

APPELLATE PRACTICE

Section Newsletter

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From the Chair

By Barbara H. Goldman

In the Pink:

Thoughts on Unpublished Opinions

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In my first weeks as an undergraduate, some years ago, I encountered the concept of “culture lag.” The idea, essentially, is that as technological and economic change occurs, laws and customs “lag” behind. Some aspects of appellate practice in Michigan are showing signs of culture lag.

Any veteran Michigan lawyer can recall the days when the term “slip opinion” referred to a real “slip”—a document printed, double-sided and head-to-toe, on colored paper. Court of Appeals opinions destined for publication made their first appearance in dull yellow, and the rest came out in pale rose. Every law firm, library, and judge’s or clerk’s office featured shelves stacked or cabinets crammed with “buffs” and “pinks.” The latter arrived, *en masse* and unsorted, at some point after the official release date.

In those days, locating an unpublished opinion was tedious, time-consuming, and sometimes expensive. If you did not subscribe to the unpublished opinions, your only choice was a trip to the law library. And even if the opinions themselves were at hand, you needed the release date to begin the search. Finding the opinion you wanted then entailed looking through a stack of papers until you found the right one. Without the release date, the job required a preliminary call to the court or a long session reviewing everything issued during a given period of time. The alternative was a purchase from *Michigan Lawyers Weekly*—still an imperfect solution, because it indexed opinions weekly, and the cumulative version came out only twice a year. As for searching for opinions on a particular topic or question, unless you had a law clerk to deploy for an extended examination of the MLW indexes, it was too impractical to undertake.

All that changed, however, on July 1, 1996. Every opinion of the Michigan Court of Appeals released since then has been accessible in electronic form. By the time this column is printed, the court will have issued close to 3,000 published opinions and

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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.

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over 40,000 unreported decisions—an average of about 67 a week—since the change. Now anyone, anywhere, using the Court of Appeals website's "Case Inquiry" function, can find a decision by party name, docket number, release date, key word, trial court, or other variable. All opinions are included in commercial databases and are as searchable as anything else on Westlaw, Lexis, or their competitors.

What implications does this have for appellate practice? Is it time to think about some of the culture lag that has developed since 1996?

Perhaps the first thing to consider is MCR 7.215(C)(1). "A party who cites an unpublished opinion must provide a copy of the opinion to the court and to opposing parties with the brief or other paper in which the citation appears." Now that anyone with a computer and a docket number can find an opinion, published or not, do we really need to sacrifice more trees to make copies of every unreported decision referred to in a brief? It may be appropriate to amend the rule and limit the requirement to Michigan opinions issued before July 1, 1996 and unreported decisions from other jurisdictions.

Next, the appellate community needs to give some consideration to MCR 7.215(C)(1) and MCR 7.215(B). MCR 7.215(C)(1) provides that "[a]n unpublished opinion is not precedentially binding under the rule of stare decisis." The rigid distinction between published and unpublished decisions was essential when only opinions bound and printed in report could be found and read. "Stare decisis" had little meaning unless lawyers, clients, and citizens knew what the decisions were that the courts would "let stand." Whatever courts held in unpublished decisions languished in file cabinets with no real route to discovery by anyone unconnected with the case. In an era of electronic opinions, however, the line between "available" and "unavailable" has blurred, if not disappeared completely. Panels have long noted that unpublished opinions may be persuasive authority. The court might evaluate formalizing that concept. And allowing citation to unpublished opinions as supplemental authority (MCR 7.212(F)(3)) may not be outside the bounds of consideration as well.

MCR 7.215(B) sets the "standards for publication" of a Court of Appeals opinion. An opinion "must" be published if it "establishes a new rule of law," "construes a . . . constitution, statute, ordinance, or court rule," "alters or modifies an existing rule of law or extends it to a new factual context," "reaffirms a principle of law not applied in a recently reported decision," or if any of several other criteria apply. If the Court of Appeals followed this rule strictly, it would have to publish nearly every opinion it issues. This rule is ripe for reevaluation at the same time as the concept of "publication" itself.

Although the increase in accessibility of "unreported" decisions has many advantages, there is another side to it as well—loosely speaking, we now face an information overload. Searching reported decisions might have taken mastery of the West digest system, Shepard's citators and other finding tools, plus a bit of intellectual effort, but, at the end of the journey, a lawyer or clerk could be reasonably sure of having seen everything within the parameters of the search. As the pool of opinions has expanded, however, it may take an Olympic-size effort to review all the potential authority. And it will only continue to grow, as each Wednesday or Friday morning brings another batch of cases to be reviewed. Even if one has the time and energy to create and update a private index in a given subject area, the number of opinions to be included will expand indefinitely and, at some point, the system will become impractical to use.

An Overview of Stays Pending Appeal

By Liisa R. Speaker

Michigan statutes and court rules provide a panoply of provisions for stays pending appeal for specific types of appeals, including adoption appeals, probate appeals, administrative appeals, and criminal appeals. This article is intended to provide a survey of the Michigan statutes and court rules that address stays pending appeal. Bonding issues, which go hand-in-hand with stays pending appeal, are beyond the scope of this article.

Most appellate practitioners are familiar with the stay provisions in MCR 7.209 and MCR 2.614. MCR 2.614 provides for an automatic stay for 21 days following the trial court's order, regardless of whether an appeal is actually filed. MCR 2.614(A)(1). This 21-day period allows the aggrieved party to decide whether to file an appeal without worrying about enforcement issues. This automatic stay ends automatically at the end of the 21-day period, so if a party wants a stay pending appeal, he or she will need to move for a stay, as discussed below. The automatic stay does not apply when the trial court issues injunctive relief, when the trial court action is for a receivership, or in certain domestic relations cases. MCR 2.614(A)(2).


MCR 7.209 is the general rule for stays pending appeal, and governs stays issued by both the Court of Appeals and the trial court. The trial court can grant a stay pending appeal under MCR 7.209 "with or without bond as justice requires." MCR 7.209(E). The bulk of the rule pertaining to the trial court's issuance of a stay addresses the bonding requirements for the stay pending appeal. In the event that a governmental entity files a claim of appeal from an order denying governmental immunity, then the court rule directs that the "trial court shall stay proceedings regarding that party during the pendency of the appeal, unless the Court of Appeals directs otherwise." MCR 7.209(E)(4).

For a stay by the Court of Appeals, the rule provides that the party seeking the stay must first file a motion for stay in the trial court. MCR 7.209(A)(2). If that motion is denied, the party may then file a motion for stay in the Court of Appeals, and include a copy of the trial court's order denying the stay, along with a copy of the transcript from the proceeding in which the stay was requested. MCR 7.209(A)(2), (3). On those occasions when it is not feasible to first ask the trial court for the stay and then wait for the hearing, an order, and transcript from the hearing, an appellate practitioner may circumvent the requirements of MCR 7.209(A)(2) and (A)(3) by filing a motion in the Court of Appeals asking the Court to waive the requirements of MCR 7.209. IOP 7.209(A)(3). Although the motion to waive requires an additional motion fee, appellant can file a single document encompassing both the motion to waive and the motion for stay.

In situations where there is not time to wait for a trial court ruling on a motion for stay, the appellant may also need emergency relief on the motion for stay. MCR 7.209 also includes a provision for ex parte stays, which allows an interim stay to automatically begin once a party files the motion, the order on appeal, and any affidavits supporting the stay, and a notice of hearing. MCR 7.209(I). The Court of Appeals, however, discourages parties from utilizing this ex parte provision because the Court's emergency stay procedures make it possible for a party to file a motion for stay, serve the opposing party, and obtain a ruling within "a matter of hours." IOP 7.209(I). The appellant can accomplish this task by paying an additional motion fee for a motion for immediate consideration and by personally serving the motion for stay and motion for immediate consideration on opposing counsel. MCR 7.211(C)(6). If the appellant serves the motion on

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How does this all affect the definition of what is enough research? Does the fact that unpublished opinions can be reviewed mean that a reasonable attorney is now required to search them all before declaring that the job is complete? Is a case with just the right twist of facts lurking somewhere amidst the hundreds of appeals on "open and obvious" condition or "serious impairment of body function"? Is it malpractice if we fail to seek it out? What if a searcher overlooks the gemstone among the pebbles? Conversely, is it appropriate to bill a client for multiple hours invested in reviewing the unpublished cases on the chance that something directly on point may be hidden in the depths? These are questions that appellate lawyers are beginning to ask themselves and that, some day, courts may have to answer—issues to ponder while waiting for the "culture" to catch up with the "lag." 

the opposing party by mail, the Court of Appeals holds the motion for at least seven days to ensure that the opposing party has actually received service. MCR 7.211(C)(6).

The rules governing circuit court appeals and Supreme Court appeals also touch on stays pending appeal. MCR 7.101 notes that an appeal does not stay execution of a judgment unless the appellant files a stay bond. MCR 7.101(H)(1)(b). MCR 7.302 provides that once a stay has been entered in the case, the stay continues while the case is pending in the Supreme Court. MCR 7.302(H).

Aside from these general provisions governing stays pending appeal, several other statutes and rules provide authority for stays pending appeal in specific contexts. The following survey is intended to be a comprehensive list of stay provisions.

Probate Cases: EPIC, Adoption, Guardianship

MCL 600.867 provides an automatic stay when an appeal is filed from a probate court, except in adoption cases. MCL 600.867(1); MCL 710.65. It appears that this automatic stay provision applies to probate appeals filed in both the circuit court and the Court of Appeals. Specifically, the statute states that after a claim of appeal is filed and notice is provided to the probate court, “all further proceedings in pursuance of the order, sentence or judgment appealed from shall cease until the appeal is determined. . . .” MCL 600.867(1). According to MCR 7.101(H)(2)(a), however, the probate court has continuing jurisdiction to decide other matters arising from a proceeding in which a circuit court appeal is filed.

MCR 5.802 limits the automatic stay provision of MCL 600.867 for certain types of probate appeals. An appeal is not stayed pending appeal “unless ordered by the court on motion for good cause” from an order removing a fiduciary, appointing a special personal representative or special fiduciary, granting a new trial or rehearing, granting an allowance, granting permission to sue on a fiduciary’s bond, or suspending a fiduciary and appointing a special fiduciary. MCR 5.802(C).

In adoption appeals, the appellant is not required to file a motion for stay in the trial court, which means the appellant can file the motion directly in the Court of Appeals without the additional delay of a trial court hearing or expense of a motion to waive the requirements of MCR 7.209. Likewise, certain appeals from the juvenile division of the probate court (arising from the mental health code, such as guardianship proceedings) do not require a motion for stay in the trial court; the stay can only be obtained from the Court of Appeals. MCL 600.867(2); MCL 330.1001 et seq.

Family Cases: Support, Child Custody, and Paternity

Although MCL 552.1625 (Uniform Interstate Family Support Act) does not directly state it applies to appeals, its stay terms do not preclude that result. According to the stay provision, if a party presents evidence establishing a defense to a registered support order, “a tribunal may stay enforcement of the registered order.” MCL 552.1625(2).

In cases in which a foreign support order is registered in Michigan and the obligor challenges the validity of the foreign support order, an automatic stay of enforcement of that foreign support order will enter if the obligor shows that an appeal of the foreign support order has been taken in that foreign jurisdiction. MCL 780.180(4). In that instance, however, the obligor must furnish security for the payment of the support order before the stay issues. MCL 780.180(4).

The Uniform Child Custody Jurisdiction and Enforcement Act restricts when a stay pending appeal may issue. MCL 722.1313. Under that Act, the appealing party can only obtain a stay if the Michigan court has entered a temporary emergency order. MCL 722.1313. The Michigan court can only enter an emergency order if the child is present in Michigan and has been abandoned or it is necessary in an emergency to protect the child from mistreatment or abuse (or the threat of mistreatment or abuse). MCL 722.1204.

In appeals from paternity actions, there is no stay of execution unless the defendant (putative father) gives security. MCL 722.724.

General Civil Litigation

Under MCL 600.3840 (actions pertaining to public nuisances), if an owner of a building who is subject to an abatement order for a public nuisance appeals to the Supreme Court, then the injunction or abatement order shall not be stayed unless two justices of the Supreme Court agree to the stay in a written order. MCL 600.3840(3).

When a party appeals a possessory judgment in a landlord-tenant action or land contract case, there is an automatic stay as long as the appealing party files a bond or escrow order. MCR 4.201(N)(3)(b).

Certain foreclosure and expedited quiet title actions are subject to an automatic stay pending appeal under MCL 124.759(13). Under that section, when a party appeals from the foreclosure or quiet title action of the land bank fast track authority, the circuit court’s judgment foreclosing property “shall be stayed until the court of appeals has reversed, modified, or affirmed that judgment.” MCL 124.759(13).

There is an interesting stay provision that includes a stay of a civil case in which the plaintiff in the civil case seeks damages for bodily injury resulting during his or her commission of a felony until the criminal proceeding against the civil plaintiff is concluded. MCL 600.2955b. In that instance, the civil plaintiff cannot proceed with the civil case until the final disposition of the proceeding on that person's commission of a felony if (1) the civil defendant moves to dismiss the civil suit on the ground that the plaintiff was committing a felony, and (2) the court finds probable cause to believe that the civil plaintiff was committing a felony. MCL 600.2955b(3).

Under the Uniform Foreign-Country Money Judgments Recognition Act, the Michigan circuit court may stay any proceedings with regard to the foreign-country money judgment pending the appeal of the money judgment in that foreign country. MCL 691.1138. If the Michigan court stays the proceeding, then the stay is in place "until the appeal is concluded, the time for appeal expires, or the appellant has had sufficient time to prosecute the appeal and has failed to do so." MCL 691.1138. Interestingly, a separate provision under the same Act creates an automatic stay provision when the "judgment debtor shows the circuit court, the district court, or a municipal court that an appeal from the foreign judgment is pending or will be taken." MCL 691.1175.

An attorney who appeals a discipline order arising out of a grievance proceeding receives an automatic stay if the discipline order is for a suspension of 179 days or less. MCR 9.122(C). But when the suspension exceeds 179 days or when the order disciplines the attorney in some manner other than suspension, then the attorney can only obtain a stay pending appeal by petitioning the Supreme Court. MCR 9.122(C).

Criminal Cases

MCL 32.1067 addresses appeals from military tribunals and provides that the military tribunal may grant a stay or defer service of the sentence of confinement or any other punishment until the tribunal's final decision in the case. MCL 32.1067(8).

In the event a person arrested for misdemeanor violations for driving while intoxicated appeals to the circuit court, the circuit court "may ex parte order the secretary of state to stay the suspension, revocation, or restricted license" while the appeal is pending. MCL 257.625b. A similar stay provision applies to persons whose operator's or chauffeur's license is suspended for manufacturing controlled substances under MCL 333.7408a.

When a criminal defendant appeals from an order departing from the sentencing guidelines, the appeal does not stay execution of the sentence. MCL 769.34(9).

Administrative Appeals

There are several rules and statutes governing administrative appeals. The general stay provision for administrative appeals in contested cases appears in MCR 7.105. There is no automatic stay, but the court may order a stay "on appropriate terms and conditions only." MCR 7.105(G). These conditions resemble the requirements for obtaining a temporary restraining order. MCR 7.105(G)(1). Before a stay can issue, the court must find that the applicant will suffer irreparable injury, has made a strong showing that it is likely to prevail on the merits, that the public interest will not be harmed, and that the harm to the applicant if there is no stay outweighs the harm to other parties. MCR 7.105(G)(1)(b). Although the requirements for obtaining a stay are more rigorous in an appeal from an administrative agency in a contested case, the court rule also allows the court to enter an ex parte temporary stay of enforcement if the applicant satisfies additional requirements. MCR 7.105(G)(2).

MCL 1174q governs appeals to circuit court from the administrative hearings bureau regarding the Home Rule City Act (blight violations, zoning issues). In those appeals, the hearing officer can stay the order pending appeal prior to the filing of the appeal, and once the appeal is filed, the circuit court can stay the order. MCL 117.4q(19).

MCL 125.1517 relates to stays pending appeal to a board of appeals, to the state construction code commission, or to a court of competent jurisdiction under the Administrative Procedures Act. An appeal arising from a state construction code case automatically stays the order appealed except when the appeal pertains to a stop construction order, or when the enforcing agency "establishes that immediate enforcement of the order, determination, decision or action is necessary to avoid substantial peril to life or property." MCL 125.1517.

Similarly, in appeals under the Mobile Home Commission Act, the appeal to the department of commerce or to court of competent jurisdiction under the Administrative Procedures Act provides an automatic stay except when the department of commerce establishes that immediate enforcement of the order "is necessary to avoid substantial peril to life or property" or when the appeal is from a cease and desist order. MCL 125.2340.

Appeals to the zoning board of appeals automatically stay all proceedings unless the body or officer from whom the appeal is being taken certifies that the stay pending appeal would cause imminent peril to life or property. MCL 125.3604(3). In those instances, the appealing party can only obtain a stay by a restraining order issued by the zoning board of appeals or a circuit court. MCL 125.3604(3).

Under the Airport Zoning Act, the party appealing the decision to the airport zoning board automatically stays the


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proceedings unless the administrative agency certifies to the airport zoning board that a stay would cause imminent peril to life or property. In that event, a stay pending appeal can only issue if the zoning board orders a stay and "on due cause shown." MCL 259.459. However, when a party files a petition with the circuit court to review the zoning board of appeals' decision, the circuit court's decision to grant the writ does not automatically stay the proceeding. MCL 259.461. Instead, the petitioner may apply to the circuit court for a restraining order. MCL 259.461.

When an appeal is filed in the Court of Appeals from a decision of the railroad commission, a party may apply to the commission to present additional evidence. MCL 462.26(6). Upon filing a copy of the application in the Court of Appeals, the appeal is automatically stayed pending the commission's receipt and consideration of the proposed evidence.

Under the Uniform Condemnation Procedures Act, an appeal from an interim order granting possession of condemned property to a private agency does not stay the possession order. MCL 213.59(3).

Under the Occupational Safety and Health Act, there is no stay of the abatement period pending appeal when a party challenges the decision of the department of labor or the department of public health on the violation of an abatement period. The statute is silent as to an appeal of a decision regarding a citation, proposed penalty, or fine.

A claim for review of an order providing benefits to the Workers' Compensation Appellate Commission does not stay weekly benefits in the award of the workers' compensation magistrate or arbitrator, nor does it stay medical benefits. MCL 418.862. 

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Stu's Tech Talk

by *Stuart Friedman*

PDF—A Lawyer's New Best Friend

In the last three years, portable document format, or "PDF," has quickly overtaken other computer formats as the number one electronic format used by lawyers to exchange documents. E-filing is in use in all of Michigan's federal courts (and may soon be implemented in the Michigan Court of Appeals),¹ judicial opinions are often released in PDF, and PDFs increasingly replace faxes. In fact, many faxes now include the ability to directly e-mail PDFs as an alternative to faxing. To be environmentally friendly, many university libraries have upgraded their copy machines to allow patrons to send free PDFs to their e-mail accounts as an alternative to traditional copying.

Increasingly, an office has to adapt its strategies to produce documents in PDF format. This article provides an overview of this new format, together with some tools and tricks that make a lawyer's life easier.

Introduction

In 1993, Adobe introduced its Acrobat as a tool to assist in desktop publishing workflow. Acrobat allowed documents to be exported from numerous desktop publishing solutions into a common format that could be shared with typesetters, printers, and other businesses involved in digital layout and production. At first, the format was not overly popular because there was no free reader program and the documents produced by Acrobat were significantly larger than plain text files. In the era of dialup modems, this was a major hindrance.

Adobe overcame many of the initial obstacles and established itself as the leading format for document conversion to the Web through the distribution of a free reader program (Acrobat Reader, now Adobe Reader) and later through royalty-free access to third-party developers of PDF-compatible programs. As of January 1, 2008, PDF is now an open format contained in ISO 32000 Standard (DIS).² PDF is now under the control of the United Nations International Standards Committee. (In a move reminiscent of the Cold War, Russia abstained on the otherwise overwhelming vote for the acceptance of PDF as an international standard).

As a result of this evolution, PDF is now the international standard for digital documents. While Acrobat is still the leading program to produce PDFs, numerous other programs (including some versions of both Word and WordPerfect) can now read and write Acrobat formats. Newer versions of the Apple Macintosh are shipped with PDF writing installed directly in the operating system. A number of converters also have emerged to convert files into and out of PDF format.

As more and more cases involve the use of PDFs, a lawyer will need to invest in a better “tool kit” to deal with the various issues that may come up.

Do I Need “Acrobat,” and if so, Do I need the Professional Version?

While there are many other programs available to create PDF files, Adobe Acrobat remains the industry leader. Adobe (now counting the free reader program) comes in three versions: Standard, Professional, and Professional Extended. The features provided in the extended version are not needed by most law offices. Firms will probably want one copy of Adobe Acrobat Professional, but may wish to use the Standard Edition or one of the two major competitors for many of their workstations.

Acrobat Standard is Adobe’s basic PDF creation program. It has the ability to create PDFs both from scanned pages and from other computer programs. It accomplishes the latter feat by pretending to be a printer driver and allowing you to “print” to an Acrobat document. Acrobat also installs itself into the Microsoft Office family of programs and permits “one click” conversion of files from the Microsoft program’s native format to PDF. Acrobat also contains optical character recognition (OCR) scanned documents so that search and find functions can be used.

Another helpful feature in both the Standard and Professional versions is the ability to transform documents (scanned or created from another program) into a form that can be filled out by any user who has the free Adobe Reader program. Both the Standard and the Professional versions also include the feature (starting at Version 7) to archive multiple Outlook e-mails in a single PDF, including attachments. When closing a client file, this is a very handy feature for archiving e-mails associated with the case.

Lastly, both versions of Acrobat have added security features to the files which permit you to digitally sign a file (to prove authorship), to remove document history materials (“metadata”), to gain some protection against alteration of the documents,³ to combine and separate PDFs, and to collectively work on a document in a workgroup environment.

Acrobat Professional offers some additional features of interest to a law firm, including redaction—the ability to securely remove information from a PDF. This feature is very handy when sharing documents subject to a duty of partial disclosure (e.g., materials containing privileged and non-privileged materials). Additionally, Acrobat Professional adds a handy “Bates numbering” feature.⁴

Other PDF Solutions that Support Scanning: Adobe Competitors

There are several formidable competitors marketing comparable programs for significantly less than the Adobe

product. Now that PDF is an open standard, many of these programs support both reading and writing to the PDF format. Perhaps the best and most popular competitor is Nuance Software’s PDF Converter Professional, which includes scanning and PDF conversion facilities. Nuance’s “Enterprise Version,” which retails for \$150 per set, is the competitor of the \$400 Adobe Acrobat Professional. The “Enterprise Version” also offers document scanning, PDF creation, PDF security, Bates numbering, collaboration, and redaction. This program is a very formidable competitor of Acrobat Professional and may prove particularly appealing to Lexis/Nexis subscribers. PDF Converter offers some tools designed for integration into the Lexis/Nexis product line. The most compelling feature that the Nuance PDF Converter offers is two-way conversions. You can convert a PDF file back to Microsoft Word or WordPerfect.⁵

I used this conversion feature recently when I had to respond to a very well-crafted brief filed by a skilled opponent. After a quick read of the brief, I converted the brief back to Word and uploaded it to West Publishing’s West Check service.⁶ The service instantly generated a report of every citation in my opponent’s brief and alerted me to significant criticism of several of his main cases.

Another popular Acrobat competitor is Nitro PDF.⁷ Nitro PDF includes the ability to create PDFs from programs and scanners, contains Office integration similar to Acrobat’s, handles PDF security, and provides the ability to insert headers, footers, Bates numbering, and watermarks in documents. At the \$99 list price,⁸ this is also a very formidable competitor to Adobe. Nitro PDF also offers two way conversions and supports Adobe group commenting features.

PDF Solutions to Just Create PDFs from Computer Files

For individuals who simply wish to create PDFs from their computers without the “extra” features, there are a number of possibilities. First, if you are a WordPerfect user, most newer versions of WordPerfect come with the ability to create PDF files directly inside WordPerfect. Some versions of Microsoft Word also offered this feature. PDF support appeared in Office 2007, Beta 2, but was removed from the final production version of the program following a fight with Adobe.⁹ The module, however, is available as a free download from Microsoft’s website and works with Office 2007.¹⁰

There are also several free programs offering a printer driver to make PDF files from most programs. PDF-Redirect is a free program which offers not only PDF creation, but also basic PDF management capabilities. While the manufacturer’s website is offline,¹¹ the program can be legally downloaded from download.com at the address appearing in the

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footnote.¹² There is also an open source program called "PDF creator" available for free download.¹³


Special-Purpose PDF Tools

Over the years, I have found two tools that are indispensable for PDF management. First, if your PDF creation program does not support exports to your word processor, there are several third-party tools designed for this purpose.

PDF2Word is only \$10 for individuals and is a pretty good converter. Nuance Software, discussed above, also makes a basic version of its PDF Converter program. This program costs roughly \$100 and contains OCR capabilities. This is important if the original PDF was created on a scanner. Scanned PDFs rarely have the underlying text contained in them, and a program is required to reconstruct the actual text.

Every now and then a PDF file gets corrupted. A German company offers a PDF repair utility called 3-Heights, and it is the best I've ever used. I've been a loyal subscriber to this program for the last four years and have not been disappointed. I've only needed to use the program a dozen times, but each time it has recovered the file.¹⁴

Conclusion

PDFs are quickly displacing paper as the method of distribution for legal documents. These tools should hopefully make the management of these digital documents a little easier. 

Endnotes

- 1 MCR 2.107 also was recently amended to permit attorneys to voluntarily serve documents via PDF.
- 2 http://www.iso.org/iso/iso_catalogue/catalogue_tc/catalogue_detail.htm?csnumber=45873 (last visited November 4, 2008).
- 3 The protection is not perfect. A Russian-based software company sells a program to crack the password protection scheme in Acrobat.
- 4 The Bates Company in roughly 1896 invented an automatic stamping machine that numbered progressively. Each time the machine was pressed down onto a sheet of paper, a rotating wheel incremented by one. Pages were numbered using a six-digit sequence. For example, page 824 in a document set would be 000824. Courts and law firms quickly adopted this system, which is commonly referred to as Bates Numbering. See http://en.wikipedia.org/wiki/Bates_numbering.
- 5 WordPerfect Office X4 Standard Edition or higher also comes with the ability to import PDFs. The Family and Student Edition does not contain this feature.
- 6 <https://westcheck.com/Default.aspx> ((last visited October 20, 2008).
- 7 <http://www.nitropdf.com> (last visited October 20, 2008).
- 8 Amazon.com offers the program for \$67. http://www.amazon.com/Avanquest-4386-Nitro-PDF-Professional/dp/B000LU89Y8/ref=sr_1_1?ie=UTF8&s=software&qid=1224538719&sr=8-1 (last visited October 20, 2008).
- 9 http://blogs.msdn.com/brian_jones/archive/2006/06/03/616022.aspx (last visited October 20, 2008).
- 10 <http://www.microsoft.com/downloads/details.aspx?familyid=F1FC413C-6D89-4F15-991B-63B07BA5F2E5&displaylang=en> (last visited October 20, 2008).
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- 12 http://www.download.com/PDF-ReDirect/3000-10743_4-10255233.html?tag=mncol;lst&cddlPid=10873927.
- 13 <http://sourceforge.net/projects/pdfcreator/>.
- 14 <http://www.pdf-tools.com/asp/products.asp?name=REPD&ttype=gui>.

Recent Decisions of Interest to the Appellate Practitioner

Appeals From Declaratory Judgment Actions and Issues of Public Consequence

Mich Educ Assc v Secretary of State, ___ Mich App ___ (2008)[Docket No. 280792]

In this published decision, the Court of Appeals was asked to decide a first impression issue concerning Michigan's Campaign Finance Act, MCL 169.201 *et. seq.* The dissenting judge believed that the issue framed by the parties was too narrow to resolve the larger question of funding PACs via payroll deductions. The dissent would have asked the parties to submit additional briefs to allow the Court to render a more comprehensive opinion. The majority, however, limited itself to the questions framed and briefed by the parties. It declined to address issues "not set forth in the statement of questions presented on appeal, nor . . . raised by any of the nine parties or amici briefs or at oral argument. We are not obligated to consider issues not properly raised and preserved or first raised on appeal, and we generally do not consider any issues not set forth in the statement of questions presented." Sl op, p 6. In the view of the majority, "this Court should not *sua sponte* create issues on appeal and then remand to the trial court for a determination of those issues, or request additional briefing to dispose of the issues for the first time on appeal." Sl op, p 7 (citations omitted).

The "First-Out" Rule and Stare Decisis


Shember v University of Michigan Medical Center, ___ Mich App ___ (2008) [Docket No. 276515]

In this medical malpractice case concerning a recent statutory amendment, the Court of Appeals clarified that *stare decisis* trumps the "first-out rule" of MCR 7.215(J). "We are bound to follow a published opinion of this Court establishing a rule of law that our Supreme Court or a special panel of this Court has not reversed or modified. MCR 7.215(J)(1). But under the doctrine of *stare decisis*, this Court must follow decisions of our Supreme Court." Sl op, p 10. Quoting *Boyd v W G Wade Shows*, 443 Mich 515, 523 (1993), the Court pointed out that "[I]t is the Supreme Court's obligation to overrule or modify case law if it becomes obsolete, and until this Court takes such action, the Court of Appeals and all lower courts are bound by that authority." *Id.*

Federal District and Circuit Court Opinions are not Precedentially Binding on State Courts

Allen v Bloomfield Hills School District, ___ Mich App ___ (2008)[Docket No. 275797]

New Freedom Mtg Corp v Globe Mtg Corp, ___ Mich App ___ (2008)[Docket No. 274864]

Two published cases released this past quarter remind us that federal opinions may be persuasive, but are never binding. In *Allen v Bloomfield Hills School District* (a third-party auto negligence claim), the majority rejected a New Jersey federal district court's definition of "bodily injury" in connection with a closed-head injury. And in *New Freedom Mtg Corp v Globe Mtg Corp*, the Court was persuaded to follow a district court's treatment of the fraud exception to the "full credit bid rule" (a rule that applies when a mortgagor bids on its own mortgaged property in foreclosure). 



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

By Linda M. Garbarino

This is an ongoing column that provides a list of cases pending before the Supreme Court after the grant of oral argument on application. The list is comprised of two groups: those cases in which argument has been scheduled or has already occurred and those cases in which argument has not yet been scheduled. The descriptions are intended for informational purposes only and cannot and do not replace the need to review the cases themselves.

ORAL ARGUMENT YET TO BE SCHEDULED

Bush v Shababang, S Ct 136983, COA 274726

Medical Malpractice: Whether dismissal without prejudice was properly granted where the notice of intent did not address claims of direct liability asserted against the health care entity.



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.

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

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

Grievance Administrator v Cooper, S Ct 135053

Attorney Discipline: Whether the Attorney Discipline Board erred in holding that a fee agreement was ambiguous as to whether the minimum fee was non-refundable; whether the attorney agreement or the respondent's partial retention of the minimum fee after the client terminated the relationship violated MRPC 1.5(a), MRPC 1.15(b), or MRPC 1.16(d); and, whether the Attorney Discipline Board erred in finding the respondent guilty of violating the rules of professional conduct and/or in declining to make its ruling prospective only.

People v Sierra, S Ct 135772, COA 277838

Criminal Law: What constitutes a "similar motive" to develop testimony under MRE 804(b)(1) and whether the trial court abused its discretion when it concluded that the prosecution lacked a "similar motive" to develop the testimony at a prior trial of a now unavailable declarant, by direct, cross, or redirect examination within the meaning of MRE 804(b)(1).

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

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

DECISIONS PENDING/ORAL ARGUMENT ALREADY CONDUCTED

Argued October 2, 2008

Moore v Secura Ins, S Ct 135028, COA 267191

No Fault: Whether under the No Fault Act, attorney fees

and costs were recoverable because the benefits were overdue, because there was an unreasonable refusal to pay the claim, or because there was unreasonable delay in making payment.

People v Parks, S Ct 126509, COA 244553

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

Argued October 22, 2008

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

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

About the Author

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The Basics of Brief Writing in the Court of Appeals

By Timothy A. Diemer¹

Know Your Audience

Appellate brief writing is vastly different from brief writing in the trial courts, where, because of volume and time constraints, a brief must grab the trial judge’s attention almost immediately to have any chance of success. Briefs in the trial court are often more overtly aggressive and to the point. The same strategy will not necessarily succeed in the Court of Appeals, however, where a brief passes through numerous levels of review, beginning with a prehearing/research attorney, followed by the prehearing/research supervisor, and ending in judicial chambers, where each of the three judges on your panel will be assisted by a law clerk (or two) who will closely review your brief, your opponent’s brief, and the prehearing report. Obviously, this more extensive review process allows for a deliberate and reflective analysis of the case, making the punchy style of trial court brief writing unnecessary and, ultimately, ineffective.

This multi-level review process means that misstatements of the record will be caught—as will misstatements of legal precedent. Given what can sometimes amount to an audience of eight, as well as an opponent who will be sure to point out your inaccuracies, it is nearly impossible to sneak a misstatement of fact or a misinterpretation of law past the Court of Appeals. The first rule of appellate brief writing, therefore, must be accuracy and commitment to the record.

Knowing your audience requires some appreciation for the role played by the prehearing division. This is a pool of newer attorneys, primarily first- and second- year lawyers, who examine the parties’ briefs and the trial court record before anyone else at the Court.² The prehearing attorney will prepare a report that is submitted to the panel of judges assigned to decide your case. This report is intended to be an in-depth review of the file. The prehearing attorney will read all the appellate briefs and the cases cited, review all trial/hearing transcripts, and conduct independent research. The final prehearing report will include a summary of the issues, a statement of facts and procedural history, a legal analysis of the issues in dispute, and a recommended disposition. Again, this process is undertaken before the appeal is even submitted to a panel of judges and their law clerks.

Because the prehearing attorney handling your appeal will actually read the full transcript, misrepresentations of fact will be corrected in the prehearing report. And because the prehearing attorney will conduct independent research into the applicable law, legal errors will also be noted.

In many cases, the prehearing attorney also prepares a proposed opinion. If the assigned panel is satisfied with the prehearing attorney’s report and recommended disposition, it may elect to adopt the drafted opinion. Getting the first- or second-year prehearing attorney on your side early in the process can be vital.

One other thing to keep in mind is that the Court of Appeals handles criminal appeals, termination of parental rights cases, zoning disputes, workers’ compensation claims, insurance coverage litigation, etc. Just because you understand the

Continued on the next page

three different ways to prove acquiescence to boundary lines does not mean your reader does, especially given that the typical prehearing attorney is a first- or second-year lawyer. Although many attorneys are specialists, the chances that any random Court of Appeals judge shares your specialty are quite slim. Write for a generalist audience.

Statement of Facts

The distinction between appellate and trial court briefing may be most evident in the presentation of the facts of the case. In the Court of Appeals, a statement of facts must remain just that: a presentation of the record facts, clearly distinct from any legal analysis. And the recitation of facts should be thorough. Trial court briefs typically feature a melded factual account and legal analysis.

Because appellate courts often resolve disputes of law and not fact, practitioners often assume that the legal argument is the most important part of a Court of Appeals brief. I don't believe this is entirely accurate. Providing an accurate statement of facts is probably the single most important component of an effective brief—it goes first and will shape the contours of the legal discussion to follow. Playing loose with the record will diminish an attorney's credibility, possibly causing the panel to approach the legal arguments with skepticism, not only in that particular case, but for upcoming appeals. While there may be hundreds of trial judges across the State of Michigan, there are only 28 judges on the Court of Appeals. And again, because of the way the Court of Appeals is structured, your brief will be fact-checked on a number of levels, virtually guaranteeing that any misstatement or misrepresentation will come to light.

The court rules impose a number of requirements for the statement of facts, mostly intended to ensure the demarcation between fact and law. And although the rules are often ignored without risk of the appellate brief being stricken, the rules do provide useful stylistic suggestions, including that the statement of facts be “clear,” “concise,” and, importantly, that “[a]ll material facts, both favorable and unfavorable, must be fairly stated without argument or bias.”³

A statement of facts must also have support in the record created below.⁴ Nearly every appellate practitioner has a nightmare story about a perfectly defensible appeal thwarted by an inadequately developed record in the trial court. A trial judge may be familiar with the facts of the case, eliminating any drive to bombard the judge with deposition transcripts and loads of paper. But while a light touch with the record evidence might garner a win at the trial level, it will prove immensely harmful in the Court of Appeals. Only those materials actually submitted to the trial court can be considered

The distinction between appellate and trial court briefing may be most evident in the presentation of the facts of the case.

by the Court of Appeals.⁵ Have a document or deposition transcript that may be dispositive of the appeal? It does not matter if it is not part of the record.

While the court rules repeatedly instruct that the statement of facts must be neutral and objective, it is still possible to “argue” your client's legal position in an effective and ethical manner. The goal is to introduce and plant the seeds of your argument in the fact statement without resorting to the trial court style brief writing, which can run afoul of effective brief writing in the Court of Appeals.

An effective brief uses the statement of facts to frame or preview the legal issues raised later in the argument section. The fact statement should contain not only the underlying facts, but also the procedural history of the case, which can be used effectively to introduce the legal issues central to the appeal. For example, a dispositive motion in the trial court presents a prime opportunity to outline the positions of the parties and their take on the factual and legal questions involved in your appeal, i.e., “Defendant moved for summary disposition, arguing that the ice hazard was open and obvious, while plaintiff argued that there were special aspects of the hazard thereby precluding application of the open and obvious doctrine.” This technique both states the facts of the case and foreshadows the central legal issues tackled later in the brief.

Another method of guiding the legal discussion is to insert a summary of appellate issues or statement of the case before delving into the fact statement. Such a summary is allowable under the court rules, as long as it is clearly marked as such and is not made a part of the statement of facts. Introducing the legal issues gives the Court some sort of context within which to understand and analyze the facts that follow. The statement of questions presented can also serve the purpose of providing the reader with a road map while reviewing the facts.

Never use the statement of facts to disparage opposing counsel or the trial judge. Few tactics will turn off an appellate judge more than character assassinations. Once in the Court of Appeals, it is time to let go of the fact that the defendant failed to timely answer interrogatories or that the plaintiff's attorney failed to show for a deposition. Petty personal attacks do not address the legal issues of the case, and on a more pragmatic level, many Court of Appeals judges were trial judges before taking the appellate bench and will

not appreciate diatribes against the trial judge who decided the case. Personal attacks may even create a natural level of sympathy for the judge or attorney being attacked.

While it is never a good idea to unfairly disparage the trial judge or your opponents, it may be effective to use their misstatements of fact or questionable legal propositions to cast doubt on the reliability of their overall position on appeal. For example, use bizarre quotations from hearing transcripts or trial court briefs to cast doubt on the reasoning of your opponents or the trial judge. In the open and obvious example used above, suppose the trial judge ruled that a sheet of ice in a store's parking lot was not open and obvious because the plaintiff testified he could not see it when he walked past it. This reasoning conflicts with the objective standard our case law mandates for the open and obvious doctrine, and obviously, this misstatement of law should be prominent in the procedural history of the case. This is a way to attack the result below without attacking the trial judge.

By the end of the fact statement, the issues should be framed in the reader's mind, and the answers should be suggested so that the reader is already persuaded or at least leaning your way.

Argument Section

Offering advice on the argument section of the brief is a tougher task. The law is the law, and it is up to you to decide the most effective and logical way to present your argument. Some general guidelines are offered here, and they largely continue the themes developed above. Know that your legal citations and legal reasoning will be scrutinized in the same manner as your factual account. And know that the Court will conduct its own thorough research, going beyond the authorities cited in the parties' briefs.

The Court Rules actually require argument headings in all caps and bold-faced.⁶ But again, complying with the seeming hyper-technicalities of the Court Rules actually helps you write a more effective brief. Appellate briefs, including the additional components and statements required, often approach 60 pages; argument headings are necessary to break up lengthy legal discussions. They also serve as a road map to the brief, when set forth in the table of contents, and help ensure for the writer a logical flow in the arguments.

A couple of other requirements: every brief must have a statement of the standard of review and an issue preservation statement.⁷ Don't view these two requirements as mere technicalities. An unfavorable standard of review can be the death knell of a compelling legal argument. To prevail on appeal under the abuse of discretion, for example, it is necessary to show that the trial judge's decision was "so palpably and grossly violative of fact and logic that it evidences a perversity of will, a defiance of judgment, or the exercise of passion or bias."⁸ This is obviously a high hurdle and if representing an


appellant, you want to get out from under this burdensome standard of review if at all possible. Evidentiary issues are reviewed under the abuse of discretion standard, but if the evidence admitted is inadmissible as a matter of law (under a *de novo* standard), an abuse of discretion is shown.⁹

Even more difficult than prevailing under the abuse of discretion standard is obtaining a reversal on an argument that was not raised in the trial court. An unpreserved issue is a virtually guaranteed loser.¹⁰ For unpreserved errors, relief is not available absent plain error affecting substantial rights.¹¹ The Court of Appeals "may consider an issue not decided by the lower court if it involves a question of law and the facts necessary for its resolution have been presented."¹² But this gives the Court discretion to address the issue or not, a position no appellant wants to face.

As for the heart of the argument section, there is no "blueprint" for effectively making your point. Style and structure will vary according to the issues involved and whether you are the appellant or appellee. An appellant's brief, naturally, will be more emphatic, critical, and argumentative, while the appellee will try to paint the lower court result as reasonable, fair, and legally accurate. Furthermore, the tenor of your brief should also correspond to the issue being addressed. There's no need to rant about the trial judge's denial of \$250 in taxable costs—this will compromise the effectiveness of those arguments where screeching advocacy is called for.

As for technique generally, writing styles vary greatly, and a good result can be obtained with an explanatory style of appellate brief writing as well as with a more bellowing diatribe about the injustice of the result below. Lastly, the sheer bulk of brief reading performed by the judges who will decide your case begs for some level of creativity or effort to make the brief an interesting read.

Conclusion

An appeal in the Court of Appeals will likely be your last opportunity to prevail in the case. A trial court victory can be quickly squandered with an ineffective appellate brief, and conversely, a trial court loss can be rectified with an effective appellate brief. If you are a trial attorney, it is imperative to approach the brief writing task with a proper understanding of the review process in the Court of Appeals. It may even be worth your while to consult with an appellate specialist, who will likely provide a different and valuable perspective of how to best present your case at the appellate level. 

Endnotes

- 1 Timothy Diemer is a former prehearing attorney at the Court of Appeals. Currently, Tim is an associate concentrating in appellate practice at John P. Jacobs, P.C.

Continued on the next page

- 2 Not all appeals go through the prehearing division. Complex matters often instead go directly to judicial chambers for a report or alternatively, to another, more experienced pool of research attorneys.
- 3 MCR 7.212(C)(6).
- 4 See MCR 7.210(A)(1); *Sherman v Sea Ray Boats, Inc*, 251 Mich App 41, 56; 649 NW2d 783 (2002).
- 5 *Reeves v Kmart Corp*, 229 Mich App 466, 481, n. 7; 582 NW2d 841 (1998).
- 6 See MCR 7.212(C)(7).
- 7 MCR 7.212(C)(7).
- 8 *Franchino v Franchino*, 263 Mich App 172, 193; 687 NW2d 620 (2004).
- 9 *People v Lukity*, 460 Mich 484, 488; 596 NW2d 607 (1999).
- 10 See *Fast Air, Inc v Knight*, 235 Mich App 541, 549; 599 NW2d 489 (1999) (defining unpreserved error as that which was not raised in the trial court).
- 11 *Hilgendorf v St John Hosp & Med Ctr Corp*, 245 Mich App 670, 700; 630 NW2d 356 (2001).
- 12 *Michigan Twp Participating Plan v Fed Ins Co*, 233 Mich App 422, 435-436; 592 NW2d 760 (1999).



Recommended Reading for the Appellate Lawyer

By Mary Massaron Ross

For this issue, I have reviewed several books about politically important trials that have taken place in this country and abroad. They will take you on a journey to our nation's capitol, Washington, D.C., to Germany, and to South Africa.

The United States v. I. Lewis Libby

Edited & with Reporting by Murray Waas
(Union Square Press 2007)

Reading this book will take you on a busman's holiday. Appellate lawyers and judges spend a significant part of their time at work reading transcripts, and while appellate decisions repeatedly refer to the record, including transcripts, as the "dry record," a phrase that suggests reading it must be boring, I often find them fascinating. You don't have to be Art Linkletter to believe that "people are funny," and trial testimony offers a window onto the human condition with all of its glory and all of its duplicity. Reading transcripts offers insights of many sorts. Besides hearing people obfuscate, prevaricate, and outright lie, one learns all sorts of things about the world. I once read volumes of testimony about milking machines, barn cleaning, and the diseases that cows will suffer if the machines don't function well and the barn is not clean.

If you are not too tired of reading transcripts at the end of the day, this book offers a fascinating picture of politics, journalism, and the practice of leaking stories to the press. The transcript from the Libby trial is edited and surrounded with editorial aids to follow its content. The book starts with a timeline that will allow you to follow the testimony and keep events in chronological order, something that is often difficult to do without extensive notes when you read transcripts. The book also lists key figures in the trial, including a short description of the defendant, Scooter Libby, and defense witnesses, including Ari Fleischer, Judith Miller, Robert Novack, and Bob Woodward. It's too bad jurors didn't get such editorial aids when they decided the verdict in some of the trials I have studied on appeal.

The book offers an introduction, which describes Dick Cheney's trip to Norfolk, Virginia to watch Nancy Reagan christen a carrier ship, and his conversations with Scooter Libby on the return flight. The editor offers one perspective on Joseph Wilson's charge that the Bush administration had deliberately "twisted" the intelligence to make the case for invading Iraq, and his later claim that his wife's identity as a CIA agent had been deliberately leaked to the press. But the actual transcript allows you to decide whether you agree or disagree. Whatever conclusion you come to about what happened in this classic tale of Washington power, spies, and leaks to the press, you will find the testimony fascinating. Anyone who has ever wondered who leaked a story to the *Washington Post* or the *New York Times* or some other paper will find this trial testimony enlightening.

As a lawyer, you will find it fascinating as well. You can read the testimony, and second-guess the trial attorney's strategic decisions to your heart's content. You can study the indictment, the opening statements, and the closing arguments. You can evaluate the jury instructions. You can review and annotate the trial testimony. And having done so, you can evaluate the manner in which the trial was conducted, and

make your own assessment of the correct verdict and any potential grounds for appeal. President Bush commuted Libby's jail sentence after the D.C. Circuit Court of Appeals declined to allow him to remain free pending his appeal. The president left in place a hefty fine. But the outcome for Scooter Libby is less the point, for me at least, than is the manner of handling information in Washington, a place where everyone seems to have a vested interest in the "truth," and information is shared for all sorts of purposes beyond being informative. Understanding this backdrop is worthwhile for citizens of every perspective. And because I have never seen such a close-up picture of the political and press interactions that are hidden behind the stories in the daily press, or in the memoirs we read of politicians and reporters at the end of their careers, I think this book is worth reading.

Nuremberg: Infamy on Trial

Joseph E. Persico
(Penguin Books 1995)

Another book about a very public trial is Persico's *Nuremberg: Infamy on Trial*. Many accounts have been written about the Nuremberg trials and those who were involved. Persico wrote this account of the trial after the United Nations Security Council created an international tribunal to prosecute war crimes, an event that occurred in 1993. Persico writes in a narrative style intended for the general student of history. But his focus is on the legal strategy and proofs offered in Nuremberg.

The book is organized around the phases of the trial, including the all-important pre-trial thinking about what theory could be used to bring charges against the Nazi war criminals. President Truman asked Associate Justice Robert Jackson to serve as prosecutor at the trials. Jackson invited his son, a recent law school graduate and navy ensign, along, telling him, "You'll be defending me long after I'm gone. That's one reason I want you there." Jackson worked with Murray Bernays, a colonel in the Department of War, who had written a memorandum about trial of the European war criminals. Bernays suggested trying the case on a theory that the SS was a criminal organization, which would allow prosecution of those who belonged to it without the need to offer individual proofs. Another lawyer involved in early analysis of theories for the trials was Herbert Wechsler, then working for Attorney General Francis Biddle. Wechsler disagreed with Bernays' approach. Part of the difficulty that they had in formulating an approach was the desire to avoid charges that they were enforcing *ex post facto* laws.

Persico develops the story of the trial by telling the stories of the prosecution team, the defense team, and the defendants. His narrative follows the trial testimony, and includes many quotations from transcripts. He sets forth the efforts of

the prosecutors to make their case, and their difficulty with keeping it interesting as they introduced countless documents, often not reading them in open court. At one point, the prosecution showed a film taken by allied military photographers as the armies liberated areas in which concentration camps were located. During the showing of the film, weeping could be heard in the courtroom, and one woman fainted and had to be carried out. Another film shown during the trial had been taken by the Germans themselves, and showed prisoners being taken into a barn, which was set on fire. Prisoners seeking to escape the burning building were shot.

Persico also describes the tension between some of the defendants, their different defenses, and the fear that they would commit suicide. Persico discusses the efforts that the Allies made to provide a fair trial, paying for the defense lawyers, allowing them access to the many documents relevant to the case, providing essentially unlimited time for them to confer with their clients. He places the trial in the context of larger issues, including the fraying relationship between the U.S. and England on the one side, and Russia on the other.

Persico ends his account with an epilogue, discussing the verdict of history. According to Persico, "Nuremberg increases the prospects for effective war-crimes trials in our time." In his view, the trial also had the benefit of contributing to the emergence of a democratic Germany. Nazis who were tried in a fair process could not cast themselves as martyrs or deny the existence of the Holocaust and the horrifying events that occurred. Persico also points to the many instances since then in which innocents have been killed, including in Cambodia and other places. And yet few trials have occurred in the aftermath of these events. He raises the question of whether they should and urges a law that would allow for this. The difficulties of achieving such a world are enormous, and the best approach is subject to dispute. But the problems of war crimes and the suffering from attacks motivated by ethnic and racial differences during war-time remain in too many places around the world. This book is worth reading for the light it sheds on one approach to trying to address them.

Bram Fischer: Afrikaner Revolutionary

Stephen Clingman
(University of Massachusetts Press 1998)

Many years ago, I developed an interest in the history and politics of South Africa by discovering the novels of Nadine Gordimer. She remains for me one of the greatest novelists of the twentieth century. One of her books, *Burger's Daughter*, tells the story of a young girl, Rosa, whose parents are engaged in the struggle against apartheid. The novel raises important questions about human suffering and the willingness of people to sacrifice for the greater good. The novel sets

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Recommended Reading
Continued from page 15

this life choice against the desire for personal freedom, love, and the enjoyment of beauty. Rosa must make this choice for herself. Many years later, I read Nadine Gordimer's discussion of how she came to write this novel, which is loosely based on the life of Bram Fischer, an activist Afrikaner lawyer in South Africa. When she finished writing the novel, Gordimer asked Fischer's daughter to read her manuscript. Fischer's daughter told Gordimer that the novel had captured her life. This prompted my interest in this Afrikaner lawyer and the political trials that took place in South Africa during apartheid. Fischer was involved in several, one of which resulted in acquittal for the defendants.

The most famous such trial was that of Nelson Mandela. Mandela provides a fascinating and inspiring account of his life, including the trial, in his autobiography, *Long Walk to Freedom*. If you have not read it, I would highly recommend it. But the book I am writing about today is Clingman's biography of Bram Fischer, the lawyer who defended Mandela in the treason trial brought against him by the government. Mandela and the other defendants in that trial sought to put the government on trial. They also sought, if possible, to obtain a sentence of life imprisonment, rather than death. That was the best that Mandela could hope for. He spoke, as the rules of procedure allowed, at the end of the trial, making a statement that he repeated when he was finally released from prison almost 30 years after the trial. His words are worth remembering:

During my lifetime I have dedicated my life to the struggle of the African people. I have fought against white domination, and I have fought against black domination. I have cherished the ideal of a demo-

cratic and free society in which all persons live together in harmony and with equal opportunities. It is an ideal which I hope to live for, and to see realized. But my Lord, if need be, it is an ideal for which I am prepared to die.

Mandela's final sentence was made in open court despite Bram Fischer's concern that it would make the death penalty more likely. But the sentence was life imprisonment.

Bram Fischer was born into a prominent Afrikaner family. He and his wife, Molly, who died in a car crash during the Mandela trial, became involved in the struggles against the apartheid government early in their careers, and never wavered from their commitment despite the great personal cost to them and to their children. Each time Fischer undertook the defense of those charged with violating the repressive laws of the apartheid regime, he lost work from paying clients and became more isolated from the community in which he had grown up. He and his wife were imprisoned by the regime on various occasions, and he ultimately died in prison before the apartheid regime fell.

Clingman's account of Fischer's life is fascinating for the light it sheds on South Africa's history, for the insight it provides into one legal system and its use for good and ill during the time of apartheid, and for the story of one man and his family who stood up for what was right. It is the kind of story that can inspire us, as lawyers and as Americans. We are lucky to be lawyers in the United States at this time, and so are not called to engage in the kind of sacrifice that Fischer faced. But his life story can inspire us as lawyers as it has inspired many lawyers in South Africa. 🏛️

Shannon's Soapbox

By Brian Shannon



The fall crop of appellate rule amendments and proposed amendments deals mostly with tolling motions and immunity appeal stays. Some amendments were effective the first of September, another one takes effect on New Year's Day, and three new proposals were released in September. If none of this interests you, it's time to turn the page. It's OK with me. I don't really get it, but considerable evidence suggests that some lawyers don't mind playing the litigation game without knowing all the rules.

One of the proposed amendments includes an Alternative

A and Alternative B, diametrically opposed to each other. I think the court should adopt a variation on Alternative A, which I propose near the end of this Soapbox. First, however, the new rules already adopted:

ADM No. 2005-36

The first change adopted, over Justice Markman's dissent (a misplaced concern over minuscule "delay," more than offset by real appellate timing advantages, or at least so I argued in a previous Soapbox), changes the deadline for reconsideration

tion motions from 14 to 21 days. ADM File No. 2005-36, amending MCR 2.119(F)(1). At the same time, there is some rewording of MCR 7.204(A)(1)(b), the basic tolling rule for appeals of right, matched by the new and parallel tolling rule for applications, MCR 7.205(A)(2). The addition of a tolling rule for applications is long overdue and very welcome.

Perhaps the most interesting aspect of the rewording, which I noticed only recently (due to my own inattention), is that “denied” has been changed to “decided.” The section recommended that change, I’ve learned. We are all used to a rule that says a new 21-day appeal clock runs from the *denial* of a timely reconsideration motion, but now it runs from the *decision* of such a motion. (Most of the time, anyway—the rule still says “denying” rather than “deciding” when it comes to criminal appeals. MCR 7.204(A)(2)(d).)

There may have been some concern on the APS council that if a reconsideration motion was decided in an order that was not couched as a denial, yet afforded the prospective appellant no relief or too little relief, a strict reading of the former language could raise the argument that there was no new 21-day period and the appeal of right had been lost.

The old formulation may have been chosen because it was assumed that if the motion was granted rather than denied, the outcome must have been changed radically enough that either the original order was no longer appealable of right, or the party who had planned to appeal would no longer wish to do so. That wasn’t always true, and the change to “decided” is one way to clarify that there will be a new 21-day appeal period no matter how the reconsideration motion is resolved.

Or will there? Circuit court judges sometimes “grant” reconsideration when they mean only to require a response from the nonmovant and schedule oral argument, following which the previously “granted” motion will be decided weeks later.

What happens if a reconsideration motion is granted in this sense and then, more than 21 days later, the judge writes an opinion saying that he or she got it right the first time? When an appeal is then claimed, can the appellee argue for dismissal on the ground that the appeal period began to run again when reconsideration was “decided” by being “granted?”

Of course that would be putting form over substance. Still, a plain reading of rule text has been known to have that result. The old formulation, “denied,” predates the current definition of finality, which stresses that only the “first” final order counts. A second final order that does not make a substantive change is disregarded.

I think everyone would agree that under either formulation, a party has 21 days to appeal from the denial/decision of a timely tolling motion. It remains to be seen whether parties may encounter problems when a reconsideration motion

is facially “granted,” then actually “decided” more than 21 days later.

Criminal law practitioners should note that a new paragraph has been added after MCR 7.205(F)(4). (F)(4) creates some special time periods, different from the usual 12-month period in (F)(3) for late applications. If certain listed motions are filed within six months (or sometimes within the period allowed by MCR 7.208(B) if an appeal has been claimed), (F)(4) permits an application to be filed within 21 days after decision of the motion. (These are motions to withdraw a plea, for directed verdict of acquittal, to correct an invalid sentence, or for new trial.) The new paragraph after (F)(4) says that a timely reconsideration motion after the decision of the (F)(4) motion—and only a timely motion—extends the time to file the application.

ADM No. 2006-11

ADM No. 2006-9

Already effective are the new stay rules for immunity appeals, which affect MCR 2.614, 7.101, 7.209, and 7.302. Effective on January 1, 2009, is an amendment to the final order rule concerning immunity appeals, MCR 7.202(6)(v). The section’s position letter on these changes appeared in the last APS Newsletter (Vol. 12, No. 3).

I won’t repeat the concerns expressed in the Section’s letter to the Supreme Court. The stay rules are intended to provide a broad automatic stay when an immunity issue is raised on appeal, but questions remain concerning how the stay affects private parties joined in the litigation. I also wish the rule contained language permitting a trial court to modify the automatic stay for good cause shown. Perhaps that discretion exists, but it would be better if the rule said so.

As for the soon-to-be-effective change to MCR 7.202(6)(v), the announced intent is to clarify that this includes decisions based on both MCR 2.116(C)(7) and (10). It is in response to a couple of decisions from the Court of Appeals in 2004. As the section pointed out in its comment letter, however, the rule may be construed to *require* an immediate appeal (since the order is by definition “final”), which a governmental defendant might prefer to defer for tactical reasons.

ADM No. 2007-40

Turning to proposed amendments, the Supreme Court has proposed two versions of a rule to deal with the question of whether the time for a delayed application for leave is tolled while a claim of appeal is pending. This is in response to *Beavers v Barton Malow Co*, 480 Mich 1049 (2008), in which the Court permitted equitable tolling despite the absence of clear rule language, because prior decisions argu-

Continued on next page

ably had created an expectation among attorneys that tolling occurred in this situation.

The section wrote an excellent amicus brief in *Beavers*. It did not take a position on what the rule *should* be, but argued that, indeed, attorneys had every right to rely on the prior decisions.

The new proposal is straightforward. Alternative A provides that the 12-month limitation of MCR 7.205(F)(3) is tolled while an appeal is pending “pursuant to a claim of appeal.” Alternative B provides that there is no such tolling. This squarely poses the policy question not decided in *Beavers*.

The situation arises when a party claims an appeal of right that later is dismissed for one reason or another without reaching the merits. If the original 12-month period of MCR 7.205(F)(3) had not run at the time of dismissal, the appealing party could file a late application for leave to appeal under either proposed rule. The problem arises when the original appeal has been pending so long that the 12-month period has expired.

To toll or not to toll? That is the question. General finality considerations appear to favor no tolling. In particular cases, though, the policy of preferring to decide cases on their merits will apply with force and override finality concerns.

It seems to me that Alternative A would be the better choice if it were rewritten. As it's written now, an appeal of right could be pending for a year or more, and none of that time would shorten the 12-month clock of (F)(3). Assuming the appeal of right was timely claimed, only 21 days would run on the 12-month clock of (F)(3) before tolling kicked in.

A better formulation would give the appellant only 21 days to file a late application after the dismissal of the appeal of right, if the original 12-month period had elapsed or was about to elapse in less than 21 days. In cases where the appeal of right was dismissed with more than 21 days left on the original 12-month period, the appellant should have the rest of that period in which to apply for leave.

Writing the rule that way would alleviate much of the “finality” concern with Alternative A.

Another factor, important to Justice Corrigan, writing in dissent in *Beavers*, is what to do when the dismissal of the appeal is really the appellant's fault, not just some reasonable misunderstanding about arcane finality rules. My formulation eases that concern, too, because it caps the amount of additional time an appellant can get for a late application.

Finally, what about the appellant who believes the court of appeals erred in dismissing the appeal of right and wants

to solicit the Supreme Court's opinion on the issue before filing an application for leave to appeal on the merits? One response might be: tough. If you care that much, just do both simultaneously. File applications for leave in both courts within the time allowed by each. A better approach, I think, would be to permit the Supreme Court application to be decided first and have the rule provide 21 days after the Supreme Court denies leave to file a delayed application in the Court of Appeals.

Apart from Supreme Court applications, the same question arises with respect to seeking reconsideration of the dismissal from the Court of Appeals itself. In some cases, that will be by far the most time-efficient approach, when the Court of Appeals has made some clear error concerning its own jurisdiction (not that I've ever had much luck in convincing that court that it was misapplying the jurisdictional rules.)

Both of these concerns can be addressed easily by linking the end of the tolling period to the date on which the Court of Appeals dismissal order becomes “effective” under MCR 7.215(F)(1)(a).

My Alternative A, then, would read:

(c) The 12-month limitation period provided in sub-rule (F)(3) is tolled for the period when an appeal is pending pursuant to a claim of appeal, until the order dismissing the appeal becomes effective under MCR 7.215(F)(1)(a), except as follows:

- (i) if more than 21 days remains in the original 12-month limitation period after the order dismissing the appeal becomes effective, then there is no tolling under this section; and*
- (ii) if 21 or fewer days remain in the original 12-month limitation period after the order dismissing the appeal becomes effective, then an application for leave to appeal may be filed within 21 days after the date the order dismissing the appeal becomes effective.*

ADM No. 2007-42

This proposal is intended to give the Supreme Court the authority to compel the correction of a deficient brief, or strike it, and to dismiss applications and other filings not pursued in conformity with the rules. If you had asked me, I would have assured you that the Supreme Court already had this authority, either inherently or under some rule like MCR 7.316(A)(7) or 7.314. I'm surprised anyone thinks more specific language is needed.

One effect the adoption of this rule might have is to increase the number of party motions to strike opposing briefs. The addition of MCR 7.302(F) would invite such motions at the application stage. Such motions often would be a waste of time. The Court no doubt receives many deficient applications, which it simply denies. The proposed rule suggests that the court might require a “supplemental” brief correcting defects or striking the deficient brief.

The rule is facially neutral, and could apply either to the application or a response brief. (The proposal doesn’t use the word “application,” but proposed new MCR 7.302(F) is in the application rule, so what else could it mean?) Despite the facial neutrality, I expect that the rule will be used most often as a weapon against defective applications. If the Court used the rule to require appellant to try again, it could be a good thing. But if the Court merely strikes applications as defective, then there would seem to be nothing left for the Court to decide. Surely many applications are denied now simply because the presentation is so pitiful. Will litigants be any happier to know why their application was denied?

ADM No. 2008-24

This is a follow-up proposal, intended to make MCR 2.614(A)(1) jibe better with the new amendments to MCR

2.119(F), 7.204, and 7.205, discussed above. It says that a circuit court has discretion to extend for “good cause” the time within which a tolling motion may be filed, if the discretion is exercised within the original 21-day period. This is a sound proposal, in my view. MCR 2.614(A) is the automatic stay rule that provides a needed brief interval after final judgment (whether via trial or summary disposition) in which the losing party may decide whether to appeal, whether to seek relief via a tolling motion from the circuit court, or whether to end the litigation.

The Bar’s Civil Procedure and Courts Committee recommended that the Supreme Court give the circuit court discretion to extend this brief interval for “good cause,” in the context of calculating the time for appeal. I agree with this idea, as I noted a couple of “Soapboxes” ago (Vol. 12, No. 2). Now that the Supreme Court has adopted this idea in ADM No. 2005-36, it just makes sense to add the “good cause” proviso to the automatic stay rule of MCR 2.614(A)(1).

— Brian Shannon



—From the Section Council

General Announcements

Appellate Practice Section Council 2009 Meetings

All meetings start at 2 p.m. unless otherwise noted.
Farmington Hills meetings are held at the law offices of
Kohl Secrest

Friday, January 16	TBD (Detroit metro area)
Friday, February 20	Lansing
Friday, March 20	Farmington Hills
Friday, April 17	Grand Rapids [tentative]
Friday, May 15	Farmington Hills
Thursday, June 18	Dinner meeting, Brighton [time to be determined]
Thursday, Sept. 17	Dearborn (Annual Meeting)



Congratulations and welcome to APS new council members:

Geoffrey Brown
Stuart G. Friedman
Stephanie Simon Morita
Elizabeth Sokol

Practice Warning: Apple Macintoshes and Sixth Circuit's Electronic Filing System

In the last issue, we reported on the new e-filing system in the United States Court of Appeals for the Sixth Circuit. We have since confirmed that this system does not work with the Apple Macintosh, (at least not natively). While an electronic brief can be produced on a Macintosh, it cannot be filed using any of the web browsers for the Macintosh Operating System. This appears to be due to an incompatibility with how JAVA is currently implemented on the Macintosh. Rumor has it that the next upgrade to JAVA for the Macintosh will cure this problem.

In the meantime, there are several workarounds. First, an individual can always borrow a PC for the last step. Second, on newer Macintoshes (using Intel processors), there are several programs available to run Microsoft Windows on a Mac. These include Fusion, Parallels, and Apple's Bootcamp. Third, on older Macintoshes there is a program called VirtualPC which will run Windows, but there are many complaints that this arrangement is unacceptably slow. We know that these are not perfect solutions, but they do work.

This problem does not appear to affect electronic filing systems in the Eastern or Western District of Michigan.

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