

APPELLATE PRACTICE

Section Newsletter

FREEDOM • TRUTH • EQUALITY • JUSTICE



News on Section Amicus Briefs

The Appellate Practice Section recently filed amicus curiae briefs in the cases of *Houdini Properties, LLC v City of Romulus*, Supreme Court Docket No 132018, and *Beavers v Barton Malow Co*, Supreme Court Docket No 133294.

The Section’s Amicus Brief in the *Houdini* case

The section was invited by the Michigan Supreme Court to file an amicus brief in *Houdini*, which involved an issue of appellate procedure. *Houdini* was an appeal by a property owner from an adverse decision of the City of Romulus Board of Zoning Appeals.

In *Houdini*, the property owner filed a claim of appeal to the Wayne County Circuit Court from the adverse Zoning Board of Appeals decision, as well as a separate civil action challenging the constitutionality of the zoning ordinance, and seeking damages for a taking of the property. The circuit court affirmed the Zoning Board’s decision on appeal, and then granted summary disposition in the separate civil action, holding that the civil action should have been joined with the appeal under the compulsory joinder rule, MCR 2.203. The Court of Appeals affirmed the grant of summary disposition, also holding that the complaint for damages should have been joined with the claim of appeal under MCR 2.203(A).

In a brief prepared by former council member (and current section member) John Bursch, the section took the position that the compulsory joinder rule, MCR 2.203, does not apply to a claim of appeal, because a claim of appeal is not a “pleading” as defined by MCR 2.110, and because a claim of appeal does not “state[] a claim.” The section submitted that any joinder should be permissive, not mandatory.

Houdini was argued on November 8, 2007. The Supreme Court subsequently issued an order reversing the Court of Appeals and trial decisions, adopting the section’s position that the compulsory joinder rule does not apply.

The section is also preparing a proposed court rule change to make it clear that joinder of original circuit court actions and circuit court zoning appeals is permissive, not mandatory, as part of a complex ongoing project to redraft the court rules governing circuit court appeals.

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A little about the building

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

From the Chair

By Paul Bernard

Theoretically Speaking

Through the leadership of numerous editors and the contributions of many section members, this newsletter has provided a valuable forum for discussing many different aspects of appellate practice—and it will continue to do so. As chair of the section for the upcoming year, one of my duties will be to fill a column in each issue.

I considered several different approaches to this task, but all seemed unworkable. I’m no good with limericks, and even if I were, it’s difficult to rhyme with “appellate,” and there are only so many times that I could make a wink-and-nod reference to briefs. (The previous sentence was my first and last, and it probably was one too many.) I also rejected the idea of a series of columns on the pros and cons of citational footnotes.¹

Then I had a serious idea: discuss issues of legal theory that are particularly relevant to appellate lawyers. These issues could include different approaches to textual interpretation, such as originalism and textualism, or different decisional doctrines, such as the principle of *stare decisis*. There are, of course, many others. My discussion of these issues will not be painstaking. Rather, it will consist of some reflections that have occurred to me during the course of my practice.

I hope that such a discussion in these pages will not begin and end with this column. As any participant in the section’s listserv knows, many readers of this newsletter have well-developed points of view on these issues and no reluctance to express them. But, for all of its virtues, the listserv provides a rather evanescent forum. It’s too easy to overlook a serious idea that appears in the flickering stream of e-mails constantly flowing across our computer screens. Ideas often have more weight—literally and figuratively—when they appear on paper, a medium more readily carried to an easy chair or some other place of repose.

Thus, I hope that, for the next year, this column will inspire some debate or discussion that can make its way into the newsletter. The elements of this discussion should be something more than a flying riposte sent to the listserv with the click of a mouse—but also something less than a scholarly article.

As appellate lawyers, we have more need for theory than many of our colleagues. In many appellate cases, the outcome turns on a fine distinction that can only be made through an artful use of a theoretical idea. It seems appropriate, then, that we all should take the time to think in a moderately serious way about the kind of theoretical propositions that we must regularly use and refute. And what better way for lawyers to think than by writing down their points and counterpoints and by reading those of their opponents?

There is another reason for giving two cheers for theory. As a section organized around procedure rather than substantive law, we may have an inclination to focus too closely on matters of strategy or procedure. It is necessary and important for us to consider the forms that our arguments and advocacy take. But we must also pay attention to the tangible stuff inside those forms.

It might seem curious to characterize theoretical considerations as tangible, but, in the context of appellate litigation, I think they are. They are the things that we handle—one might say, manipulate—every day. And I think it’s worthwhile to sometimes hold them at arm’s length and take a careful look. 🏛️

Endnote

1 See Bryan Garner.

Kathleen McCree Lewis



Kathleen McCree Lewis

In 2007, the Appellate Practice Section said goodbye to Kathleen McCree Lewis, who lost her valiant battle with cancer. Kathleen was our colleague and our friend who, in addition to many local and national accomplishments, helped organize our Appellate Practice Section and served as a member of its council for many years. We will miss her.

On Friday, October 18, 2007, the Appellate Practice Section conferred its Lifetime Achievement Award on Kathleen. The Lifetime Achievement Award is the highest honor that the Michigan appellate bar can bestow. It has been given only rarely in the past, and never before to an attorney. Because Kathleen's contributions were so extraordinary, she is deserving of the honor of being the first

attorney to receive this award. She was—quite simply—the best.

The Lifetime Achievement Award is traditionally presented at the Michigan Appellate Bench Bar Conference, and we have selected the next conference as a particularly appropriate time to present this public honor. Kathleen served as a valued member of the Michigan Appellate Bench Bar Conference Planning Committee when it organized the first conference, and played an integral and essential role in every conference since then. She worked tirelessly to persuade the appellate bench to participate in the first conference, which created a true forum for dialogue on appellate law and practice. Out of that conference came the impetus for publication of the Court of Appeals internal operating procedures, an important tool for every appellate practitioner in this state.

In 2004, Kathleen worked with judges and the chief clerk of the Court of Appeals to survey the court about advocacy preferences. The survey and resulting report remains a seminal source of information for advocates and has formed the basis for numerous educational presentations since then. And for the last conference, Kathleen, despite her illness, worked on the keynote session regarding issues of waiver, preservation, and decision-avoidance techniques, all matters of major concern to the appellate bar, and participated as a panelist, enhancing the presentation immeasurably.

In further honor of Kathleen's memory, the Appellate Practice Section has made contributions of \$1,000 each to the Wade McCree Scholarship Fund at Wayne State University Law School and to the Wade McCree Endowed Professorship at the University of Michigan Law School.

Kathleen served our profession with grace and dignity and was truly dedicated to the advancement of appellate practice. Her influence will live on for many years. 🏛️

Who Are We?

In 2007, the State Bar compiled a profile of each of its sections. The results may interest you.

With regard to size, the Appellate Practice Section lands somewhere in the middle, with 646 active members. Considerably larger is the Probate & Estate Planning Section, which is 5,522 members strong. On the other end of the spectrum are the Aviation Law Section and the Animal Law Section, numbering under 200.

Most of our members are male, but we have proportionately more women than the State Bar has generally. Of our 646 members, 394 (61 percent) are male and 252 (39 percent) are female, as compared to the State Bar, which is 69.8 percent male and 30.2 percent female.

Not surprisingly, “baby boomers” (born 1944-1960) and “Gen Xers” (born 1961-1980) make up most of our membership. The numbers are pretty evenly split: 307 to 300. The Millennials, however, are beginning to make their appearance, with two members on the scene.

Most members of our section hail from Michigan, but we were surprised to learn that 16 (2.4 percent) are from out of state, and two are from outside the country. In-state members represent 41 counties, with 9 percent from Kent, 12.4 percent from Ingham, 26 percent from Wayne, and 28.1 percent from Oakland. Out-of-state members reside in Arizona, the District of Columbia, Florida, Illinois, Indiana, Louisiana, Oklahoma, Pennsylvania, and Washington.

Most of us are in private practice (65.2 percent), but we are also in government (including the judiciary) and corporations. And for the 422 members who are in law firms, 36.7 percent practice in large firms, 11.8 percent in medium firms, 26.8 percent in small firms, and 23.9 percent are solo. 🏛️

State Bar of Michigan's Appellate Practice Section Sponsors 2008 State of Michigan Moot Court Competition

By Evelyn Tombers

The State Bar of Michigan's Appellate Practice Section has agreed to sponsor this year's State of Michigan Moot Court Competition. As the sponsor, the section donated money to cover prizes for the competitors and meals for the competitors and judges. Two of its council members, Judith Curtis and Mike Updike, have agreed to judge the students' briefs. Other council members and section members will be judging the competition's oral argument rounds. If you'd like to judge a competition round, please contact Prof. Evelyn Tombers at tomberse@cooley.edu or by phone at (517) 371-5140 ext. 2606.

The State of Michigan Moot Court Competition began in 2002 and was the brainchild of a University of Detroit Mercy School of Law professor and law student. A team from the University of Michigan won the inaugural event, narrowly beating a team from


the Thomas M. Cooley Law School. The competition is open to law schools in Michigan.

The location of the competition rotates among the Michigan law schools. The University of Detroit Mercy School of Law, Wayne State University Law School, and Ave Maria School of Law have all hosted. This year's competition takes place at the Thomas M. Cooley Law School's Lansing campus on March 29, 2008.

To compete, students write an appellate brief to the moot Michigan Supreme Court and participate in at least three rounds of oral argument. During those rounds, the students argue the side that they wrote the brief for and must also take the opposite position during at least one round. The brief score counts for 50 percent of the team's score, and the oral argument counts for the other 50 percent. Awards are given to the championship team, the second place

team, the top three briefs, and the top three advocates.

Moot court competitions provide students with an opportunity to test their oral advocacy skills before a panel of appellate "judges" made up of Michigan attorneys. They're evaluated on their knowledge of the law and of the facts, their ability to think on their feet by answering questions from the judges, their deference to the court, and their ability to present a coherent argument. And because each team of two to four students prepares its brief and arguments together, the students learn how to effectively collaborate with each other; both skill sets are necessary in any law practice.

On behalf of the State of Michigan Moot Court Competition's steering committee, I thank the section for its generous support and its willingness to participate in the law students' educational experience. 

Special Thanks to Outgoing Council Members

John Bursch has served the section as both treasurer and council member for the past several terms, and is a regular contributor to the newsletter. He has decided to step down from the council to allow time for other pursuits, though we expect he will continue to submit articles for our newsletter and participate in section activities.

Council member Janet Boes has also decided to step down from council. Janet served as our website liaison with the State Bar and represented an important voice on behalf of the criminal appellate bar and local prosecutor offices.

And last, but not least, the section says good-bye to Terry Flanagan, who served as an important voice for the criminal defense appellate bar.

Thank you, John, Janet, and Terry! 

Michigan Supreme Court's Citation to Wikipedia

By Liisa R. Speaker

Many of you have heard of Wikipedia, and maybe some have even used it. But have you cited to Wikipedia in a brief, motion, or letter to the client? Michigan courts have taken the lead in the nation in using Wikipedia as a reference tool in judicial decisions. In fact, it appears that Justice Markman of the Michigan Supreme Court was the first judge in the country to cite to Wikipedia on July 30, 2004, when he used it to define a term in *Bryant v Oakpointe Villa Nursing Centre, Inc.*, 471 Mich 411, 415 n2; 684 NW2d 864 (2004).

For those readers who are not familiar with Wikipedia, it is a free online encyclopedia launched in January 2001. Myers, *Wikimmunity: Fitting the Communications Decent Act to Wikipedia*, 20 Harv J Law & Tech 163, 167 (2006). Since its creation, Wikipedia has generated huge popularity, carrying over 8.2 million articles in over 253 languages. See <http://en.wikipedia.org/wiki/Wikipedia> (accessed September 22, 2007). In spite of its popularity, Wikipedia has many downfalls that raise questions about the propriety of citing to Wikipedia in a judicial opinion. Wikipedia is user-generated and edited by persons around the globe, including anonymous posters. Myers, *supra* at 169. The Wikipedia users who create and edit content have varying levels of expertise in the particular field on which they are posting (some of them with no expertise). *Id.* Consequently, Wikipedia articles sometimes have included blatantly false information, often at the hands of vandals or pranksters. *Id.* at 164, 168.

What do other jurisdictions and legal scholars say?

With these pitfalls in mind, a United States Court of Federal Claims reversed a special master's decision inappropriately relying on Wikipedia to dismiss a case filed under the National Childhood Vaccine Injury Act. *Campbell v Sec'y of Health & Hum Servs*, 69 Fed Cl 775 (2006). The trial judge admonished the special master for relying on articles from Wikipedia and other Internet sources because those did not "remotely meet this reliability requirement [referring to *Daubert*]." *Campbell, supra* at 780-781. The trial judge explained that Wikipedia "allows virtually anyone to upload an article into what is essentially a free, online encyclopedia." *Campbell, supra* at 781. The court also noted the "pervasive" and "disturbing" disclaiming contained on the Wikipedia website, including that:

(I) any given Wikipedia article "may be, at any given moment, in a bad state: for example it could be in the middle of a large edit or it could have been recently vandalized;" (ii) Wikipedia articles are "also subject to remarkable oversights and omissions;" (iii) "Wikipedia articles (or series of related articles) are liable to be incomplete in ways that would be less usual in a more tightly controlled reference work;" (iv) "[a]nother problem with a lot of content on Wikipedia is that many contributors do not cite their

sources, something that makes it hard for the reader to judge the credibility of what is written;" and (v) "many articles commence their lives as partisan drafts" and may be "caught up in a heavily unbalanced viewpoint."

Campbell, supra at 781. The trial judge concluded that the special master's heavy reliance on Wikipedia and other Internet materials "involved an extraordinary risk that cannot be squared with the special master's responsibility for conducting a proceeding consistent with the principles of fundamental fairness." *Id.*

By all means, not all courts are as critical of Wikipedia as the trial judge in *Campbell*. In fact, courts around the country have cited to Wikipedia on a number of occasions, including 48 state court decisions and 122 federal court decisions. Among all these decisions (published and unpublished), 42 percent derive from the appellate courts. The United States Supreme Court has yet to cite to Wikipedia.

Notwithstanding this increasing frequency of citation, it appears that most courts that refer to Wikipedia in judicial opinions do so for "soft facts" that are not relevant to the outcome of the case. Cohen, *Courts Turning to Wikipedia, but Selectively*, Chicago B J, 2 (Jan 30, 2007). However, some judges have used Wikipedia for serious legal issues, including a 2004 tax case before the Tennessee Court of Appeals. Cohen, *supra* at 2. The *Campbell* case discussed above is another example of

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the judicial system relying on Wikipedia for outcome determinative issues. Legal scholar Cass R. Sunstein fears that “if judges use Wikipedia, you might introduce opportunistic editing’ to create articles that could influence the outcome of cases.” Cohen, *supra* at 2. As noted by the trial judge in *Campbell, supra*, the main concern with Wikipedia is whether the information is reliable. Cohen, *supra* at 1.

Michigan Courts and Wikipedia

These concerns raised around the country bring us back to Michigan and how our courts are utilizing Wikipedia. As examined below, the Michigan Supreme Court has cited to Wikipedia in five cases. Justice Markman cited Wikipedia in a majority opinion on July 30, 2004 to define the term “positional asphyxia.” *Bryant, supra* at 415 n2. The decision arose from a medical malpractice and negligence case in which the estate of a deceased woman sued her nursing home after the deceased died from positional asphyxia. *Bryant, supra* at 414. The issue before the Supreme Court was whether the plaintiff’s claims arose in negligence or medical malpractice. Although positional asphyxia was the cause of death, the Court’s citation of the Wikipedia definition of the case did not bear on its legal grounds for deciding the case, but merely provided background information.

“As noted by the trial judge in *Campbell, supra*, the main concern with Wikipedia is whether the information is reliable.”

Justice Young was the next Michigan Supreme Court Justice to cite to Wikipedia, also in a majority opinion, in *Michigan Department of Transportation v Haggerty Corridor Partners Limited Partnership*, 473 Mich 124;

700 NW2d 380 (2005). The Court examined whether a post-taking rezoning was irrelevant to the issue of the condemned property’s fair market value at the time of the taking. *Haggerty, supra* at 127. Justice Young cites to Wikipedia to define a psychological term “hindsight bias” in making an analogy to point out a fallacy in the dissenting opinion of Justice Markman. *Haggerty, supra* at 142 n36. Similar to Justice Young’s citation to Wikipedia, Justice Kelly has cited to Wikipedia in two dissenting opinions to point out her colleagues’ logical fallacies. See *People v Peals*, 476 Mich 636, 680 n16; 720 NW2d 196 (2006) (citing “false choice fallacy” in response to Justice Corrigan’s majority opinion); *Rowland v Washtenaw County Rd Comm’n*, 477 Mich 197, 257; 731 NW2d 41, 61 n12 (2007) (citing “ad hominem logical fallacy” in response to Justice Markman’s concurring opinion). These types of Wikipedia references to challenge another judge’s approach seem innocuous because they do not address the core legal issues in the case.

An example of the Michigan Supreme Court citing to Wikipedia for “soft facts” to help tell the story occurred in *Radeljak v DaimlerChrysler Corp*, 475 Mich 598, 654 n10; 719 NW2d 40 (2006). The decision in *Radeljak* arose from a product liability case, but the legal issue at stake was whether Michigan was a forum non conveniens for juris-

dictional purposes. Justice Kelly cited to Wikipedia (and also to the Internet Movie Database) to elucidate the reader about the plaintiff/deceased, Ena Begovic, who was a famous actress in Croatia. *Radeljak, supra* at 654 & n10.

The trouble with courts, especially the highest court of a jurisdiction such

as the Michigan Supreme Court, citing to Wikipedia is that it may influence and encourage the lower courts and attorneys to cite to Wikipedia. Even though it appears that, in large part, the Michigan Supreme Court has only cited Wikipedia on tangential issues—such as to make a point or to tell a story—the lower courts or parties may not be so restrained in citing to Wikipedia. For instance, in a Michigan Court of Appeals opinion, the court cited to Wikipedia to define a term that was not defined by the insurance policy at issue in the case, “recreational vehicle.” *Ferguson v Stonebridge Life Ins Co*, unpublished per curiam opinion of Michigan Court of Appeals, issued on February 1, 2007 (Docket No. 271488). Whether the plaintiffs were driving a recreational vehicle went to the heart of the claim as to how much they could recover under their accidental death and dismemberment insurance policy. *Ferguson, supra* at 2, 5. To date, *Ferguson* is the only Michigan Court of Appeals case that cites to Wikipedia.

The author can envision very few scenarios where it would be necessary for a court to cite to Wikipedia for a proposition other than a “soft fact” or background information. One such example arose out of the California appellate courts in *O’Grady v Superior Court of Santa Clara County [In re Apple Computer, Inc]*, 139 Cal. App. 4th 1423 (2006). *O’Grady* involved a law suit between a computer manufacturer and website publishers. Apple Computer alleged that unknown persons had caused the wrongful publication on the Internet of “Apple’s secret plans to release a device that would facilitate the creation of digital live sound recordings on Apple computers.” *O’Grady, supra* at 1432. The appellate court cites to Wikipedia to define 10 terms legally relevant to the case, but also notes why it has turned to Wiki-

pedia as a resource for its decision: “As with many of the concepts in this opinion, the most authoritative and current sources of information may themselves be found on the web.” *O’Grady, supra* at 1433 n3.

It is not surprising that reputable printed resources would not have up-to-date information for a hi-tech case, such as the one facing the court in *O’Grady*. But when reputable printed sources are available, a court’s citation to Wikipedia instead of a more reliable source should be questioned. The examples provided in this article should serve as a cautionary note against careless citation to Wikipedia (particularly when reputable printed resources are available). The Michigan Supreme Court’s citation to Wikipedia could have a dramatic impact on whether the bench or bar of this state believes it is appropriate to cite to Wikipedia. Further, the lower courts and advocates may not be as constrained in their citation to Wikipedia as the Michigan Supreme Court has been, which could raise problems such as seen in *Campbell, supra* and *Ferguson, supra*. Only time will tell. 🏠



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.



Recommended Reading for the Appellate Lawyer

By Mary Massaron Ross

The reviews in this issue include two books about Justice Clarence Thomas, his recently published memoir and a controversial biography.

Supreme Discomfort: The Divided Soul of Clarence Thomas

Kevin Merida and Michael A. Fletcher (Doubleday 2007)

My Grandfather’s Son

Justice Clarence Thomas (HarperCollins 2007)

Justice Clarence Thomas has garnered attention since his controversial confirmation hearings. Today, more than 15 years later, Justice Thomas is probably best known, at least among those who are not students of the Supreme Court, for his failure to ask questions on the bench except on rare occasions. This atypical silence from the bench has prompted Thomas critics to suggest that he is not bright enough to be on the Court, or to call him Justice Scalia’s puppet with nothing of his own to say. Shortly after his confirmation, Judge A. Leon Higginbotham, Jr., chief judge emeritus of the U.S. Court of Appeals for the Third Circuit, circulated an “open letter” to Justice Thomas, offering what Merida and Fletcher call “part history lesson and part admonition.” Merida and Fletcher explain that “it read like a stern grandfather lecturing his bull-headed grandson: “*Don’t forget the roots of your success, boy, and the responsibilities you have to those who paved your way.*” As Higginbotham’s letter demonstrates, Thomas has been repeatedly subjected to scrutiny focused not only on his scholarship and jurisprudence as a justice, but on his jurisprudence in light of the fact that he is an African American. Judge Higginbotham’s emotional attack on Thomas set the tone for Thomas’s later public reception. Both Thomas’s memoir and the biography by Merida and Fletcher offer a complex portrait of an unusual justice, whose history and perspective are often misunderstood.

Thomas’s confirmation was controversial. Negative views about the Senate’s handling of the Anita Hill/Clarence Thomas controversy prompted an upsurge in women voters favoring women candidates that has continued to this day. Merida and Fletcher call the battle a “cultural touchstone, a transforming political event that pulsed long after it was over.” In their view, it “tarnished the image of the white-dominated U.S. Senate, inspired the successful campaigns of women running for Congress, reignited the uneasy debate about black male-female relationships, and added kerosene to the partisan wars over judicial nominations.” This controversy has not dissipated over time. Merida and Fletcher suggest that “today the estrangement between the justice and broad swaths of his own people seems almost irreconcilable.”

Merida and Fletcher vividly portray the human side of the confirmation hearings. They depict the decisions regarding strategy by Thomas’s friends and supporters. Senator Danforth, who later wrote that he was concerned about the “danger of perjury” if Thomas went too far in his denials, persuaded a Justice Department

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Recommended Reading
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lawyer, and later federal judge, Mike Luttig, to warn Thomas about this. According to Merida and Fletcher, this concern prompted Thomas's statement that "if there is anything that I have said that has been misconstrued by Anita Hill or anyone else, to be sexual harassment, then I can say that I am so very sorry, and I wish I had known." But the statement "ran counter to the thrust of Thomas's statement of categorical denial" and did not "reflect his disposition about the proceedings, which he considered a gross injustice to him." Merida and Fletcher suggest that this "would not be the last time that Thomas's confidants would try to protect him against the possibility that he might not be telling the truth."

According to Merida and Fletcher, "The accusations [of Anita Hill] sapped the life out of Thomas and made him morose." They describe Thomas during this period as "a mess" who "felt powerless and broken." A group of friends from his stint as a staff member of Senator Danforth's office visited him hoping to help develop a strategy for winning a confirmation. They found him to be despairing, disheveled, "wearing beat-up pants and a polo shirt, thick socks but no shoes," with red eyes from "lots of crying and too little sleep." One asked if there had been anything between him and Anita, but he refused to talk about it.

Thomas places the battle within a context of racial animosity: "I'd grown up in a part of America where a black man was defenseless against the accusations of any white person—especially a woman. The fear and vulnerability that I had known then came back to haunt me now." During the months when his nomination was in dispute, Thomas recalls growing "flabby from lack of exercise, and my stomach was in knots."

Thomas was told by his advisors to expect questioning on "two things: my temper and my views on natural law." He spent time at home, reading and studying, making courtesy calls on Senators, and dealing with rumors in the press. In his memoir, Thomas pulls no punches. He characterizes Senator Joseph Biden as a hypocrite, whose "smooth, insincere promises that he would treat me fairly were nothing but talk." He calls Senator Howard Metzenbaum "unlikable." According to Thomas, Metzenbaum "actually tried to lure me into a discussion of natural law, but I knew he was no philosopher, just another cynical politician looking for a chink in my armor, so all I did was ask him if he would consider having a human-being sandwich for lunch instead of, say, a turkey sandwich." To Thomas, this is "Natural Law 101: all law is based on some sense of moral principles inherent in the nature of human beings, which explains why cannibalism, even without a written law to proscribe it, strikes every civilized person as naturally wrong." Thomas castigates Metzenbaum because "[a]ny well-read college student would have gotten my point, but Metzenbaum just stared at me awkwardly and changed the subject as fast as he could." Thomas likewise recounts the attacks on him by civil rights groups, including the NAACP, a group he believes lost its independence in "doing the bidding of the AFL-CIO."

But Thomas saves his harshest criticism for the Anita Hill accusations, which he flatly denies. In his view, the "weapon of choice" of his opponents was to be "the age-old blunt instrument of accusing a black man of sexual misconduct." According to Thomas, it "did not matter that a black woman was being used to make the accusations."

An equally interesting aspect of the books is their portrayal of Thomas's

earlier life, and the illumination both the memoir and biography shed on his current thinking. Both books offer the same basic outline of his life, from a hardscrabble upbringing in harsh circumstances, to a college flirtation with the radical views of the Black Panthers, to a later embrace of conservatism. Thomas's father abandoned his mother to raise her children alone. Thomas first met his father when he was nine, and saw him only twice when he was young. Thomas's mother, herself born out of marriage, was raised by her maternal grandmother because her mother died in childbirth. Thomas had an older sister and a younger brother, all delivered by a midwife. Thomas's mother struggled to feed and clothe the children, and often they were hungry, dirty, and left unsupervised. Eventually, his mother sent the two boys to live with her father and his wife. Thomas's grandfather had had two children out of wedlock, one of them Thomas's mother, before his marriage. He and his wife had no children of their own. They took Thomas and his brother in and raised them both.

Thomas's new life seemed to be a "luxury" with the increased physical comfort of a clean home and a bedroom of their own, an indoor bathroom, a separate living and dining room, den, and kitchen, adequate food and clothing, and an endless supply of soft drinks and fresh milk. But all this came with the strict rules and rigid parenting of his grandfather. According to Thomas, on the morning that they moved in, his grandfather told Clarence and his brother, "The damn vacation is over." Thomas recalls numerous rules and regulations followed by "swift, sure, and painful" punishment for any transgression. According to Thomas, "Daddy didn't whip us regularly, but our encounters with his belt or a switch were far from infrequent,

and it soon became clear that he meant to control every aspect of our lives: there would be no more carefree days spent wandering the marshes hunting for fiddler crabs, no more roaming the streets instead of going to school.”

Reading Thomas’s account of his conflicted relationship with his grandfather, one gets the sense that Merida and Fletcher’s description of the “divided soul” of Thomas is apt. According to Merida and Fletcher, these conflicting tensions placed Thomas between two worlds, but left him uneasy in both. They recount a comparison of Thomas’s story with that of Bigger Thomas, the character in Richard Wright’s novel, *Native Son*. The comparison was first made in an article published by *Reason* magazine, which Thomas later recommended to friends “as a way of understanding him.” Thomas identified with Bigger Thomas’s “roiling, misunderstood character.” Merida and Fletcher’s discussion of Thomas borders on pop psychology in places. For example, they quote a professor of law and psychology, who characterizes Thomas as “the epitome of a selfish man, a narcissist to the core. The man you invite to a party whose presence hangs like a dark cloud over the fun that would be.” The psychologist apparently bases this conclusion on Thomas’s penchant for delivering speeches about the hardships of his early life, and his struggle to graduate from Yale Law School. It seems a harsh conclusion with little empirical support, and more reflective of the strong views Thomas seems to engender than anything in his life to support it.

Both Thomas and his biographers describe his Catholicism as a key aspect of his development. Thomas explains his grandfather’s conversion to Roman Catholicism, because “the orderly Catholic liturgy and the discipline of the nuns and priests were more to his liking than the endless Baptist services and the overemotional preachers who led them, and he also thought that children learned better when they wore uniforms

and studied in a structured environment.” To Thomas, “the nuns, for all of their strictness, seemed almost lenient by comparison with my all-seeing grandfather.” As a child, Thomas was responsible for doing his homework, doing chores, delivering fuel oil with his grandfather during the winter months, and farming his grandfather’s farm during the summer months. In retrospect, Thomas explains his grandfather’s strictness as a way of ensuring that he and his brother did not get into trouble, which was always a dangerous possibility for young black men during that pre-civil rights era in the South. Thomas tempers his portrayal of his grandfather’s harsh and rigid discipline with his depiction of his generosity in helping Thomas attend the more rigorous, but more expensive, largely white high school and college. He also sees it in his grandfather’s affectionate treatment of Thomas’s son, Jamal, and in his grandfather’s private expression of grief when Thomas dropped out of the seminary.

Thomas’s explanation of his first foray into the white world at Saint John Vianney, a diocesan minor seminary, also offers a fascinating perspective on his views. His grandfather agreed to let him apply but made him promise that “if you go, you have to stay. You can’t quit.” His grandfather told him, “Don’t shame me—and don’t shame our race.” When Thomas arrived, he was unprepared for the “sea of strange white faces all staring at me.” Thomas does not recall hostility from the other students, but he remained in “a constant state of controlled anxiety.” This fear came from the academic requirements, which were more rigorous than any he had experienced before, and from being one of the first to try to succeed in this environment. According to Thomas, “We had always believed that we could do as well as whites if we were only given a fair shake—but what if it turned out that we weren’t good enough after all?” Thomas had gone from being in a “household in which

[he] was the most literate member” to being “surrounded by well-educated people.” While Thomas knew this to be a great opportunity, he also recalls it as isolating and lonely.

Along with the academic challenges, a priest told Thomas that he did not speak standard English, a statement that he initially took as a slap in the face. The priest explained that he would “have to learn to talk properly if I didn’t want to be thought ‘inferior.’” Thomas later learned that the priest had “said similar things to white students whose accents were about as thick as mine—but his candor hurt me, and it also made me self-conscious about talking out loud in class.” Along with these challenges, Thomas heard fellow students describe Jim Brown as a “n...” and received a note suggesting it would be good if Martin Luther King, Jr. were dead. Despite his sense of isolation, Thomas stuck it out and graduated.

Thomas left his home for the Conception Seminary, but did not stay to finish, a decision that precipitated a break with his grandfather that was never entirely repaired. According to Merida and Fletcher, Thomas left the seminary and the Catholic Church because it “was supposed to be about brotherhood and understanding, but instead he found racism and hypocrisy at every turn.” In response, his grandfather “put him out of the house.”

Thomas was soon admitted to Holy Cross, a “highly regarded men’s college” near Boston. This college life is a curious phase—and one that seems in many ways disconnected to his recollection of who he was as a child, and his depiction of himself as an adult. He had to work as a dishwasher and waiter in the school dining hall to help support himself, which left him constantly short of funds. Merida and Fletcher report that Thomas was “among the group of students at Holy Cross who helped form the school’s first black student union.” Thomas has described

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News on Section . . .
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The Section's Amicus Brief In The *Beavers* Case

Beavers v Barton Malow Co, another case in which the section submitted an amicus brief, involves a very different issue of appellate procedure.

In *Beavers*, the appellant's appeal as of right was dismissed by the Court of Appeals for failure to timely file a brief and obtain transcripts. The appellant's application for leave to appeal to the Supreme Court from the dismissal was denied. The appellant then filed an application for leave to appeal to the Court of Appeals from the original trial court order, but more than one year after entry of the order.

The Court of Appeals dismissed the application as untimely, deeming that the one-year period for delayed applications under MCR 7.205(F)(3) was not tolled during the pendency of the prior appeal by right in the Court of Appeals and on application to the Supreme Court.

The section's amicus brief was prepared by Liisa Speaker, who currently


serves as secretary on the section's Council, and Jodi Latuszek, a Section member. The section submitted that, even though MCR 7.205(F)(3) does not explicitly provide for tolling, the Court should use the "equitable tolling" doctrine to hold that the one-year period for delayed applications was tolled while the prior appeal as of right was pending.

The section submitted that the equitable tolling doctrine should be applied because of reliance by practitioners on prior appellate decisions allowing tolling during the pendency of a prior appeal as of right, and for reasons of judicial economy. Alternatively, the section submitted that the Court should adopt a court rule specifically providing for such tolling, and/or should make any "no tolling" rule prospective only.

The brief represented the position supported by a majority of the council. Some council members, however, voted against this position, expressing concern that MCR 7.205(F)(3) does not

provide for tolling, or that tolling, even if appropriate in certain cases, may not necessarily be appropriate for all cases.

The *Beavers* application was argued before the Court on December 5, 2007. The Court issued an order on February 1, 2008, reversing the Court of Appeals decision and remanding this case to the Court of Appeals for that Court to exercise its discretion to determine whether to grant leave to appeal. The Supreme Court held that the Court of Appeals erred in dismissing the application as untimely. The Supreme Court also indicated that it "plans to open an administrative file to explore whether to amend MCR 7.205(F)(3), in recognition of the uncertainty present in cases like this one."


Justice Corrigan dissented, stating that tolling was not appropriate where the plaintiff filed a timely claim of appeal that was dismissed due to plaintiff's "negligence" in failing to comply with filing requirements. 

Welcome to New Council Members

The section welcomes new council members Frank Bernacki, Graham Crabtree, Cara Edwards, and Peter Van Hoek. Frank Bernacki has been a Wayne County prosecutor for 30 years, and is current president of the Appellate Forum for the Michigan Appellate Prosecutors. He also lectures at seminars on trial and appellate practice.

Graham Crabtree is a shareholder and chair of the appellate practice group at Fraser, Trebilcock, Davis & Dunlap, P.C., in Lansing. He has been in practice for 27 years, 11 of which were spent as an appellate specialist in the Oakland County prosecutor's office.

Cara Edwards is an appellate specialist at Dykema Gossett, in Ann Arbor. She has been in practice for seven years, including a year with the Court of Appeals and a clerkship with Justice Marilyn Kelly.

Peter Van Hoek is with the State Appellate Defender Office and has been in practice for 31 years, most of them with SADO, after serving as a prehearing attorney in the Court of Appeals and then clerking for Judges Dorothy C. Riley and George Bashara. 



Recommended Reading
Continued from page 9

this time as his “radical years,” before he “grew up.” Merida and Fletcher note that he “invokes [this past] in a way that seems aimed at surprising those likely to be suspicious of his conservative views.” For example, he “frequently mentions his college experiences working in the Black Panther-style free breakfast program, and marching against the Vietnam war, and for minority rights” to Supreme Court clerks of liberal justices. According to Merida and Fletcher, while at Holy Cross, Thomas “put a poster of Malcolm X on the wall of his dorm room, and immersed himself in Malcolm’s speeches.” Thomas was not the only black student to suffer from the effects of racial isolation and hostility at Holy Cross. The novelist Edward P. Jones, also a student at Holy Cross at that time, wrote about racial incidents at the school in an alternative student publication. Thomas recalls the experience as lonely and difficult.

In retrospect, Thomas describes this as a time of testing and exploration, which later took him back to embrace the conservative values of his grandfather, who emphasized self-discipline, self-reliance, hard work, and education as the way to succeed. Thomas attributes his ability to survive and flourish in difficult circumstances to his grandfather’s values. Thomas chafes at the restrictions he felt were placed on him to articulate only liberal views as an African American. He associates himself with longstanding strains of thought in the black community focused on self-reliance, education, and self-discipline.

His memoir recounts his years in law school, his job with the Missouri attorney general, his work on the staff of Senator Danforth, his brief stint at Monsanto Corporation, and his career in public service. At each step of the way, he offers his perspective, and at-

tempts to answer critics by explaining the choices that he made. Thomas’s memoir ends with his description of the confirmation process, which he continues to call a lynching, and with his swearing in.

Merida and Fletcher’s biography recounts Thomas’s work on the court for the past 16 years. They describe his efforts to assist African-American judicial candidates whose nominations have been stalled in the Senate. Those he intervened to help include Judge Eric Clay, now on the Sixth Circuit, and Judge Victoria Roberts of the District Court for the Eastern District of Michigan. Judge Roberts told Merida and Fletcher that she was “very comfortable with [Thomas] to my surprise.” Thomas told Roberts that if Damon Keith was vouching for her, that was good enough for him, and he made calls to several senators to help her through the confirmation process.

Merida and Fletcher also describe Thomas’s second marriage and his home life with his second wife, his trips in an RV during the summer, and his efforts to be a good parent to the son from his first marriage and to a great-nephew who lives with him because his father is in prison. Merida and Fletcher offer Henry Louis Gates, Jr.’s analysis of Thomas, placing him in the context of African American history and culture. These last chapters, likely to draw ire from Thomas fans, are nevertheless worth reading for the light they shed on broader questions.

Disappointingly absent from both books is any real discussion of Thomas’s jurisprudence as a Supreme Court justice. His work on the Court is significant, and understudied in the popular and academic press. But in the meantime, Court watchers should read both of these books. 🏛️

Bench Bar Materials

Did you miss the Appellate Bench Bar Conference on May 2-4, 2007? Are you hungry to know more about the nitty gritty of appellate practice? Curious about what was discussed at the conference?

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Shannon's Soapbox

By Brian Shannon



Today's Soapbox is mainly for the relatively new appellate lawyer, who didn't practice during the Bad Old Days when appeals often took two years to decide and sometimes took three. It may also interest you veterans who haven't thought much about those days recently. I think it is worth remembering those times now, as the pendulum threatens to begin an inexorable swing back in the wrong direction.

What has me thinking about this is the Court of Appeals' "Progress Report No. 21," released on September 21, 2007. It marks more than five years of quarterly reports on the progress of appellate "delay reduction." During those years, the average claim-to-decision time in opinion cases was reduced from 653 days in 2001 to 382 days in the second quarter of 2007. In the third quarter of 2007, that number was back up to 462.

When I wrote last time that the public and our clients need a full complement of 28 judges working in the Court of Appeals, I thought the idea of trying to make do with fewer judges was unlikely to find much favor with anyone. But then the State Court Administrative Office (SCAO) issued a report recommending that the number of judges be reduced to 24 via attrition.

I won't debate that proposition further now. The two recent openings in the Court of Appeals were promptly filled (welcome to the Honorable Elizabeth Gleicher and the Honorable Jane Beckering!), and that debate can be left to simmer a while longer.

Even with 28 judges, the Court of Appeals is in a bad way. It has not been able to hire research attorneys for a year and has had to abort the expedited

track for summary disposition cases, closed for eight days this summer, and discontinued the cost-effective contract attorney program for termination of parental rights appeals. The budget crisis (and political gridlock in Lansing) threatened to shut down the government in late September.

Before things get worse, however, it is worth taking a good look at what has been accomplished. The bench and bar have had the same goals throughout—quality appellate decisions in less time—although we have not always agreed on the best means to accomplish that end. Still, I believe that the cooperation of appellate practitioners with the court has played a role in the gains of the last five years.

Much has been achieved since March 2002, when the court started in earnest to reduce the time it takes to move an opinion case from claim of appeal to decision. If you have never looked at any of the quarterly reports chronicling this progress, you should. The first 20 reports may be found on the court's website. Just go to the drop-down menu under "Resources" on the court's home page, scroll down to "Reports," then "Delay Reduction Work Group," then scroll down to "Progress Reports" below "Statistics." (The "Statistics" section is more current, although not as reader-friendly.) The latest progress report is the one to look at, because it reprises all the earlier information.

Progress Report No. 21 provides information through the end of June 2007. Like the others, it uses 2001 as the base year. Annual filings have been in the same ballpark since 2001. That year, as I said, the average time for disposition of opinion cases was 653 days

(see Chart 1). The first thing to note, though, is that the average time for "regular" and "complex" cases, combined, was 694 days (see Chart 3 on page 8 of the report). The overall average is shorter because it includes "summary" and "expedited" cases. In fact, the average time for "non-expedited" cases was 740 days—over two years! And that was just the "average." Many appeals take much more than average time to decide.

The progress reports break appeals down into component parts. Our end of the pipeline is "intake," which includes record production and briefing. The court's end is "research" and "judicial chambers." The black hole between those two ends is the "warehouse," where briefed appeals sit during the time when the court can't get to them because it is deciding older appeals. In 2001, appeals sat in the warehouse on average for 271 days—331 days for "non-expedited" cases (Charts 1 and 3). That's almost a full year in which *nothing* happened and the appeal was just waiting in line.

There was a time before 2001 when the backlog was even worse. I remember advising clients in civil appeals that they could expect to wait 14 to 18 months after the appellee's brief was filed before oral argument. But an average of 11 months in limbo certainly is bad enough.

You young 'uns who have begun to practice only recently don't know what "waiting in line" can mean and has meant. The "non-expedited" warehouse wait in 2005 was 175 days (Chart 7) and in 2006 was 183 days (Chart 8). That's five months less time in limbo-land than the 2001 wait. Again, these are averages, and some appeals take longer.

The court's announced long-range goal when it embarked on the current delay reduction crusade was to dispose of 95 percent of all cases within 18 months of filing. Lest you think that too modest a goal, only 25 percent of the appeals decided by opinion in 2001 were disposed of within 18 months (Chart 10). By the second quarter of this year, 80 percent of the opinion cases were decided within 18 months (*id.*). When the appeals decided by order (a category in which the cases almost always have been decided within 18 months) are factored in, the second quarter percentage increases to 91.15 (Graph 13). Oh so close to the 95 percent goal. Clearly, though, we won't be that close when the next report is issued.

In 2002, the first year for which the court can calculate the overall disposition rate (opinions and orders combined), only two out of three appeals were decided within 18 months. Better than 97 percent of the "order" cases met that goal, but only one out of three opinion cases did. Real strides were made in 2003 and 2004, followed by more modest gains in 2005 and 2006.

The question now is how far back the pendulum will swing. If the court's output continues to match or exceed input, maybe not too far. But if output drops while filings are steady, the warehouse will grow, and appeals will take longer to decide despite the best efforts of bench and bar.

The court, as I argued last time, is working as fast as it can, consistent with quality decision-making. I still do not believe there is anything to gain by cutting back on judges to hire staff attorneys. Indeed, I fear there is much to lose.

The new progress report includes a telling chart on the numbers of senior research and prehearing attorneys at the Court of Appeals (Chart 11). There was a decided dip in the number of senior research attorneys between 2001 and 2002, but since then, the

number has been steady at around 15. In contrast, the recent hiring freeze has decimated the ranks of prehearing attorneys. The FTE figure for 2006 was 30.53, and for 2007 (through June), it is only 22.21. It seems likely that the loss of eight prehearing attorneys (perhaps more by now) is going to be reflected in the number of appeals decided.

From 2001 through 2006, intake time (our end of the appeal) was reduced from 260 days to 182 days (i.e., shortened by 2 ½ months), and judicial time was cut from 61 days to 30, saving another month. Research time was shortened only slightly. The big savings came in the warehouse, where the wait in line was cut from 271 days to 159, close to four months. Reducing processing time from 653 days to 423 between 2001 and 2006 saved on average over 7 ½ months per appeal.

The 95 percent goal would easily be met without the warehouse. But the warehouse isn't going away. There is a choke point at the court's end of the pipeline that can't be enlarged without an infusion of money no one foresees. The only other solution would be fewer new appeals, which is equally unlikely. New filings are relatively stable. Higher filing fees might decrease civil appeals, but the section rightly opposes the idea of making access to the court more difficult.

Inevitably, the warehouse will start growing again as cases back up at the court's end of the pipeline. Indeed, it already is growing. It was down to 130 days in the second quarter of 2007, but jumped to 162 days in the third quarter. That added month is no doubt just a sign of things to come.

It has been argued that shifting resources from judges to staff attorneys would enable the court to decide more appeals with fewer dollars. But that raises troubling issues of undue reliance on unaccountable and often inexperienced attorneys. Michigan has proven that a centralized research staff can improve productivity, but only in partner-

ship with enough accountable judges at the final stage to convert that research into responsible decisions. It's a delicate balance, to be sure. I sincerely hope that money can be found somehow to hire more prehearing attorneys, but not by eliminating Court of Appeals judges and using a portion of the "savings."

Hmmm. It turns out to be hard for me to talk about the possible return of the Bad Old Days without drifting back to the question of whether the SCAO proposal is a good one. The bigger the warehouse gets, and the longer the money crunch continues, the louder the clamor will be for some solution like the one proposed by the SCAO. But a cynic can take some comfort in the thought that no governor, Republican or Democrat, will ever be able to resist filling a vacant seat on the bench of the Court of Appeals. I'm OK with that.

Brian Shannon

P.S. While this issue of the newsletter was awaiting publication, the Court of Appeals released Progress Report No. 22, dated October 5, 2007, covering the entire third quarter. This quarter includes the court's summer furlough days, and there is no doubt which way the pendulum is swinging.

Just comparing Chart 8 (2006) and Chart 9 (3rd Q 2007) in the new report, the average total disposition time for non-expedited opinion cases has increased from 467 days to 532 days—more than two months longer. A chunk of that increase is attributable to intake, which for some reason (perhaps the summary disposition track?) was shorter than ever in 2006. But in the 3rd quarter, the warehouse was two weeks bigger, as was judicial chambers. It's hard not to notice that fewer opinions are being released each week. 🏛️

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Former SBM President Kimberly Cahill Passes Away at 47

Former State Bar President Kimberly M. Cahill, 47, passed away Monday evening, January 21, following a brief but courageous battle with cancer. Serving as the 72nd president of our organization, she was the fourth woman to hold that distinction.

“I will always remember Kim’s outstanding service to the Bar and to our profession,” said State Bar President Ronald D. Keefe. “Most of all, I will remember our friendship and the good times we had, especially this past year as she prepared me to succeed her as State Bar president. If I do anything right as president, it will be because of what I learned from Kim. Those of us who were lucky enough to spend time with Kim will never forget the intelligence, wit, and humanity she brought to everything she did.”

Janet K. Welch, executive director of the State Bar of Michigan, said “Kim Cahill was an extraordinarily gifted lawyer who was generous beyond measure in sharing her talents on behalf of the profession she loved. Her inspiring leadership and tireless efforts on behalf of access to justice have left an indelible mark, and have strengthened both the organized bar and the legal system in Michigan. Those of us who had the pleasure of working with her are richer for having

known her, and we will miss her exuberant spirit and uncommon common sense. This is a very sad day for the legal community in Michigan.”

Kim practiced law in Center Line for more than 20 years. Her longtime law partners were her mother, Florence Schoenherr-Warnez and sister, Dana M. Warnez. Their practice focused on real estate, probate, estate planning, and family law matters. She was also the president of Schoenherr Developments, Inc., a company that acquires, develops, constructs, and leases commercial, industrial, and office properties.

Rich in leadership experience, Kim served as a State Bar commissioner from 1997-2007 and chaired the Representative Assembly from 1999-2000. She also served as commissioner liaison to numerous sections and committees, and served as the statewide chair of the Bar’s Access to Justice Campaign. She also sat on the board of the Michigan State Bar Foundation, which helps administer and coordinate grants to legal service providers.

A lifelong resident of Warren, Kim was very active in her local community. She held many leadership positions, including president of the Macomb County Bar Association in 2001-2002. She was a founding member and recent past president of the Macomb County

Bar Foundation. She also served as president of both the Macomb region of the Women Lawyers Association of Michigan (MLAM) in 1989 and the state WLAM in 1996. She also served as treasurer of the WLAM Foundation, which promotes educational opportunities for women lawyers and law students.

During her distinguished career, Kim was honored with many awards and accolades, including the Alexander Macomb Citizen of the Year Award in 1998. A graduate of the University of Michigan, she received her B.A. in 1982 and her J.D. in 1985. She is survived by her mother, Florence Schoenherr-Warnez, and sisters Dana M. Warnez and Pamela M. Cahill.

Memorial donations can be made to the Capuchin Soup Kitchen, Focus Hope, the Access to Justice Fund, U of M Law School, Women Lawyers Association of Michigan Scholarship Fund, or the Macomb County Bar Foundation Scholarship Fund.



Appellate Practice Section Mission

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

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