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From the Chair

by Liisa R. Speaker

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In this Issue

As my chair year approaches the finish line, I am reflecting on what our Section has accomplished this year. The year has not been a marathon but a relay race, where we have passed the baton by collaborating with other sections on numerous projects. In retrospect, coordinating our efforts with other sections has been the most challenging aspect of this year, but also the most rewarding. It has been challenging because working with other sections means we have had to coordinate that many more schedules to make a meeting happen or to prepare a proposal. It has been rewarding because other organization have offered different viewpoints that have sharpened what our Section presents to the bench and bar.

The following projects are ones on which we have collaborated with other Sections:

Delayed application rule. The Appellate Practice Section is continuing to work with the State Bar of Michigan, the State Appellate Defender's Office, the Family Law Section, the Litigation Section, and the Criminal Law Section on proposing a court rule revision to change the time period for a delayed application to the Court of Appeals from the current 6 month period to 12 months. The Appellate Practice Section voted in favor of the rule change at our April 20, 2012 council meeting. The proposal will be submitted to the Supreme Court before the Section's annual meeting in September.

Final order rule. The Appellate Practice Section is working with the Family Law Section on a proposal to modify the final order rule for domestic relations matters. The rule proposal would help clarify what constitutes a final order in a custody case. The proposed rule change will be presented to the Council for the Appellate Practice Section sometime this summer.

Probate Appeal rules. The Appellate Practice Section coordinated with the Probate and Estate Planning Section, the Court of Appeals, and the Michigan Probate Judges Association to work on revising a pending ADM file regarding probate appeals. The Appellate Practice voted in favor of ADM 2011-30 as revised through the collaborations with these other organizations. The ADM, as revised, would make almost all orders of the probate court appealable to the Court of

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Appeals. I testified at the Supreme Court's administrative hearing on this topic on May 16, 2012, along with representatives of the Probate Section and Michigan Probate Judges Association. Our Section continues to collaborate with these other groups over the summer in developing a response to the Supreme Court's jurisdictional questions posed at the administrative hearing.

Third Party Publication. As an extension of last year's annual meeting panel discussion on unpublished opinions, the Appellate Practice Section has been exploring a possible rule change to allow a third party (such as a State Bar section) to request publication of an unpublished opinion. The Appellate Practice Section met with the Court of Appeals Rules Committee to discuss the proposal, and is also collaborating with the Family Law Section and the Probate and Estate Planning Section. The Appellate Practice Section has not taken a formal position on the proposal and probably will not formally address the topic until the next fiscal year.

Upcoming Annual Meeting. In keeping with what turned out to be the theme for the Section's endeavors this year (that is, collaboration), our incoming chair Phil DeRosier has been coordinating with the Litigation Section for a joint annual meeting program on September 20, 2012. The topic of the program is issue preservation and will include esteemed panelists such as Judge Elizabeth Gleicher, Judge Amy Ronayne Krause, Linda Garbarino, and Mark Granzotto. The panel discussion will begin at 2 p.m., immediately following the Section's business meeting, which starts at 1 p.m.

Appellate Practice Section Business Meeting & Program

The Section's Business Meeting & Program is offered in conjunction with the State Bar's Annual Meeting.

Thursday, September 20, 2012 ● DeVos Place, Grand Rapids

Business Meeting: 1:00–1:45 p.m.
Program: 2:00–4:00 p.m. (with the Litigation Section)

Registration: While there is no cost to attend, registration is requested for proper facilities planning (http://e.michbar.org).

Preservation and Presentation of Issues on Appeal
A panel of Court of Appeals judges and appellate specialists will discuss how to ensure that issues are raised and preserved in the trial court and properly presented on appeal.

- *Hon. Elizabeth Gleicher, Michigan Court of Appeals, Detroit*
- *Hon. Amy Ronayne Krause, Michigan Court of Appeals, Lansing*
- *Linda Garbarino, Tanoury Nauts McKinney & Garbarino PLLC, Detroit*
- *Mark Granzotto, Mark Granzotto PC, Royal Oak*

Michigan's Changed Appellate Abuse of Discretion Standard

Part II: The Old Standard, Its Renewal, and Its Decline

by Howard Yale Lederman

Welcome to this series, Part II. In Part I, we focused on the almost insurmountable *Spalding v Spalding* standard[1], its sudden emergence, and three Michigan appellate decisions reversing lower court decisions for abuse of discretion, but refusing to apply the *Spalding* standard. Their refusal to use *Spalding* arose from the standard's problems themselves. In Part II, we will look at these problems.

To almost all Michigan litigators, what kind of abuse of discretion standard prevails does matter. Michigan appellate courts review many different kinds of trial court decisions for abuse of discretion. Examples include whether to permit pleading amendments,[2] which discovery sanctions amounts to impose,[3] which case evaluation sanctions amounts to impose,[4] whether to uphold default entry or default judgment,[5] which hearing and trial evidence to admit or exclude,[6] and whether to reconsider an order.[7] If the abuse of discretion standard practically compels appellate courts to uphold lower court discretionary decisions, negative outcomes from appeals from such decisions are near certainties. But if the abuse of discretion standard permits appellate courts some latitude in reviewing and deciding these appeals, positive outcomes are likelier. So, the kind of abuse of discretion standard in place makes a big difference.

Spalding's Slow Disintegration-Criminal Appeals Repudiation

From outward appearances, the *Spalding* abuse of discretion standard was strong and predominant from 1959 to 2003. Numerous appellate decisions approved and cited it.[8] But *Spalding* exemplified ineffective judicial problem solving. In trying to solve one problem, the Court created others. The new problems were worse than the old. Soon after 1959, *Spalding's* problems appeared and began growing. The first problem was overextension to criminal cases.

In *People v Charles O Williams,* 386 Mich 565, 573; 194 NW2d 337 (1972), *People v Merritt,* 396 Mich 67, 80-81; 238 NW2d 31 (1976), and *People v Wilson,* 397 Mich 76, 81; 243 NW2d 257 (1976), the Court recognized this overextension and repudiated *Spalding* for criminal cases. In *Charles O Williams,* on the scheduled trial date, the defendant moved for substitution of counsel. The defendant claimed that his defense counsel had not tried to obtain alibi witnesses, because defense counsel was sure that the defendant would plead to the charges, felonious assault and armed robbery. Characterizing the motion as a delaying tactic, the trial court denied the motion. The Michigan Court of Appeals affirmed.

On appeal, the Court quoted the *Spalding* standard. Then, the Court refused to apply it: **"While the [*Spalding*] rule…is generally the correct rule to apply, a somewhat stricter standard should be observed in criminal cases[,] where loss of freedom by incarceration is often the penalty that a convicted defendant will suffer."**[9]

Based on the defendant's assertion of the important constitutional right to counsel, his legitimate reason for asserting this right, and the irreconcilable differences between the defendant and the defense counsel, the defendant's non-negligence, and the trial court's incorrect position that the defendant had caused several trial adjournments, the Court reversed. It analyzed the case under a more expansive, but undefined, abuse of discretion standard, not *Spalding.* Given the criminal case context and factual situation, the Court concluded that in denying the motion, the trial court had abused its discretion.[10]

Therefore, in *Charles O. Williams*, *Merritt,* and *Wilson,* the Court restricted *Spalding* severely. But the Court never defined a criminal appeals abuse of discretion standard. Later, the Michigan Court of Appeals described it as a weighing of competing interests standard.[11] However, this description did not define the standard. For noncriminal appeals, the Court reaffirmed *Spalding.* But far from entrenching *Spalding* as the unchallenged noncriminal abuse of discretion standard, *Charles O Williams, Merritt,* and *Wilson* opened the door to more challenges.

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Spalding's Slow Disintegration- Civil Case Challenges and Alternative Standards

In 1981, the first major challenge to *Spalding* occurred. Ironically, the attack occurred in a criminal appeal. Justice Levin called on the Court to repudiate and overrule *Spalding:*

"[I]n in the endeavor to send an unmistakably clear message[,] the Court raised the standard of review to an apparently insurmountable height."[12]

"*Spalding's* hyperbolic statement leaves the impression that a judge will be reversed only if it can be found that he acted egregiously—the result evidencing `perversity of will,' the `defiance [of judgment],' `passion or bias.' To repeatedly invoke this overstatement leads lawyers and judges to believe that a discretionary decision is virtually immune from review and leads appellate courts to view any challenge to such a decision as essentially unfounded. Repetition of this statement is simplistic and misleading, and should not be indulged in by this Court or any other."[13]

He urged the Court to adopt the U.S. Supreme Court's *Langnes* abuse of discretion standard as "[a] more balanced view of judicial discretion[:]

"`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.'"[14]

Though vague, this standard emerged as the main *Spalding* alternative. In the mid-1980s, another justice and several Michigan Court of Appeals judges approved or adopted Justice Levin's position. Concurring in *Bosak v Hutchinson,* Justice Riley quoted Justice Levin's *Talley* attack with apparent approval.[15] But then in *Marrs,* Justice Riley called the *Spalding* standard "essentially intact."[16] The *Martin* Court recognized the contradiction.[17] Meanwhile, the Michigan Court of Appeals proved more receptive to Justice Levin's position, and several judges supported it.[18] The *Stamp* Court highlighted the difficulties in using *Spalding.*[19] By the late 1980s, the Michigan Supreme Court and the Michigan Court of Appeals recognized a Michigan Supreme Court split on whether to repudiate and overrule *Spalding.*[20] But the Michigan Supreme Court left its resolution "for another day."[21]

After reviewing many different abuse of discretion standards for trial court decisions granting or denying a new trial, the *Arrington* Panel concluded that at least in this context, the *Bosak* Court had adopted Justice Levin's *Talley* concurrence standard as the specific abuse of discretion standard. This standard is:

> "`Thus[,] when a question of abuse of discretion is properly framed, it is incumbent upon a reviewing court to engage in an in-depth analysis of the record on appeal. This Court has, in spite of references to *Spalding, [supra],* continued to give full-fledged review to discretionary decisions[,] by carefully weighing the various rights and considerations involved in each type of discretionary decisions.'"[22]

Since the *Bosak* standard was the Michigan Supreme Court's most recent abuse of discretion "address[ing] the review of discretionary decisions," the *Arrington* Panel used that standard to review the trial court's new trial decision.[23] In doing so, the *Arrington* Panel rejected *Spalding.* From 1989 to 2006, in their treatment of *Spalding,* Michigan Court of Appeals panels and judges conflicted, and many cited it only in name.[24]

The next step was the Michigan Supreme Court's outright refusal to apply *Spalding* in favor of results-oriented abuse of discretion decisions. The most notorious was *People v Fultz.*[25] There, the state charged Fultz "with four counts of first-degree criminal sexual conduct…."[26] The prosecutor petitioned the probate court for an order waiving "jurisdiction over respondent to the circuit court for trial as an adult."[27] The prosecutor claimed that in late October or early November 1984, just after turning 16, the respondent had sexually assaulted his 7-year-old niece. At a phase I probable cause hearing, "the probate court found probable cause to believe that the respondent had committed the charged crimes and scheduled a phase II hearing to determine whether respondent should be treated as a juvenile or adult offender."[28] The complainant testified there that "she did not tell anyone about [the sexual assault] until 1991[,] because respondent threatened her. Respondent denied ever touching the complainant in an inappropriate or sexual manner."[29]

At the phase II hearing, the probate court heard a juvenile caseworker's testimony that the juvenile rehabilitation system was not equipped to address the needs of 23-year-old offenders and similar testimony from a Michigan Department of Social Services caseworker. The probate court also heard the respondent's testimony that he was married and had three daughters, two born to his present wife, was unemployed, but looking for a job, denied sexually assaulting the complainant, had no criminal record, and had never received sex offenders counseling. The probate court heard his wife's testimony that "he is a good father and has never acted inappropriately with his daughters."[30]

After evaluating all MCR 5.950(B)(2)(c) factors applicable to juvenile waiver decisions, "the probate court declined to waive probate court jurisdiction and dismissed all charges against the respondent…..The probate court noted that eight years had passed since the alleged offense[,] and that respondent had neither displayed a pattern of repetitive sexual misconduct nor been charged with any other crime."[31] These factors overrode the serious charged crime, Criminal Sexual Conduct I. The probate court concluded that respondent was not a public safety threat.

When the prosecutor appealed to the circuit court, that court "noted that it would have given greater weight to the seriousness of the offense, but…[found] no abuse of discretion."[32] The Michigan Court of Appeals adopted the abuse of discretion standard for probate court decisions refusing to waive jurisdiction over minors charged with crimes to the circuit court. The Court found no abuse of discretion. The Court explained that the lower courts' factual findings were not clearly erroneous. Thus, the Court concluded that the lower courts had not abused their discretion.

Dissenting, Judge Smolenski concurred with adoption of the abuse of discretion standard. But he concluded that the lower courts had abused their discretion. He noted that the probate court had found probable cause to believe that the respondent had committed the crime. He noted that the respondent "was ineligible for placement at any juvenile facility because of his age. The complainant complained that she had kept silent about respondent's alleged sexual assaults[,] because respondent had threatened her."[33] Judge Smolenski would hold that the probate court had abused its discretion, because it had not weighed the charged crime's seriousness, the public welfare's best interest, or public safety enough, while overweighing respondent's eight crime-free years.

Based on Judge Smolenski's holding and reasoning, the Michigan Supreme Court reversed and ordered the probate court to waive jurisdiction over the respondent to the circuit court.[34]

Justices Levin and Cavanagh dissented. They would hold that the probate court had not abused its discretion, because "the probate judge [had] carefully and thoughtfully reviewed all the criteria."[35] The probate court had analyzed each MCR 5.950(B)(2)(c) factor, "decid[ed] if the factor favored waiver, and [determined] how much weight to give each factor. She concluded that Fultz had not displayed a pattern of repetitive sexual misconduct, nor did he represent a threat to public safety. While recognizing the seriousness of the charges facing Fultz, she determined that the other evidence reduced [that factor's] weight…."[36] She "issued a detailed opinion stating the facts that she had found to be relevant to each criterion, whether each criterion favored waiver or retention of jurisdiction, and the relative weight she thought should be accorded each criterion[.]"[37] Because of this detailed and reasoned analysis, the probate court's decision to decline to waive jurisdiction over respondent was far from an abuse of discretion.

Justices Levin and Cavanagh further observed that not even Judge Smolenski had found any probate court factual finding clearly erroneous. Thus, the following probate court decisions and findings were uncontested: "(1) Fultz, at the time of the phase II hearing, was a mentally mature and responsible father and husband; (2) he had no criminal record, either before the alleged incident or afterward; (3) he had not engaged in a repetitive pattern of criminal sexual conduct."[38]

After citing the *Spalding* standard, Justices Levin and Cavanagh continued: "[I]t is impossible to categorize the probate judge's decision in this case as `so palpably and grossly violative of fact and logic that it evidences…[a] perversity of will.' The probate judge provided reasons based on the evidence amply justifying her conclusions. The opinion is articulate and well-reasoned. The probate judge's decision is not in defiance of reason."[39]

Lastly, Justices Levin and Cavanagh emphasized that disagreement with a lower court's decision does not make that decision an abuse of discretion: "When this Court adopted an abuse of discretion standard, it obligated itself to accept some results with which it and other reviewing judges and courts might disagree had the justices or other appellate judges been sitting at the probate court level."[40] This case exemplified such a result. They contended that "review for abuse of discretion should focus on the judge's reasoning[,] rather than on the conclusion reached."[41] Since the probate court's reasons were sound and sufficient, and since its factual findings were not clearly erroneous, any abuse of discretion did not exist.

The *Fultz* majority's failure to apply *Spalding* or address the dissenting justices' analysis makes this case notorious. *Fultz* is a prime example of a negative result-oriented decision. *Fultz* is a prime example of a court pronouncing an appellate review standard and refusing to follow it. Even assuming that Judge Smolenski's factors analysis was correct, the *Fultz* majority's failure to apply *Spalding,* or modify or overrule it in favor of a better standard, is unjustified. The *Fultz* majority never explained why, under *Spalding,* the probate court abused its discretion. While explaining his disagreement with the probate court's decision, Judge Smolenski never explained why it showed "perversity of will" or "defiance of reason." Therefore, the *Fultz* majority, not the *Fultz* dissenters, the Michigan Court of Appeals majority or the circuit court, failed to apply the governing review standard and thus abused its discretion.

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Appellate Abuse
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Spalding's Apparent New Lease on Life

From 1999 to 2003, the Michigan Supreme Court apparently breathed new life into *Spalding.* In *Alken-Ziegler,*[42] a unanimous Court quoted and reaffirmed *Spalding* and *Scripps.* Though *Alken-Ziegler* involved the issue of whether to uphold a trial court's default judgment, the Court's decision's impact went far beyond this issue. Echoing the *Fultz* dissenters, the Court declared: "An abuse of discretion involves far more than a difference in judicial opinion."[43] The Court emphasized: "This Court historically has cautioned appellate courts not to substitute their judgment in matters falling within the discretion of the trial court, and has insisted upon deference to the trial court in such matters."[44] Thus, the Court reaffirmed and reemphasized *Spalding,* slammed the door on any *Spalding* challenges and challengers, and sent a clear message to the Michigan Court of Appeals: On appeals from discretionary decisions, the strong rule is to uphold the trial court. Therefore, the Michigan Supreme Court gave *Spalding* a new lease on life.

Based on *Alken-Ziegler, Spalding's* resurgence and reign for at least 20 or 25 years would be a safe prediction. Likewise, substantial sanctions for attorneys challenging *Spalding* would be safe predictions. But one Michigan Supreme Court decision foretold a possible shift: In *Bean v Directions, Unlimited,*[45] the Court majority, in responding to the dissent's position "that the record supports the grant of a new trial," declared that "this…merely leads to the conclusion that if the trial court had granted a new trial, this too, would have been within the trial court's discretion."[46] In denying the new trial motion, the trial court acted within its discretion. In reversing the trial court's decision, the Michigan Court of Appeals violated *Spalding.* While outwardly endorsing and applying *Spalding,* the majority's declaration was open to another reading. Within a year, this reading would appear, and within four years, it would predominate.

In Part III, we will see how these happened.

Endnotes

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

2 *Eg, Weymers v Khera,* 454 Mich 639, 655, 666-667; 563 NW2d 647 (1997).

3 *Eg,Dean v Tucker,* 182 Mich App 27, 82; 451 NW2d 571 (1990).

4 *Eg, Ivezaj v ACIA,* 275 Mich App 349, 356; 737 NW2d 807 (2007).

5 *Eg, Saffian v Simmons,* 477 Mich 8, 9; 727 NW2d 132 (2007).

6 *Eg, People v Gursky,* 486 Mich 596, 606; 786 NW2d 579 (2010).

7 *Eg, In Re Beglinger Trust,* 221 Mich App 273, 279; 561 NW2d 130 (1997).

8 *Eg, Kurtz v Faygo Beverages, Inc,* 466 Mich 186, 193; 644 NW2d 710 (2002), *Alken-Ziegler, Inc v Waterbury Headers Corp,* 461 Mich 219; 600 NW2d 638 (1999) (unanimous decision), *Dacon v Transue,* 441 Mich 315, 328-329; 490 NW2d 369 (1992), *Poet v Traverse City Osteopathic Hospital,* 433 Mich 228, 251; 445 NW2d 115 (1989), *Marrs v Board of Medicine,* 422 Mich 688, 694; 375 NW2d 321 (1985), *Wendel v Swanberg,* 384 Mich 468, 475-476; 185 NW2d 348 (1971).

9 *Charles O Williams,* 386 Mich 565, 573 (my emphasis).

10 *Accord, Merritt,* 396 Mich 67, 74-82, *Wilson,* 397 Mich 76, 77-81 (both concurring with and applying *Charles O Williams'* conclusions and reasoning).

11 *People v Martin,* 147 Mich App 297, 300; 382 NW2d 726 (1985). *See also, Stamp v Hagerman,* 181 Mich App 332, 340; 448 NW2d 849 (1989) (recognizing *Martin's* definition).

12 *People v Talley,* 410 Mich 378, 397-, 398; 301 NW2d 809 (1981) (Levin, J, concurring).

13 *Talley,* 410 Mich 378, 396-397, 399-400 (Levin, J, concurring).

14 *Id* at 398 (Levin, J, concurring), quoting *Langnes v Green,* 282 US 531, 541; 51 S Ct 243; 75 L Ed 520 (1931).

15 *Bosak v Hutchinson,* 422 Mich 712, 737; 375 NW2d 333 (1985) (Riley, J, concurring).

16 *Marrs,* 422 Mich 688, 694 (Riley, J, concurring).

17 *Martin,* 147 Mich App 297, 300 FN2.

18 *Guzowski v Detroit Racing Association,* 130 Mich App 322, 329-332; 343 NW2d 536 (1983), *People v Holmes,* 132 Mich App 730, 750; 349 NW2d 230 (1984) (Kelly, J, concurring), *Muntean v Detroit,* 143 Mich App 500, 508, 509; 372 NW2d 348 (1985).

19 *Stamp,* 181 Mich App 332, 340.

20 *Poet,* 433 Mich 228, 253, *Eyde v Eyde,* 172 Mich App 49,

54 FN1; 431 NW2d 459 (1988), *lv den* 432 NW2d 837 (1989), *Stamp,* 181 Mich App 332, 340.

21 *Poet,* 433 Mich 228, 253.

22 *Arrington,* 196 Mich App 544, 558, quoting *Bosak,* 422 Mich 712, 737 (Riley, J), quoting *Talley,* 410 Mich 378, 399 (Levin, J, concurring).

23 *Arrington,* 196 Mich App 544, 558.

24 *Compare Farleigh v Amalgamated Transit Union, Local 1251,* 199 Mich App 631, 636-637; 502 NW2d 371 (1993) (though citing *Spalding,* applying it minimally), *Lopez v GMC,* 219 Mich App 88, 112-117; 555 NW2d 875 (1996) (Bandstra, J, concurring) (though citing *Spalding,* applying it minimally), *Marinelli v Provident Life & Accident Insurance Co,* 242 Mich App 255, 272-276; 617 NW2d 777 (2000) (Markey, J, concurring in part & dissenting in part), *app dis* 630 NW2d 626 (2001) (citing and applying *Spalding*), *Elia v Hazen,* 242 Mich App 374, 377; 619 NW2d 1 (2000), *lv den* 465 Mich 870; 634 NW2d 357 (2001) (citing, but not applying *Spalding*), *Gates v Gates,* 256 Mich App 420, 442; 664 NW2d 231 (2003) (Sawyer, J, concurring in part & dissenting in part), *lv den* 469 Mich 980; 673 NW2d 757 (2003) (citing and applying *Spalding*), *Mays v Schell,* 268 Mich App 432, 435-436; 706 NW2d 892 (2005), *revd* 474 Mich 1109; 711 NW2d 381 (2006) (though citing *Spalding* standard, applying it minimally), *Id* at 438-439 (Cooper, J, dissenting) (citing and applying *Spalding* and *Alken-Ziegler*).

25 *People v Fultz,* 453 Mich 937; 554 NW2d 725 (1996), *reversing People v Fultz,* 211 Mich App 299; 535 NW2d 590 (1995).

26 *Fultz,* 211 Mich App 299, 301.

27 *Id.*

28 *Id* at 302.

29 *Id.*

30 *Id.*

31 *Id* at 302-303.

32 *Id* at 303.

33 *Id* at 312 (Smolenski, J, dissenting).

34 *Fultz,* 453 Mich 937.

35 *Id* at 940 (Levin & Cavanagh, JJ, dissenting).

36 *Id* at 941 (Levin & Cavanaugh, JJ, dissenting).

37 *Id* at 941 (Levin & Cavanaugh, JJ, dissenting).

38 *Id* at 943 (Levin & Cavanagh, JJ, dissenting).

39 *Id* at 944 (Levin & Cavanagh, JJ, dissenting).

40 *Id* at 943 (Levin & Cavanagh, JJ, dissenting).

41 *Id* at 943 (Levin & Cavanagh, JJ, dissenting).

42 461 Mich 219.

43 *Id* at 227, citing *Williams v Hofley Mfg Co,* 430 Mich 603, 619; 424 NW2d 278 (1988).

44 *Alken-Ziegler,* 461 Mich 219, 228.

45 *Bean v Directions, Unlimited,* 462 Mich 24; 609 NW2d 567 (2002).

46 *Id* at 34-35.

Note

In June 2012, the Court of Appeals posted to its website an update to the Internal Operating Procedures (IOPs). The only change was to IOP 7.211(C)-1, regarding a Motion to Appear. That IOP was revised to reflect the amendments made to MCR 8.126 by ADM File NO. 2004-08 (April 5, 2011).

Stu's Tech Talk

by Stuart Friedman

The Empire Strikes Back: Microsoft's Return to the Stage

For the last two years, it seems like Microsoft has been losing its competitive edge. Microsoft has done nothing wrong, but its attempt to move from its core business of server software, Windows Operating System, and Microsoft Office has not been successful. It has withdrawn its unsuccessful Zune line of MP3 players, and never reached critical marketshare with its Windows Mobile 6 and 6.5 phones. Meanwhile, Apple has become the largest computer vendor in the world overtaking Microsoft in value. Similarly, Google has made a number of inroads in the market. For a long time, it has seemed like it was "out of the game." Microsoft's brand new releases show that nothing could be further from the truth.

Windows Mobile Phone 8

Earlier this year, Microsoft launched its Windows Mobile phone 7 to critical success. Windows Mobile 7 is virtually a complete rewrite of its software. Microsoft spent far more time undertaking usability testing than normal and created a operating system which delivered the maximum amount of information to the user on the start screen.[1] It provided deep integration with its ecosystem and formed a strategic alliance with wounded mobile giant Nokia to release a series of competitive phones which are holding their own with Android and the iPhone. Microsoft also worked to insure that third party software developers were developing software for this new platform. According to Microsoft, there are now more than 100,000 apps in the Windows Marketplace.[2] In comparison, Apple claims 500,000 apps.[3] Surprisingly, Google now claims more applications for their phones than Apple. According to one story, there are now more than 700,000 Android applications. [4] While Microsoft is clearly in third place, most of the core applications are now represented for this platform.[5] Microsoft is clearly back in the game.

Microsoft Surface Tablets

Microsoft followed this relaunch with the release of its new Surface line of tablets, Windows 8, and Office 2013 which move forward with this new interface and approach. The interface is designed to maintain continuity across multiple devices and to drive people back to the revitalized Microsoft ecosystem.

Microsoft's tablet launch is particularly interesting. [6] The surface is an iPad competitor that comes with a keyboard built into the case and which can run a nearly full version of Microsoft Office on its basic version. Its advanced version runs a full copy of Windows 2008 and is effectively a laptop. It can run the full office suite.[7] The basic version of the Surface is called Surface RT; the advanced version will be called Surface Pro.

The Surface RT is fine for casual computing. It runs an ARM-based NVidia Tegra 3. This processor will give people longer battery life than the i5 based Surface Pro consumes. While it will run a respectable copy of Microsoft Office, it will not run many applications that the lawyer will be running on his/her desktop. Like the iPad, you will be restricted to Applications available in their application store (The "Windows Store")

The Pro has an optimized version of the Intel i5 processor and will run a full version of Microsoft Windows 8. It can therefore run every application that is run on a desktop computer.[8]

Like the competing iPad, this device is targeted at the former Netbook market. It is a small and light device which can handle computing duties when someone is away from their desk. The Surface is not designed to be a desktop replacement, but fits neatly in a briefcase or purse and can handle most computing needs outside the office.

Reviewers who have played with beta versions of the Surface believe that users with the RT will be more productive than those with the current generation of iPads. The Surface RT has computer style multitasking and allows you open two separate applications on the same screen.

The Surface comes by default with a membrane keyboard which is helpful for email and light word processing tasks. For a few dollars (and ounces) more Microsoft has a thin mechanical keyboard which would be helpful for more typing intensive jobs.[9] This keyboard reminds me very much of the Logitech ultrathin keyboard for the Apple iPad which has become my new best friend.[10] During the Microsoft keynote on the Surface, [11] Microsoft employees promised that this keyboard had an outstanding feel consistent with a true laptop keyboard. My experience with the Logitech competitive keyboard for the iPad confirms that such a typing experience is possible in a small unit. Both keyboards are magnetically

mounted and can be detached when the unit is being used in tablet mode.

A fully equipped Surface Pro should be able to compete with the new Ultrabook lines of computers and reduce by half the number of computing devices many of us take on trips. While I have generally reduced my travels to carrying only an iPad, my informal observation of business travelers indicate that most of them are now travelling with both an iPad for entertainment (and some casual computing such as notetaking in meetings) and a notebook computer to get serious work done on the road.

Microsoft has chosen a different set of feature selections than Apple. A Surface comes with a USB port and you can connect traditional devices (including thumb drives to the surface). Conversely, a Surface does not come with a cellular modem. Users wishing to connect to cellular data networks will need an external modem. The Surface RT will weigh the same as an iPad and will be competitively priced. The Surface Pro will be slightly heavier and is rumored to start at upward of $1,000 placing it in competition with the ultrabok line of computers.

I have owned an iPad since the day that Apple first released it to the general public in May of 2010.[12] During the interim, I have watched the competing offerings. This is the first competing tablet which has seriously tempted me.

Windows 8

On the same day that Microsoft announced the Surface line of tablets, they also officially announced their new operating System – Microsoft Windows 8. Beta versions of this product have been available for some time.[13] Windows 8 continues the new interface across its platform. Windows 8 is the most significant change in the Windows interface since Windows 95 was released nearly twenty years ago. While it will be possible to emulate the old interface, the new interface replaces the desktop with a smarthub which is designed to let a user keep track of news developments on the fly. Like Apple's new Mountain Lion Operating System, Windows 8 will introduce side panes of information which can be swiped on and off of the desktop. Individuals upgrading old desktops to this new operating system are advised to replace their mice with trackpads optimized for Windows 8 to take advantage of the full experience. Upgrades to Windows 8 will run $39 for Windows 7, Vista, and XP users. While the official requirements for the final version of the program are not available, the public beta version currently requires 1 gigahertz or faster processor, 1 gigabyte of ram, 16 gigabytes for the 32 bit version (20gbs for the 64 bit version) a graphics card which supports DirectX 9 graphics device, a touch device capable of handling multitouch, and a screen resolution of at least 1024 by 768. These requirements are very modest by modern standards. In fact, some machines which fall below the minimum standards for Windows 7 will be able to run Windows 8.

Office 2013

With Windows 8, Microsoft has released a new version of its venerable Office Program. This improvement, while significant, does not appear as "huge" as the other improvements.

Office 2013 offers tight integration with Microsoft's SkyDrive cloud service. Skydrive offers a free 7GBs of cloud storage for documents and storage. Additional storage is available for purchase. On the corporate level, Office 2013 provides even better integration with its Sharepoint technology. For businesses interested in outsourcing IT function, Office 2013 also offers tight integration with Microsoft's cloud based Office 365 system.

Microsoft has also improved the user interface on Office 2013 to make it more consistent with the Windows 8 experience. Based on my brief experience with the public preview version of Windows 8, people will not have the same frustration that they did adapting to prior versions of Office. Microsoft has learned to take smaller steps in transforming its interface than it did when it released its Office 2007 upgrade.

Microsoft now provides for remote editing of documents through any web browser for free. Owners of Office 2013 get free access to the light version of Office for the web for free. This version can share custom dictionaries, templates, and other users settings with the computer version of the program. This certainly makes the remote version feel more personal.

This new version also includes the "Live Layout" feature which helps with graphic placement. While I found the feature interesting, it probably is less helpful in law than other areas of business

Conclusion

Microsoft has proven than it hasn't lost its ability to be competitive in the modern market. While its delay in releasing critical products have given competitors a toe-hold in areas of computing previously controlled by Microsoft, it is clear that they are not out of the game.

Endnotes

1 This interface was originally called Metro, but was recently "depbranded" by Microsoft . Daniel Ionescu, PCWorld, *Microsoft Looks to Drop Metro Brand | PCWorld*, http://www.pcworld.com/article/260298/microsoft_looks_to_drop_metro_brand.html (last visited Aug. 5, 2012).

2 Windows Phone | Cell Phones, Mobile Downloads, Mobile Apps, and More | Windows Phone 7, http://www.microsoft.com/windowsphone/en-us/default.aspx (last visited Aug. 5, 2012).

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Tech Talk
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3 Apple - iPhone 4S - Find over 500,000 apps on the App Store., http://www.apple.com/iphone/built-in-apps/app-store.html (last visited Aug. 5, 2012).

4 Brad Spirrison: Comparing the First Four Years of the App Store to the Early Commercial Web, http://www.huffingtonpost.com/brad-spirrison/app-store_b_1662300.html (last visited Aug. 5, 2012).

5 Blackberry is in fourth place with 60,000 applications. Adam Zeis, *BlackBerry App World Stats: Over 2 billion downloads; 60,000 apps available | CrackBerry.com*, http://crackberry.com/blackberry-app-world-stats-devcon-europe (last visited Aug. 5, 2012).

6 Surface by Microsoft, http://www.microsoft.com/surface/en/us/default.aspx (last visited Aug. 5, 2012).

7 There is currently no version of Microsoft Office for the iPad. Several third party developers have created third party products that can read and write Office format on the iPad. No solution is currently perfect. For a review of various competing offerings, see Office for iPad: 5 Alternatives for the iPad, http://www.gottabemobile.com/2012/03/06/office-for-ipad-5-alternatives-for-the-ipad/ (last visited Aug. 5, 2012).. My current favorite is CloudOn which recompiles a version of Office to work over the internet on an iPad. http://itunes.apple.com/us/app/cloudon/id474025452?mt=8 The main problem is that a continuous data connection is needed to use CloudOn.

8 Melissa J. Perenson, PCWorld, *Microsoft Surface RT vs. Surface Pro: Which Tablet Will You Want? | PCWorld*, http://www.pcworld.com/article/260101/microsoft_surface_rt_vs_surface_pro_which_tablet_will_you_want.html (last visited Aug. 5, 2012).

9 Surface by Microsoft, http://www.microsoft.com/surface/en/us/gallery.aspx (last visited Aug. 5, 2012).

10 http://www.logitech.com/tablet-accessories/keyboard-cases/ultrathin-keyboard-cover?WT.srch=1&ci=0&WT.mc_id=AMR_DR_Q2_FY13_SERP&geo=US

11 Microsoft Surface Keynote - YouTube, http://www.youtube.com/watch?v=jozTK-MqEXQ&noredirect=1 (last visited Aug. 5, 2012).

12 Wikipedia, *iPad*, http://en.wikipedia.org/wiki/IPad (as of Aug. 5, 2012).

13 Users can download their own preview version of Microsoft Windows 8 by visiting buildwindows.com.

Lifetime Achievement Award

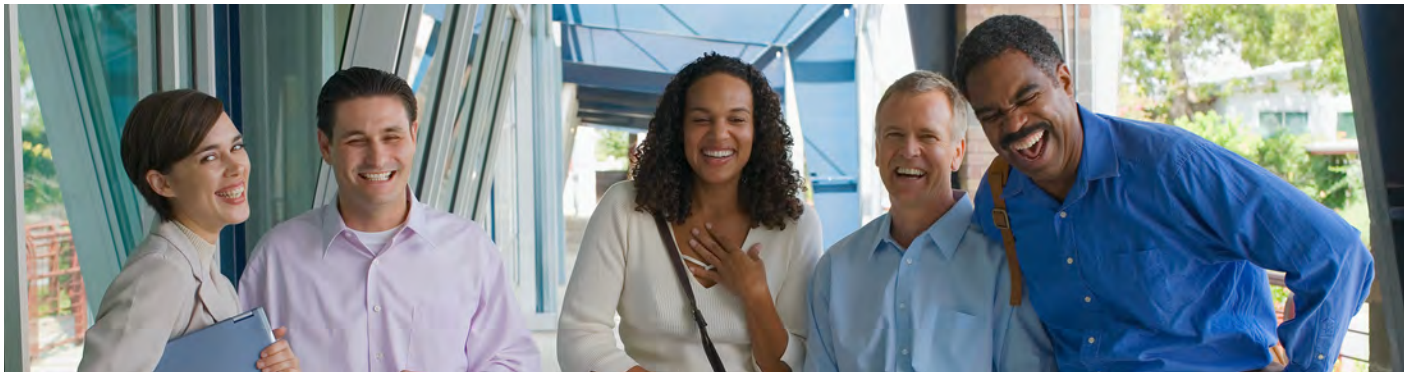
Sandra Schultz Mengel was a member of the Michigan Court of Appeals staff for 32 years, from her law school graduation in 1979 until her retirement in 2011. During her career, she served in each of the principal divisions of the Court, as a research attorney, a judicial law clerk, a research division supervising attorney, and in various positions in the Clerk's Office. At her retirement, Ms. Mengel had served as Chief Clerk for ten years. During that period, she also served on the court's committees for internal operating procedures, court rules, personnel, technology, summary disposition fast track, delay reduction, and long-range planning, as well as SCAO committees or work groups on technology issues, record production, and ADA policy, and the State Bar of Michigan's Judicial Crossroads Task Force committee on technology.

For many years, Ms. Mengel served as the Court of Appeals' unofficial liaison to the Appellate Practice Section and worked as a planner and panelist at Appellate Bench Bar Conferences throughout the years. Following her retirement, she served on the State Bar's Character & Fitness Committee in 2011-2012, and maintains membership on the Judicial Crossroads Task Force committee on technology. She works as a volunteer tutor at Dominican Literacy Center, is a driver for the American Cancer Society Road to Recovery program, and is the Monday-Tuesday care provider for her grandson.

The Ronald McDonald House of Detroit

On Monday, June 25, 2012, members of the Appellate Practice Section Council served dinner to families staying at the Ronald McDonald House of Detroit. Volunteer council members included: Marilena David-Martin (State Appellate Defender Office), Danielle Schoeny (Sommers Schwartz), Beth Wittmann (Kitch Drutchas Wagner Valitutti & Sherbrook), and Phillip DeRosier (Dickinson Wright).

The group served a dinner of roasted chicken, roasted vegetables, cheesy potatoes, antipasto salad, burritos and rice to families whose children and young loved ones are hospitalized at the nearby Children's Hospital. The families and staff expressed gratitude for the meal and for the company. The Ronald McDonald House of Detroit is a very deserving charity, and a great place for lawyers to donate their time to serve the community. If you do stop in to volunteer, be sure to get a tour of the house from charismatic staff member, Irma…and pay attention, because there is a quiz. (APS passed with flying colors).



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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.

***Admire v Auto-Owners Ins Co,* SC 142842, COA 289080**

No Fault: Whether the defendant insurer is obligated to pay personal protection insurance benefits under the No Fault Act, MCL 500.3101 *et seq* for handicap-accessible transportation.

***Atkins v Suburban Mobility Authority for Reg Trans* SC 140401, COA 288461**

No Fault: Whether written notice of the plaintiff's no fault claim, together with SMART's knowledge of facts that could give rise to a tort claim by the plaintiff, constituted written notice of her tort claim sufficient to comply with MCL 124.419.

***Bazzi v MaCaulay,* SC 144238, COA 299239**

Family Law: Whether the plaintiff has standing under MCL 722.714 to bring an action to determine paternity where an acknowledgement of parentage had been signed by another man for a child born out of wedlock.

***Cedroni Assoc, Inc, v Tomblinson, Harburn Assoc Architects & Planners, Inc*, SC 142339, COA 287024**

Business Torts: Whether there were genuine issues of material fact as to whether the plaintiff, a disappointed low bidder on a public contract, had a valid business expectancy, and whether the defendant architectural firm's communications, made pursuant to its agreement with the contracting school district, amounted to intentional and improper conduct sufficient to sustain a claim of tortious interference with a business expectancy.

***Hill v Sears Roebuck & Co,* SC 143329, COA 295071**

Negligence: Whether the defendants, installers of an electrical appliance, had a duty to the plaintiff with respect to an uncapped gas line in the home which was separate and distinct from their contractual duty to properly and safely install the electrical appliance; whether the defendant installers created a new dangerous condition with respect to the uncapped gas line, or made an existing dangerous condition more hazardous; and whether the defendants entities breached any duty owed to the plaintiff.

***Hoffner v Lanctoe*, SC 142267, COA 292275**

Negligence/Premises Liability/Release of Liability: Whether the defendants were entitled to summary disposition due to lack of possession and control of the premises; whether the plaintiff released the defendants from liability and alternatively whether the doctrine of open and obvious applies to preclude the premises liability claim.

***McCahan v Brennan*, SC 142765, COA 292379**

Court of Claims: Whether the plaintiff's failure to comply with the notice requirement of MCL 600.6431(3) foreclosed her claim against the University of Michigan Regents.

***People v Brown*, SC 143733, COA 305047**

Criminal: What relief, if any, is available to a defendant who pled guilty to second-degree home invasion as a second habitual offender and, as part of the plea proceeding, pursuant to MCR 6.302(B)(2), was informed that his maximum possible sentence was 15 years, despite the fact that his maximum sentence as a second habitual offender was 22-1/2 years.

***People v Kiyoshk*, SC 143469, COA 295552**

Criminal: Whether the defendant waived family court jurisdiction by pleading guilty to a specified juvenile violation under MCL 712A.2(a)(1).

People v McCauley
SC 140422, COA 281197

Criminal: Whether a defendant can raise a challenge to the effective assistance of counsel during the plea bargaining process where the defendant rejected the plea offer and subsequently received a fair trial, and, if so, what remedies should be available to the defendant.

People v Minch
SC 144631, COA 301316

Criminal: Whether under the felon-in-possession statute, MCL 750.224f, the trial court erred by ordering the police department to deliver the defendant's firearms to the defendant's designee.

People v Mitchell
SC 144239, COA 293284

Criminal: Whether the Court of Appeals correctly remanded the case to the trial court for an evidentiary hearing regarding *Miranda* rights issues, including whether a statement was tainted by misleading advice concerning the defendant's right to counsel and whether a statement should have been excluded because it was preceded by another interrogation before the defendant was advised of his *Miranda* rights.

People v Rao
SC 142537, COA 289343

Criminal: Whether x-rays and a radiology report constituted newly discovered evidence warranting a new trial, and whether the evidence, if newly discovered, would have made a different result probable on retrial given the other evidence implicating defendant as the cause of other injuries suffered by the child.

**Linda M. Garbarino is a civil practitioner who heads the appellate group at the law firm of Tanoury, Nauts, McKinney & Garbarino, P.L.L.C.*

Recommended Reading for the Appellate Lawyer

By Mary Massaron Ross

The book reviews in this issue include a fascinating biography of a former justice of the Michigan Supreme Court, and the story of a controversial and highly-publicized murder trial of the 1930s. Both involve accounts of criminal trials that may have been flawed and resulted in convictions that the authors suggest may have been wrong. Thus, when read together the books raise questions about error in the criminal justice system, and the forces that may allow for a miscarriage of justice in a particular case. If readers conclude that the convictions were proper, the stories nevertheless serve as a reminder of the human cost of criminal trials, and the possibility of rehabilitation for those incarcerated.

The Rise and Fall of Michigan Governor John Swainson: Wounded Warrior

Lawrence M. Glazer (Michigan State University Press 2001)

When I was very young, one wall in our family home was hung with photographs of some of the major political figures of the day. These black-and-white photos of G. Mennen Williams, Blair Moody, Jr., John Swainson, and others long-since forgotten, were inscribed to my father, with words like "To Joe, from Soapy Williams" or "To Joe, Thanks for your support." They seemed a window on the larger and important outside world where these men served the government in key positions. My father, son of a union skilled trade worker, was a loyal Democrat, and as a returning veteran of World War II, thought that everyone had a responsibility to become engaged with politics to assure a better future for our country. In one election in the mid-1950s, my father ran for the Michigan State Senate on the Democratic ticket although we lived in Grand Rapids, a Republican-dominated area. My first political activity was standing at the local grade school where voting would take place and handing out kicker cards for "Go, Go, Going Joe" – my dad. But I was far too young to understand the political issues, or to evaluate the policy differences, or to even truly get to know any of the candidates whose photos became so familiar to me. Because of this history, I picked up the Swainson biography to better understand the political battles that had occupied so much of my father's time. Since he is no longer with us to ask, I thought Glazer's book might shed light on my father's views and political activities during that time period. And it did not disappoint.

Lawrence Glazer, a lawyer whose prior work has included a stint as assistant attorney general, chief legal advisor to a former governor, and a circuit court judge, brings to this history extensive real-world knowledge of Michigan politics and history. After providing a brief overview of Swainson's early childhood and high school years, Glazer moved quickly to World War II and Swainson's injury. He lost both legs as a result of an explosion caused when a U.S. army jeep detonated a mine that had been planted by German soldiers in France where Swainson was serving as a member of C Company in the 95th Division under General Patton. After his near death from the injuries, Swainson was awarded the Purple Heart. Swainson

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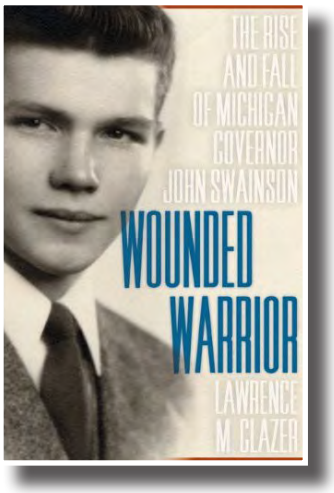

endured multiple surgeries and months of hospitalization before he finally returned home with two artificial limbs as well as crutches. Swainson later said that, but for his injury, he would probably never have become a lawyer or gone into politics.

The early post-war years were times of change within Michigan's political systems. Long a Republican state, the Michigan Democratic Party was weak and corrupt. Glazer thought it "served mainly as a mechanism for distribution of federal patronage from the Roosevelt administration." But veterans like my father returned from the war with a passion for reform and a belief that their military service entitled them to speak on the issues of the day. They began to build what became a powerful political force. Those early leaders, including Hicks and Martha Griffiths, Neil Staebler, and Gerhard Mennon Williams, worked put a coalition together to win control of state elective offices. Williams sought to garner union support from well-known labor leaders like Gus Scholle (now-known to lawyers in Michigan for his litigation to establish one-person one-vote as a basis for drawing legislative district lines) and Russ Leach. A series of political squabbles reflected policy divisions within the Michigan Democratic Party, and embroiled Swainson and others in fights between differing portions of the party's union constituents. To explain these events, Glazer included stories about some well-known names from Michigan political history including Zolton Ferency, Roy and Walter Reuther, Mildred Jeffries, Leonard Woodcock, William Marshall, and others. For political junkies, the stories are fascinating.

Swainson captured the gubernatorial nomination, going on to win the election. This victory came at an unusually early age, as the photos in the book reveal. Swainson's decisions as governor, many of which were focused on the state's fiscal condition, a public policy issue that remains a focus of Michigan's current governor, are also discussed. Interestingly, Swainson was defeated for reelection, largely because of a controversy over the propriety of the City of Detroit effort to enact a non-resident income tax. Given the state's current fiscal problems, this history provides context for today's debates.

A bonus in the books is Glazer's discussion of former Governor George Romney's career. If you are interested in today's presidential nominee, Mitt Romney, you will enjoy reading about Governor George Romney's past work as president of American Motors Corporation, and his civic and political involvement. Romney's call for a constitutional convention led to the 1963 constitutional convention, a process that resulted in adoption of the current constitution. In setting forth how Romney became governor, Glazer described some of the major issues he dealt, including a debates over the best approach to taxation.

After losing to Romney, Swainson went into law partnership with Congressman John Dingell, Ken Hylton, and Allen Zemmol. And he continued in politics in a number of ways, including working to elect another World War II hero, John F. Kennedy, Jr. After a relatively short time in private practice, Swainson returned to public service – he became a circuit court judge in Wayne County. In the mid1960s, G. Mennen Williams returned from a stint as ambassador to the Philippines and announced his intention to run for the Michigan Supreme Court. Swainson also decided to run and was successful in obtaining the Democratic Party's nomination for the second seat on the Michigan Supreme Court to be elected that year. Both he and Williams were elected. This was the high point of Swainson's judicial career. But it did not last.

Swainson, like a tragic hero in a Greek play, was accused of bribery and was eventually convicted, not of bribery but of perjury. The biography includes extensive analysis of the criminal investigation, the trial, and the subsequent appeals. The extensive quotations from trial testimony, documents, and interviews, gives the reader a sense of the evidence, the strategic decisions of the lawyers, and the questions about Swainson's conduct. The jury found Swainson guilty of perjury, but not of bribery, after a trial in which evidence was brought in on the basis of a claim that he was a co-conspirator with a bail bondsman, who had accepted money for a bribe from the criminal defendant. While the bail bondsman's improper conduct was clear, Swainson's involvement was subject to less direct proofs, and thus was more open to question. Glazer tried to analyze whether Swainson actually was guilty of bribery, and his discussion is thoughtful and balanced.

Glazer's account of Swainson's conviction, and the years after his release from jail, is moving. Swainson tried to find meaningful work and a way to support his family without his law license, which was suspended due to the perjury conviction. Attorney General Frank Kelly, who had been appointed to that position by Swainson, remained a loyal friend, and visited Henry Ford II confidentially to ask a personal favor, that Ford would help Swainson by finding him some employ-

ment. Ford agreed, and two weeks later the Ford Family Trust contacted Swainson and appointed him to a job as consultant on the problems of addiction and children. Swainson's interest in this subject stemmed from the repeated drug problems of one of his children. Swainson was later able to obtain other work as a consultant and lobbyist.

But his problems were not over on finding gainful employment. In addition to the ongoing drug problems of his son, Swainson struggled with his own problems with alcohol. He was stopped on several occasions for driving under the influence, which resulted in additional legal problems and negative publicity.

Retired Detroit Free Press columnist Hugh McDiarmid, called the book "an excellent full-fledged biographical, historical and political reminder that Swainson … was one of the most fascinating and troubled figures in 20th century Michigan politics…. And thanks to Glazer's excellent and fair book, he is less likely to be forgotten." I agree and strongly recommend it to anyone with an interest in Michigan history and politics.

Never Seen the Moon: The Trials of Edith Maxwell
Sharon Hatfield
(University of Illinois Press 2005)

Sharon Hatfield has written a fascinating book about patricide, regional stereotypes, media hype and its impact on criminal trials, and the story of Edith Maxwell, a woman who was convicted of killing her father after an argument about her late hours. If you think current media trials are new, read this account of a dramatic murder trial that became the focus of national media attention. In 1935, Edith Maxwell, a teacher who lived with her parents in Appalachia, was convicted by an all-male jury of killing her father. Her story was sensationalized in the national press, which reported on it as a cautionary tale about the backward nature of those who lived in Appalachia. Stories reported highly critical and outlandish stories about the region including one suggesting that women living in Wise County had curfews so early that they "never saw the moon."

Hatfield was interested in the impact of this media coverage on the events, and also evaluated how others (the lawyers, the media, national interest groups, politicians) sought to use the case to score political points of their own. While none of the lawyers or individuals involved in Maxwell's defense comes off too well, Hatfield's account revealed the distorting impact this struggle for control of Maxwell's story may have had on the outcome.

Hatfield has engaged in exhaustive research and her book includes photographs on Edith Maxwell, her family, and the places in Wise County, Virginia where the events took place. It was apparent that Edith Maxwell's father had been abusive and that he and Edith had argued on the night of his death. It was also apparent that he had been drinking. Edith's story of events changed, but her defense at trial was that she had taken a shoe and tried to hit her father in self-defense when he attacked her in anger for being out late.

Among the press accounts included in the book are articles written by James Thurber, Walter Winchell, and Ernie Pyle. Pyle's account was the most balanced, and he concluded, "It was a freak death, like falling out of a chair and breaking your neck." The blow to the head had caused a blood clot that had killed Edith's father, an event akin to "kill[ing] a man by tapping him on the head with a pencil." Despite the thin proof presented at trial, Edith was convicted by an all-male jury. After her first trial, she was sentenced to twenty-five years.

The National Woman's Party and others were seeking reform of laws that prevented women from serving on juries, ostensibly to protect them from "hearing the sometimes graphic testimony presented on the witness stand…." The Virginia chair of the National Woman's party "pounced on the Maxwell case," because "the plight of Edith Maxwell could call attention to the issue in a dramatic way." The National Women's Party began raising funds to help with Maxwell's legal defense.

The Hearst newspapers through the Washington Post also raised funds for her defense and ended up with a contract limiting Maxwell's interviews with other media. After a national press effort to draw attention to the trial, Maxwell's initial conviction and the jury sentence of twenty-five years was overturned.

Edith's brother, a lawyer, had largely handled her defense at the initial trial along with several other local lawyers. But once it became a matter of media and national attention, lawyers from outside Virginia become involved. Hatfield noted that, as the case advanced, "Charles Henry Smith, the lawyer for the Washington Post, had by now emerged as Edith's principal attorney, although M.J. Fulton of the Woman's Party was still an active participant." And a National Woman's Party member, and the first woman to argue in Wise County, urged the court to strike down the law

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allowing Maxwell to be tried by an all-male jury, and preventing women from serving. But this issue was not pursued on appeal, perhaps because at some point Maxwell and the National Woman's Party disagreed about the best strategy – and Edith disassociated herself from the group and its lawyer. In Hatfield's view, this was likely due to her brother's influence and was a serious mistake since it deprived Edith of the chance to obtain a reversal on the basis of a constitutional challenge to the all-male jury.

Edith was again convicted after the second jury trial and was ultimately sent to prison with a twenty-year sentence, five years less than that imposed by the first jury. This would keep her behind bars for another decade, even with half-time off for good behavior and credit for time already served in the county jail. And Edith feared that she had lost her chance to ever marry, have children, or have any kind of normal life.

Efforts began immediately to seek a pardon or commutation of her sentence. Among those who urged that her sentence be commuted was Eleanor Roosevelt, who wrote to the governor asking him to examine the case. This effort was ultimately successful though it took years to accomplish. But eventually, Edith Maxwell was released. She "would live for another thirty-seven years after her release" and moved away from Virginia, took a new name, and built a new life. She fell in love with an older man, married, had two children, and lived a quiet life. According to Hatfield, "she was something of a mystery even to her own children, declining to reveal details of her youth or even to tell her age."

Hatfield's account of Edith Maxwell's trial and of the media attention that it garnered raises thought-provoking questions about our criminal justice system that are still relevant today. Although the jury pool is more diverse, the complex interplay seen in Maxwell's story - with its overarching media sensationalism and inaccurate stories, over-matched defense lawyers who missed obvious inconsistencies and problems with the prosecution's proofs, and difficulties with evidence when the criminal defendant argues self-defense and a history of abuse – remains of interest. Anyone who tries criminal cases will be interested in the detailed accounts of the proofs and the strategies considered and implemented at trial. Anyone involved in appellate work will want to consider the various available strategies for obtaining relief – those pursued and those abandoned. And those who simply like a riveting story will also enjoy reading this book.