Appellate Practice

Section Newsletter

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Justices Offer Differing Viewpoints at State Bar Convention on Supreme Court's Mission

By Tammy J. Reiss, Editor

Michigan Supreme Court Justices Marilyn Kelly and Maura Corrigan, accompanied by Chief Commissioner Al Lynch, imparted their judicial philosophies and answered questions posed by the audience at the State Bar Appellate Practice Section's program on Supreme Court Advocacy held September 17, 1999, in conjunction with the 64th Annual State Bar Meeting in Grand Rapids, MI.

Each justice gave personal tips on how to prepare and argue cases before the high court. Justice Corrigan said that her best advice is to "know your audience." She noted the obvious shift in the Court's judicial philosophy since January 1999. With the recent arrival of Stephen Markman, four of the seven justices are strong subscribers to the textualist philosophy. Corrigan recommended that attorneys appearing before the Court read Justice Anton Scalia's book "A Matter of Interpretation" which she called the "bible" for the textualist approach.

In her view, the new Supreme Court is concerned with the following aspects of the Court's role:

- The scope of the Court's judicial power.
- A concern for the separation of powers.
- Whether fair meaning is being given to the words in a statute.
- Whether the Court overstepped its bounds in past precedent.
- The scope of the common law powers of the Court.

Justice Corrigan stressed that this Court is aware of its power to overrule established precedent. "You can't just cite a case and that's the end of the story," she said. While there is a concern for stare decisis, and the stability of the law, if the Court determines that there was an error in the way the precedent has operated, the Court will not continue the error. She said the Court is concerned with judicial restraint.

Justice Kelly has a different view about judicial restraint and stare decisis. Quoting from Justice Michael F. Cavanagh's opinion in *Brown* v *Manistee County Road Commission*, 452 Mich 354, 550 NW2d 215 (1996), she said: "[u]nder the doctrine of stare decisis, principles of law deliberately examined and decided by a court of competent jurisdiction should not be lightly departed." Further quoting from *Brown* she stated, "Absent the rarest circumstances, we should remain faithful to established precedent."

Both Justices, having been members of the Michigan Court of Appeals before coming to the Supreme Court, commented on the differences between the two Courts. Justice Kelly said that there is more give and take among seven justices than three judges, and that there is a sense that the decision that the Court will make will be the final decision in the matter. She said that the Court's opinions often take so long to be released because the Court goes through many revisions. "The Court is aware that its opinions are more open to public review" so great care is taken, Kelly said.

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Appellate Practice Section Officers: (seated) Timothy K. McMorrow, Immediate Past Chairperson; Noreen Slank, Incoming Chairperson; (standing) Evelyn Tombers, Treasurer; Gary L. Field, Chairperson-Elect

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Michigan Court of Appeals Revised IOPs

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From the Chair

By Noreen L. Slank

I have four of these columns to write this year. If the first one thanks all those who helped me get here, and the last thanks all those who helped me stay here, that leaves only the middle two. One of those could emphasize that the section has much interesting and important work to do, with committees that need members, and that you should seriously consider stepping up to the plate. The other could report on the section's ongoing work.

Here goes. This fall—Thanks. This winter—Please, we need you to volunteer your time to section committees. Next spring—We do lots of good work. Summer—Thanks again. A whole year's worth of quarterly addresses from the chair have just passed painlessly for all of us.

So much for Plan A. Now for Plan B. My tenure reaches into the year 2000. This coincides with my 20th year of practicing law at the same firm. I'm going to aim for more reflective columns. If you feel I pile it on too thick, blame it on the fact that I took up a militant form of yoga this year so I now spend time in the company of somewhat overly sincere people.

A transition. The Appellate Practice Section Council members attended a baseball game on the night of our last meeting for the Council's season in June. Tim McMorrow arranged for our group to be recognized on the Tiger Stadium electronic sign. We were welcomed as: "The appealing lawyers." We laughed. Tim beamed.

Even the most-seasoned appealing lawyer is sometimes made to suffer certain indignities. A client questions the amount of research needed on some key appeal issue. We are the specialists who are supposed to know such things, after all. A third party billing administrator declares that reading an appeal transcript is a paralegal function or that it will not pay for what it deems "excessive" (one) revision of a brief. We must, for assorted reasons, raise issues that we would like to argue wearing a bag over our heads. One more weekend falls victim to an Emergency Application For Leave To Appeal that the referring attorney knew for weeks was brewing. With due dates stacked atop due dates, we stop to organize the collection of *original* signatures on that key document: the stipulation to extend the Court of Appeals' briefing schedule.[1]

This is the path we chose for ourselves. Remembering why is what I've been thinking about lately. Most appellate practitioners

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From the Chair *(continued from page 2)*

would thrive even in the fray of another type of litigation practice. We could try cases. We are not hiding in our books. We can think on our feet. Why did we choose this particular path?

What prompted this bout of introspection was the opportunity to spend the better part of two weeks immersed in one file. It was important enough that I off-loaded all the distracting tasks that gather like crows on road kill whenever there is no time to do them. Planning for the client seminar could wait, even though there were those who urged otherwise. My historical aversion to filing motions to extend the time for filing appeal briefs gave way. Now was a good time to change my tune and realize such motions are not really a public confession of poor time-management skills.

I am supported by a firm of talented attorneys who manage just fine during my infrequent absences. So I became absent, essentially, except to *one* appeal, This is luxury, in any practice, but especially so in the context of a busy insurance defense practice. I worked hours that were way too many to manage over a longer haul. I reestablished my acquaintance with the late night cleaning shift. I struggled to find exactly the right case. I dusted off my Bryan Garner seminar materials. I looked for *precisely* the right words.

I served the client well, but the project also served me well. It reminded me, since I had not thought about it much recently, how much I like to research and, maybe even more, how much I like to write. At our best, as professional writers and first-rate thinkers, appellate lawyers are uniquely positioned to affect the quality of justice. We are honored by being part of this important work.

I recommend a simple experiment. Choose a project, even a small one. Make it as good as you can possibly make it. Pull out all the stops. Let yourself forget that it cannot all be billed to the client. Don't just do a workmanlike job. Don't just do your usual good job. Revise it until it is your best work. The courts and our clients are entitled to look to us to inform, to provoke, to inspire. Devote whatever time it takes to do that. Even if the bulk of your professional life has to be bottom-lined and billing-guidelined into submission, give yourself this experience anyway. Remind yourself how proud you are about what it is we do. ■

[1] Effective September 1, 1999, MCR 7.202(6) has been deleted from the Court Rules. That is the rule that defined "signed" to mean an "original signature (facsimile signature is not permitted)." With this deletion, an attorney for a party can sign other attorney's names to documents such as stipulations. Hallelujah! Kudos to the Supreme Court for eliminating this cumbersome requirement.

Happy Holidays and
a Prosperous New Year!

Meeting Schedule

Thursday, December 16, 1999
3:00 p.m.
Patrick L. Rose's Office
230 N. Washington Square #306
Lansing, MI 48933

Friday, January 14, 2000
2:00 p.m.
Sommers, Schwartz, Silver & Schwartz
2000 Town Center #900
Southfield, MI 48075

Friday, February 11, 2000
2:00 p.m.
Sommers, Schwartz, Silver & Schwartz
2000 Town Center #900
Southfield, MI 48075

Thursday, March 16, 2000
3:00 p.m.
Gary Field's Office
232 S. Capitol Ave. #1000
Lansing, MI 48933

Friday, April 14, 2000
2:00 p.m.
Sommers, Schwartz, Silver & Schwartz
2000 Town Center #900
Southfield, MI 48075

Friday, May 12, 2000
2:00 p.m.
Sommers, Schwartz, Silver & Schwartz
2000 Town Center #900
Southfield, MI 48075

June 9 or 16, 2000
2:00 p.m.
Sommers, Schwartz, Silver & Schwartz
2000 Town Center #900
Southfield, MI 48075

ADR Section Holds Seminar in Detroit

Seminar to be held in Grand Rapids, January 14, 2000

The Alternative Dispute Resolution Section of the State Bar held a "2 for 1" from "1 to 4" seminar on October 29, 1999, in the Detroit courtroom of the Michigan Court of Appeals. The same program will be held in Grand Rapids, January 14, 2000.

The Detroit program featured welcoming remarks from Judge Helene N. White and Judge Jeffrey G. Collins. Judges Harold Hood and Brian K. Zahra were also on hand to welcome attendees.

The first part of the seminar, "Practice Tips: Preparing your Client for Facilitative Mediation" consisted of a panel discussion and was moderated by Laurence D. Connor of Dykema Gossett PLLC, Detroit. Mark Granzotto of Granzotto and Nicita, PC of Detroit provided the plaintiff's perspective while John P. Jacobs of O'Leary, O'Leary, Jacobs, Mattson, Perry & Mason, PC of Southfield spoke for the defense. J. Patrick Martin of Gourwitz & Barr, PC, Southfield commented from the viewpoint of a mediator.

The second half of the seminar featured a "Program Spotlight: Facilitative Mediation in the Michigan Court of Appeals. The speakers were A. David Baumhart III, Settlement Attorney, and James N. McNally, Settlement Director—both from the Michigan Court of Appeals. The program highlighted the procedures and theory behind the court's settlement program, and its successes and failures to date.

The presenters emphasized that once a case is selected for the program, it is mandatory that the attorneys attend, but it is not mandatory that a settlement be reached. The program is designed to get the parties talking; only the results are reported to the court, not the details of the process. The facilitators do not judge "good faith."

In addition, the program is flexible, and the conferences can be tailored to suit the desires and needs of the parties.

For information and to reserve a spot in the Grand Rapids program, contact Annie Madigan at (313) 256-9282. ■

Judge Encourages Participation in Settlement Program

Editors Note: *The following is Judge Helene White's opening remarks at the ADR Seminar*

I want to welcome you and thank you for coming. We are very pleased with our settlement program and hope that you will contribute to the program's continued success.

When I decided to run for the Court of Appeals in 1992, I did so with a fair amount of ambivalence. I still loved being a trial judge. One of the things I enjoyed most was settling cases, especially the ones where the attorneys, parties, and adjusters let me know immediately that I shouldn't waste my time because there was no possibility of settlement. The process of helping the parties to settlement was most gratifying. I feared I would miss the settlement process a great deal if elected to the Court of Appeals. When I arrived here ,I saw that I had been correct. I did miss it greatly. I also found that I was frustrated by the artificial wall that existed between settlement at the trial level and settlement on appeal. At the trial level, there are institutional mechanisms to encourage and facilitate settlement.

While the right to go to trial is respected, settlement is recognized as a valuable and essential part of the legal culture. Lawyers expect to settle most of their cases, and they welcome the involvement of their peers through mediation, and judges through settlement conferences. In contrast, while some cases are indeed settled after verdict, this not the norm in cases where both sides feel that they have a good chance of prevailing on appeal. There have been many cases on the case call that have caused me to say to myself, "This case could and should be settled. If only there were a way of getting the parties together." Well, we are very happy to say that there is a way to get the parties together and it is working.

Appellate advocacy is a distinct area of legal expertise. While the bar as a whole may not realize this, most individual attorneys who venture into the Clerk's office come to this realization rather quickly. Some of the skills and practices of a good appellate practitioner serve the settlement process well, but there are other skills and experiences necessary for an effective settlement process that may be lacking. The good appellate practitioner knows the trial record well and, most important, has a firm grasp of the strengths and weakness of his or her case, and the ability to communicate them effectively. These are the positives. However, the appellate specialist may lack the mentality of compromise, the skills of negotiation, the close relationship with the client, and the ability to embrace a settlement as a "win."' Further, because of the need we all have to believe in legal principles and the consistent application of the law, and to believe that the application of our skills to the appellate process makes a difference, those of us who are most involved in the appellate process may be the least likely to recognize the unpredictably of the results in cases that fail to settle.

Last, I want to share with you one of the many statistics compiled by the settlement office, and that is that most settlements come in cases where the parties predicted that settlement was unlikely. Thus, attorneys, parties, and facilitators must approach the settlement process with open minds and flexibility.

In deciding whether to take that extra step with the settlement facilitator as you approach your bottom line, remember, no one can make you or your client accept a settlement. You always retain control of the case. That is, until the Court decides it. ■

Recent Changes In Settlement Conference Procedures

The following changes were recently implemented in the Court of Appeals settlement conference program:

- **Rescheduling conferences —** This settlement conference reflects an obligation owed by the attorneys to the Michigan Court of Appeals. To avoid unnecessary delays, if a scheduling conflict arises in another court we must ask that counsel first attempt to reschedule the appointment in the other court. We will continue to reschedule settlement conferences due to trials, but we must ask that routine trial court business (such as motions) yield to the Court of Appeals schedule. If you need the Court of Appeals to contact a lower court or opposing counsel to facilitate rescheduling of a lower court event, please contact us immediately at (313) 256-9282.
- **Time allotted —** The typical first session lasts between two and three hours. Please come prepared to discuss your settlement strategy in depth.
- **Briefing schedule —** If the case does not settle, the court will set a briefing schedule. Due dates will vary. **The previous practice of automatically granting appellants 56 days will no longer apply.** ■

DRI's Second Annual Appellate Advocacy Seminar

DRI's second appellate advocacy seminar will take place at Le Meridien Hotel in New Orleans, Louisiana, from March 9-10, 2000. Renowned federal appellate judges, including Judge Alex Kozinski and Judge John C. Godbold, will offer insight into advocacy at the appellate level. Two experienced appellate lawyers will hold a mock oral argument before a distinguished panel of federal appellate judges, including Judge Martha Craig Daughtrey from the Sixth Circuit Court of Appeals and Judge Fortunato P. "Pete" Benevides from the Fifth Circuit. Following the oral argument, attendees will participate in an interactive panel discussion with the oralists and judges to find out what works—and what doesn't—when arguing before appellate courts.

Attendees will also hear speakers addressing when and how to take an interlocutory appeal in the federal appellate courts, how to use CD-ROM briefing, the different rules of practice and procedure that apply to appeals of administrative agency decisions, effective amicus brief writing, and when and how to seek a new trial.

Besides the substantive information, there will be opportunities to network with participants and speakers at cocktail receptions and lunch. Attendees can also sign up to sample the world famous cuisine of the "Big Easy" at area restaurants with other seminar attendees and speakers.

For further information, contact Mary Massaron Ross at (313) 983-4801, or call the Defense Research Institute at (312) 795-1101. You can also e-mail DRI at *seminar-reg@dri.org*. ■

State Bar's E-Journal

Now Unpublished Decisions and Published Decisions Available in One Place

Have you discovered the State Bar of Michigan's E-Journal? You haven't? Well, fire up your Internet browser, and point it to *http://www.michbar.org*. Enter your name, enter your e-mail address, and you'll start receiving daily messages from the Bar that summarize published and unpublished opinions from the Sixth Circuit Court of Appeals, the federal district courts in Michigan, the Michigan Supreme Court, and the Michigan Court of Appeals. It has been available since June 1999.

Not only does the E-Journal contain summaries of these decisions, it also contains hypertext links to the opinions themselves. So, if you see an unpublished decision right on point, you no longer have to call an automated service to fax it to you. The opinion is on the State Bar's website—available to all.

Did you miss an E-Journal on a particular day? No problem. You can find a link to each issue at *http://www.michbar.org/e-journal/*.

As a companion to the E-Journal, the State Bar has started publishing its "Green Sheets Edition" in the Michigan Bar Journal. The "Green Sheets" contain all of the month's summaries that appeared in the e-Journal organized by practice area. Therefore, even if you don't have Internet access, you can still get the summaries of unpublished opinions and can get copies of those opinions by fax.

Now, add to all of this the fact that the Court Opinions area on the State Bar's website is fully searchable, and you've got yourself an invaluable research tool. Fully searchable, you ask? But the instructions say only to enter the defendant's name. Well, keyword searches work here, too. To retrieve an opinion you've heard about, you can enter either the defendant's last name or enter a keyword or two. Voila! The opinions containing those words appear—complete with a relevance rating and a small portion of the opinion's text. You can also browse the opinions released by a certain court in a certain month.

Applause to the State Bar for starting this service. Practitioners: Start taking advantage of it.

Shannon's Soapbox

By Brian Shannon

Well, I won't actually be mounting the soapbox this time around, since I have several broken bones in my right leg and ankle that will be puzzled together in mid-November, once the swelling goes down. I won't bore you with the whole story, but I'll give you the moral: In an encounter with a bus, it is little consolation to a pedestrian to know he had the right of way.

My real topic today is a familiar one to veteran section members, albeit not one that the section has addressed lately. Should counsel be permitted to see the prehearing report in their appeal before oral argument? Linda Miller Atkinson, a nationally renowned litigator whose home base is the U.P., recently argued in a Michigan Lawyers Weekly "Viewpoint" that the answer is "yes". She urged the Court to make prehearing reports available so that *all* the participants in oral argument have the same base of information.

Don't hold your breath, Linda. It's an excellent idea whose virtues are apparent to almost all practitioners and even a few appellate judges, but there is no chance whatsoever (in my opinion) that the Court of Appeals will ever agree to release prehearing reports, or that the Supreme Court will ever require it. I think there *is* a chance, however, that the rules (or just the custom) could be changed to give lawyers some useful insights into the prehearing report, in a way the Court of Appeals and Supreme Court would support.

The APS Council discussed the subject at some length in October, without reaching any final conclusions. Speaking for myself, though, I thought some of the ideas expressed had a realistic chance of finding favor with the Court. Before summarizing those ideas, I suppose I should begin by explaining why it is that the Court won't just give us the damn things.

The Court, as I understand it, deems prehearing reports to be internal work product, just as private as conversations between a judge and her elbow clerk. As an interim step along the way to a decision, and one that precedes the panel's own work, prehearing reports have the potential to mislead advocates. The reports themselves are necessarily of uneven quality, and judges vary widely in the degree to which they rely on them. I can hear you, Linda, saying, "Hey, let *me* worry about how much weight to give the report. I just want to know what the judges are reading."

Well, there are other obstacles. Prehearing reports that recommend *per curiam* or memorandum disposition (*i.e.*, most of them) are supposed to include a proposed opinion. Some of those proposed opinions are adopted by the panel with little change. A panel that uses a proposed opinion may or may not have done its job. Either way, however, it is not hard to understand why the panel would not want the parties to know the genesis of the opinion.

The losing party would likely feel that the panel had abdicated its responsibility and that the appeal had been decided, unfairly, by an inexperienced and unaccountable lawyer. But the fact is, as we all know, that judges everywhere rely in varying degrees on individual ("elbow") clerks, research attorneys, court commissioners, *etc*., in reaching a decision and preparing an opinion. These judicial helpers vary widely in experience and competency. The same can be said for the judges themselves, of course.

If I could vote on whether Judge X or Commissioner Y or Advanced Research Attorney Z should write the opinion deciding my appeal, Judge X wouldn't always get my vote. And I say that even though Judge X is the only one of the three I'll ever get to look in the eye and talk to about the issues. Fortunately, no doubt, I'll never have to add that decision to the list of tactical considerations presented by every appeal.

The bottom line is that the judges who sign the opinion are responsible for it whether they wrote it or not, whether it is good or bad, and whether it is right or wrong. I don't think I have a right to know if a judge tells his elbow clerk after argument to draft an opinion reaching the judge's desired outcome, and I don't think I have a right to know if a judge decides that a prehearing attorney's proposed *per curiam* opinion is on the money. There may be more risk in the second instance that the judge has abdicated her responsibility by failing to think long enough or hard enough about the case, but so what? There's no real choice, given the Court's volume and size. There are too many cases and not enough judges. Realistically, I can't ask for more than a decision signed by the judge. I don't think I have a right to demand access to intermediate steps leading to the decision.

This doesn't fully address Linda's argument, which began by pointing out that the panel and the parties had a common interest in an oral argument that cut immediately to the chase. Linda observed that access to the prehearing report would help her do her part to achieve that common goal. It would indeed, and most judges would agree. This advantage, however, is overcome completely by the Court's desire to keep its internal operations private.

That last sentence requires immediate qualification. In recent years, the Court of Appeals has been remarkably forthcoming in revealing to the practicing bar how it functions internally. As I write this column (flat on my back in bed, with my bum leg elevated to reduce the swelling), I am referring to the 119-page chapter of the 1998 Michigan Appellate Bench Bar Conference Handbook entitled "Case Preparation by the Research Division." This chapter describes the Research Division and how cases flow through its various units, reproduces the manual used by prehearing attorneys, provides copies of actual prehearing reports (with the names changed), and much more.

It is only because the Court has been so open that I know as much as I do about prehearing reports. But this openness about the process does not extend to specific cases. I'm convinced it never will. And because I'm also convinced that the Supreme Court would never release its Commissioners' reports, I can't see the

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MICHIGAN COURT OF APPEALS
Internal Operating Procedures
1999 Revisions

IOP 7.202(6) — "Signed." Prior to September 1, 1999, MCR 7.202(6) required that any document that was required to be "signed" must bear the *original* signature of the attorney, or of a party proceeding *in propria persona.* Effective September 1, 1999, that requirement was removed from the court rules. Since then, the clerk's office has accepted signatures by consent, signatures by permission, facsimile signatures, block stamps, and signature stamps. The clerk's office will *not* accept filings with blank signature lines or omitting any symbol that could be construed as a signature. *(Effective 10/99.)*

In multiple-party cases, all the parties' signatures need not be on the same page. Parties may submit a number of different copies of the signature page, each bearing one or more original signatures of multiple attorneys. *(Published 9/98.)*

IOP 7.204(B)(2)-2 — Claim of Appeal; Filing Fee; Multiple Lower Court Numbers. The filing fee of $250.00 is set by MCL 600.321; MSA 27A.321, which states that "[t]his fee shall be paid only once for appeals that are taken by multiple parties from the same lower court order or judgment and can be consolidated." *(Effective 10/99.)*

Only a single fee is to be collected from (a) one party appealing a final trial court order or judgment, or from (b) multiple parties filing multiple appeals from a final trial court order or judgment, so long as these multiple filings allow for efficient and purposeful consolidation for processing, hearing and decision as a single appeal. *(Effective 10/99.)*

The listing of multiple lower court numbers on an order or judgment is by itself of no consequence in determining the number of filing fees to be paid. If it can be *and* is determined at the time of filing that another party has previously paid the filing fee, the later appeal will be accepted without fee. If it cannot be *or is not* determined at the time of filing that another party has previously paid the filing fee, the second fee will be required and it shall be up to the parties to seek a prorated refund of any excess fee from the Court upon a showing by affidavit that the parties cannot accomplish the proper allocation of fee responsibility between or among themselves. *(Effective 10/99.)*

IOP 7.204(H) — Claim of Appeal; Time for Filing Docketing Statement. MCR 7.204(H) requires that two copies of the docketing statement be filed within 28 days after the claim of appeal or claim of cross appeal was filed in a civil appeal. [The same deadline applies after entry of an order granting an application for leave. MCR 7.205(D)(3).] If the docketing statement copies are not filed, the clerk's office will send a letter to the appellant or cross appellant informing that party that the appeal is subject to dismissal under MCR 7.217 if the docketing statement is not filed within 21 days after the date of the letter. If the docketing statement copies are not filed within that 21-day period, the matter will be referred to the Chief Judge for dismissal or other action under MCR 7.217. Filings received after the 21st day may be accepted, but costs will be assessed. *(Effective 10/99.)*

MCR 7.205(B)(7)-2 — Applications; Filing Fee; Multiple Lower Court Numbers. The filing fee of $250.00 is set by MCL 600.321; MSA 27A.321, which states that "[t]his fee shall be paid only once for appeals that are taken by multiple parties from the same lower court order or judgment and can be consolidated." *(Effective 10/99.)*

Only a single fee is to be collected from (a) one party appealing a single trial court order or judgment, or from (b) multiple parties filing multiple appeals from a single trial court order or judgment, so long as these multiple filings allow for efficient and purposeful consolidation for processing, hearing and decision as a single appeal. *(Effective 10/99.)*

The listing of multiple lower court numbers on an order or judgment is by itself of no consequence in determining the number of filing fees to be paid. If it can be *and* is determined at the time of filing that another party has previously paid the filing fee, the later appeal will be accepted without fee. If it cannot be *or is not* determined at the time of filing that another party has previously paid the filing fee, the second fee will be required and it shall be up to the parties to seek a prorated refund of any excess fee from the Court upon a showing by affidavit that the parties cannot accomplish the proper allocation of fee responsibility between or among themselves. *(Effective 10/99.)*

IOP 7.205(E)-1 — Application for Leave; Categories of Emergencies. If a motion for immediate consideration is filed with an application for leave to appeal under MCR 7.205(E), the application is internally reviewed and categorized by staff as follows, depending on the nature of the emergency. In this context, the term "priority" is *not* meant to reference priority cases under MCR 7.213(C). *(Published 9/98.)*

"Priority" category:

A motion for immediate consideration is served by mail (7-day notice period) or by hand ("immediate" submission), but the stated emergency is not viewed by the district commissioner's office as requiring action within the expedited notice period. The answer to such an application should be filed as directed by the district commissioner's office. If the application is defective, the appellant will be notified by telephone of the defect and what must be done to correct it. The matter will be processed as a priority, but it may not necessarily be submitted until at least the 21-day notice date. *(Effective 10/99.)*

"Emergency" category:

A motion for immediate consideration is served by mail (7-day notice period) or by hand ("immediate" submission). The district commissioner's office concurs with the request for action in more than 2 or 3 days, but less than 21 days. The answer to such an application should be filed as directed by the district commissioner's office. If the application is defective, the appellant will be notified by telephone of the defect and what must be done to correct it. The district commissioner's office will determine when to submit to the panel deciding the matter. *(Effective 10/99.)*

A motion for immediate consideration is served by hand and the matter is noticed for "immediate" submission. The district commissioner's office concurs with the request for action within 2 or 3 days. The answer to such an application should be filed as directed by the district commissioner's office. If the application is defective, the appellant will be notified by telephone of the defect and what must be done to correct it. The district commissioner's office will determine whether time permits the preparation of a commissioner's report and when to submit to the panel deciding the matter. *(Effective 10/99.)*

Practice Note: The district offices of the clerk are each authorized and trained to accept and process emergency applications and motions. *(Published 9/98.)*

Upon receipt of a motion for immediate consideration with a newly filed claim of appeal, application for leave, or original proceeding, the filing will be docketed in the district where it was filed and submitted to a panel of judges from that location. Opposing counsel will be telephoned, advised when the motion will be submitted, and asked whether and when an answer will be filed. Submission to a panel of judges will occur as quickly as necessary under the circumstances of the individual case, as outlined above. *(Effective 10/99.)*

Several options may be available to opposing counsel as to the timing of any answer. If counsel will affirm in writing that the action sought to be stayed will be voluntarily delayed until after the Court rules on the emergency filing, the submission process may be delayed to provide opposing counsel an opportunity to draft a reply and to give the panel an opportunity to more carefully review the matter before issuing a ruling. If counsel cannot delay the action sought to be stayed, counsel may want to consider filing a rudimentary response accompanied by copies of all pleadings on which the trial court's ruling was based. This response will be considered the answer to the motion, so it should be as complete as possible within existing time constraints. *(Published 9/98.)*

All parties should be aware that the Court may issue an immediate ruling granting stay pending further review and order of the Court, and then issue a final ruling after a full review of the trial court's ruling, the transcript of the trial court hearing, and the parties' filings. This type of order will preserve the status quo while the Court more fully considers the matter. *(Published 9/98.)*

If a motion for immediate consideration is *not* filed with an emergency application for leave to appeal under MCR 7.205(E), appellant may still alert the clerk to the fact that some action is requested within 56 days of the date the application is filed by, including a prominent notice on the cover sheet or first page of the application, including the date by which action is required. See MCR 7.205(E)(1). The application will be treated as a priority if the district commissioner's office determines that the application should be submitted in more than 21 days but less than 56 days from the date of filing, because the order appealed requires acts or has consequences of a substantial nature, such as compelling discovery of allegedly privileged information, or because of some impending deadline, such as the start of trial. If the district commissioner's office determines that the application should not be treated as a priority, the appellant will be notified by telephone as soon as the determination is made. The appellant may then choose to file a motion for immediate consideration. *(Effective 10/99.)*

IOP 7.210(B)(3)-2 — Late Transcript. If the transcript is overdue more than 14 days past the date set in the court rule, a 21-day warning letter will be sent to appellant(s) with copies to appellee(s). See MCR 7.217(A). The appellant is then on notice that some action must be taken within the next 21 days or the appeal will be submitted to the Court on the first Tuesday that is 21 days after the date of the letter. Submission will be to the administrative motion docket for dismissal (if counsel is retained), or for remand for the appointment of substitute counsel (if counsel is appointed). Filings received after the 21st day may be accepted if the matter has not yet been submitted to the Court, but costs will be assessed. *(Effective 10/99.)*

Two alternatives are available to appellant upon receipt of a 21-day involuntary dismissal warning letter: (1) a motion to extend time for filing the transcript, MCR 7.210(B)(3)(b); or (2) a motion to show cause against the court reporter for failing to file the transcript in accordance with the court rule, MCR 7.210(B)(3)(f). Both motions must be served on opposing counsel and on the pertinent court reporter. Failure to take any action will result in either an untimely brief or submission of the appeal on the involuntary dismissal docket. *(Published 9/98.)*

If a motion to show cause against the court reporter is filed and granted, the court reporter must file the transcript by the stated date, or appear before the Court and explain the failure to file. If the transcript is not filed by the stated date, the court reporter must appear at the show cause hearing. Once the show cause date is set, the Court will monitor the situation and ensure the ultimate filing of the transcript. There is no need for counsel to appear at the show cause hearing. *(Published 9/98.)*

IOP 7.211(A)-1 — Motions; Original and Four Copies. An original and four copies of each motion are required to be filed. The original must have a signature. See IOP 7.202(6). *(Effective 10/99.)*

IOP 7.212(A)(4)-1 — Briefs; Appellant Brief Late. Although

costs may still be assessed, the clerk's office will accept a late appellant's brief as long as the matter has not been submitted to the Court under the involuntary dismissal docket. (See IOP 7.217 for a complete discussion of the involuntary dismissal docket.) If the appeal has been dismissed or the matter has been remanded for the appointment of substitute appellate counsel (in cases where appellant is represented by appointed counsel), the brief must be accompanied by a motion to reinstate the appeal or a motion for rehearing of the order to remand. *(Effective 10/99.)*

IOP 7.212(C)(6) — Briefs; Statement of Facts. If the statement of facts fails to include references to the transcript, the pleadings, or other document or paper filed with the trial court, the clerk's office will send a letter advising that the brief is defective. If the statement of facts is not corrected to include references to the transcript, the pleadings, or other document or paper filed with the trial court, the appellant's brief may be stricken in accordance with IOP 7.212(I). *(Effective 10/99.)*

IOP 7.212(F)-1 — Briefs; Supplemental. Absent leave of the Court, there is no provision for the filing of a supplemental *brief.* If a motion to file a supplemental brief is granted, a response brief will be permitted. The time for filing such a response will be set in the order granting leave to file the initial supplemental brief. If no deadline is set, a response brief may be filed at any time before the appeal is decided. *(Effective 10/99.)*

IOP 7.213(D) — Arrangement of Calendar. The parties are notified in writing at least 21 days before their case is heard as to the date, location, and panel that will hear the case. The parties are also notified as to the order in which the cases will be heard. The letter will state the date by which further motions in such cases should be filed, which date will provide the judges with sufficient time to review the motions and issue orders before the date of oral argument. If necessary, motions for oral argument, motions to adjourn, and motions to dismiss will be submitted to the panel before the proper notice of hearing date. Opposing counsel will be alerted by telephone when this occurs. A party can ensure expedited processing if the motion is accompanied by a personally served motion for immediate consideration. *(Effective 10/99.)*

IOP 7.215(H) — Resolution of Conflicts in Court of Appeals Decisions. Panels of the Court of Appeals are not permitted to issue opinions that are in conflict with earlier published opinions of the Court. Rather than issue a conflicting opinion, the second panel's opinion must reach a result consistent with the earlier decision, but the second panel will state in its opinion that it would have reached a different result but for the controlling nature of a prior published decision of this Court. *(Published 9/98.)*

Once such an opinion is published, MCR 7.215(H) provides the mechanism by which the conflict will be resolved. Careful note should be taken of the fact that the polling procedure contained in MCR 7.215(H)(3)(a) will *not* be invoked if the Michigan Supreme Court has *granted* leave to appeal in the controlling case. Thus, the parties in the second appeal are responsible for monitoring the Supreme Court's orders granting leave to appeal and for understanding the impact of such an order on their time for rehearing or application for leave in the second case. *(Effective 10/99.)*

IOP 7.217(A) — Dismissal. This rule is employed by the Court to exercise control over its docket. The clerk's office maintains case management lists that are referenced to the filing deadlines for the docketing statement, the transcript, and the brief of appellant (or cross-appellant). When one of these filings is overdue or when the Court has specifically become aware that the appellant has not ordered the complete transcript, the clerk's office will mail to the attorneys or unrepresented parties a letter warning that if the deficiency is not cured within 21 days of the date of the letter, the appeal will be submitted on the involuntary dismissal docket. Where the letter is addressed to appointed counsel, a copy of the letter is mailed to the appointing trial court and to the office of the Michigan Appellate Assigned Counsel Service (where appropriate) [See the Overdue Brief section below for information on appointed counsel's failure to file a brief on behalf of a defendant-appellee in a prosecutor's appeal.] *(Effective 10/99.)*

IOP 7.217(A)-1 — Overdue Docketing Statement. Filing of the missing docketing statement *within the 21 days*, in the form required by the Court, will completely cure the deficiency. Filing of the missing docketing statement *after the 21 days, but before submission* on the involuntary dismissal docket will avoid dismissal but will still result in the assessment of costs. See MCR 7.219(I). The current practice of the Court is to set such costs at $200. Costs are assessed against the attorney. Filing of the missing docketing statement *after an order is entered* dismissing the appeal (or remanding for the appointment of substitute counsel in a termination of parental rights appeal) will not automatically reinstate the appeal. Appellant will be required to file a 56-day motion for reinstatement following dismissal under MCR 7.217(D) [or a 21-day motion for rehearing of the remand order under MCR 7.215(G)(1)]. Even if reinstatement or rehearing is granted, the $200 in costs will generally be assessed. *(Effective 10/99.)*

IOP 7.217(A)-2 — Overdue Transcript. Filing of the transcript within the 21 days of the involuntary dismissal warning letter and immediately notifying the Court of that filing will remove the case from eligibility for submission on the involuntary dismissal docket and provide the basis for the filing of a *timely* appellant's brief. *(Effective 10/99.)*

Filing an overdue transcript *after* the matter has been submitted on the involuntary dismissal docket is treated in the manner described above for docketing statements. However, because a party is entitled to the effective assistance of appointed counsel on appeal, the Court will not dismiss appeals that are being handled by appointed counsel. Rather, remand for the appointment of substitute counsel is the customary sanction for an *appointed* attorney's failure to ensure the timely filing of the transcripts in any appeal. *(Published 9/98.)*

IOP 7.217(A)-4 — Overdue Brief. Filing of the brief within the 21 days will remove the case from eligibility for submission on the involuntary dismissal docket. But as with overdue transcripts, the

time for filing the brief is not thereby extended and the brief will be docketed as untimely filed. As a practice note, appellants are advised that a motion to extend time to file appellant's brief is *not* a recommended response to a 21-day warning letter. The extension will almost never be granted. And costs will likely be assessed. *(Effective 10/99.)*

Filing an overdue appellant's (or cross-appellant's) brief after the matter has been submitted on the involuntary dismissal docket is treated in the manner described above for docketing statements. However, the Court will not dismiss appeals that are being handled by appointed counsel, because a party is entitled to the effective assistance of appointed counsel on appeal. Remand for the appointment of substitute counsel is the customary sanction for an *appointed* attorney's failure to timely file an appellant's brief in any appeal. *(Published 9/98.)*

In appeals filed by a prosecutor's office, appointed counsel for defendant-appellee is required to file an appellee's brief on defendant's behalf or risk remand for the appointment of substitute counsel under the process described in this IOP. *(Published 9/98.)*

IOP 7.218(A) — Dismissal by Appellant. This rule provides the vehicle by which an appellant may successfully dismiss his or her own appeal without the necessity of securing the signatures of every opposing counsel or party on a stipulation to dismiss. A motion to withdraw the appeal under this rule will be held by the clerk's office until the first Tuesday that is 7 days from the date of service of the motion on the appellee(s). If no answer in opposition is filed, a clerk's order of dismissal will be entered. If the case has gone to a case call panel, it is discretionary with the panel whether to grant the motion or accept a stipulation to dismiss. *(Effective 10/99.)*

If an answer in opposition is filed by an appellee or a cross-appellee on or before the first Tuesday that is 7 days from the date of service, the matter will be submitted on the regular motion docket to a panel of three judges for disposition. As with any other motion, a motion fee is required in support of an appellant's motion to withdraw an appeal. *(Published 9/98.)*

IOP 7.218(B) — Stipulation to Dismiss. If the parties to an appeal agree to dismiss the appeal, a stipulation to dismiss may be filed under this rule. The stipulation must bear the signature of each attorney or party that is still active in the appeal (a party that was earlier dismissed from the appeal or who never appeared is not required to sign). See IOP 7.202(6) for information on the types of "signatures" that are accepted by the clerk's office. Further, if counsel for a party is appointed, that party's signed personal affidavit in support of the stipulation must be filed with the stipulation that is signed by the attorneys. If the party is a minor (as in a delinquency proceeding), the affidavit must be signed by the adult who initially requested the appointment of counsel. In all cases, the caption on the stipulation must match the order appealed from, and any lower court number that is stated on the face of the filing must match the lower court number of the appeal being dismissed. *(Effective 10/99.)*

A clerk's order of dismissal will be entered when a conforming stipulation to dismiss the appeal is filed. If the case has gone to a case call panel, it is discretionary with the panel whether to grant the motion or accept a stipulation to dismiss. The order of dismissal will be sent to the parties and to the trial court judge and clerk. The order will reproduce the parties' specifications as to costs and as to dismissal with or without prejudice. If neither subject is addressed in the stipulation, the order will merely state that the dismissal is without costs. Dismissal with or without prejudice is only discussed in the order if it is addressed in the parties' stipulation. *(Published 9/98.)*

Partial dismissals by stipulation may be secured by the parties. For instance, one of multiple appellants or appellees may be dismissed without dismissing the entire appeal. Or where more than one lower court number is represented in a single appeal, a dismissal of that part of the appeal represented by just one of those numbers may be effected. *(Published 9/98.)*

Parties are advised not to submit proposed orders with stipulations to dismiss under this rule. The clerk's office will always enter its own order of dismissal on Court order paper. *(Published 9/98.)*

Stipulations to dismiss appeals will not trigger a *clerk's* order of dismissal if fees are outstanding, if the appeal involves a class action, or if the case has been submitted on a session calendar. In such appeals, an order of a three-judge panel granting dismissal of the Court is required by the rule. *(Published 9/98.)* ■

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 quarterly. The newsletter also welcomes ideas or tips on hot topics you may wish to see covered here.

Deadline for the February newsletter is Monday, January 24, 2000.

Shannon's Soapbox (continued from page 6)

Supreme Court forcing the Court of Appeals to release prehearing reports.

My impression at the October meeting of the APS Council was that no one could imagine prehearing reports being released to attorneys. There were, however, some interesting ideas expressed. For example, prehearing attorneys already are encouraged to mention in their reports the questions they feel would be helpful to ask at oral argument (page A-35, for those of you following along in your Handbooks). Why not release those questions to the parties *before* oral argument? In fact, why not require, or at least encourage even more strongly, the formulation of questions by the prehearing attorneys? I think such questions might be very revealing, sometimes intentionally and sometimes unintentionally

These questions could be released to the attorneys in a couple of ways, screened or unscreened. The advantage of having them screened by the panel first is that the actual decision-makers could then weed out weak, off-point or misleading questions, and perhaps even *add* questions. The disadvantage, of course, is that already busy judges would then have yet another task. Although not a particularly time-consuming task, it's one that couldn't be done until preparation for argument was well underway.

It's easy for me to suggest that judges should undertake more work, but there could be rewards for the judges, too. In Linda's "Viewpoint," she reported Judge Whitbeck's advice at the Upper Michigan Legal Institute in June that attorneys should get right to the point during oral argument. Judge Whitbeck, of course, speaks for appellate judges everywhere with this observation. I can't think of anything more likely to lead to focused, concise arguments than questions supplied to the advocates a few days beforehand, particularly if those questions have been reviewed and supplemented by the panelists themselves.

The general idea of some kind of pre-argument signal from the panel is not new. Judges vary widely in how forthcoming they are about what they're really thinking, and different courts have experimented along these lines from time to time. The idea of a pre-argument communication from the Court is not that different from the judge who tells you, as you approach the podium, that you would be well advised to explain immediately why Fact X is not fatal to Argument Z.

I don't think a rule change is needed to experiment along these lines. Judges who want to give it a try can just do so, can't they? OK, I guess I don't know if they can or not, but they certainly don't need a rule change. I would think it should be enough if an entire panel is amenable to the idea. No doubt it would help if the idea found favor at a meeting of all the judges. And I imagine Carl Gromek will want encouragement from sources other than this soapbox before he directs that added emphasis is to be placed on the formulation of counsel queries in prehearing reports.

For myself, even if judicial screening proved impractical, I would love to know in advance what the prehearing attorney thought should be asked at oral argument. Whether in search of clarification or information, or whether in an attempt to expose the intellectual bankruptcy of an advocate's position by withering Socratic examination, these questions would supply clues to the prehearing attorney's "take" on the case. I would have time not only to prepare answers to the questions, but to reflect on what they might mean about how well the questioner understood the case.

The questions, particularly if unscreened, should be sent to counsel with a prominent disclaimer:

> THESE QUESTIONS WERE NOT FORMULATED BY NOR REVIEWED BY THE JUDGES IN YOUR CASE. THEY WERE FORMULATED BY A RESEARCH ATTORNEY WHO HAS LOOKED AT YOUR CASE. THEY ARE BEING SENT TO YOU NOW FOR YOUR INFORMATION ONLY. AT ORAL ARGUMENT, THE JUDGES MAY NOT ASK ANY OF THESE QUESTIONS. IF NOT ASKED, YOU NEED NOT ADDRESS THEM UNLESS YOU WISH TO.

Or something to that effect.

Another suggestion at the October Council meeting was to release just the fact section of the prehearing report to counsel. This was Gary Field's idea, and it's an interesting one. A primary responsibility of the prehearing attorney is to provide the panel with a neutral account of the relevant facts, anchored in the record. If the report gets a key fact wrong, everything "downstream" is likely to be tainted by the error. Moreover, an error of this kind is especially hard for an advocate to overcome at argument.

Many of the objections to release don't apply at all or apply with much weakened force to the statement of facts section. The statement of facts section would, in most cases, provide ample insight into the prehearing attorney's "take" on the case (better than proposed questions). Moreover, counsel would have the very text most likely to be relied upon by the panel.

Of course, there would have to be strings attached. The Court is not going to release any portion of the prehearing report if to do so will invite motions from disgruntled litigants, wanting permission to file eleventh-hour briefs aimed at proving that the prehearing attorney got the facts wrong or misunderstood which facts mattered. It's not that the Court isn't interested in getting the facts right; it's just that the idea of a new category of motions and briefs is terrifying to the Court. I think the existing rules will suffice if the prehearing facts are not released to the attorneys until after the motion cutoff date specified in the notice of submission. That should leave advocates with no choice but to explain at oral argument why they think the prehearing facts are wrong.

This proposal has the advantage of making no demand on scarce judicial time and the disadvantage of making public a significant portion of the prehearing report itself (even if the least-objectionable portion). It cannot succeed unless the Court is willing to analyze its reluctance to release prehearing reports closely, and to treat differently portions of the report as to which the substantial reasons for that reluctance do not apply.

Surely, however, there is a workable compromise waiting to be made. It may be nothing like the proposals aired here. Whatever form it may take, it would be a worthwhile step towards our common goal of greater appellate justice. ■

Recommended Reading for the Appellate Lawyer

This issue's book reviews include two books dealing with objective legal questions and the exercise of discretion.

By Mary Massaron Ross

Law and Objectivity

Kent Greenawalt

Oxford Univ Press 1992

Modern skepticism prompts many to "think that the law is largely indeterminate, even to think legal reasons are just manipulative techniques that lawyers and judges use to support results reached on unstated grounds." And to the extent that judges issue result-oriented decisions, cynicism increases. Kent Greenawalt has written a thoughtful book examining the question of whether, and in what sense, the law is, or should be, objective.

Taking as his point of departure the notion that the law is usually indeterminate, a position with which he disagrees, Greenawalt considers the import of language on the determinacy of legal rules. He points out that the significance of an imperative (a rule for example) "depends on both shared linguistic competence and shared assumptions about the social universe people inhabit, how some forms of action in response to an imperative can determinately, or objectively, be said to comply" and other forms of action be said not to comply.

Greenawalt emphasizes that a legal question "is rarely about law in general, but rather is about some specific aspect of the law of some jurisdiction as it applies to specific events." This narrowing of the universe of questions makes the likelihood, a generally agreed upon answer much greater. In addition, Greenawalt points out that the norms or rules of any legal system "are determinate in their nonapplicability to countless human activities." This means that analyzing determinacy in light of a "steady dose of opinions, especially appellate opinions, highly distorts one's views" about the question, since those opinions are only necessary when the case is close or the answer less than clear.

Greenawalt examines the nature of authority within literary criticism, theological interpretation, and the social sciences and compares it to the kind of interpretation we see in the law. Looking at the authority of the text and of the interpretative community in these contexts, Greenawalt concludes that legal interpretation fundamentally differs. Legal interpretation has an authoritative interpretative community of judges and relies on past precedent to decide narrow and focused questions.

Greenawalt also considers the different senses of objectivity, including "(1) objective (external) versus subjective (internal); (2) objective (criteria based on reasonable persons) versus subjective (personalized criteria); (3) objective (dealing with many situations similarly) versus contextualized (using individualized approaches); (4) objective (dictating results) versus discretionary (leaving much to the judgment of officials); (5) objective (fair) versus arbitrary (or unfair)." In his view, "law that is 'objective' usually has a flavor of all these senses." Analyzing whether the law is appropriately objective requires an understanding of the precise sense in which the term is used. Greenawalt also treats objectivity as it relates to the generality of the law, comparing precise general rules, open standards, and outright discretion as a way of making decisions.

Greenawalt looks at the law in light of broader sources of cultural and political morality or economic efficiency. He questions whether, and in what manner, these broader sources can be used in legal reasoning and discusses their impact on objectivity in the law. In doing so, he discusses the views of Dworkin, Hart, and many others.

Not light reading, Greenawalt's book provides a thoughtful answer to a significant question about the nature of the law. And, equally important, it offers a conceptual framework that is helpful for analysis of any number of thorny problems involving rules, discretion, and objectivity.

The Uses of Discretion

Keith Hawkins, ed

Clarendon Press 1992

Anyone who has ever dealt with bureaucratic intransigence based on "Catch 22" rules recognizes the importance of discretion. And, anyone who has ever been surprised and outraged by disparities in the treatment of like cases knows that unrestrained discretion can readily become problematic. This book of essays provides a broad legal and social science analysis of discretion and its use.

Hawkins defines discretion as "the space, as it were, between legal rules in which legal actors may exercise choice...." Hawkins argues that "[t]o understand how law works, how the words of law are translated into action, it is essential to know how legal discretion is exercised." He insists that a better "appreciation of the nature of discretion is also essential to refinement of legal debate and to policy questions" concerned with the exercise of discretion. He has collected a series of articles from lawyers and social scientists to help in that effort.

Among the most useful essays in the book is the essay written by Carl E. Schneider, *Discretion and Rules: A Lawyer's View.* According to Schneider, a rule is "an authoritative, mandatory, binding, specific, and precise direction to a judge which instructs him how to decide a case or to resolve a legal issue." Discretion, on the other hand, leaves the judge free to decide "one way or another." Schneider identifies intermediate categories where policies or principles come into play. After explaining the advantages and disadvantages of discretion and rules, Schneider describes numerous ways to limit discretion. Schneider ultimately takes "an irreducibly equivocal position, for it is not possible to say a priori what mixture of rules and discretion will best serve in any situation." The choice will have to be made by careful analysis of each case.

(Continued on page 13)

Justices Offer Differing Viewpoints (continued from page 1)

Justice Corrigan quoted Justice Boyle as saying that being on the Court is like being in a marriage, "and maybe it's a shotgun marriage. You have to get along, and learn to disagree without being disagreeable."

Justice Corrigan believes that oral argument has a greater effect at the Supreme Court level than in the court of appeals. Also, practitioners can expect an active court. "You will be peppered with questions," she said.

In fact, because the Court is so active, Justice Corrigan asked practitioners present if they would prefer, as is the practice in many *en banc* circuit courts, that they be allowed five free minutes to get their points out first, "then we beat you up, " she smiled. The audience seemed to have mixed reaction to this suggestion.

Chief Commissioner Al Lynch tried to clarify the procedure the Court uses when considering applications for leave to appeal, and specifically the timing aspects, for the audience. According to Lynch, if the Court is considering whether to grant an application, it will often be given "deferred grant status." This means that no order will be immediately issued, and instead, the case will be placed on a list that the Court will review at a later date. He said there may be 30-40 cases on the list, from which the Court chooses which ones to take.

"It is an effort to use the utmost care in order to select the best cases from the big mix that the court is confronted with," he said.

Even with the care taken, there are still times when the Court will dismiss a case on the basis of "leave improvidently granted." Justice Corrigan said that this happens when the case, for some reason, turns out to be different than the Court thought.

Commissioner Lynch stated that the number of applications being filed with the Court is down from years past. He said the Court disposed of 550 more applications than were filed last year, and this year has disposed of 200 more than were filed. This is good news for practitioners since the time it takes for an application to be acted upon will become shorter.

"Currently applications are being assigned to the Commissioner's office about four months after they are filed," he said. "A couple of years ago it was nine to nine and a half months."

Both Justices said amicus briefs are welcome. In fact, Justice Kelly said that the Court may hesitate to grant leave in a particular case if the briefs are poor. Amicus briefs can "fill in the holes" left by the parties. Amicus briefs can also point out the impact of the relief sought to others and the broader considerations the case poses.

Justice Kelly also thought *amicus* briefs were helpful to the court, and that she has used some as a predicate to the Court's opinion. "The most powerful amicus brief can have an unbelievable effect on the ultimate opinion issued," she said.

Both Justices strongly disfavor the Supreme Court's former practice of de-publishing opinions and vowed that the procedure will not continue. "It's a bad practice, it leaves everyone wondering why," Justice Kelly said. "The Supreme Court owes the parties and the lower court an explanation. I acknowledge that it's easier and safer to give little explanation, but it is part of our role to give an explanation, even if it provokes reconsideration."

Finally, the Justices seemed intrigued by a suggestion from the audience with regard to suspending the precedential effect of court of appeals opinions where leave has been granted by the Supreme Court. Because there is such a high rate of reversal or significant modification of the lower court's opinion, this would prevent other cases from being decided based on precedent that the Court is likely about to change. ■

The Appellate Practice Section's program was video taped and copies can be obtained for a small fee by contacting Gary L. Field.

Book Review *(Continued from page 12)*

John Bell, a British scholar, also discusses discretion in a legal context in *Discretionary Decision Making: A Jurisprudential View.* He argues for a theory of law that integrates knowledge about power relationships and the exercise of discretion that has been learned from empirical research. He views discretion as a "power to choose standards for action on the part of an actor," with the power to choose unilaterally, and legitimacy conferred by the law into the choice.

Other essays look at administrative discretion, decision-making theories as they relate to discretion, and the excercise of discretion outside the courtroom.

Like Greenawalt's book, this book is difficult reading. Some of the essays are written in relatively dense and technical prose. Some of them are only indirectly relevant to most legal inquiries. But anyone seeking to refine their understanding of the exercise of discretion, its advantages and disadvantages, and the effect of a discretionary approach as opposed to use of a rule or some intermediate standard, will find this book extremely useful. ■

Federal Court Practice Chair Sought

The Appellate Practice Section is looking for someone to chair its Federal Court Practice committee. Interested parties should contact:

Noreen Slank, Appellate Practice Section Chairperson
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4000 Town Center #909
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Significant Differences in Federal and State Appellate Practices

The following chart was prepared by Rosalind H. Rochkind of Garan, Lucow, Miller & Seward P.C. for the Sixth Circuit Practice, Nuts and Bolts for Michigan Lawyers seminar held earlier this year. It may be useful for the appellate practitioner who rarely practices in either the Sixth Circuit or the Michigan Court of Appeals.

Notice of Appeal

Federal	State
File the notice of appeal with the district court, generally within 30 days (civil) or 10 days (criminal)	File the claim of appeal with the Court of Appeals; generally within 21 days
Order appealed from must be designated in notice of appeal, and attachment of any order which is to be subject of the appeal is requested, but attachment is not required by court rule.	Order appealed from must be attached to claim of appeal.
Pay fees owed to both the district and circuit courts with the district court.	Pay fee owed to the trial court with the trial court, and fee owed to the Court of Appeals with the Court of Appeals
Every attorney signing a pleading in the 6th Circuit must be specifically admitted to practice before the 6th Circuit.	Admission to practice in Michigan is sufficient.
District Court will serve the notice of appeal on all parties, and will provide a copy of the transcript order form and docket entries.	Appellant serves the notice of appeal on all parties.

Information from the court

Federal	State
6th Circuit will send an informational packet to parties, including appearance forms and other information about the appeal process.	
6th Circuit will establish the correct case caption, which must thereafter be utilized.	

Automatic Stay

Federal	State
Orders are generally not enforceable for 10 days, excluding weekends. Note that this is shorter than the time provided for taking an appeal.	Orders are generally not enforceable for 21 days, which is the period provided for taking a civil appeal.

Transcripts

Federal	State
It is permissible for the appellant to order only partial transcripts without the court's approval. If an appellee desires additional transcripts, it can request that they be ordered, and, if necessary, it can order them.	Absent stipulation or order of the court, an appellant must order all of the transcripts.
An appellee must secure its own copy of the transcripts.	The appellant must serve a copy of transcripts on each appellee.

Briefs

Federal	State
6th Circuit sends out a briefing schedule once the transcripts have been filed.	Dues dates of the appellant and Appellee briefs are calculated according to the court rules.
Formalized schedule regarding the briefing of cross-appeals.	No specific provisions in the court rules regarding the briefing in cross appeals.
No extensions of time provided in the court rule. Brief extensions are available by motion.	Stipulated extensions of time for up to 28 days are available for most appellant and appellee briefs. Extensions are available by motion.
Formalized requirements regarding length of brief, including font requirements, type volume limitations.	Page and font limitations.
Colored covers are required.	No covers required or desired.
"Proof" brief is filed before the filing of the joint appendix, which is followed by the filing of the final brief.	
Each party designates the contents of the joint appendix at the end of their brief.	
Failure to file a timely appellant's brief will result in dismissal of the appeal if the brief is not filed relatively quickly after its due date, and accompanied with a motion to accept late brief.	Failure to file a timely brief may result in the dismissal of the appeal, but this would only occur after notice and a lengthy delay.

Your brief is timely if…

Federal	State
Your brief is timely if it is "dispatched" on its due date under the circumstances set forth in FRAP 25.	Your brief is timely if it is filed in Court of Appeals on its due date.

Appendix

Federal	State
Formalized requirements for the preparation and filing of a joint appendix, which is the burden of appellant.Provision of appended material is optional for each party.	Provision of appended material is optional for each party.

Oral Argument

Federal	State
	A party will lose the right to oral argument if the request for same is not set forth on the cover sheet of the brief or if the party's brief is untimely.

Rehearings

Federal	State
A party has 14 days to file a motion for rehearing, and no response is permitted unless requested by the court.	A party has 21 days to file a motion for rehearing, and timely responses are permitted.
En banc rehearings may be requested.	No provision for en banc rehearings, although the Court of Appeals may convene a conflict resolution panel.

Appeals to a higher court

Federal	State
Petitions for a writ of certiorari must be filed in the United State Supreme Court within 90 days.	Timely applications for leave to appeal to the Michigan Supreme Court must be filed within 21 days, and will be accepted if filed within 56 days.

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