaches of appellate theory. Speakers will include solo, small firm, large firm and government appellate lawyers from around the country, as well as state and federal appellate judges and leading academics. No other event for appellate lawyers during 2002 will offer this diversity of programming or this abundance of talent.

The Council of Appellate Lawyers was formed in 2001 with the mission of creating the opportunity for dialogue between the country's appellate judges and advocates. For more information on the conference visit *www.abanet.org/jd/ajc/cal02brochure.html.*

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Newsletter Articles and Ideas Needed

The newsletter invites interested parties to submit articles or commentaries for publication. Articles can be submitted by mail, fax or e-mail to the editor:

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Please contact the editor concerning proper format for submissions.
The newsletter is published three times a year.
The newsletter also welcomes ideas or tips on hot topics you may wish to see covered here.

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