

An Advocate's Approach to Precedent, Stare Decisis, and the Development of the Law

Technical mastery of procedure is important for appellate advocates. But equally important to successful appellate advocacy is the ability to fashion a creative argument that adequately addresses existing precedent. An advocate's approach to precedent, stare decisis, and the development of the law must be based upon an understanding of the nature of stare decisis and the use of precedent. Precedent (and its scope) may differ depending on whether the existing precedent is defined by examining the ratio decidendi, the result, or the articulated rule.

The rule an advocate offers may require the appellate court to expand or contract existing precedent. An understanding of the numerous judicial techniques for employing precedent, many of which have been catalogued by Karl Llewellyn, will help an advocate advance an argument based upon the expansion or contraction of existing precedent. A thorough understanding of these techniques helps the advocate with the close reading necessary to understand the nuances of existing precedent. By taking advantage of these techniques, the advocate also expands his or her toolbox of methods to reach the advocate's desired outcome.

Common law and text-based precedent may be treated differently. Common law reasoning is based upon reasoning from earlier judicial decisions. In contrast, text-based precedent always goes back to the words of the statute or the constitutional provision at issue. Judges and scholars disagree about the effect these differences should have on judicial decisions. Appreciating these differences is essential to an appellate advocate's preparation of an argument based on common law or statutory precedent.

Finally, judges and scholars disagree over the factors affecting whether to overrule or uphold erroneous precedent. Careful study of the law yields a number of considerations that may make a reversal more or less likely. An appellate advocate should be knowledgeable about these factors.

Because of space constraints, Mary Massaron Ross's article on an advocate's approach to precedent, stare decisis, and the development of the law could not be included in this appellate theme issue. The article discusses these issues and provides a roadmap for the advocate to use when dealing with precedent. Watch for it in a future issue of the *Michigan Bar Journal*.

Notice to Michigan Lawyers of New Appeal Rules

It's not surprising that no one is clear on what actions of a district court, municipal court, tribunal, administrative agency, city, township, board, government official, discretionary act, adjudication, decision or determination, filing of plan final action, inspector's opinion, issue rule, order or regulation, judgment or order, notice of rejection or refusal, and the like the circuit court may review and how it should do so.

HOW TO APPEAL? A committee has begun reviewing over 100 statutes that provide some kind of review by the circuit court. Each has its own language, procedure, timetable, scope, and standard of review. With never-ending variations, each provides a unique way for you to start your case by filing an action, appeal, certiorari claim of appeal, injunction, mandamus, petition, or make a claim for superintending control or leave to appeal.

WHAT TO APPEAL? Every statute offers ways to decide what is appealable or reviewable and to calculate deadlines. They include such things as an action, determination, inaction, action on an order, permit or application, adjournment, confirmation or declaration, date delivery, entry, filing, submission or furnished, grant of leave, issuance, June 30th of the tax year, last publication date, mailing, notice of mailing or service, payment or receipt, posting, presentation, and receipt.

HERE IS YOUR CHANCE: If you have struggled in an area that you think the committee should address or you want to suggest corrections to the legislature or supreme court relating to any appeal or review submitted to a circuit court from any source, in any manner, contact the Appeals to Circuit Court Rules Committee:

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