

APPELLATE PRACTICE

Section Newsletter

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From the Chair

By Paul Bernard

Textualism’s Post-modern Impulse

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What do the “new textualism” in legal theory and post-modernism in cultural theory have in common? The intuitive answer seems to be “nothing.” It is hard to see anything in common between the jurist who turns to the dictionary as his or her first interpretive tool and the cultural critic who disdains the idea that interpretation can produce any objective meaning. Nevertheless, while this difference is real enough, there is an important similarity between these apparently divergent ways of thinking. Both share an intense sensitivity to the idea that reading a text can be a political act.

Michigan lawyers are certainly familiar with the new textualism and the rationale behind it. Believing that many, if not most, canons of statutory construction are vehicles for inserting the judge’s subjective preferences into the text, the new textualists dramatically limit the number of interpretive instruments that they are willing to use. Textualists contend that the jurist’s task is to receive the “plain, ordinary meaning” of the statutory language, not to extract a meaning from that language through a more complicated process of analysis. Because they conclude that the process of such extraction has an inevitably political dimension, they believe that minimizing interpretation, in turn, minimizes the possibility that judges will substitute their political judgments for those of the political branches of government.

Postmodernists¹ agree that interpretation is an essentially political act. Profoundly influenced by Marxist theory, postmodernism considers a society’s culture to be a “superstructure” erected on top of the fundamental social, political, and economic structure of that society. Both structure and superstructure are designed according to the same plan and purpose—to reinforce the political hegemony of the dominant class. All of the elements of culture, including ways of thinking and modes of analysis, reflect this hegemonic purpose and therefore have an inescapably political dimension.

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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

Thus the similarity between the new textualism and postmodernism: a suspicion that interpretation is an instrument for manipulating a text to conform to the reader's purposes. This similarity should not be entirely surprising because both theoretical perspectives emerged from the cultural and political ferment of the early- and mid-twentieth century. After the rise of nationalism, the decline of colonialism, revolution, two world wars, numerous genocides (most notably the Holocaust), and more than a couple of crises in the structure of liberal capitalism, it became understandably difficult for anyone to conclude that people of good will could readily reach a rational consensus on how to address social problems—or even on how to define what social problems were. A certain degree of cynicism about the relationship between politics, power, and ideas was inevitable, and probably salutary.

Of course, it is important not to overemphasize the significance of the similar impulses of new textualists and postmodernists. That similarity cannot obscure the fundamental difference between the two. While postmodernism sees every mode of thinking as inherently politicized and every reading of any text as a political instrument, the new textualists believe that a relatively objective (or, at least, minimally political) reading of a text is possible. For postmodernists, even a lingering and conditional faith in objectivity seems hopelessly atavistic.

Does this similarity of orientation, however limited, tell us anything about what it means to adopt a textualist approach to legal texts? I think so. The cynical impulse that informs the new textualism (and post-modernism) is in tension with some traditional ways of thinking about how legal texts work.

This traditional view, a product of pre-modern Enlightenment rationalism, assumes that a legal text is a vehicle for communicating the author's purposes to the reader. To use another metaphor, the text is a bridge between the lawmaker and the citizen, which conveys an understanding of the reasons for the rules set forth in the text. This conveyance gives the text and its rules their authoritativeness. According to this traditional view, a citizen accepts the authority of a rule by recognizing the reasons behind the rule. When a rule obtains its authority in this way, it does not simply command reflexive obedience; it invites the willing assent of those who follow it. When a rule is opaque, permitting no glimpse of its animating reasons, rule following becomes an exercise in pure obedience. One follows the rule, not because he or she understands and accepts it, but simply because it is a rule.

The new textualists are skeptical about how much can be conveyed through a legal text. To be sure, they do not go as far as the post-modernists in rejecting the idea that a text provides unmediated communication between author and reader. But they are cautious about how much the reader can rely on the text as an expression of the author's purposes. And this caution assumes that those who follow rules cannot take for granted that they understand the purposes of the rulemaker. In this respect, the new textualism involves a "new" approach not only to reading texts but also to understanding the nature of legal authority. 🏛️

Endnotes

- 1 This characterization of postmodernists is admittedly simplistic, eliding significant differences between theorists as diverse as Michel Foucault, Jacques Derrida, Antonio Gramsci, and many others. I suspect most readers will be grateful for the elision.

Statement of the Appellate Practice Section on the “Reform Michigan Government Now” Proposal


July 11, 2008

The Appellate Practice Section has a limited and specifically focused interest in the ballot initiative sponsored by the “Reform Michigan Government Now” organization. At this point, the section is still deliberating about what its position will be on the particular matters of interest. It can, however, now identify what those matters are.

First, the section is concerned with the fact that the proposal would significantly reduce the size of Michigan’s appellate judiciary by eliminating two seats on the Supreme Court and seven seats on the Court of Appeals. The section recognizes that such a reduction could have an effect on the appellate courts’ ability to efficiently handle their caseloads and to deliver timely decisions. In recent years, the Michigan Court of Appeals has been especially concerned with improving its administrative efficiency and timeliness. The section also recognizes that questions about the politicization of the judiciary could arise from the proposal’s methods for identifying the judicial positions to be eliminated.

Second, the section is concerned with the proposal’s effect on judicial salaries. Although a reduction in judges’ pay would certainly reduce the judiciary’s budgetary needs at a time when almost any budget reduction is welcome, the reduction could affect the judiciary’s ability to attract and retain well-qualified judges. The section is weighing the relative merits of these two possible outcomes of the proposed salary reduction.

Third, the proposal would make a popular vote the mechanism for resolving some difficult questions about the separation and balance of powers among the branches of Michigan government. The section believes there is an important question about whether a popular vote on a 100-word ballot proposal is the best means to resolve these fundamental questions of constitutional law.

The section will determine its position on these questions as events surrounding the proposal develop. It will also, of course, monitor those developing events to determine whether the proposal might raise other issues relevant to the operation of the judiciary, particularly in the appellate courts. 



Turn to page 10 to see what these items have to do with our annual meeting.

APS Section Comment on Proposed Rule Change

Mr. Corbin R. Davis, Clerk
Michigan Supreme Court
P. O. Box 30052
Lansing, MI 48909

RE: ADM 2006-9
ADM 2006-11

Dear Mr. Davis:

The Appellate Practice Section of the State Bar of Michigan offers its comments on all of the proposed amendments to the Michigan Court Rules that would affect appeals from decisions involving government immunity. Although those amendments are presented in two separate administrative orders, ADM 2006-11 and 2006-9, the section will address all of the amendments at once because they implicate questions about different aspects of the procedure related to governmental immunity appeals.

When this Court first proposed rule amendments to facilitate interlocutory appeals from decisions regarding governmental immunity, the section opposed them on the ground that they would promote unnecessary piecemeal appeals. After several years of experience with the amended rules, the members of the section are divided about them. The members of the section recognize the efficiencies that benefit government defendants and the courts when appeals about issues of governmental immunity can be brought sooner. They also recognize that, in many cases, those efficiencies are offset by increased burdens on plaintiffs, and, in some cases, on private defendants who are joined with government entities. Regardless of how the balance between these efficiencies and burdens is calculated, there is no value to increasing the uncertainty regarding when appeals of right may be brought, the scope of matters that are subject to appeal, and the effect of the appeal on trial court proceedings that are in the same case but are not connected to any question about governmental immunity. The proposed amendments to MCR 2.614, 7.101, 7.209, 7.302 and 7.202 are ambiguous in ways that could promote such uncertainty.

One problematic ambiguity arises from the provision of an automatic stay for all appeals from governmental immunity decisions. In the section's view, the proposed amendments do not clearly establish whether there will be a stay of *all* proceedings in the trial court in cases where government defendants and private parties are joined as defendants. In these cases, an automatic stay for all parties and all issues would promote some efficiencies. On the other hand, if the issues regarding the private party are essentially independent of those regarding the government defendant, a stay of all trial court proceedings might unnecessarily hinder the prompt resolution of those claims. Thus, in addition to its ambiguity, the proposed amendments regarding automatic stays are problematic because there are some cases in which a uniform stay rule would promote neither fairness nor judicial economy.

A similar problem of ambiguity presents itself in connection with the proposed amendment of the definition of "final order" in MCR 7.202. From the language of the proposed amendment, it is not clear whether the amended definition would apply to orders on motions in which governmental immunity is the only issue or to orders on summary disposition motions in which governmental immunity is one issue among others. In other words, is the "final order" the particular decision about the issue of governmental immunity, or is it the entire order in which an issue of governmental immunity is addressed? There is a further uncertainty if the governmental immunity issue is one of several issues in a summary disposition motion but is not resolved by an order while other issues are. In this situation, does the trial court's order constitute a "final order" for the purposes of the amendment?

Another problem arises from defining "final order" to include every order that decides an issue of governmental immunity. If such orders are final, it seems that the failure to appeal them immediately constitutes a waiver of the right to appeal them at all. Depending upon the facts and circumstances of the case, there are situations in which a party might have valid reason to delay any appeal on the issue of governmental immunity until the conclusion of a case. If interlocutory appeals are, in effect, mandated by an amendment to MCR 7.202, then parties will be deprived of the opportunity to make such strategic choices.

Appeals in the American Military Justice System

By Michael L. Updike

There is another uncertainty about appellate procedure in cases involving governmental immunity which does not arise directly from the proposed amendments. In a case where more than one government defendant is joined, the rules, even as amended according to ADM 2006-11 & 2006-9, do not address the possibility that government defendants could bring successive interlocutory appeals on the question of whether they were entitled to the protection of immunity. Such a series of appeals could create a delay of several years in the trial court proceedings.

Although its internal differences prevent the section from taking a substantive position on the proposed amendments, the section is prepared to contribute to the project of improving the procedure for taking appeals from decisions about government immunity. In the event that this Court would appoint a committee or task force on the rules governing this procedure, several members of the section, representing different viewpoints, are eager to participate.

If you have any questions, or if the Appellate Practice Section can be of any further assistance, please do not hesitate to contact me.

Very truly yours,

Paul R. Bernard
Chair



Appellate practitioners who have not served in the American armed forces probably have little knowledge of the military justice system generally, and even less about the appeals in that system. The American military justice system has always been separate from its civilian counterpart (indeed, it predates the creation of federal courts by some 13 years), so it is not surprising that appeals operate separately as well. It is generally recognized that, because of the military's unique requirements for order and discipline, a separate system of justice is appropriate.¹

Military appeals stem from court martials, which can be one of four types: summary, special, special with the power to impose a bad conduct discharge, and general. Court martials can only be ordered by commanding officers who have specific court martial convening authority. Most installation commanders (i.e., the individual in charge of an army post like Fort Bragg, North Carolina or an air force base like McCord Air Force Base near Seattle, Washington) will have at least summary court martial convening authority. Commanders of larger installations will generally have special or special with the power to impose a bad conduct discharge convening authority. General court martial convening authority is restricted to commanders of the largest installations and organizations.

The convening authority, with the advice of its judge advocate (JAG²) (military lawyer³), decides whether to convene a court martial to try a service member accused of a crime under the Uniform Code of Military Justice, or UCMJ. The UCMJ is actually a federal statute, now found at 10 USC § 801 *et seq.* JAGs who work for the convening authority (the office is typically called the Staff or Command Judge Advocate) serve as prosecutors (trial counsel). However, the military judge who presides at special and general court martials is independent of the convening authority and provided by the Military Trial Judiciary.

Similarly, the accused is provided a JAG as his or her defense counsel. That JAG will be from the military's Trial Defense Service (TDS), and will be specially certified for defending the accused in court martials. The accused has the right to request a specific JAG as his or her counsel, and if that individual is reasonably available, he or she will be assigned the case. The accused also has the right to arrange for civilian counsel, but this will be at the accused's own expense.

All court martials are governed by the Manual for Court Martial (MCM), which is an executive order signed by the president. The Military Rules of Evidence (MRE) are, for all practical purposes, the Federal Rules of Evidence (FRE), tailored to meet conditions unique to the military. The only substantive difference between the FRE and the MRE is in Section III. Changes in the FRE automatically apply to the MRE after 90 days, unless the president takes action to exempt the particular MRE from the FRE change.

The MCM sets up a standardized procedure for trials, arguably one that is more rigid than what one typically sees in civilian courts. It is difficult to say whether this favors the defense or the prosecution at trial, although it may be more difficult for the accused to prevail in an appeal if the military judge and trial counsel faithfully follow the MCM. On the other hand, an error is much less likely to be found harmless if the military judge or trial counsel did not follow the MCM.

Continued on the next page

Many court martials are bench trials. However, a defendant can demand a jury. Jurors, technically members of the court martial, must be senior in rank to the accused, and are selected by the convening authority. Jurors are subject to voir dire and to challenge for cause as well as on a peremptory basis. All voting is by secret ballot within the jury room.

Military appeals stem from court martials, which can be one of four types: summary, special, special with the power to impose a bad conduct discharge, and general. Court martials can only be ordered by commanding officers who have specific court martial convening authority.

If the court martial results in an acquittal, either by the decision of the military judge or the members of the court martial, the matter ends there. As in civilian practice, the prosecution has no appellate rights once an accused's liberty has been placed in jeopardy and the accused has been acquitted. However, if the accused is convicted, there are two types of appeals available, one of which has no equivalent in the civilian world.

First, the convening authority has the duty to review the proceedings for correctness and also has the unlimited equitable power, for lack of a better characterization, to *reduce* the sentence imposed by the court martial, to *suspend* it, or to *void* it entirely. Such decisions are not subject to review—that is, the sentence cannot be later increased, activated, or reinstated.

There is nothing comparable to the convening authority's power to review, reduce, suspend, and void a sentence in the civilian justice system. While the complete voiding of court martial convictions is relatively rare, it is not at all unusual for a convening authority to exercise his or her discretion to reduce or suspend a sentence when it appears the service member's crime was an aberration, there were extenuating circumstances, and so on. This is the first of the two types of appeals in the military justice system, and is largely automatic.

The second type of appeal is similar to what exists in civilian practice. If the convening authority approves the verdict of the court martial, the accused has an appeal as of right in the case of special and general court martials to an intermedi-

ate appellate court—the United States Army Court of Criminal Appeals, the U.S. Navy-Marine Corps⁴ Court of Criminal Appeals, the U.S. Air Force Court of Criminal Appeals, and the U.S. Coast Guard Courts of Criminal Appeal.⁵ These are staffed by senior military judges who are independent of all convening authorities. They sit in three-judge panels, and have the power to overturn convictions and sentences approved by a convening authority. The military provides the accused with a TDS attorney for the appeal.

It is probably safe to say that an accused who had his or her conviction voided or disapproved by a convening authority is not going to pursue an appeal to a court of criminal appeals. However, the accused is free to appeal a sentence that has been reduced or suspended by the convening authority. The court of criminal appeals cannot increase or activate the sentence, but it retains the power to overturn the conviction.

The highest military court is the United States Court of Appeals for the Armed Forces (USCAAF), formerly known as the United States Court of Military Appeals, which is an Article I court rather than an Article III court, as are the courts of criminal appeals. The USCAAF has five judges who serve 15-year terms by appointment of the president with the advice and consent of the Senate. It hears appeals from the four courts of criminal appeals, in most instances by leave granted. Death penalty cases⁶ are automatically appealed through the USCAAF, and any sentence of death must ultimately be approved by the president. The accused is provided with a TDS attorney in an appeal to the USCAAF.

A final decision of the USCAAF can be appealed to the U.S. Supreme Court through a Petition for a Writ of *Certiorari*. There was no statutory basis for such review until 1984. The Supreme Court had, however, accepted certain cases that came up through a collateral attack on a court martial conviction in the regular federal court system before 1984, albeit only on comparatively rare occasions.⁷ Such attacks were generally based on an alleged lack of jurisdiction over the accused.⁸

It was noted earlier that there were four types of court martials, with three—special, special with bad conduct discharge authority, and general—having well-established appellate procedures. Appeal procedures are substantially different with respect to the lowest level court martial, the summary court martial. There, the accused does not have a right to TDS counsel at trial (although TDS will help the accused prepare for trial), and there is no right to a jury. There is also no military judge. Instead, the convening authority appoints an officer, typically a field-grade officer (army, air force, and marines—major, lieutenant colonel, and colonel; navy and coast guard—lieutenant commander, commander,

and captain), who essentially serves as judge and jury (and, to a certain extent, the prosecutor, as he or she can call witnesses for the government).

The summary court martial officer has a duty to be fair and impartial and to assist the accused in calling and cross-examining witnesses. Unfortunately, he or she can be in the chain of command for the convening authority, so there is the risk of command influence and certainly a significant risk of the appearance of command influence. A better practice might be to have the convening authority request the appointment of a summary court martial officer by another organization outside the convening authority's chain of command.


The concept of summary court martials is probably difficult for most attorneys who have not served in the armed forces to accept. However, no service member can be required to undergo a summary court martial. The service member can decline to be tried by a summary court martial. It is then up to the convening authority to drop the matter or else convene a special court martial. The punishments that can be imposed by a summary court martial are substantially less than those that can be imposed by a special court martial, so sometimes an accused will accept trial by summary court martial, in effect balancing a loss of rights in exchange for a sharply reduced maximum sentence in the event things go against the accused at trial. Further, the summary court martial officer could be someone who was known for his or her fairness and independence.⁹

An appeal of a summary court martial conviction is primarily administrative in nature. The convening authority retains the right to review, reduce, suspend, or vacate any conviction. This will be done automatically, but the accused can also request review, sort of a second bite of the apple. TDS will assist the accused in preparing such a request. If the convening authority confirms the conviction, TDS will assist the accused in preparing an appeal to the judge advocate general, the head of the JAG branch, who can set aside the conviction.

The military also has something called nonjudicial punishment, popularly known as Article 15, after Article 15 in the UCMJ. It is primarily for minor breaches of good order and discipline—missing a formation, coming back late from a pass, failing to prepare for an inspection, etc. Punishments can range from the trivial—several days of extra duty—to fairly serious—loss of rank and pay. Different levels of commanders can impose different levels of punishment—the higher the rank, the stiffer the punishment that can be imposed.

Except for very limited circumstances when aboard a military ship or aircraft, no service member can be required to accept an Article 15. He or she can simply refuse it, and then leave it up to the commander who wants to impose the Article 15 to convene (if he or she has convening authority) or

to request the convening authority (if he or she does not have convening authority) to convene a summary court martial or to drop the matter. As indicated *supra*, a service member can also decline a summary court martial.¹⁰

A service member will often accept an Article 15 because he or she knows the maximum punishment that can be imposed (the service member can consult with a JAG before deciding to accept or reject an Article 15), knows that accepting the Article 15 precludes a trial by court martial for the same offense, and knows that, in most instances, it will not become part of his or her permanent record and will not be available to promotion and assignment boards.¹¹ This can often be an important consideration to someone who plans to make the service his or her career. 

Endnotes

- 1 See, for example, 346 US 137, 140; 73 S Ct 1045; 97 L Ed 1508 (1953).
- 2 All branches of the American military are obsessed with abbreviations and acronyms. All JAGs are admitted to the practice of law in at least one state. Such admission is a requirement for admission to the military appellate courts, to be discussed *infra*.
- 4 The navy and Marine Corps have a combined court of criminal appeals because of the traditionally close relationship between those two services. At one time, the Marines became part of the navy during war.
- 5 These four courts were previously known as the Courts of Military Review.
- 6 The military has the death penalty and has executed more than 100 persons since WW I—there are nine former service members presently awaiting execution by lethal injection at Fort Leavenworth, Kansas.
- 7 Collateral attacks on a court martial conviction starting in a U.S. district court remain possible despite the right to seek direct review in the U.S. Supreme Court. 28 USCS § 2241. However, the accused must retain his or her own counsel for such collateral attacks; TDS counsel will not be provided.
- 8 See, for example, *O'Callahan v Parker*, 395 US 258; 89 S Ct 1683; 23 L Ed 2d 291 (1969), overruled in *Solorio v United States*, 483 U.S. 435; 107 S. Ct. 2924; 97 L. Ed. 2d 364 (1987); see also *McElroy v United States*, 361 US 281; 80 S Ct 305; 4 L ED 2d (1960).
- 9 The only summary court martial that occurred during this writer's tenure as Fort McCoy's command

Continued on the next page

judge advocate in 1990-1991 resulted in an acquittal. It may have helped the defendant that the summary court martial officer, although not JAG branch, was an experienced attorney in civilian life and took his duty to conduct a fair and impartial hearing very seriously.

- 10 In 1981, this writer was involved in a case in which a sergeant turned down both an Article 15 and a summary court martial. The convening authority insisted on a special court martial, which resulted in an acquittal. It probably didn't help that the government's chief medical witness against the accused (he was charged with being drunk on duty) was popularly known in the relevant military community as "Dr. Quack," and this was brought out at trial.
- 11 Article 15 punishment can only be imposed by the service member's commanders. The commander imposing the Article 15 has the option of designating an Article 15 for inclusion in that part of the individual's service record that is available to promotion and assignment boards, or in that part that is not available to them. Genuinely low-level Article 15s are typically destroyed when a service member transfers to a new assignment and there is no record of them left anywhere.

Standards of Review: Back to Basics

By Linda M. Garbarino and Nicole Coroiu

As appellate practitioners, we are especially mindful of the "standard of review," as our arguments often rise or fall with the review criterion. We all know that we must identify the correct standard in our briefs. But in practice, knowing the applicable standard at the very beginning, before a word is put down on a page, is a crucial step toward effective appellate argument. How can the advocate champion his or her position without knowing the measuring stick that will be applied by the reviewing court? The formation of appellate arguments must always be guided by the applicable standard. And in our experience, assessing the standard of care should begin even earlier—at the trial court level. Only then can the advocate ensure that his or her case is properly positioned in the event an appeal becomes necessary. While in most instances, the standard of review, even if not obvious, is easily ascertained, the correct standard can at times be elusive or even obscured by one's opponents. Thus, review and reconsideration of the appellate standards should always be considered when starting a project. This article is intended to be a refresher of sorts for the civil practitioner.

There are three principal standards of review on appeal: *de novo*, clearly erroneous, and—the most elusive—abuse of discretion.

De Novo Review

As the appellant, *de novo* is the standard that one is most often gladdened to argue. "*De novo*" has been defined as "anew," "afresh," "again," and "a second time." *Dept. Of Civil Rights v Silver Dollar Café*, 441 Mich 110, 115-116; 490 NW2d 337, 340 (1992). When this standard is applicable, the issue is to be considered anew by the reviewing court. *Id.* The reviewing court "may substitute its assessment for the findings, conclusion, and decision" of the lower court. *Id.* at 116. Examples of when the *de novo* standard is used include determination as to trial court subject matter jurisdiction, *Specht v Citizens Ins Co of America*, 234 Mich App 292, 294; 593 NW2d 670, 671 (1999); determination as to personal jurisdiction, *Poindexter v Poindexter*, 234 Mich App 316, 319; 594 NW2d 76, 78 (1999); questions of law, *Magee v DaimlerChrysler Corp.*, 472 Mich 108, 111; 693 NW2d 166, 167-168 (2005); constitutional issues, *County Road Assn of Michigan v Governor*, 474 Mich 11, 14; 705 NW2d 680, 682 (2005); summary disposition rulings, *Roberts v Mecosta County General Hospital*, 466 Mich 57, 62; 642 NW2d 663, 667 (2002); questions of statutory interpretation, *Roberts v Mecosta County General Hospital*, 466 Mich 57, 62; 642 NW2d 663, 667 (2002); and whether a cause of action is barred by the applicable statute of limitations (in absence of disputed facts), *Magee v DaimlerChrysler Corp.*, 472 Mich 108, 111; 693 NW2d 166, 167-168 (2005).

When a matter is to be reviewed "anew" and "afresh," the parties know that their appeal will be thoroughly reconsidered on the merits by the higher court. The appellant need not focus on the trial court's reasoning as much as on the correct legal analysis and conclusion sought. A complete record, however, is crucial in these appeals. Since the record cannot be enlarged on appeal, *Amorello v Monsanto Corp.*, 186 Mich App 324; 463 NW2d 487 (1990), efforts must be taken to ensure that

the necessary evidentiary materials and documents are filed with the trial court.

Clearly Erroneous Standard

The courts have been fairly consistent in their definition of review under the “clearly erroneous” standard. The highest level of deference is given to decisions or findings of the lower court when this standard governs. The reviewing court may reverse only if it is “left with a definite and firm conviction that a mistake has been committed.” *Overall v Overall*, 203 Mich App 450, 454; 512 NW2d 851, 853 (1994). If a trial court’s finding is a mix of fact and law, “[a] trial court’s factual findings are reviewed for clear error, while its application of the law to the facts is reviewed *de novo*.” *Centennial Healthcare Management Corp v Michigan Dept. Of Consumer Industry Services*, 254 Mich App 275, 284; 657 NW2d 746, 752 (2002). Special deference is given to the fact finder’s ability to evaluate the credibility of witnesses. MCR 2.613(C).

Examples of application of the clearly erroneous standard include class certification, *Neal v James*, 252 Mich App 12, 15; 651 NW2d 181, 183 (2002); findings of fact, MCR 2.613(C); and decisions on motions for involuntary dismissal, *Phillips v Deihm*, 213 Mich App 389, 397; 541 NW2d 566, 572 (1995).

Abuse of Discretion Standard

The abuse of discretion standard is the most elusive, and certainly the standard an appellant most often prefers not to have. In an early decision, *Spalding v Spalding*, 355 Mich 382, 384-385; 94 NW2d 810, 812 (1959), the Supreme Court set forth a highly deferential articulation of the abuse of discretion standard. It stated that abuse would be found only when the lower court’s decision is “so palpably and grossly violative of fact and logic that it evidences not the exercise of will but perversity of will, not the exercise of judgment but the defiance thereof, not the exercise of reason but rather of passion of bias.” *Id.* at 384-385.


However, in *People v Babcock*, 469 Mich 247, 666 NW2d 231, (2003), the Supreme Court found that such a level of deference was inappropriate. Instead, the Court concluded that there could be more than one “reasonable and principled outcome,” and an abuse occurs only when “the trial court chooses an outcome falling outside this principled range of outcomes.” *Id.* at 269, 243.

Although *Babcock* seemed to limit this articulation to the context of the case (criminal sentencing), the Supreme Court adopted it as the default abuse of discretion standard in *Maldonado v Ford Motor Co*, 476 Mich 372; 719 NW2d 809 (2006). In *Maldonado*, the Court stated: “We prefer the articulation of the abuse of discretion standard in *Babcock* to the *Spalding* test and, thus, adopt it as the default abuse of discretion standard.” *Id.* at 388, 817. *Maldonado* has since been cited numerous times by the Supreme Court and the

Court of Appeals for this new abuse of discretion standard. See *Barnett v Hidalgo*, 478 Mich 151, 158; 732 NW2d 472, 477 (2007); *Saffian v Simmons*, 477 Mich 8, 12; 727 NW2d 132, 135 (2007); *In re Duane v Baldwin Trust*, 274 Mich App 387, 397; 733 NW2d 419, 425 (2007); *Taylor v Currie*, 277 Mich App 85, 93; 743 NW2d 571, 576-577 (2007); *Young v Nandi*, 276 Mich App 67, 90; 740 NW2d 508, 522 (2007).

Examples of application of the abuse of discretion standard include a decision to allow or deny the amendment of pleadings, *Hanon v Barber*, 99 Mich App 851, 857; 298 NW2d 866, 869 (1980); determination of appropriate attorney fees, *Antiphon, Inc v. LEP Transport, Inc*, 183 Mich App 377, 386; 454 NW2d 222, 226 (1990); the setting aside or refusal to set aside a default judgment, *Federspiel v Bourassa*, 151 Mich App 656, 661; 391 NW2d 431, 433 (1986); the decision to admit or exclude evidence, *Pena v Ingham County Road Commission*, 255 Mich App 299, 303; 660 NW2d 351, 354 (2003); the grant or denial of a motion for a new trial, *Graham v Firestone Tire and Rubber Co*, 137 Mich App 215, 217; 357 NW2d 666, 668 (1984); the grant or denial of remittitur or additur, *Hines v Grand Trunk Western Railroad Co*, 151 Mich App 585, 595; 391 NW2d 750, 755 (1985); rulings concerning qualifications of expert under MRE 702, *Potts v Shepard Marine Construction Co*, 151 Mich App 19, 29; 391 NW2d 357, 361 (1986); and acceptance of settlement in class action suit, *Brenner v Marathon Oil Co*, 222 Mich App 128, 133; 565 NW2d 1, 4 (1997).

Certainly, when the ruling of the trial court is at the core of the review standard, such as in an abuse of discretion or clearly erroneous standard, the advocate must attempt to compel the lower court to articulate its reasoning on the record and to even place the court’s rationale in the order itself (when possible or appropriate). Securing the transcript of the trial court hearing becomes essential for the review process.


Once the applicable standard of review has been determined, key elements of an appellate argument begin to fall into place. Citation to recent decisions in which the appellate courts have applied the same standard to similar facts with favorable results will make the briefing that much more persuasive. And although parties may appear to agree on the applicable standard, they may have very different views on how that standard should be applied. A thorough understanding of an opponent’s standard of review may shed considerable light on the flaws or inconsistencies in his or her position. Taking a fresh look at how courts are defining and applying standards of review may prove worthwhile. 

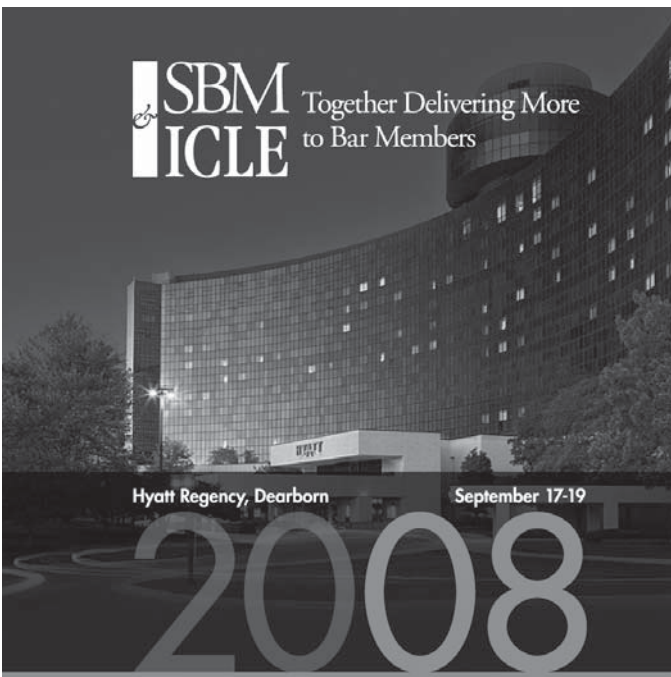

About the Authors

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Good News for this Luddite!

By Marcia L. Howe
Johnson, Rosati, LaBarge,
Aseltyne, and Field, P.C.

As an unsophisticated computer user, I was skeptical about the Sixth Circuit's e-filing system. Still, I felt secure in the belief I would not have to venture into the unknown on my currently pending appeals, i.e., filed pre-June 2008. In one of these pending appeals, however, I was surprised to receive a letter from the court advising the parties that their designation of record was due. (The form is available online.) Next, I received a letter with a Briefing Schedule that lacked any reference to either a proof brief or joint appendix. After a few moments of panic, I contacted the case manager, who encouraged me and explained the process. The light came on! This system will be beneficial to the attorneys and a gift to the clients. In most appeals, the documents to be e-filed are the appearances, the designation of the record, any motion, and the appellate brief. The court clerk now takes on the responsibility of compiling the relevant lower court record, and consecutively numbering each page of the entire electronic document. The parties rely on this compilation to reference the record when preparing their briefs. Unlike the state county e-filing programs that may charge a filing fee for a pleading and the additional e-filing fee, the only fee involved in the Sixth Circuit Appeal is the fee for the claim of appeal. Plus, my client saves the expense of the copy costs for the multiple copies of the pleadings filed at the Sixth Circuit, the postage or the over-night U.P.S. costs, and any attorney fees relating to the preparation of the joint appendix. I'm hooked. The Section should thank those Michigan attorneys who worked with the Sixth Circuit's court staff and judges to streamline and economize this system. They are Richard Bisio of the Kemp Klein Law Firm, James (Jamie) Geary at Howard & Howard, P.C., and David Zacks at Ishbia & Gagleard, P.C. Their efforts might have been wasted without the special assistance of Judge David McKeague, the chair of the court's information technology committee, who was instrumental in convincing his colleagues to go "all electronic," and, unlike other circuits, rejected the option of requiring the filing of paper briefs along with the electronic filing. 



Hyatt Regency, Dearborn September 17-19

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Appellate Practice Section Annual Meeting Program

Honey and Vinegar: Civility in Appellate Practice

September 18, 2008, 2 p.m. - 4 p.m.
Hyatt Regency, Dearborn

Panel Participants: Mark R. Bendure, Hon. Elizabeth L. Gleicher, John P. Jacobs, Hon. Marilyn J. Kelly, Hon. Christopher M. Murray, and Hon. Henry W. Saad.

The program will consist of a panel discussion of the practitioner's preference for zealous advocacy, the judge's commitment to informed decision-making, and the goal of civility in appellate law.

Recent Decisions of Interest to the Appellate Practitioner

Trial court jurisdiction to amend custody, support, and other domestic orders while appeal is pending

Lemmen v Lemmen, 481 Mich 164 (2008)

An order of child or spousal support may be amended by the trial court even though the order is before the Court of Appeals on an appeal as of right or by leave granted. As a general rule, MCR 7.208(A) prohibits such amendments once the orders are within the jurisdiction of the Court of Appeals. But the rule recognizes a few exceptions, one of which is where trial court authority is “otherwise provided by law.” Though not expressly stated, two statutes, MCL 552.17(1) and MCL 552.28, “otherwise” allow for the amendment of certain domestic orders while on appeal.

“[T]o require the trial court to wait to make modifications until after an appeal is completed is contrary to the plain language of the statutes and would defeat their purpose, which is to enable the trial court to make modifications to child and spousal support orders when such modifications are necessary.” 481 Mich at 167.

Appellant’s standing to appeal from a favorable ruling

Manuel v Gill, ___ Mich ___ (2008)(Docket No. 131103)

Appellants prevailed in the Court of Appeals. (An order of summary disposition was affirmed in their favor.) But they sought leave to appeal to the Supreme Court because the Court of Appeals affirmed on grounds that would have permitted their opponents to refile the lawsuit in the Court of Claims. (The trial court, on the other hand, had dismissed these claims with prejudice.) Because the Court of Appeals had effectively revived claims, appellants were aggrieved parties who “suffered a concrete and particularized injury as a result of the Court of Appeals decision.” Appellants had standing to proceed with a further appeal.

Judicial review of moot issues

City of Detroit v Ambassador Bridge Co,
481 Mich 29 (2008)

In this case, the Court decided an issue even though the city’s issuance of a construction variance rendered the issue moot while the case was pending on appeal. The Court observed that generally, it “does not reach moot questions or declare principles or rules of law that have no practical legal effect in the case before us.” 481 Mich at 50-51, quoting *Federated Publications, Inc v City of Lansing*, 467 Mich 98, 112 (2002). An exception is made, however, when “the issue

is one of public significance that is likely to recur, yet evade judicial review.” *Id.* The issue before the Court involved “the operation of the busiest international border in the state,” the Ambassador Bridge. 481 Mich at 51. Because the controversy with the city was likely to arise again despite the issuance of the variance, the question was deemed justiciable.

One-third contingency fees:

must include appellate attorney fees

Reed v Breton, ___ Mich App ___ (2008)
(Docket No. 276057)

A personal injury contingency fee agreement necessarily includes the firm’s appellate work, even if the written agreement expressly excludes it. In this case, plaintiff personal representative retained a law firm to represent the estate in a wrongful death action. The contingency fee agreement expressly excluded fees incurred in the event of an appeal. When one of the defendants was dismissed by summary disposition, the law firm filed an application for leave to appeal in the Court of Appeals, and prevailed. Defendant then filed an application for leave in the Supreme Court, which prompted plaintiff to retain a second law firm for the response. Ultimately, plaintiff settled with the other defendants and submitted settlement documents to the circuit court for approval. Plaintiff’s proposed distribution included 1) attorney fees to the original firm in the amount of one-third of the net recovery; 2) attorney fees to the original firm for the appeal, calculated on an hourly basis; and 3) attorney fees to the second law firm based on the contracted-for hourly rate. The Court rejected the separate appellate fees to the original law firm under MRPC 8.121(B), which limits a firm’s recovery to one-third the actual recovery for any one “claim” or “action.” Quoting an ethics opinion of the State Bar, the Court of Appeals explained: “[w]e are aware of no authority or reasoning which would conclude that the trial of a matter is a ‘claim’ or ‘action’ different and distinguishable from an appeal.” Sl op, p 3, citing State Bar of Michigan Formal Ethics Opinion R-011 (July 26, 1991). The award of appellate fees to the second law firm was allowed, however, because those fees “were not incurred pursuant to the original contingent-fee agreement between plaintiff and [law firm no. 1] but were incurred pursuant to a *separate* fee agreement [with law firm no. 2], which covered proceedings before the Michigan Supreme Court only.” Sl op, p 4.

Continued on the next page


Explained: the effect of an order denying leave “for lack of merit on the ground presented”

Capco 1998-D7 Pipestone, LLC v Milton Ventures Ltd Partnership, unpublished per curiam opinion of the Court of Appeals, issued July 24, 2008 (Docket No. 271907)

In *Capco*, the Court of Appeals was presented with an appeal as of right on an issue that previously had been raised in an application for leave to appeal. The Court denied the application “for lack of merit in the grounds presented.” When the issue was raised again on the appeal by right, appellee objected, citing the doctrine of the law of the case. The Court acknowledged that it typically recognizes such orders “as being decisions on the merits constituting the law of the case.” But it went on to point out that “the law of the case doctrine is a discretionary rule of practice and does not limit our power. The doctrine ‘is a matter of practice and discretion rather than an absolute limit on the courts’ authority.’ Under the circumstances, we are presented with an interlocutory order that expresses no reasoning on the merits, and we are convinced that the circuit court’s order . . . was error, we [therefore] exercise our discretion to address the merits of this appeal.” Sl op, p 5 (citations omitted).

Vexatious appeal sanctions—separate motions are required

Citizens Ins Co v Secura, unpublished per curiam opinion of the Court of Appeals, decided May 15, 2008, (Docket No. 274751)

The Court of Appeals reiterates that requests for appellate sanctions must be made by a separate motion and will not be considered if made only in the appellate brief. See MCR 7.216(C). Also, vexatious appeal sanctions will not be awarded when the appeal presents “a unique question that is not well settled under Michigan law.” Sl op, p 6. 

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

By Linda M. Garbarino and Nicole Coroiu

This column provides 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 pending 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: First, 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 substitute for a review of the cases themselves.

DECISIONS PENDING/ORAL ARGUMENT ALREADY CONDUCTED

Argued January 9, 2008

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.

ORAL ARGUMENT YET TO BE SCHEDULED

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.

Fedewa v Robert Clancy Contracting, Inc, S Ct 136065, COA 274088

Negligence: Whether the decedent was a trespasser or an implied licensee and whether, and to what extent, the defendants owed a duty to the decedent.

About the Authors

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Stu's Tech Talk¹

by Stuart Friedman

Taming Your E-mail: Five Tips for More Efficient Management of Your E-mail Box

In 1975, *Business Week* predicted that paper documents were fast becoming a thing of the past and that in the future all work communication would be electronic.² In the intervening 30 years, we have come a long way toward making that prediction true. The Sixth Circuit and Michigan's federal district courts have implemented e-filing systems; Michigan state courts are clearly moving in that direction. Each day, more communications come through our e-mail box than our traditional mailbox. Many of us receive 50 or more e-mails for every first-class letter. This can include e-filing notices from federal court, important communications from opposing counsel and clients, and other matters of immediate interest. Many of us also receive legal updates from informational services and listserv communications, together with bulk mail and unwanted spam.

To effectively make it through each day, it is important to devise a strategy to efficiently sort through this sometimes overwhelming avalanche of information. By adopting push e-mail, separating bulk from important e-mail, and using filtering tools, a good archival system, and spam controls, you can quickly bring your e-mail under control and regain time for the practice of law.

Tip 1: Get Rid of POP E-mail

Five years ago, most people received their e-mail on only one computer. The prevailing e-mail delivery system was "Post Office Protocol version 3" or "POP" e-mail. E-mail was downloaded from a server to individual e-mail clients. While multiple e-mail programs could be programmed to receive mail from the same server, in most cases, this was a first-come-first-served basis. If your work computer picked up your mail, it was normally not available for your home computer to download.³ Just as importantly, you had to delete the same e-mails on multiple machines, and separately file the e-mails on each machine. In 1998, when the average business person received 10 e-mails per day, this was not a significant problem. By 2004, this number was up to 42 non-spam e-mails per day.⁴ In all probability, this number has now doubled.

The amount of e-mail we receive can be overwhelming. To keep up, attorneys have started carrying smartphones ca-

pable of retrieving e-mails on the go. These include Microsoft Windows Mobile devices, BlackBerry devices, and the now famous iPhone. Attempts to extend that POP mail standard to deal with these new realities were proposed, but have effectively died on the vine.

All but the smallest firms quickly migrated to enterprise e-mail solutions designed to take full advantage of attorneys checking their e-mails on the go. The most popular solution was and is Microsoft Exchange Server, which contains a proprietary protocol designed to synchronize the e-mails, phonebooks, and calendars of individuals on multiple devices. An e-mail opened on one machine is marked "opened" on all machines synchronizing with this account; e-mails deleted on one machine are deleted on all machines.

Recently, several companies have begun to offer hosted Exchange accounts for individuals or smaller companies interested in using this technology, but who do not desire to expose their servers to the risks of the Internet or who simply wish to outsource their IT.⁵ For individuals, Apple Computer has launched a service called Mobile Me, which offers hosted Exchange server service for individuals for roughly \$100 per year. While this service is designed to augment the Apple iPhone, it is fully compatible with any Exchange server-compatible device. In June, Verizon offered a hosted Exchange server for its wireless subscribers called RemoSync. The suggested price for this service was \$10 a month, plus data.⁶

An open standard called IMAP provides similar functionality for e-mail synchronization only. Currently, IMAP does not support calendar and phonebook synchronization. While IMAP does not have all the functionality of Microsoft Exchange, it has many advantages. Because it is an open standard, it is supported by most e-mail programs. Similarly, many Internet service providers and free mail providers (e.g., Yahoo and Google) have started giving away free IMAP accounts to their users. Unlike Exchange, most e-mail programs can handle multiple IMAP accounts at once.

With IMAP and Exchange, a person's e-mail can remain synchronized on a central server and various devices. POP does not have this functionality. While there are technologies

Continued on the next page

available to synchronize POP e-mail between a computer and a smart phone, this technology generally does not support multiple computers and is normally dependent on leaving a computer running all day.⁷ If that computer crashes or is accidentally shut off, the e-mail stops flowing to the smart-phone.

POP mail, while still popular, is past its prime. If you have not migrated from POP, the time has come.

Tip 2: Get a Bulk Mail E-mail Account

We routinely give out our e-mail address for a variety of matters ranging from important business to store discount clubs and listservs. For most of us, these e-mails flow into the same account. On a day with a pressing deadline or spent on the road, this bulk e-mail (even if solicited) tends to slow things down and create an unneeded distraction.

While a few law firms have policies against accessing personal e-mail accounts on company machines, these firms tend to be in the minority and usually have special concerns about informational leaks (e.g., firms specializing in security and exchange matters).

If your firm allows it, consider signing up for a free e-mail account with a company such as Google or Yahoo. (Google is this author's favorite.) Both companies provide large e-mail accounts (in excess of five gigabytes of storage), offer full support for IMAP, and have free utilities that allow you to read their e-mail on most smartphones *when you want to*. By separating your bulk e-mail from your true business account, you remove the distractions on the days you have a pressing deadline, provide the first sorting mechanism between important mail and bulk mail, and reduce the overwhelming sensation that occurs when you discover that you have "500 new e-mails."

Tip 3: Build Rules and Filters to Automate the Processing of E-mail

The most popular e-mail programs now have the ability to build rules to automatically file e-mails in various folders on the basis of key words in the subject line or the identity of the sender. For instance, it is very easy to build a filter to send any e-mail with the phrase "[SBM Appellate]" in the subject field to a folder specially designated for forum mail from the Appellate Practice Section.

Many programs allow you to create very powerful rules. A personal favorite is Auto-Mate for Microsoft Exchange.⁸ With Auto-Mate, I have been able to program e-mails to automatically move to client folders two hours *after* I've read the e-mail. Bulk mail that I receive on my Gmail account (see above) is automatically deleted after two weeks. Simi-

larly, ads from various vendors are automatically placed in a folder and then deleted. I've even been able to program Auto-Mate to automatically forward certain e-mails to other people or other e-mail accounts.

For example, even "dumb" cell phones now have an e-mail address. For Verizon, the e-mail address is that person's phone number at vtext.com (e.g., 2485551212@vtext.com).⁹ I have one friend who has programmed his system to automatically forward any alert from the U.S. District Court's e-filing system to his cell phone. One caution: these emails count as text messages for most cell phone plans. If you don't have a text messaging plan, expect to pay 15 cents per e-mail/message.

Both Auto-Mate and Microsoft Outlook work with "sent mail folder" as well as the inbox. Many people spend hours organizing their inbox, but completely ignore their outbox. What you send is every bit as important as what you receive.

A special type of add-on program addresses the problem of duplicate records. If you have been using Microsoft Outlook for some time, you are bound to have had many duplicate records. Sperry Software makes a number of tools designed to manage your e-mail box.¹⁰ My favorite is its Duplicate Eliminator series of programs, which will comb through my e-mail, address book, and calendar and eliminate any duplicate entries.¹¹

One of the nicest things about electronic mail (unlike its paper predecessor) is that you can program it to file itself.

Tip 4: File Those Old E-mails

Microsoft Outlook comes with a powerful, but little-known feature. You can drag an e-mail out of an Outlook folder and store it directly in a document folder. When I close out a case, I will drag all of the saved e-mails about that case into the client folder and then burn an archival copy of the client's entire e-file to a DVD disk. This both reduces the size of my e-mail box and ensures that all the documents are archived to a client-oriented medium.

Tip 5: Fight That Spam

Unfortunately for many of us, the largest clogger of our e-mail boxes is spam. Researchers have stated that every day, 120 billion pieces of spam are sent across the Internet.¹² It is nearly impossible to completely avoid spam, but with a little bit of care, you can greatly reduce the amount of spam that makes it to your e-mail box.

Spammers get their lists of e-mail addresses from a variety of sources. Probably the number one source for harvesting e-mail addresses is from the Internet itself.¹³ Some spammers have programs that literally search through the entire Inter-

net looking for e-mail addresses that they can add to their automated directory. These directories, which can consist of hundreds of millions of e-mail addresses, are then sold to various companies. Lawyers are obvious targets because many law firms list the e-mail addresses of the attorneys on their websites. A far better option is to use a contact box that does not publicly display the attorney's e-mail box. An alternative is to display the e-mail address as a graphic rather than a live link.

Assuming that spammers already have your e-mail address, there are a number of techniques to attempt to deal with spam. First, if you are capable of choosing your own e-mail provider, choose one that provides quality spam filtering. When I switched my e-mail account to Link2exchange.com, three-quarters of the spam I was receiving disappeared overnight. Postini (recently purchased by Google) has one of the most effective spam filtering systems I've seen and is widely used by Exchange hosting companies. For firms that host their own server, Barracuda Networks offers a simple spam and virus filter that can be installed by a qualified IT person in under an hour and provides very effective spam filtering. For individuals, I Hate Spam from Sunbelt Software does a nice job at detecting spam.¹⁴

No spam filtering system is perfect—some spam will get through. Even more distressing is the fact that some important messages will eventually find their way into a spam filter. Most spam filters provide a place where potential spam is stored. Many of these storage places are not part of your ordinary e-mail accounts folders, but require logging on to a special website to review the spam. It is very easy to forget about these digital holding bins, but forgetting could be very costly. Once a week, someone should manually go through the spam receptacles looking for misfilings.

One old technique that no longer works is to attempt to block e-mail addresses of spammers. Most spam is sent from forged e-mail addresses. While many spam programs offer the option to block all e-mail from a given domain or users, *don't use this option*. This option is a dangerous vestige that should be eliminated. A friend of mine recently used this option on a piece of e-mail offering a certain well known "male enhancement" drug. Unfortunately for my friend, the spammers forged his e-mail address as both the sender and the recipient. When my friend hit the block button, he not only blocked many pieces of legitimate e-mail, he also uploaded his e-mail to an international registry of e-mail addresses associated with spam.

As we shift from a paper and print-driven profession to one dependent on e-mail, it is important to develop a strategy to address the avalanche. With careful planning, it is possible to bring your e-mail box under control. 🏠

Endnotes

- 1 Editors' note: Stu's column will be a regular feature of this publication and will address a range of technical topics.
- 2 "The Office of the Future" (30 June 1975), *Business Week* (2387), pp 48–70.
- 3 It was possible to program one machine to not delete e-mails when it downloaded them, but people repeatedly had problems when critical e-mails were on one machine, but not the other.
- 4 <http://www.microsoft.com/presspass/press/2005/mar05/03-15threeproductivedayspr.mspx>.
- 5 Several popular services are 1and 1 (<http://www.1and1.com>), Mail Street (<http://www.mailstreet.com>), and Link2Exchange (<http://www.link2exchange.com>).

Mail Street and Link2Exchange also support hosted Blackberry Enterprise Server Accounts.

- 6 <http://www.intomobile.com/2008/06/11/verizon-rolls-out-exchange-server-push-email-support-with-remosync.html>.
- 7 One notable exception is the free synchronization utility/service available from www.emoze.com. Emoze can synchronize two computers and provides a push mail service to many smartphone devices.
- 8 www.pergenex.com/auto-mate/. A notable competitor is Sperry Software's Mailbox Organizer, which offers very comparable features. <http://www.sperrysoftware.com/Outlook/Incoming-Mail-Organizer.asp>.
- 9 A list of the e-mail addresses for many cellular and paging services can be found at <http://www.notepage.net/smtph.htm>.
- 10 <http://www.sperrysoftware.com/Outlook/default.asp>.
- 11 Another program that promises to eliminate Outlook duplicate records is Duplicate Remover. <http://outlook.duplicate-remover.com/>. I have no experience with this program.
- 12 http://www.responsesource.com/releases/rel_display.php?relid=35547&chilite=.
- 13 Additionally, spammers will obtain e-mail addresses (or at least use e-mails) from infected machines and from programs that attempt to guess e-mail addresses.
- 14 <http://www.sunbeltsoftware.com/>.



Recommended Reading for the Appellate Lawyer

By Mary Massaron Ross

Advocacy is an art—but it is an art that can be taught. This issue's book review discusses a book that offers tips on advocacy.

Making Your Case: The Art of Persuading Judges

Antonin Scalia & Bryan A. Garner
(Thomson/West 2008)

Last week I attended a one-day seminar in Washington, D.C. taught by Justice Scalia and Bryan Garner. The text used was this marvelous book. I sat in the front row with a DRI friend and fellow appellate lawyer from Texas. We listened, laughed, and learned about advocacy from two masters: Antonin Scalia, a former law professor and current justice on the United States Supreme Court, and Bryan A. Garner, lexicographer, writer, and preeminent guru on legal writing. Together, they provided the audience with a quick trip through the 115 tips on advocacy covered in the book. Interspersed into the presentation were video clips of interviews with other notables from the bench. If you missed the seminar, you can still enjoy the repartee between Scalia and Garner, debating whether citations should be in footnotes or not, disagreeing about the use of informal speech in briefs, and offering examples of what to do and what not to do as advocates, by reading the book.

The book is divided into four sections: general principles of argumentation, legal reasoning, briefing, and oral argument. The authors present a comprehensive discussion of how to become a great advocate. Any advocate who adheres to the authors' advice will improve. In fact, this is the best single book on advocacy that I have read—and those of you who have seen my library of books on lawyering or have read these reviews over the years know that is saying a lot. This book now has a favored place next to my computer and next to David Frederick's excellent book on oral advocacy, so that I can consult it regularly.

Justice Scalia and Bryan Garner offer a number of key principles of argumentation. For example, they urge advocates to "[o]ccupy the most defensible terrain," advice that should prompt thinking about the strength of the litigant's position, and the breadth of relief needed for the litigant to be able to claim victory. At the same time, they counsel advocates to "[y]ield the indefensible terrain—ostentatiously." Taking such a step will allow you to give your best argument concerning why that terrain is unnecessary to victory. It will also endear you to the court, which will see you as "an emi-

nently reasonable advocate." Related to this advice, Justice Scalia and Bryan Garner urge advocates to "[c]oncentrate your fire." By this, they mean to avoid scattershot arguments. If you have been handling appeals for any length of time, you have probably heard other lawyers or clients urge inclusion of numerous issues. "How do we know which issue will most attract the appellate court's attention?" they ask. Scalia and Garner advise you not to "let that happen." They say, "Arm-wrestle, if necessary, to see whose brainchild gets cut." But use your best judgment to select the strongest issues, which should ordinarily be limited to three.

Justice Scalia and Bryan Garner offer an unbelievably concise, and yet complete, overview of legal reasoning. They urge advocates to "[t]hink syllogistically." They suggest that advocates "[k]now the rules of textual interpretation," a pointer that most Michigan advocates have down pat by now. During the seminar, Justice Scalia offered an additional, and useful, observation. Know the difference, he said, between legislative history and statutory history. Legislative history includes committee analyses and other such non-voted-on materials that some judges will consider for whatever light they shed on the meaning of statutory text. Textualists reject use of such materials, but non-textualists may consult them when the text fails to offer a "crystal-clear" answer to the question presented. Statutory history, on the other hand, offers useful information about what the legislature did in the past. If the legislature amended the text to delete a word or to alter a phrase, for example, one can ordinarily deduce that it intended to change the meaning. Both textualists and non-textualists will consider statutory history in determining the meaning of a statute.

Tips on brief writing provide additional guidance for advocates. First, advocates should prepare for brief writing by improving their command of the English language. This can be accomplished by reading good prose—which does not include reading legal briefs or opinions. Second, the authors encourage advocates to use desk references such as a good thesaurus, Fowler's *Modern English Usage* (2nd ed. 1965) and Garner's *Modern American Usage* (2nd ed. 2003) and *Dictionary of Modern Legal Usage* (2nd ed. 1995). Third, the authors urge advocates to consult and follow the court rules, but to

do so “sensibly.” Thus, advocates should not refer to the parties as appellant and appellee throughout merely because the rules designate them as one or the other. Fourth, the authors suggest that advocates create a schedule with “timelines for the stages of your work.” By counting backwards from the date when the brief is due to be shared with a client or senior partner, advocates can assure themselves that they have set aside adequate time to review the file, think about the arguments and issues, outline the brief, write a draft, and revise. Trying to do it all in one day is a colossal mistake. The authors offer many useful tips on the writing process, the most important of which is to spend time thinking about the argument.

The book’s tips on oral advocacy are equally worth reading. Justice Scalia and Bryan Garner urge advocates to develop their public speaking skills. They emphasize the importance of correct usage and pronunciation at oral argument, suggesting several books that can help ensure that your speech does not offend by mispronouncing words, whether they are proper names, legal terms, or English words. Not surprisingly, they contend that advocates should spend adequate time preparing for an argument, and they set forth the steps needed to prepare well. One tip that I thought particularly helpful (and one that can give you ammunition if there is a disagreement about who should argue an appeal) is to “[s]end up the skilled advocate most knowledgeable about the case.” Other tips focus on handling questions, organizing your argument, and handling “difficult” judges. That advice alone is worth the price of the book.

One thing that Justice Scalia said in the seminar, and that comes through repeatedly in the book, is that attaining excellence in advocacy is hard, but that it is worth it because it matters to the outcome. As anyone who has ever labored over a brief late into the evening to try to get it right knows, striving for excellence is not easy. And the temptation exists to simply do an “adequate job” and go home. This book inspires readers to do more. Justice Scalia and Bryan Garner urge advocates to “look upon this profession of advocacy as a long-term continuum, each individual case not standing in isolation but profiting from and building upon your prior success.” They urge you to “[a]rgue not just for the day but for reputation.” Their book offers an outstanding discussion of precisely how to do so. If you don’t have it yet, I urge you to get it immediately. If you have it, I urge you to read it, and read it again, and try, as I am doing, to put the advice into practice. 🏛️



Shannon’s Soapbox

By Brian Shannon

If ever a public question cried out for editorials, letters to the editors, and general opining, it would appear to be the sweeping ballot proposition promulgated by Reform Michigan Government Now. Unfortunately, this Soapbox appears too infrequently to have any chance of being the first to opine about the wisdom or folly of amending Article VI of Michigan’s Constitution in the manner proposed (or Articles II, IV, or V, for that matter). I’m sure whatever I might say will have been said already by others.

But will I let that stop me? Of course not. Nor will I be deterred by the distinct possibility that this proposition won’t ever make it to the ballot. How often does one get a chance like this? So don’t stop me if you’ve heard this one.

I’ll focus on two provisions listed under “Schedule and Temporary Provisions.” These aren’t the constitutional changes themselves, just the provisions that would “ensure the orderly implementation of the 2008 amendments to the constitution.”

Section 3 of these provisions would implement a reduction in the number of Supreme Court justices from seven to five “by eliminating the two justices with the shortest tenure” on the court. (That would be Justices Robert Young, Jr., and Stephen Markman, of course, who both joined the Court in 1999).

Section 4 would implement a reduction in the number of Court of Appeals judges from 28 to 21 “by eliminating the seven judgeships with terms expiring on January 1, 2011.” I’ve already expressed my views on why reducing the number of judges would be an unmitigated disaster, so I won’t repeat myself. Instead, I’ll limit myself to the methodology used for that reduction by this ballot proposal.

If you look at the roster of judges on the Court of Appeals, you’ll see that 13 of them have terms expiring at the beginning of 2009, seven at the beginning of 2011, and the remaining eight in 2013. The targeted 2011 group includes our most senior judge, David Sawyer (22 years); the sixth most senior judge, Helene White (16 years; she’s moving to the federal bench); Joel Hoekstra (14 years); William Whitbeck (11 years); Kurtis Wilder (10 years); Donald Owens (9 years); and Pat Donofrio (6 years). Judges Sawyer, White, and Hoekstra were initially elected. The other four initially were appointed by former Governor John Engler. Collectively, these seven judges have served almost 90 years in the Court of Appeals.

In other words, under this proposal, the two junior justices and seven veteran Court of Appeals judges would lose their jobs. Critics of the proposal are quick to point out that all these potentially out-of-work justices and judges, save one who is leaving anyway, are affiliated with the same political party.

Continued on next page

These are nominally non-partisan offices, of course, but judges are entitled to have political views, too, at least when they are not wearing their robes. It would be very wrong indeed if sections 3 and 4 of the temporary provisions were *designed* to eliminate justices and judges on the basis of their party affiliation, but let's not be too quick to judge. Maybe there's a neutral explanation everyone is overlooking.

Sure, it looks bad on the surface. And plenty of commentators have been quick to find political motives in these provisions. But I'd think a group sophisticated enough to propose a major overhaul of Michigan's Constitution would also be sophisticated enough to see that politically motivated implementation provisions aimed only at one political party could backfire on election day. It will be difficult for the proposal to pass if one party is unified against it.

Or am I being naïve? Might the RMGN people just be counting on voters not to understand the proposal? Especially since it will be boiled down to 100 words on the ballot?

It's tough not to be a cynic in this world, but I do try. In that spirit, I have tried to find some politically neutral reason for deselecting junior justices but selecting veteran judges from Michigan's two appellate courts. How do we know there isn't a neutral reason if we don't even look before rushing to judgment?

Hmmm. Section 3 might be written the way it is to retain Michigan's most experienced justices. Arguably, there's no substitute for experience on a state supreme court. And section 4 might be written the way it is because only in the 2010 election will exactly the right number of judges be up for election. Yeah, that's the ticket.

Hmmm again. But if trimming in one court can be accomplished by removing the judges with the least tenure, why couldn't the same procedure be followed in the other appellate court, too? Let's see, that would eliminate Judges Elizabeth Gleicher, Jane Beckering, Deborah Servitto, Alton Davis, Stephen Borrello, William Schuette (who has said he isn't running again, anyway), and Karen Fort Hood.

The first five of these seven were appointed by Governor Jennifer Granholm. Three of these (Beckering, Davis, and Gleicher) are running this fall, so they would be on the ballot at the same time as the RMGN proposition. Judges Schuette and Fort Hood ran in 2002 and took office on January 1, 2003. Judge Fort Hood also will be on the ballot this fall, as will those seeking to fill Judge Schuette's seat.

If RMGN had proposed that these seven be pink-slipped, it might be able to beat the rap of being politically motivated. This group of intermediate appellate judges is about as solidly affiliated with one political party as is the other group—but it's a different party. And in each group, the one judge who is

most identifiable as politically "other" isn't running again.

(For the record, I don't really know the politics of any of these judges. I keep out of their politics and expect them to keep their politics out of my cases. Governors do tend to appoint judges from their own parties, by and large, and I've made some assumptions here, I admit. Judges who first reached the court via the nonpartisan ballot are a little harder to figure for those of us who are not politically astute—that would be me.)

I'm aghast at the thought of losing either group. My clients already are waiting longer and longer for panels. But, again, that's not today's topic. The question is why RMGN didn't call for the Court of Appeals judges with the shortest tenure to be axed. It may be reason enough that four of the six who plan to stay on the court will be running for election on the same ballot as this proposition (assuming it survives the legal challenges and makes it to the ballot). And a fifth judge will be newly elected at the same time. It would be just too bizarre if five judges were reelected or elected in November and terminated on December 20, 2008.

But that doesn't really make it OK to terminate all the judges who otherwise would run in 2010 and begin new terms on January 1, 2011—unless there was no other way. Surely RMGN could have proposed that it be done in other, better ways.

What about simple attrition? Judges White and Schuette already are going to create a couple of vacancies, aren't they? Well, no, not really. Someone will be elected this fall to Judge Schuette's seat on the bench, and Governor Granholm, I'm guessing, will appoint someone to fill Judge White's seat before the election. But that still leaves attrition after the Constitution is amended, assuming the proposition is on the ballot and passes.

Based on recent history, there will always be natural attrition. Governor Granholm made four appointments in 2005-2007. Chief Justice Clifford Taylor's proposal to reduce the size of the Court by four judges relied on attrition, as I recall. Heck, the 15 percent cut in pay is likely to light a fire under the attrition rate. And if judicial pensions are tied to the pay rate at the time of retirement (as I've heard but not verified), the passage of this proposition in November could lead to more than enough retirements in the last two months of the year to accomplish RMGN's goal of creating seven vacancies by December 20, 2008.

A better way to have drafted section 4 of the "temporary provisions," then, would be along these lines:

"The reduction in number of Court of Appeals judges to 21 as specified in Article VI, Section 8, as amended, shall be implemented on December 20, 2008, by not replacing

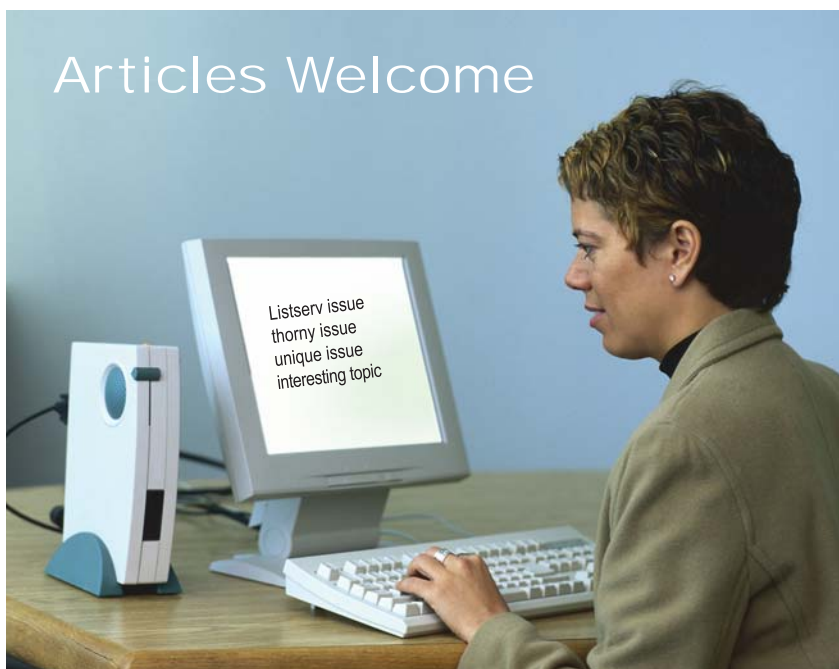
judges who have announced their retirements by that date and, if fewer than seven judges so retire, by ...”

Hmmm again. It's not so easy to finish that sentence. It's not fair to downsize any of the 13 judges who will just have been elected or reelected. As between those with terms ending January 1, 2011 and January 1, 2013, I guess it does make marginally more sense to terminate those who have served more of their terms (and presumably amortized more of their campaign costs). But not all seven whose terms end 1/1/2011 will have to go if the passage of this amendment precipitates a mini-exodus from the court. Oh-oh, now I know how to end section 4:

“...and, if fewer than seven judges so retire, by having the judges with terms expiring on January 1, 2011 play rock paper scissors until the number of judges to be eliminated reaches seven.”

That would do it. But this whole scheme to eviscerate the courts we practice in, to the profound detriment of all Michigan citizens, is so ill-conceived and would be so disastrous if implemented, that I'm not sure whether the losers at rock paper scissors would be the judges who had to leave the court or those who had to stay.

—*Brian Shannon*



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. The next publication deadline is October 20.

Bar Dues Waived for SBM Members on Full-Time Active Duty in the U.S. Armed Forces

Dues have been waived for up to four years for SBM members engaged in full-time active duty in the United States Armed Forces. The waiver, recommended by the State Bar of Michigan Representative Assembly, is intended to relieve the burden on lawyers whose professional careers have been disrupted by deployments into active military duty.

The American Bar Association has called for all bar associations to consider dues exemptions for military members. Michigan is among the first states to implement such an exemption. The waiver takes effect October 1, 2008 — the same date that dues are payable by SBM members.

Greg Ulrich, a member of the State Bar Board of Commissioners and sponsor of the resolution before the Representative Assembly, hailed the recent Michigan Supreme Court order regarding the waiver.

“The waiver recognizes sacrifices by Michigan lawyers serving in the military,” Ulrich said. “They are drawn away from their families and daily lives by their commitment to protect us all.”

Ulrich also noted other measures voluntarily undertaken by the legal community to respond to the needs of soldiers and veterans, especially the disabled, such as the University of Detroit Mercy School of Law Veterans Law Clinic and Thomas M. Cooley Law School's Service to Soldiers program.

Appellate Practice Section Newsletter

SBM

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