Scott S. Brinkmeyer

Back to the Beginning—A Rare Opportunity

On November 4, 2003, the Michigan Supreme Court issued an Administrative Order[1] directing the Michigan Court of Appeals to develop a plan for the management of civil appellate cases that includes "just in time" briefing,[2] by February 1, 2004. Although the abbreviated time period poses a daunting challenge, this directive has provided the court of appeals, appellate practitioners, and the State Bar of Michigan[3] with an exceptional opportunity to construct a method for improving the delivery of appellate legal services and reducing the unacceptable delay in appellate decisions. Bench-bar collaboration in the development of more effective caseflow management is considered essential to success by experts,[4] but in practice it is rare that attorneys have a chance to work with judges to actually develop the process by which their cases will be handled.

Justifiably concerned with the protracted time period required to process appellate decisions, in 2002 a court of appeals work group undertook an in-depth analysis of its case data for the prior year. They found that, although case filings had declined almost 50 percent from the 15-year high in 1992,[5] the 3,100 cases actually disposed of by opinion[6] in 2001 took an average of 654 days from date of filing to issuance of an opinion.[7] They also determined that the average days each opinion case spent in each processing stage[8] was: 274 days within intake; 288 days in the warehouse; and 73 days in judicial chambers. Notably, the longest average time period for any stage, almost 9½ months, was in the warehouse, so-called because following intake each opinion case file is basically "warehoused" for the better part of a year awaiting assignment to research. Realizing that these delays were unacceptable, the court adopted an ambitious delay reduction program on March 8, 2002. Their overall objective was to dispose of 95 percent of all of the court's cases within 18 months (548 days) of filing, starting October 1, 2003.[9]

In order to accomplish their goal, the appellate judges felt that the average time opinion cases were spending in intake, warehouse, and judicial chambers had to be substantially reduced. The court developed largely internal procedures for dealing with delays in the warehouse and judicial chambers. Additionally, their plan contemplated shortening time limits in the intake process by amending various court rules, particularly those that related to briefing times, and eliminating stipulations for extensions.

Chief Judge William C. Whitbeck then approached the State Bar of Michigan and its Appellate Practice Section seeking their support for the plan. We were also asked to immediately lend a hand in seeking appropriations from the state legislature to provide the court with sufficient finances to expand their research attorneys and other resources, a request with which we enthusiastically and successfully complied.[10] Then-President Bruce Neckers organized the State Bar of Michigan's Delay Reduction Task Force, comprised of experienced appellate practitioners, who were asked to study the initiative for report and recommendations to the State Bar. The Appellate Practice Section's Council had likewise appointed an ad hoc committee to study the plan.

The Appellate Practice Section's committee report was issued in early November 2002.[11] Despite their support of the primary goals of the delay reduction plan and many of the proposed Court Rule amendments, they strongly objected to reduced briefing times and eliminating of automatic stipulations. The court's proposal was to replace the stipulations with motions for extensions to be granted only "for good cause shown." Appellate practitioners were concerned that "good cause" would be extremely difficult to demonstrate to a court with an overriding concern for saving time. Moreover, they expressed that shortened briefing times would negatively impact the overall quality of briefing, which is the only stage of processing in which the litigants have an involvement, and that a motion practice would merely increase costs to litigants. It was also felt that this would impair practitioners' ability to efficiently and economically investigate and represent criminal and indigent litigants.

The State Bar Task Force reached similar conclusions and offered a number of specific recommendations for addressing delay.

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Foremost was their proposal to eliminate the warehouse,[12] which they concluded would effectively solve the problem. This was seen as a first step, before undertaking wholesale revisions to the court rules affecting practitioners and litigants. The Task Force also suggested re-defining "delay," by simply not commencing calculation of disposition time until all briefs have been filed and the case is ready for research. That approach would eliminate 263 days from the 2001 average intake stage, thereby reducing the average disposition time for opinion cases to well below the court's target. Since intake entails virtually no involvement of the court, the thought was that it should not be considered delay attributable to the court. They felt that "delay" should refer only to those elements of the appellate process during which nothing productive is happening in connection with the case.

The Task Force was also concerned that the substitution of a purely motion practice in place of automatic stipulations would increase the court's work load, add to delay, and also increase the cost of appeals, as each motion would require a fee.[13] They also perceived that delay in the filing of records and transcripts from the lower courts is an integral part of the problem. They supported changes that would accelerate transcript and record filing, thereby helping to considerably reduce the time for all appeals.[14]

Beginning in March 2003, the Supreme Court published the proposed court rule amendments with a comment deadline of June 1. The rules were scheduled for a public hearing before the Supreme Court later that month. Despite agreement on many points, the parties' positions were polarized regarding the intake stage and it appeared they were on a collision course. Chief Judge Whitbeck felt very strongly that attorneys should surrender briefing time and that elimination of automatic stipulations was essential so that the court could retain control of its own docket.

He seemed convinced that the best and only way to achieve additional appellate delay reduction was to pass the proposed court rule changes. The State Bar and appellate practitioners were equally convinced that no such reduction should be implemented before the court could demonstrate that the warehouse had been eliminated, recommendations could be submitted by the newly formed work group studying transcript and record delay, and a realistic look at the impact of reduced briefing times on quality of briefing could then occur.

In an effort to see if a "winner take all" result could be avoided, a State Bar committee was appointed to work with Chief Judge Whitbeck and his staff to see if a solution could be reached before a decision of the Supreme Court. He graciously pledged his cooperation and access to the court's case data, and also agreed to work for an adjournment of the hearing date, which was indeed changed from June to September. We also agreed to consider whether a differentiated case management system could be devised to help solve the intake problem without blanket reductions in briefing times.

The Appellate Practice Section financed the retention of two experienced consultants who set about analyzing the court's data. Their report was particularly enlightening. For example, after examining 7,347 opinion and order cases, they ascertained that 68 percent of all cases were disposed of in 18 months or less. Moreover, by the end of the first quarter of 2003, the average disposition time for opinion cases had already been reduced to an average 556 days, less than eight days above the court's 18-month target. They also concluded that, if the warehouse period, defined as the period from the date a case is ready for research to the date sent to research,[15] were to be eliminated, 88.9 percent of *all cases* would be disposed of in 18 months or less.[16]

Focusing on those cases (11.1 percent of all cases), which would exceed the court's 18-month target even if the warehouse were to be eliminated, the consultants analyzed the impact of late filing of trial transcripts and records. They concluded that the filing of trial transcripts took over 108 days in 50 percent of the cases, and over 200 days in another 25 percent of those cases. Moreover, they found the lower court record was also late in a substantial percentage of the cases.

In mid-July 2003, Chief Judge Whitbeck projected that additional resources resulting from legislative appropriations would allow the elimination of the warehouse in its entirety, commencing with those cases filed after September 30, 2004. Coupled with strides made by the judges in judicial chambers reducing their averages for opinion cases from 61 to 28 days earlier this year, and realizing that the work group should be forthcoming with recommendations for reducing transcript and record delay, the State Bar felt that the process was well under way to finding a solution as these remedies would go a long way toward reaching, and perhaps even exceeding, the target average set by the court, perhaps without any change in briefing times.

Unfortunately, the parties were still at an impasse. The court had re-evaluated its assessment of the prospects for eliminating the warehouse and determined that, even with the additional resources, the warehouse likely could only be substantially reduced, not eliminated. The court held firmly to the belief that control of the docket required eliminating the stipulations and that practitioners should relent and agree to reduce briefing times. Unable to compromise, the parties then proceeded to argue the issues before the Supreme Court in late September and six weeks later received their Administrative Order for a "just in time" briefing plan. Chief Judge Whitbeck was quick to follow the Supreme Court's suggestion for cooperation with the State Bar, and a joint committee has been formed to develop the plan, and to give

further consideration to differentiated case management and other remedies for appellate delay.

It would appear that all of the necessary players are now assembled and the stage is set for judges, attorneys, staff, and court personnel to establish a process that will benefit not only the judicial system, but more importantly, the citizens who avail themselves of that system. I know that the outstanding attorneys and judges who have volunteered their time to bring these efforts to a successful conclusion are committed and determined to achieve that goal. Chief Judge Whitbeck, his colleagues in the court of appeals, and their staff, are to be commended for their hard work and dedication to solving this nagging problem. Despite our disagreement on the appropriate method for dealing with the intake stage of appellate case processing, in my view this has been a particularly positive cooperative effort between judges and lawyers representing every facet of the appellate system in Michigan. I hope to be able to report to the membership in 2004, that we have an appellate delay reduction plan that is a model for others to emulate.[17] ✦

FOOTNOTES

1. ADM File No. 2002-34; Administrative Order No. 2003-6 Case Management at the Court of Appeals.
2. "Just in time" briefing generally refers to a process that provides lengthy advance notice of briefing deadlines, typically scheduling filing closer to oral argument.
3. The Administrative Order encouraged the court of appeals to continue to work with the State Bar of Michigan and other interested groups and individuals in developing the plan.
4. See, for example, the ABA standards on Appellate Court Disposition Time: "Timely disposition of appeals is a cooperative effort among those responsible for the administrative, lawyer, and judicial functions in a court system. *Time standards should be developed by each court after appropriate involvement of, and consultation with those whose work they monitor.* These goals are not intended to become rules for the Appellate Court . . . The function of time standards is to establish a method for assessing whether the rules and procedures are successful." (Emphasis added.)
5. Progress Report No. 1, Michigan Court of Appeals Delay Reduction Plan, August 15, 2002, p.2. 13,352 cases were filed in 1992, compared to 7,102 in 2001. Dispositions were 13,037 in 1993, but 7,606 in 2001.
6. Id. Disposition by court "opinion," i.e., memorandum, per curiam or authored opinions of the court of appeals, as opposed to court order.
7. Id., p.1. Later revised to 653 days in Progress Report No. 2, November 20, 2002.
8. There are four processing stages. Intake includes the time from filing the appeal through completion of briefing and filing of transcripts and records. A second stage is the "warehouse," explained above. The third stage is research, where a report is prepared by assigned research attorneys. The last stage is judicial chambers, which includes hearings on oral argument, judicial conferences and completion of opinions.
9. The focus of the court's efforts, and those of the State Bar of Michigan and the Appellate Practice Section, has been on the processing of opinion cases. Virtually all of the court's data analysis has involved only opinion cases.
10. With the help of the State Bar, the court of appeals was successful in obtaining legislative appropriations estimated to generate an additional $525,000 in additional revenues.
11. By the fall of 2002, the court reported that the average processing time for opinion cases had been reduced by almost 12 percent. Interestingly, the average overall processing time of 576 days per opinion case achieved by September 2002, was less than 30 days short of the court's goal of an 18-month disposition average.
12. Chief Judge Whitbeck has insisted that elimination of the warehouse will not result in the 18-month/95 percent disposition target.
13. The court's statistics indicate that stipulations for extensions are used in approximately 52 percent of opinion cases. The court concluded an average of 22 days could be saved by elimination. We have no information projecting the time that would necessarily be added back to the process in order to accommodate the filing, briefing, and hearing of motions for good cause. Given that much of the court's augmented financial resources will come from approved increases in motion fees, the court has an apparent financial incentive to require more motions.
14. As of the end of 2002, the issue of transcript and record delay had not been directly involved in the court's planning efforts. During the summer of 2003, a Record Production Work Group was appointed to analyze and make recommendations regarding late filing of transcripts and records, and the impact upon appellate delay.
15. This is a conservative estimate of "warehouse" since it does not include the time that a case is not active after being sent to research before being assigned to or work done by a research attorney.
16. This is a mere 6.1 percent less than the court's overall target of 18 months disposition for *95 percent of all cases.*
17. Importantly, the Record Production Work Group is not expected to have recommendations until later in 2004. Since this is a critical factor for reducing appellate delay, a final decision on a comprehensive plan would presumably have to await input from both groups.