An Appellate Lawyer's Take on Advocacy

The New Fast Track Summary Disposition Rules

Mary Massaron Ross, an appellate lawyer and head of the appellate practice group at Plunkett and Cooney P.C. in Detroit, shares her wisdom, knowledge, and experience with State Bar members. She is a past chairperson of the Bar's Appellate Practice Section and was a member of the Differentiated Case Management Work Group, a task force examining ways to reduce delay in the court of appeals. A former law clerk to Associate Justice Patricia J. Boyle of the Michigan Supreme Court, she has over 40 published opinions to her credit. Ms. Massaron Ross has won numerous victories before the Michigan Supreme Court for clients overturning multi-million dollar judgments and establishing new legal principles.

Q: As an advocate, what changes will you make in handling a case as a result of the new rules?

A: The new rules will require a quicker initial evaluation of the appeal to make early strategic decisions regarding the nature of the issues to be presented. The advocate will need to explore almost immediately whether the case is suitable for the fast track or not. It will also require closer working cooperation with the trial attorney if the appellate advocate is not the same person.

Q: As an advocate, how will you evaluate an appeal in order to decide whether to move to remove it from the fast track?

A: An appellant must file a motion to remove a case from the fast track with the claim of appeal. In making this decision, an advocate should review the motion for summary disposition, the briefs filed supporting and opposing it, and any exhibits or attachments that will form part of the record. The transcript is unlikely to be available in time to review for this decision because the motion to remove the appeal from the fast track must be filed so quickly. This preliminary review will ordinarily allow the advocate to determine whether the appeal involves a matter of first impression, or involves the first construction of a court rule or statute, or involves complex facts or law.

If the appellant does not move to remove it, the appellee may file a motion to remove the case no later than with the filing of the appellee's brief. But filing a motion should not be an automatic response by an appellee. The appellant is often more the party most likely to benefit from the increased time and attention provided to an appeal and from the oral argument. Thus, the appellant will, in many cases, be the party seeking to remove cases from the fast track. If the appellant does not do so, the appellee should carefully consider the strategic implications for doing so or for leaving the case on the fast track.

Advocates who regularly practice in the court of appeals need to be concerned about filing too many motions to remove. Like the proverbial child who cried wolf, if an advocate sees every case as one that should be removed, the advocate's credibility with the court will be weakened.

Q: As an advocate, when might you seek an extension of time and how would you document it?

A: The court has provided guidance by preparing a form for such motions. The critical aspect of persuading the court that additional time is necessary is to provide concrete details regarding conflicting deadlines, emergencies, or problems. These can include the advocate's obligation to complete other briefs, oral arguments, trials, and legal work that are due at the same time. The advocate can also explain that out-of-town prepaid vacations, or trips for bar-related seminars or activities, or family obligations of some kind will interfere with the advocate's ability to timely complete and file an appropriately scholarly brief. The specific times and reasons should be provided. Simply indicating that the press of business or family obligations prevents the timely filing of the brief is unlikely to be successful.

Q: Is there anything about the changes in transcript requirements that an advocate should keep in mind?

A: Transcripts are no longer required for summary disposition appeals. The appellant may waive the transcript and the appellee, while entitled to order it, need not do so. But I would strongly encourage advocates to order the motion transcript or transcripts. It may reveal that the opposing side has waived an issue or argument. Or it may reveal factual admissions that will be important on appeal. As an advocate for the appellee, I have found that the transcript is often beneficial when there is a dispute concerning whether the opposing party specifically raised some discovery issue or requested leave to amend or took some other step below. Without the transcript, these arguments are difficult, if not impossible, for the appellate court to resolve. In addition, the trial court may have issued an extensive oral argument on the record that is persuasive and helpful to the advocate's position. Or the trial court may have made comments that can be used to show that the analysis below was incorrect.

Ordering the transcript also gives the advocate a short additional time to begin preparation of the brief because the due date is

delayed until 28 days after the timely ordered transcript has been filed. This practical benefit stems from taking a step that should be taken in almost every appeal in any event.

The transcript costs have been increased to a page rate of $3/original page and $.50/copy page. But this increased cost must only be paid if the transcript is timely filed. And the administrative order significantly reduces the preparation time to 28 days. If the transcript is untimely, the court reporter receives only the lower rate.

If a transcript is late, the advocate has only seven days to file a motion for an order to show cause or a motion to extend the time of the transcript. Monitoring the due date and following up on transcripts will be more important than ever.

Q&A: Are there any changes that an advocate should make at the trial court stage of the proceedings in light of the new rules?

Because the trial court motions, briefs, and exhibits will be attached to the briefs on appeal, the advocacy at that level becomes even more important. This suggests that the trial attorney must do a more thorough job, particularly in terms of written advocacy at the trial level. If the trial and appellate lawyer are not the same, it is a good idea to have appellate involvement in the briefing at the trial court stage. If an issue has not been raised below or was inadequately briefed below, with the brief in front of them, the appellate court may be less willing to address it on appeal.

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Q&A: Will your briefing change as a result of the new rules? How?

A: ened to 35 pages. If the appeals that are factually and legally complex are removed from the track, the briefing is likely to remain the same. If some of those cases remain on the track, then it will become critical to write more concisely.

Q&A: Whom should attorneys contact to provide input about how the new rules are working?

The Appellate Practice Section of the State Bar of Michigan is monitoring the implementation of the new fast track. Both positive and negative experiences should be reported to the Section so that they can provide input and comment on behalf of the members of the Bar. Please contact the Chairperson of the Appellate Practice Section, J. Mark Cooney at (248) 370-2111 or cooneym@cooley.edu. ✦