



MICHIGAN APPELLATE PRACTICE JOURNAL

AN OFFICIAL PUBLICATION OF THE STATE BAR OF MICHIGAN APPELLATE PRACTICE SECTION

From the Chair

By Barbara H. Goldman

The First Wednesday in November

Spring 2009, Vol. 13, No. 1

In this Issue

The “Ins and Outs” of Electronic Filing in the Sixth Circuit	3
Stu’s Tech Talk.....	7
Spring Conference.....	9
The New Michigan Supreme Court and the Law.....	10
Recent Decisions of Interest to the Appellate Practitioner	12
Cases Pending Before the Supreme Court after Grant of Oral Argument on Application.....	13
Recommended Reading for the Appellate Lawyer	15
Shannon’s Soapbox	18

I charge[] your judges . . . [to] [h]ear the causes between your brethren, and judge righteously between every man and his brother, and the stranger that is with him.
Exod. 18:13-16

Democracy substitutes election by the incompetent many for appointment by the corrupt few.
George Bernard Shaw (1903)

It has been said that democracy is the worst form of government except all the others that have been tried. . . .
Winston Churchill (1947)

Like many others, I spent the early morning of last November 5 combing through the election reports to determine who would be joining, rejoining, or departing from the ranks of the Michigan judiciary—the first glimpse of those whose faces might be on the other side of the bench at my next appearance.

Aside from the predictable side effects (bleary eyes and blood pressure spikes), the experience also reawakened in me the question I ask in every even-numbered year: is this really the best way to select our judges? Whether the issue ranks on par with the great questions of our time (“Is poverty inevitable?” “Are we alone in the universe?” “Who taught Cloris Leachman to dance?”), it is one worth considering—perhaps more often than every other year.

When Jefferson wrote that, “Governments are instituted among Men, deriving their just powers from the consent of the governed,” he revived a philosophy that had been largely dormant for two millennia. We can presume that, in the earliest stages of human history, there were no “judges.” Disputes were resolved between the parties, likely in favor of the side with the strongest arm or the biggest rock. As civilization evolved, however, things changed.

Continued on next page

SECTION COUNCIL

CHAIR

Barbara H. Goldman, Southfield

CHAIR-ELECT

Christina A. Ginter, Detroit

SECRETARY

Liisa R. Speaker, Lansing

TREASURER

Megan K. Cavanagh, Detroit

COUNCIL

TERM EXPIRES 2009

Geoffrey M. Brown, Southfield
Judith A. Curtis, Grosse Pointe
Phillip J. DeRosier, Detroit
Deborah A. Hebert, Southfield
Ronald S. Lederman, Southfield
Stephen J. Rhodes, Okemos
Mary Massaron Ross, Detroit

TERM EXPIRES 2010

Graham K. Crabtree, Lansing
Linda M. Garbarino, Detroit
Marcia L. Howe, Farmington Hills
Anica Letica, Detroit
Gerald F. Posner, Detroit
Peter J. Van Hoek, Detroit

TERM EXPIRES 2011

Paul R. Bernard, Southfield
Stuart G. Friedman, Southfield
Stephanie Simon Morita,
Farmington Hills
Elizabeth L. Sokol, Royal Oak

IMMEDIATE PAST CHAIR:

Paul R. Bernard, Southfield

EX-OFFICIO:

Linda M. Garbarino, Detroit

COMMISSIONER LIAISON:

Laura Anne Chappelle, Okemos

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

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

For unrecorded generations, authority came from above: deities, priests, and kings both made the rules and saw them applied. Not until "the grandeur that was Greece" did the concept of "democracy"—government by the governed—appear. Athens, however, did without professional jurists. It was not until thirteenth century England that what we would call "judges," i.e., legal experts with authority, appeared. Like other officers of the king, they were appointees, delegates of a magisterial power. The concept of elected judges is, then, relatively modern.

The legislative branch is inherently partisan. *Profiles in Courage* aside, we want our elected representatives to "present" our interests, whatever they may be. Elected members of the executive branch are also chosen based, in part, on affiliation. The judiciary, however, is expected to be impartial and disregard whatever political affinities may characterize its individual members.

The vast majority of the judges in the United States are selected by popular election.¹ The drawbacks of direct choice of judicial officers are all too well known to need exploration here. In an age of paid political advertising, the power of money is an ever-present factor. Indeed, the Supreme Court is about to consider a case² in which the issue is whether the due process clause requires a state Supreme Court judge to recuse himself from the appeal of a verdict against one of his major campaign supporters.

But the effects of judicial election go beyond the direct influence of contributions by identifiable donors on specific decisions. There is, for example, a shade of unseemliness about having a group of lawyers hosting a fundraiser on Thursday night for the same judge in whose courtroom they will be spending Friday morning. Even at the appellate level, where there are fewer judges and fewer campaigns, an advocate in front of a three-judge panel may wonder whether his checkbook could have been deployed better in the last election cycle.

Apart from the immediate connection between money and electoral success, there is something tawdry about judicial candidates hawking themselves like detergent and hamburgers. As general electoral politics has descended into the slinging of mud and the raking of muck, judicial elections have been sucked into the same vortex.

A generation or two ago, a man (they were usually men) running for judge posed for photos with his dog and an American flag; boasted that he was "experienced," "compassionate," or "tough on crime;" and rarely referred to his opponents at all. As other elections have grown dirtier, however, so have judicial races, to the point that Michigan has seen Supreme Court candidates characterized as condoning pedophilia and terrorism.³ While we in the profession appreciate that procedural due process requires protecting the rights of unpopular defendants, the larger public may not make the same distinctions. Subtleties are hard to convey in a 30-second TV spot.

But if direct popular election is not the best way to pick our judges, is any alternative preferable? The obvious choice is the appoint-with-consent system of the federal judiciary and a few of the states. At one level, we may argue that it has worked reasonably well. The need for legislative confirmation tends to weed out the genuinely unqualified political hacks, while the requirement of selection by the president and state senators means that, over time, the federal courts will roughly reflect the views of the country as a whole. At the same time, however, no one can disregard the drawbacks of a method that scares off some excellent candidates,

who prefer privacy to a confirmation hearing and financial disclosure statement, and allows for the sort of impasse that kept the Sixth Circuit understaffed for so long.

Appointment with popular approval is another possibility. A substantial percent of states follow the same model as Michigan for filling unexpired judicial terms, that is, appointment by the governor followed by a retention election. Despite the attractiveness of this approach, the generally low level of attention to judicial contests means that “appointment-with-retention” is rarely distinguishable from appointment alone.

Another angle is the “Missouri Plan,” which, originated in 1940. As Missouri itself describes it:

Under the Missouri Nonpartisan Court Plan, a nonpartisan judicial commission reviews applications, interviews candidates and selects a judicial panel. . . It is composed of three lawyers elected by the lawyers of The Missouri Bar . . . three citizens selected by the governor, and the chief justice, who serves as chair. . .⁴

The commission recommends three candidates to the governor, who chooses one of them. The successful candidate is subject to evaluation by a committee and runs, unopposed, in a retention election after a year or more of service. Variants of the “Missouri Plan” are in place in many states, but it has been criticized at least as much as every other system.

In the long run, then, there is no perfect solution. As it has been said, “A country gets the government it deserves.” If judges are elected by the people, then the electors must be interested, informed, and alert. If judges are appointed by the chief executive, then he or she must have the intelligence and strength of character to make choices based on the candidates’ merit and the good of the populace. No law will guarantee either condition.

2010 is barely around the corner. With two Supreme Court justices and six Court of Appeals judges likely to run for reelection, it is already time to be thinking, or rethinking, judicial choice in Michigan. 🏛️

The views expressed in this column are personal and do not represent those of the Appellate Practice Section.

Endnotes

- 1 www.ncsc.online.
- 2 *Caperton v. A.T. Massey Coal Co., Inc.*, Docket No. 08-22, scheduled for argument in March.
- 3 E. Thomas Fitzgerald, 2000; Diane Hathaway, 2008.
- 4 <http://www.courts.mo.gov/page.asp?id=297>.

The “Ins and Outs” of Electronic Filing in the Sixth Circuit

By Phillip J. DeRosier, Dickinson Wright PLLC

Introduction

As of June 1, 2008 (and as amended effective January 12, 2009), the Sixth Circuit brought mandatory electronic filing to the realm of federal civil and criminal appeals. As many appellate practitioners who have had a chance to use it can attest, electronic filing in the Sixth Circuit involves a certain learning curve. But there are also many positives, including instant access to notices, briefs, and the district court record. This article seeks to provide a few insights into the electronic filing process based on my own experiences with it. Another excellent resource is the Sixth Circuit’s own “Guide to Electronic Filing,” which can be found on the court’s website, <http://www.ca6.uscourts.gov> (last accessed March 11, 2009),

along with electronic-filing related amendments to the Sixth Circuit’s rules and internal operating procedures. You can also call the ECF Help Desk, which is available by phone at (513) 564-7000 from 8:00 a.m. to 5:00 p.m. EST. And, of course, there is always the Clerk’s Office. The court’s case managers are invaluable when it comes to answering the many practical questions that often arise during the course of an appeal.

Registering for Sixth Circuit E-Filing

An initial consideration is to make sure that you have actually registered to use the Sixth Circuit’s electronic case filing (“ECF”) system. Although a general PACER

Continued on next page

account will provide access to docket reports and documents, a separate and additional Sixth Circuit ECF account must be set up in order to file documents electronically. Registration instructions can be found at http://pacer.psc.uscourts.gov/announcements/general/ea_filer.html (last accessed March 11, 2009). Just as with electronic filing in the district court, a registered attorney's login name and password serve as the attorney's signature on all documents filed. Attorneys are still, however, required to provide a signature block at the end of all electronically filed documents, using the following format:

/s/ Attorney Name
Attorney Name
ABC Law Firm
1234 First Street
Cincinnati, Ohio 45202
Telephone: (513) 987-6543
Facsimile: (513) 987-3456
E-mail: AttorneyName@abclawfirm.com
Attorney for _____.¹

Once you have registered to file documents electronically, it might also make sense to do a "test run" to make sure that your computer is properly configured for accessing the Sixth Circuit's ECF system, which operates a little differently from the systems used in the Eastern and Western Districts of Michigan. There have been reports of problems arising due to certain security features being enabled on the user's computer. For example, the Java browser plug-in must be installed, and any Internet pop-up blockers disabled.

General Information Concerning Electronic Filing

With certain limited exceptions set out in 6 Cir. R. 25(b) (e.g., petitions for permission to appeal, petitions for review of an agency order, and petitions for extraordinary writs), all documents must now be filed electronically. In addition, orders, decrees, notices, opinions, and judgments of the court will be issued electronically.² Finally, and as discussed in more detail later, proof briefs are no longer required to be filed, and the traditional joint appendix has been for the most part eliminated.

Service of electronically filed documents is accomplished through the ECF system by way of a "Notice of Docket Activity" (NDA) that is automatically generated and issued by the court to all registered attorneys in the case. The NDA serves as confirmation of the filing and includes a link providing access to the document filed.³ Non-registered attorneys must be served by mail. In either case, documents

filed through the ECF system must include a certificate of service.⁴ For example:

I certify that on _____, the foregoing document was served on all parties or their counsel of record through the CM/ECF system if they are registered users or, if they are not, by placing a true and correct copy in the United States mail, postage prepaid, to their address of record.

/s/ Attorney Name

ABC Law Firm
1234 First Street
Cincinnati, Ohio 45202
Telephone: (513) 987-6543
Facsimile: (513) 987-3456
AttorneyName@abclawfirm.com

Two other issues are worth a brief mention. As in the district court, electronic filing in the Sixth Circuit provides practitioners with some flexibility in terms of the time of day that a filing can be accomplished. Unless a specific time of day deadline is set, attorneys technically have until midnight to complete their filing. However, keep in mind that the ECF Help Desk closes at 5:00 p.m. There also is the possibility of a technical failure. According to section 13.2 of the court's "Guide to Electronic Filing," the court's website will be deemed "to be subject to a technical failure on a given day if the site is unable to accept filings continuously or intermittently over the course of any period of time greater than one hour after 12:00 noon (Eastern time) that day." If a technical failure occurs on a given day, "filings due that day which were not filed due solely to such technical failures shall become due the next business day." However, "[s]uch delayed filings must be accompanied by a declaration or affidavit attesting to the filer's failed attempts to file electronically at least two times after 12:00 noon separate by at least one hour on each day of delay because of such technical failure."

Finally, there is the issue of documents needing to be filed under seal. Section 7 of the court's "Guide to Electronic Filing" explains that a motion to file documents under seal may be filed electronically. Then, if the motion is granted, the documents may be filed in paper format in an envelope accompanied by the order authorizing the filing under seal and conspicuously marked "DOCUMENTS UNDER SEAL."

Initiating the Appeal

The process for initiating an appeal in the Sixth Circuit

under the new electronic filing system is pretty much the same as with traditional filing. The notice of appeal should be electronically filed in the district court, with the appeal fee paid either by check or online using a credit card. Payment by credit card is strongly encouraged in both the Eastern and Western Districts of Michigan. For more information, both districts provide detailed filing information on their websites:

- <http://www.mied.uscourts.gov/CMECF/Policies/NoticeofAppealInstructions.pdf> (last accessed March 11, 2009)
- <http://www.miwd.uscourts.gov/ECF/pay.gov%20reference.pdf> (last accessed March 11, 2009)

After the notice of appeal has been filed, the clerk of the district court will file a certificate of service confirming that the notice of appeal has been served on the Sixth Circuit and all interested parties.

Case Opening Forms

Within a few days, the Sixth Circuit will docket the appeal and issue its traditional “case opening” letter instructing the parties that the appeal has been docketed and that they should file their case opening forms, including appearances by both parties along with a Civil Appeal Statement of Parties and Issues and any transcript order forms by the appellant (transcript order forms are still required to be filed in the district court as well.⁵ All of these forms, which are located on the Sixth Circuit’s website, <http://www.ca6.uscourts.gov/internet/forms/forms.htm> (last accessed March 11, 2009), must now be filed electronically. This is done by logging into the court’s ECF system at <https://ecf.ca6.uscourts.gov/> (last accessed March 11, 2009), selecting “File a Document on CM/ECF,” and then going to the ECF system’s “Startup Page.” Once there, you will select “Docketing” from the toolbar menu, followed by “File a Document.” At that point, it is just a matter of entering your case number, selecting “Case Opening Forms,” choosing the form to be filed, and then following the on-screen instructions. In order to further familiarize yourself with the e-filing process, the court offers several “training presentations,” which can be accessed at http://www.ca6.uscourts.gov/internet/cm_ecf/cm_ecf.htm (last accessed March 11, 2009).

The Record on Appeal

The Sixth Circuit’s new electronic filing system has largely eliminated the need to prepare a traditional joint appendix. The only exceptions are for “appeals from a district court where there are documents that are not part of the district court’s electronic record that must be included in an appendix as provided in 6 Cir. R. 30(f)(1),” appeals in cases brought pursuant to 28 U.S.C. § 2254 (i.e., habeas corpus appeals),

appeals from decisions of the United States Tax Court, and petitions to review or enforce federal administrative agency decisions.⁶

In the vast majority of district court appeals, “[t]he record on appeal is comprised of the items specified in FRAP 10,” which include “the original papers and exhibits filed in the district court,” “the transcript of proceedings, if any,” and “a certified copy of the docket entries prepared by the district court.”⁷ To the extent that these items are part of the district court’s electronic record, the Sixth Circuit will now access them directly.⁸ To assist the Court in referencing the district court’s electronic record, each party is required to include, as an addendum at the end of its principal brief, a designation of relevant district court documents (see 6 Cir. R. 30(f)(1)).⁹ The designation must “include for each document the record entry number from the district court docket and a description of the document.”¹⁰

If, however, any relevant district court documents are *not* available electronically,¹¹ then 6 Cir. R. 30(a) requires the appellant to prepare an electronic appendix containing those items and file it along with the appellant’s principal brief as an electronic document in PDF format.¹² This includes any “manageable” paper exhibits filed with the district court but not made part of the district court’s electronic record.¹³ Detailed rules governing how such an appendix should be prepared and formatted are set out in 6 Cir. R. 30(h) through (k), but to summarize: The appendix must be paginated and have a table of contents that (1) describes each document, (2) includes the record entry number from the district court docket, and (3) shows the page in the appendix where the document can be found.¹⁴ For witness testimony, the appendix must also contain, immediately following the table of contents, “an alphabetical list of witnesses whose testimony is included in the appendix, with the date and proceeding, if other than trial, where the testimony begins and the page(s) in the appendix.”¹⁵ A multi-volume appendix “must be consecutively paginated and must contain the full table of contents and index required by 6 Cir. R. 30(h) and (i).”¹⁶ Moreover, “[t]he table of contents and index in each volume must include the contents of all volumes of the appendix.”¹⁷

If the appellee determines that a necessary part of the record was not included in the appendix, 6 Cir. R. 30(C)(2) provides that “the appellee may prepare a separate appendix including the omitted part(s) and file and serve it when the appellee files its brief. The pagination of the appellee’s appendix must be consecutive, beginning with the next page number after the last page of the appellant’s appendix.”¹⁸

For physical exhibits and “bulky paper exhibits,” 6 Cir. R. 10(c)(2) instructs that “[c]ounsel is responsible for arranging with the district court for the transmission of physical and

Continued on the next page

bulky paper exhibits to th[e] court. . . . Physical and bulky paper exhibits may not be transmitted to the court of appeals without the circuit clerk’s express written permission.”¹⁹ 6 Cir. I.O.P. 10 explains that the intent behind distinguishing between “manageable” and “bulky” paper exhibits is “(1) to allow parties to include in an appendix copies of exhibits or excerpts of exhibits without burdening the court with extremely voluminous exhibits and (2) to provide for physical transmission of voluminous exhibits to the court as part of the record on appeal when immediate availability to the court of such exhibits is important to the appeal. If a party is uncertain as to how certain exhibits should be handled, the party should contact the case manager.”

6. Cir. 30(f)(5) addresses the process for including sealed items in the appendix:

If in counsel’s opinion it is necessary to include sealed items, a copy of the sealed item(s) must be placed in a separate sealed envelope and filed with the clerk. An appropriate notation on the cover of the envelope should specify the nature of the sealed enclosure. The balance of the appendix will be treated as part of the public record. The sealed item will not.

Briefs

Preparation of briefs under the Sixth Circuit’s electronic filing system is pretty much the same as before, with a couple of exceptions. First, proof briefs have been eliminated. As explained in § 6.1 of the 6th Circuit’s “Guide to Electronic Filing,” “[p]roof briefs are no longer required to be filed. The clerk will not accept a proof brief for filing.” Second, instead of citing to the joint appendix, parties are now required to cite directly to the district court’s electronic record. Specifically, 6 Cir. R. 28(a) requires a brief to “refer to the particular item in the record and the specific pages by reference to the record entry number or particular transcript or exhibits.” If there is an appendix, “a brief referring to material in the appendix must also refer to the page of the appendix.” The rule provides the following examples:

For example, if the reference is to defendant’s motion for summary judgment, the brief should refer to “Record Entry No. 15, defendant’s motion for summary judgment, pp. 2-3.” For cases where there is an appendix, a brief referring to material in the appendix must also refer to the page of the appendix. For example, if the reference is to defendant’s motion for summary judgment, the brief should refer to “Record Entry No. 15, defendant’s motion for summary judgment, pp. 9-10; Appendix, pp.

69-70.” Suitable abbreviations in these references are acceptable.

Once you are ready to file your brief, you will want to once again return to the “File a Document” page in the ECF system. This time, select “Briefing” as your category, and then click on the corresponding brief being filed (e.g., “appellant brief,” “appellee brief,” “reply brief,” “amicus curiae brief,” “Anders brief,” etc.) There is even an option for filing citations to supplemental authorities under Fed. R. App. P. 28(j). Finally, keep in mind the requirement that all electronically filed documents contain a certificate of service.²⁰

Conclusion

To be sure, using the Sixth Circuit’s ECF system involves a certain amount of trial and error. Over time, however, electronic filing in the Sixth Circuit should prove to be less costly and more efficient than traditional paper filing. 🏛️

Endnotes

- 1 6 Cir. R. 25(d).
- 2 See 6 Cir. R. 25(a), (b), and (e).
- 3 According to § 11.2 of the Sixth Circuit’s “Guide to Electronic Filing,” “parties and counsel of record are entitled to one free copy of each document filed in their cases, within fifteen days of filing.”
- 4 6 Cir. R. 25(f).
- 5 6 Cir. R. 10(b)).
- 6 6 Cir. R. 30(f) details the requirements for the appendix in appeals from the tax court, appeals from agency proceedings, and habeas corpus appeals.
- 7 6 Cir. R. 10(a); Fed. R. App. P. 10(a). Effective January 12, 2009, the Sixth Circuit has ceased its use of the former electronic Record on Appeal (“ROA”), in favor of direct reference to the district court’s electronic record. Counsel should consult the latest versions of the Sixth Circuit’s rules, including 6 Cir. R. 10, 27, 28, 30, and 101, and 6 Cir. I.O.P. 10 and 11.
- 8 See 6 Cir. I.O.P. 11(a)(1) (“When there is an electronic record, the district clerk will not transmit the portions of the record that are filed electronically to the court of appeals. The court of appeals will electronically access the district court record.”).

9 6 Cir. R. 30(b).

10 *Id.*

11 6 Cir. R. 30(f)(1) specifies the items that must either be available in the district court's electronic record or included in an appendix.

12 See generally 6 Cir. R. 30(a), (b), (c)(1), (d), (e) and (f).

13 6 Cir. R. 10(c).

14 6 Cir. R. 30(h).

15 6 Cir. R. 30(i).

16 6 Cir. R. 30(j).

17 *Id.*

18 6 Cir. R. 30(C)(2).

19 6 Cir. I.O.P. 10 explains that the intent behind distinguishing between "manageable" and "bulky" paper exhibits is "(1) to allow parties to include in an appendix copies of exhibits or excerpts of exhibits without burdening the court with extremely voluminous exhibits and (2) to provide for physical transmission of voluminous exhibits to the court as part of the record on appeal when immediate availability to the court of such exhibits is important to the appeal. If a party is uncertain as to how certain exhibits should be handled, the party should contact the case manager."

20 6 Cir. R. 31.

Stu's Tech Talk

by Stuart Friedman

Lessons Learned About the Michigan Court of Appeals' E-Filing System

On March 16, 2009, I attended a demonstration of the Court of Appeals new e-filing system presented to the Appellate Practice Section council by the clerk's office. Earlier that week, I e-filed my first case. This is what I have learned from this collective experience.

Introduction

E-filing is here. While technically still in the "pilot stage," the program is expanding and will soon include most appeals filed in the Michigan Court of Appeals. The pilot project started with appeals from the Michigan Public Service Commission and was later expanded to include criminal appeals in which parties were represented by the State Appellate Defender's Office and the Metro-Detroit prosecutors' offices.

Recently, the e-filing program has been expanded to all criminal cases and to civil cases commenced under the e-filing system in Oakland County Circuit Court. E-filed cases out of Oakland County are being singled out because that circuit court uses the same e-filing provider as

Fast Facts

- Court of Appeals now has optional e-filing in all criminal appeals and in civil appeals e-filed in the Oakland County Circuit Court.
- Law firm administrator needs to contact Wiznet to set up firm account. Sub-accounts can then be set up by your administrator.
- A small fee is charged for each e-filing.
- Cases can be opened online.
- Court of Appeals recommends use of multiple e-mail addresses so that notices are not lost. One account should be on a different domain in case of server failure.
- Appendixes should be a single document (unlike federal court).
- Court of Appeals e-filing forms are optional.
- Bookmarks in PDFs are encouraged; hyperlinks are discouraged.

the Court of Appeals (Wiznet). This has made it possible to create a greater integration between the Oakland County and Court of Appeals systems.

Wiznet makes money by charging a small fee (often under \$10) to handle the e-filing transaction. When compared to the cost of a runner or photocopies, this charge is a bargain. And for the procrastinators among us, we can e-file up until 11:59 p.m. on the date the brief is due. Wiznet allows the user to register a credit card for use in fee payment. There is also an alternative payment system for institutions where this is not practical.

Wiznet is different from the federal court system in several critical ways. First, users do not need to e-file each exhibit or attachment as a separate file. The Court of Appeals prefers two PDFs in most cases. The first PDF should be your brief, and the second one should include all of the attachments. In the

US District Court, filers must split the attachments into separate PDF files.

Continued on the next page

How to Remove Hyperlinks from Microsoft Word Documents

Microsoft Word is programmed to automatically turn references to e-mail addresses or web locations into hyperlinks which Adobe Acrobat automatically imports.

You can remove a single hyperlink without losing the display text or image, by right-clicking the hyperlink, and then clicking "Remove Hyperlink." To remove all hyperlinks in a document, press CTRL+A to select the entire document and then press CTRL+SHIFT+F9. (Note: Performing this operation converts all fields, not just hyperlinks, to plain text. It will not disturb other formatting such as underlining or italics).

To disable automatic hyperlinking at the outset, in Microsoft Office Word 2003 and in Microsoft Word 2002, follow these steps:

1. On the Tools menu, click AutoCorrect Options.
2. On the "AutoFormat as You Type" tab and on the AutoFormat tab, click to clear the "Internet and Network Paths With Hyperlinks" check box.
3. Click OK.

In Microsoft Office Word 2007, follow these steps:

1. Click the Microsoft Office Button, and then click Word Options.
2. Click Proofing, and then click AutoCorrect Options.
3. On the "AutoFormat as You Type" tab and on the AutoFormat tab, click to clear the "Internet and Network Paths With Hyperlinks" check box, and then click OK.

It is unclear whether or when e-filing will be expanded to the Michigan Supreme Court, but given the Michigan Supreme Court's current practice of posting merit briefs on its website and requesting copies of merit briefs on a CD-ROM (in addition to the printed copies), it would seem that the Court is heading in that direction.

E-filed documents are not available through the Court of Appeals online docketing system at the present time. This may change, but the Court is still considering a number of issues involving privacy and storage.

If an attorney is served a document by e-mail, that document may be downloaded more than once without charge and will remain online for at least 30 days.

Registration

The first step in registering for e-filing in the Court of Appeals is performed manually. Each firm must establish an account by contacting Wiznet by e-mail (*support@wiznet.com*) or phone (800-297-5377). Once the account is set up, the firm administrator can create various subaccounts for each user in the firm.

The Court of Appeals recommends creating a generic e-mail account for all e-filing in addition to individual user accounts. The Court also recommends creating an account on a separate domain in case the firm account goes down. A free account with Google (gmail), Microsoft (hotmail), or Yahoo is perfect for this. A list of registered generic addresses for prosecutors' offices and some law firms appears on the Court of Appeals website.

You will also need to establish a method for payment of filing and processing fees, unless you are exempted from filing fees.¹ Most firms will want to register a credit card with Wiznet, but alternative payment arrangements are available where this is not feasible. You should do this before filing your first pleading. Registration is easy and fast. I registered my account on the same day that I submitted my first e-filing with the Court. The staff was polite and efficient. Obviously, counsel should allow a few days for registration if facing a jurisdictional deadline.

You will also need your opponent's information for the digital proof of service at the time of e-filing. This includes both the traditional information as well as an e-mail address and telephone number. Wiznet electronically serves your opponent at your request.

When someone is electronically served, it will be through a notice advising that a document has been filed, with a link to retrieve the document. Unlike the federal system, the individual can download the document as many times as desired within a 30-day time period. (Right now, the documents are actually staying on the system more than 30 days, but this could change at any time.) Also unlike the federal system, there is a record when an individual retrieves the document which eliminates any question of whether the e-mail was actually delivered.

Forms

The Court of Appeals currently has created electronic versions of the Claim of Appeal, Brief Cover Sheet, Docketing Statement, Jurisdictional Checklist, and Motion to Extend Time. The forms are in "fileable" PDF format. The forms cannot be saved with Acrobat Reader, but they can be saved with Acrobat Professional or equivalent.²

Continued on the page 20

Federal Appellate Insider Tips

Everything you want to know about
the Sixth Circuit but were afraid to ask

Sponsor: State Bar of Michigan Appellate Practice Section

Thursday, June 4, 2009
St. John's Conference Center

Plymouth, Michigan • 1:00 p.m. - 4:30 p.m.
Cost: \$20 Members • \$35 Non-Members

Conference Agenda

1:00 p.m. - 3:00 p.m.	SIXTH CIRCUIT CLERKS	2:30 p.m. - 3:00 p.m.	Q&A Session – Clerk's office representatives and prior speakers
1:00 p.m. - 1:30 p.m.	Filing and Jurisdictional Issues Regarding Appeals – 6th Circuit Clerk Leonard Green's Representative	Break	
1:30 p.m. - 2:00 p.m.	Record on Appeal – e-filing briefs, technical issues, briefing questions – 6th Circuit Case Manager	3:00 p.m. - 4:30 p.m.	SIXTH CIRCUIT JUDGES
2:00 p.m. - 2:30 p.m.	Ins and Outs of Working with the Settlement Office – Robert W. Rack, Jr., 6th Circuit	3:00 p.m. - 4:30 p.m.	Judges Panel – Written and Oral Advocacy, Preferences and Pet Peeves – Moderated by Mary Massaron Ross, Jill M. Wheaton and Marcia L. Howe
		4:30 p.m. - 5:00 p.m.	RECEPTION



Appellate Practice Section

REGISTRATION FORM

Federal Appellate Insider Tips • June 4, 2009

Cost: \$20 Members; \$35 Non-Members

**Please RSVP by
June 1, 2009**

Name: _____ **City, State, Zip:** _____

Title: _____ **Phone:** _____

Firm: _____ **Fax:** _____

Address: _____ **E-mail:** _____

Please return registration form to: Dykema Gossett • Attn: Jill M. Wheaton • 2723 S. State St., Suite 400 • Ann Arbor, MI 48104, call (734) 214-7629. For further information, contact Mary Massaron Ross, Plunkett Cooney, at (313) 983-4801 or mmassaron@plunkettcooney.com

The New Michigan Supreme Court and the Law

By Ron Lederman, Sullivan Ward Asher & Patton PC

Following the 2008 election, which saw Justice Diane Hathaway (Democrat) ascend to our state's highest court in place of former Chief Justice Clifford Taylor (Republican), many observers began contemplating the effect of the shift on Michigan substantive law. This past decade saw a spate of controversial opinions by predominantly conservative jurists, often decided by a vote of 4 to 3. While the Republican-nominated justices still comprise the Court's majority, Justice Elizabeth Weaver has more often aligned in recent years with the dissenters, and her independent thinking is expected by many to play an important role as the Court moves forward in the face of precedent created by the former conservative majority. Indeed, in a recent order issued in *Sazima v Shepherd Bar & Restaurant*, __ Mich __ (2008), Justice Robert Young observed that "it is entirely likely that I will soon be in the philosophical minority on this Court."

What follows is a brief summary of some of the more prominent opinions and issues in civil litigation that may earn re-examination by this newly comprised Court. *It is not intended, however, and should not be viewed as an editorial on the propriety or wisdom of the legal authority addressed.*

The Common Law Discovery Rule

In *Trentadue v Gorton*, 479 Mich 378 (2007), the former majority overruled several decades of common law that allowed tolling of statutes of limitations pending discovery of the cause of action [e.g., discovery of the wrongful act or of the manifestation of damages]. *Trentadue* rejected the rule applied in *Johnson v Caldwell*, 371 Mich 368 (1963) and in other opinions holding that a statute of limitations does "not start to run until the date of discovery, or the date when, by the exercise of reasonable care, plaintiff should have discovered the wrongful act." 371 Mich at 389. The former majority reviewed the relevant statutory language afresh and concluded that "the statutory [limitations] scheme is exclusive and thus precludes this common law practice of tolling accrual based on discovery in cases where none of the statutory tolling provisions apply." 479 at 389.

Justices Weaver, Marilyn Kelly and Michael Cavanagh dissented in *Trentadue*, preferring to adhere to precedent under the doctrine of *stare decisis*. They wrote for the continued application of the common law discovery rule.

Most recently, the Michigan Court of Appeals applied *Trentadue* in *Terlecki v Silver Lake*, 278 Mich App 644 (2008). Leave to appeal in *Terlecki* was denied by the Supreme Court on November 21, 2008 (Docket No. 136509), with Justices Kelly, Cavanagh, and Weaver dissenting.

Future consideration of the common law discovery rule seems likely. [In fairness, the author discloses that he prepared and filed a brief in *Trentadue* on behalf of *amicus curiae* favoring the continued enforcement of the discovery rule].

Open and Obvious Doctrine

In *Lugo v Ameritech Corporation, Inc.*, 464 Mich 512 (2001), the Michigan Supreme Court re-emphasized that a premises possessor's duty to exercise reasonable care to protect an invitee from an unreasonable risk of harm caused by a dangerous condition on the land does not extend to "open and obvious dangers." The logic behind this doctrine is that open and obvious dangers are avoidable and thus really no danger to a reasonably careful person.

The majority in *Lugo* limited exceptions to this "no duty" rule to circumstances in which the "special aspects of a condition make an open and obvious risk unreasonably dangerous." *Id.*, at 517. Examples of special aspects that would cause even an open and obvious condition to become actionable are those that make the condition "effectively unavoidable" or those that "impose an unreasonably high risk of severe harm." *Id.*, at 518.

Various commentators have criticized *Lugo* for ignoring the dictates and import of Michigan's comparative fault statute, MCL 600.2957. Others point to the concurrences in *Lugo*, which observed that the "special aspects" standard set forth by the majority was more restrictive and otherwise contrary to Michigan's common law. *Id.*, at 544.

It should be pointed out, however, that whatever concerns there may be over *Lugo*, the concurring justices did agree with the majority that, as a general rule, a premises possessor does not owe a duty to protect against open and obvious dangers. They differed instead on the restrictive "special aspects" test adopted by the majority in considering exceptions to the "no duty" rule. Justices Cavanagh, Weaver, and Kelly advocate a more liberal approach toward this question of duty where the invitee is unable to protect himself or herself even if the danger is discovered or realized. *Id.*, at 530.

This author does not anticipate abrogation of the open and obvious danger doctrine by the new Supreme Court. What we will more likely see is a softening in its application. Indeed, one scenario that might be revisited is the slip and fall on snow and ice case, which is largely non-actionable under *Lugo*. The former majority preferred an objective view of open and obvious, and believed that the risks presented by a snow-covered surface during Michigan winters are always open and obvious, absent some special aspect. See, e.g.,

Kenny v Kaatz Funeral Home, Inc., 472 Mich 929 (2005). This approach may well be revisited by the “new majority,” in the “black ice” cases. Whether black ice should be deemed open and obvious as a matter of law was recently rejected by the Michigan Court of Appeals in *Slaughter v Blarney Castle Oil Company*, 281 Mich 474 (2008). Leave to appeal is pending before the Michigan Supreme Court.

No-Fault Threshold Injury

In *Kreiner v Fisher*, 471 Mich 109 (2004), the former majority issued what might be its most controversial opinion, at least in the field of personal injury litigation, where it interpreted the statutory term “serious impairment of a body function” for purposes of Michigan’s No-Fault Act. *Kreiner* continued the decades-old debate about the scope of this legislatively imposed limit on tort recovery under no-fault. The majority applied its favored “textualism” approach to interpreting the statutory phrase “an objectively manifested impairment of an important body function that affects the person’s general ability to lead his or her normal life.” MCL 500.3135(7). It concluded that such a threshold requires that “the objectively manifested impairment of an important body function must affect the course of a person’s life.” 471 Mich at 130. An injury that results in minor changes in how the injured person performs daily activities would not suffice to satisfy the threshold.

Kreiner has been greatly criticized. It even triggered efforts by some Democrats in the state legislature to amend the statutory language, efforts which to date have been unsuccessful. Expect the new Supreme Court to continue to grapple with the parameters of threshold injuries under no-fault, a system designed to limit but not bar tort litigation in exchange for unlimited PIP benefits. One hint at how a new majority might view the rule of *Kreiner* is Justice Cavanagh’s dissent, joined by Justices Weaver and Kelly, in which he states that the majority decision “serves as a chilling reminder that activism comes in all guises, including so-called textualism.” 471 Mich at 157. See also *Benefiel v Auto Owners Insurance Company*, 482 Mich 1077 (2008) (Cavanagh, dissenting).

Strict Enforcement of Statutory Notice Provisions

The Governmental Immunity Act provides that, to invoke certain exceptions to the defense of governmental immunity, a plaintiff must provide notice of the claim in accordance with requirements of the Act. For some 30 years, the Michigan Supreme Court has held that failure to provide notice within the specified period does not bar suit against a governmental agency unless the agency has been prejudiced by the lack of such notice. See, e.g., *Hobbs v Department of State Highways*, 398 Mich 90 (1976) (addressing the notice provision applicable to the “public highway” exception to governmental

immunity). In *Rowland v Washtenaw Road Commission*, 477 Mich 197 (2007), the majority overruled *Hobbs* and its progeny, and held that the notice provision of MCL 691.1404 must be strictly enforced regardless of whether the failure to timely provide pre-suit notice resulted in prejudice. *Rowland* was given full retroactive effect, notwithstanding *Hobbs* and other cases that relaxed the statutory requirement upon a showing of the absence of prejudice.

Rowland was recently applied by the former majority to strictly enforce the notice provision applicable to the public building exception in *Chambers v. Wayne County Airport Authority*, 482 Mich 1136 (2008). Again, Justices Weaver, Cavanagh, and Kelly dissented, with Justice Kelly in particular voting to reconsider the dictates of *Rowland*. Plaintiff in *Chambers* has filed a motion for reconsideration. With the potential shift in the judicial philosophy of the majority of justices on the bench, *Chambers* may indeed serve as a vehicle to re-examine *Rowland*.


The One-Year-Back Rule and the Doctrine of Judicial Tolling

The statutory one-year-back rule limits the recovery of first party (PIP) benefits to losses incurred within one year of the date an action for PIP benefits is commenced. MCL 500.3145(1). Overruling nearly 20 years of case law beginning with *Lewis v DAIIE*, 426 Mich 93 (1986), the Michigan Supreme Court in *Devillers v ACIA*, 473 Mich 562 (2005) held that the one-year-back rule must be strictly enforced and did not allow common law judicial tolling. Prior decisions had permitted tolling from the time a PIP claim was submitted to the insurer until the time the insurer denied the claim. The majority in *Devillers* did reaffirm that Michigan courts retain the equitable power to toll a limitations period or estop a limitations defense in “unusual circumstances,” including but not limited to the existence of fraud or mutual mistake. 473 Mich at 590. But it determined that equity did not warrant tolling in that case.

The majority opinion in *Devillers* triggered stinging dissents from Justices Cavanagh, Kelly and Weaver. Justice Cavanagh in particular observed that “equitable tolling has a venerable history in federal and state jurisprudence that today’s majority ill-advisably chooses to disregard in favor of denigrating the purposes of the No-Fault Act.... The citizens of Michigan, and the Legislature, deserve better.” *Id.*, at 572.

Expect the new Michigan Supreme Court to take an early opportunity to re-evaluate the breadth and limits of judicial tolling in Michigan.

Conclusion

Brace yourselves, ladies and gentlemen. This could get interesting! 

Recent Decisions of Interest to the Appellate Practitioner

Timing of Circuit Court Appeals from Administrative Decisions

Pontiac Food Center v Dept of Community Health,
___ Mich App ___ (2008) (Docket No. 277281) (S Ct application pending)

Pontiac Food Center was a vendor for “WIC,” a federal program that provides nutritional assistance to women, infants, and children. When the Department of Community Health terminated its contract due to minor accounting irregularities, the center sought review before an administrative law judge, who upheld the termination. The center then filed an appeal with the circuit court. That appeal was dismissed as untimely, and the center appealed to the Court of Appeals. After outlining the “three possible avenues of relief... available to a party seeking judicial review of an administrative agency’s decision,” the Court determined that the center’s appeal was governed by the provisions in its agreement with the department, a contract formed under the federal act. Michigan’s Administrative Procedures Act, MCL 24.201 *et. seq.*, with its 60-day window for appeals, did not apply.

Appellate Attorney Fees

Bonkowski v Allstate Ins Co, 281 Mich App 154 (2008)
(S Ct application pending)

This appeal involved a denial of attendant care PIP benefits. Plaintiff insured prevailed on his claim for benefits and asked for appellate attorney fees, claiming a vexatious appeal. The court denied the request, because the insurer’s grounds for opposing the award were reasonable, and in fact, the insurer did prevail on appeal on some issues. An appeal is vexatious only if taken for hindrance or delay or without any reasonable basis or belief that there is a meritorious issue. The court also reiterated the rule that a request for vexatious appellate attorney fees must be made by motion.

New Properties, Inc v Kitchen, unpublished per curiam opinion of the Court of Appeals, decided January 20, 2009 (Docket No. 280153)

Appellate attorney fees were allowed under MCL 600.2919a(1), a provision in the Revised Judicature Act that creates special remedies for civil actions involving embezzlement/receiving stolen property. The statute expressly allows the recovery of “3 times the amount of actual damages sustained, plus costs and reasonable attorney fees.” *Id.* After pointing out that “the statute does not explicitly authorize or prohibit the recovery of post judgment attorney fees,” the court considered the purpose of the statute and the manner in which other similar statutes have been applied. The request for post-judgment and appellate attorney fees was allowed.

Federal Appellate Court Jurisdiction—Final Order

Swegan v Buckeye Retirement Co,
555 F3d 510 (6th Cir 2009)

The bankruptcy court granted debtor’s motion to discharge his debt to the defendant, who objected on grounds of concealment. The Bankruptcy Appellate Panel (BAP) reversed and remanded, finding that the lower court’s view of concealment was too narrow and there were questions of fact on that score. The debtor then filed a notice of appeal to the 6th Circuit, which ultimately held that “[t]here is no appellate jurisdiction to review the BAP’s reversal of summary judgment, because the BAP’s decision is not a final judgment.” “The BAP’s decision contemplates further non-ministerial proceedings and, therefore, . . . is not a final order over which we have appellate jurisdiction.”



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.

Final Judgment Allows Review of Prior Orders, Including Decisions

Green v Ziegelman, unpublished per curiam of the Court of Appeals, decided February 3, 2009 (Docket No. 280624)

Appeal from a final order enforcing an arbitration award allowed for the review of pre-arbitration summary disposition rulings of the same circuit court that resolved disputes over the terms of the arbitration agreement.


Standard of Review for WCAC's Dismissal of an Appeal for Breach of the 70 Percent Rule

Adrine v Event Staffing, Inc., unpublished per curiam opinion of the Court of Appeals, decided February 3, 2009 (Docket No. 281360)

The Workers' Compensation Appellate Commission (WCAC) dismissed the employer's appeal for failure to pay 70 percent of the employee's benefits while the appeal was pending. This was after the employer and its insurer brought payments up to date and promised to continue making them upon learning of the omission. One issue on appeal in the Court of Appeals concerned the constitutional authority of that Court to review such discretionary rulings of the WCAC. The Court concluded that its broad grant of jurisdictional authority did allow such review. "It is well established through the decisions of this Court and our Supreme Court that the abuse of discretion standard of review applies to the appellate review of the decisions of the WCAC to dismiss appeals on procedural grounds." The Court determined that the WCAC did abuse its discretion and remanded the case for a determination on the merits of the appeal.

Standard of Review for Retirement Benefit Ruling

Johnson v State Employees' Retirement Board, unpublished per curiam opinion of the Court of Appeals, decided February 3, 2009 (Docket No. 278248)

Circuit court review of a decision of the State Employees' Retirement Board "is limited to determining whether the decision was contrary to law, was supported by competent, material, and substantial evidence on the whole record, was arbitrary or capricious, was clearly an abuse of discretion, or was otherwise affected by a substantial and material error of law." The Court of Appeals then reviews the circuit court decision for clear error. 

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

By Linda M. Garbarino

This is an ongoing column which provides a list of cases pending before the Supreme Court by order directing oral argument on application. The descriptions are intended for informational purposes only and cannot and do not replace the need to review the cases themselves.

ORAL ARGUMENT YET TO BE SCHEDULED

Dept of Human Services v McBride, S Ct 136 988, COA 282062

Family Law: Whether the trial court violated MCL 712A.17c and MCR 3.915(B)(1) by denying the father's request for the appointment of counsel to represent him at trial on a supplemental petition for termination of his parental rights; whether the trial court violated the respondent's due process rights by denying the request for counsel; whether, if the trial court violated MCL 712A.17c, MCR 3.915(B)(1) or the Due Process Clause, such an error may be harmless; whether the Department of Human Services is asserting inconsistent positions regarding the harmlessness of the error in denying counsel; if a denial of a request for counsel can constitute harmless error, whether the existence of an alternate placement plan or guardianship option, such as those provided for in MCL 712A.19a(7) and MCL 700.4201-5219, can prevent a denial of a request for counsel from being harmless; and, if the existence of an alternate placement or guardianship option can prevent a denial of a request for counsel from being harmless, by what standard should a court evaluate foreseeability of the alternative placement or guardianship option in determining whether the error was harmless.

People v Holder, S Ct 137486, COA 286100

Criminal: Whether the judgment of sentence was valid when imposed because the defendant was not on parole at the time he committed the offense, despite subsequent effort to cancel his parole discharge; whether the trial court lacked authority to later modify the judgment of sentence.

Continued on the next page

***People v Kircher*, S Ct 137652, COA 275215**

Criminal: Whether the plain language of MCL 324.3115(4) requires a determinate sentence of five years for posing a substantial endangerment to the public health, safety, or welfare, or whether the inclusion of that statute in MCL 777.13c requires the imposition of an indeterminate sentence.

***People v Lowe*, S Ct 137284, COA 286373**

Criminal: Whether with respect to a defendant subject to sentence enhancement under MCL 333.7312(2), the minimum sentence range recommended by the sentencing guidelines may be doubled; whether this question was correctly decided in *People v Williams*, 268 Mich App 416 (2005); and what impact, if any, MCL 777.21(4) has on this question.

DECISIONS PENDING/ORAL ARGUMENT ALREADY CONDUCTED

Argued October 2, 2008

***Moore v Secura Ins*, S Ct 135028, COA 267191**

No Fault: Whether under the No Fault Act attorney fees and costs were recoverable because the benefits were overdue, there was an unreasonable refusal to pay the claim, or there was unreasonable delay in making payment.

***People v Parks*, S Ct 126509, COA 244553**

Criminal: Whether evidence of prior accusations of sexual abuse by the victim against another person not the defendant is admissible.

Argued October 22, 2008

***Estate of Alice J. Raymond/Morse v Sharkey*,
S Ct 134461, COA 267364**

Probate: Whether language in a will is sufficient to convey the possibility that the claims of “brothers and sisters that survive me” might have no members; whether the language “or to the survivors thereof” creates an alternative devise to the descendants of predeceased siblings of the testator which only takes effect if all of the testator’s siblings predecease; what significance, if any, should be attributed to the placement of the language “share and share alike” in the middle of the pertinent clause, rather than at the end; and what effect, if any, the antilapse statute should have on the will language.


Argued November 19, 2008

***Sazima v Shepherd Bar & Restaurant*,
S Ct 136940, COA 281855**

Workers’ Comp: Whether the decision of the Workers’ Compensation Appellate Commission is contrary to the Court’s decision in *Simkins v GMC*, 453 Mich 703 (1996), which held that when an employee is going to work or coming from work, an injury that occurs on property not owned, leased, or maintained by his employer is in the course of his employment only if the employee is traveling in a reasonably direct route between the parking area owned, leased, or maintained by the employer and the work site itself.

Argued December 3, 2008

***Chambers v Wayne County Airport Authority*,
S Ct 136900, COA 277900**

Governmental Immunity: Whether the plaintiff satisfied the notice requirement of MCL 691.1406 and whether constructive notice may be deemed sufficient given the statute’s lack of definition of “notice.” 

Linda M. Garbarino is a civil practitioner who heads the appellate group at the law firm of Tanoury, Corbet, Shaw, Nauts, Essad & Beutel, P.L.L.C.

**Attorneys Needed to Identify
Accessibility Issues for People
with Disabilities**

The State Bar of Michigan will be conducting an online survey during the next few months to better understand the current issues related to access to justice for people with disabilities.

Two attorney populations are asked to participate – attorneys with disabilities, and attorneys who have represented clients with disabilities within the past two years. If you are a member of either of these populations and are willing to share your experiences and views, please submit your contact information by clicking on the following link: <http://www.michbar.org/participate.cfm>.

The aim of the survey is to determine the availability of policies and programs and the responsiveness to accommodation requests over the past few years, and to formulate strategies that will ensure fairness and accessibility within the justice system. The survey is a follow up to a study done by the now-defunct Open Justice Commission in 2001. That study’s findings can be found at www.michbar.org/programs/ATJ/pdfs/disabilities.pdf.



Recommended Reading for the Appellate Lawyer

By Mary Massaron Ross

For this issue, I have reviewed several books about President Abraham Lincoln on the 200th anniversary of his birth. So many well-written and thought-provoking books about Lincoln have been published that it is as difficult to choose which to write about as it is to write the discussion. Some of them focus on Lincoln's facility with words, some on his presidential decisions, some on Lincoln and his family, and some are simply short collections of quotations or speeches or stories he told.

Team of Rivals: The Political Genius of Abraham Lincoln

Doris Kearns Goodwin

(Simon & Schuster Paperbacks 2005)

Doris Kearns Goodwin, a well-regarded biographer, wrote this book focusing on Lincoln as illuminated by a study of his rivals for the 1860 nomination, each of whom were incorporated “into his political family, the cabinet....” Goodwin reads in Lincoln’s willingness to appoint these men to positions high in the government “evidence of a profound self-confidence and a first indication of what would prove to others an unexpected greatness.” She notes that each of his rivals was “better known, better educated, and more experienced in public life than Lincoln,” yet he was able to bring them into public life and remain in charge.

Goodwin’s book is of great interest lately because President Obama is known to have studied it, along with other accounts of Lincoln, as he begins his administration. Goodwin does not hold back in her praise of Lincoln. There are those who suggest that a biographer must fall in love with her subject to write a good biography. I don’t know if this is true—but Goodwin’s praise of Lincoln’s leadership is fulsome. In Goodwin’s view, Lincoln “possessed an acute understanding of the sources of power inherent in the presidency, an unparalleled ability to keep his governing coalition intact, a tough-minded appreciation of the need to protect his presidential prerogatives, and a masterful sense of timing.” She infers from his treatment of his rivals “decency and morality—kindness, sensitivity, compassion, honesty, and empathy....” She lauds his “profound self-awareness,” his “gift for storytelling and his life-affirming sense of humor.”

Some biographers fill the pages of their books with a tedious account of every fact they find in their research.

Goodwin pares and focuses her discussion on details that illuminate her larger theme. Although we know the outcome in history, Goodwin gives her account a narrative thrust that pulls the reader along from page to page out of a desire to find out what happens next.

For example, Goodwin recounts an instance in which Lincoln gave a congressman authorization for the War Department’s help in a project. According to Goodwin, “[w]hen Stanton refused to honor the order, the disappointed petitioner returned to Lincoln, telling him that Stanton had not only countermanded the order but had called the president a damned fool for issuing it.” Goodwin tells the story: “} Did Stanton say I was a d____d fool?’ Lincoln asked. ‘He did, sir,’ the congressman replied, ‘and repeated it.’ Smiling, the president remarked: ‘If Stanton said I was a d____d fool, then I must be one, for he is nearly always right, and generally says what he means. I will step over and see him.’”

Lincoln and Stanton became close friends during their years of service together. And Goodwin’s account of their evolving relationship is fascinating and offers insight into Lincoln’s method of leadership. When Stanton sought appointment to the Supreme Court to replace Justice Taney, Lincoln refused. He explained to a bishop who was urging the appointment, “Bishop, I believe every word you have said. But where can I get a man to take Secretary Stanton’s place? Tell me that, and I will do it.”

Goodwin’s biography is well worth reading.

Lincoln as a Writer

Several books about Lincoln’s power with words are worth reading. In addition to the one I have chosen to talk about, an excellent account of Lincoln’s use of language can be found in Ronald C. White, Jr. *The Eloquent President: A Portrait of Lincoln Through His Words*, which was published by Random House Trade Paperbacks in 2005. White wrote another book focused entirely on one speech of Lincoln’s, his second inaugural address. That book, *Lincoln’s Greatest Speech: The Second Inaugural* sets forth the history of the second inaugural and analyzes the text of Lincoln’s speech. Douglas L. Wilson lauds Lincoln’s use of language in *Lincoln’s Sword: The Presidency and the Power of Words*, published by

Vintage Books in 2006. Harold Holzer describes Lincoln's campaign speech at Cooper Union in *Lincoln at Cooper Union: The Speech that Made Abraham Lincoln President*, an award-winning book published by Simon & Schuster in 2005. Holzer places the speech in context, and describes how it dispelled doubts about whether Lincoln would be a good president. Those who would simply like to read some of Lincoln's speeches can find them in a slim and inexpensive volume published by Dover entitled *Great Speeches: Abraham Lincoln*. The book includes the text of Lincoln's "house divided" speech, his speech at Cooper Union, his farewell address in Springfield, his two inaugural addresses, and a number of other important speeches.

Lincoln: The Biography of a Writer

Fred Kaplan

(Harper Collins 2008)

Kaplan calls Lincoln the "Twain of our politics" because of the power with which he wrote. According to Kaplan, "Lincoln became what his language made him." Kaplan's account focuses on Lincoln's early childhood love of reading, his developing reputation as someone who was very smart, and his ability to tell stories, often about books he was reading.

Kaplan lists the books that Lincoln is known to have read, and analyzes the lessons he undoubtedly took from them. As a very young boy, Lincoln loved *Robinson Crusoe* and *Arabian Nights*. He also read *Pilgrim's Progress*, Noah Webster's *Speller*, Lindlay Murray's *The English Reader*, and William Scott's *Lessons in Elocution*. These were coupled with readings from the Bible and Shakespeare. Kaplan's book is filled with quotations from family and neighbors about Lincoln's voracious reading and his desire to learn through books.

His early learning laid the foundation for Lincoln's later study of the lives of great men. He read biographies and histories, including William Grimshaw's *History of the United States*, a book emphasizing the "forging of a nation. . . ." Lincoln also began to read poetry as a teenager, a study that resulted in his trying to write poetry himself. Lincoln's study led him to believe that "[r]eason, logic, and experience seemed best for guides" and not that "which could not be proven or rather demonstrated," according to a friend.

Lincoln often read aloud, a practice he adopted as a means of better learning the text, and as "an aspect of oral performance. . . ." As Lincoln studied, he mastered more and more material. He once said, "My mind is like a piece of steel, very hard to scratch anything on it and almost impossible after you get it there to rub it out." The anthologies he studied offered "lessons in elocution, from which it is a short step to oratory." Lincoln also began

to draw on these works for "words of wisdom and moral guidance" that he "later reworked" into his speeches and writings.

Kaplan's account of Lincoln's education and development as a writer will interest any reader who is interested in history; it illuminates Lincoln's life as a politician and president and leader. Kaplan's account of Lincoln's education and development as a writer is also fascinating for any reader interested in learning more about the building blocks to becoming a great writer. Since most lawyers, like Lincoln, deal with words in almost everything they do, this book is a winner.

***The Wit and Wisdom of Abraham Lincoln:
A Book of Quotations***

Edited by Bob Blaisdell

(Dover Publications 2005)

Some public figures have a unique and compelling way of presenting their thoughts. Few surpass Lincoln as a public speaker. Lincoln's legendary storytelling ability helped him succeed as a lawyer, helped him to win public office, and helped him to lead the country during its most difficult time. He left countless documents with witty and wise sayings that are worth rereading. This book is filled with quotable quotes. For instance, Lincoln said, "As I would not be a slave, so I would not be a master. This expresses my idea of democracy. Whatever differs from this, to the extent it differs, is not democracy." On another occasion, Lincoln's notes for a lecture on the law reflect this thought: "Resolve to be honest at all events; and if, in your own judgment, you cannot be an honest lawyer, resolve to be honest without being a lawyer. Choose some other occupation."

Lincoln said of Douglas, "Douglas is a great man—at keeping from answering questions he don't want to answer." Lincoln's frustration in debating Douglas and trying to get his points across is a not-unfamiliar feeling for most lawyers. On another occasion, Lincoln said of Douglas, "It is impossible to get the advantage of him. Even if he is worsted, he so bears himself that people are bewildered and uncertain as to who has the better of it." He also said, "Douglas managed to be supported both as the best instrument to put down and to uphold the slave power; but no ingenuity can long keep these antagonisms in harmony."

Lincoln offered advice for lawyers in some of the lectures that he gave. In one, he told them that "[e]xtemporaneous speaking should be practiced and cultivated. It is the lawyer's avenue to the public." But he also cautioned that it would be a "fatal error" to rely "too much on speech-making. If anyone, upon his rare powers of speaking, shall claim an exemption from the drudgery of the law, his case

is a failure in advance.” In one speech, Lincoln remarked on the length of his speeches. He said, “You know that it has not been my custom, since I started on the route to Washington, to make long speeches; I am rather inclined to silence, and whether that be wise or not, it is at least more unusual nowadays to find a man who can hold his tongue than to find one who cannot.”

Lincoln’s comments on his generals and the war he led them to fight are at various times inspirational, sad, and humorous. Here is a remark he made about General Grant when someone complained that he drank. “So Grant gets drunk, does he? ... Well, you needn’t waste your time getting proof; you just find out, to oblige me, what brand of whiskey Grant drinks; because I want to send a barrel of it to each one of my generals.” Lincoln’s frustration at the overly-cautious approach of General McClellan is well-known to those who have read Civil War history. In response to one communication from McClellan, Lincoln wrote, “I have just read your dispatch about sore-tongued and fatigued horses. Will you pardon me for asking what the horses of your army have done since the battle of Antietam that fatigue anything?” On another occasion after McClellan had planned to send boats up the Potomac River canal when they would not fit, Lincoln remarked, “Why in tarnation ... couldn’t the general have known whether a boat would go through a lock before spending a million dollars getting them there? I am no engineer, but it seems to me that if I wished to know whether a boat would go through a ... lock, common sense would teach me to go and measure it. I am almost despairing of these results.”

If you enjoy reading quotations, or like to keep books of quotations for use in speeches or briefs, this book is worth getting.

***Lincoln on Leadership:
Executive Strategies for Tough Times***

Donald T. Phillips

(Warner Books 1992)

Lincoln’s ability to inspire and lead others, even in extremely difficult times, was remarkable. And anyone who wants to improve his leadership abilities would benefit from reading this book.

Phillips offers a compelling and well-organized discussion of the traits and tactics used by Lincoln to lead. His discussion includes liberal quotation from Lincoln’s speeches and correspondence to illustrate the points he makes. Phillips begins each chapter with a list of Lincoln principles and a quotation. He then elaborates on those principles as they apply to today’s leaders in business, politics, and the community.

One mark of a great leader, according to Phillips, is the practice of getting out of the office and circulating among the troops. Lincoln relieved one of his generals for failing on this point, noting that General Fremont’s “cardinal mistake is that he isolates himself, & allows nobody to see him; and by which he does not know what is going on in the very matter he is dealing with.” Lincoln’s hands-on approach included allowing people to drop by to see him, making himself accessible through public receptions, standing in the rain to greet his soldiers, and visiting hospitals and private funerals to pay his respects.

Another attribute of a great leader is to persuade. Lincoln understood this, noting “With public sentiment, nothing can fail; without it, nothing can succeed. Consequently, he who molds public sentiment goes deeper than he who enacts statutes or pronounces decisions.” Lincoln also understood that to persuade someone required the advocate to “convince him that you are his sincere friend.” Lincoln believed that doing so was “the great high road to his reason, and which, when once gained, you will find but little trouble convincing his judgment of the justice of your cause, if indeed that cause be really a just one.” Lincoln “preferred making requests as opposed to issuing orders” to his generals, writing to one, “This letter is in no sense an order.” He wrote another, “I hope you will consider it...”

Phillips devotes a chapter to the impact of character on leadership, focusing on honesty and integrity as illustrated by Lincoln. He also devotes a chapter to the magnanimous spirit that Lincoln evidenced in his presidency. Lincoln’s rejection of “malice” in speeches and correspondence is well-known. Lincoln often exercised clemency to soldiers who ran during battle, remarking, “If Almighty God gives a man a pair of cowardly legs, how can He help their running away with him?” He told one general, “I am bound to oppose the escape of Jeff Davis; but if you could manage to let him slip out *unbeknownst-like*, I guess it wouldn’t hurt me much.” And when the Civil War finally ended, Lincoln requested that “Dixie” be played “at a rally outside the White House,” a step intended to show “that Lincoln would not seek revenge now that the War was ended.”

Other chapters focus on Lincoln’s nuanced thinking and mastery of paradox, his ability to be decisive, his self-confidence and willingness to encourage his followers to succeed and to recognize their successes, his goal-setting and encouragement of innovation, and finally, his ability to communicate.

This slim volume is a wonderful read, filled with stories about Lincoln’s leadership, quotations worth using, and ideas worth emulating. I highly recommend it. 📖

Shannon's Soapbox

By Brian Shannon



It's a minor annoyance at worst, but why are we still attaching unpublished decisions to our briefs if they are readily available on public sites? Oh, right—we have to. MCR 7.215(C)(1) says so.

Surely it's time to amend this rule and bring it into the 21st century. Maybe save a few trees. The section's chair, Barb Goldman, suggested this in the last newsletter, and I've been thinking about it myself. There was a thread on the section listserv 18 months ago on this subject, and Jerry Schrottenboer suggested that perhaps Michigan should consider adopting the new federal rule, Fed. R. App. P. 32.1(b). Barb's suggestion was a little different, so I'll propose two alternatives (as the Supreme Court recently did on another topic).

First the federal rule, for those who haven't seen it yet. Old Sixth Circuit Rule 28(g) required attachment of unpublished opinions, much like the current Michigan rule but with language about the use being disfavored. Federal Rule of Appellate Procedure 32.1(b) changed the rule in most instances:

(b) Copies Required. *If a party cites a federal judicial opinion, order, or other written disposition that is not available in a publicly accessible electronic database, the party must file and serve a copy of that opinion, order, judgment, or disposition with the brief or other paper in which it is cited.*

Rule 32.1(b) has been in effect for more than two years now and seems to be working. Most of the publicity surrounding the rule concerned Rule 32.1(a), which permitted citation of unpublished decisions (from 2007 forward) in jurisdictions that previously had barred citation, like the Ninth Circuit. Rule 32.1(b) went largely unnoticed.

It wasn't clear to me if the phrase "publicly accessible electronic database" includes sites like Westlaw and Lexis that charge for access but provide it to any member of the public who cares to pay (or who has access to a law school library). I'm told by the Sixth Circuit clerk's office that the phrase does include both free and for-profit electronic databases.

Some individuals who file briefs in the Court of Appeals, I assume, do not have access to those services or any of the other for-profit research services available.

I suppose a line has to be drawn somewhere, since there are still people in the world without computers or ready

Internet access who have a threshold problem more basic than whether the access is free or not. They wouldn't know what to do with a link to the opinion on the Court of Appeals' website, much less a citation to the case on a for-profit database. As litigants go, however, these people are the exception, and the only rule that would work for them is the current one.

My proposed revision to the Michigan rule, which follows, led me to try revising another important rule that we all use with every brief we write, whether we reread it every time or not. I'd delete the second sentence in MCR 7.215(C)(1), because many lawyers will miss it there, and move the idea to MCR 7.212(C)(7), the rule governing arguments in appeal briefs. That's where it logically belongs. MCR 7.212(C)(7) has become long and dense because of previous add-ons. It would benefit greatly by being broken up like (C)(6), the "facts" portion of the same rule. Thus:

(7) The arguments, each portion of which must be prefaced by the principal point in capital letters or boldface type. As to each issue, the argument must:

(a) state the standard or standards of review that apply, with supporting authorities;

(b) state whether and where the issue was preserved for appeal, with specific page references to the transcript or other portion of the record showing preservation, or authorities showing why an unpreserved issue should be reviewed;

(c) cite the record specifically by page to support facts stated, or reference where in the statement of facts the record citations appear;

(d) quote or attach the relevant portion, if the issue requires the study of a constitution, statute, ordinance, rule, judgment, order, written instrument or document;

(e) send the court a copy of the presentence report when the brief is filed, if a sentencing issue is presented in a criminal appeal; and

(f) attach a copy of any unpublished judicial opinion, order, or other written disposition that is not available in a publicly accessible electronic database.

Or, as an alternate (call it f-2):

(f) attach a copy of any unpublished judicial opinion, order, or other written disposition, except that unpublished decisions of this court released after July 1, 1996, need not be attached if the citation references this court's case number.

While subdividing MCR 7.212(C)(7), I took the liberty of making a few minor style changes, but (aside from proposed (f-1) and (f-2)) only one or two changes that require comment.

In the “preservation” subparagraph, (b), I think it would be good to spell out better what the attorney should do with issues that are *not* preserved. Experienced appellate attorneys do this already, but the uninitiated will benefit by being told that there’s a better choice than just ignoring the problem.

In (c), the current language appears to require that record cites *must* be duplicated in the argument even if they already appear in the facts, where the citations also are required. That’s not how experienced appellate counsel write, especially with facts of minor significance to the argument. Requiring duplicate record cites to all facts wastes space (when the requirement isn’t simply ignored by the writer).

COA website vs any database

Barb Goldman, I’m guessing from her last column, leans towards relaxing the attachment requirement just for opinions on the Court of Appeals website. The “f-2” approach is friendliest to parties who have Internet access but don’t subscribe to a for-profit legal research company. The federal rule, on the other hand, focuses on electronic availability, period, and would relax the attachment requirement more often.

It shouldn’t matter which approach is taken from the Court’s point of view. I think the Court of Appeals staff has “free” access to one or more for-profit legal research providers, as do the chambers of many trial courts, at least with respect to Michigan opinions.

It also won’t matter much to lawyers in larger law firms. Westlaw and Lexis offer special pricing arrangements to high-volume law firm customers that make it practical to access Michigan and federal opinions without incurring standard search charges.

But it will make some difference to lawyers without favorable pricing plans from Westlaw or Lexis, and it will make more of a difference to pro se litigants with no access to these services.

While I have some sympathy for pro se litigants, I think on balance that “f-1” is the preferable alternative. The “f-2” version will require attachment of many more opinions to accommodate a relatively small group of filers. In fact, if the Supreme Court were leaning towards “f-2,” I’d suggest further modifying it to accommodate only pro se filers. Call it alternative “f-3.”

(f) attach a copy of any unpublished judicial opinion, order, or other written disposition, if the opposing party is appearing pro se, except that unpublished decisions of this court released after July 1, 1996, need not be attached if the citation references this court’s case number.

If the “f-1” version is adopted, it might be a good idea to issue an IOP explaining what a publicly accessible electronic database is and how it should be cited. The Michigan Uniform Rules of Citation are not very satisfactory when it comes to electronic sources and judicial opinions. Under “miscellaneous citations,” there’s a short paragraph on Internet material at I(C)(13), but it’s no help.

Even if the “f-1” version is adopted, the IOP probably should require or encourage parallel citation of unpublished opinions to two sources, one of which is the COA website. This would help litigants who do not have access to for-profit sites and would permit all users to easily select their preferred opinion-delivery system.

Anyone versed in the Court of Appeals web site can find an opinion released after July 1, 1996 with just the parties’ names and a year (although *Smith v Smith* could take a while), but if the COA docket number is included, the opinion can be found in a very few key strokes. If a parallel citation to another source like Westlaw or Lexis were required, the citation could look something like this:

Smith v Smith, 2007 WL xxxxxxx (Mich App No. 28xxxx, mm/dd/2007).

I don’t mean to exclude citation to for-profit companies other than Westlaw and Lexis. I just don’t know very much about them. Last time I looked, which was years ago, most of them essentially were “portal” outfits, offering links to public sites like the Court of Appeals website. I gather from some of the recent e-mail advertising I’ve been getting that this may no longer be true.

Computer-assisted legal research is a field in flux, and no one can anticipate what the field will look like very far down the road. That’s the advantage of a generic phrase like “publicly accessible electronic database,” and that’s part of why I give the edge to the “f-1” alternative in my proposed revision of MCR 7.212(C)(7). Still, the “f-2” or “f-3” versions would be better than the current rule. And as the years pass, those versions would excuse parties from attaching a greater and greater body of opinions.

—Brian Shannon

Stu's Tech Talk

Continued from page 8

Use of these forms is completely optional. There does not appear to be any preference for using the Court's forms. They are meant solely as a convenience to the practitioner.

The Brief

The electronic brief is simply a digital version of the traditional brief. The brief should not link to items not contained in the brief. This includes links to legal research systems such as Westlaw or Lexis. The Court's e-filing system is programmed to disable these links. Any attempt to include them could create some problems.


This technical issue is wholly apart from the issue of when it is appropriate to cite to the Internet. There is considerable debate on this point, and it is beyond the scope of this article.

Internal links and bookmarks are not only permissible, they are encouraged. Adobe Acrobat and some of the competitors build themselves into Microsoft Word and will automatically generate bookmarks from the Table of Content headers that have been marked in Microsoft Word. Modern versions of WordPerfect can do this without the aid of Adobe Acrobat.

Bookmarks are very helpful because they make it possible to automatically navigate the document. The Court of Appeals has invested in large monitors

to reduce the need to print the documents. Bookmarks are also helpful in appendixes for this same reason. As time goes on, the number of documents which are being physically printed is decreasing. Any person drafting a brief for an e-filing jurisdiction should consider making the document as electronically approachable as possible.

In Adobe Acrobat, you can set how a document will open (e.g., with bookmarks or thumbnails displaying) in the properties tab under "file." If this feature has not been enabled, you can open document navigation features by pressing the F4 key. This will allow you to view the document in either bookmark or "pages" mode. Pages mode allows you to see a thumbnail of the pages in the left column of the document. This is very handy for browsing through a document which does not have bookmarks. While you cannot read the text of the documents, you can generally make out the point headings, and the various parts of the brief. This will speed up the navigation process.

E-filing in the Court of Appeals is no longer an idea of the future and will certainly continue to evolve as usage is increased. From what I have learned and experienced so far, the Court of Appeals e-filing project is off to a good start. 

Endnotes

- 1 Wiznet charges a minor processing fee for every document filed, so even items not subject to a Court of Appeals processing fee (e.g., the brief on the merits) is subject to the processing fee.
- 2 I covered many of the alternative programs in the fall section newsletter.

2009 Appellate Practice Section Council Meetings

All meetings start at 2 p.m. unless otherwise noted.

Friday, April 17
Grand Rapids

Friday, May 15
Farmington Hills,
Kohl Secret
30903 Northwestern Highway

Thursday, June 18
Dinner meeting, Brighton
[time to be determined]

Thursday, Sept. 17
Dearborn (Annual Meeting)