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From the Chair

By Joanne Geha Swanson

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In this Issue

While reviewing back issues of the *Michigan Appellate Practice Journal,* I was struck by the enduring contributions appellate lawyers have made to the section in the over two decades since its creation. For example, as far back as 2009/2010, Elizabeth Sokol and Nancy Vayda Dembinski have been editors of the Appellate Practice Section Journal, a position they continue to fulfill today along with Lauren London, Howard Lederman, and Bridget Brown Powers. With the same continuity, regular Journal feature writers have for many years regaled us with the interesting and informative columns we have come to expect, such as Stu Friedman's *Tech Talk,* Mary Massaron's *Recommended Reading for the Appellate Lawyer*, Brian Shannon's *Shannon's Soapbox*, Barb Goldman's *Selected Decisions of Interest to the Appellate Practitioner,* and Linda Garbarino's *Cases Pending Before the Supreme Court.* Also, more recently, Ann Sherman and Conor Dugan have shared writing a recurring *Meet the Judge* column, and Howard Lederman has contributed a series of articles on standards of review and originalism.

This is an amazing year-after-year dedication of time and effort. Although it would be much easier for a busy appellate practitioner to say "thanks, but no thanks," that doesn't seem to happen much in our world. My look back revealed that a literal "who's who" of appellate lawyers have served on the section council in years past. Equally striking is the number of appellate lawyers who, defying the "been there, done that" attitude, continue on the council or one of its active committees despite lengthy terms of service earlier in their careers. And then there are those like our treasurer, Stephanie Simon Morita, who has repeatedly declined advancement to the position of chair in favor of the less glamorous and tireless job of guiding the section's finances.

This "you can count on me" attitude is endemic. There is no shortage of enthusiasm on the section council no matter what the task. We count on Graham Crabtree, our Lansing "correspondent," to keep us informed of relevant legislative activity. Larry Saylor, Phil DeRosier, and Joe Richotte take a first look at proposed rules changes and provide recommendations for section comment. They are currently in the midst of reviewing the implications of Administrative Order 2016-25, which seeks to amend MCR 7.212 to provide for the filing of appendices. Beth

Section Council

From the Chair
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Gaetan passing the gavel to Joanne

Wittman and Larry Saylor interface with our courts on practice issues. Barb Goldman and Jason Killips oversee technology matters. Jill Wheaton and Richard Kraus monitor federal appellate practice developments. Ann Sherman and Christina Gintner coordinate our volunteer efforts. Brad Hall, Liisa Speaker, Jason Killips, and Joe Richotte address the economics of appellate practice. Chair-elect Bridget Brown Powers is planning our 2018-2019 annual meeting program, and Phil DeRosier is our liaison to the coordinating committee of the Michigan Appellate Bench Bar Conference. And this is not by any means an exclusive list of contributing council or committee members. As is frequently the case in active organizations, many work behind the scenes to further the work of the section.

The section's newest committee, spearheaded by our immediate prior chair, Gaetan Gerville-Reache, is our E-Briefing/Readability Subcommittee consisting of Gaetan, Scott Bassett, Stuart Friedman, Joe Richotte, Lauren Donofrio, Barb Goldman, Richard Kraus, Jason Killips, Jerry Posner, Larry Saylor, and Brian Shannon. This committee has spent countless hours over the past year evaluating the work and recommendations of the ABA's Council of Appellate Lawyers, researchers who study readability, and leading typographers. Adding their own practical experience to the mix, as well as feedback received from other practitioners, the Subcommittee drafted a proposed Administrative Order, *Briefs Formatted for Optimized Reading on Electronic Displays*, which describes the committee's recommendations for a pilot program that will allow attorneys to file briefs in a more functional and e-readable format.

The Administrative Order recommends adjustments to length, line spacing, font, margins, bookmarking, and other formatting parameters. The proposal was presented to the section for discussion and debate at the annual meeting program in September. Our panelists included Michigan Court of Appeals Judge Elizabeth L. Gleicher, Court of Appeals Senior Research Attorney John Hiemstra, Daniel C. Brubaker, Chief Commissioner at the Michigan Supreme Court, and Subcommittee members Scott Bassett, Joe Richotte, Stuart Friedman, and Lauren Donofrio. Follow-up efforts are currently underway to elicit additional feedback from the bench and bar, and to refine the Subcommittee's recommendations for formal presentation and approval.

I am in awe of the section's good fortune to have such a robust group of enthusiastic and interested council and committee members. They truly relish the work they do and take seriously the section's purpose of promoting "the skillful, efficient and effective practice of appellate law," advancing the administration of justice, and better serving the public interest. This mission requires a diligent, ongoing, all-hands-on-deck effort. We are not exclusive; you need not be on the council to participate. If you are so inclined, we would love to have you join us. I can be reached at jswanson@kerr-russell.com.

Joanne Geha Swanson *is a member of Kerr, Russell and Weber, PLC in Detroit, where she specializes in federal and state court litigation and appeals.*

Indigent Appellate Defense Reform:

Michigan Appellate Assigned Counsel System (MAACS) Concludes Two-Year Pilot Project to Standardize Fees and Improve Efficiency

By Bradley R. Hall

On December 31, 2017, the Michigan Appellate Assigned Counsel System (MAACS) will conclude a two-year Regional Pilot Project that has standardized attorney fee policies among participating trial courts, consolidated appellate assigned counsel lists by region, streamlined the process for selecting and appointing felony appellate counsel, and improved the quality of appellate representation for indigent criminal defendants. After launching in two geographic regions consisting of 14 courts, the pilot has now expanded into all corners of the state, with participation from the majority of Michigan's 57 felony trial courts.

Based on the success of the pilot and overwhelming approval by courts and assigned counsel, MAACS has rewritten its Regulations, implemented an innovative new case assignment system, and proposed a Supreme Court administrative order and court rule amendments that would cement these reforms into the appellate counsel assignment process statewide. At the same time, MAACS has engaged with courts and other stakeholders to explore ways in which these lessons might be applied to court appointed civil appeals.

This article begins with a history of felony appellate assigned counsel in Michigan, including past reforms. It then describes how MAACS has managed to leverage its limited mandate and resources to overcome unique funding and structural obstacles and enhance operational efficiencies for the trial courts and the quality of appellate representation for indigent criminal defendants. Finally, the article discusses some of the parallels between different types of appointed appellate representation—and how these reforms to the criminal appellate process might be applied to child welfare and other indigent appeals as well.

History of Felony Appellate Assigned Counsel in Michigan

In Michigan, when a defendant requests the appointment of counsel to appeal a felony conviction, the trial court is responsible for appointing an attorney.[1] Historically, each trial court had its own method of selecting appellate counsel. Many courts relied on ad hoc systems in which judges would "pick private attorneys . . . on whatever basis the judges choose."[2] At times this included "simply . . . select[ing] a lawyer who happens to be in the courtroom when the defendant requests counsel," but more frequently it involved selection from a formal or informal list of lawyers "based on merit, patronage, personal relationships or their willingness to help move the docket by not gumming up the works . . . ."[3] While some courts attempted to address these concerns with rotating assignment lists, access to those lists often depended on the same influences.[4]

Other courts would contract with a single local attorney to handle all appointed felony appeals for a flat annual fee. County funding units tended to prefer these contract appellate schemes because they "provide budget predictability and encourage low bidding."[5] Not surprisingly, however, they also "promote a high volume practice in which lawyers cannot afford to devote the necessary time to each case."[6]

Both of these assignment schemes led to wide disparities in caseloads and the quality of representation—which were compounded by natural impediments to vigorous appellate advocacy, such as a lawyer's reluctance to be too critical of the appointing court. A primary problem was the lack of independence for appointed counsel. Indeed, according to the American Bar Association, the First Principle of a Public Defense Deliver System is that "[t]he public defense function, including the selection, funding, and payment of defense counsel, is independent."[7] "Removing oversight from the judiciary ensures judicial independence from undue political pressures and is an important means of furthering the independence of public defense."[8]

But the lack of independence was not the only problem. Exacerbating that concern was the lack of funding for court-appointed appellate counsel. Just as the trial courts are responsible for the appointment of appellate counsel, their county funding units are responsible for attorney compensation. And although rates and fee schedules have historically varied widely, virtually none were commensurate with high quality appellate representation. As a result, too many appeals were handled by untrained and unsupervised novices

or overburdened regulars handling cases in volume just to make ends meet. "Except for a dedicated handful, most well-qualified, experienced criminal appellate lawyers declined appointments in favor of more lucrative work."[9] The result "was seriously deficient performance in many cases," including neglected appeals, the absence of client consultation, pro forma briefs, missed issues, and questionable billing practices.[10]

Creation of the State Appellate Defender Office

The system took a step forward in 1970, when the State Appellate Defender Office (SADO) began accepting felony appellate assignments from trial courts throughout the state.[11] For the cases in which SADO was appointed, this represented a vast improvement in terms of both independence and funding, as SADO was state-funded and staffed by salaried public defenders who did not depend upon trial court judges for their livelihood. SADO was immediately able to provide consistently high-quality appellate representation to its clients.

This quality was not evenly distributed, however. While many rural trial courts welcomed the opportunity to appoint SADO as appellate counsel and shift the financial burden to the state rather than the counties, other courts—including some of the largest—preferred to maintain greater local control over appellate representation and therefore appointed SADO in fewer than ten percent of indigent appeals. As a result, "taxpayers and defendants in some counties received a disproportionate share of SADO services while those in other counties derived little or no benefit from that agency."[12]

Passage of the Appellate Defender Act and Creation of MAACS

In 1978, the Legislature addressed these inconsistencies by passing the Appellate Defender Act, which mandated "a system of indigent appellate defense services which shall include . . . the state appellate defender . . . and locally appointed private counsel"—both overseen by an Appellate Defender Commission.[13] The Act requires SADO to accept at least 25% of assigned appeals statewide, with the remainder assigned to private counsel whose names appear on a "statewide roster" approved by the Commission.[14] Trial courts could no longer appoint whomever they wished on felony appellate matters, but instead were required to appoint "from the roster provided by the commission or . . . to the office of the state appellate defender."[15]

Recognizing that "[t]he appearance of justice is better served if the judge about whose decisions claims of error may be raised is not called upon to select the lawyer who is charged with raising those claims,"[16] the Commission proposed a scheme in which control over the "statewide roster," as well as the selection of counsel from that roster, would be independent from the trial court judiciary. This required distinguishing between the *selection* of appointed appellate counsel, which the Commission sought to place in the hands of nonjudicial personnel acting under standardized procedures,[17] and the *appointment* of appellate counsel, which by statute is the responsibility of the trial court.[18]

To administer the system, the Commission proposed an "Appellate Assigned Counsel Administrator's Office," which would be "coordinated with but separate from" SADO. The role of this new office would be to "compile and maintain a statewide roster of attorneys eligible and willing to accept criminal appellate defense assignments and to engage in activities designed to enhance the capacity of the private bar to render effective assistance of appellate counsel to indigent defendants."[19]

Under this scheme, lawyers approved for the statewide roster would specify the trial courts from which they were willing to accept appellate assignments, and the Administrator would compile and maintain a "local list" for each trial court.[20] A court staff person called a local designating authority, or LDA, would "be responsible for the selection of assigned appellate counsel from a rotating list and . . . perform[ing] such other tasks in connection with the operation of the list as may be necessary at the trial court level,"[21] including the creation and service of appointment orders. The Administrator, in turn, would be responsible for ensuring the quality of appellate assigned counsel by enforcing a set of minimum standards and investigating possible violations of those standards.[22] To comply with SADO's statutory mandate and ensure the even distribution of SADO cases, the regulations provided that SADO "shall be placed in every fourth position on each local list."[23]

In a 1981 Administrative Order, the Michigan Supreme Court approved these recommendations and instituted the Minimum Standards for Indigent Criminal Appellate Defense Services.[24] After the Legislature appropriated funds in 1984, the Commission oversaw the staffing and operations of a new agency known as the Michigan Appellate Assigned Counsel System, or MAACS. In 1985, MAACS solicited applications for the statewide roster, held orientation training programs around the state, and distributed local lists to each felony trial court.[25]

The vast majority of courts immediately began appointing appellate counsel under the MAACS Regulations, though a few of the state's largest courts were slow to comply.[26] Then, in 1989, the Supreme Court issued another administrative order relying on its general power of superintending control to direct all trial courts to select felony appellate counsel under the MAACS Regulations.[27] "The change was immediate," and "[r]otational appointments of eligible roster attorneys became the norm for appellate assignments in every jurisdiction."[28]

The Compounding Problem of Fees

In many respects, MAACS has been a tremendous success. It ensured independence and consistency in the selection of appellate counsel, removing many problematic influences in the process. And, for the first time, it provided statewide standards for experience, training, and client representation—along with an entity to monitor compliance with those standards.

But "[f]or all its efforts to improve roster attorney services through eligibility screening, training and complaint processing, MAACS has always been stymied by its inability to control the bottom line—fees."[29] During the same year that the Appellate Defender Act was passed, Michigan voters approved the Headlee Amendment to the Michigan Constitution, which required the state to reimburse local government units for any new programs or expenses required by the state.[30] Thus, the state has been powerless to impose attorney fee standards on the trial courts without additional state funding.

In fact, the establishment of MAACS may have worsened the attorney fee problem by relieving the trial courts of accountability with their local bars. By guaranteeing the availability of counsel for all indigent felony appeals from a statewide roster and allowing trial courts to refer costly appeals to SADO, MAACS has diminished trial courts' financial incentives to pay reasonable or uniform fees.[31] As a result, most courts have failed to provide reasonable compensation in all but the simplest of cases. Some courts did not adjust their fee policies for over 40 years, until recently paying rates as low as $25 per hour or $350 per case.

The problems associated with low and disparate fees are twofold. First, and most obviously, they have had devastating direct consequences on attorney morale, retention, recruitment, and overall quality:

> If assigned appeals are compensated at such low rates that attorneys cannot make a reasonable wage per hour, the attorneys have three choices. They can stop doing assigned appeals; they can increase their income by taking on more work, even if they cannot then devote adequate attention to each case; or they can do a responsible job for their clients despite the low fees and effectively subsidize the criminal justice system from their own pockets.[32]

Compounding the quality concern, disparate fee policies lead to inconsistencies in payment vouchers, making it virtually impossible for MAACS to conduct meaningful analysis of the time, performance, and cost data from cases assigned by different courts.

Second, the existing disparate fee structure has compelled the persistence of a decentralized and inefficient administrative model, with each unique attorney fee policy depending on a separate local list and local court staff to rotate the list, select counsel, and create and serve appointment orders—all of which could otherwise be handled more quickly and efficiently by the MAACS administrative staff, particularly given the technological advances that have made a centralized paperless process more feasible.

These limitations have been apparent for some time, and as early as 1985, MAACS recommended structural changes to address both of them. As to fees, MAACS recommended that "[c]ompensation for appellate assigned counsel should be determined, funded and paid at the state level," arguing that "[o]nly state-funding can correct the widely disparate, and often shockingly low, fees presently paid by the counties."[33] Not only would state funding "relieve the counties of a substantial and unpopular expense," it would also "permit the centralization of functions now being performed by judges and clerks in 83 counties," "concentrating responsibility in a single state agency would eliminate work for numerous trial court personnel."[34]

And as to administrative efficiency, MAACS recommended a centralization of the assignment process, recognizing that "the system is cumbersome because MAACS is responsible for maintaining the local lists while the trial courts are responsible for using them," resulting in "[s]ubstantial duplication of effort."[35]

> Centralizing the appointment process at the state level would not only streamline the tasks to be done, it would match administrative functions with actual responsibility. As a practical matter, the trial courts would have to begin preparing the orders of appointment with necessary information contained in their files. MAACS could then select counsel, complete the orders, obtain required signatures, and distribute copies.[36]

In spite of the promise of these ideas, MAACS would struggle for the next 20 years under the same structural and financial obstacles, while its state-funded counterpart SADO would continue to grow and thrive.

Administrative Efficiency Through Voluntary Uniform Fees

In September 2014, the Michigan Supreme Court merged MAACS with SADO for management purposes and directed the Appellate Defender Commission "to review operations of [] MAACS and submit a proposed administrative order that reflects the consolidation of the two offices and incorporates proposed updates or revisions that the commission recommends."[37]

The Commission began its review with a close examination of how MAACS could be restructured to remove

impediments to reform and encourage uniform attorney fees, greater administrative efficiency, and better practices. Over several months in 2015, new MAACS leadership held countless meetings with roster attorneys, trial court judges, court administrators, county executives and commissioners, appellate judges, academics, and other stakeholders. The result was a proposal to implement a series of interdependent reforms that would dramatically reshape MAACS—all made possible through the creative leveraging of limited state and county resources, but *without* the legislative reform and new state funding that had long been assumed necessary.

In September 2015, the Supreme Court authorized "a one-year pilot project to assess the feasibility, costs, and benefits associated with structural reforms currently under consideration for permanent statewide implementation."[38] These reforms include:

- Trial courts' voluntary adoption of uniform attorney fee and expense policy.
- Transfer of administrative burdens from participating trial courts to MAACS.
- Consolidation of independent trial court assignment lists into regional lists.
- Pre-screening of appellate counsel before entry of appointment orders.
- Electronic service of orders and related documents to MAACS and parties.

The pilot was implemented in fourteen circuit courts in two geographically and demographically diverse regions, the Eastern Lower Peninsula and the Upper Peninsula. In these regions, local trial court assignment lists were abolished and replaced by regional assignment lists consisting of roster attorneys who are willing to accept appellate assignments from any of the participating courts—provided that they will be compensated under a uniform attorney fee policy, regardless of the particular assigning court.

The consolidation of assignment lists has allowed for the transfer of many administrative tasks from local trial court personnel to MAACS. Under the pilot, a participating trial court transmits the request for counsel to MAACS electronically, along with the judgment of sentence and request for counsel. MAACS then electronically transmits these documents to the next-in-rotation roster attorney on the applicable regional list, who is given one business day in which to accept or decline the assignment before rotation to the next available attorney. After an attorney accepts the assignment, MAACS creates a proposed appointment order including all lower court transcripts, and provides the order to the trial court electronically for a judge's signature. Once signed, MAACS serves the order on the defendant, the attorney, and the Court of Appeals, saving the court time and postage.

While these changes appear simple, they have reduced substitutions of counsel by 47% and amended orders for additional transcripts by 70%, substantially alleviating unnecessary delays, efforts, and costs on the trial courts, Court of Appeals, roster attorneys, and MAACS.

The implementation of these reforms depends upon the trial courts' voluntary adoption of a uniform attorney fee policy, developed in consultation with attorneys and courts and approved by the Appellate Defender Commission. The current policy features hourly rates of $75 and $50, depending on type of appeal and severity of sentence, as well as presumptive hourly maximums of 15 hours for plea appeals and 45 hours for trial appeals. Travel is compensated separately at $25 per hour.

Given the disparities in trial court fee policies in the past, adoption of the pilot fee policy carries budget implications for most trial courts, the extent of which depends upon a court's prior fee policy. While some courts can reduce overall costs or remain flat, most see some degree of increase. MAACS can reliably forecast the potential budget implications for any trial court by aggregating and analyzing pilot voucher data from multiple jurisdictions to assess the average hours, fees, and costs associated with appellate assignments of differing type, and comparing these averages with historical voucher data from the individual court.

In September 2016, the Supreme Court extended the pilot until December 31, 2017, allowing an expansion of regional assignment lists and the collection of more data and feedback. Shortly thereafter, MAACS launched a web-based case assignment system to accommodates the new assignment process in an even more efficient and user-friendly manner. This system delivers some of the most important features of the pilot to *all* trial courts statewide—including those that have not adopted uniform fees and joined regional assignment lists. The new system automates many of the processes that MAACS and trial court staff had undertaken manually in the pilot, including pre-screening of counsel by automated email notifications, the electronic transmission of appointment orders and related documents, and the ability for judges and court staff to e-sign appointment orders. To pre-screen counsel in all cases and accommodate both pilot and non-pilot courts, it divides the assignment process into multiple steps, with MAACS assuming responsibility for the creation and service of appointment orders—albeit only for pilot courts. Approximately 95% of trial courts and 91% of roster attorneys report overall satisfaction with the new case assignment system.

Trial court participation has grown steadily, and the pilot now includes over 30 trial courts divided into five regional assignment lists covering all corners of the state. Surveys

reveal overwhelming trial court support for these reforms, with large majorities reporting an improved experience from MAACS's creation (94%) and service (100%) of appointment orders.

The significant financial implications do not appear to have lessened the courts' enthusiasm. All 14 original pilot courts reported that they were "satisfied with the overall fairness and reasonableness" of the new fee policy through the first year, and 86% of participating courts report overall satisfaction after year two. Surveys reveal that much of the courts' satisfaction with the fee policy is driven by a new sense of confidence in the reliability of vouchers. Unlike traditional MAACS vouchers, pilot vouchers contain substantially more detail as to services and expenses, and are not submitted to the trial courts until MAACS has reviewed them for accuracy and compliance. Several court administrators have observed that roster attorneys now treat vouchers with greater care and attention due to this additional layer of scrutiny. This gives the courts greater confidence that they are getting what they pay for. After one year, all 14 original pilot courts reported satisfaction with the pilot vouchering process. After the second year, the satisfaction level remained at 87% of all participating courts.

Even more important than the popularity and efficiency of the new process, these reforms are helping improve the quality of appellate representation for indigent defendants. The prompt appointment of pre-screened counsel, with a complete record, allows representation to begin immediately after sentencing, before the expiration of filing deadlines and while witness memories are fresh. The standardization of reasonable and predictable attorney fees boosts attorney morale and aids efforts to recruit and retain quality appellate lawyers, while allowing MAACS to monitor attorney performance and efficiency. And the regional consolidation of assignment lists reduces and regulates attorney caseloads.

Along with improved training, greater access to investigative and legal resources, and a rigorous new quality and retention review process, the changes implemented by this pilot represent an essential component to lasting and meaningful reform at MAACS.

Lessons for Other Court Appointed Appeals

To appreciate how far MAACS has come, one might look to the process for selecting appellate counsel in child welfare appeals, including those involving the termination of parental rights. The counsel selection process in these cases looks much like the process in criminal appeals prior to 1970, with no nonjudicial agency to ensure independence or regulate quality, and with most trial courts relying on ad hoc or contract schemes that inherently discourage vigorous appellate advocacy.

One example is appellate counsel's frequent inability to review the entire lower court record. While appointed counsel in criminal appeals are entitled to any transcript they request[39]—and do not risk the loss of future appointments by making such requests—appointed counsel in child welfare appeals are frequently limited to the "portions of the transcript" that are "require[d]" for the appeal.[40] Even where this determination falls to counsel and not the trial court itself—which the Rule does not explicitly require—the absence of an independent counsel selection process deters counsel from requesting costly transcripts, which might make an appointing court less inclined to appoint the same attorney on future cases.

In November 2016, the Appellate Practice Section of the State Bar of Michigan held a seminar entitled "The Economics of Court-Appointed Appeals," which focused largely on the underfunding of appointed appellate representation in criminal and child welfare cases, as well as the ongoing efforts to address this problem at MAACS. Throughout the one-day seminar, appointed appellate counsel, trial and appellate judges, and trial court administrators discussed common concerns and the ways in which the lessons described above could potentially be applied in other contexts, particularly including child welfare appeals.

The seminar focused new attention on many of the problems plaguing appellate assigned representation in Michigan. In light of these concerns, stakeholders have begun discussing ways in which lessons from the ongoing MAACS reform could potentially improve the child welfare appellate system as well. These conversations are already bearing fruit, as the Michigan Court of Appeals has proposed amendments to the Michigan Court Rules that "would require the production of the complete transcript in criminal appeals and appeals from termination of parental rights proceedings when counsel is appointed by the court."[41] Consistent with the MAACS pilot experience, the Court believes that these changes "would promote proper consideration of appeal issues and eliminate unnecessary delays to the appellate process."[42]

There are also discussions about whether MAACS—or a separate but similarly situated agency—should regulate the appointment of appellate counsel in child welfare appeals. Recognizing the need for reform, a number of trial courts have indicated their interest in exploring such a system through a new child welfare appellate pilot project, perhaps modeled on MAACS. Michigan Supreme Court Justice Bridget McCormack, for one, has said she is optimistic about the potential for further reform, explaining, "Since we have this working model, why not apply it in this other area where we know we have a similar problem?"[43]

Conclusion

As the Supreme Court explained, the MAACS Regional Pilot Project was designed to assess "the extent to which this consolidation results in greater speed and efficiency in the assignment process" and "the extent to which uniformity in attorney fee policies allows more meaningful data analysis related to attorney performance and efficiency, as well as the potential financial impact . . . on the circuit courts and their funding units."[44] By this measure, it has been a tremendous success.

The pilot has brought greater speed and efficiency to the assignment process, new county funding in the form of a reasonable and predictable attorney fees, and better overall appellate representation to indigent criminal defendants. These popular and innovative reforms have transformed the criminal appellate assigned counsel system and paved the way for improvements in other corners of Michigan's appellate process as well.

Bradley R. Hall *has been Administrator of the Michigan Appellate Assigned Counsel System since 2015.*

Endnotes

1 MCL 780.712(6).

2 Michigan Appellate Assigned Counsel System, *A Decade of Challenges* (1995), p 3 (on file with author).

3 *Id*.

4 See *id*.

5 *Decade*, p 4.

6 *Id*.

7 ABA, *Ten Principles of a Public Defense Delivery System, Principle 1 with commentary* (2002) (citing National Advisory Commission on Criminal Justice Standards and Goals, *Task Force on Courts, Chapter 13, The Defense* (1973), Standards 13.8, 13.9; National Study Commission on Defense Services, *Guidelines for Legal Defense Systems in the United States* (1976), Guidelines 2.8, 2.18, 5.13; American Bar Association Standards for Criminal Justice, *Providing Defense Services* (3rd ed. 1992), Standards 5-1.3, 5-1.6, 5-4.1; Standards for the Administration of Assigned Counsel Systems (NLADA 1989), Standard 2.2; NLADA Guidelines for Negotiating and Awarding Contracts for Criminal Defense Services, (1984), Guidelines II-1, 2; National Conference of Commissioners on Uniform State Laws, *Model Public Defender Act* (1970), § 10(d); Institute for Judicial Administration/American Bar Association, *Juvenile Justice Standards Relating to Counsel for Private Parties* (1979), Standard 2.1(D)). Available at http://www.americanbar.org/content/dam/aba/administrative/legal_aid_indigent_defendants/ls_sclaid_def_tenprinciplesbooklet.authcheckdam.pdf (accessed Oct. 2017).

8 *Id*. (citations omitted).

9 *Decade*, p 6.

10 *Id*.

11 Michigan State Appellate Defender Office, *Annual Report* (1972), p 1. Available at http://www.sado.org/content/commission/annual_report/1972.pdf (accessed Oct. 2017).

12 *Decade*, p 5.

13 MCL 780.712(4).

14 MCL 780.712(6).

15 *Id*.

16 *Decade*, p 8.

17 *Id*.

18 MCL 780.712(6).

19 Administrative Order No. 1981-7, § 1(1), 412 Mich lxv (1982).

20 *Id*. at § 3(2), (3).

21 *Id*. at § 3(1).

22 *Id*. at § 4(6)(a).

23 *Id*. at § 3(2)(c).

24 *Id*. at § 1(1).

25 *Decade*, p 10.

26 *Id*. at 11-12.

27 Administrative Order No. 1989-3, 432 Mich. cxxvi (1989).

28 *Decade*, p 12.

29 *Id*. at 22.

30 Const 1963, art 9, § 29.

31 AO 1989-3, § 3(7); 3(15).

32 *Decade*, p 22-23.

33 *Id*. at 30.

34 *Id*.

35 *Id*. at 29.

36 *Id*.

37 Administrative Order No. 2014-18, 497 Mich cvxii (2014).

38 Administrative Order No. 2015-9, 498 Mich cvi (2015).

39 MCR 6.425(G)(2)(a)(iii).

40 MCR 3.977(J)(1)(b).

41 Order regarding Proposed Amendments of MCR 3.977 and 6.425, ADM File No. 2017-08 (Staff Comment) (Oct. 17, 2017). Available at http://courts.mi.gov/Courts/MichiganSupremeCourt/rules/court-rules-admin-matters/Court%20Rules/2017-08_2017-10-17_FormattedOrder_PropAmendtOf3.977-6.425.pdf (accessed Oct. 2017).

42 *Id*.

43 Hinkley, *Attorneys get better pay, more oversight in state program*, Lansing State Journal (Dec. 5, 2016).

44 AO 2015-9.

Unresolved Attorney Fee Disputes:

Do They Impact the Finality of a Judgment for Purposes of Appeal?

By Phillip J. DeRosier

A fundamental rule of appellate jurisdiction is the need for a "final" decision – whether it be a judgment or order. In Michigan, a final judgment or order is typically "the first judgment or order that disposes of all the claims and adjudicates the rights and liabilities of all the parties." MCR 7.202(6)(a)(i). In federal court, a "'final decision' generally is one which ends the litigation on the merits and leaves nothing for the court to do but execute the judgment."[1] But what if there is an attorney fee issue outstanding at the time the underlying judgment or order on the "merits" is entered? Does that affect the time for filing an appeal? The answer would appear to depend on whether the case is in federal or state court, and, if in state court, whether the claim for attorney fees is based on a (1) contract or (2) a court rule or statute.

Federal Court

In *Ray Haluch Gravel Co v Central Pension Fund of the Int'l Union of Operating Eng'rs*,[2] the United States Supreme Court resolved apparent uncertainty among the federal circuits regarding whether a decision on the merits is "final" if there is an unresolved claim for attorney fees based on a contract. Federal courts have long recognized that an unresolved issue of attorney fees generally does not prevent the judgment on the merits from being final.[3] But the First Circuit in *Haluch* concluded that this general rule did not "mechanically" apply where the "entitlement to attorneys' fees derived from a contract," the "critical question" being "whether the claim for attorneys' fees is part of the merits."[4]

The Supreme Court reversed, holding that application of the general rule "did not depend on whether the statutory or decisional law authorizing a particular fee claim treated the fees as part of the merits."[5] The Court explained that fees and costs are generally treated as "collateral for finality purposes," and that the "operational consistency" and "predictability" of this rule would be compromised "by providing for different jurisdictional effect to district court decisions that leave unresolved otherwise identical fee claims based solely on whether the asserted right to fees is based on a contract or a statute."[6]

The *Haluch* Court did appear to leave open one possible exception – cases where "'the substantive law requires [attorney] fees to be proved at trial as an element of damages.'"[7] In those cases, "'such damages typically are to be claimed in a pleading and may involve issues to be resolved by a jury.'"[8] But in the "vast range of cases where a claim for attorney's fees is made by motion under [Rule 54(d)(2)]," there is no distinction between statutory and contract-based fee requests.[9]

State Court

So what about cases pending in Michigan courts? Does the same rule apply? It appears that the answer is "no." While the case law is sparse, it appears that the Michigan Court of Appeals has taken a different approach to finality when it comes to unresolved attorney fee issues. On the one hand, MCR 7.202(6)(a)(iv) provides that postjudgment orders "awarding or denying attorney fees or costs under MCR 2.403, 2.405, 2.625 or other law or court rule" are considered "final orders" that are separately appealable. Indeed, the Court of Appeals has said that such orders *must* be separately appealed.[10] At the same time, MCR 7.203(A)(1) provides that such an appeal is "limited to the portion of the order with respect to which there is an appeal of right." Thus, when attorney fees are being sought pursuant to statute or court rule, a party should not wait to appeal the judgment or order deciding the merits of the case until after the attorney fee issue is resolved. For example, in *Jenkins v James F Altman & Nativity Ctr, Inc*,[11] the Court of Appeals held that the plaintiffs could not challenge the trial court's summary disposition decision because they did not timely appeal.[12] While the plaintiffs did timely appeal from the trial court's postjudgment order awarding attorney fees and costs pursuant to MCR 2.114(E), the Court of Appeals held that its jurisdiction was limited to the postjudgment order.[13]

On the other hand, the Court of Appeals has, on at least two occasions, held that there is no final judgment if there is an unresolved claim for *contractual* attorney fees. In *Jets v Hampton Ridge Props*,[14] the plaintiffs filed a lawsuit claiming breach of contract. Following a bench trial, the trial court found in favor of the plaintiffs and awarded damages. The

trial court entered a judgment to that effect on March 25, 2009, and also determined that the plaintiffs were entitled to contractual attorney fees. An opinion and order awarding attorney fees was entered on September 29, 2009, after which the defendants filed a claim of appeal.

On appeal, the plaintiffs argued that the Court of Appeals lacked jurisdiction "to consider any issues other than those relating to the award of attorney fees."[15] The Court of Appeals disagreed, finding that the March 25, 2009 judgment was not the final judgment because it "did not resolve the issue of contractual attorney fees, which was a distinct claim in plaintiffs' complaint."[16] Observing that "'[a]ttorney fees awarded under contractual provisions are considered damages, not costs,'" the Court held that the plaintiffs' claim for contractual attorney fees had to be resolved before there was a final judgment.[17] Because that claim "was not resolved until the trial court issued its September 29, 2009, order establishing the amount of contractual attorney fees," it was that order that was "the first judgment or order that dispose[d] of all the claims' alleged in plaintiffs' complaint."[18]

The Court of Appeals followed a similar analysis in *Laurel Woods Apts v Roumayah*.[19] In that case, a landlord brought an action against its tenants for breach of lease and attorney fees in connection with a fire that the landlord claimed was the result of the tenants' negligence. Prior to trial, "the trial court instructed the parties that it would decide the issue of [the landlord's] claim for contractual attorney fees after the jury trial."[20] As a result, the landlord's claim for attorney fees "was not an issue in the jury trial."[21]

Following the trial, the jury found in the landlord's favor and awarded damages, but in an amount far less than the landlord had requested. The trial court entered a judgment on the jury's verdict, as well as a separate order denying the landlord's request for attorney fees under the parties' lease agreement.[22] The landlord moved for judgment notwithstanding the verdict (JNOV), a new trial, and/or additur with respect to the jury's award, and also moved for reconsideration of the attorney fees order. The trial court denied the landlord's JNOV motion on June 4, 2010, and denied reconsideration of the attorney fees order on July 13, 2010. The landlord filed its claim of appeal on August 3, 2010.

As in *Jets*, the tenants in *Laurel Woods* argued that the Court of Appeals only had jurisdiction to address the attorney fee issue, as no claim of appeal had been filed within 21 days of the denial of the landlord's motion for JNOV. The Court of Appeals, however, rejected that argument. The Court reasoned that, because the landlord "claimed attorney fees in . . . its complaint pursuant to a provision of the parties' lease," this contractual attorney fees claim "needed to be adjudicated in order to dispose of all the claims in the complaint."[23] As the claim was not resolved until the entry of the attorney fees order, the Court of Appeals concluded that, even though it was "entered after the judgment, the attorney fees order was the 'first' 'final order' under MCR 7.202(6)(a)(i)."[24]

Conclusion

So, what should practitioners take from all of this? In federal court, the rule appears to be clear: unless the substantive law requires that a claim for attorney fees be pleaded and proved at trial as an element of damages, it will be treated as a collateral "cost" issue that does not affect the finality of the decision on the merits.

But in Michigan, the Court of Appeals appears to treat contractual attorney fees differently than requests for attorney fees based on a statute or court rule, with only statutory or court-rule based attorney fee awards being considered as separately appealable "postjudgment" orders. As the Court observed in *Laurel Woods*, a claim "for attorney fees under [a] contract . . . is distinct from a postjudgment claim for attorney fees."[25] This is consistent with the language of MCR 7.202(6)(a)(iv), which limits the rule's application to orders awarding or denying attorney fees "under MCR 2.403, 2.405, 2.625 or other law or court rule."

Thus, if a judgment on the merits has been entered in a case in state court where a claim for contractual attorney fees has been made, in all likelihood that judgment will not be considered final for purposes of appeal until the attorney fee claim has been resolved.

Phillip J. DeRosier *is a member in the Detroit office of Dickinson Wright PLLC, and specializes in state and federal civil appeals. Prior to joining Dickinson Wright, he served as a law clerk for Michigan Supreme Court Justice Robert P. Young, Jr. He is a former chair of the Michigan State Bar Appellate Practice Section.*

Endnotes

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2 *Ray Haluch Gravel Co v Central Pension Fund of the Int'l Union of Operating Eng'rs*, ___ US ___; 134 S Ct 773 (2014).

3 See *Budinich v Becton Dickinson & Co,* 486 US 196 (1988).

4 *Central Pension Fund of the Int'l Union of Operating Eng'rs* v *Ray Haluch Gravel Co,* 695 F3d 1, 6 (CA 1, 2012).

5 *Haluch,* 134 S Ct at 780.

6 *Id.* at 780-781.

7 *Id.* at 781, quoting FR Civ P 54(d)(2).

8 *Id.*, quoting Advisory Committee's 1993 Note on subd (d), par (2) of FR Civ P 54, 28 USC App, pp 240-241.

9 *Id.* at 782.

10 See, e.g., *McIntosh v McIntosh*, 282 Mich App 471, 484;

768 NW2d 325 (2009) ("[T]he trial court's May 15, 2008, postjudgment order required plaintiff to pay defendant attorney fees of $2,000 in anticipation of appeal. Plaintiff never appealed this postjudgment order. Instead, plaintiff merely argued in his claim of appeal from the judgment of divorce that the trial court erred in awarding attorney fees. Because plaintiff was required to file a separate claim of appeal from the postjudgment order and he did not, we lack jurisdiction to consider this issue."); *Ambler v Thompson*, unpublished opinion per curiam of the Court of Appeals, issued March 29, 2016; 2016 WL 1243425, at *1 (Docket No. 325042) (holding the Court lacked jurisdiction over an appeal from a postjudgment award of attorney fees under MCR 2.114(E) because it was not separately appealed); *Wipperfurth v Macatawa Bank*, unpublished opinion per curiam of the Court of Appeals, issued Dec 9, 2014; 2014 WL 6956379, at *2 (Docket No. 317105) ("[T]he trial court's summary disposition orders are beyond the scope of this appeal as of right from the trial court's June 17, 2013 order granting sanctions. The June 17, 2013 order granting sanctions is a final order under MCR 7.202(6)(a)(iv), and MCR 7.203(A)(1) limits the scope of the appeal of right regarding that order to the part which is appealable of right, i.e., the sanctions issue.").

11 *Jenkins v James F Altman & Nativity Ctr, Inc*, unpublished opinion per curiam of the Court of Appeals, issued May 31, 2005; 2005 WL 1278478 (Docket No. 256144).

12 *Id*. at *3.

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14 *Jets v Hampton Ridge Props*, unpublished opinion per curiam of the Court of Appeals, issued Aug 29, 2013; 2013 WL 4609208 (Docket Nos. 294622, 297844).

15 *Id*. at *2.

16 *Id*.

17 *Id*., citing *Central Transp, Inc v Fruehauf Corp*, 139 Mich App 536, 548; 362 NW2d 823 (1984).

18 *Id*. (citations and some quotation marks omitted).

19 *Laurel Woods Apts v Roumayah*, unpublished opinion per curiam of the Court of Appeals, issued Dec 11, 2012; 2012 WL 6177083 (Docket No. 299396).

20 *Id*. at *2.

21 *Id*.

22 *Id*.

23 *Id*. at *4.

24 *Id*.

25 *Id*. at * 3 n 4.

Originalism-Part Three: The Ratifying State Conventions' Voters

By Howard Lederman

With President Donald J. Trump in the White House and Originalism popular among academic, establishment, tea party, Department of Justice, and Senate Republicans, we can expect an aggressive campaign for more originalist US Supreme Court, US Courts of Appeals, and other federal and state justices, judges, and decisions. So, for appellate practitioners, understanding originalism is imperative. Likewise, understanding its strengths and weaknesses, and its praises and criticisms, is imperative.

As we have seen in Part I of this series, Justice Antonin Scalia, some conservatives, and a few liberals championed the most popular form of originalism called original meaning. Other conservatives and a few liberals championed another form called original intent. An original meaning proponent focuses on how the US Constitution's ratifiers assembled in state conventions in 1787-1788 interpreted the Constitution's provisions. An original intent proponent focuses on how the US Constitution's drafters assembled at the 1787 Philadelphia Constitutional Convention interpreted the Constitution's original provisions and how Congress interpreted the amendments.[1]

In this article, we will focus on one of the strongest criticisms of original meaning: Since the Constitutional Convention and the ratifying conventions arose from political processes excluding African-Americans (except for a small number of free African-Americans), Native Americans, women, and lower-class white males, the conventions did not represent the American people as a whole, but only the upper and some of the middle classes, including solely white males. The state convention ratifiers did not represent African

Americans, Native Americans, poorer Americans, women, and a few other groups, because almost all states holding ratifying conventions barred almost all of these groups' members from voting in convention delegate elections. The critics charge that this wide-ranging exclusion makes original meaning illegitimate and unjustified. The respondents assert that the ratifying conventions resulted from elections featuring at a least greater white male electorate than ever before.

As the following voting timeline shows, this exclusion is a historical fact:

1776: In their state constitutions, New Jersey, North Carolina, and Pennsylvania permit free African-Americans to vote, subject to property qualifications.

1777: In its state constitution, New York permits free African-Americans the right to vote subject to property qualifications, but prohibits women from voting.

1777: In its state constitution, Vermont abolishes slavery, permits free African-Americans to vote, and abolishes property qualifications.

1780: In its state constitution, Massachusetts abolishes slavery and gives free African-Americans the right to vote, but prohibits women from voting.

1784: In its state constitution, New Hampshire permits free African-Americans the right to vote subject to property qualifications, but prohibits women from voting.

1787: As of 1787, only New Jersey permits women to vote, though the right was subject to property qualifications.

1790: As of 1790, Maryland, Massachusetts, New Hampshire, New York, North Carolina, Pennsylvania, and Vermont permit free blacks to vote subject to property qualifications.

1792: In its state constitution, Kentucky rejects property qualifications for voting and becomes a model for states admitted to the union after 1792.

1802: In its state constitution, Ohio prohibits free African-Americans and women from voting.

1807: New Jersey prohibits free African-Americans and women from voting.

1809: Maryland prohibits free African-Americans from voting.

1818: Connecticut prohibits free African-Americans from voting.

1821: While abolishing property qualifications for whites, New York keeps them for free African-Americans.

1822: Rhode Island prohibits free African-Americans from voting.

1835: North Carolina prohibits free African-Americans from voting.

1838: Pennsylvania prohibits free African-Americans from voting.

1842: Rhode Island rejects Dorr Constitution continuing prohibition on free African-Americans from voting.

1856: After a long campaign to remove property qualifications for voting, North Carolina becomes the last state to abolish them.

1866: Congress passes the 14th Amendment, granting all African-Americans US citizenship and sends it to the states for ratification.

1868: Three-fourths of the states ratify the 14th Amendment.

1869: Congress passes the 15th Amendment, giving African-American men the right to vote.

1870: Three-fourths of the states ratify the 15th Amendment.

1876: The US Supreme Court rules that, under the 14th Amendment, Native Americans are not citizens.

1882: Congress passes the Chinese Exclusion Act, barring Chinese Americans from naturalization to become US citizens and thus barring their right to vote.

1887: Congress passes the Dawes Act, giving Native Americans the right to vote, if they renounce all tribal affiliations and allegiances.

1890: Congress passes the Indian Naturalization Act, permitting Native Americans to apply for US citizenship like foreign immigrants and thus gain the right to vote.

1890: In its state constitution, Wyoming becomes the first state to give women the right to vote in its state elections.

1919: Congress passes the 19th Amendment, giving women the right to vote.

1924: Congress passes, and the President signs, the Indian Citizenship Act of 1924 granting Native Americans citizenship and thus the right to vote.

1920: Three-fourths of the states ratify the 19th Amendment.

1922: In *Ozawa v United States,* 260 US 178, 194-198; 43 S Ct 65; 67 L Ed 199 (1922), the US Supreme Court rules that Japanese-Americans cannot become naturalized US citizens and thus cannot gain the right to vote.

1923: In *United States v Thind,* 261 US 204, 213-215; 43 S Ct 338; 67 L Ed 616 (1923), the US Supreme Court

rules that Indian-Americans cannot become naturalized US citizens and thus cannot gain the right to vote.

1952: Congress passes, and the President signs, the McCarran-Walter Act permitting all Americans of Asian ancestry to apply for US citizenship, become naturalized US citizens and thus gain the right to vote.

As a rule, four large groups of Americans could not vote in Constitutional Convention delegate elections: "the slaves, the indent[ur]ed servants, the mass of men who could not qualify for voting under the property tests imposed by various state constitutions and laws, and women, disenfranchised and subjected to the discriminations of the common law. These groups were, therefore, not represented in the Convention which drafted the Constitution, except under the theory that representation has no relation to voting." A few states, Pennsylvania and Georgia, made exceptions for "propertyless mechanics[.]"[2] But even these voters could not be blacks, women, indentured servants, or the like. Thus, besides slaves and women, "the most excluded groups were "laborers, tenant farmers, unskilled workers, and indentured servants, all of whom were considered to lack a "stake in society," a permanent interest in the community and the wherewithal to withstand corruption."[3]

As Professor Alexander Keyssar wrote: "At its birth, the United States was not a democratic nation—far from it. The very word `democracy' had pejorative overtones, summoning up images of disorder, government by the unfit, even mob rule. In practice, moreover, relatively few of the nation's inhabitants were able to participate in elections: among the excluded were most African Americans, Native Americans, women, men [under majority age], and white males [not owning land or meeting property qualifications]." [4] Indeed, as we shall see below, many founding fathers disdained democracy and expanded suffrage.

Constitutional Ratification Convention Delegates Selection

All states held elections to select ratification convention delegates. In most states, a greatly restricted "the people" elected their states' delegates. For instance, in Massachusetts, New York, South Carolina, Vermont, and Virginia, such restricted popular elections occurred. Connecticut elected its delegates at town meetings. But in some states, the state legislatures elected delegates. For example, the Georgia and Virginia Legislatures elected their states' delegates. [5]

Property and Income Voting Restrictions—Their Theoretical Bases

During the colonial period, the main colonial American voting restriction principle was the same as Britain's: Only white men having "freehold landed property sufficient to ensure that they were personally independent and had a vested interest in the welfare of their communities could vote."[6] In law and thought, in theory and practice, this principle was entrenched everywhere. "By the middle of the eighteenth century[,] all American colonies save one had adopted election laws[,] which denied the colony franchise to those who owned no property.….[B]y the time of the Revolution, only South Carolina retained a taxpaying qualification for the vote. In all other colonies, election laws excluded the propertyless from the suffrage without distinction." [7]

Colonial authorities, legal authorities, and other writers rationalized this exclusionary principle by finding the propertyless lacking in free agency and thus independence from outside influences:

"[T]hose without property were not free agents. Those who owned no property were powerless and dependent; they were nearly always subject to the will of those who commanded resources. Because they were not their own men, they lacked political capacity. The political community simply could not trust such men with the important task of selecting magistrates or legislative representatives[,] because they could never exercise independent judgment. They would always be compelled to do the bidding of the wealthy." [8]

Sir William Blackstone wrote: "`The true reason of requiring any qualification, with regard to property, in voters, is to exclude such persons as are in so mean a situation that they are esteemed to have no will of their own. If these persons had votes, they would be tempted to dispose of them under some undue influence or other. This would give a great, an artful, or a wealthy man, a larger share in the elections than is consistent with general liberty.'" [9]

John Adams, second U.S. President, wrote: "`Such is the frailty of the human heart, that very few men who have no property, have any judgment of their own. They talk and vote as they are directed by some man of property, who has attached their minds to his interest….[They are] to all intents and purposes as much dependent upon others, who will please, feed, clothe, and employ them, as women are upon their husbands, or children on their parents.'" [10]

Even most radical Whigs agreed: Joseph Priestley wrote: "`[T]hose who are extremely dependent should not be allowed to have votes…because this might…be only throwing more votes into the hands of those persons on whom they depend.'" [11] Indeed, to most eighteenth century Whigs, "property represented much more than material possessions. It represented `the attributes of a man's personality that gave him a political character.'" [12]

This attitude carried over into the Constitutional Convention itself. There, James Madison, Jr. (who would become the fourth U.S. President) warned the Convention of what

he considered the dangerous future industrial working class:

"`Viewing the subject in its merits alone, the freeholders of the Country would be the safest depositories of Republican liberty. In future times[,] a great majority of the people will not only be without land, but any other sort of property. These will either combine under the influence of their common situation; in which case, the rights of property and the public liberty will not be secure in their hands, or, which is more probable, they will become the tools of opulence and ambition; in which case there will be equal danger on the other side.'" [13]

Elbridge Gerry (who would become the fifth U.S. Vice-President) condemned "`Democracy' as `the worst…of all political evils.'" [14]

Such was the prevailing ideology in 1787.

Property Voting Restrictions: Their Loosening

The American Revolution led to expanded voting rights and reduced property voting restrictions. The revolutionary experience cracked the rock solid ideological wall protecting property voting restrictions and promoted competing principles and values of expanded voting rights. [15] "[T]he notion that a legitimate government required the `consent' of the governed became a staple of political thought," and the notion that the governed included more than the upper crust gained ground. [16] During the American Revolutionary period (1774-1787), states expanded the percentage of eligible voters overall by over 10 percent.[17] For example, in 1776, Pennsylvania granted "all taxpaying adult males" the right to vote. By 1787, about "87.5 percent of adult white males" could vote."[18] Virginia relaxed its property requirements. By 1787, about 60 percent of adult white males could vote.[19] New York also relaxed its property requirements. By 1787, about 58 percent of adult white males could vote.[20] Likewise, New Jersey and Georgia lightened their property requirements, thus increasing the percentage of white men eligible to vote.[21]

In deciding who could vote in Constitutional Convention delegate elections, most states imposed the same or similar property and income voter eligibility requirements as they did for their state legislatures' lower house elections. As of 1787-1788, even universal white male suffrage did not exist. White male suffrage subject to property and income restrictions was the rule. According to "distinguished historian Jill Lepore, …only 6 percent of Americans could vote" translating into "about 15% of the free adult population."[22] In Virginia, by 1750, about 67% of free white men could vote. In the New England colonies and the middle colonies big seaports, by then, about 75% of free white men could vote. "[Historians] Chilton Williamson and Robert Dinkin estimated that in the late colonial era[,] the proportion of freehold owners ranged between 50 and 75 (or even 80) percent) in the various communities and states, while [Historian] Alexander Keyssar suggests that overall nearly 60 percent of adult white males were eligible to vote." Compared to Britain, these percentages were high.[23]

But for Constitutional ratification convention elections, "….the Founders generally set aside ordinary property qualifications in administering the special elections for ratification-convention delegates."

"The Founders' decisions to waive these property rules in the special elections of 1787-88 built upon conceptual and practical foundations laid by several states when framing their state constitutions." For example, in 1776, Pennsylvania permitted state militiamen unable to meet property qualifications to vote for Constitutional Convention delegates. By one historian's estimate, Pennsylvania expanded its electorate for that election by 50-90%. Several years later, Massachusetts expanded the electorate even more: It "eliminated property qualifications" in the vote to ratify the new state constitution. In 1784, New Hampshire did something similar. [24]

The states did not hold statewide votes on whether to ratify the Constitution. Rather, the states opted for state conventions. In addition, the states did not always implement the Founders' decision to waive property requirements. For instance, in Virginia, "the General Assembly had to decide who would be eligible to serve as delegates and which voters would be qualified to elect them. Each of the eighty-four counties could send two delegates, while the borough of Norfolk and the City of Williamsburg would have one each. While legislators had to be residents and property owners in the county that they represented, the delegates to the convention were not subject to that restriction….In deciding who would be eligible to vote for delegates, the General Assembly extended the right to those who were currently eligible to cast a ballot in legislative elections." [25]

More on Women

All colonies defined women as their husbands' dependents. Some colonies gave widows responsible for family property the right to vote. Except for this limited exception, all colonies denied women that right. [26]

Even after the Revolution, almost every state denied women the right to vote. Men barred women from voting based on gender alone. No matter how much property a woman owned, no matter how much wealth she had, no matter what amount of property taxes she paid, she could not vote. "The reasoning behind this discrimination rested on the assumption that married women were liable to coercion by their husbands; if a wife voted,…, it meant that man cast two ballots. As one man put it, `How can a fair one refuse her lover?'" [27] But the states also denied single, unmarried women the right to vote.

"Blatantly discriminatory attitudes kept lawmakers from giving women the vote. They did not want to share their political power with daughters, mothers, and wives, just as they did not want to share it with freed black men or immigrants." In New Jersey, in 1776, the state legislature gave women the right to vote. "In 1807[, the legislature] took this right away—not only from women but from [free] black men and aliens as well."[28]

More on Free Blacks

After the Revolution, some states granted free blacks the right to vote. These states were Maryland, Massachusetts, New York, New Jersey, North Carolina, Pennsylvania, and Vermont. The others did not. The immediate post-Revolution period was free blacks' voting rights high point until the Civil War Amendments and Reconstruction. From 1819 until the Civil War, every new state entering the union barred free blacks from voting. By 1855, despite the number of states increasing from 13 to 33 since 1790, only five states permitted free blacks to vote: Maine, Massachusetts, New Hampshire, Rhode Island, and Vermont. [29] New Jersey and North Carolina had abrogated free blacks' right to vote. [30]

Conclusions

Original meaning proponents' abilities to respond to the criticism is restricted. The Constitutional Convention and the ratifying conventions did arise from political processes excluding slaves, women, and lower-class people. But original meaning proponents can claim that, compared to the pre-Revolution electorate and the 1800-1830 electorate, the ratifying conventions' electorate, though restricted to white, middle and upper-class males, was greater. Exceptions for some groups of white males based on Revolutionary War service and avenues for other groups of white males based on lower property restrictions in many states and near-universal white male suffrage in a few states made the electorate more representative of white males. But even this expanded electorate excluded almost all poor and near-poor white males. Therefore, the critics' charge that the ratifying conventions did not represent substantial parts of society based on economic and social class, race, and gender remains valid. The same is true of the related charge that the Constitution had built-in class and race prejudices. The real issue becomes whether originalism's advocates can prevail on their position that, despite these criticisms, originalism is truer to the Constitution and thus more legitimate than its competitors.

***Howard Yale Lederman**, a solo practitioners, has been an Appellate Practice Section Charter Member since the section's 1996 founding. He has been a Cooley Law School Adjunct Professor since 2012. He practices mainly appellate, commercial, constitutional, and employment litigation. He has written or co-written over 30 articles and book contributions in the above areas.*

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Using Tech to Improve Your Appellate Documents

By Scott Bassett

As appellate attorneys, we spend more time writing than attorneys in other legal specialties. We want our appeal documents to be accurate, concise, and persuasive. Technology can help.

Most of us prepare documents using Microsoft Word. While there are WordPerfect holdouts, the add-ins available for Word make it hard to justify continuing to use WordPerfect – notwithstanding the much-loved Reveal Codes. Get over it! Learn how to use Word's Styles and you may soon forget about Reveal Codes.

And now that I've offended WordPerfect stalwarts, let me also offend Mac users. The most useful Word add-ins are only available for the Windows operating system. For that and other reasons, including a huge variety of hardware to choose from, I think appellate lawyers are better off with Windows machines. If you prefer Apple hardware, consider installing Windows 10 on your Mac. Use Boot Camp or a virtualization program like Parallels or VMware Fusion. Then run the Windows version of Office 365, which the latest version of Microsoft Word, on your Mac. This gives you access to all of the great Word add-ins.

My two favorite Word add-ins for improved writing are WordRake and PerfectIt. They do different things. It is worth having both.

WordRake for Microsoft Word costs $129 for a one-year subscription. Two and three-year subscriptions are available at a discount. WordRake is licensed for a single computer, not user. You must purchase two licenses if you want to use WordRake on both your desktop and laptop computer.

WordRake analyzes your document and makes recommendations for removing useless words and phrases. It does not duplicate the grammar and spell-checking functions

built-into Word. I always run Word's spelling and grammar checker on each motion or brief before I let WordRake analyze my writing.

WordRake displays suggested changes in-line using Word's Track Changed function. You can quickly go through your document and accept or reject any of WordRake's suggestions. I usually accept more than half of WordRake's suggestions. Sometimes the suggested change alters the meaning of a sentence. If so, I reject the change and move on. Usually the suggested change makes my writing clearer and more concise by eliminating unnecessary words.

After completing both Word's built-in spell and grammar check and WordRake's review, I use PerfectIt from Intelligent Editing. PerfectIt costs $99 and there is no ongoing annual subscription cost. It is licensed per user, so you can install it on both your desktop and laptop, as I did. It is designed for legal writing and does a great job of finding inconsistencies in word usage, format, and style that Word's built-in functions miss.

I use the American Legal Style that comes with PerfectIt. This style sheet checks spelling, capitalization, hyphenation and italicization in legal terms based on *Black's Law Dictionary*; finds errors in case citations based on *The Bluebook: A Uniform System of Citation*; and suggests style tips from *The Red Book: A Manual On Legal Style* by Bryan Garner and *The Elements of Style* by Strunk & White. I love the way it finds and allows me to correct mistakes such as unclosed quotation marks and unclosed parentheses or brackets.

Both WordRake and PerfectIt have free trials. WordRake lets you install and try it for 7 days. PerfectIt has a 30-day free trial. Neither is cost prohibitive. I view them both as essential tools to improve my appellate legal writing.

Then, of course, there is manual proofreading because all of this wonderful technology will not catch every error. Tech is fast and efficient, but it is not yet a substitute for the human eye and brain.

Another essential tech tool for lawyers who write appellate briefs is Best Authority from Levit & James. It doesn't improve your writing, but it saves time when your writing is done. Like WordRake and PerfectIt, Best Authority works only in Microsoft Word running on Windows.

You can use Word's built-in feature to generate a table of authorities. But doing so involves individually marking citations. That takes time. I don't always have that kind of time.

Unlike Word's built-in feature for creating a table of authorities, Best Authority automatically scans and recognizes citations in your brief. It then generates a table of authorities in the location you selected prior to the "scan and build" process. Generating the table of authorities is fast.

Best Authority has a 30-day free trial, but you must first fill-out an online form to request an evaluation copy of the software. As a solo practitioner, the less expensive Light Edition of Best Authority meets my needs. The Premium Edition is intended for larger organizations because it offers centralized administration and configurable user permissions.

The initial license fee for the Light Edition is $225 per litigator. It is a perpetual license, but I also subscribe to the Software Subscription Service (SSS), which includes bug fixes and updates. My Light Edition SSS fee for 2017 was $45. The initial license fee for the Premium Edition is $360 per litigator.

Starting in January of 2018, Levit and James will introduce Best Authority Version 5, which included a "pay per document" option with no up-front cost. An individual document is $65, but the price can drop as low as $35 for pre-purchased "packs" of documents. This would be good for lawyers who only occasionally write briefs requiring a table of authorities.

I've concluded that each of these three Word add-ins is worth my money. WordRake is used for all of my documents, not just appellate briefs. There is even a version that works with Outlook so emails are concise and readable. PerfectIt is great for appellate briefs because it catches inconsistence that are otherwise hard to spot and will be missed by Word's built-in tools. Best Authority is a great time-saver for lawyers handing appeals or filing trial court briefs requiring a table of authorities.

Scott Bassett *is a member of the State Bar Appellate Practice Section Council and a past chairperson of the State Bar Family Law Section. He is also a Fellow of the Michigan Chapter of the American Academy of Matrimonial Lawyers (AAML). He became Michigan's first "virtual" lawyer in 2002 when he closed his physical office and moved his practice to the Cloud.*

Appellate Practice Section Mission Statement

The Appellate Practice Section of the State Bar of Michigan provides education, information and analysis about issues of concern through meetings, seminars, the website, public service programs, and publication of a newsletter. Membership in the Section is open to all members of the State Bar of Michigan. Statements made on behalf of the Section do not necessarily reflect the views of the State Bar of Michigan.

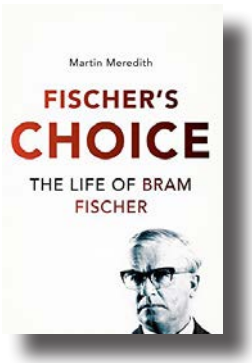
Recommended Reading for the Appellate Lawyer

By Mary Massaron

During late August and early September, I was lucky enough to spend two weeks in South Africa. The first week was on a safari in KwaZulu-Natal, which is a province in South Africa with many reserves at which visitors can see lions, cheetah, rhinos, hippos, zebra, giraffe, and many other animals and birds in the wild. The second week, I spent time on Capetown, visiting Robben Island, and art galleries in town, rode a luxury train through the wine country and high veld, and visited Johannesburg. It was incredible – almost indescribable. While there, as anyone who has traveled with me knows, I went in search of books by local authors to learn more about the people and the country. My search was easy in South Africa because the airports all had terrific bookstores with loads of books of interest to me – so much so that I had to use my fold-up extra Tumi bag to get them all home. This issue's reviews will discuss several of them.

Fischer's Choice: The Life of Bram Fischer

Martin Meredith (Jonathon Ball Publishers 2002



Readers of this column may recall that I reviewed an earlier biography of Bram Fischer as well as Nelson Mandela's *The Long Walk to Freedom*. Nelson Mandela has been a hero of mine since I was a teenager and first began following the protests against the apartheid government in South Africa. And Bram Fischer, the lead trial lawyer at the Rivonia Trial, has also been a hero of mine. Nelson Mandala said of Bram Fischer, that he "could have become prime minister or the chief justice of South Africa if he had chosen to follow the narrow path of Afrikaner nationalism. He chose instead the long and hard road to freedom not only for himself but for all of us." This slim biography offers an overview of Bram Fischer's life, his gradual conversion to become a committed member of the Communist Party since it was the chief vehicle for protest against the Afrikaner regime of the time, and his eventual death of cancer, still under house arrest for his work against the government.

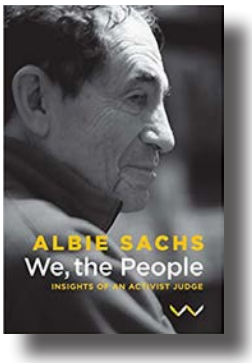
This biography places Fischer's life within the context of Afrikaner history and culture beginning with his father, who accepted a position in the unity government after the first Boer war though his sympathies remained with those protesting this regime. As a child and college student, Bram was part of his Afrikaner culture. But at college he came under the influence of a teacher who introduced him to leading members of the African community involved in discussing the current situation and its problems. Fischer changed gradually as a result his own deep thinking about his country and himself. At the start of his awakening to the issues of race, when he first was introduced to black African fellow students Fischer felt "a sudden revulsion at having to shake their hands." He described asking himself what had changed since his childhood when he had enjoyed countless days of playing with two African youths of his own age. He said "What became abundantly clear was that it was I and not the black man who had changed." He reflected on this and concluded that "I had developed an antagonism for which I could find no rational basis whatsoever."

Fischer's deepening awareness of these issues in South Africa led him to more and more involvement in groups seeking to change the laws, and more and more often defending those charged with violating the race laws. The book alternates between vignettes and stories related to the love of his life, his wife, Molly, and the birth of their children, and those related to his early political involvement. Both make for fascinating reading. And of course, the book includes an account of the Rivonia Trial, a trial which remains an abiding inspiration for me both because of the brave men and women willing to put their lives on the line for an idea of freedom and democracy, and the trial team who sacrificed so much to defend them at trial, despite a loss of income, prestige in the then-existing social world, and the constant threats of violence, loss of work, and arrest. I am glad to have read this biography and think you will also find it compelling.

We, the People: Insights of an Activist Judge

Albie Sachs (WITS University Press 2016)

This fascinating collection of essays, lectures, and writings from former judge Albie Sachs offers great insight into South Africa's constitution, as it was formulated and as it has been applied. Albie Sachs participated in protests against apartheid, and was arrested for sitting on a bench marked for



non-whites only at the Capetown post office during the Defiance of Unjust Laws Campaign of 1952. He went on to become a lawyer, and eventually was forced into exile in Mozambique and England. This book includes a series of captioned photographs showing Sachs at historical moments, both of great pain and tragedy such as when his car exploded in Mozambique causing him to lose most of one arm and sight in one eye, and of great triumph, such as when he worked with others to prepare a draft Bill of Rights for the new South African constitution.

Sachs's life embodies and illustrates many of the contradictions and tragedies of South African history. It also illuminates the triumphs and the inspiring struggles of so many to create a democracy under the rule of law that offers a place for all. Part of my fascination with the country and its struggles is because we see the rule of law tested against the difficulties created by South Africa's fraught racial history. Sachs writes eloquently about the constitutional framework that exists and how it came to be. Sachs credits Oliver Tambo, a partner in a law practice with Nelson Mandela before Mandela's arrest and incarceration. Tambo was a proponent within the ANC for the view that the constitution ought not "introduce constitutionalized markers of identity, culture and historical provenance into the very formal structures of government itself." Instead, Tambo urged that a Bill of Rights could "enunciate the quintessence of all we had been struggling for." According to Sachs, "The Bill of Rights for us … is the foundation of our transformation of South Africa." Sachs elaborates on this noting that the constitution "acknowledges and embraces multiculturalism" but "does so without allowing group rights to become the foundation of the governing structures of our new constitutional order."

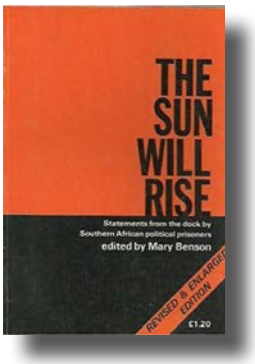
Sachs's discussion of the drafting of this constitution is itself inspirational to any lawyer who believes in the rule of law as a savior for a diverse nation and people. Sachs also wrote about the profound changes needed at this turning point in history. "We who have spent our lives fighting power, now suddenly face the prospect of exercising it." What would this mean? According to Sachs, this time of constitution drafting was vital to the ability to create a new nation. His reflections on this process are fascinating. And his discussion of the Constitutional Court's powers, including striking down some of then-President Mandela's initiatives, is also terrifically told.

Sachs discusses a number of key early decisions of the Court, and the principles that were employed as the new country began and as the Court searched its way into its initial jurisprudence. This history reminds me of this country's founding era with its giants on the Supreme Court, deciding the initial cases about what the American Constitution meant. I highly recommend Sachs's book.

The Sun Will Rise: Statements from the dock by South African political prisoners

Mary Benson

(International Defense and Aid Fund for South Africa 1981)



I found this slim volume in a book shop on Robben Island where Nelson Mandela was imprisoned for almost thirty years and where numerous other political prisoners were held for years as a result of their efforts to end the apartheid regime. The tour of the prison was led by one former prisoner there, who had spent a decade in his twenties on that island due to his courageous support of those seeking to end that government.

This book includes the statements that political prisoners made during political trials that took place during the 1960s and on. The first statement was made by Robert Sobukwe, an early leader of the Pan-Africanist Congress. Sobukwe was the son of a Methodist minister who took part in the 1952 Defiance Campaign and lost his job as a teacher. He later resigned from a job as a professor at the University of Witwatersrand to lead the anti-pass-laws protests in 1960. In his statement before the Johannesburg Regional Court, where he was tried for inciting a campaign against the anti-pass laws, Sobukwe said "The chief aims of the PAC are the complete overthrow of white domination and the establishment of a non-racial democracy in South Africa was well as throughout the whole of Africa." He also said in mitigation of the sentence that "[w]ithout wishing to impugn the personal honor and integrity of the magistrate, an unjust law cannot be applied justly." And he indicated that "The history of the human race has been a struggle for the removal of mental, moral and spiritual oppression, and we would have failed had we not made our contribution to the struggle." Sobukwe spent almost a decade on Robben Island and, when he was released, was required to stay in Kimberly, a somewhat bleak and isolated mining town in South Africa, where he died before the end of apartheid.

Another statement in the book is that of Nelson Mandela to the Pretoria court where he was tried for inciting workers to strike and for traveling without a passport. Mandela explained his role as a leader in the struggle saying, "I regard it as a duty which I owed, not just to my people, but also to my profession, to the practice of law, and to justice for

all mankind, to cry out against this discrimination which is essentially unjust…. I believed that in taking up a stand against this injustice I was upholding the dignity of what should be an honorable profession." According to Mandela, his role was not easy since he had to "separate myself from my wife and children, to say goodbye to the good old days when, at the end of a strenuous day at an office, he could look forward to joining my family at the dinner-table, and instead take up the life of a man hunted continuously by the police…."

On that occasion, Mandela was sentenced to three years imprisonment, which he served at Pretoria Prison.

But while he was serving this sentence, he was charged with treason and brought to trial again. This was the famous Rivonia Trial at which he was convicted of treason. He again made a statement from the dock in which he recounted his childhood in the Transkei, discussed the charges and proofs at the trial, and explained why he and others chose violence but not terrorism. He said, "We believed that South Africa belonged to all the people who lived in it, and not to one group, be it black or white." And he explained, that "We did not want an inter-racial war…."

Mandela's statement was quite lengthy. He reviewed his history, his thinking, and the conditions in the country, all of which served to account for these efforts at changing the government. He ended his speech with some of the most inspirational thoughts I have ever heard, thoughts he repeated to vast crowds on his release from Robben Island almost thirty years later. Here are his last words from the dock:

During my lifetime, I have dedicated myself to this 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 democratic 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 achieve. But if needs be, it is an ideal for which I am prepared to die.

The book contains many statements from the dock by others who were also prepared to sacrifice their freedom and even their lives for a free and democratic society, including that of Bram Fischer, and those of some young students arrested during the student and youth protests of the 1960s. To anyone who is ever complacent about our democratic constitution, or about the liberty we enjoy in this country despite its flaws, or about the privilege of practicing the honorable profession of law, the statements in this book should be required reading. It will reinspire you and deepen your gratitude. I highly recommend it.

***Mary Massaron**, a former chair of the Michigan State Bar Appellate Practice Section, co-chair of the Michigan Appellate Bench Bar Conference Foundation, and Chair of the Michigan Supreme Court Historical Society Advocates Guild, has focused her practice on appellate law in state and federal appellate courts for decades. She is a Fellow in the American Academy of Appellate Lawyers and a former President of DRI-The Voice of the Defense Bar.*

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

By Linda M. Garbarino

This is an ongoing column which provides a list of cases pending before the Supreme Court by order directing oral argument on application. The descriptions are intended for informational purposes only and cannot and do not replace the need to review the cases.

***People v Smith;* SC 156353, COA 332288**

Criminal Law: Issues include (1) whether a prosecutor's inclusion of a provision in a plea agreement that prohibits a defendant from holding public office violates the separation of powers or is void as against public policy; (2) whether the validity of the provision requiring the defendant to resign from public office was properly before the Court of Appeals since the defendant resigned from the Michigan Senate after the Wayne Circuit Court had struck that part of the plea agreement and, if so, whether it violates the separation of powers or is void as against public policy; and (3) whether the trial court abused its discretion by voiding terms of the plea agreement without affording the prosecutor an opportunity to withdraw from the agreement.

***Bertin v Mann;* SC 155266, COA 328885**

Negligence: Whether the reckless misconduct standard of care or the ordinary negligence standard of care applies to an injury resulting from the operation of a golf cart while playing golf recreationally.

***Merchand v Carpenter;* SC 154622, COA 327272**

Medical Malpractice: Whether the medical records and testimony sought to be admitted were admissible under MRE 404(b).

The Court of Appeals held that the plaintiff should have been permitted to admit testimony and medical records regarding the defendant-physician's other patients under MRE 404(b) to show the defendant's scheme, plan, or system of creating medical records that did not accurately reflect his interactions with patients where surgeries resulted in serious complications.

***People v Garcia-Mandujano;* SC 153697, COA 324963**

Criminal Law: Whether the defendant was denied the effective assistance of trial counsel where: (1) counsel failed to interview the physician's assistant who examined the complainant prior to trial; and (2) counsel failed to impeach the trial testimony of the physician's assistant, that she used an adult speculum to examine the 12-year-old complainant, where the witness made no mention of the speculum in her report documenting the complainant's examination.

***People v Hewitt-El;* SC 155239, COA 332946**

Criminal Law: Issues include whether: (1) the defendant's alleged grounds for relief were decided against him on direct appeal; (2) the Court of Appeals failed to defer to the Wayne Circuit Court's credibility determinations; and (3) the defendant has established entitlement to relief under MCR 6.508(D).

***People v Oros;* SC 156241, COA 329046**

Criminal Law: Whether the Court of Appeals properly viewed the trial record for sufficient evidence of premeditation and deliberation in the light most favorable to the prosecution, including drawing all reasonable inferences in favor of the jury verdict, and whether the record evidence is sufficient to sustain defendant's conviction for first-degree premeditated murder.

Note: With its most recent orders granting oral argument on the application, the Supreme Court has modified its filing requirements. The Court has staggered the briefing, with the appellant's brief due within 42 days of the Court's order, the appellee's brief then due within 21 days, and an optional reply brief due within 14 days. Formerly, both parties' supplemental briefs were due within 42 days of the Court's order and there was no provision for a reply brief. In addition, the appellant is required to electronically file an appendix containing the items listed in MCR 7.312(D)(2). The appellee must also electronically file an appendix, or stipulate to the use of the appellant's appendix. Formerly, no appendix was required where the Court granted oral argument on the application.

Linda M. Garbarino *is a former chair of the Appellate Practice Section and heads the appellate group at the law firm of Tanoury, Nauts, McKinney & Garbarino, PLLC.*

Selected Decisions of Interest to the Appellate Practitioner

By Barbara H. Goldman

Published Opinions

Preservation of issue - supplemental brief after grant of MOAA

Kemp v Farm Bureau
___ Mich ___ (docket no. 151719, rel'd 6/15/17)
Trial court: Wayne Circuit Court

In a first-party no-fault case, the plaintiff sought benefits for injuries he received while removing some personal items from his truck. Farm Bureau denied his claim on the basis that he was not eligible under MCL 500.3106(1)(b) (parked vehicles). The trial court granted summary disposition to the insurer and the Court of Appeals affirmed. The Supreme Court granted oral argument on the plaintiff's application for leave to appeal, directing the parties to address two specific questions. Farm Bureau, in the brief it submitted after the grant of "mini" oral argument, raised a new way of construing the statute. The Court held that the issue was not preserved. Farm Bureau did not "contest the meaning of this subdivision in the lower courts, and [the Supreme Court] did not request briefing on the issue."

Record on appeal - videotape recording

People v Kavanagh
__ Mich App ___ (docket no. 330359, rel'd 7/6/17)
Panel: Stephens, Shapiro, Gadola
Trial court: Berrien Circuit Court

The defendant was convicted of possession with intent to sell marijuana. He challenged the search of his car after a traffic stop. The search was recorded on the police officer's "dash cam" video. The defendant's attorney "noted that the tape was available if the [trial] court wished to watch it," but "neither party specifically requested that it do so." The court denied the defendant's motion to suppress. The defendant raised the video again at the trial. The court watched it, but did not change its ruling. The Court of Appeals panel "watched and listened to the recording." It applied a recent decision, *East Grand Rapids v Vanderhart*, ___ Mich App ___ (Docket No. 329259, rel'd 4/11/17), lv pending, (Opinion of Swartzle, J.) which "conclud[ed] that because an appellate court is able to review a video as easily as the trial court, the trial court's factual findings regarding that video are entitled

to less deference." The court specifically disagreed with one of the trial court's factual findings, based on the tape. The opinion also highlighted the value of video recordings to a reviewing court.

Claim of appeal - effect on post-judgment motion

Safdar v Aziz
___ Mich App ___ (docket no. 337985, rel'd 9/7/17)
Panel: O'Brien, Jansen, Murray
Trial court: Oakland Circuit Court, Family Division

The parties were divorced. The mother's appeal of an attorney fee award in the divorce judgment (docket no. 336590) was still pending when she moved to take their daughter to Pakistan. The trial court denied her motion "without prejudice," finding the court lacked authority to modify the divorce judgment while the appeal was pending. The Court of Appeals granted the father's application for leave to appeal and held that the trial court had "jurisdiction to consider the merits" of the motion for change of domicile. MCR 7.208(A)(4) allows a post-claim-of-appeal judgment to be modified "as otherwise provided by law." The panel held that *Lemmen v Lemmen*, 481 Mich 164, 167; 749 NW2d 255 (2008) "is equally applicable to situations involving custody." The court concluded that the trial court had the authority to consider the mother's motion and "[n]either the child nor the parties" should have to wait for resolution of the initial appeal.

Issue abandoned - no authority

Wagner v Farm Bureau Ins Co
__ Mich App __ (docket no. 332400 , rel'd 9/12/17)
Panel: Talbot, O'Connell, Cameron
Trial court: Kalamazoo Circuit Court

Several actions resulted from a motor vehicle accident. One plaintiff sued Farm Bureau for uninsured motorist benefits. Farm Bureau argued her claim was untimely, but the trial court denied its motion for summary disposition. The Court of Appeals granted leave to appeal, but affirmed. On appeal, Farm Bureau included an argument that the plaintiffs had filed a related suit only two weeks before the applicable time limit. The Court of Appeals declined to consider that argument because Farm Bureau "cited no authority in support of its position requiring plaintiffs to file their third-party claim at an earlier date."

Law of the case - appeal of summary judgment after prior motion to dismiss

Miller v Maddox
___ F3d ___ (docket no. 17-5021, rel'd 8/3/17)
Panel: Moore, Stranch, Donald
Trial court: Middle District of Tennessee

In a 42 USC 1983 case, the Sixth Circuit affirmed denial of the defendant's motion to dismiss in an earlier appeal but the district court later granted his motion for summary judgment. The plaintiff argued that the prior decision "found in her favor" on two of the elements of her claim and, therefore, the law of the case doctrine conclusively establishes that those elements . . ." The panel held the law of the case doctrine did not apply. The doctrine "is intended to enforce a district court's adherence to an appellate court's judgment, and so is applied only loosely" when the appellate court reviews its own decisions. In addition, a "holding on a motion to dismiss does not establish the law of the case for purposes of summary judgment, when the complaint has been supplemented by discovery." Finally, the court held that a motion to dismiss was decided "under a standard more favorable to [the defendant]."

Unpublished Opinions

Law of the case - order on remand

Clark v Krawczyk
Docket no. 332172, rel'd 6/8/17
Panel: Swartzle, Saad, O'Connell
Trial court: Livingston Circuit Court

The parties were divorced in 2013. One of the marital assets was an unprofitable business. The trial court "deferred" valuing and dividing it for a year. In an earlier appeal (docket no. 316633), the Court of Appeals reversed and remanded with orders to value the business as of the date of the divorce and divide it "as it equitably sees fit." The previous panel also noted that it "ruling does not preclude the trial court from reevaluating [facts] that are necessary for it to determine" the value of the business. On remand, the trial court required a valuation by a CPA and ordered a division of the business' debts. It then entered an amended judgment of divorce, which was unfavorable to the plaintiff. She moved for relief from judgment. The court granted that motion and the defendant appealed. The Court of Appeals rejected the defendant's law-of-the-case argument, holding that the order "[was] not inconsistent with this Court's prior judgment."

Law of the case - issue not decided

In re Caraco Pharmaceutical Labs Shareholder Litigation
Docket no. 329933, rel'd 6/13/17
Panel: M. J. Kelly, Beckering, Shapiro
Trial court: Wayne Circuit Court

The case was a shareholders' derivative action arising out of a merger sale of the corporation to another pharmaceutical company. The trial court had granted summary disposition and denied the plaintiffs' motion to amend; the Court of Appeals reversed in an earlier appeal (docket no. 313893). On remand, a different judge allowed the plaintiffs to file an amended complaint, which included only one "new" count. The defendants argued in part that the amended complaint should be dismissed based on the law of the case. The trial court granted summary disposition to the defendants, dismissing the "old" counts without considering them, because it thought the law of the case doctrine required that result. The Court of Appeals held that

the law of the case rule did not apply. "The only question 'specifically decided' . . . in plaintiffs' first appeal was whether [the trial judge] abused his discretion by denying plaintiffs' motion for leave to amend their original complaint." "Michigan law is clear that a trial court may revise its previous decisions."

Appellate jurisdiction - child support modification

Miller v Johnson
Docket nos. 336083; 337055, rel'd 8/8/17)
Panel: Cavanagh, Meter, M. J. Kelly
Trial court: Livingston Circuit Court, Family Division

In a child support and custody case, the defendant (father) appealed from orders "granting plaintiff . . . sole legal custody of the parties' child, denying [his] motion for primary physical custody of the child, reducing [his] parenting time, and modifying [his] child-support obligation." The Court of Appeals did not consider the child support order because it was not a "final order" under MCR 7.202(6)(a)(*iii*) ("a postjudgment order affecting the custody of a minor") because it did not "change the amount of time either parent spends with the child." "[C]hild-support provisions have no such [e]ffect."

Appellate jurisdiction - final order on reconsideration

Liberty Mutual Fire Ins Co v Ross
Docket no. 332597, rel'd 7/25/17)
Panel: Gleicher, M. J. Kelly, Shapiro
Trial court: Oakland Circuit Court

Liberty Mutual sued Ross to recover no-fault work loss benefits it had paid to him after he began receiving social security disability. Ross filed a counterclaim as well as asserting several affirmative defenses. The trial court granted summary disposition to Liberty Mutual on both its claim and Ross's counterclaim. Ross moved for reconsideration. While that motion was pending, the trial court entered judgment on the claim. Several months later, it denied the motion for reconsideration. Ross appealed from the order denying reconsideration. The Court of Appeals held the appeal was timely. "[The] appeal was from a final order . . ."

Appellate jurisdiction - probate court final order
Waiver - issue raised by cross-appellant

In re Rhea Brody Living Trust
Docket no. 330871, rel'd 9/12/17
Panel: O'Brien, Jansen, Murray
Trial court: Oakland Probate Court

The settlor was declared disabled. Her husband was the successor trustee, but was removed by the probate court. Their daughter was appointed as trustee in his place. The husband appealed; his son, the brother of the successor trustee, cross-appealed. The daughter argued that the son was not an "aggrieved party" and so lacked standing to cross-appeal, "because [he] had no pecuniary interest in [the husband's] removal as trustee. The Court of Appeals held "[b]ecause the probate court's remedies for [the husband's] breaches affected [the son, he] has standing to file a cross-appeal challenging the probate court's rulings related to [the husband's] conduct, which served as the basis for the court's decision to remove [the husband] as trustee."

The son, in his cross-appeal, argued that the probate court erred in removing the father as trustee. The Court of Appeals noted that "[the husband] did not raise this argument in his statement of questions presented in his opening brief on appeal," but that the issue was not waived because "it is properly raised by [the son in his cross-appeal]."

Appellate jurisdiction - consent judgment

GRR Capital Funding LLC v Benner
Docket no. 333017, rel'd 9/19/97
Panel: Talbot, O'Connell, Cameron
Trial court: Kent Circuit Court

The defendant was the guarantor of several companies that had mortgages with Comerica. The borrowers went into bankruptcy. As part of the bankruptcy, they agreed to entry of a consent judgment if their Chapter 11 reorganization failed. Comerica later alleged the borrowers had defaulted. The trial court denied Comerica's attempt to enforce the consent judgment. The bankruptcy court then converted the bankruptcy to a Chapter 7. Comerica, the borrowers, and the guarantor (GRR) agreed to a settlement, but the borrowers defaulted on it. Comerica exercised its rights under the settlement; later, GRR purchased them from Comerica. The defendant filed several motions related to the remedies exercised under the consent agreement. The plaintiff then moved to "set aside the order of dismissal, reinstate the case, and enter a consent judgment against defendant." The trial court granted the motion and later entered the consent judgment; it denied the defendant's motion for reconsideration. The defendant appealed. The plaintiff argued the Court of Appeals lacked jurisdiction. The Court of Appeals held it could consider the appeal, as "[the defendant's] arguments on appeal are not addressed in the underlying consent judgment." The court, however, also held that the defendant had failed to preserve several arguments related to the amount of the judgment.

Appellate attorney fees - amount

In re Attorney Fees of John J. Ujlaky
Docket no. 332914, rel'd 8/22/17
Panel: Boonstra, Ronayne Krause, Swartzle
Trial court: Ottawa Circuit Court

Ujlaky was appointed to represent a woman in an application for leave to appeal from a no-contest plea in a felony case. He moved for "extraordinary" attorney fees, supported by an itemized bill. The trial court granted him the standard fee for plea-based convictions ($500) and some additional costs. The trial court "read the 16-page, one-issue brief that appellant submitted on appeal, and found that the issue was common and obvious and

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Selected Decisions of Interest to the Appellate Practitioner

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should not have taken an experienced appellate attorney very much time to address." The Court of Appeals affirmed. "Considering the totality of the circumstances, the trial court noted that appellant was aware of the county maximum when he accepted the appeal and, given his experience and efficiencies gained through that experience, could have completed the case within the time parameters to which he agreed."

Abandonment - Issues not briefed

Retail Works Funding, LLC v Tubby's Sub Shops, Inc
Docket no. 332453, rel'd 8/31/17)
Panel: Gadola, Meter, Fort Hood
Trial court: Oakland Circuit Court

A cupcake store, Just Baked, financed most of its operations with Retail Works. It got a judgment against Just Baked, which also had a large tax liability. Just Baked closed most of its stores. Retail Works sued Tubby's for the judgment against Just Baked, asserting it was liable under several theories. The trial court refused to consider a supplemental brief filed by Retail Works and granted summary disposition to Tubby's. The Court of Appeals held that the plaintiff had "failed to argue or set forth the applicable law regarding" other exceptions to "the general rule of successor non-liability" and so had abandoned that argument. The court, however, went on to consider it anyway, although it held the "other exceptions" did not apply.

The panel also declined to consider the plaintiff's supplemental brief. "Plaintiff did not raise a claim of error regarding the trial court's exclusion of this evidence in its statement of the questions presented, thus abandoning any error on appeal." The court 'decline[d] to consider any evidence plaintiff presented in its supplemental brief or thereafter."

Mootness - different from standing

Wenners v Chisholm
Docket no. 332654, rel'd 7/20/17)
Panel: Servitto, Murray, Borello
Trial court: Washtenaw Circuit Court

The parties were all property owners who had access to a lake, which they got to via a footpath. Their initial dispute concerned whether Appellants, the Chisholms, who did not own waterfront property, had riparian rights to use the footpath, and to place a dock at its end. The Chisholms moved for summary disposition, which was denied. While their application for leave to appeal was pending, they got a default judgment against the unknown owner of the footpath. The Court of Appeals then dismissed the application as moot (docket no. 314938). The plaintiffs settled with the Chisholms and dismissed them; the case proceeded against another owner. She moved for summary disposition, arguing that the plaintiffs lacked standing because they "[had] no rights or interest in the footpath . . ." as against her. The trial court agreed and granted the motion. The Court of Appeals held that the prior ruling on "mootness" did not affect the plaintiffs' standing. "This Court's earlier decision regarding mootness of the claims between plaintiffs and the Chisholm defendants does not require a ruling that the claims between plaintiffs and defendant are moot." Based on the record before this Court, it remains possible to award plaintiffs the relief they seek against defendant[.]

Precedent - pre-1990 decision

Pisciotta v Kardos
Docket no. 332300, rel'd 10/5/17)
Panel: Gadola, Meter, Fort Hood
Trial court: Genesee Circuit Court

The defendant lent money to the plaintiff and his business, secured by several mortgages. The plaintiff defaulted and the defendant began foreclosure. The plaintiff filed for an injunction against the foreclosure, arguing in part that the loan was "usurious." The trial court granted summary disposition to the defendant, relying in part on a Court of Appeals decision from 1989. The panel "declined plaintiffs' invitation to ignore the rule of stare decisis," holding that where the earlier decision was not "unworkable or badly reasoned," it should be applied.

Barbara H. Goldman *is research and appellate attorney with a solo practice in Southfield, Michigan. She is a former chair of the Michigan State Bar Appellate Practice Section.*