

# APPELLATE PRACTICE

Section Newsletter

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## From the Chair

By Paul Bernard

### Originalism’s Historical Problem

Spring 2008, Vol. 12, No. 2

#### In this Issue

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Dismissal Without Prejudice and the “Final Order” Rule.....	3
E-Filing Is Coming to the Sixth Circuit .....	6
Cases Pending Before the Supreme Court After Grant of Oral Argument on Application.....	7
Recommended Reading for the Appellate Lawyer .....	9
Internet Research: Appellate Blogs.....	11
Recent Decisions of Interest to the Appellate Practitioner .....	12
Shannon’s Soapbox .....	13

Can we know what the framers thought? Originalism presumes that we can. Moreover, many proponents of originalism assume that access to the framers’ thoughts provides a way to, in essence, avoid the interpretation of legal texts. In this view of originalism, “interpretation” is not a matter of reading and analyzing. It is a matter of discovering a historical fact about the framers and acquiescing to it.

Thus, to a significant degree, originalism undertakes the project of intellectual history: the attempt to identify and explain the role of ideas in the past. But intellectual history has its problems, especially for lawyers. In particular, it cannot provide an escape hatch from interpretation.

Intellectual history’s problem for lawyers arises from its relentless contextualism. Given that historical figures are invariably exposed to diverse intellectual influences, getting a manageable idea of context is a formidable task. Consider Thomas Jefferson as an example. A notorious polymath, Jefferson dabbled in many fields and read exceptionally widely. Which part of that reading influenced which part of his thought? And in what proportion? Fifty years ago, it was taken for granted that Jefferson’s ideas about political liberty and social order came from Locke and Montesquieu. More recently, other historians have detected the influence of something decidedly less secular—Scottish Common Sense philosophy, which, among other things, is supposed to be the source of Jefferson’s idea of “the pursuit of happiness” as a political virtue. And who knows, maybe something Jefferson read about woolly mammoths inspired a political thought in some hard-to-imagine way. How does one tease apart the numerous threads that someone like Jefferson wove into an idea, to develop a reliable sense of what Jefferson intended in his writing?

This is not a question that intellectual historians are necessarily obliged to answer. They have an escape hatch that lawyers and judges can’t use. Historians can revel in indeterminacy. The historian can say, “Well, I’m just pointing out one influence. I’ll leave it to others to put the whole picture together.”

Continued on next page

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### ABOUT THE COVER:

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.

From the Chair  
Continued from page 1

This is an evasion for someone comfortable with contingency and uncertainty. Someone who luxuriates in juggling multiple interpretations of one thing. The law does not, however, so readily permit this agnostic luxury. It demands a firm answer to the question, "What is *the* meaning of the text?"

Some originalists attempt to solve this problem with an objectivist maneuver. Instead of exploring the minds of the framers themselves, they explore the collective mind of their audience. In this exploration, the old edition of the dictionary is the guide. But old dictionaries hardly provide a refuge from the burdensome and elusive task of finding a single, universally held meaning for an idea subject to a collection of influences.

A portion of an opinion by Justice Thomas demonstrates the difficulty of dictionaries. In *United States v Lopez*, 514 US 549 (1995), Justice Thomas' concurring opinion argues for a particular understanding of the Commerce Clause by invoking the meaning of "commerce" in the early years of the republic. Justice Thomas wanted to show that "commerce" had a narrowly economic meaning so that he could insist that the Commerce Clause did not authorize the federal government to regulate as widely as judges have supposed in the last 70 years or so. Toward this end, Thomas cited Samuel Johnson's dictionary, among others, as authority that the framers understood "commerce" in a narrowly economic way. *Id.* at 585-586 (Thomas, J, concurring).

Although Johnson is a venerable authority, Thomas' reliance on him was spectacularly misplaced. Just about everyone in the early republic was, at least nominally, an evangelical Protestant. Deists and skeptics like Jefferson or Benjamin Franklin were the rare exception, not the rule. Accordingly, Americans shunned the intellectual products of religious skeptics. Because Johnson was a famous religious skeptic, evangelical Protestants in the United States at the time of the framing had utterly no use for him. They knew that Johnson was a fellow traveler with David Hume, whom they regarded as a heretic of the first order.

In fact, not only would people in the early republic have ignored Johnson's ideas, many of them would have had a more expansive idea of commerce than Johnson did. They would have imbued it with a moral dimension. In this view, "commerce" was not defined strictly by the cash nexus. It related to all kinds of interactions among citizens, tangible and intangible, economic and otherwise. Certainly, this was the view of the Scottish Common Sense crowd, and, for the first half of the 19<sup>th</sup> century, they controlled almost every American college and university. The academic study of economics in this period was almost entirely dependent on Scottish Common Sense philosophy and was therefore linked to certain aspects of mainstream Protestant thought. In fact, Johnson's rigorously economic view of "commerce" was part of an attempt to secularize thinking about social relationships, removing the moral dimension of social theory as a means of broadening and rationalizing that theory. This attempt was precisely why American Protestants disliked Johnson and his ilk.

The problem with Johnson's dictionary raises a broader question about dictionaries generally. In the 18<sup>th</sup> and early 19<sup>th</sup> centuries, dictionaries could be instruments of philosophical combat. You can win the argument if you get to define all the words. Standardization is a modern phenomenon. Not even *time* was standardized before the middle of the 19<sup>th</sup> century. It is difficult, if not impossible, to pin down standard, universally recognized meanings for any concept during this period, except for the resolutely banal things that no one worries about. This is

# Dismissal Without Prejudice and the “Final Order” Rule

By Barbara H. Goldman

**Prej-u-dice:** injury or damage resulting from some judgment or action of another in disregard of one’s rights; *especially:* detriment to one’s legal rights or claims

When a claim, a party, or an action is dismissed “without prejudice,” everyone involved usually has an idea of what that means – whatever was dismissed has gone into cold storage, possibly to be revived somewhere down the line when circumstances have changed. But what does it imply for determining whether there is a “final order” for appeal purposes if part of the case has been dismissed “without prejudice”? Unfortunately, the answer in Michigan is not always predictable and, sometimes, depends on the litigant’s ability to persuade the Court of Appeals that the case should proceed.

The principle that appellate courts have jurisdiction over “final orders” of the lower courts is longstanding. It was not until the 1995 amendment of MCR 7.202, however, that the Michigan Court Rules actually included a definition of the term. Since January 1, 1996, MCR 7.202(6)(c)(1)(a)(i) has defined a “final order” in a civil case as “the first judgment or order that disposes of all the claims and adjudicates the rights and liabilities of all the parties” . . . While the applicability of pre-1996 case law to current “final order” issues is subject to challenge, both pre- and post-amendment opinions can provide some guidance.

The Court of Appeals’ most recent decision on a “dismissal without prejudice” order contained a sharp rebuke of what the panel<sup>1</sup> perceived as an attempted end run around the

“final order” rule. *City of Detroit v State*, 262 Mich App 542; 686 NW2d 514 (2004) arose out of a dispute over development of land near the state fairgrounds. The city filed an action, seeking an injunction against the proposed development and a declaratory judgment that it would constitute a nuisance. The state moved for summary disposition on the basis that a statute gave it exclusive control over the fairgrounds. The trial court denied the motion, and the parties “stipulated dismissal of the claims that were not addressed in the motion.” 262 Mich App at 545. The state appealed. The Court held that the order was not appealable of right:

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


Continued on the next page

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From the Chair  
Continued from page 2

really originalism’s fundamental problem. It wants to find uniformity and objectivity for a period in which those concepts had far less importance (not to mention different meanings) than they do today.

In this respect, originalism is kind of ahistorical historicism. It’s historicist in the sense that it values history as a method of finding meaning. But the instruments that it uses in the service of that method are, unfortunately, blunted by an ahistorical concept – the chronological fallacy that we can understand people from the past on our terms, without any adjustment for the differences that time has wrought.

Does this mean originalism is fatally flawed as an interpretive method? Certainly not. But originalism cannot deliver the degree of certainty and objectivity that its most ardent proponents ascribe to it. In other words, originalism is not an escape from the difficulty of choosing between competing interpretations of a legal text. 

Dismissal . . .  
Continued from page 3

appealing trial court decisions piecemeal is exactly what our Supreme Court attempted to eliminate through the “final judgment” rule. . . .

Accordingly, this Court does not have jurisdiction over this appeal as an appeal as of right because the trial court has not entered a final order disposing of all plaintiffs’ claims. And we caution practitioners and trial courts to refrain from this type of improper practice, which we do not wish to reward. [262 Mich App 542, 545-546. Citations omitted. Emphasis supplied.]

The lesson of *Detroit v State*, then, appears to be that an agreement to dismiss some of the claims in an ongoing case does not make a ruling on the remaining claims “final.” This decision, however, would not have predicted the results in three unpublished opinions, in which the parties did much the same thing.

*Richfield Landfill, Inc v Dep’t of Natural Resources*, unpublished opinion per curiam of the Court of Appeals, issued 10/27/05 (Docket No. 260850) involved a long-running dispute over regulation of a landfill. In a prior appeal, the panel explained that the parties had “arriv[ed] at a final order that could be appealed” by way of a stipulated order “staying the order granting the operating license, dismissing count II of the 1991 suit without prejudice, and dismissing the DNR’s counterclaim without prejudice.” *Id.* at \*3, citing *Richfield Landfill, Inc v State of Michigan*, unpublished opinion per curiam of the Court of Appeals, issued January 26, 2001 (Docket Nos. 202774, 202777) at 2-4.

Similarly, in *Grand/Sakawa Macomb Airport, LLC v Macomb Twp*, unpublished opinion per curiam of the Court of Appeals, issued 6/7/05 (Docket No. 256013), a zoning dispute, the complaint included seven counts, but the trial court “bifurcated the equitable/taking claims and the damages claims and the matter proceeded to trial” on only three claims. The plaintiff voluntarily dismissed two others without prejudice. The trial court made fact findings at a bench trial. Eventually, “pursuant to the parties[’] stipulations a final order was entered dismissing plaintiffs’ damages claims without prejudice.” *Id.* at \*5. The defendant’s appeal was treated as an appeal of right without comment by the court.

The plaintiffs also dismissed a claim without prejudice in *Chapman v Silwick Unlimited, Inc*, unpublished opinion per curiam of the Court of Appeals, issued 5/7/96 (Docket No. 166345), a dispute over sales commissions. The trial court granted partial summary disposition to the defendant as to claims arising after a given date, but denied summary

disposition as to claims for an earlier period. The plaintiffs “voluntarily dismissed without prejudice” the claim related to the earlier time, “making [the] earlier order of partial summary disposition a final order.” *Id.* at \*1.

The *Detroit v State*, *supra*, panel relied on a 2000 decision, *Wickings v Arctic Enterprises, Inc*, 244 Mich App 125, 135; 624 NW2d 197 (2000), a products liability action, for the rule that a dismissal without prejudice was not “final.” The parties in *Wickings* originally agreed to arbitrate and the trial court, *sua sponte*, dismissed the circuit court action “without prejudice.” The arbitration, however, did not take place and the plaintiff moved to compel arbitration or reinstate the action. The trial court denied the motion, so the plaintiff filed a new case. In support, he submitted documents attempting to show that the defendant had previously agreed to waive a statute of limitations defense. The trial court granted summary disposition in favor of the defendant and the plaintiff appealed. The Court of Appeals held that the appeal was premature.

[T]he order dismissing the case without prejudice was not a “final” judgment or order because it did not dispose of all of Wickings’ claims and it did not adjudicate the claims. . . . “An administrative decision to dismiss a case for lack of progress does not operate as an adjudication on the merits.”

. . . Not until the trial court denied the motion to reinstate the action did the parties have any firm indication that the case had finally concluded. [244 NW2d 135. Citation omitted.]

The Court of Appeals did find a dismissal “without prejudice” order “final” in *Turner v Autoalliance Intern’l, Inc*, unpublished opinion per curiam of the Court of Appeals, issued 11/19/02 (Docket No. 233185), although the fact scenario was unusual. The plaintiff was a union employee who was injured on the job. He received disability payments for a time, but they were discontinued. He did not return to work and was fired, under the terms of the union contract. He later obtained workers’ compensation benefits. He sued his employer, alleging retaliation for filing the compensation claim, at the same time as he was pursuing a grievance under the contract. The trial court dismissed the case, because it held that the claim should be made part of the grievance procedure.

The plaintiff appealed, but then dismissed the appeal. Later, he filed a second action, alleging the same claims. He appealed from that order, but the Court of Appeals dismissed that appeal as well.

Plaintiff lost in an arbitration on the grievance and filed a third complaint in the circuit court. That case was also dismissed, leading to a third appeal. The Court of Appeals held that the original order was “final:”

While a dismissal without prejudice is generally not a “final judgment,” here, the trial court’s decision constituted a “final judgment” for appellate purposes under MCR 7.202(7)(a)(i) because it was “the first judgment or order that disposes of all the claims and adjudicates the rights and liabilities of all the parties....”

[P]laintiff’s subsequent claims were precluded by his failure to appeal the trial court’s 1997 order. [*Id.* at \*2.]

There are no opinions providing guidance where one or more parties were dismissed “without prejudice.” Anecdotes abound of the Court of Appeals’ dismissals based on lack of “finality” because a party was dismissed “without prejudice.” But where the appellant can demonstrate that the dismissed party is genuinely out of the picture – for example, if the statute of limitations expired after the order of dismissal – the court may be convinced to reinstate the appeal.

In 2002, the Appellate Practice Section’s Michigan Court Practice Committee met with the Court of Appeals to discuss the effect of dismissals without prejudice. Practitioners explained that, very often, the final order is a dismissal without

prejudice of a cross-claim, or a third-party claim, such as a claim for indemnity. Because the principal claim has been resolved, via summary disposition or judgment, there is no longer any basis for the indemnity claim. The party with the indemnity claim, however, does not want to stipulate to a dismissal with prejudice, in case the principal claim is revived on appeal. A solution was devised, which the court has generally accepted. By including language in the dismissal order stating that the claim is “dismissed with prejudice, unless the case is remanded as the result of an appeal,” the party seeking to preserve the indemnity claim on that limited ground is protected, and the Court of Appeals is assured that it really is dealing with a final order.

In the final analysis, however, the “without prejudice” terrain is perilous for the attorney seeking an appeal of right. For the trial attorney hoping to appeal an adverse decision as of right, while keeping another part of the case alive for other purposes, the Court of Appeals will almost certainly block the way. In other words, don’t expect to have your cake and eat it too in the wonderful world of appellate practice. 🏛️

### Endnotes

- 1 Judges Wilder, Hoekstra and K. F. Kelly, in a per curiam opinion.



Articles Welcome

Listserv issue  
thorny issue  
unique issue  
interesting topic

Encountered a unique or thorny issue lately? Need a résumé builder? Interested in pursuing a listserv issue in greater depth? Consider writing an article for the section’s newsletter. Just contact one of the editors (see page 2) for additional information. Publication deadlines are July 24 and October 20.

## Save the Date

The annual meeting of the Appellate Practice Section will take place at the State Bar Annual Meeting, on Thursday September 18, 2008, at 2 p.m. A program will be presented. More details will be provided in the next newsletter.




Hyatt Regency, Dearborn      September 17-19

# 2008

## State Bar of Michigan ANNUAL MEETING

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# E-Filing Is Coming to the Sixth Circuit

By Richard Bisio

Electronic filing is coming soon to the Sixth Circuit Court of Appeals. The Sixth Circuit will be one of the first federal circuits to roll out e-filing. Unlike some of its sister circuits, the court will try to go completely electronic, accepting paper filings in only limited situations.

The information in this article is what I have learned from my work on the Sixth Circuit's rules advisory committee. The chief circuit judge appoints the committee, which has representation from the nine districts in the circuit and a mix of practice areas. The committee advises the court on rule changes and procedure. We've been working with the court as it makes plans for e-filing.

As of this writing, the court hasn't published formal proposals for e-filing. However, the judges have made a number of policy decisions about how e-filing will work.

The court's goal is to start mandatory e-filing for new cases docketed on and after June 1, 2008 where the appeal is from a trial court or agency that used electronic filing. The process of electronic filing in the Court of Appeals will be similar to that in the district courts.

The biggest change for practitioners will be in working with an electronic record on appeal (ROA), which will replace the joint appendix. The district court will compile an electronic ROA that will include all filings in the district court, including transcripts ordered for the appeal. The district court's software will assign serial page numbers to the ROA. The court of appeals will docket the ROA in its electronic docket. It will then be available for download. Transcripts will be password protected for the first 90 days after filing so that only the parties to the case can access them.

Since the electronic ROA will be easily accessible, the court will eliminate the joint appendix. Instead, references in the briefs will include a reference to the page number of the electronic ROA. For example:

- Affidavit of John Smith, ¶ 7; record entry no. 37; ROA p 543.
- Transcript 5/5/08, pp 7-10; record entry no. 63; ROA pp 656-659.

Since the ROA will be available well before briefs are due, the court will eliminate proof briefs.

There will still be a need for a paper appendix for items that are not part of the electronic ROA. For example, it

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The court's goal is to start mandatory e-filing for new cases docketed on and after June 1, 2008 where the appeal is from a trial court or agency that used electronic filing.

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might be necessary to have an appendix to present trial exhibits that are not made part of the electronic ROA and sealed and confidential filings (such as presentence investigation reports).

There may be some glitches in the use of an electronic ROA when there is a need to supplement the original ROA. The software will handle additional filings in the district court for creation of a supplemental ROA. This could be the case, for example, when trial exhibits that are not part of the original record are needed. It can also happen when transcripts not originally ordered become relevant in light of an argument raised in a brief. The district court can prepare a supplemental ROA that will be docketed in the Court of Appeals. It is unclear whether the supplemental ROA will be available sufficiently in advance for a party to have the ROA page numbers for use in a brief. This is a detail that remains to be addressed.

The court will be revising its local rules and internal operating procedures and issuing a guide to electronic filing to implement e-filing changes. It anticipates having training modules available on its website. Since the court anticipates mandating e-filing by June 1, 2008, the normal 90-day comment period will not be available for local rule amendments. We expect that the rule changes (or at least an administrative order specifying the procedures) and training materials will be available at least by mid-May.

You can pre-register now for appellate electronic filing at [http://pacer.psc.uscourts.gov/announcements/general/ea\\_filer.html](http://pacer.psc.uscourts.gov/announcements/general/ea_filer.html).

This is a national registration site for appellate e-filing registration that currently allows registration in three circuits.

As we continue to work with the court to implement e-filing, I'd appreciate comments or suggestions you have. You can send them to [richard.bisio@kkue.com](mailto:richard.bisio@kkue.com). 

# Cases Pending Before the Supreme Court After Grant of Oral Argument on Application

By Linda M. Garbarino and Nicole Coroiu

This is a new column premiering for the first time in the APS spring 2008 newsletter. The goal is to provide a list of cases pending before the Supreme Court after the grant of oral argument on application. The list is comprised of three groups: those cases in which argument has already occurred, those cases in which argument has been scheduled, and those cases in which argument has not yet been scheduled. Now our disclaimer: While we hope that we have included all pending application cases, we cannot guarantee so (although it is our goal to provide an exhaustive list). Second, the descriptions are intended for informational purposes only and cannot and do not replace the need to review the cases themselves.

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## DECISIONS PENDING/ORAL ARGUMENT ALREADY CONDUCTED

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### Argued March 6, 2008

#### *Dimmitt & Owens Financial v Deloitte & Touche*, S Ct 134087, COA 262381

*Venue*: Parties directed to address what “original injury” the plaintiffs suffered, where that injury occurred, and whether the record was sufficiently developed to make such a determination.

#### *Willer v Titan Ins*, S Ct 133596, COA 273805

*Insurance/No Fault*: Whether plaintiff’s injuries resulting from scraping the windshield of her vehicle arose out of the “ownership, operation, maintenance or use of a motor vehicle as a motor vehicle” within the meaning of MCL 500.3105(1).

### Argued March 5, 2008

#### *People v Osantowski*, S Ct 134244, COA 264368

*Sentencing*: Whether under Michigan’s sentencing guidelines, a threat must itself constitute an “act of terrorism,” as defined by the Michigan Anti-Terrorism Act, MCL 750.543b, for 100 points to be assessed under offense variable 20.

### Argued March 4, 2008

#### *Manuel v Gill*, S Ct 131103, COA 258933

*Agency and Court of Claims*: Whether the Tri-County Metro Narcotics Squad (TCM) is equivalent to a state agency and whether TCM was an aggrieved party entitled to appeal considering the statement of the Court of Appeals that a breach of contract claim against TCM may be viable in the court of claims.

#### *Oram v Oram*, S Ct 134670, COA 267077

*Sanctions*: Whether the dismissal of plaintiff’s claims with prejudice was proper, and whether such dismissal was a “verdict” as defined in MCR 2.403(O)(4) for purposes of ordering case evaluation sanctions.

#### *People v Blackston*, S Ct 134473, COA 245099

*Evidence*: Whether the trial court erred in excluding two witnesses’ inconsistent statements, whether reversal was warranted based on this error, if the claim of error was properly preserved, and possible consequential effect on the standard of review.

### Argued January 9, 2008

#### *Gee v Arthur B. Myr Industries, Inc*, S Ct 133762, COA 269351

*WCAC*: The applicability of res judicata to the proceedings of the Workers’ Compensation Appellate Commission (WCAC) in context of a preliminary denial of plaintiff’s request for attendant care services, followed by a subsequent grant of such benefits.

#### *Pappas v Bortz Health Care Facilities*, S Ct 128864, COA 251144

*Statute of Limitations/Medical Malpractice*: Whether the personal representative’s claim was timely commenced under the savings statute, MCL 600.5852.

Continued on next page

Cases Pending . . .  
Continued from page 7

***Boodt v Borgess Medical Center*, S Ct 132688, COA 266217**

*Medical Malpractice*: Whether the notice of intent met the requirements of MCL 600.2912b.

***Minter v City of Grand Rapids*, S Ct 133988, COA 273017**

*Insurance/No Fault*: Whether *Kreiner v Fischer* was properly applied and whether plaintiff's injuries met the no-fault threshold.

**Argued December 13, 2007**

***People v David Gordon Ream*, S Ct 134913, COA 268266**

*Criminal*: Whether the Michigan Supreme Court should overrule its holding in *People v Wilder*, 411 Mich 328 (1981), that the conviction of both felony murder and the underlying felony violates double jeopardy.

**Argued December 5, 2007**

***Jones v Olson*, S Ct 132385, COA 268929**

*Insurance/No Fault*: Whether *Kreiner v Fischer* was properly applied and whether plaintiff's injuries met the no-fault threshold.

**Argued November 7, 2007**

***People v Holley*, S Ct 133264, COA 264584**

*Criminal*: Whether MCL 750.483a(1)(b), interfering with a crime report, requires proof beyond a reasonable doubt that a person committed or attempted to commit a crime.

***People v Gardner*, S Ct 131942, COA 267317**

*Sentencing*: Whether multiple convictions arising out of a single criminal incident count as only a single prior conviction for habitual offender purposes.

***Latham v Barton Malow Company*, S Ct 132946, COA 264243**

*Contractor Liability*: Whether the proofs submitted at trial satisfied the standard for general contractor liability established by *Ormsby v Capital Welding, Inc*, 471 Mich 45 (2004).

**Argued October 4, 2007**

***Stokes v Chrysler, LLC formerly known as DaimlerChrysler*, S Ct 132648, COA 268544**

*WCAC*: Whether the burden-shifting analysis described in the Court of Appeals opinion relieved the plaintiff of the burden of proving that he was disabled from all jobs within his qualifications and training.

**Argued October 3, 2007**

***Ross v Blue Care Network*, S Ct 131711, COA 266240**

*Insurance*: Whether the recommendations of an independent review organization are binding on the Office of Financial and Insurance Services commissioner.

***People v Dendel*, S Ct 132042, COA 247391**

*Criminal Trial*: Whether the Court of Appeals correctly determined that defendant was denied the effective assistance of counsel.

**Argued September 14, 2007**

***People v Barrett*, S Ct 133128, COA 261382**

*Evidence*: Whether the Supreme Court should overrule *People v Burton*, 433 Mich 268 (1989), which requires independent proof of a startling event before an out-of-court statement may be admitted as an excited utterance under MRE 803(2).

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**ORAL ARGUMENT SCHEDULED FOR APRIL 2008**

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***Credit Acceptance Corp v 46<sup>th</sup> District Court*, S Ct 133292, COA 262404**

*Garnishment*: Whether the Court of Appeals correctly interpreted MCR 3.101(D) as prohibiting a court from requiring that a judgment creditor provide additional information to that required by the rule before the court will issue a writ of garnishment.

***People v Smith*, S Ct 134682, COA 267099**

*Sentencing*: Whether the upward departure from recommended sentencing guidelines was proportionate, and whether the trial court properly articulated its reason for such departure on the record.

## ORAL ARGUMENT YET TO BE SCHEDULED

***Dept of Transportation v Initial Transportation*, S Ct 134798, COA 272560**

*MCSA*: Whether the Motor Carrier Safety Act (MCSA) provides a private cause of action for third parties, and whether the MCSA implicitly amended the cap on recoverable property damages found in the Michigan No-Fault Act.

***Fundabunks v Capital Area Transportation Authority*, S Ct 134408, COA 274928**

*Governmental Immunity*: Whether bus driver's conduct amounted to gross negligence, precluding application of governmental immunity.

***Miljevich v North Country Bank & Trust*, S Ct 134780, COA 268356**

*Banking*: Whether damages are recoverable due to an alleged failure to publish interest rate and/or whether bank indirectly published its interest rate by advising plaintiff that the *Wall Street Journal* prime rate was the applicable interest rate.

***Zavradinos v JTRB, Inc***

*Property*: Whether MCL 557.151 was properly construed in *DeYoung v Mesler*, 373 Mich 499 (1964), to imply a statutory presumption that property held jointly by a husband and wife is held as tenants by the entirety, unless expressly provided otherwise. If such a presumption exists, how may it be overcome. 🏠

**About the Authors**

*Linda M. Garbarino is a civil practitioner who heads the appellate group at the law firm of Tanoury, Corbet, Shaw, Nauts, & Essad, P.L.L.C. Nicole Coroiu is a second-year law student at Thomas M. Cooley Law School and is currently employed as a law clerk for Tanoury, Corbet, Shaw, Nauts, & Essad, P.L.L.C.*

**Recommended Reading for the Appellate Lawyer**

By Mary Massaron Ross

**The Appeal**

John Grisham Doubleday 2008

John Grisham's novels, largely legal thrillers, do not typically interest me. I associate Grisham's formulaic novels with the airports in which they are often purchased by business travelers looking for a way to pass the time while trying to get comfortable on the plastic seats arranged near the gate awaiting a delayed flight. Grisham offers a light read with a strong plot—just the thing to read in a distracting environment. Grisham's most recent novel, *The Appeal*, is in second place on this week's *The New York Times* "Book Review" best sellers list, attracting attention for reasons that have more to do with recent concerns about the judicial selection process and its impact on judicial independence than with any literary impact.

*The Appeal* tells the story of heroic plaintiffs' lawyers who struggle against great odds to win a jury verdict against a chemical company for injuries from contaminated water caused by the chemical company's operations. The jury awards compensatory damages, but also \$38 million in punitive damages. The owner of the chemical company, a classic villain unloved by his trophy wife and uninterested in his child, decides to obtain a reversal of the verdict by unseating a Supreme Court justice and funding the candidacy of someone who will vote to reverse the judgment against his company. The characters are types—not people. And the plot is largely predictable.

Grisham's dialogue is similarly hard to take. Here are a few quotes to give you the idea: "A bunch of ignorant rednecks out there who collectively couldn't earn a hundred grand a year, and they sit there like gods taking from the rich and giving to the poor." "You'll pay in the morning, ole boy. We're betting Krane's stock drops 20 percent." "We've lost a lot, but then so has my hometown. Hopefully, the losing is over now. Wes and I are young; we'll survive. But many of these folks are either dead or deathly ill." Do people talk like this?

In addition to dialogue that I found jarring, Grisham's description of appellate lawyers was downright irritating. Here is a paragraph description: "In Atlanta, Jared Kurtin passed the file to the firm's appellate unit, the 'eggheads,' as they were known, brilliant legal scholars who functioned poorly in normal circles and were best kept in the library. Two partners, four associates, and four paralegals were already hard at work on the appeal when the massive transcript arrived and they had their first look at every word that was recorded at trial. They would dissect it and find dozens of reasons for a reversal." All you eggheads out there who fill your appellate briefs with "dozens" of arguments but can't function in normal circles will surely love this book. As for me, I am heading to the library right now where my work keeps me most of the time.

By now you may be wondering why I bought the book, and why I am bothering to review it. I rarely, if ever, write about books to trash them, and this review is not intended to do so with this book. Although the book is filled with clichés and stereotypes as are many such novels that are written for light

Continued on next page

Recommended Reading  
Continued from page 9

entertainment, Grisham uses that genre to raise profound questions about judicial selection and judicial independence that are worth talking about. In addition to describing the litigation battle between the chemical company and the plaintiffs, Grisham spends about half the novel describing a judicial campaign in which the challenger uses tactics that are questionable at best to unseat an incumbent justice and thus position the chemical company to win its appeal.

Set in Mississippi, the chemical company executive pays millions of dollars to a shadowy organization that finds an unsuspecting candidate, persuades him to enter the race, tutors him on how to win, and promotes his campaign. The incumbent, depicted as a moderate, is defeated by the chemical company's candidate, who uses misleading attack ads. *The New York Times* "Book Review" lauded this aspect of the novel, saying: "Unlike a lot of novels and TV docudramas that selectively latch onto facts to create a false picture, *The Appeal* delivers a real picture of a real problem. And it all goes down easily because [Grisham] spins it around such a gripping tale."

Not being a Grisham fan, I am not sure that I can go that far in praising the novel. But I will say this: if you like his style, this Grisham novel is worth reading. And as you read the novel as a page-turner, its depiction of judicial campaigns with their distortions and take-no-prisoners rhetoric may ring too true for comfort. While I would like to dismiss it as exaggerated, friends from around the country have told me that it is loosely based on actual cases. Set in Mississippi, the novel has some basis in that state's history. But it also and perhaps more closely tracks a case in West Virginia, *A T Massey Coal Company, Inc v Caperton, West Virginia Supreme Court, slip op 2/15/08*. Carl Trudeau is said to be based on the coal company CEO, Don Blankenship, and litigation involving two coal companies. In November 2007, the chief justice of the West Virginia Supreme Court voted to overturn a \$76 million judgment against Blankenship's coal companies. Shortly after, photos surfaced on the Internet showing the justice vacationing in Europe with Blankenship while the appeal was pending. In a recusal order, another justice on the West Virginia Supreme Court, Justice Starcher, noted that the coal companies sought his disqualification for criticizing Blankenship's expenditure of millions to influence the election, that Blankenship "sported a 'Get Starcher' ball cap announcing [Starcher] as his 'next target' as he publicly was spending millions to influence elections...."

Justice Starcher decided to recuse himself after the case took on a life of its own in the public eye, and after Blankenship's companies sued him in federal court "alleging that *my* statements and *my* refusal to disqualify myself from hearing cases involving his companies violate their constitutional rights." Starcher recused himself but in doing so wrote that "Mr. Blankenship, his money, and his friendship have far more egregiously tainted the perceived impartiality of this Court than any statement by me." Starcher then referenced the photos depicting Blankenship's relationship with "another justice on this Court." Starcher then references other facts involving justices on the West Virginia Supreme Court, Blankenship's companies and lawyers, and campaign contributions. I have never practiced in West Virginia, and do not know any of these justices. But the entire dispute is likely to cause the public to lose confidence in its judiciary.

Grisham's novel offers a stirring depiction of how easy it is to twist the import of judicial decisions for political advantage, a practice all too common in the heat of campaigns. And Grisham is surely correct that because it is so difficult to correct the distortion of complex legal decisions, the candidate who is willing to win on the basis of such distortions has an advantage. Grisham is also correct that judicial politics is problematic—and that it can create a huge problem for the judiciary and ultimately for the rule of law. Grisham's novel draws attention to the problem but offers no solutions.

Moreover, Grisham's novel fails to deal with the nuances of the problem. For example, if a litigant supports those with a philosophy of interpreting statutes broadly according to their purpose and favoring jury trials, can that be said to be buying the election to preserve a plaintiff's jury verdict? And conversely, if a litigant favors a textualist approach to interpretation of statutes, and reads the court rules and statutes providing for a summary disposition to require the early dismissal of weak cases, does that suggest that the litigant is trying to defeat jury verdicts against his company? Grisham's example blurs the nuances of these questions. The problem of ensuring a proper judicial selection process and maintaining the integrity of the appellate process is not formulaic or simplistic. And it remains for us to solve. To the extent that Grisham's book creates a public discussion of the issues, it is worth reading. 🏛️

# Internet Research: Appellate Blogs

By Megan K. Cavanagh, Garan Lucow Miller, PC

Most appellate practitioners know where to look on the Internet for the basic, practical information about appellate practice in Michigan. Some of us, myself included, have a slightly unhealthy attachment to the Michigan Court of Appeals Case Inquiry system (<http://courtofappeals.mjud.net/resources/public.htm>) and regularly peruse the Sixth Circuit's PACER site (<http://ecf.ca6.uscourts.gov>). However, many of us may be unaware of numerous other websites and appellate blogs that are out there and which offer a wealth of practical information regarding appellate practice in courts across the country as well as thoughts and tips from fellow appellate practitioners. The next time you find yourself looking for other practitioners' perspective on oral argument or single-sentence questions presented, or find yourself wondering about the peculiarities of practice in some far-away state or federal circuit, check out some of these sites.

## Appellate Advocacy

- Appellate Law and Practice: <http://appellate.typepad.com/appellate/>
- Have Opinion, Will Travel—More Really Bad Appellate Advocacy: <http://haveopinionwiiltravel.blogspot.com/2006/04/more-really-bad-appellate-advocacy.html>

## Legal Writing

- An Appeal to Reason: <http://www.donnabader.com/>
- Writing tips for e-mail: <http://www.judgepainter.org/legal-writer57.htm>
- Research and Writing Law Blog: <http://www.researchand-writinglawblog.com/>
- Wayne Scheiss Legal Writing Blog: <http://www.utexas.edu/law/faculty/wschiess/legalwriting/>
- Minor Wisdom—Tactical Choices in Briefwriting: <http://raymondward.typepad.com/newlegalwriter/2008/04/tactical-choice.html>

## Recent Appellate Decisions of Interest

- The Opening Brief: <http://www.caso-law.com/blog/wordpress/>
- How Appealing: <http://howappealing.law.com/>
- Decision of the Day: <http://www.enotes.com/blogs/decision-blog/>
- Supreme Court of the United States (SCOTUS) blog: <http://www.scotusblog.com/wp/>

## Federal Practice and Procedure

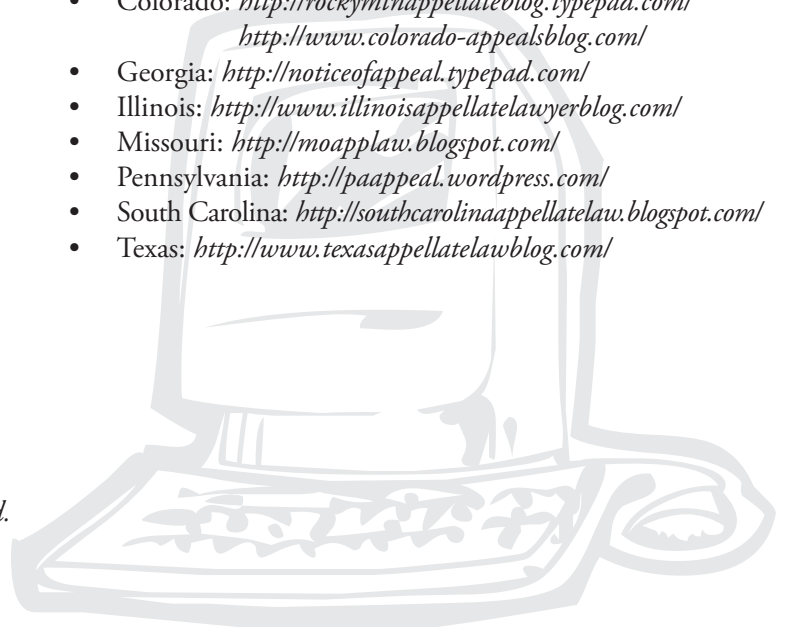
- Federal Civil Practice Bulletin: <http://federalcivilpracticebulletin.blogspot.com/>
- Statutory Construction Blog: <http://lawprofessors.typepad.com/statutory/>

## Federal Circuit Courts of Appeal

- 1<sup>st</sup> Circuit Court of Appeals: <http://circuit1.blogspot.com/>
- 2<sup>nd</sup> Circuit Court of Appeals: <http://circuit2.blogspot.com/>
- 3<sup>rd</sup> Circuit Court of Appeals: <http://circuit3.blogspot.com/>
- 4<sup>th</sup> Circuit Court of Appeals: <http://circuit4.blogspot.com/>
- 5<sup>th</sup> Circuit Court of Appeals: <http://circuit5.blogspot.com/>
- 6<sup>th</sup> Circuit Court of Appeals: <http://circuit6.blogspot.com/>
- 7<sup>th</sup> Circuit Court of Appeals: <http://circuit7.blogspot.com/>
- 8<sup>th</sup> Circuit Court of Appeals: <http://circuit8.blogspot.com/>
- 9<sup>th</sup> Circuit Court of Appeals: <http://circuit9.blogspot.com/>
- 10<sup>th</sup> Circuit Court of Appeals: <http://circuit10.blogspot.com/>
- 11<sup>th</sup> Circuit Court of Appeals:
  - <http://abstractappeal.com/>
  - <http://noticeofappeal.typepad.com/>

## State Courts

- California: <http://calapp.blogspot.com/>
- Colorado: <http://rockymtnappellateblog.typepad.com/>  
<http://www.colorado-appealsblog.com/>
- Georgia: <http://noticeofappeal.typepad.com/>
- Illinois: <http://www.illinoisappellatelawyerblog.com/>
- Missouri: <http://moapplaw.blogspot.com/>
- Pennsylvania: <http://paappeal.wordpress.com/>
- South Carolina: <http://southcarolinaappellatelaw.blogspot.com/>
- Texas: <http://www.texasappellatelawblog.com/>



# Recent Decisions of Interest to the Appellate Practitioner

## Trial court jurisdiction after reversal

In an interesting opinion released for publication on March 11, 2008, *Rema Village Mobile Home Park v Ontwa Twp*, \_\_\_ Mich App \_\_\_ (2008) (Docket No. 276506), the Court of Appeals clarified that once an appeal is over, jurisdiction automatically reverts to the lower tribunal on all matters of enforcement, even in the absence of a remand order.

Plaintiff in that case was a taxpayer who, in an earlier proceeding, lost in the tax tribunal on its challenge to a special tax assessment, but later prevailed in the Court of Appeals. When the appeal concluded, the taxpayer sought a refund of the assessment (which it had paid) in the tribunal, which declined to consider the request in the belief that the appeal had divested it of all jurisdiction over the matter. The Court of Appeals had reversed, but it had not remanded for further proceedings.

On the taxpayer's second time up, the Court of Appeals interpreted MCR 7.215(F)(1) as vesting lower tribunals with jurisdiction to enforce all appellate court judgments. "[E]xecution on the Court of Appeals judgment is to be obtained or enforcement proceedings had in the trial court or tribunal after the record has been returned . . . or, if a record was not transmitted to the Court of Appeals, after the time specified for return of the record had it been transmitted." MCR 7.215(F)(1)(b). Finding that the taxpayer's motion for a refund was "substantially . . . a motion to enforce this Court's decision," the Court held that the "implications, ways, and means of that enforcement are not matters before this Court," *sl op*, p 2. "The case is remanded to the tribunal for proceedings to enforce this Court's earlier decision," *sl op*, p 3.

## The Sixth Circuit – no jurisdiction over remand orders based on lack of subject jurisdiction


In *Blackburn v Oaktree Capital Mgt, LLC*, 511 F3d 633 (CA 6, 2008), the Sixth Circuit spoke to its lack of jurisdiction over orders remanding a case to state court. *Blackburn* had originally been filed in state court, and then removed to federal court on the basis of diversity jurisdiction. Plaintiffs were allowed to amend their complaint some five months later, adding defendants who destroyed diversity jurisdiction. A remand order issued. Defendants tried to appeal the order allowing the amended complaint, but the Sixth Circuit decided that it had no jurisdiction to consider the appeal. Its decision resolved some confusion over the issue under prior case law, and was based on the Supreme Court's decision in *Powerex Corp v Reliant Energy Services, Inc*, 127 S Ct 2411, 2416 (2007).

## Frivolous action sanctions for appellate filings—trial courts may assess

In *Thomas v La-Van Hawkins*, unpublished opinion per curiam of the Court of Appeals, issued January 3, 2008 (Docket No. 271031), the Court allowed frivolous action sanctions assessed by the trial court under MCR 2.114(E), for "baseless misrepresentations of fact contained" in the briefs and motions filed at the appellate level. By its plain terms, MCR 2.114(E) applies to "other papers provided for by these [court] rules" and "is broad enough to encompass papers filed in the appellate courts." *Sl Op*, p 5. "The rule makes no distinction between documents filed in a trial court and those filed in an appellate court." *Id*.

Plaintiff in *Thomas* objected to the court's appointment of a particular receiver to oversee the sale of his restaurant. The trial court resisted plaintiff's attempts to remove the receiver, which prompted plaintiff to file an application for leave to appeal in the Court of Appeals and then, when that was denied, in the Supreme Court. Because of the factual allegations in his application concerning the receiver's alleged relationship with the plaintiff, his ex-wife, and others, the Supreme Court retained jurisdiction and remanded to the trial court for an evidentiary hearing. After taking evidence, the trial court observed that plaintiff's allegations were not well grounded in fact and were sanctionable. The Supreme Court subsequently denied leave on the issue of the appointment of the receiver, and the court then entered an order awarding sanctions.

On appeal from the sanctions order, the Court of Appeals initially observed that the trial court exceeded its remand authority when it made its decision about sanctions (the Supreme Court's remand order had stayed proceedings pending the evidentiary hearing). But the Court went on to note that the order of sanctions was not entered until after jurisdiction was returned to the trial court, and was therefore proper on both procedural and substantive grounds.

Of further interest is the Court's secondary basis for affirming the sanctions order: the "inherent authority [of the courts] to sanction litigants and their attorneys" for misconduct, *sl op*, p 7. This argument was not raised below, only on appeal, but the Court considered it, on the authority of the case law allowing an appellee to argue alternative grounds for the same result. 



# Shannon's Soapbox

By Brian Shannon

Court rules always need amending. Not just our MCRs, but all court rules. You might think eventually all the tweaking would be done and we could just leave them alone for a while. Not so. Looking only at the appellate MCRs during the 23 years they've been around, the pattern is a constant series of individual rule changes since the last wholesale revision.

The Michigan Court Rules of 1985 replaced the General Court Rules of 1963, which themselves were adopted when Michigan enacted its current constitution. The Federal Rules of Appellate Procedure recently have been completely overhauled and the Federal Rules of Civil Procedure received their overhaul even more recently. A joint committee of APS members, judges, and court staff has been working for years now on a complete reworking of subchapter 7.100, the woefully inadequate rules for appeals to Michigan circuit courts. No one will miss the present rules when they are replaced.

The way in which court rules are amended in Michigan has definitely improved in recent years. For one thing—and the Appellate Practice Section played a role in this—the amendments now become effective at three regular intervals throughout the year (January 1, May 1, September 1), unless notice is dispensed with under MCR 1.201(D). This policy was adopted in Administrative Order 2001-2, and it has worked well, making it easier for all of us to stay current. (It's probably time to move those dates from the AOs, which are not much more than a rumor to so many lawyers, into MCR 1.201, where a person would expect to find them.)

Corresponding to the three regular effective dates for amendments, the Supreme Court has been holding three public hearings a year on rule proposals since 1998, under AO 1997-11 and MCR 1.201(E). The great majority of rule amendments begin life as proposals, which could originate with anyone. (I just proposed one a paragraph ago.)

If the Supreme Court thinks a proposal warrants public discussion, it opens an administrative file, publishes the proposal in the *Michigan Bar Journal*, and invites comments, which then are published on the Supreme Court's website under "proposed rule amendments." After the comment period comes the public hearing, where anyone can sign up to tell the Court (in three minutes or less) what they think about the proposal and why.

I've said it before on this Soapbox, and I'll say it again. Not enough lawyers use the opportunity they have to comment in writing and orally about proposed rule amendments. It's not that lawyers don't have opinions about the rules. Far

from it. If you ask a room full of lawyers what they think about a court rule and a proposed change, you'll get an earful. Some of it will make sense, too.

But we are all busy and no one pays us to comment on the court rules. Members of the Appellate Practice Section have the additional excuse that they expect the APS council to comment on appellate rule proposals on their behalf. The council does do this, of course. But after years of either participating in or at least closely observing the process, I have news for everyone who ever thought about commenting for or against a proposed amendment—but didn't: The Supreme Court does listen to and weigh the comments it receives.

If you didn't write because you thought the whole comment process likely was cosmetic, you were wrong. Time and again the Supreme Court has adopted suggestions made by the APS and others (but especially the APS) about proposed appellate amendments, either to rework a proposal in light of some deficiency or unwanted consequence, or to abandon a proposal entirely. Not always, of course. But often enough so that you're making a mistake if you have something to say and don't say it.

Currently, there are some interesting rule proposals floating around. That gives me an opportunity to kill two birds with one stone by spouting my opinions on them here on the Soapbox—and then sending the column (or a variant of it) to the Supreme Court in response to the invitation for public comment.

## MCR 2.119(F)(1)

This amendment, part of ADM File No. 2005-36, was proposed in October 2007. The comment period is closed, but there hasn't been a public hearing yet, and the Court is still posting comments on its website. The proposal for MCR 2.119(F)(1) would change the default 14-day period for reconsideration motions to 21 days, aligning it with the time periods on appeal for post-judgment motions. This is a great idea, and I should have said so earlier to the Supreme Court, but didn't. (Moral: Do as I say, not as I do!) The only comment so far opposing this proposed change comes from an Oakland County circuit court judge.

The judge says the change "appears harmless," but would "delay" justice by 50 percent when such motions are brought for stalling purposes. There is no need for consistency, he

Continued on next page

says. He doesn't remember anyone ever complaining about the 14-day period and concludes by saying if it ain't broke, don't fix it (although the judge, of course, rewrites the idiom into standard English).

Where to begin? The need for consistency is real; the 14-day period has always been too short; the complaints and confusion over the years have been substantial; and the 50 percent increase is only a 50 percent increase in decision time when the motion is denied the day it's filed (and it's not filed until the 21<sup>st</sup> day).

Take the case of a summary disposition motion which, when granted, is a final order under MCR 7.202(6). It's a decision on a motion, so MCR 2.119(F) by its terms applies. Many cases are decided this way, as the expedited track made clear to all of us. Because it's a final order, the Court of Appeals is going to measure the timeliness of post-judgment motions with a 21-day clock under MCR 7.204. But is MCR 7.204 "another rule" that "provides a different procedure for reconsideration of a decision," as MCR 2.119(F)(1) says at the start?

Well, yes, I think it should be, but can you afford to have that fight with your opponent by moving for reconsideration more than 14 days after summary disposition is granted? What if the trial court dismisses your motion as untimely on the 22<sup>nd</sup> day?

With all respect to the judge who opposes the change, prudent lawyers do not "complain" to judges about the court rules. If the rule says 14 days, they grit their teeth and get the damn thing filed within 14 days, muttering quietly to themselves, even if they really needed a few more to do a better job. They can't take the chance of a fight on the collateral timing issue.

Nonfinal orders pose most of the same questions. There is a proposal, also in ADM No. 2005-36, to add the tolling-motion language found in MCR 7.204 to MCR 7.205, making it clear that an application for leave from an interlocutory order is timely if brought within 21 days of the decision on a timely motion for reconsideration. That has been the Court's unwritten practice for years, so this change is not really a change at all. The motion for reconsideration is timely if brought "within the original 21-day appeal period." Not 14 days, but 21. The issue is the same, and the problem for the movant is the same.

Depending on what is going on in your practice and your life when you get a summary disposition ruling, sometimes a few extra days can be very important to you and your client. But practitioners complain all the time to me (if not to judges) that they don't dare rely on the appeal rules rather than MCR 2.119(F).

The judge who opposes this change thinks there is no reason why trial and appellate periods should be consistent. I disagree, but set that aside. What about consistency between different but functionally identical post-judgment motions? Take this example. Opposing parties in a case stipulate to the material facts and have a bench "trial" with no witnesses. Same case, but this time the parties file cross motions for summary disposition, closely resembling the briefs in the bench "trial." In the bench trial, the MCR 2.611(A)(2) post-judgment motion is undoubtedly a 21-day motion. In the other case, the reconsideration motion is going to be a 14-day motion in enough courtrooms so that you'd be crazy to take a chance.

And, of course, if the judge wants the nonmovant to respond to a reconsideration motion, or if the judge takes a few weeks or a couple of months to decide the motion, then the 50 percent increase in time the movant had to file winds up being insignificant in the overall motion process.

Do some attorneys stall? Sure. But one week is such a petty stall, even when it happens, compared to all the stalling potential in the court rules as a whole. Rules should not be driven by the possibility of insignificant misuse. That is far from the first consideration in determining whether a rule will tend to increase or decrease the delivery of justice to litigants.

The 14-day period of MCR 2.119(F)(1) always was a bad idea. Until all courts are electronic, attorneys are going to lose precious days when a written decision they weren't expecting is mailed to them or an order is entered without proper notice by the other side (a misuse of the rules far more harmful than a one-week stall). Too often the 14-day period is a nine- or eight-day period by the time the lawyer learns of the decision or the entry of the order—or even less by the time newly retained appellate counsel can get up to speed. A 21-day period, if nothing else, alleviates the effect of lost days at the front end.

This is a salutary change that the Supreme Court should adopt.

**MCR 7.204(A)(1)(b)**  
**MCR 7.205(A)(2)**  
**MCR 7.205(F)(3)(b)**

These proposed changes to the tolling motion rules also are part of ADM File No. 2005-36. Not incidentally, if these changes are made, the change to MCR 2.119(F)(1) becomes even more necessary. Again, I failed to file a timely comment. The Bar's Civil Procedure and Courts Committee (I'll call it the CPCC), however, did comment, and what it had to say is significant.

Frank Greco, chair of the CPCC, is a former Supreme Court Commissioner who spent many years drafting, analyzing, and making recommendations concerning proposed rule amendments. Members of the CPCC are appointed by the Bar's president. The CPCC comments are quite thoughtful.

There's no question that tolling language should be added to MCR 7.205 to correspond to the tolling language in MCR 7.204. That's been the Court of Appeals' policy as long as I can remember. Adding that language will do away with the common but misguided argument, made by lawyers who don't know the unwritten policy, that an application for leave to appeal is untimely if not filed until after decision of a motion for reconsideration. The CPCC is solidly in favor of adding such language (and in favor of the proposed change to MCR 2.119(F)(1)).

The gist of the proposed changes to the tolling rules is the elimination in each rule of the phrase "or within further time the trial court may have allowed during that 21-day period." The phrase would be deleted from MCR 7.204(A)(1)(b) and 7.205(F)(3)(b) and would be absent from the new rule, MCR 7.205(A)(2). This is the language that gives a trial court discretion to grant extra time, within the original 21-day period, for the filing of a tolling motion.

The CPCC thinks (and I agree) that this discretion should be retained. The CPCC suggests that the current language be modified to add a "good cause" requirement. Here is what the CPCC told the Supreme Court:

"While a further extension will not often be appropriate, there are various reasons why one might be necessary in a few cases, such as the need for a transcript or unexpected illness of an attorney. Including this discretion is not likely to delay proceedings in many cases, since judges tend not to favor such motions and are unlikely to grant extensions except where it is really appropriate."

In my own experience, the need for extra time is relatively common. And often it is newly retained appellate counsel who most need the time. After a trial, especially a jury trial, a post-judgment motion for JNOV or for a new trial on "great weight" grounds often requires the full transcript to enable the trial court to rule meaningfully. Unless the attorneys have been getting daily transcripts during the trial, it often will be impossible to get the full transcript within 21 days. This makes it very difficult for the movant to prove that there was no evidence on an element of the claim (JNOV) or that the verdict is contrary to the overwhelming weight of the evidence.

One unsatisfactory solution is to file an incomplete post-judgment motion within 21 days, asking the trial court to delay its ruling until after the full transcript is obtained and the parties have filed supplemental briefs. Many judges, understanding that the transcript is necessary, will accede to this request, but others will not. In the latter case, the result may

be an appeal that results in a ruling the trial court could have made a year or more earlier.

In the "great weight" context, the retrial sometimes will have been unnecessarily delayed. In the JNOV context, the appeal might have been avoided altogether or better focused with the parties' roles reversed and the legal issue meaningfully decided by the trial court, simplifying the appeal.

The CPCC's proposed solution is to add the phrase "or within further time the trial court has allowed for good cause during that 21-day period or an earlier extension" in MCR 7.204(A)(1)(b), the new 7.205(A)(2), and existing 7.205(F)(3)(b). In a second letter, the CPCC further recommends that this language be added to MCR 2.614(A)(1).

Existing MCR 2.614(A)(1), the automatic stay rule, *already* gives trial courts discretion to extend the stay period, presumably in cases where it has extended time for a post-judgment motion. The Supreme Court's proposed changes do not alter this language.

If the changes are made as the Supreme Court has proposed them, I believe parties still will be able to do what many do now—file a timely motion and request that the hearing date be postponed until after the transcript is done and supplemental briefs are filed. If I'm right about that, it just makes sense to permit a motion for additional time within the 21-day period. Why force litigants to file an inadequate motion and request the right to supplement, when the need for more time could be addressed forthrightly in a motion for an extension of filing time?

The need for more time is particularly acute when new counsel will be doing the appeal. Many of us who do appeals exclusively are not retained until after the verdict. We were not at trial. To provide optimal service, we often need to file a significant post-judgment motion before we claim the appeal. Often a week or more of the initial 21-day period is gone before we even arrive on the scene. We may have a powerful argument that could eliminate the need for appeal entirely if only we had the time (and proof in the form of the transcript) to argue it effectively to the trial court.

The Court's proposed change is a false economy because by curtailing trial court discretion—a discretion those courts long have had, see GCR 1963 803.1(a)((ii)—the trade-off in some cases will be a few extra weeks in the trial court vs. an extra 18 months in the Court of Appeals.

MCR 2.614(D)  
MCR 7.101(H)(1)(b)(iii)  
MCR 7.209(A)(1) & (E)(4)  
MCR 7.302(H)

These proposed changes, all part of ADM 2006-11, create an automatic stay during the pendency of governmental immunity appeals. Comments are due by May 1, 2008,

although they will be accepted after that. There were none posted the last time I looked.

The rules already require a stay of proceedings when a “government party” claims an appeal from an order denying immunity. MCR 7.209(E)(4). But the rule now contemplates a stay motion. The proposals would make the stay automatic in every appeal, without a motion. As I read the plain language of the proposals, the trial court would have no discretion to lift the stay, even in part, for any reason. Based on list-serv back-and-forth on this proposal, I know that some esteemed colleagues do not read the proposals as eliminating discretion.

One of the healthy things about the APS is that it is an umbrella group of lawyers with widely diverse practices, united mainly by a common interest in appellate law. This is a set of proposals on which APS members are divided because the interests of their clients are divided. From my vantage point on the Soapbox (and because I don't deal with immunity issues in my practice), I think I'm reasonably neutral on this issue.

My opinion is that the proposals are overbroad and need tweaking to make it explicit that trial courts retain discretion to modify the automatic stay on good cause shown in the interests of justice. To those who would argue that circuit courts have inherent power to do just that, I say why invite litigation over the question when it would be so much simpler just to make the rules clear in the first place?

Because I don't practice in this area, I'm not the best one to ask for hypotheticals illustrating when either the plaintiff or the governmental defendant might want at least a partial lifting of the stay pending appeal. Life and litigation are complicated things, and any court rule written in absolute terms is almost bound to cause injustice sooner or later, to one side or the other.

If, say, a key fact witness is diagnosed with a fast-acting lethal cancer during the pendency of an immunity appeal, should the side likely to benefit if the witness dies without being deposed be able to block the other side's motion to lift the stay for that discovery? That could be the result if the trial court doubted its power to modify the automatic stay created by these proposals.

Some APS members have discussed forming a special purpose committee to consider possible variations on the proposals. If you are a section member who *does* practice in this area, you might consider contacting Victor Valenti to urge the creation of such a committee and to volunteer to be a part of it. (I'm not authorized by Vic or anyone else to extend that invitation but, hey, it's my Soapbox.)

Even the present language of these rules contains arguable ambiguities. For example, under MCR 7.202(6)(a)(v), a “governmental party” includes a governmental agency, official, or employee, *i.e.*, both individuals and units of government. MCR 7.209(E)(4) uses the phrase “government party” rather than “governmental party.” Is there an intended difference here? Is “government party” intended to exclude individuals? If not, why use a different word? If so, surely the intended difference could be expressed more clearly. Just as it is the job of lawyers to raise questions like this to benefit their clients, it is the job of rule makers to write rules that are not open to such questions.

More generally, is a procedure in which all immunity denials are appealed of right immediately the most efficient procedure? Might not there be other ways to balance the competing considerations that would be fairer to all parties and more efficient of judicial resources (both trial and appellate)?

### Other Proposals

I'm out of space, but there also is a proposal to amend MCR 7.202(6)(a)(v) to “clarify” the appeal rights of governmental parties. Comments are due by June 1, 2008. And there's a proposed amendment to MCR 7.215(J), tweaking the conflict resolution rules. The comment period has passed, but it's not too late to add your voice. If you regularly encounter any of these rules in your practice, you should take a real interest in how they can be improved and whether amendments proposed by others make the rules better or worse. 🏛️

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