By Naseem Stecker

On the Fast Track

A new year and new appeals rules to live by. In particular, appeals from summary disposition orders are now on the "fast track" to speed up the work of the Court of Appeals. This means that cases that used to take a year and a half to resolve will now be wrapped up in six months—provided there are no major glitches. Michigan Supreme Court Administrative Order 2004-5 significantly cuts briefing times—28 days for the appellant and 21 days for the appellee, and page lengths for briefs—from 50 to 35 pages. Extensions by stipulation are no longer allowed. A motion to extend must show good cause and if granted will gain only 14 days. And there are penalties for late briefs. Costs will be assessed if the appellant's brief is a week late. If it is 14 days late, the appeal will be dismissed.

Michigan Court of Appeals Chief Judge William C. Whitbeck chaired the Case Management Work Group that drafted what eventually became the administrative order. He stressed that this process was a model of how things should be done and of bench-bar cooperation. Although there are no guarantees of success, "we'll have to cooperatively figure out the fixes that need to be made and we will do that," he said in a recent interview. The following is an excerpt from an interview with Judge Whitbeck and Chief Clerk Sandra Schultz Mengel.

COA Chief Judge William C. Whitbeck

Q&A: Can you outline the plan to speed up the appeals process?

Whitbeck: Our basic premise was that we could take on in Fast Track a certain category of appeals. The idea is that we isolate cases that come to us as a result of a grant or denial of summary disposition at the trial court level. The reason we picked those was because they do share certain characteristics in common. For example, there usually is not much of a transcript. When I was practicing, I don't think I ever had an argument on a motion for summary disposition that took more than an hour. You don't get reams and reams of transcripts as a result of grant or denial of summary disposition. Secondly, on the court rules, they are decided on certain types of fact, so we picked out that discrete set of cases and called it the 90-90 expedited track. Ninety days for the lawyers to do their work in terms of filing the record and filing the transcripts, filing the briefs and 90 days for the court to do its work in terms of working up a research report, hearing the case, and getting an opinion—180 days total and that's the overall timeline. Within those overall timelines, there are certain milestones.

[For more details check **http://courtofappeals.mijud.net**]

Q&A: Will the time deadlines for filing a claim of appeal or claim of cross appeal change?

Mengel: No, we have not tried to change those. Those are still due at the same time.

Q&A: What deadlines will change?

Mengel: Previously an appellant would have 56 days plus a possible stipulation for 28 days, plus the opportunity to move for another 28 days, to file their brief. Under the 90-90 expedited track the brief will be due within 28 days and they will have a possible motion for 14 days, but it will be much more carefully reviewed. So, it's a much shorter time frame for the appellant and for the appellee and in fact a reply brief is due in less time as well.

Q&A: Does the new track contemplate shorter deadlines for the court personnel and the judges as well as the attorneys?

Mengel: Yes, it does. For the court personnel that are impacted with working on the cases in terms of adding to the product it would be our research division and our judges. The clerk's office will monitor things as they come in and keep up with them, but we don't add to the product necessarily we just manage it through. So the Research Division will get these cases as priority matters. The record will have been requested from the trial court at the beginning of the appeal rather than after the briefing, which is a change and so we'll have the record as soon as the briefing is complete, instead of having to wait for another three plus weeks for it. Then it will go immediately to research where they will assign it as soon as they have an available

research attorney and then the case will be fast tracked. The judges by an administrative order have 35 days from the submission or oral argument to release their opinion.

How will the Court handle motions to remove the case from the priority track?

Whitbeck: Very carefully... what we are planning to do when we start getting such motions—the four administrative judges will teleconference probably once a week—that will commence in late January in order to size up what the grounds are and to attempt to assure some consistency... Remember that the judges only have seven days to decide such a motion. I am hopeful that we will not see a flood of motions to remove cases from the fast track docket. The whole purpose is to expedite these cases. I'll grant you there will be some that are not appropriate but most of them in my opinion will be. I think everybody benefits, the litigants in particular when we decide things. Timing: It doesn't strike me that 180 days is overly brief, that's still a period of time.

What is likely to be seen as a strong basis for removal from the track?

Whitbeck: I'll use a type of case. Let's take a plaintiff discrimination case. Those cases can and often are being decided on summary disposition. By their nature they can be somewhat complex. There are others that might be removed.... So, if they fell into those complex facts of law, case of first impression, construction of the statute of the constitution, those would be likely candidates.

What changes are there in the transcript requirements and timing?

Mengel: The parties can waive the transcript altogether, which is unusual. However, if the appellant or appellee determines that they want the transcript, it needs to be ordered with the filing of the claim of appeal if it's for the appellant and it needs to be filed in a shorter time line. If that happens, the court reporter is entitled to a newly enacted higher page rate of pay, which would come from the attorneys.

Whitbeck: It's sort of an incentive concept that we persuaded the legislature—frankly, they didn't need a lot of persuading, it was virtually unanimous. If the court reporters do this time length, and it is accelerated, they should be paid for it.

Are there changes to the rules governing the format for briefs? What are they?

Mengel: There really isn't.
Whitbeck: Format, no. Page length, yes.
Mengel: Both parties are limited to 35 pages in the briefing format now.

Will there be oral argument?

Whitbeck: Probably not... we have a process at this court called summary panels. These summary disposition cases will go into the summary panel process, although those are two distinct terms, and be handled the same way. In the vast majority of cases we do not have oral argument on summary panels but if it's requested, the panel may choose to grant it.

How will the Court handle motions for an extension of time? When are they likely to be granted?

Whitbeck: Very carefully. We'll handle them I think the same way we handle motions for the extension of time now. They will be dealt with if the case has been assigned to the panel, by the panel itself usually but not always, and if it is before the time it has gone to the panel then it's done on the ad modum. When I get a motion for an extension of time at the end of the process, I have been fairly tough in not granting those motions. I guess that comes out of my own experience as a practicing lawyer. My own experience was that at both the trial court level and the appellate level, these are not overly onerous timelines. They require a certain amount of organization, a certain amount of foresight but after all, that's what lawyers are in business to do. I have been fairly tough on those. I suspect that again there is a form that—they would really have to show good cause, that's one way to put it. It really is going to have to be good cause. 'It's my wife's birthday' probably won't do it. I do occasionally see motions based on things like that.

Will it also affect the way that they make/present their case at the trial level?

Whitbeck: It may well... A person will recognize that at many times there is a disconnect between the lawyer who tries the case and the lawyer who handles the appeal. Often, they are not the same person... the trial lawyer has to think carefully about what's in his brief at the trial court level because by enlarge that's what's going to be in the brief at the appellate court level. There's not going to be a lot of time to sit down and construct a whole approach because it is a fast track docket and so the trial lawyers are going to have to look fairly closely at what's in the requirement for an appeal when they're filing their briefs and making their oral argument at the trial court level. Secondly, and this is a point that we will make with our trial court judges—it's quite important that the lawyers and the trial court judges identify the grounds, particularly that section of the court rules on which summary disposition is being granted. There's a difference between a C10 motion and a C8 motion and a C7 motion—not that it happens all the time, but many times trial court judges will view the grant or deny without specifying which section of the court rule they are relying on... We have a way of sorting through it but it takes time to do this. It's very important that the lawyers and the trial court judges recall the requirements... Please specify the grounds, particular section of the court rules upon which you are granting or denying.
Mengel: The other point that we should make, when you asked how the briefs might be different now. The Supreme Court order indicates that briefs should be accompanied by the trial court motion and other documents that were submitted to the trial judge so that the brief—even though the brief is shorter standing alone at our level—comes with a lot of attachments that are meant to flesh out the picture and that's another reason why the trial court practice will be more important to lawyers.

Is this plan based on a similar one elsewhere in the country?

Whitbeck: Yes and no. The idea of differentiated case management has been around for a long time. We didn't model it on any other state in particular although we looked around. But we took it from the particularity of Michigan court rules and our general knowledge of how appellate practice works in Michigan. So in that sense it is unique.

What lies at the heart of this new approach? You've stressed that justice delayed is justice denied but favoring speed over quality may also result in injustice.

Whitbeck: If that's what happens. I've yet to see any evidence frankly that the time we've cut in our overall process has in any way reduced the quality of our decisions. If there's evidence out there, I'd certainly like to see it, but I haven't seen any evidence. I think you can do both. I've also said and I'll say it again, our first job at the court of appeals is to get it right. Our second job is to get it out. They are not mutually exclusive, they complement one another. I don't think there is a credible argument that can be made in support of delay.

Let me use three examples. Let's say you are the *Lansing State Journal* and you get sued for libel and the jury returns a verdict of a million dollars… the appeal takes two years. Under those circumstances, I don't know how the *Lansing State Journal* makes sound business decisions. Their decision-making is distorted by that contingent liability that's out here. Next example. Suppose you are a criminal defendant and you've been convicted, it doesn't happen often, but we all know that sometimes in our system innocent people are convicted. That guy, and it usually is a guy, spends two years in prison. Everyday of those two years is a day that he's not going to get back. Most importantly, are cases dealing with children, with custody and termination of parental rights. We all decide those cases probably and we're doing pretty well. We need to do better… If we don't we'll lose those kids. We'll see them again in the criminal justice system; we'll see their children because we'll be terminating their rights to their children. That cycle repeats. I just don't see how a credible argument can be made in favor of protracted litigation.

The other point though is, let's assume for the moment that we were wrong. If the program does not work well, that it does decrease the quality of our opinions or that there are glitches that we haven't anticipated. We've done something here that is rare in government. We are testing it. This is sunset in two years. If it works then we'll make it permanent. If it doesn't work well, then we won't make it permanent. It is something that we do all the time and when you launch a rocket or something you test it two or three times before you try to put a man on the moon. That's what we're doing here and to me that's eminently sensible.

Mengel: I think its important to note that speeding up this class of cases is different than speeding up the entire caseload. It's a class of cases that Judge Whitbeck said that we all thought was eligible for shorter treatment, faster treatment because of what's involved in the cases. At the same time we're not touching in any way right now, other timelines, other kinds of cases, which are cases that may well deserve those longer timelines. So the differentiated case management thing comes into justice delayed justice denied by saying here these can move faster and we're going to try that. These we're not sure about and we think these maybe should stay where they are but if we can move these faster we accomplish overall our goal of getting the cases out in the time that each case deserves rather than somehow sledge hammering them all through faster than any of them should go.

It's been pointed out that the real causes of delay occur at the warehouse phase. In light of that will these new procedures make a difference?

Whitbeck: Not there really—although part of the time it will come out of the warehouse. Remember from whence does the warehouse derive? The warehouse derives from the fact that the lawyers go through a process till the case becomes ready to be submitted to research and that warehouse built up over time because there were inadequate resources and not enough people in the research division to take them as they became ready. So they had to sit literally gathering dust. We are reducing the warehouse because the legislature gave us increased funds. They allowed us to increase our fees. It didn't come out of the general fund. Essentially the lawyers are paying for it, but we've increased the staff of the research division and that's how we're cutting down the time in the warehouse. So that is independent of this effort. This effort goes at intake because it cuts the time down for providing the record and it goes at the chambers—although we are doing well frankly. We say we are going to get these cases out in 35 days. We're currently getting our cases out in 30 days. So this is not going to be a huge difference for our judges to be honest. Overall, we are getting our cases out once they hit the chambers within 30 days. So that's very respectable mind you. It used to be 60—its cut in half. So we are attacking the warehouse on different grounds although this will have some impact on it. Its major impact will be at the front end at the intake process.

How will these new procedures be monitored?

Whitbeck: We've sat down several times internally. Let me brag a little about our internal system. The courts case management system and its system for lots of other things is called MAPPIS and its a marvelous tool…. We sat down [with the information system people] and worked out a series of data collection points that will tell us for example how many motions to remove are we getting? Where are we getting them? Where does the case stand? Either individually or on average? How long is it taking? Let's say that a case somehow slips through the cracks in the judge's chambers, it happens sometimes… That system will pop up on my computer as a reminder to find out why that case isn't done. So we're going to try to get every step of the way, both individually and in terms of data collection. We met with the case management work group last week. We will meet with that group quarterly. One of my charges to them was: think about what data you as a private practitioner would like to know about

because we'll share it with you. That meeting we're going to have in March, April at the end of the first quarter—we're going to turn over our tracking statistics and say here's where we are and what more do we need to know? So, I think we're going to be tracking this virtually daily here. This system allows us to do that. It is enormously flexible.

Mengel: We have always had case management lists that we use to track all of our caseload and at any given time every case is on one list if not more than one list depending on what's going on and the people in my office review those lists weekly and know if the case is overdue for a brief or overdue for a transcript and then warning procedures fall into place—letters are sent out, calls are made, hearings are held to find out what's going on with the court reporter, those procedures will apply in these cases. They have been modified slightly so that the shorter time lines are applicable—but we'll be watching those . . . .We will make sure that no case gets too far behind because we know that human nature is such that somewhere along the line, somebody will be late with the filing or whatever and we'll be watching for that.

Q & A: How will you decide if this has been a success or a failure?

Whitbeck: I think we'll know well before the end of two years. The Supreme Court has asked us for an 18-month report and a two-year report. I think we'll have a fix on how well it's working by the summer of next year. Having said that, the question is more difficult than it appears on the surface because there are measurable things and unmeasurable things. The measurable things, we can measure and will. How many days, is it working in terms of the timelines that we've set, and how close are we coming. That we can measure. Measuring the quality of the work product though is more difficult. I'm not saying you can't measure quality—you obviously can in one way or another. But that is a subjective rather than a qualitative analysis. I think our judges being reasonably sophisticated will have a feel for that. Would this system be working? I think the litigants would have a feel for that but you're going to have to say in July of 2005—on a scale of 1 to 10, our quality is at 9.8. You can't do that. That's not the way you measure quality. One of the things we mentioned to the case management work group to the private practitioners was "look we need your feedback." Granted it will be anecdotal. That's all right. You get a mountain of anecdotal evidence you can start to reach some conclusions with that, but don't wait till the end of two years and hit us with a bunch of horror stories. Tell us about it right now so that we can modify what we are doing.

Q & A: Will certain groups of lawyers for example, solo practitioners be disadvantaged by this process?

Whitbeck: I don't think so. The lawyer who is disadvantaged by this process will be the lawyer who doesn't read the rules. It strikes me that solo practitioners read the rules just as well as mega law firms. The other lawyer who may be disadvantaged somewhat is the lawyer who does a rare appeal. To that lawyer, whether he or she is a solo practitioner or with one of the big five law firms, I would say remember the canons of ethics? They tell you that if you are not able to handle a particular question or area of law you should associate yourself with someone who can. That's what the canons require.

Q & A: What's your advice to lawyers? What's the best way for them to transition from the old way of doing things to this new fast track system?

Whitbeck: First of all read the administrative order very carefully. I don't think it's terribly complex. I think its reasonably straight forward, but I know that every time I file an appeal when I was practicing I would go back and read the rule. I'd go through the rule just to make sure that I haven't forgotten anything. Secondly, this is more a practice tip—these are cases that are not necessarily hard, just long . . . Look, these are complicated cases. Your job is to make them simple. Out of complexity, you need to bring clarity . . . Sometimes I think all of us, lawyers, judges, make things overly complex. We just fall into that trap and here because of the timelines and because of the constraints there's going to be a particular premium on clarity. Read the rules over—read them every time.

Mengel: I think that's true, what people need to keep in mind is we're changing the timeline and we're changing the page length but we're really not changing anything else about doing an appeal. So, there really are no hidden traps here, as long as you do read the administrative order and follow the timeline and you're going to be fine. And clarity is going to be a benefit to them if they can do it in these cases and it will benefit all their other cases. Short and sweet is good. ✦

Naseem Stecker is a staff writer for the Michigan Bar Journal. *She can be contacted by e-mail at nstecker@mail.michbar.org.*

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