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Michigan Appellate Practice Journal

An official publication of the State Bar of Michigan Appellate Practice Section

From the Chair

by Liisa R. Speaker

Spring 2012, Vol. 16, No. 2

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You may have noticed that the Section is hosting several conferences this Spring. Regardless of whether the conference brings in 20 people or 200 people, we designed these events as a benefit to our Section members and to educate our Section members.

First, there was the Cloud Computing Seminar on March 2, 2012. Although this was a small event, everyone who attended was highly engaged in the topic. Thanks to our own Stuart Friedman for sitting on the panel and to Barbara Goldman for organizing the event. This seminar was a general interest topic not necessarily geared to appellate practitioners, but was certainly of value to all attorneys, appellate attorneys included.

Second, the Section hosted the Circuit Court Appeals Webinar on April 23, 2012. Yours truly organized the Webinar with much-needed assistance from our resident techy Stuart Friedman. Council member Gaëtan Gerville Réache, past Chair Don Fulkerson, and myself presented the Webinar. Council member Lauran Donofrio also provided invaluable assistance before and during the Webinar. Although we had a few glitches in the program, overall the Webinar was a success according to the folks who attended it!

The idea for the Webinar was inspired by Chief Justice Young's comments at the December 2011 administrative hearing where he expressed concern about giving the bench and bar sufficient time to become familiar with the new circuit court appeals rules. The Section decided to host the Webinar at no charge to the registrants, in an effort to encourage attorneys, judges, and court staff to attend. We also scheduled it for a lunchtime event so that more court staff would be able to join us. The Section was able to use dues revenue to finance the project. Not only did we educate our Section members about the new rules, but we were able to contribute to the improvement of the bench and bar. Indeed a large percentage of the registrants were not Section members. There was so much interest in this Webinar that we decided to record it and make it available on the State Bar website (www.michbar.org/appellate).

Finally, the Federal Practice Seminar on interlocutory appeals occurred on May 15, 2012. The Section tries to host a conference devoted to federal appeals at least once every three years. Council member Jill Wheaton and former Chairs Mary Massaron Ross and Megan Cavanagh worked hard to put together a fantastic panel of federal judges and court staff.

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Although these conferences represent a higher than usual number of events, we wanted to take advantage of the fact that is the year before the triennial Appellate Bench Bar Conference scheduled for April 24 through April 26, 2013. What better way to use membership dues and our Section members' volunteer time to provide affordable conferences that can serve to improve our Section members' law practices and the state of appellate practice in Michigan? I cannot. Consider the conferences from this Spring as a warm up for the fantastic 2013 Appellate Bench Bar Conference.

Michigan's Changed Appellate Abuse of Discretion Standard

Part I: The Old Standard and It's Decline

Understanding and Applying the Applicable Appellate Review Standards are Crucial

by Howard Yale Lederman

Since the applicable appellate review standards substantially impact on or even control an appeal's or appellate issue's outcome, we must consider these standards, as we do the applicable substantive law and facts. So, in considering whether to appeal or on which issues to appeal, we must consider these standards. Considering them means applying them to the substantive law and the facts.[1] In our age of bite-size attention spans and severe appellate brief page and word restrictions, extensive analysis of the review standards is unnecessary. But writing with them in mind is necessary. Otherwise, opponents and court clerks can review and write with them in mind, sometimes with disastrous consequences.[2]

Michigan civil and criminal law features three main review standards: De novo, abuse of discretion, and clearly erroneous. Under the de novo standard, the appellate court can review the lower court's legal conclusions anew without any deference to these conclusions. Compared to the other two, the de novo standard is the most expansive. In contrast, the clearly erroneous standard is the most restrictive. Under this standard, the appellate court can overturn the lower court's factual findings only if clearly erroneous. This standard involves great deference to the trial court's ability to see and hear witnesses' testimony and to judge their credibility and

demeanor. Since Michigan became a state, the de novo and clearly erroneous standards have remained the same.

This article focuses on the abuse of discretion standard. This standard is different. For most of Michigan's modern history, three known abuse of discretion standards were operating. Two civil abuse of discretion standards co-existed with a border uncertain. One criminal abuse of discretion standard was implicit. Since 2006, only two known abuse of discretion standards have been operating. The oldest has been operating since 1959. The youngest has been operating since 2003. Since then, the Michigan Supreme Court has extended it to all known criminal and most known civil cases. So, the new standard has overshadowed the old. But issues remain: Despite the new standard's different language, is it different from the old? If so, significantly? If so, how? In deciding whether to appeal, on which issues to appeal, and how to address the abuse of discretion standard, responding to these questions becomes important.

Some Federal Abuse of Discretion History

The Michigan Supreme Court adopted the new abuse of discretion standard from a combination of an older US Supreme Court standard, the federal Seventh Circuit Court of Appeals' standard, and growing Michigan appellate justices' and judges' dissatisfaction with the old Michigan standard. To understand Michigan's new standard, some federal and state abuse of discretion history is essential. The US Supreme Court has not pronounced a uniform abuse of discretion standard. The federal appeals courts have not agreed on one standard. But the US Supreme Court has endorsed a standard influencing the Michigan Supreme Court's decision to adopt a new standard. The US Supreme Court has described discretion as follows:

"The term `discretion' denotes the absence of a hard and fast rule * * * When invoked as a guide to judicial action[,] it means a sound discretion,…a discretion exercised not arbitrarily or willfully, but with regard to what is right and equitable under the circumstances and the law, and directed by the reason and conscience of the judge to a just result."[3]

This standard recognizes that in some areas of law, hard and fast rules do not exist and should be absent.[4] This standard recognizes the close relation between abuse of discretion standards and judicial temperament. Besides being a review standard, these words call for trial judges to show a balanced judicial temperament. Behind these words are most attorneys' and citizens' expectations of judges: Exercise reason and control biases and emotions. Find a place for conscience, community and individual. Apply the law. Arrive at a just result.

A great federal appellate judge, Judge Henry J. Friendly of the Second Circuit Court of Appeals, has described discretion this way: A trial court has discretion, when an appellate court will not reverse the trial court's decision simply because the appellate court disagrees with the decision.[5] Judge Friendly repudiates result-oriented abuse of discretion standards and decisions. He makes appellate courts responsible for establishing and implementing abuse of discretion standards preventing such reversals and rising above result-oriented standards and decisions. We will look at a Michigan case showing a complete appellate failure to do any of these.

Rejecting the idea of a single abuse of discretion standard, Judge Friendly argued for several different abuse of discretion standards. "Some cases call for application of the abuse of discretion [standard] in a `broad' sense and others in a `narrow' one." The reason is that "`the justifications for committing decisions to the discretion of the trial court are not uniform and may vary with the specific types of decisions…. the scope of review will be directly related to the reason why that category or type of decision is committed to the trial court's discretion in the first instance.'"[6]

Other authorities have concluded that several different abuse of discretion standards exist. "[T]here are gradations of discretion.…At one end of the spectrum is unfettered discretion, what Professor Rosenberg has termed `Grade A discretion' -- `virtually impervious to appellate overturn –it is unreviewable and unreversible.'….“At the other end of the spectrum is `Grade D discretion,' which is `the most dilute form of discretion conceivable.'"[7] The *Arrington* Panel reviewed many different abuse of discretion standards for trial court decisions granting or denying a new trial that Michigan appellate courts have used.[8] Recently, Michigan appellate courts endorsed only three.

The Older State Abuse of Discretion Standards

An older Michigan abuse of discretion standard paralleled Judge Friendly's position: Only when the trial court "has departed widely and injuriously" from the applicable legal standards will an appellate court overturn the trial court's decision as an abuse of discretion.[9] "[W]hen there is no better reason than its own opinion that the course actually taken was not as wise or sensible or orderly as another would have been," the appellate court will not find an abuse of discretion.[10] Another older Michigan abuse of discretion standard was far different: "[T]he abuse of discretion ought to be so plain that, upon consideration of the facts upon which the court acted, an unprejudiced person can say that there was no justification or excuse for the ruling made."[11] Until the turn of the century, Michigan appellate courts applied or cited this standard with approval.[12] It should have been the main civil abuse of discretion standard. But another emerged from nowhere and replaced it. From then on, few Michigan appellate decisions used it.

In 1959, the Michigan Supreme Court adopted the nearly insurmountable (if applied)

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Spalding abuse of discretion standard.[13] *Spalding* was a divorce case. In 1952, the plaintiff and the defendant divorced. The lower court set the defendant's child support payments at $15 a week. On April 15, 1952, April 13, 1953, and June 25, 1954, the lower court increased the child support payments, with the last increase being to $35 a week. On December 5, 1957, the plaintiff asked for an increase to $60 a week. The lower court increased the child support payments to $42.50 a week. Dissatisfied, the plaintiff appealed.

The Court decided the case before 1965, when the Michigan Court of Appeals arrived on the scene. If the appeal had occurred in 1965 or later, the Michigan Supreme Court would have denied leave. The child support issue was a routine issue, and the appeal was another routine domestic relations appeal. Using the *Scripps* standard, the Michigan Court of Appeals would have found no abuse of discretion and upheld the lower court decision, and almost no one would have noticed, let alone cited, the decision. Except for the parties and attorneys involved, the decision would have been insignificant.

But for the abuse of discretion standard, the *Spalding's* appeal's timing could not have been worse. The Michigan Supreme Court felt flooded with insignificant appeals, including insignificant domestic relations appeals. The Michigan Court of Appeals had not arrived on the scene. Whether the Michigan Legislature would create an intermediate appellate court was unknown. The Michigan Supreme Court wanted to stop insignificant appeals now.[14] To do so, the Court created a Maginot Line abuse of discretion standard:

> "We have held repeatedly, and we again hold, that we will not interfere with the discretion of the trial [court] in these cases[,] unless a clear abuse thereof is manifest….In view of the frequency with which cases are reaching this Court assailing the exercise of a trial court's discretion as an abuse thereof, we deem it pertinent to make certain observations with respect thereto in the interests of saving expense to the litigants and avoiding delay in reaching final adjudication on the merits. Where, as here, the exercise of discretion turns upon a factual determination made by the trier of the facts, an abuse of discretion involves far more than a difference in judicial opinion between the trial and appellate courts. The term discretion itself involves the idea of choice, of an exercise of the will, of a determination made between competing considerations. **In order to have an `abuse' in reaching such determination, the result must be so palpably and grossly violative of fact and logic that it evidences not the exercise of will[,] but perversity of will, not the exercise of judgment[,] but defiance thereof, not the exercise of reason[,] but rather of passion or bias.'"**[15]

In upholding the trial court's decision, the Court did not have to create this standard. The Court could have reaffirmed and reemphasized *Scripps* and sent the same message. The Court did not do so. It did not cite any authority for adopting this standard. The Court could have overruled or restricted *Scripps.* The Court did neither. The Court could have defined what kinds of cases to which the new standard would apply or restricted the new standard to certain appeal categories. The Court did neither. Rather, it adopted this standard as a blanket standard without overruling *Scripps*. Whether *Scripps* survived and to which cases it applied were unclear. In adopting the new standard this way, the Court asked for trouble and soon got it.

Whether Any Trial Court Decision Could Meet This Near-Impossible Abuse of Discretion Standard—*Randolph*

That is the inevitable question. The short answer is yes. But as we shall see below, some trial court decisions could meet this standard only through appellate court refusal to apply *Spalding*.

Michigan Department of Transportation v Randolph[16] exemplifies such refusal. There, the plaintiff sued the defendants under the Michigan Uniform Condemnation Procedures Act.[17] The "defendants obtained a judgment on a jury verdict far" exceeding the plaintiff's "good-faith offer of just compensation."[18] Under MCL 213.66(3), the defendants requested plaintiff reimbursement of their attorney fees. Although defendants and their counsel had a one-third contingency agreement providing for "payment of one-third of the amount by which the judgment exceeded the department's offer, the trial court ordered reimbursement [based on] the actual hours expended by counsel multiplied by counsel's hourly rate [the lodestar method]."[19] Though recognizing its obligation to consider the eight MRPC 1.5(a) factors in determining whether the requested attorney fees were reasonable, and considering other applicable legal principles, the trial court never evaluated whether the hourly rate was reasonable. Instead, as MDOT had accepted the plaintiff's proposed hourly rate and hours as reasonable, the trial court accepted them. Affirming, the Michigan Court of Appeals found no abuse of discretion.

Vacating and remanding, the Michigan Supreme Court held that in failing to first consider "whether the attorney fee actually charged to defendants was reasonable under MRPC 1.5(a)," the lower courts had abused their discretion.[20] The

lower courts focused on determining "an appropriate fee award under the circumstances without respect to the attorney fee actually charged to defendants."[21] The Court concluded that the lower courts could make such "independent determination[s], but only after [determining that] either (1) the owner's attorney fees are unreasonable, or (2) that only `part' of the owner's otherwise reasonable attorney fees should be reimbursed by the agency. MCL 213.66(3)…."[22] In using the wrong legal standard, the lower courts had abused their discretion. Thus, under *Randolph,* when applying the wrong legal standard, the trial court abuses its discretion.

Whether any Trial Court Decision Could Meet This Near-Impossible Abuse of Discretion Standard—*Gates*

In *Gates v Gates,*[23] in the divorce judgment, the trial court divided the considerable marital estate about equally. "The trial court also awarded defendant $200 a week in rehabilitative spousal support for a five-year period, as well as $5,500 in attorney fees."[24] The defendant had requested $70,900 in attorney fees and costs.

Reversing the attorney fee award, the Court held that in awarding the defendant only $5,500 in attorney fees, the trial court had abused its discretion. After quoting the *Spalding* standard, the Court cited the relevant substantive law: "It is well settled that a party should not be required to invade assets to satisfy attorney fees[,] when the party is relying on the same assets for support."[25] Applying the substantive law alone, the Court explained that even with the above spousal support award, the defendant's income was "insufficient to satisfy her considerable debt of attorney fees and costs, and that she would be required to invade the assets awarded her" in the divorce judgment "to pay those fees."[26] Therefore, the Court concluded that the trial court's attorney fee award was an abuse of discretion. Accordingly, under *Gates,* when applying the law to the facts incorrectly, the trial court abuses its discretion.

Dissenting, Judge Sawyer would conclude that in its attorney fee award, the trial court had not abused its discretion. He cited and applied the ***Spalding*** standard. He found that "[t]he trial court's decision here was not palpably and grossly violative of fact and logic, it was not a perversity of will, it was not the defiance of judgment[,] and it most certainly was not the exercise of passion or bias."[27] Accordingly, he would affirm the trial court's attorney fee award.

Whether any Trial Court Decision Could Meet This Near-Impossible Abuse of Discretion Standard—*Mays*

In *Mays v Schell,*[28] the plaintiff sued the defendant for medical malpractice. During the three-week trial, the trial court admitted "40 exhibits…, including numerous medical records."[29] During jury deliberations, in delivering trial exhibits to the jury, court officers mistakenly delivered "defense counsel's banker's box" containing "numerous items never admitted at trial, including medical records; deposition transcripts, including one questioning plaintiff's expert about his censure by the American Association of Neurosurgeons; testimonial history of expert witnesses; deposition summaries; memos to the file; memoranda of law, including one on the ability of defense counsel to cross-examine on the expert's censure; some marked exhibits; correspondence between [an expert] and defense counsel; correspondence between [an expert] and Pronational Insurance Company; and defense counsel's notes."[30] After the jury had returned its no cause of action verdict, and the trial court had discharged the jury, "the trial court's clerk retrieved the exhibits from the jury room and found that some…[trial] exhibits were intermixed with the contents of defense counsel's bankers box."[31] Which specific exhibits was unclear.

The plaintiff moved for a new trial based on the jurors' exposure to the prejudicial documents. However, the plaintiff objected to recalling the jurors to question them to discover whether they had looked at the banker's box items. In granting the motion, the trial court "concluded that the banker's box materials were prejudicial and reasoned that because of the quantity and complexity of the exhibits in the case, it would be impossible to determine…if the jury relied on the prejudicial materials in reaching its verdict."[32]

Reversing, the Court held that in granting the new trial motion, the trial court had abused its discretion. The Court quoted the relevant legal standards: The factfinder's "`consideration of documents…not admitted into evidence[,] but…submitted to the jury'" is not reversible error, "`unless the error…substantially prejudice[d] the party's case.'"[33] When inadmissible evidence reaches the jury room, "`then before a verdict will be set aside for that cause, it must appear either from examination of the objectionable article itself, or from the facts …that such [evidence] must have been,…or…was, considered by the jury in arriving at the…their [sic] verdict."[34] **Applying this substantive law alone,** the Court explained that although the jury had the banker's box for a long time, "the plaintiff…did not prove – indeed, objected to eliciting proof – that the jury even looked at the items in the box, let alone considered any item."[35] Thus, the jury may not have reviewed the banker's box items. The record did not show any jury review of or reliance on the inadmissible items. As a result, the trial court had no reason to find substantial prejudice. Rather, the trial courts based its decision on speculation. Therefore, the Court concluded that the trial court's new trial decision was an abuse of discretion.[36]

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Dissenting, Judge Cooper would affirm and hold that in granting a new trial, the trial court had not abused its discretion. He cited other relevant legal principles, for example: "``[I]t is perfectly plain that the jury room must be kept free of evidence not received during the trial[,] and that its presence, if prejudicial, will vitiate the verdict.""[37] "The moving party must establish `that the jury was exposed to extraneous influences[,]' and that there was `a real and substantial *possibility* that [those influences] *could have affected* the jury's verdict.'"[38] Judge Cooper then quoted the *Budzyn* Court's five factors for deciding whether the moving party carried its burden. [39]

Judge Cooper explained: Because of "trial court error, the jury was given an entire banker's box of information never admitted at trial, including inadmissible evidence and defense counsel's personal notes on the case. Several… documents directly attacked the credibility of [the] plaintiff's expert witness. The information was available to the jury for several hours[,] while it deliberated."[40] Nobody discovered the error until two days after the jury had returned its verdict, and the trial court had dismissed the jury. "[W]hen the information was retrieved from the jury room, several exhibits were discovered intermingled with these inadmissible and privileged documents."[41] Jury consideration of these documents was "obvious."[42] Accordingly, "further inquiry into the[ir] prejudicial effect on the jury's verdict was unnecessary….it does not matter which exhibits were intermingled. What matters is that these trial exhibits were found intermingled with the defense attorney's personal notes. This was highly improper and blatant error. There was more than a real and substantial possibility that the inappropriate material in the banker's box affected the outcome of this case."[43]

After quoting the *Alken-Ziegler* and *Spalding,* Judge Cooper concluded: "The trial court's decision to order a new trial was based on the submission to the jury of highly prejudicial information not presented at trial. **This determination was in no way `palpably and grossly violative of fact and logic….'"**[44] The majority "have inappropriately substituted their judgments for [the trial court's]."[45]

In neither *Randolph, Gates,* nor *Mays* did the Michigan appellate courts explain why the lower courts' decisions showed perversity of will, defiance of judgment, or exercise of passion or bias. In *Randolph,* the lower courts used the wrong legal standard. But nothing suggested that they did so purposefully. In *Gates,* the lower court misapplied the right legal standard. In *Mays,* the lower court based its decision on applicable law, its reasonable application to an unusual situation, and plausible conclusions. **The appellate courts failed to apply *Spalding*. While explaining why the lower courts' decisions were wrong, the appellate courts did not explain why these decisions met *Spalding*. So, *Randolph, Gates* and *Mays* exemplify reversals of lower court decisions under *Spalding* only in name. Only by ignoring *Spalding* could the appellate courts reverse.**

In adopting *Spalding,* the Michigan Supreme Court asked for trouble and soon got it. Ignoring *Spalding* and applying it inconsistently were two kinds of trouble. If appellate courts repeatedly fail or refuse to use an appellate review standard, what good is it? Such repeated failure or failure becomes harmful. If appellate courts can apply or not apply a review standard as they please, this facilitates arbitrary and result-oriented decisions. While *Randolph* did not open this possibility, *Gates* and *Mays* did. **The *Gates* and *Mays* dissenters were right: The lower court decisions were not even close to meeting *Spalding's* "palpably and grossly violative of fact and logic…perversity of will…defiance of judgment…exercise of passion or bias.'"**[46] In ignoring *Spalding,* the *Gates* and *Mayes* majorities could and did substitute their judgments for the trial courts'. But these two decisions did not flow from the majorities' desire to do so. As we will see in Part 2, a Michigan Supreme Court decision had warned them against doing so. Rather, these two decisions resulted from the *Spalding* standard's problems themselves. In Part 2, we will see how these problems arose and grew.

An alternative response to decisions like *Gates* and *Mayes* was a Michigan Supreme Court decision reaffirming and reemphasizing appellate courts' obligations to use *Spalding.* As we will see in Part 2, the Michigan Supreme Court did reaffirm and reemphasize *Spalding.* But even that decision did not save *Spalding.* Other forces were undermining *Spalding.* In Part 2, we will see how and why. In Part 3, we will see the surprising outcome.

Endnotes

1. *See* W Wendell Hall, *Standards of Appellate Review in Civil Appeals,* 21 St Mary's L J 865, 868 (1990).
2. *See* Hall, *supra,* p 868.
3. *Langnes v Green,* 282 US 531, 541; 51 S Ct 243; 75 L Ed 520 (1931).
4. *People v Talley,* 410 Mich 378, 398; 301 NW2d 809 (1981) (Levin, J, concurring) (first).
5. Judge Henry J. Friendly, *Indiscretion About Discretion,* 31 Emory L J 747, 747 (Fall 1982).
6. Friendly, *supra,* p 764, quoting in part *US v Criden,* 648 F2d 814, 817 (CA 3, 1981).

7 *Arrington v Detroit Osteopathic Hospital Corp,* 196 Mich App 544, 558-559; 493 NW2d 492 (1992), *lv den* 443 Mich 870; 481 (1993), quoting _ Rosenberg, *Appellate review of trial court discretion,* 73 FRD 173, 176, 179 (1975).

8 *Arrington,* 196 Mich App 544, 550-559.

9 *Scripps v Reilly,* 35 Mich 371, 387 (1877). *Accord, Alken-Ziegler, Inc v Waterbury Headers Corp,* 461 Mich 219, 228; 600 NW2d 638 (1999) (unanimous decision) (quoting *Scripps* with approval).

10 *Scripps,* 35 Mich 371, 387. *Accord, Alken-Ziegler,* 461 Mich 219, 228 (quoting *Scripps* with approval).

11 *Detroit Tug & Wrecking Co v Gartner,* 75 Mich 360, 361; 42 NW 968 (1889). *Accord, Alken-Ziegler,* 461 Mich 219, 228 (quoting *Gartner* with approval).

12 *Eg, Cooper v Carr,* 161 Mich 405, 412; 126 NW 468 (1910), *Seifert v Buhl Optical Co,* 276 Mich 692, 699; 268 NW 784 (1936), *Patzke v Chesapeake & Ohio Railway Co,* 368 Mich 190, 194; 118 NW2d 286 (1962), *cert den* 373 US 968; 83 S Ct 1298; 10 L Ed 2d 411 (1963), *Alken-Ziegler,* 461 Mich 219, 228, *Bank of Lansing v Stein,* 100 Mich App 719, 724; 300 NW2d 383 (1980), *Eliason v Dept of Labor,* 133 Mich App 200, 203-204; 348 NW2d 315 (1984).

13 *Spalding v Spalding,* 355 Mich 382, 384-385; 94 NW2d 810 (1959).

14 *Talley,* 410 Mich 378, 397 (Levin, J, concurring).

15 *Spalding,* 355 Mich 382, 384-385 (my emphasis).

16 *Michigan Department of Transportation v Randolph,* 461 Mich 757; 610 NW2d 893 (2000),

17 MCL 213.51 *et seq*.

18 *Randolph,* 461 Mich 757, 758.

19 *Id.*

20 *Id* at 768.

21 *Id.*

22 *Id* at 768-769.

23 256 Mich App 420; 664 NW2d 231 (2003), *lv den* 469 Mich 980; 673 NW2d 757 (2003).

24 *Id* at 422.

25 *Id* at 438, citing *Maake v Maake,* 200 Mich App 184, 189; 503 NW2d 664 (1993).

26 *Gates,* 256 Mich App 420, 438.

27 *Id* at 442 (Sawyer, J, dissenting), quoting *Spalding,* 355 Mich 382, 384 (my emphasis).

28 268 Mich App 432; 706 NW2d 892 (2005), *rev'd* 474 Mich 1109; 711 NW2d 381 (2005).

29 *Id* at 433.

30 *Id* at 433-434.

31 *Id* at 434.

32 *Id* at 434-435.

33 *Id* at 435, quoting *Phillips v Deihm,* 213 Mich App 389, 402-403; 541 NW2d 566 (1995) (further citations omitted).

34 *Mays,* 268 Mich App 432, 435-436, quoting *People v McCrea,* 303 Mich 213, 266; 6 NW2d 489 (1942) (further internal citation omitted). *Mays,* 268 Mich App 432, 435-436, quoting *People v McCrea,* 303 Mich 213, 266; 6 NW2d 489 (1942) (further internal citation omitted).

35 *Mays,* 268 Mich App 432, 435-436, quoting *People v McCrea,* 303 Mich 213, 266; 6 NW2d 489 (1942) (further internal citation omitted).

36 *Mays,* 268 Mich App 432, 436.

37 *Id* at 437 (Cooper, J, dissenting), quoting *People v Keeth,* 63 Mich App 589, 593; 234 NW2d 717 (1975), quoting *Dallago v US,* 138 US App DC 276, 283; 427 F2d 546, 553 (1969).

38 *Mays,* 268 Mich App 432, 437 (Cooper, J, dissenting), citing *People v Budzyn,* 456 Mich 77, 88-89; 566 NW2d 229 (1997). *Budzyn,* 456 Mich 77, 88-89 (Judge Cooper's emphasis).

39 *Mays,* 268 Mich App 432, 437 (Cooper, J, dissenting), quoting *Budzyn,* 456 Mich 77, 89 (further citation omitted).

40 *Mays,* 268 Mich App 432, 437 (Cooper, J, dissenting).

41 *Id* at 438 (Cooper, J, dissenting).

42 *Id* (Cooper, J, dissenting).

43 *Id* (Cooper, J, dissenting), citing *Eley v Turner,* 155 Mich App 195, 199; 399 NW2d 28 (1986) ("noting the strong likelihood that the jurors would be tainted by the receipt of evidence not admitted at trial[,] as they are `able to view it and review it[,] as often as they like[,] during the course of their deliberations.')" and *McCrea,* 303 Mich 213, 266.

44 *Mays,* 268 Mich App 432, 439 (Cooper, J, dissenting), quoting *Spalding,* 355 Mich 382, 384 (my emphasis).

45 *Mays,* 268 Mich App 432, 439 (Cooper, J, dissenting).

46 *Gates,* 256 Mich App 420, 442 (Sawer, J, dissenting), quoting *Spalding,* 355 Mich 382, 384 (my emphasis). *Accord, Mays,* 268 Mich App 432, 439 (Cooper, J, dissenting), quoting *Spalding,* 355 Mich 382, 384 (first phrase).

Task Force Recommendations Would Dramatically Change How the Michigan Supreme Court Justices are Selected

by Liisa R. Speaker

On April 26, 2012, the Judicial Selection Task Force held a press conference at the State Capitol introducing its report and recommendations to overhaul the selection process for the Michigan Supreme Court. Michigan Supreme Court Justice Marilyn Kelly and Sixth Circuit Judge James Ryan co-chaired the Task Force and presented the recommendations. Sandra Day O'Connor served as Honorary Chair to the Task Force. The Task Force's report is available at *www.lwvmi.org*.

The Task Force represents a bipartisan group of judges, attorneys, and non-attorneys who came together in an attempt to remedy the negative image of the Michigan Supreme Court. The Task Force is a private endeavor and was funded by the State Bar Foundation, the Charles Stewart Mott Foundation, and the League of Women Voters. As noted in the Task Force's report, Supreme Court elections in Michigan have "attracted national attention for its excessive cost, its lack of transparency, and its damaging negativity."

The Task Force made six recommendations. Making the recommendations a reality will involve a combination of legislative action, constitutional amendment, and executive order.

1. Reform the Campaign Finance Act to require the names of PAC contributors to be publicly available. This is the Task Force's first recommendation because Michigan has the highest spending of all states for supreme court elections. As Judge Ryan reported at the Task Force press conference, the 10th highest state (Iowa) spent less than $2 million. The 2nd highest state (Pennsylvania, whose population is larger than Michigan's) spent $5.5 million. Michigan is in 1st place with expenditures of over $9 million for the supreme court races, not including another $3 million from outside the State. Michigan's campaign finance system was highlighted in a recent report on "The New Politics of Judicial Elections: 2009-2010" (2011), available at http://www.brennancenter.org/content/resource/the_new_politics_of_judicial_elections_200910/. That report noted that most of the spending on Michigan's Supreme Court race came from special-interest groups, and that source of the special-interest spending was concealed from the public.

2. Eliminate the selection of Supreme Court justices through the political parties. The Task Force highlighted the importance of this recommendation because the allegedly nonpartisan judicial elections in Michigan ring hollow when political parties nominate candidates for the Supreme Court. In fact, the only way for a candidate to appear on the ballot is to secure the nomination of a political party. Eliminating political parties from the election process would give the public confidence in the nonpartisan elections.

3. Create a nonpartisan citizens' campaign oversight committee to monitor judicial campaign advertisements. The formation of the committee would help reduce negative campaigns, which "weaken public confidence in the justices." The oversight committee would check the factual claims in advertisements and "denounce false, misleading, or destructive messages."

4. Distribute a voters education guide to all registered voters, which would be prepared by the Secretary of State. The guide would provide voters neutral information about each candidate for the Supreme Court.

5. Create a nonpartisan Governor's Advisory Screening Committee consisting of nonpartisan attorneys and non-attorneys to advise the governor on appointments to the Supreme Court. The Task Force noted that the Governor would not be bound by the recommendation of the committee. The Task Force further recommends that the names and credentials of the candidates under consideration for the appointment to the supreme court be publicly available. The Task Force noted that "this process would assure the public that the Governor did not base his or her appointments on whim or political patronage but instead on a sound examination of each candidate's suitability for office."

6. Remove the age 70 limitation in the Michigan Constitution that prevents justices from running for election or being appointed to the Michigan Supreme Court after their 70th birthday.

The Task Force also explored the possibility of creating a judicial nomination committee which would replace the judicial election system for the Supreme Court. This is often referred to as a "merit selection" system. There are several

models that could serve for a nomination-based system, such as a gubernatorial appointment with legislative confirmation or gubernatorial appointment with a retention election.

Although some member of the Task Force preferred a nominations system, that is not one of the Task Force's recommendations. In any event, if the six recommended changes were made to the judicial election system, and if those changes succeeded in "restoring public confidence in the supreme court, decreasing misleading attack advertisements, reducing the influence of political parties, better educating voters, and reducing undisclosed spending" then some members of the Task Force who favored a nomination process would still view the reform as a success.

The Task Force recommendations are a significant first step in what will certainly prove to be a long process to effectuating needed improvements to the judicial election system for the Michigan Supreme Court.

Liisa R. Speaker is the Chair of the State Bar of Michigan's Appellate Practice Section.

The Rapid Growth and Slow Shrinkage of the Michigan Court of Appeals

By Graham K. Crabtree

In these days of scarce funding, state government has been required to perform its various functions with fewer resources. Our state courts have not been exempted from this reality, and thus, the Legislature has found it necessary to make some significant changes with respect to the amount and allocation of available judicial resources, consistent with the recommendations of the Supreme Court and Governor Snyder.

In its latest Judicial Resources Recommendations published in August of 2011, the State Court Administrative Office ("SCAO") recommended that 45 trial court judgeships be eliminated by attrition, and that the size of the Court of Appeals be reduced by attrition from 28 to 24 judges. These suggestions were not new. In 2007, the SCAO recommended that 10 trial court judgeships be eliminated, and that the Court of Appeals be reduced to 24 judges; in 2009, it recommended the elimination of 15 trial court judgeships and renewed its suggestion that the Court of Appeals be reduced by 4 judgeships.[1]

In each of these reports, the SCAO has noted that substantial reductions of the Court of Appeals' prehearing staff have been necessitated by budget cuts, while the number of the Court's judges cannot be reduced without amendatory legislation. The SCAO has emphasized that these reductions in the research staff have required a shifting of some of the responsibility for preparatory review and research in opinion cases from the central research staff to the judicial chambers – an inefficient use of resources which has substantially reduced the amount of time available to the judges for preparation of the Court's opinions. Accordingly, the SCAO has consistently suggested that the Court's efficiency could, and should, be improved by elimination of 4 judgeships and using approximately half of the money saved to hire additional research staff. But these recommendations have not been based upon economic necessity or desired efficiencies alone; they have been motivated, as well, by statistics reflecting a steady and substantial reduction of judicial caseloads in recent years.

The SCAO's recommendations have been adopted by the Supreme Court and advocated by Chief Justice Young, and thus, legislation to implement the proposed changes was promptly introduced and taken up in the fall of 2011. These efforts have produced a series of new Public Acts providing for the elimination of 36 trial court judgeships, and consolidation of trial court functions in certain areas, in accordance with the Supreme Court's recommendations.[2] Another new Public Act – **2012 PA 40** – has amended the Revised Judicature Act to redefine the election districts for the Court of Appeals and reduce the number of its Judges from 28 to 24 by attrition, in accordance with the recommendations of the Chief Justice and Governor Snyder.

Public Act 40 became the law of the land with Governor Snyder's approval of **Senate Bill 849**[3] on March 6, 2012, and took effect on March 25, 2012. To obtain the Republican

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support needed for the elimination of the Court of Appeals judgeships effected by that legislation, Mr. Snyder reluctantly agreed to fill the two previously-vacant judgeships by appointment – an agreement which quickly drew sharp criticism from the minority party. Those judgeships had become vacant in 2011, when Judge Brian Zahra was appointed to the Supreme Court and Judge Richard Bandstra resigned from the Court of Appeals to join the administration of Attorney General Bill Schuette. Mr. Snyder had resolved to leave those vacancies unfilled as a cost cutting measure – a strategy which did not sit well with many members of his own party who could not abide the thought of their Governor relinquishing the opportunity to appoint two new conservative judges after eight years of appointments by Governor Granholm.

To uphold his end of the necessary compromise, Governor Snyder appointed Judges Mark T. Boonstra and Michael J. Riordan as the newest members of the Court of Appeals on March 16, 2012 – before the effective date of the amendatory legislation – and thus, the reduction of the Court to 24 judges by attrition will be delayed. Had the vacancies remained unfilled, the two vacant judgeships would have been eliminated on March 25, 2012, and the further reduction to 24 judges would have been completed by January 1, 2017, with the age-mandated retirements of Judges Owens and Whitbeck, *assuming* that neither of them would have died in office or chosen to resign from the Court before the end of his last term, allowing the Governor to appoint a successor whose judgeship would not be subject to elimination under the terms of the new statutory language until the newly appointed judge retired at the end of his or her initial or subsequent term. With the vacancies now filled by appointment, the reduction to 24 judges will be accomplished over a period of years by retirements, voluntary or age-mandated – a process which will not be completed until the first four incumbent judges have retired from the Court at the end of their respective terms of office. How long this will take cannot be predicted today with any certainty.

Public Act 40 has also redrawn the election districts for the Court of Appeals to accomplish a more even distribution of the state's population between the election districts in accordance with Const 1963, art 6, § 8, which requires that the judges of the Court of Appeals "be nominated and elected at non-partisan elections from districts drawn on county lines and as nearly as possible of equal population, as provided by law." To comply with this requirement, the Legislature has redrawn the boundaries of the Court's election districts from time to time, to account for population shifts revealed by the most recent census data.

The Evolution of the Court and its Election Districts

The growth of the Court of Appeals and the refinement of its election districts since its creation in 1964 provide an informative illustration of Michigan's development over the last 50 years. The creation of the Court of Appeals as an intermediate appellate court was first authorized by the 1963 Constitution; before that time, an appeal to the Supreme Court was the only available means for judicial review of circuit court judgments. Although this worked well enough for the first century of Michigan's statehood, the need for an intermediate appellate court to serve the needs of Michigan's citizens had became apparent well before the last constitutional convention. But although the need was clearly understood, the convention delegates probably did not envision the Court of Appeals as it exists today. Const 1963, art 6, § 8 declared that the Court of Appeals would "consist initially of nine judges," but allowed for future expansion by providing that "[t]he number of judges comprising the court of appeals may be increased, and the districts from which they are elected may be changed by law."

In 1964, the Legislature amended the Revised Judicature Act of 1961 to add a new Chapter 3, establishing the Court of Appeals as a court of record in accordance with the constitutional mandate, with nine judges to be elected from three election districts – three from each district.[4] As originally configured, the first election district was comprised of Wayne County alone. The second district included 16 counties – Huron, Tuscola, Sanilac, Genesee, Lapeer, St. Clair, Shiawassee, Livingston, Oakland, Macomb, Ingham, Jackson, Washtenaw, Hillsdale, Lenawee, and Monroe – and the third district included all of the remaining 66 counties. The new § 306, MCL 600.306, authorized the Supreme Court to transfer judges from the circuit or superior courts to the Court of Appeals to act as temporary appellate judges. That section provided that such transfers "may be made to replace disabled or disqualified judges, or to enlarge the court of appeals temporarily to not more than 12 judges if the business of the court of appeals is deemed by the supreme court to warrant it," but also specified that no more than one circuit judge could be assigned to hear any case.

In 1968, the Legislature increased the size of the Court of Appeals from 9 to 12 judges.[5] The election districts remained unchanged, but with the enactment of this amendatory legislation, each of them became entitled to elect 4 judges. MCL 600.306 was amended by this legislation to allow the Supreme Court to temporarily enlarge the Court to no more than 18 judges.

In the years that followed, Michigan's economy grew and

its increasing population became more evenly distributed, and thus, it became necessary to create additional judgeships and redefine the Court's election districts. In 1972, the Legislature transferred Washtenaw County and Livingston County from District 2 to join Wayne County in District 1.[6] Two years later, the Legislature expanded the size of the Court to 18 judges, with 6 judges to be elected from each of the three election districts.[7] MCL 600.306 was amended by this legislation to allow temporary enlargement of the Court to no more than 27 judges by transfer from the circuit court or assignment pursuant to Const 1963, art 6, § 23, which provides that the Supreme Court "may authorize persons who have been elected and served as judges to perform judicial duties for limited periods or specific assignments."

In 1986, the Legislature expanded the size of the Court to 24 judges, with 8 judges to be elected from each of the three election districts.[8] This legislation moved Monroe, Lenawee and Jackson Counties from District 2 to District 1, joining Wayne, Washtenaw and Livingston Counties in that District. Ogemaw, Arenac, Gladwin, Midland and Bay Counties were added to District 2, joining Huron, Tuscola, Sanilac, Genesee, Lapeer, St. Clair, Shiawassee, Oakland, Macomb and Ingham Counties. Hillsdale County was moved from District 2 to join the numerous counties remaining in District 3. MCL 600.306 was amended to allow temporary enlargement of the Court to no more than 36 judges.

By 1993, an additional increase had been necessitated by a rapid expansion of the Court's case load. In that year, the Legislature expanded the Court of Appeals to its current size of 28 judges.[9] To facilitate the election of that number of judges, the 1993 legislation also replaced the three former election districts with four new ones, each of which would be entitled to elect 7 judges. The new District 1 was comprised of Wayne, Monroe and Lenawee Counties. The new District 2 included Genesee, Shiawassee, Oakland and Macomb Counties. The new District 3 consisted of Berrien, Cass, St. Joseph, Branch, Hillsdale, Washtenaw, Livingston, Jackson, Calhoun, Kalamazoo, Van Buren, Allegan, Barry, Kent, Ottawa and Muskegon Counties. The remaining 60 counties were put into the new District 4. MCL 600.306 was amended to allow temporary enlargement of the Court of Appeals to no more than 48 judges.

In 2001, the Legislature again adjusted the Court's election districts to comply with the constitutional mandate for an even distribution of the state's population.[10] That legislation removed Calhoun County and Hillsdale County from District 3, and added them to District 1. Eaton, Ionia and Newaygo Counties were moved from District 4 to District 3.

The 2012 legislation has established the current election districts to account for the additional population shifts revealed by the 2010 Census. To adjust for a substantial loss of population in Wayne County, Public Act 40 has transferred Calhoun County from District 1 to District 3, and moved Kalamazoo, St. Joseph and Branch Counties from District 3 to District 1, for a net gain of two counties in District 1. To adjust for recent development in Oakland and Macomb Counties, Shiawassee County was moved from District 2 to District 4. Four counties (Calhoun, Mason, Oceana and Montcalm, moved from Districts 1 and 4) were added to District 3, and three counties (Kalamazoo, Branch and St. Joseph) were removed to District 1, for a net gain of one county in District 3. With the addition of Shiawassee County from District 2 and the loss of Mason, Oceana and Montcalm Counties to District 3, there was a net loss of two counties in District 4.

The High Water Mark and the Receding Tide

In 1993, when the Court of Appeals was increased to its present 28 judges, Michigan's judicial business was brisk, and there was a very substantial need for additional judges. The Enrolled Analysis for House Bill 4842 prepared by the House Legislative Analysis Section reported that the number of appeals filed each year had increased from 1,235 in 1965 to 13,352 in 1992. This equated to an increase from 137 filings per judge in 1965 to 566 filings per judge in 1992 – a figure which ranked Michigan's appellate caseload per judge among the highest in the nation. Those practitioners who were doing appellate work in the late 1980s and early 1990s may recall that the Court of Appeals made extensive use of visiting circuit judges to cover its case load during that time, and that appellate dispositions were substantially delayed. To remedy these difficulties, the SCAO's 1992 Judicial Resources Report had recommended the addition of 9 new judgeships in 1993, and 6 more in 1995.

The number of appellate filings has been dramatically reduced in the years since 1993. The Supreme Court's 2000 Annual Report states that the number of new Court of Appeals filings had decreased to 10,370 (370 per judge) in 1995; 8,866 (317 per judge) in 1997; and 7,731 (276 per judge) in 1999. To put these numbers into proper perspective, this report acknowledges that the Court of Appeals had changed its methodology for counting of new cases in 1998. Prior to that time, the Court's statistics had reflected one case filing for each lower court docket number in cases involving multiple lower court files. In 1998, the Court's statistics began to reflect one filing for each Court of Appeals docket number, without regard to the number of lower court numbers involved. But although the prior methodology may have overstated the number of filings somewhat for the years before 1998, the Supreme Court's statistics still show a distinct downward trend. The Supreme Court's 2004 Annual Report shows 7,102 case filings for 2001, a resurgence to 7,445 filings for 2003, and 7,055 filings for 2004. The Su-

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preme Court's 2011 Annual Report shows increased filings in 2005 and 2006 – to 7,951 in 2006 – followed by declining numbers in 2007, 2008, 2009, 2010 and 2011, when there were only 6,089 case filings and 5,982 dispositions.

What have been the causes for these declining numbers? There are several that can be identified or readily supposed. Michigan's overall population declined slightly – by .6% – between the year 2000 and 2010, and there has been a considerable erosion of its economy in recent years. Fewer people and less commerce will invariably bring about a reduced level of litigation, and less litigation at the trial court level means fewer appellate filings. This assumption is supported by the Supreme Court's statistics, which have shown a downward trend in the numbers of trial court case filings and dispositions in most categories of cases since 1996.

It is likely that the number of civil filings have been decreased somewhat by the tort reform measures adopted in 1993 and 1995.[11] The Supreme Court's 2000 Annual Report noted, in this regard, that the tort reform measures had "resulted in an unusually large volume of civil case filings in 1996 as litigants moved to file cases before tort reform took effect. Following the passage of tort reform legislation, effective in 1996, tort filings have decreased to a level last seen in 1988." And although there have been fluctuations from year to year, the overall numbers of civil filings have followed a downward trend over the last ten years – a trend which has been especially pronounced with respect to non-auto damage cases.

There has been considerable fluctuation in the numbers of circuit court criminal filings in recent years, but these numbers have also shown a slight downward trend. In its 2000 Annual Report, the Supreme Court noted that the Legislature had recently increased the value thresholds for a number of felony property offenses, and that this had caused a substantial decrease in the number of circuit court felony filings as more offenses were retained for prosecution as misdemeanors in the district courts. With fewer criminal cases adjudicated in the circuit courts, there would necessarily be fewer criminal filings in the Court of Appeals. And it is likely that the number of criminal filings in the Court of Appeals was also reduced by the constitutional amendment eliminating the constitutional right to appeal plea-based convictions adopted by the voters in 1994. In more recent years, the slight decline in criminal filings has probably been caused, in large part, by the reduction of resources available to local governments for crime detection and prosecution of offenders.

The Political Compromise and the Road Ahead

Although the statistics have made a persuasive case for reduction of the Court of Appeals to its former 24 judges, implementation of the Supreme Court's recommendations was not accomplished easily. Elimination of established judgeships is always more complicated than creating new ones, and thus, the Chief Justice's recommendation was not met with unanimous approval. Many legislators and interested parties have expressed a reluctance to reduce the size and capacity of the Court, and as previously discussed, there were many on the Republican side of the aisle who were vigorously opposed to reducing the number of judges until Governor Snyder had taken full advantage of his opportunity to appoint two more conservative judges.

With these uncertainties, there was no consensus, among the ruling Republicans at least, as to whether any Court of Appeals judgeships should be eliminated at all. Wishing to provide for all contingencies, Republican Representative Pete Lund introduced two bills on November 10, 2011 – House Bill 5160, which proposed only a redrawing of the election district boundaries; and House Bill 5161, which proposed the same redrawing of the election districts and the elimination of four judges requested by the Chief Justice and the Governor.

The issue was given prompt consideration by the House Committee on Redistricting and Elections, but with the Republicans still undecided about the requested elimination of judgeships, the Committee reported House Bill 5160 – the Bill to redraw the election districts only – without amendment on November 29, 2011. This action was taken with little fanfare, with all Republican Committee members voting in favor, and all three Democratic members abstaining. On December 1, 2008, the House adopted and passed a Bill Substitute (H-2), which proposed the same redrawing of the election district boundaries with no elimination of judgeships, and also included a directive, of questionable validity, requiring the Governor to fill any existing vacancies by appointment.

House Bill 5160 could not be used for elimination of judgeships because it was a single-section Bill, and the Senate Rules did not allow an amendment to change the additional section which would have been required to do so. Thus, to permit a quick completion of action eliminating judgeships, the Senate passed Senate Bill 849 – a two-section Bill – in stripped down "shell" form on December 8, 2011. As passed by the Senate, that Bill eliminated the existing definitions of the election districts without proposing any new ones, and did not propose any elimination of judgeships. The Bill could not have been passed by the House in that form; it merely provided a ready "vehicle" for

fast implementation of whatever changes might be agreed upon in the further discussions to come.

By February 21, 2012, with the filing deadline for this year's election looming, the further discussions were completed, and the agreement finalized; the legislative leadership would deliver the votes required for the proposed elimination of judges. In exchange for this, Governor Snyder agreed to fill the two existing vacancies by appointment before the effective date of the amendatory legislation. With the agreement in place on that date, Senate Bill 849 was discharged from the House Committee on Redistricting and Elections, the required Bill Substitute (H-4) was adopted, and the Bill was passed by the House. The Senate concurred in the House amendments the next day, and the Bill was off to the Governor's desk.

Governor Snyder approved Enrolled Senate Bill 849 on March 6, 2012, and promptly upheld his end of the bargain by his appointment of Judges Boonstra and Riordan, as previously discussed. Thus, in the absence of any further legislative action, it may now be reasonably assumed that Public Act 40 will reduce the Court of Appeals to its former 24 judgeships eventually, but with the prior vacancies now filled, there can be no assurance that the process will be completed anytime soon. As previously discussed, the elimination of judgeships will be brought about by retirement of incumbent judges at the end of their terms of office, but the judgeship of a new judge installed by gubernatorial appointment due to the death or early retirement of an incumbent judge cannot be eliminated under the terms of this legislation until the appointed judge retires at the end of his or her initial or subsequent term.

We must not forget, however, that there is much that will be revealed to us in the years to come which cannot be foreseen today. If Governor Snyder's efforts to reinvent Michigan pay off, there may be a resurgence of our economy which could bring about a new era of growth and prosperity that might, in turn, present a new need for additional judicial services and provide the funding required to pay for them. If that should occur, a future Legislature may find it prudent to reconsider this year's bargain and strike a new deal which could prevent or reverse the currently scheduled shrinkage of our intermediate appellate court.

Endnotes

1 The reports and recommendations cited in this article may be found on the Supreme Court's website: http://courts.michigan.gov/supremecourt/.

2 2011 PA 300 and 2012 PA Nos. 16-23 and 33-38.

3 Senate Bill 849 was introduced by Republican Senator Joseph Hune on November 10, 2011.

4 1964 PA 281

5 1968 PA 127

6 1972 PA 157

7 1974 PA 144

8 1986 PA 279

9 1993 PA 190, created by the enactment of House Bill 4842 (Nye – R).

10 2001 PA 117

11 Tort reform measures applicable to medical malpractice cases were enacted by 1993 PA 78, effective April 1, 1994. The 1995 tort reforms, applicable to tort actions in general and product liability claims in particular, were enacted by 1995 PA Nos. 161 and 249, effective March 28, 1996.

Write About It!

Encountered a unique or thorny issue lately? Need a résumé builder? Interested in pursuing a listserv issue in greater depth? Consider writing an article for the section's newsletter. Just contact one of the editors for additional information.

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Question and Answer

What is the precedential effect of a Michigan Supreme Court order stating "in lieu of granting leave to appeal, we REVERSE the judgment of the Court of Appeals, for the reasons stated in the Court of Appeals dissenting opinion," when the Court of Appeals opinion being referenced is *unpublished*?

by Danielle Schoeny

On occasion the Michigan Supreme Court will issue orders reversing the judgment of the Court of Appeals for the reasons stated in the Court of Appeals dissenting opinion. There are times when the Court of Appeals opinion being referenced in the order is an unpublished opinion. In light of the fact that both the Michigan Constitution and the Michigan Legislature require all decisions of the Michigan Supreme Court to be in writing, are the lower courts required to give precedential effect to those orders referencing unpublished opinions?

The following are two examples of such orders:

> In *Jackson v State Farm Mutual Automobile Insurance Company*[1] the Michigan Supreme Court issued an order stating:
>
> > "in lieu of granting leave to appeal, we REVERSE the judgment of the Court of Appeals, for the reasons stated in the Court of Appeals dissenting opinion . . ."[2]
>
> Similarly in *Brian M Kelly Trust v Adkison, Need, Green & Allen, PLLC*,[3] the Court issued an order stating;
>
> > "in lieu of granting leave to appeal, we REVERSE in part the judgment of the Court of Appeals, for the reasons stated in the Court of Appeals dissenting opinion, and we REMAND this case to the Oakland Probate Court for entry of an order granting summary disposition to the respondents"[4]

Decisions of the Michigan Supreme Court, including all decisions on prerogative writs, are required by the constitution to be in writing and to contain a concise statement of the facts and reasons for each decision, along with reasons for each denial of leave to appeal.[5] Moreover, by dictate of the Michigan legislature, all decisions of the Michigan Supreme Court, including cases of mandamus, quo warranto and certiorari, are required by statute to be in writing, and to contain a concise statement of the facts and reasons for the decisions.[6]

In light of the requirements of the Michigan Constitution and Michigan Legislature there is a valid argument to be made that Supreme Court orders such as those set forth above, should not be given precedential effect, as the orders do not set forth the facts upon which the Court relied, and in lieu of setting forth its own reasons for the decision, the Court merely adopted the reasoning set forth in Court of Appeals dissents, which were unpublished opinions.

Of course the above should not be understood to suggest that a Supreme Court order could never have precedential effect. When the order appropriately complies with the constitutional and legislative requirements set forth above, the order should certainly be afforded precedential effect. In *People v Crall*[7] the Michigan Supreme Court held that such an order shall be given precedential effect in all Michigan courts where the order contains "a concise statement of the applicable facts and the reason for the decision."[8] The Supreme Court order at issue in *Crall* was *People v Bailey*.[9] A review of the Supreme Court's order in *Bailey* demonstrates that the Court set forth the salient fact and the Court's reasoning in the order itself.[10]

Contrary to the order at issue before the Court in *Crall*, the orders set forth as examples above, do not contain the applicable facts, or the reason for the decision, and instead, merely reference an unpublished dissenting opinion. A finding that such an order should be given precedential effect on lower courts is concerning for a number of reasons.

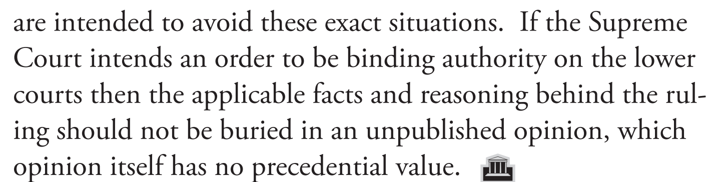
First, MCR 7.215(C)(1) states that an unpublished case is of no precedential value. It is well known that unpublished cases do not go through the same level of scrutiny before being issued as do published opinions. The Court of Appeals in issuing the opinion obviously had its reasons for determining that the case should not be published. Unpublished opinions are meant to be the law of the particular matter before the Court, and are not intended to be cited by parties in other controversies, as binding authority.[11]

Moreover, an unpublished opinion is not available to all who endeavor to locate precedent pertaining to a particular issue. For example, a person who does not have the means or knowledge to access the internet, and is solely relying on printed research materials, would not have access to the

unpublished dissenting opinion, which opinion is the only place the applicable facts and reasoning forming the basis of the Supreme Court's ruling can be ascertained.

It is also worth noting that even the technologically savvy researcher would have difficulty uncovering the precedential value of an unpublished dissent. If a seasoned computer based researcher used a typical key terms search to locate precedential cases on a particular legal issue the Supreme Court order on point would typically not turn up in the search, as the order itself does not contain any applicable facts or reasoning which a key terms search criteria would include. While the unpublished opinion may be unearthed by the same key term search, practitioners are repeatedly reminded by the courts that unpublished opinions are of no precedential value and as such many practitioners would completely dismiss the opinion. Unpublished cases are often not digested, and therefore a digest search pertaining to the particular legal issue, would also not direct the researcher to this arguably precedential authority.

It would appear that the requirements set forth in the constitution and Michigan legislature, requiring all decisions of the Supreme Court to be in writing and to contain a concise statement of the facts and reasons for each decision, are intended to avoid these exact situations. If the Supreme Court intends an order to be binding authority on the lower courts then the applicable facts and reasoning behind the ruling should not be buried in an unpublished opinion, which opinion itself has no precedential value.



Endnotes

1 *Jackson v State Farm Mutual Automobile Insurance Company*, 472 Mich 942, 698 NW2d 400 (2005).

2 *Id.*

3 *Brian M Kelly Trust v Adkison, Need, Green & Allen, PLLC*, 480 Mich 909, 739 NW2d 622 (2007)

4 *Id.*

5 Const. 1963 Art. 6 §6

6 MCL 600.229

7 *People v Crall*, 444 Mich 463; 510 NW2d 182 (1993)

8 *Id.* at n. 8

9 439 Mich 897 (1991)

10 *Id.*

11 *Stine v Continental Casualty*, 419 Mich 89, 95, n 2 (1984)

Hybrid Briefs:

A Conflict Between the MCR & the IOP, One Practitioner's View

By Philip L. Ellison, MBA, JD, Esq[1]

The Internal Operating Procedures of the Clerk of the Michigan Court of Appeals ("IOP") is an invaluable tool for understanding the ins and outs of the operations and related procedures of the Clerk's Office. The IOP is "intended to memorialize the practices adopted by the clerk's office to move appellate papers through the Michigan Court of Appeals efficiently and in conformity with the Michigan Court Rules."[2] Despite claimed conformity with the Michigan Court Rules ("MCR") and as the IOP itself notes, the IOP does not have the force of law.[3] Yet, occasionally the IOP makes an appearance in a judicial opinion as the basis for a particular result, but never as the singular basis for the outcome of a case in-and-of itself.[4]

So what happens when the IOP and the MCR conflict? This is one of those real-life situations.

Fact Pattern:

AT, as plaintiff below, files an appeal after losing most, but not all, of the lower court bench trial, appealing Issues A and B. The dozens of defendants below are now the appellees. One appellee, CA, files a timely cross-appeal making AT a cross-appellee in addition to being the standard appellant. CA raises separate and somewhat related issues

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> identified as Issues C and D. All parties stipulate to the 28 day extension of time[5] for both AT and CA to file their respective initial appellant and cross-appellant briefs.
>
> CA files his cross-appellant brief by the extended deadline. AT neglects the deadline altogether and files nothing. As such, AT is untimely and has, in accordance with the Court Rules, forfeited his right to oral argument.[6]
>
> The Clerk then generates and sends the customary Involuntary Dismissal Warning providing a specific drop-dead date or else face a dismissal. One day before the Clerk is to file a request to the COA panel to dismiss AT's portion of the appeal, AT files a *hybrid brief*,[7] which consists of briefing on Issues A and B *and* AT's response to Issues C and D raised by CA in the cross-appellant brief. AT is untimely as to Issues A and B, but is timely as a response to Issues C and D. AT requests and expects to orally argue the case, despite the penalty of MCR 7.212(A)(4) of no oral argument for late briefs.
>
> The Clerk, pursuant to IOP 7.212(E) rather than any court rule, deems the hybrid brief as being timely filed.

This fact pattern is based on a true set of events currently pending in a case before the Michigan Court of Appeals. Of course, a party filing a late brief forfeits his or her right to have oral argument.[8] Yet, the IOP provides that a "party may file a joint brief, such as an appellant/cross-appellee brief or an appellee/cross-appellant brief."[9] Even more interesting, "[a] combined appellant/cross-appellee brief filed by the date the cross-appellee brief is due will be docketed as timely filed."[10]

Since the Clerk deems the hybrid brief as being timely filed, it appears that despite being nearly a month late, having more than three additional weeks to draft the appellant brief, and having a sneak-peek into CA's brief, AT does not forfeit oral argument.

As a result, this practitioner, as counsel for CA, asks, "on what authority does the Clerk accept AT's hybrid brief as being conforming and timely filed?"

The Michigan Court Rules are silent as to a hybrid brief. Yet, the deadline gamesmanship of AT provided him with not only a free preview of CA's issues and research, but also an additional three weeks to draft and fine-tune proffered arguments.

So what is the appropriate result, if challenged?

The appropriate result would be to strike AT's brief as being a non-conforming brief[11] but allow AT to file a separate appellant's brief and a separate response to CA's proffered arguments within a reasonable amount of time, such as the customary 21 days. Missing the due date for appellant's brief acts as a complete forfeiture of oral argument as required by MCR 7.212(A)(4) and MCR 7.214(A).

Now, one could argue that the COA should permit AT to orally counter-argue Issues C and D but has only forfeited the right to orally argue Issues A and B. Given the closeness of the issues presented, this type of hairsplitting is impractical at oral argument. Additionally, what if the panel inquires into an aspect of Issue A or B at oral argument? Is CA's counsel supposed to stand up and object during oral argument, like an objection in the trial courts? Probably not.

Further, AT's request and expectation of oral argument without explanation as to why Issues A and B were late 'smacks' of gamesmanship. The Court Rules provide the ability for AT to explain why the appellant brief was late.[12] If AT argues that he was not late pursuant to the IOP, the issue of the force of law of the IOP is back in dispute.

The Court Rules lay out an explicitly clear call-and-response format of practice before the Court. One party files first, the responding party then files a response, and a final optional reply is available. Allowing these hybrid briefs confuses standard practices and unfairly benefits the party who has the responsive deadline. In addition, one must not forget that there were other appellees in the fact pattern above. If the Court lets stand the filing of a hybrid brief, do the other appellees have to respond to Issues A, B, C, and D, or just Issues A and B?

The IOP's allowance of such deviations from the MCR creates more problems than it resolves. The appropriate resolution of this case should have been AT filing a motion seeking implicit forgiveness. Simply disregarding the deadline and hoping for the best is clearly improper and unfair to the other parties.

So, what did I do as counsel for CA? I filed a motion for guidance and asked the Court what CA and the appellees are allowed to do in light of this filed hybrid brief. The Court of Appeals, through Judge Donald Owens, granted the motion for guidance directing that CA may file a "combined appellee/cross-appellant reply brief" by a certain deadline. As to the question of what issues may be orally argued by AT, the request for guidance was denied "without prejudice to raising the issue before the case call panel."

In law school, a favorite lecturer was often cited for his axiom "there are no answers, only the solutions you come up with." This is clearly one of those situations. As it stands

currently, the question of whether the IOP-authorized hybrid brief is in conformity to the MCR remains unresolved.

Endnotes

1 Philip L. Ellison is a business counselor and civil litigator with his firm, Outside Legal Counsel PLC. His practice focuses on real property, employment, government transparency, and business issues and related litigation. He has represented individual and business clients in various state and federal courts including recently arguing before the US Court of Appeals for the Sixth Circuit. He is a graduate of MSU College of Law and holds a Master of Business Administration (MBA) degree from Central Michigan University and bachelor's and associate degrees from Lake Superior State University. View his full profile at *www.olcplc.com*.

2 Office of the Clerk, *Internal Operating Procedures*, Michigan Court of Appeals, http://coa.courts.mi.gov/clerkoffice/clerkiop.htm (last accessed Apr 10, 2012).

3 Michigan Court of Appeals Office of the Clerk, Internal Operating Procedures 5, *available at* http://coa.courts.mi.gov/pdf/clerkiops.pdf [hereinafter "IOP"].

4 See *In re Bradshaw*, unpublished decision of the Court of Appeals, issued July 19, 2011 (Docket No. 302439) (citing Internal Operating Procedure 7.211(C)(5)-1); *People v Waclawski*, 286 Mich App 634, 662; 780 NW2d 321 (2009)(citing IOP 7.209(I)); *Gable v Production Stamping*, unpublished decision of the Court of Appeals, issued Aug 21, 2001 (Docket No. 230004) (citing "MCR 7.205, and corresponding Internal Operating Procedures, e.g., IOP 7.205-2, IOP 7.205(B)(7)-2.").

5 See MCR 7.212(A)(1)(a)(iii); MCR 7.212(A)(2)(a)(ii).

6 MCR 7.212(A)(4); MCR 7.214(A).

7 The author uses the term "hybrid brief" rather than the IOP's "joint brief" to distinguish between a single brief filed on behalf of several appellate parties (see e.g. *River Inv Group, LLC v Casab*, 289 Mich App 353, 355 n.1; 797 NW2d 1 (2010)) from a single brief filed by a single party which combines the appellant/cross-appellee briefs or an appellee/cross-appellant briefs into a single filed document.

8 MCR 7.212(A)(4); MCR 7.214(A).

9 IOP 7.212(E).

10 *Id*.

11 MCR 7.212(I).

12 MCR 7.214(E)(2); but see *Lyzohub v Salem*, unpublished decision of the Court of Appeals, issued Jan 7, 2003 (Docket No. 233291)("While a party may submit a motion requesting oral arguments to the Court of Appeals pursuant to MCR 7.211, the brief on appeal is not the proper way to raise the issue.").

Recommended Reading for the Appellate Lawyer

By Mary Massaron Ross

This issue's reviews discuss a fascinating account of the legal challenges brought in the wake of a deadly e-coli outbreak that led to changes the law governing the food supply chain, a thoughtful discussion of competing theories of constitutional interpretation, and an entertaining story of what has been called "the most colorful and notorious law firm in American history."

Poisoned: The True Story of the Deadly E. Coli Outbreak That Changed the Way Americans Eat

Jeff Benedict (Inspire Books 2011)

In *Poisoned: The True Story of the Deadly E.Coli Outbreak That Changed the Way*, Jeff Benedict has written a fascinating account of a tragic story in the history of food safety regulation in America. In January of 1993, newspapers reported an E. coli outbreak tied to Jack in the Box hamburgers. At the time, the Center for Disease Control did not "list it as a reportable disease." But in this single outbreak, "over 750 children were poisoned and four had died." Benedict's writing captures the fear and sense of helplessness experienced by parents whose healthy children became deathly ill in a matter of days, and their increasing despair when health professionals could not figure out what was wrong or treat it.

Benedict's vivid account of events in the early days of the outbreak evidence the more than two hundred interviews he conducted with those involved. He also had access to "deposition transcripts, thousands of pages of discovery documents (internal corporate records from Jack in the Box, medical records from numerous hospitals and doctors' offices, and insurance records), and billing records and internal memos from numerous law firms involved in the Jack in the Box litigation." This depth of original source material has allowed

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Recommended Reading
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Benedict to write a highly detailed and comprehensive account of a fascinating legal and human story.

Characters in the story include the plaintiff's attorney who created a new legal specialty, litigation arising out of food safety and foodborne illnesses, Bill Marler, the CEO of Foodmaker, parent company of Jack in the Box, Jack Goodell, another lawyer who brought a class action suit against Jack in the Box, Lynn Sarko, the former Carter press secretary who agreed to help the beleaguered president of Jack in the Box, and the lawyers who sought to defend the companies and individuals who were targeted in the litigation.

Benedict's account is written in such a vivid way that it offers a lesson for any appellate writer trying to make a statement of facts come alive. And his descriptions of the twists and turns of the litigation offers a roadmap and object lesson for anyone working as a lawyer, whether advising companies engaged in the good industry or bringing or defending against suits brought on that basis. I would highly recommend it.

Cosmic Constitutional Theory: Why Americans Are Losing Their Inalienable Right to Self-Government

J. Harvie Wilkinson, III
(Oxford University Press 2012)

Judge Wilkinson has written a thoughtful analysis of competing theories of constitutional interpretation and coupled it with a persuasive argument for judicial restraint without embracing any single "cosmic" theory. Judge Wilkinson offers what amounts to a primer in the current theories of constitutional interpretation.

Judge Wilkinson's catalogue of theories includes Justice Brennan's "Living Constitution" theory, originalism as defended by Judge Robert Bork and others, the political process theory advanced by John Hart Ely, and pragmatism as elucidated by Judge Posner. In separate chapters, Judge Wilkinson traces the origins, strengths, and problems with each of these theories. Unlike many treatises or scholarly articles, Wilkinson does not characterize theories he rejects outrageous. He offers an even-handed account, taking care to include the benefits derived from adhering to a particular approach. But as to each, he eventually concludes that it fails to fulfill its promise of constraining judicial discretion.

Judge Wilkinson reminds readers of the importance of judicial restraint as a constitutional and societal value. He rejects the notion that the expansion of presidential powers warrants a similar expansion of judicial powers. According to Judge Wilkinson, "it is one thing for courts to check the excess of another and something else for us to superintend the even more volatile subjects of democratic disputation with rulings designed to please our preferences." Judge Wilkerson emphasizes that "[t]he republican virtue of restraint requires no cosmic theory." And he points out that "[t]he controversies that flare brightly today provide no more than a glimmer of greater controversy tomorrow." In Judge Wilkerson's view, both liberals and conservatives have failed to maintain the judicial self-restraint that would preserve a sphere for democratic self-government.

Judge Wilkerson offers an impassioned plea for a return to restraint, which he believes will come from "an escape from theorizing." According to Wilkerson, "Convinced that they possess prearticulated frameworks that dictate unassailable results, theory-driven judges and scholars have forgotten that wisdom lies simply in knowing the limits of one's knowledge, that good sense is more often displayed in collective and diverse settings than in a rarified appellate atmosphere, and that the language, structure, and history of law serve best as mediums of restraint rather than excuses for intrusion." To replace theory, Judge Wilkerson urges judges to "pay attention to the text, structure, and history of the Constitution and not go creating rights out of whole cloth." And he contends that judges should respect the allocation of authority to other branches and other institutions including the private sector.

While Judge Wilkerson calls these "mundane and humdrum truths," he is right to call attention to them. This book is important – and useful. I highly recommend it.

Scoundrels in Law: The Trials of Howe and Hummel, Lawyers to Gangsters, Cops, Starlets, and Rakes Who Made the Gilded Age

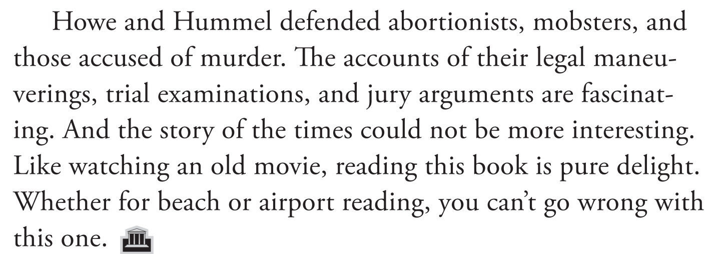
Cait Murphy
(Harper Collins 2011)

If you have ever yearned for an earlier time when lawyers were civil and law was not a business but an honored profession, you may find this account of the unseemly side of the past reassuring. At least it demonstrates that lawyers have engaged in sharp practices, that greed and unethical conduct are not problems new under the sun, and that such outsized characters can besmirch the reputation of the profession, as a matter of history as much as they might do today. Reassured that the human condition has not fundamentally changed, you can at least take comfort in some improvements in the profession from the time of Hummel and Howe.

The notorious law firm of Hummel and Howe reached its height during the Gilded Age when William Howe won acquittals for gangsters and con men over and over again as a result of his courtroom oratory. With chapter headings like "The Ghastly Trunk" and "Three Shots and an Affidavit", you know you are in for a lively and fun read. Murphy's prose adopts a breezy sort of slang that echoes the language of the time, and keeps the story moving. At one point she says, "Besides, New York was lousy with

do-gooders and civic worthies and labor activists and anti-vice campaigners galore, of course…. Howe & Hummel had nothing to do with these matters. But in the decades that nursed the impulses that would bloom into what became known as the Progressive Era, they couldn't help being drawn into a few causes." With that introduction, you can't help but be interested in hearing more.

Howe and Hummel defended abortionists, mobsters, and those accused of murder. The accounts of their legal maneuverings, trial examinations, and jury arguments are fascinating. And the story of the times could not be more interesting. Like watching an old movie, reading this book is pure delight. Whether for beach or airport reading, you can't go wrong with this one.



Stu's Tech Talk

by Stuart Friedman

Five Tips to Make You More Productive in 2012

If your New Years resolutions included being more productive in 2012, it's not too late to try these five tips to make you more productive in 2012 at work:

1. Track your appellate cases with ChangeDetection.*com.*

I learned about a wonderful free service called changedetection.com. You can tell it to monitor most webpages and have the website send you an alert when the status of a deep linked page changes. With five minutes of tinkering I discovered that you could make this work with the Court of Appeals docketing computer. Here is how it works:

- Sign up for a free account at changedetection.com, give it your preferred contact email, and remain logged in.
- From a separate window or tab, go the Court of Appeals website and go to their docketing module.
- Enter the file number of the case you want to track. When the case comes up, copy the weblink from the window.
- Now, jump back to changedetection.com and click on the "monitor page" under the account settings.
- Paste the URL into the Page Address Window, and click "next."
- On the next screen, assign a name to your alert, e.g. "smith appeal."
- Now click on the "create" button.

That is all there is to it. When the Court of Appeals updates its public web entries, you will receive an alert. I have also used this service to track prisoner locations on the Department of Corrections website which is really helpful when dealing with incarcerated defendants.

Changedetection.com won't work with services which require you to login, complete a "captcha," or which do not work with a static URL for the page. Because of this, it won't work with federal courts, or the Oakland County Circuit Court website. I'm keeping a list of Courts where it works. If you discover other court websites that it works with or doesn't work with, drop me an email at *stu@crimapp.com*. I will post the list online to the Appellate Practice Section as it develops.

2. Enhanced cutting and pasting into your briefs.

Citegenie (*http://www.citegenie.com/*) is a $15 application that makes it child's play to cut and paste from Lexis or Westlaw (using the Firefox browser) into your Word or WordPerfect document. Citegenie works on both Windows and Macintosh computers.

- Once downloaded, CiteGenie installs into the Firefox Browser. You then enter your activation code, select the citation format you want to use and you are ready to start working;
- Login into Westlaw or Lexis and find the case or statute that you want to cut and paste from;
- Block the passage and right click with your mouse (control and tap on a Macintosh trackpad). Now select the Copy with CiteGenie option now the flyout.
- Switch to your wordprocessing program and select the paste button. That's it. You are done.

CiteGenie can also cut and paste from regular webpages. When you cut and paste from say a Wikipedia page, it will paste in the quote, the web URL, and the last date visited information in appropriate format for state or federal court.

3. Use Westlaw on Your iPad.

Even though it is the most expensive legal research service, I find that I get increasingly frustrated with the way that Westlaw

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"nickels and dimes" you on the small stuff. My latest beef with Westlaw is the fact that it doesn't work with the iPad *unless you upgrade to the more expensive Westlaw Plus service.* That is one fee I just will not pay on principle. Here is my work around.

In the Apple App Store for iPad, there is a $0.99 program called the "Atomic Browser." It allows you to switch settings so the program will identify itself to a website as Internet Explorer. Change the setting and it works perfectly with Westlaw. If you can't see the tool bar on the bottom of the screen, simply scroll up with two fingers and it will appear.

4. Run a Real Copy of Microsoft Word on you iPad.

I love the iPad. It has liberated me from carrying a laptop most of the time. My one complaint is that the Microsoft Office substitutes that I have tried on the iPad are just not good enough for an appellate lawyer. They are fine for writing a letter or even a simple report, but they are not heavy weight. CloudOn. (*http://site.cloudon.com/*) brings full copy of Microsoft Windows to the iPad.

CloudOn works by running copies of Office on their server and an application on your iPad designed to port over this one function to your iPad. The App resizes the icons, streamlines the screen, and creates a very attractive and easy to use display on your iPad. Using an external Bluetooth keyboard, I was easily able to edit an appellate brief and even mark citations for Table of Authority generation.

The program is exceptionally fast, but requires a data connection. More importantly, it requires that your documents be stored on a DropBox web based storage account. Dropbox gives away a free account containing 2 gigabytes of data storage, but larger accounts are sold on a pay basis. 100 gigabytes of storage on Dropbox runs roughly $200 per year. CloudOn is currently free, but will probably turn into a pay service in the near future.

Since I was already a DropBox customer, this solution worked for me, but might prove problematic to individuals working in larger corporations or organizations with strict policies against placing corporate or legal data on outside servers. If you are in such an organization, check with your IT department.

5. Run Your Own Work Computer on Your IPad.

If you need your own computer or can't place your data on Dropbox for reasons outlined above gotomypc.com and logmein.com have solutions to you. Both solutions allow you to run your entire computer on your iPad.

While the solution may theoretically sound better than the CloudOn solution discussed in the previous section, this solution is more appropriate for getting a quick piece of data from the machine than long-term work. Squeezing a 25 inch screen onto a 10 inch iPad can be painful. If you display the entire screen, you are forced to reduce the size of the screen beyond what most 18 year-olds can comfortably read, let alone what this 50 year-old can easily read.

While I have found that the GotoMyPc feature set is slightly more powerful, my nod goes to LogMeIn because the application works with LogMeIn's free service. With GotoMyPc, the application is free, but you must pay a monthly fee for the service. With LogMeIn, you pay a $25 one-time fee for the application and you can use the basic service for free for life.

LogMeIn's basic service gives you full access to your computer, but blocks you from transferring files to your iPad or remote computer. You can still email the files through your email program or copy the files to a service like DropBox so this is not a big deal for most individuals.

In my experience these tips dramatically improve my productivity. Hopefully they will improve your productivity as well.