State Bar of Michigan

Appellate Practice

Section Newsletter

FREEDOM • TRUTH • EQUALITY • JUSTICE

Protecting the Appellate Specialist's Professional Judgment[1]

By Mark Cooney

Spring 2007, Vol. 11, No. 2

In this Issue

A Note of Appreciation to the 2007 Michigan Appellate Bench Bar Conference Planning Committee..................2

A Review of MCR 7.215—Execution and Enforcement of Court of Appeals Orders......5

A New Style of Oral Advocacy: Oral Argument on the Application for Leave to Appeal...7

Ye Without Sin: Casting Stones at Opposing Counsel and Lower Courts in Appellate Briefs 9

Recommended Reading for the Appellate Lawyer 11

Shannon's Soapbox 13

Bench Bar Conference Details 17

Council Meeting Dates 20

Appellate attorneys often face a vexing dilemma. Appellate judges and experienced appellate attorneys almost uniformly advise lawyers to shed all but their strongest arguments in an appeal brief.[2] The United States Supreme Court, for example, has noted that "[e]xperienced advocates since time beyond memory have emphasized the importance of winnowing out weaker arguments on appeal and focusing on one central issue if possible, or at most on a few key issues."[3] But what if an appellate attorney sheds the weaker arguments and the appeal is unsuccessful? A disappointed client may claim that one of the discarded arguments would have won the appeal if only the attorney had raised it. Does the appellate lawyer have any protection from legal malpractice suits grounded on this type of strategy decision?

Enter the "attorney judgment" defense. At its core, the rule dictates that attorneys do not breach their duty to clients, as a matter of law, when they make informed, good-faith tactical decisions. Most legal professionals who are familiar with this rule likely think of it as a "trial tactics" rule protecting trial attorneys from malpractice suits that amount to Monday-morning quarterbacking over trial strategy. But the attorney-judgment rule protects more than just trial tactics, and a number of courts have recognized that an appellate attorney's decision to forego arguments or concede issues on appeal falls squarely within the attorney-judgment rule's protection.

An Overview of the Doctrine

Lawyers owe their clients a duty to exercise "that degree of care, skill, diligence and knowledge commonly possessed and exercised by a reasonable, careful and prudent lawyer."[4] But this duty is not without limits. "An attorney is never bound to exercise extraordinary diligence, or act beyond the knowledge, skill, and ability

Continued on page 3

A Note of Appreciation to the 2007 Michigan Appellate Bench Bar Conference Planning Committee

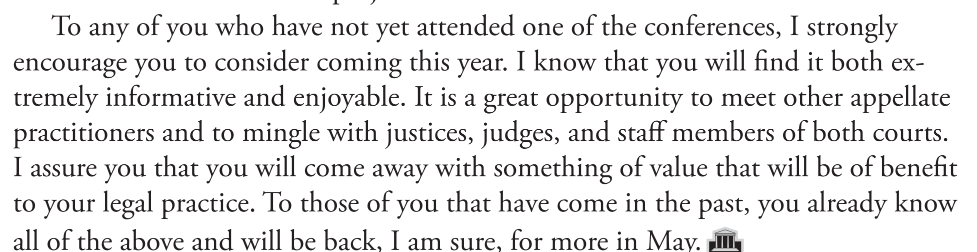
By Linda M. Garbarino, Chair

Amid the flurry of activity in these final months before the May 2007 Michigan Appellate Bench Bar Conference, I wanted to step back for a moment to express the gratitude of the section to those involved in the planning and organizing of the upcoming conference. This will be the fifth conference. The planning committee is composed of appellate practitioners from many different and diverse areas of the law. In addition, the Supreme Court, the Court of Appeals, and their staffs give generously of their time and support. While I am not directly involved in the planning work for the upcoming conference, from past experience and as this year's chair of the section, I have been privy to much of the activity and work of the planning committee.

The work of the planning committee started shortly after the end of the 2004 conference. In these last three years since the last conference, the planning committee has met numerous times. Hours and hours have been spent addressing the theme and focus of the conference, finding a location, identifying possible speakers for the two luncheons, organizing the opening reception and dinner, and, of course, actually planning the substance of the conference itself, including the topics to be included, materials to be provided, and securing court and bar representation for each of the breakout sessions. Subcommittees are formed, chairs appointed, and members sought to plan each of the various conference sessions. The subcommittees meet many times during this planning stage and report back to the larger committee on their progress. Moderators and recorders are recruited. A training session is provided. Judges are contacted for their involvement in the various sessions and for their input as to the specific discussion topics in the break-out groups. Written materials are prepared and organized into the binders given to conference attendees upon registration. On top of all this, financing of the conference is addressed, with an eye toward keeping the cost of attending as reasonable as possible. Shortly after the conference is over, these same people will meet to gather ideas generated from the discussion groups, to be provided later in report format to both the bench and bar.

All of the above is done without compensation. The driving force, one must suppose, is a true passion for the law and a dedication to the appellate process. While I am sure that a great deal of personal satisfaction is derived, I nonetheless thought it appropriate to use this space to express not only my own personal thanks, but also the appreciation of the section for the planning committee's hard work and dedication to this project.

To any of you who have not yet attended one of the conferences, I strongly encourage you to consider coming this year. I know that you will find it both extremely informative and enjoyable. It is a great opportunity to meet other appellate practitioners and to mingle with justices, judges, and staff members of both courts. I assure you that you will come away with something of value that will be of benefit to your legal practice. To those of you that have come in the past, you already know all of the above and will be back, I am sure, for more in May.



Section Council

Chair
Linda M. Garbarino

Chair-Elect
Paul R. Bernard

Secretary
Barbara H. Goldman

Treasurer
John J. Bursch

Council

Term expires 2007
- Janet M. Boes, Saginaw
- Terrence R. Flanagan, Hartland
- Marcia L. Howe, Farmington Hills
- Anica Letica, Pontiac
- Gerald F. Posner, Detroit

Term expires 2008
- Timothy Diemer, Detroit
- Rosalind H. Rochkind, Detroit
- Liisa Speaker, Lansing
- Michael Updike, Farmington Hills
- Jill Wheaton, Ann Arbor

Term expires 2009
- Phillip J. DeRosier, Detroit
- Stephen J. Rhodes, Lansing
- Judith A. Curtis, Grosse Pointe
- Christina Ginter, Detroit
- Ronald S. Lederman, Southfield
- Mary Massaron Ross, Detroit

Immediate Past Chair:
Deborah Hebert, Southfield

APS Newsletter Editors
Deborah Hebert
e-mail: *deborah.hebert@ceflawyers.com*

Marcia L. Howe
e-mail: *mhowe@jrlaf.com*

Christina A. Ginter
e-mail: *christina.ginter@kitch.com*

A little about the building

The Michigan Hall of Justice was dedicated on October 8, 2002. It houses the Michigan Court of Appeals and the Michigan Supreme Court as well as other related agencies. The words "truth," "equality," "freedom," and "justice" are engraved on the front of the building, reminding visitors of the judicial branch's mission. At the dedication ceremony, Justice Cavanagh remarked that the shape of the building is reminicent of native justice — the sentencing circle, where young and old had a voice. Chief Justice Corrigan remarked that the arms seem to be outstretched, both shielding and embracing.

Protecting . . .
Continued from page 1

ordinarily possessed by members of the legal profession."[5] Likewise, an attorney has no duty to insure or guarantee a favorable result for a client.[6]

Courts have been especially protective of lawyers' strategy decisions—so-called "judgment calls." "[A]n attorney is not held to the rule of infallibility and is not liable for an honest mistake in judgment, where the proper course is open to reasonable doubt."[7] Choosing one of "'several reasonable courses of action'" is not legal malpractice.[8] "Otherwise, every losing litigant would be able to sue his attorney if he could find another attorney who was willing to second guess the decisions of the first attorney with the advantage of hindsight."[9]

Michigan courts have expressed this sentiment in broad terms. For instance, in its oft-cited *Simko v. Blake* [10] opinion, the Michigan Supreme Court observed that "mere errors in judgment by a lawyer are generally not grounds for a malpractice action where the attorney acts in good faith and exercises reasonable care, skill, and diligence."[11] If an attorney acts in good faith "and in an honest belief that his acts and omissions are well founded in law and are in the best interest of his client, he is not answerable for mere errors in judgment."[12]

There are two scenarios that trigger the rule. The first is when a lawyer has to make a strategy decision because the law is unsettled. Attorneys "cannot be held liable for failing to correctly anticipate the ultimate resolution of an unsettled legal principal [sic]."[13] As one court observed, the attorney-judgment rule "has found virtually universal acceptance" when the attorney's alleged error "involves an uncertain, unsettled, or debatable proposition of law."[14]

The second scenario is where the law *is* settled, but the lawyer still faces a true strategy choice. Lawyers often face choices that are made difficult not because of the unsettled nature of the law, but rather because there is simply no way to predict with certainty how a judge or jury will react to one approach or another. (Consider the criminal-defense attorney's ever-present dilemma on whether to put the accused on the stand.) "[I]n the context of litigation, an attorney will not be held liable for a mere error in judgment or trial tactics if the attorney acted in good faith and upon an informed judgment."[15] A client's mere "dissatisfaction with strategic choices" cannot serve as the proper basis for a legal malpractice claim.[16]

For either scenario, most courts condition the rule's application on "the attorney acting in good faith and upon informed judgment after undertaking reasonable research of the relevant legal principals [sic] and facts of the given case."[17]

Strategic Decisions on Appeal

An appellate specialist's most common strategic choice is deciding what arguments should be raised on appeal. After carefully researching the law and studying the factual record, appellate lawyers often find potential arguments that belong in the "good" pile and some that belong in the "not so good" pile. It may take all the courage an appellate lawyer can muster to convince a client that, in the lawyer's judgment, the arguments in the "not so good" pile should be discarded so that the strongest arguments won't drown in a voluminous sea of arguments.

The Sixth Circuit is among the courts that have applied the attorney-judgment rule to protect that type of judgment call on appeal. In *Woodruff v Tomlin*,[18] the father of two minors injured in a multi-vehicle accident sued two truck drivers for negligence. One of the injured minors was driving her father's car at the time of the accident, and the other was the passenger. The truck drivers countersued, alleging that the minor driver was negligent and that the passenger "aided and abetted" her.[19] The jury returned with a verdict for the truck drivers, finding that they were free from fault and that the minors were both at fault.[20]

The father appealed the verdict. In his appeal brief, the father's lawyer made a calculated concession. He conceded that the trial evidence *supported* the jury's finding that the minor driver was negligent, choosing to focus the appeal on the passenger's freedom from fault.[21] This strategy succeeded: the appellate court reversed the truck drivers' judgments against the passenger. But, not surprisingly, the appellate court affirmed the truck drivers' judgments against the minor driver.[22]

The minors' father later sued the attorney, alleging that he committed malpractice by conceding in his appeal brief that the trial evidence supported the jury's finding that the minor driver was negligent.[23] The Sixth Circuit rejected this claim based on the attorney-judgment rule, observing that the attorney's decision to focus on salvaging the passenger's claim during the appeal "clearly appears to have been based on professional judgment."[24] The court noted that the attorney had not conceded anything that wasn't already obvious from the record; the trial evidence "clearly" supported the jury's finding of negligence by the minor driver.[25] Thus, there was solid footing for the lawyer's pragmatic decision not to attack that aspect of the jury verdict.[26]

The court also noted that the passenger's injuries, which included permanent leg damage, were far more severe than the driver's injuries.[27] Given these factors, the court concluded that "the concessions in the appellate

Continued on next page

Protecting . . .
Continued from page 3

brief resulted from a tactical decision reached in the exercise of professional judgment and d[id] not furnish a basis for a malpractice action."[28]

Similarly, the Oklahoma Supreme Court applied the attorney-judgment rule to protect an appellate attorney's decision not to raise arguments that had failed in the lower court. In *Manley v. Brown*,[29] the clients complained that they would have escaped liability in the underlying case if their attorney had challenged, at trial and on appeal, the validity of certain construction liens. The attorney had raised those arguments in a pretrial motion that failed, but opted against raising them again at trial or on appeal. The law underlying the clients' technical attack on the liens "was far from settled" when the case was tried and appealed.[30]

The Oklahoma Supreme Court held that the attorney could not "be declared negligent in having failed to press on appeal arguments that lie in an arena of unsettled law or in making substandard strategy choices."[31] It emphasized that the "[f]ailure repeatedly to advocate a questionable theory of defense rejected earlier . . . does not constitute a lawyer's breach of due care."[32] "When the law is clouded because it stands unconcretized by precedential pronouncements, a lawyer who acts in good faith and in an honest belief that his advice and acts are well founded will not be held responsible for failing to anticipate how the law's ambiguity will ultimately be resolved."[33]

When read together, *Woodruff* and *Manley* reflect that appellate attorneys need not rehash lower-court arguments in robotic fashion, against their better judgment, just to avoid potential liability for malpractice. These cases are entirely consistent with Michigan's version of the attorney-judgment rule, and they give some reassurance to Michigan's appellate lawyers that they can do what they do best: offer sound litigation strategies based on their years of experience practicing before Michigan's appellate courts.

Mark Cooney is an associate professor at Thomas M. Cooley Law School's Oakand University campus.

Endnotes

1 This article is a modified excerpt of an article originally published in the *Wayne Law Review*: "Benching the Monday-Morning Quarterback: The "Attorney Judgment" Defense to Legal-Malpractice Claims," 52 Wayne L. Rev. 1051 (2006).

2 See, e.g., *Jones v. Barnes*, 463 U.S. 745, 751-52 (1983); Henry J. Bemporad & Sarah P. Kelly, *Novel Issues, Futile Issues, and Appellate Advocacy: The Troubling Lessons of Blousley v. United States*, 35 St. Mary's L.J. 93, 94 (2003).

3 *Jones*, 463 U.S. at 751-52.

4 *Sun Valley Potatoes, Inc. v. Rosholt*, Robertson & Tucker, 981 P.2d 236, 239 (Idaho 1999).

5 *Simko v. Blake*, 532 N.W.2d 842, 847 (Mich. 1995).

6 *Id.* at 846.

7 *Bernstein v. Oppenheim & Co.*, 554 N.Y.S.2d 487, 489 (App. Div. 1990).

8 *Id.* (quoting *Rosner v. Paley*, 481 N.E.2d 553, 554 (N.Y. 1985)).

9 *Woodruff v. Tomlin*, 616 F.2d 924, 930 (6th Cir. 1980), *cert. denied*, 449 U.S. 888 (1980).

10 532 N.W.2d 842, 847 (Mich. 1995).

11 *Id.*

12 *Id.*

13 *Sun Valley Potatoes, Inc. v. Rosholt*, Robertson & Tucker, 981 P.2d 236, 239-40 (Idaho 1999).

14 *Halvorsen v. Ferguson*, 735 P.2d 675, 681 (Wash. App. 1986), *review denied*, 108 Wash. 2d 1008 (1987).

15 *Sun Valley*, 981 P.2d at 240 (citing *Simko*, 532 N.W.2d at 847).

16 *Bernstein v. Oppenheim & Co.*, 554 N.Y.S.2d 487, 490 (App. Div. 1990).

17 *Sun Valley*, 981 P.2d at 240.

18 616 F.2d 924 (6th Cir. 1980), *cert. denied*, 449 U.S. 888 (1980).

19 *Id.* at 927.

20 *Id.*

21 *Id.* at 933.

22 *Id.* at 927-28.

23 *Id.* at 928.

24 *Id.* at 933.

25 *Id.*

26 *Id.*

27 *Id.* at 927, 933.

28 *Id.*

29 989 P.2d 448 (Okla. 1999).

30 *Id.* at 452.

31 *Id.* at 458.

32 *Id.* (italics removed).

33 *Id.*

Kick up your heels!

You can find back copies of the APS newsletter at

http://www.michbar.org/appellate/newsletter.cfm

A Review of MCR 7.215—Execution and Enforcement of Court of Appeals Orders

By Liisa R. Speaker

Several times in the past few years, I have been confronted with an opponent's effort to immediately enforce a Court of Appeals' decision. These cases have presented a mix of questions, including: (1) Can the party who prevails in the Court of Appeals move for entry of judgment in the trial court before expiration of the time for filing an application in the Supreme Court, or alternatively, while an application is pending? (2) Does a Court of Appeals order granting peremptory reversal take immediate effect? (3) Does a Court of Appeals order reversing a preliminary injunction take immediate effect?

In one of my cases, a government agency began issuing misdemeanor tickets to my client for operating its business without a permit in the days immediately following the appellate decision. The Court of Appeals had reversed a preliminary injunction preserving the status quo, which allowed my client to do business on existing permits pending litigation on the nonrenewal of those permits. Ultimately, the district court dismissed these citations on the ground that the Court of Appeals order was not in effect when the citations were issued. In another case, the prevailing party asked the trial court to release the stay bond and enter judgment in its favor less than 42 days following the Court of Appeals decision.

Both scenarios are governed by court rule. This article will address some general principles that apply.

A. Can a party seek a release of the stay bond and entry of judgment in the trial Court when an application for leave is pending?

Appellate attorneys know that the answer is typically "no," but opposing counsel may need to be enlightened on the controlling authority. Under MCR 7.215(F)(1)(a),

> [U]nless otherwise ordered by the Court of Appeals or the Supreme Court or as otherwise provided by these rules, (a) the Court of Appeals judgment is effective after the expiration of the time for filing an application for leave to appeal to the Supreme Court, or, if such an application is filed, after the disposition of the case by the Supreme Court.

A Court of Appeals "judgment" is an order that decides the appeal. "When the Court of Appeals disposes of an original action or an appeal, whether taken as of right, by leave granted, or by order in lieu of leave being granted, its opinion or order is its judgment." MCR 7.215(E)(1).

The time for filing an application for leave to appeal to the Supreme Court is established by MCR 7.302(C)(2), which allows up to 42 days after the Court of Appeals clerk mails the order to be appealed. The clock starts to run from the entry of the Court of Appeals judgment, or from the entry of the Court of Appeals order denying a timely motion for reconsideration of a judgment. MCR 7.302(C)(2)(c). Thus, if the Court of Appeals order is an order that disposes of the case, it is not effective until 42 days after it is issued.

In one of my cases, opposing counsel moved in the trial court for release of the stay bond and for entry of judgment within the 42 days available to my client to file an application to the Supreme Court. The stay bond cannot be released until the Court of Appeals order becomes effective, per the court rule governing stays in the Supreme Court. MCR 7.302(H). "When a stay bond has been filed on appeal to the Court of Appeals under MCR 7.209 or a stay has been entered, it operates to stay proceedings pending disposition of the appeal in the Supreme Court unless otherwise ordered by the Supreme Court or Court of Appeals." MCR 7.302(H). A trial court would thus have no authority to order the release of the stay bond while the case is pending before the Supreme Court.

B. It matters whether the Court of Appeals order is a judgment described in MCR 7.215(E) or some other order as described in MCR 7.215(G).

Different timetables apply in determining the effectiveness of Court of Appeals orders, depending on whether they are judgments under MRE 7.215(E), or orders disposing of interlocutory matters under MRE 7.215(G). MCR 7.215(E)(1) is the judgment rule: "[w]hen the Court of Appeals disposes of an original action or an appeal, whether taken as of right, by leave granted, or by order in lieu of leave being granted, its opinion or order is its judgment." The effectiveness of these orders is controlled by MCR 7.215(F). In contrast, MCR 7.215(G) governs "[a]n order other than one described in subrule (E)." Such an order is "entered on the date of the filing," and "[u]nless otherwise stated, . . . is effective on the date it is entered." MCR 7.215(G). By its own terms, MCR 7.215(G) applies to

Continued on next page

A Review of MCR 7.215
Continued from page 5

interlocutory appellate orders, which take immediate effect. An "interlocutory order" is defined as "one which does not finally determine a cause of action but only decides some intervening matter pertaining to the cause, and which requires further steps to be taken in order to enable the court to adjudicate the cause on the merits." *Black's Law Dictionary*, 815 (6th Ed. 1990). Examples of interlocutory appellate orders include an order on a motion to consolidate, motion to strike brief, motion for amicus curiae briefing, motion for stay of underlying judgment, or motion for bond. See MCR 7.211(C) and 7.209. When the Court of Appeals order decides the whole controversy on appeal, there is no decision on the merits left undecided, and, therefore, the appellate order is not interlocutory.

In my "permit" case, the Court of Appeals order disposed of the appeal. It reversed a preliminary injunction, addressed other issues raised in the appeal, and remanded the case for dismissal by the circuit court. The Court of Appeals order finally disposed of the action and was thus a judgment under MCR 7.215(E). It did not become effective until 42 days had passed from the date of issuance, during which time my client could have filed an application for leave to appeal in the Supreme Court. MCR 7.215(F)(1)(a), MCR 7.302(C)(2). During that period, the circuit court's preliminary injunction remained in effect. Because the misdemeanor citations were issued to my client before the Court of Appeals order became final, the citations were invalid. It does not matter that an application was never filed. The rules regarding the effectiveness of an appellate order control whether or not the non-prevailing party ultimately decides to apply for leave.

C. Does an order granting peremptory reversal necessarily take immediate effect?

In my "permit" case, the government agency argued that the Court of Appeals intended its order to take immediate effect because it reversed the injunction peremptorily. A peremptory reversal means that the court found error so manifest as to warrant an immediate decision, without formal submission. *See* MCR 7.211(C)(4). But nothing in that rule suggests that such an order, which is a judgment under MCR 7.215(E), is to have an effect other than as provided in MCR 7.215(F)(1)(a). Even orders of peremptory reversal, it would seem, do not become effective until the period for filing a Supreme Court application expires.

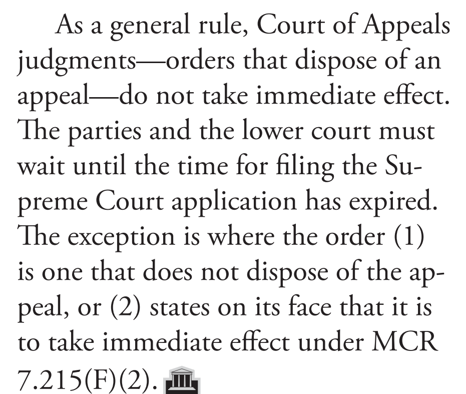
If the Court of Appeals intends its judgment to take immediate effect, it has the authority to direct that result. MCR 7.215(F)(2) specifically allows the court to order that "a judgment described in subrule (E) has immediate effect." See, e.g., *Gracey v Grosse Pointe Farms Clerk*, 182 Mich App 193, 214; 452 NW2d 471 (1989) (reversing peremptorily the lower court's decision, and stating in its opinion that "this opinion shall have immediate effect"). See also *Jones v Dep't of Corrections*, 641 NW2d 854, 854 (Mich. 2002) (stating that "[t]here do not appear to be exceptional circumstances in this case that justify immediate effectiveness of the Court of Appeals decision"). But absent specific language directing immediate implementation of the *judgment*, the parties and the lower courts must presume that the judgment is to be given effect 42 days after it is issued, or 42 days after a timely filed Supreme Court application is decided. MCR 7.215(F)(1)(a).

D. Does an order reversing a preliminary injunction necessarily take immediate effect?

The government agency in my "permit" case argued that unless the reversal of a preliminary injunction is given immediate effect, parties harmed by a wrongfully issued injunction would be left without recourse for 42 days. There are ways, however, for such parties to protect themselves. One option is to persuade the Court of Appeals during the briefing phase that if the injunction is reversed, it should take effect immediately. MCR 7.215(F)(2). Another is to petition for adequate security as allowed under MCR 3.310(D). See also *In re Prichard Estate*, 169 Mich App 140, 149; 425 NW2d 744 (1988).

Conclusion

As a general rule, Court of Appeals judgments—orders that dispose of an appeal—do not take immediate effect. The parties and the lower court must wait until the time for filing the Supreme Court application has expired. The exception is where the order (1) is one that does not dispose of the appeal, or (2) states on its face that it is to take immediate effect under MCR 7.215(F)(2).



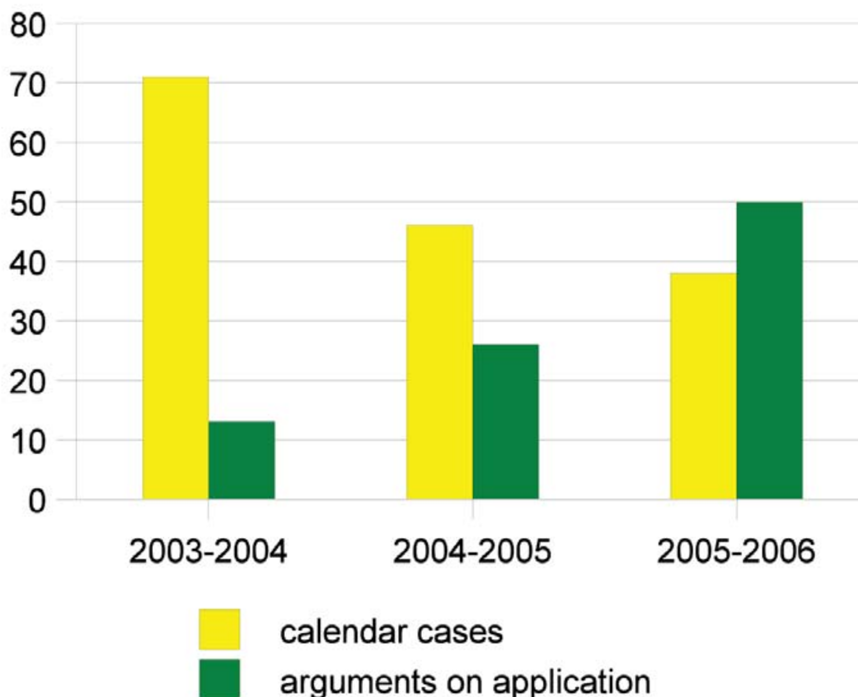
A New Style of Oral Advocacy: Oral Argument on the Application for Leave to Appeal

By Graham Bateman

In August of 2003, the Michigan Supreme Court made seemingly minor amendments to two court rules and an internal operating procedure that are changing the face of appellate practice before the Supreme Court. The result of these amendments is that the Michigan Supreme Court is now regularly scheduling half-hour arguments on applications for leave to appeal – in contrast to the one-hour arguments for calendar cases, in which leave to appeal has been granted.

What effect have the new rules had on the Court's docket? The 2003-2004 term was the first one in which oral argument on an application was available. In that term, the Court heard 71 calendar cases and 13 arguments on applications. The next year, in the 2004-2005 term, the Court heard 46 calendar cases, and 26 arguments on applications. The proportion and number of arguments on applications rose even higher in the 2005-2006 term: the Court heard 38 calendar cases and 50 arguments on applications.

The amendment to MCR 7.302(G)(1) allows the Supreme Court to order oral argument on an application for leave to appeal.[1] The amendment to MCR 7.315(A) allows the Court to order shorter oral arguments, with each side arguing less than 30 minutes.[2] The third and final change was to an internal court rule. Since 1980, the Court has had an internal rule that the Court could grant peremptory relief only with five votes. In 2003 that internal rule was amended to provide that when there has been oral argument on an application for leave to appeal, a per curiam opinion may issue on the vote of only four justices.[3]



How have these cases been decided after the Court heard the oral argument on the application for leave to appeal? Naturally, decisions or trends of decisions in prior cases are no indication of future results. But they are interesting.

The Court heard 89 oral arguments on applications for leave to appeal in the last three terms.[4] In 49 cases, about 55 percent of the applications argued, the Court of Appeals decision was reversed at least in part. Ten cases were affirmed. The Court denied leave to appeal in 18 cases, and granted leave to appeal in nine cases. Of the remaining two cases, one was remanded to the Court of Appeals for further proceedings, and one is being held in abeyance.

Oral argument on the application for leave to appeal can be granted on the vote of only four justices. And any case in which the Court orders oral argument on the application is by definition a close one. If four justices agreed that the case was significant enough to be argued, the Court would grant leave to appeal. If four justices agreed that the case did not need any further action, the Court would deny leave to appeal. If five justices agreed that peremptory relief should be granted, the Court would issue a peremptory order or a per curiam opinion. Thus, the Court will grant oral argument on the application

Continued on next page

A New Style . . .
Continued from page 7

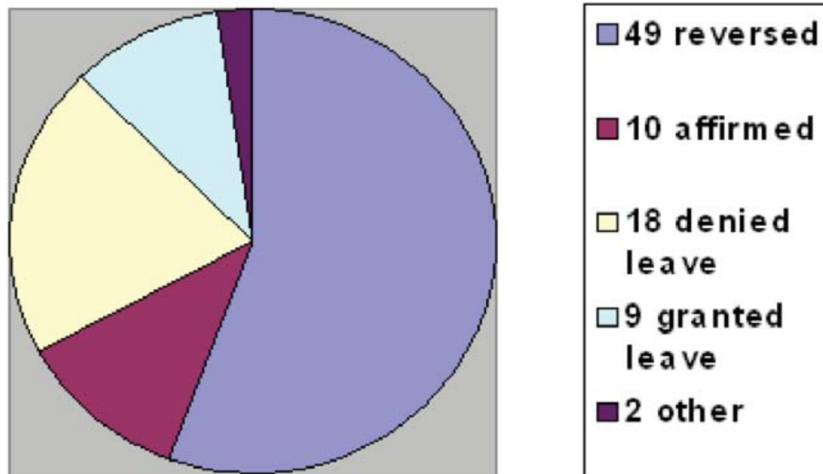
when there is some question about how to resolve the case, or when there are only four votes for peremptory action.

The order granting oral argument on the application can range from boiler-plate language:

> On order of the Court, the application for leave to appeal the October 21, 2003 judgment of the Court of Appeals and the application for leave to appeal as cross-appellants are considered and, pursuant to MCR 7.302(G)(1), we direct the Clerk to schedule oral argument on whether to grant the applications or take other peremptory action permitted by MCR 7.302(G)(1). The parties may file supplemental briefs within 28 days of the date of this order.][5]

to a detailed description of issues that the Court wants discussed:

> On order of the Court, the application for leave to appeal the August 31, 2004 judgment of the Court of Appeals is considered and, pursuant to MCR 7.302(G)(1), we direct the Clerk to schedule oral argument on whether to grant the application or take other peremptory action permitted by MCR 7.302(G)(1). The parties shall submit supplemental briefs within 28 days of the date of this order addressing: (1) what actions, if any, were taken by the two defendants after October 8, 1998 that contributed to a discriminatory hostile work environment, so as to support a December 1, 1998 date of injury; (2) whether a December 1, 1998 accrual date for injury to plaintiff is sustainable for defendant Frank Bacha, where he left his employment with the City of Taylor on October 8, 1998; and (3) the impact, if any, of this Court's decision in *Magee v DaimlerChrysler Corp*, 472 Mich. 108; 693 N.W.2d 166 (2005).[6]



Only the second type of order says that the parties *shall* submit supplemental briefs. But you may be confident that the Court prefers supplemental briefing – briefing that does not merely repeat the earlier arguments – whenever it orders oral argument on an application for leave to appeal.

It is too soon to make sweeping generalities about the effect of the Court's new procedure of ordering oral argument on the application for leave to appeal. But when you get the notice in the mail that the Court has scheduled oral argument to consider what should be done with your case, polish up your briefs. You probably won't get a second chance.

Graham Bateman is an attorney licensed in Louisiana and Michigan. She clerked for Justice Elizabeth A. Weaver, at first in the Michigan Court of Appeals then in the Michigan Supreme Court, from 1989-2006. Graham is now clerking for Judge Jimmie Peters at the Louisiana Third Circuit Court of Appeal. The opinions expressed in this article are hers alone.

Endnotes

1 ADM 2002-40

2 ADM 2002-40

3 ADM 2003-31

4 The Court had ordered oral argument on the application for leave to appeal in 4 other cases. But three cases were dismissed by stipulation of the parties, and the Court denied leave to appeal in one case before the oral argument was held.

5 *Woodward v Custer*, 471 Mich 890; 687 NW2d 298 (2004).

6 *Joliet v Pitoniak,* 472 Mich 908; 696 NW2d 711 (2005).

Spring 2007, Vol. 11 No. 2

Ye Without Sin: Casting Stones at Opposing Counsel and Lower Courts in Appellate Briefs

By John J. Bursch

In the Gospel of John, the Pharisees tried to trick Jesus by presenting a woman charged with adultery. The Pharisees reminded Jesus that under Mosaic law, adultery is an offense punishable with death by stoning. The Pharisees then challenged Jesus to judge the woman. If Jesus rejected the stoning, the Pharisees could accuse him of disobeying Jewish law; if Jesus approved the stoning, the Pharisees could accuse him of breaking Roman law, which prohibited Jews the right of summary capital punishment. Jesus paused for a moment, and—in an extraordinary example of reframing the issue presented—said, "Let the one among you who is without sin be the first to throw a stone at her." After a brief examination of conscience, the gathered crowd dispersed, and Jesus instructed the woman to go and "from now on do not sin any more."

Jesus's advice in this Biblical passage applies equally to the appellate practitioner tempted to throw any of the following "stones" in an appeal brief:

- "In an attempt to mislead this honorable court, the appellant . . ."
- "The appellant deliberately mischaracterizes the lower court record by asserting . . ."
- "Appellee miscites and misues authority to divert this court's attention from the issues at hand . . ."
- "The trial court's bias toward appellee is amply demonstrated by the illogic of its opinion, where . . ."

The recitation of these examples is not to suggest that an accomplished appellate lawyer would ever say such scandalous things in an appeal brief (pause for a brief examination of conscience), but rather to question the wisdom of throwing linguistic stones as a form of advocacy. This article discusses punitive reasons to refrain from throwing such stones, then suggests a more persuasive alternative.

The most severe way to punish an advocate who disparages the lower court or opposing counsel is dismissal.

Your Brief May Be Dismissed

The most severe way to punish an advocate who disparages the lower court or opposing counsel is dismissal. Does this sound far-fetched? Think again. In January, the Utah Supreme Court dismissed an appeal for just that reason.

The plaintiffs in two consolidated appeals in *Peters v Pine Meadow Ranch Home Association*, Case No 20050806, were trying to block the home association from levying fees to pay for roadways and other subdivision improvements. The trial court granted summary disposition to the association, and the Utah Court of Appeals affirmed, then denied a petition for rehearing.

In briefs filed in the Utah Supreme Court, the plaintiffs' attorney—a University of Utah S.J. Quinney College of Law professor—got angry, stating that "good judges never fabricate evidence," and that the Court of Appeals' opinion was "no innocent mistake." The attorney continued, "So, if a court fabricates evidence, whether intentionally, negligently, or through innocent mistake, it destroys the moral premise of the legal system." Just in case this stone was not explicit enough, the attorney went on: "A judge who fabricates evidence, even from a sincere motive to do justice in a particular case, has no moral standing whatsoever."

The Utah Supreme Court threw out the case, not on the merits, but on the basis of the attorney's behavior. "Petitioners' briefs in each case are replete with unfounded accusations impugning the integrity of the Court

Continued on next page

Ye Without Sin
Continued from page 9

of Appeals panel that heard the cases," wrote the Court. "These accusations include allegations, both direct and indirect, that the panel intentionally fabricated evidence, intentionally misstated the holding of a case, and acted with improper motives. Further, petitioners' briefs are otherwise disrespectful of the judiciary." The Court struck the plaintiffs' briefs, affirmed the Utah Court of Appeals' rulings, and assessed attorney fees, even though the Court agreed that the Court of Appeals had committed some of the errors identified in the plaintiffs' briefs. The message was clear: do not throw stones at the lower court.

Your Oral Argument May Be Wasted

After spending countless hours preparing for oral argument, an appellate advocate stands before the Michigan Court of Appeals, ready to address the intricacies of every cited case and with full command of the trial court record. After the advocate confidently declares "May it please the court," the presiding judge immediately interjects and asks, "Counselor, have you reported your opposing counsel to the bar for an ethics violation?" Counsel, unsure where this question is headed, responds a bit nervously, "Excuse me?"

The judge continues: "Counsel, Rule 3.3 of the Michigan Rules of Professional Conduct states that an attorney shall not knowingly:

- make a false statement of material fact or law to a tribunal;
- fail to disclose to a tribunal controlling legal authority in the jurisdiction known to the lawyer to be directly adverse to the position of the client and not disclosed by opposing counsel; or
- offer evidence that the lawyer knows to be false.

In addition, Rule 8.3 states that a lawyer having knowledge that another lawyer has violated the Rules of Professional Conduct *shall* inform the Attorney Grievance Commission. In the introduction to your brief, you state quite plainly that opposing counsel has mischaracterized the record and miscited the relevant cases in an effort to mislead this court. So I ask you again, have you reported your opposing counsel to the bar for an ethics violation?"

The advocate, after wasting many precious and flustered minutes, never fully recovers and fails to present a cogent appellate argument. While some would view the judge's inquisition as harsh and an overly aggressive application of the Rules of Professional Conduct, the lecture certainly falls within the plain language of the rules. Again, the potential consequences should provide more than enough incentive to set down the linguistic stones.

Your Credibility May Be Shot

Can you remember the last time you shopped for a vehicle at a used car lot? Chances are high you encountered a pushy salesperson, and the more the salesperson pushed you to buy a particular car, the more you did *not* want to buy it. As Professor James McElhaney counsels trial court attorneys, the more you try to "sell" your case, the more your audience will see you as a used car salesperson—and run in the opposite direction.

The same holds true in the appellate courts. The more an advocate tries to persuade the court that opposing counsel is mischaracterizing the facts and law, the greater the risk the court will be turned off by the approach. Moreover, throwing stones at opposing counsel imprudently takes the court's focus off of the merits and places it on the behavior of counsel. This is not effective advocacy.

A Better Approach

Instead of throwing stones and telling the court what it should think, simply share the story as it unfolds and let the court respond to it. Indeed, showing the discrepancies between an opponent's brief and the record or established case law is no different from showing a client's substantive story on appeal.[1]

The difference in approach is slight, but strikingly effective. Consider some examples:

> **Example 1:** Opposing counsel mischaracterizes the record when he asserts that the contract was executed in the name of the corporation rather than an individual.
>
> Alternative: Plaintiffs assert that the contract was executed in the name of the corporation rather than an individual. But that is not what the record reflects. The contract's execution page is attached as Exhibit A, and it shows that Mr. Smith signed the contract individually, not on behalf of the corporation.
>
> **Example 2:** The lower court completely made up facts in its unprecedented attempt to ensure that the defendant was granted summary disposition.
> Alternative: The lower relied on three "facts" in granting the defendant summary disposition. But each fact is either not present in the record or subject to conflicting testimony that only a jury can resolve. First . . .
>
> **Example 3:** Plaintiffs attempt to mislead this court in characterizing the holding in *Smith v Jones* as supportive of their preemption argument.

Alternative: Plaintiffs cite *Smith v Jones* in support of the lower court's holding that the city ordinance is preempted. But in *Smith*, this Court *declined* to hold that a local ordinance was preempted, and for reasons that apply with particular force here.

In each example, the focus subtly shifts from opposing counsel's conduct to the merits of the argument. And if presented with enough examples, the court will conclude on its own that opposing counsel is playing fast and loose with the record and authority and respond accordingly.

Conclusion

There is little to be gained from throwing linguistic stones on appeal, but much to be lost. Showing how an opponent has misread the record or miscited a case is far more effective than telling the court that it happened. With the admonishment of the Utah Supreme Court in mind, go, and from now on, do not sin any more.

John J. Bursch chairs the Appellate Practice Group at Warner Norcross & Judd LLP.

Endnote

1 *See* John J. Bursch, *Storytelling in Brief Writing*, For the Defense 42 (April 2004), available at *www.wnj.com/storytelling_jjb_article/.*

Recommended Reading for the Appellate Lawyer

By Mary Massaron Ross

This issue's book reviews include several little books, one dealing with plagiarism, a second offering words to use as an advocate, a third addressing judicial activism and the range of legitimate judicial choices. Each is a slim volume written with great clarity. Each offers provocative and useful information written in a lively manner.

The Little Book of Plagiarism
Richard A. Posner
Pantheon Books 2007

Anyone who has read Judge Richard A. Posner's books knows that he is a brilliant thinker whose writings will be rewarding to those with the discipline and interest to study them with care. This book is no exception. But unlike some of his tomes, this one is relatively short and a relatively easy read. Judge Posner reviews many of the recent controversies regarding plagiarism, including accusations brought against J.K. Rowling, historians Doris Kearns Goodwin and Stephen Ambrose, first novelist Kaavya Viswanathan, and law professors Lawrence Tribe, Charles Ogletree, and Alan Dershowitz.

Judge Posner points out that plagiarism is difficult to define, and explains that the traditional dictionary definition, literary theft, is imprecise and inaccurate. In seeking to elucidate the meaning of plagiarism, Posner explains its relationship to copyright infringement, distinguishes the concept from paraphrasing, and explains how it differs from copying stock characters or engaging in a parody.

Posner also discusses creative imitation and the use of allusions in literary works, such as the many authors whose book titles are based on a copied phrase. Examples he offers include *The Sun Also Rises*, *The Sound and the Fury*, and *For Whom the Bell Tolls*. Posner points out that "[c]lassics are constantly being reworked in new media—such as the novel *Emma* as the movie *Clueless*, or the play *Pygmalion* (itself derived, though very loosely, from Ovid's tale of Pygmalion and Galatea) as the musical *My Fair Lady*, or similarly, Voltaire's *Candide* as Leonard Bernstein's musical *Candide*, or *Romeo and Juliet* as *West Side Story*—without a sense that plagiarism is being committed, even though much of the audience for the new work will be ignorant of the copying."

From this broad discussion, Judge Posner concludes that "[p]lagiarism is a species of intellectual fraud." In his view, it "consists of unauthorized copying that the copier claims (whether explicitly or implicitly, and whether deliberately or carelessly) is original with him, and the claim causes the copier's audience to behave otherwise than it would if it knew the truth." Posner invites "cool appraisal" to discussions of the subject and identifies a number of issues that should be addressed in arriving at "a thoughtful response to plagiarism in modern America." His book offers just what he proposes: a cool appraisal and a thoughtful response that is worthy of serious consideration by anyone interested in this increasingly-discussed subject.

Continued on next page

Recommended Reading
Continued from page 11

Advocacy Words: A Thesaurus
William Drennan
American Bar Association 2005

The ABA has a plethora of valuable publications dealing with aspects of advocacy, and this one is no exception. Written to help lawyers effectively choose words, the book is comprised of lists of words. The words are placed into columns of favorable and critical words. The first part includes favorable words with lists of synonyms that are critical. The second part lists critical words with lists of synonyms that are favorable. For example, under the column heading "favorable," you will find the word "achieve." Under the column heading labeled "critical," you will find "finagle, engineer, pull off." The book's value to a writer is in helping to generate ideas about the connotations of words, and helping to find words that convey the connotation that is most useful.

As an appellate advocate, I regularly see briefs in which the writer tries to underscore the negative characteristics of his or her opponent by engaging in heightened and pejorative rhetoric, or by filling the brief with bold-faced words and underlined sentences. These tactics detract from the brief's effectiveness because they suggest an overly emotional tone, rather than a reasoned argument based on the facts and the law. However, toning down a brief does not mean ignoring advocacy, and good advocacy requires careful and precise use of words to convey the connotation that is most accurate and helpful to the advocate's case.

This book will help you do that. Let me share some other examples so that you can see what I mean. The list offers "advocate" as a favorable word, and contrasts it with "propagandist, apologist, mouthpiece, lobbyist." The list offers "aesthete" as a favorable description; it is contrasted with "fop, dilettante." Think of the implications if you call someone "agreeable" as opposed to "manipulable, docile, meek, pliant, compliant, collaborative, toadying." In an appeal involving a will contest with claimants arguing undue influence, the writer can convey in one word that the decedent was capable of being influenced.

Here is another example. The favorable word is "assertive." The critical words include "arrogant, aggressive, cocky, brash, pushy, feisty, threatening, strident, tyrannical, arbitrary, brutal, strong-arm, bullying, vicious." An advocate choosing which word to use would want to think carefully about the connotations associated with each of these words. The critical words differ in nuanced ways, and a writer seeking to convey an impression will want to select the word that offers precisely the idea that will fit.

Another list that I enjoyed reading is that offered as the critical rendition of irregular, a neutral term. In contrast, calling something "sloppy, motley, ragtag, scruffy, disorganized, ratty, dirty, filthy, slovenly, careless, messy, erratic, capricious, bizarre, hodgepodge, [or] aimless" will offer a very different impression. Likewise, a client pursuing a matter relentlessly may be "justice-seeking" or may be "vindictive" or even "vengeful." The word choice matters. The client's position may be "principled" or "stubborn, inflexible, impractical, lofty, [or] noble."

Your client is probably not "boneheaded." But occasionally, he may be "not quite accurate, erroneous, mistaken, off-target, off-the-mark, imprecise" or "in error." The last favorable word offered is "retarded," which I would not see as favorable even if it is an accurate medical diagnosis.

If you enjoy word play and strive for precision in your writing, you will find this book useful. My copy is now placed close to my computer in my office along with my court rules and my copies of Bryan Garner's writings.

The Myth of Judicial Activism: Making Sense of Supreme Court Decisions
Kermit Roosevelt III
Yale University Press 2006

This book is also a slim volume, in welcome contrast to some of the weightier tomes on jurisprudence and recent battles on the appellate courts. Roosevelt argues that the word "activist" is "little more than a rhetorically charged shorthand for decisions the speaker disagrees with."

Roosevelt offers a competing concept to employ when discussing the outer limits of appropriate judicial decision-making. He urges use of the "idea of legitimacy." According to Roosevelt, "a decision is legitimate" if the "Supreme Court has taken a reasonable position in terms of deferring or not deferring to the government body whose action it is reviewing—the president or Congress, if the case involves the federal government, or state legislatures or executives if the case involves states." A legitimate

Appellate Practice Section Mission

The Appellate Practice Section of the State Bar of Michigan provides education, information and analysis about issues of concern through meetings, seminars, this site, public service programs, and publication of a newsletter. Membership in the Section is open to all members of the State Bar of Michigan. Statements made on behalf of the Section do not necessarily reflect the views of the State Bar of Michigan.

decision is "an appropriate exercise of judicial discretion." Roosevelt emphasizes that when someone calls a decision legitimate, this does not necessarily mean that he or she agrees with it. On the other hand, "an illegitimate decision provides grounds for criticism of the Court." Roosevelt cautions the reader to "hesitate before denouncing as illegitimate decisions with which we disagree." Instead, he argues "for a standard under which a decision is legitimate if it starts with a plausible understanding of constitutional meaning (seldom a deeply controversial issue) and creates a sensible doctrine to implement that meaning (a question that typically comes down to what factors suggest that the Court should defer, or not defer, to another governmental actor)."

Roosevelt then employs his suggested analytical approach to assess many recent and controversial decisions of the United States Supreme Court. In addition to discussing decisions, Roosevelt offers a section with further reading on the arguments presented in that area of law, which is an excellent resource. Roosevelt aligns himself with those who reject originalism or a plain-meaning approach to the U.S. Constitution because he concludes that the language and constitutional history do "not give judges sufficient guidance to decide concrete cases." Whether you agree with this approach or not, his discussion is enlightening and the resources he includes for further reading are balanced and include many opposing viewpoints.

Roosevelt's goal is to offer a standard that will allow public discourse about the Court to become more constructive so that "citizens can judge the Court." The tone of civility and respect for differing viewpoints is notable in this day when pejorative and heightened rhetoric is increasingly employed about even the most abstruse notions of judicial philosophy. Roosevelt writes with grace and clarity on topics of importance to all lawyers, and whether you agree or disagree with his conclusions, his tone of respect for opposing views makes the read enjoyable and worthwhile.

Shannon's Soapbox

By Brian Shannon

If there is anything more convoluted than the Court of Appeals' definition of "final order" in a civil case (the MCR 7.202(6)(a)(i) definition), it must be the manner in which the court applies that definition in practice. Intelligent and experienced attorneys—practitioners and trial judges alike—are often surprised to find that a case isn't "final" just because there are no claims remaining in the trial court.

As construed by the court, claims must not only be "disposed of"—a key phrase in 7.202(6)(a)(i)—they must also be "adjudicated," another term in the same rule. The court gives these two terms a conjunctive reading, so it is not necessarily enough to dismiss a claim without prejudice. A claim may be "disposed of," but if it can be raised again, then it is not "adjudicated" and there is no appeal of right, even if all claims have been dismissed.

This is one of the biggest traps for the unwary in Michigan appellate law. Trial litigators routinely dismiss the last few tail-end claims when a summary disposition order has adjudicated the guts of the case and left nothing worth litigating. This is not done to outwit the Court of Appeals. It is done because the remaining claims are not worth the trouble of litigating them to a decision, in light of the trial court's prior rulings.

Lawyers are by nature a prudent bunch, always trying to guard against contingencies they do not foresee. To guard against the risk of overlooking something, these pull-the-plug dismissals after summary disposition has left the patient terminal often are entered "without prejudice." It's not that the party bringing the dismissed claims intends to refile them. It's just that no lawyer likes to burn any bridge he or she doesn't have to burn. Often, it is not the would-be appellant insisting on "without prejudice." It is the appellant's opponent, who will dismiss on no other basis.

Occasionally, I imagine, a rare attorney who knows this arcane quirk of final order practice may insist on a "without prejudice" dismissal in the hope of delaying indefinitely an opponent's appeal. But even when the parties ask the trial court to decide between "with" and "without" prejudice, the judge seldom appreciates the potential appellate consequences of the decision.

Michigan has lived with 7.202(6) for 11 years now. There have been a number of seminars, articles, and bench-bar conferences trying to explain its intricacies. There will be a breakout

Continued on next page

Shannon's Soapbox
Continued from page 13

session in the upcoming bench-bar conference devoted to the final order rule. I've participated in some of these and missed others. I'm pretty sure I know more about the "without prejudice" trap than the average lawyer, but I don't pretend to understand it fully. If I misstate the court's policy here, I'm sure some reader will set me straight.

Sometimes I tell my trial-practitioner partners that an appeal is bound to be dismissed administratively . . . and it isn't. Sometimes I predict that an appeal is rock solid . . . and it doesn't survive screening. Sometimes I think results may vary depending on who is doing the screening.

Not that I blame the screeners, mind you. It's the rule itself that needs clarification, or perhaps only the court's policy. First, the rule:

"[F]inal judgment" or "final order" means: (a) In a civil case, (i) the first judgment or order that disposes of all the claims and adjudicates the rights and liabilities of all the parties …" In the subsections that follow (a)(i), some clearly non-final orders are defined as final for various policy reasons. Pretty clearly, then, this is more a question of policy than some immutable natural law of finality.

Second, the policy:

"The parties' stipulation to dismiss the remaining claims without prejudice is not a final order that may be appealed as of right; it does not resolve the merits of the remaining claims and, as such, those claims are 'not barred from being resurrected on that docket at some future date.' … The parties' stipulation to dismiss the remaining claims was clearly designed to circumvent trial procedures and court rules and obtain appellate review of one of the trial court's initial determinations without precluding further substantive proceedings on the remaining claims. This method of appealing trial court decisions piecemeal is exactly what our Supreme Court attempted to eliminate through the 'final judgment' rule." *City of Detroit v State of Michigan*, 262 Mich App 542, 545 (2004) (citations omitted). Even more directly, "we caution practitioners and trial courts to refrain from this type of improper practice, which we do not wish to reward." *Id.* 545-546.

Despite finding no jurisdiction, the court in *Detroit v Michigan* exercised its discretion to take the appeal as on leave granted because of significant public interest. Obviously, though, the discussion was included specifically to put you and me on notice that we better not "circumvent trial procedures and court rules" designed to prevent piecemeal appellate review.

No trial procedures or rules are cited. The panel cites only MCR 7.202(6)(a)(i) itself, along with a couple of cases. To be blunt, I have no idea what trial procedures or rules the court thinks are violated by the dismissal of a claim without prejudice. I don't think there is any such rule or procedure. No, it is the Court of Appeals' policy against "piecemeal" review that is at stake here, if anything.

Evidence of this can be found in the anecdotal exceptions to the policy. If the Court of Appeals' screener is satisfied that the claims dismissed without prejudice will never be raised, there is a good chance the appeal will survive. If the dismissed claim is moot, for example, its dismissal without prejudice will be overlooked. If the statute of limitations has run on the dismissed claim, I think the story would be the same.

I have also seen the court ignore trial court claims that were dismissed without prejudice at an early stage, before any adjudication. This can happen for a number of reasons, only one of which is non-service of a party. I could be imagining this, but there seems to be an assumption that dismissals without prejudice are not done for the "wrong" reason if they *precede* the summary disposition order that is to be the real subject of the appeal. I admit, though, that I can't be sure whether the suspect dismissal early in the case was ignored or simply overlooked.

What it all boils down to, seemingly, is the idea that litigants should not be allowed to evaluate their case after a major ruling by the trial court and decide that it makes no sense to proceed further in that forum unless the governing law is first reviewed by the Court of Appeals and, moreover, that it never will make sense to proceed further if the trial court is affirmed. Within limits, I think that parties should have that right.

I understand that piecemeal appellate review is not the norm in Michigan. It is not the norm in federal court, either, although it is the norm in important jurisdictions like New York. Even in federal court, however, the need for exceptions is recognized. These include Fed R Civ P 54(b), 28 USC §1292(b), the exception for orders granting or denying injunctions, and the collateral order doctrine of *Cohen v Beneficial Indus Loan Corp*, 337 US 541, 69 S Ct 1221, 93 L Ed 1528 (1949), to name the better-known examples.

Ladies and gentlemen, I mount the soapbox today to suggest that the policy of our Court of Appeals is not necessary—because the language of the court rule does not compel the policy—and is not the best policy—because it spares the appellate court a small and mostly hypothetical amount of work in exchange for a substantial amount of generally pointless work in the trial courts, not to mention added expense and delay to the litigants. In extreme cases, parties may lose completely the appeal of right contemplated by our system.

If appeals are to be scuttled because of "without prejudice" dismissals, there should be a series of exceptions—the de facto exceptions that exist already and perhaps one or two more—mapped out by rule or internal operating procedure, so that litigants can know where they stand before it is too late. When the "rules" are anecdotal and unreliable, it is very difficult for litigants to make the right decisions after the substance of the case has been decided.

Make no mistake, litigants sometimes suffer very real prejudice when their appeal is dismissed for this reason. The Court of Appeals may think it has merely held that the appeal is premature. But a would-be appellant can find himself in a pretty deep hole when the appeal is dismissed, particularly if the claims dismissed without prejudice belonged to an adversary.

In that case, why would the adversary help perfect the appeal by agreeing to reinstitute the dismissed claim so that it can be dismissed again, with prejudice? (A rhetorical question, almost always.) The wannabe appellant's alternative is to file a motion with the trial court, which thinks the case is over and closed, asking that court to undo its dismissal so that it has jurisdiction to redo its dismissal, changing only a preposition.

Some trial judges will get it, especially when they see the appellate court's order of dismissal, but some trial judges will just be annoyed and unhelpful. If appellant is a defendant seeking review of a money judgment, what happens to the stay arrangements after the appeal is dismissed? (Answer: It depends on the wording of a stay order often written without any clue about this danger.) If appellant is a plaintiff seeking review of an adverse summary disposition, the putative advantages of the expedited track are lost when the case is cast into limbo. If an injunction is granted or denied, matters may be urgent and an appellate dismissal may cause substantial prejudice even if it is only temporary.

It is not a sufficient answer to say, well, the would-be appellant can always seek discretionary appellate review without going back to the trial court. Discretionary *delayed* appellate review, to be exact, since it will always be too late to file a timely application. I don't think I have to explain to this audience that a tardy application for leave is not a fully satisfactory substitute for an appeal of right.

Back in the day, a party could ask a Michigan trial court to certify a decision as final and then appeal of right without having to "adjudicate" any remaining tag-end claims. Now that is possible only in receivership "and similar" actions under MCR 2.604(B). Governmental parties get a pass, too, if the issue is immunity, under MCR 7.202(6)(a)(v). Immunity is a special case, however, and the unmistakable trend is to limit access to the Court of Appeals. Considering the intractable problem of the "warehouse," this is not too surprising.

While it would be helpful if trial courts had the ability to declare decisions "final" in a broader range of cases, it would not be a complete solution. There would still be lots of cases in which parties "finalized" their cases via "without prejudice" dismissals, either because the trial court declined to declare its decision final, or because the parties for reasons of their own preferred the route of dismissal and were unaware of the risk.

When it comes right down to it, I believe that the Court of Appeals is very uncomfortable with the notion that parties and their counsel may have "reasons of their own" for electing when to conclude a case in the trial court. For my part, I think that my duty to my clients extends to advising them when and how it is in their best interests to conclude a case in the trial court.

I do tell clients now that they have to be careful about stipulated orders at the end of a case, because a party cannot appeal from a consent order. If the case is to be concluded with a stipulated order, I include a paragraph in the order specifying that the parties' agreement does not extend to the court's previous adjudicated decision and that the right to appeal from that decision is expressly preserved. I recommend the dismissal with prejudice of any remaining claims, no matter which party filed them. If an opponent will not agree, I ask the trial court to order the dismissal with prejudice.

A fair question to ask here is this: What is the Court of Appeals really worried about? "Piecemeal review" happens only when the action, in fact, is revived in the trial court after appellate review and then appealed a second time. When does that happen? Not often, I submit, when the trial court's decision is affirmed. Why would it? That's what the appellee expected would occur when he or she agreed to the dismissal in the first place. As for the appellant, he or she has now lost the gist of the case in two courts. If the dismissed-without-prejudice claims were independently worth litigating, they would not have been dismissed in the first place.

If the Court of Appeals reverses, it's a whole new ball game anyway, as often as not. When there is a remand, the trial court usually has discretion to make any order not inconsistent with the appellate decision, including the reinstatement of other claims. The law-of-the-case doctrine is not generally a problem, because the dismissed claims were never reviewed.

In the less common instance when there is no remand because the Court of Appeals has converted complete defeat into complete victory, the appellant is happy and will not be refiling dismissed claims. This is the very case the appellee feared, on the other hand, and if the appellee has a viable claim

Continued on next page

Shannon's Soapbox
Continued from page 15

after the appellate reversal (a rare case, no doubt), there is a respectable argument that that appellee should be free to reinstate the claim.

While it is true that the potential availability of discretionary review does ameliorate somewhat the harshness of the court's "total adjudication" gloss on the final order rule, it would help if the policy were more widely understood and if trial courts were allowed to express an opinion in the matter. An application to the Court of Appeals surely has a better chance if the trial judge has said, "I think this should be final" or, "I think this is a controlling question of law that should be reviewed now."

One way to improve the bar's understanding of how MCR 7.202(6) will be applied in a particular case is to publish more opinions discussing the issue. Until *Detroit v Michigan* was published in 2004, few lawyers knew the dangers of "without prejudice" dismissals unless they themselves were parties to an appeal dismissed on that ground. But *Detroit v Michigan* is too broad a statement of the court's policy, giving no clue to the existence of exceptions.

Compare Michigan's sparse precedent with the large body of federal decisions considering when and why dismissals without prejudice are appealable final orders. Granted, the federal courts have been writing about the issue for many more years. Michigan has had only 11 years of experience with MCR 7.202(6)(a)(i).

I'm not suggesting that Michigan should just adopt federal precedent. The federal courts are very different in important ways. Diversity cases, for example, are often dismissed without reaching the merits for reasons that have no state law analog. My point is that the dismissal of a federal appeal for lack of jurisdiction (or even the decision that jurisdiction exists) often generates an opinion that other lawyers can read and use as a guide. The dismissal of a state court appeal in a short order sent only to the parties in the case does not have that advantage.

Practicing lawyers in Michigan will keep running afoul of the "without prejudice" trap until the policy is explained in more detail and more publicly. And while the court is publicizing its policy, it should take the occasion to explain the exceptions and safe harbors. And it should expand the exceptions so that only those who deserve to be trapped are trapped. That's not the way it works now, I'm afraid.

Brian Shannon

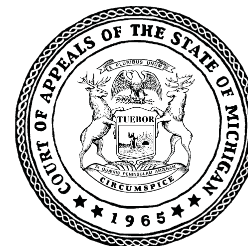
2007

MICHIGAN APPELLATE BENCH BAR CONFERENCE

www.benchbar.org

A Cooperative Effort
of the
Michigan Supreme Court
Michigan Court of Appeals
Michigan Appellate Bench Bar Conference Foundation
State Bar of Michigan Appellate Practice Section

May 2-4, 2007



THE INN AT ST. JOHN'S
44045 Five Mile Road
Plymouth, MI 48170
(734) 414-0600

Join us for
A Candid Conversation Between Bench and Bar
Working Together for Excellence and Justice
In Michigan Appellate Jurisprudence

Conference Schedule

For detailed information, log on to our website at *www.benchbar.org*.

Wednesday, May 2, 2007

5:00 – 7:00 p.m. Registration

7:00 – 8:30 p.m. Reception at St. John's

Thursday, May 3, 2007

8:00 – 9:00 a.m. **Registration**

9:00 – 9:30 a.m. **Welcome and Opening Remarks**
Chief Justice Clifford Taylor, Chief Judge William Whitbeck, and Mary Massaron Ross

9:30 – 11:45 a.m. **Plenary**
To Decide or Not to Decide: Doctrines of Appellate Decision Making

11:45 – 12:00 p.m. **Break**

12:00 – 1:30 p.m. **Luncheon**
Guest Speaker David C. Frederick: The Supreme Court and the Art of Appellate Advocacy.

1:30 – 1:45 p.m. **Break**

1:45 – 3:00 p.m. **Breakouts Concerning Oral Advocacy & Argument**

- The Do's and Don'ts of Effective Oral Advocacy
- Effective Oral Argument: Special Strategy & Practical Concerns
- Purpose, Policy, and Procedures of Oral Argument

3:00 – 3:15 p.m. **Break**

3:15-4:30 p.m. **Breakouts Concerning The Michigan Court Rules, Administrative Orders, and Court Policies and Practices: Are They Getting Us Where We Want to Go?**

Civil
- Using and Improving MCR 7.212
- Is that Final? The Final Order Rule and Appellate Jurisdiction
- The Fast Track – Where Do We Go From Here?

Criminal
The Interplay of Appellate Court Rules and Trial Court Rules

Family Law
- Right to Appeal, Wrong to Assume

4:30 – 4:45 p.m. **Break**

4:45 – 5:15 p.m. **Plenary: Hot Tips & Pet Peeves**

6:00 – 9:00 p.m **Reception and Dinner With the Bench**
An Evening of Conversation With Justices and Judges

Friday, May 4, 2007

8:00 – 8:30 a.m. **Continental Breakfast**

8:30 – 9:45 a.m. **Plenary**

For the Record: Ensuring a Decision on the Merits

9:45 – 10:00 a.m. **Break**

10:00 – 11:00 a.m. **Breakouts Concerning Substantive Issues in Civil, Criminal, and Family Law Appeals**

Civil

- Original Proceedings in the Court of Appeals: When They Are Available and How They Should Be Brought
- Do the Write Thing: Make Your Research Matter
- Doctrines of Appellate Decision Making: For the Record

Criminal

- What Michigan Criminal Appellate Lawyers Need to Know About Habeas (Even If They Don't Do Habeas)
- Crawford and its Progeny: Is the Dust Still Settling?

Family Law

- Tackling Recurring Problems in Family Law Litigation and Appeals

11:00 – 11:15 a.m. **Break**

11:15 – 12:15 p.m. **Breakouts: Repeat of 10:00 a.m. Sessions**

12:15 – 2:00 p.m. **Luncheon and Program**

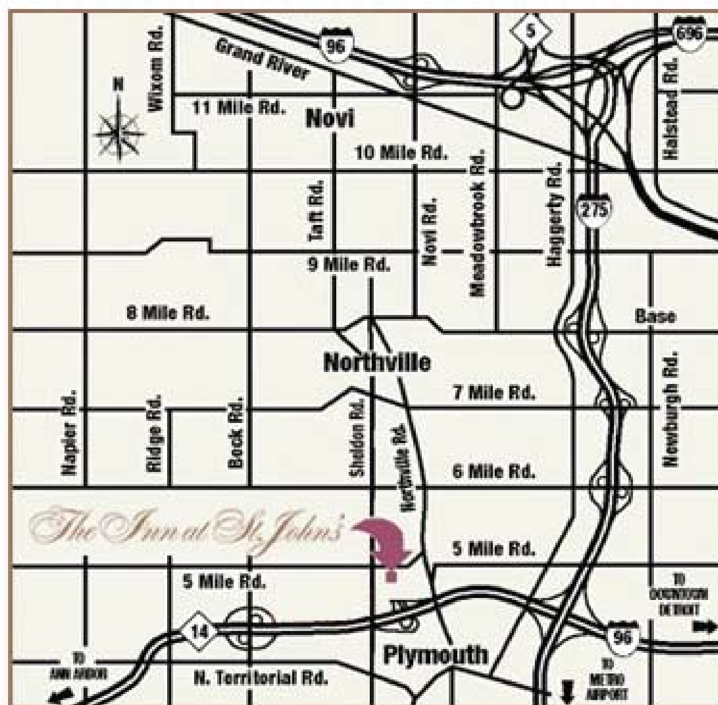
Trumpeting Your Case to Victory: How to Present Outstanding and Compelling Oral Arguments

Featuring Washington DC attorney Lawrence D. Rosenberg who will use movie clips to illustrate techniques and strategies for winning oral argument. Panel: Chief Justice Clifford Taylor, Mary Massaron Ross, and Timothy Baughman.

Important Road Construction Information

Sheldon Road Underpass Construction

Beginning mid-December 2006, Sheldon Road south of M-14 will be completely closed for construction of a railway underpass. This closure is anticipated to be in effect until nearly 2008. This closure does not affect guests heading to or from The Inn at St. John's via M-14.



2007 Michigan Appellate Bench Bar Conference

www.benchbar.org

Advance Registration Deadline: April 25, 2007
Conference Fee $ 295.

The conference fee includes program materials,
Wednesday's Pre-Conference reception, Thursday's luncheon at the conference,
Thursday's reception and dinner with the Justices and Judges, and Friday's luncheon.

All conference participants will attend plenary sessions, but space for breakout sessions is limited. Please indicate your breakout session preferences on this form.

Name: ____

Firm Name: ____

Address: ____

City: _________________________ State: ___ Zip:________

Phone: (   ) _______________ Fax: (   ) ______________

E-Mail Address: ___________________________________

I will attend the following events:

- ☐ May 2: Pre-Conference Reception
- ☐ May 3: Luncheon
  David C. Frederick:
  The Art of Oral Advocacy
- ☐ May 3: Dinner With the Bench
- ☐ May 4: Luncheon
  Trumpeting Your Case to Victory: How to Present Outstanding and Compelling Oral Arguments

Enclose your conference fee, with check payable to Michigan Appellate Bench Bar Conference, and return this form to:

John P. Jacobs, Treasurer
Michigan Appellate Bench Bar Conference Foundation
719 Griswold Street, Suite 600
Detroit, MI 48226-3260

Scholarship Request: ☐ yes ☐ no
If yes, attach a letter addressing need for scholarship.

Breakout Session Preferences

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

Thursday – 1:45-3:00 p.m.

______ The Dos and Don'ts of Effective Oral Advocacy
______ Effective Oral Argument: Special Strategy and Practical Concerns
______ Purpose, Policy, and Procedures of Oral Argument

Thursday – 3:15-4:30 p.m.

Civil:
______ Using and Improving MCR 7.212
______ Is that Final? The Final Order Rule and Appellate Jurisdiction
______ The Fast Track – Where Do We Go From Here?

Criminal:
______ The Interplay of Appellate Court Rules and Trial Court Rules

Family:
______ Right to Appeal, Wrong to Assume

Friday – 10:00-11:00 a.m. & 11:15-12:15 p.m.

Civil:
______ Original Proceedings in the Court of Appeals
______ Do the Write Thing: Make Your Research Matter
______ Doctrines of Appellate Decision Making: For the Record

Criminal:
______ What Michigan Appellate Criminal Practitioners Need to Know About Habeas
______ Crawford and its Progeny: Is the Dust Settling?

Family:
______ Tackling Recurring Problems in Family Law Litigation and Appeals

Space is Limited. Walk-In Registration Allowed Only If Space Is Available. Advance Registration Recommended.

Hotel Reservation Deadline: March 28, 2007

The Inn at St. John's ~ 44045 Five Mile Road, Plymouth, MI 48170

A limited number of hotel rooms have been reserved for conference participants.
Call 734-414-0600 for reservations and ask for the conference rate.

Council Meeting Dates

Time for all meetings is 2 p.m., except for June 22, 2007, which will be at 5 p.m.

Friday, April 20, 2007 - Grand Rapids

Friday, May 18, 2007 - Farmington Hills

Friday, June 22, 2007 - Dinner meeting at location to be announced

Stay connected. Check out the section webpage at http://www.michbar.org/appellate/.

SBM

State Bar of Michigan

michael franck building
306 townsend street
Lansing, MI 48933-2012

www.michbar.org

PRESORTED
FIRST CLASS MAIL
U.S. POSTAGE PAID
LANSING MI 48933
PERMIT NO. 191