Michigan Appellate Practice Journal

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

Summer 2017, Vol. 21, No. 3

In this Issue

From the Chair: Hail to the Adversarial Process.....1

A Michigan Perspective on the Art of Oral Argument 2

Originalism-Part Two: The Record ...13

Recommended Reading for the Appellate Lawyer.....18

Cases Pending Before the Supreme Court After Grant of Oral Argument on Application 20

Meet Judge Talbot 24

Selected Decisions of Interest to the Appellate Practitioner 27

Opinions expressed in the *Appellate Practice Section Journal* are those of the authors and do not necessarily reflect the opinions of the section council or the membership.

From the Chair: Hail to the Adversarial Process

By Gaëtan Gerville-Réache

With the Appellate Practice Section's 2017 annual meeting and program only three months away, it appears I have entered a lame duck session. Whatever the Council was going to accomplish while I sat as Chair of the Appellate Practice Section, it has already been put in motion. I am beholden to those fine appellate practitioners serving on the Council—and particularly to Chair-Elect Joanne Swanson, to whom I will hand the gavel this fall—for the work they have done to form our current vision. And I thank them for carrying forward whatever portion of our current vision for the future they deem worthy.

Speaking of the future, that vision in no small part includes bringing our appellate briefing into the 21st century, something our dedicated Ad Hoc E-briefing Committee has continued to work on diligently. Since this is the second time I have mentioned this endeavor, it is probably obvious how important it is to me. I know it is important to those on the committee and others on the Council. And it is certainly important to our appellate judiciary, since their expressions of interest in a recommendation from the Council were the catalyst for forming the committee.

In fact, this project is so important we have made it the topic of this fall's annual program. I hope you will join us for that program, as I expect the discussion at the program will greatly influence the Council's ultimate recommendation to the courts on this issue. Keep an eye on the *Michigan Bar Journal* and your e-blasts from the Section, as there will be more to come on that.

With such an important change to how our profession does business on the horizon, there is one thing about this profession that I hope will never change: your collegiality. So here is my final wish as the outgoing Chair to

Continued on next page

Section Council

Chair
Gaëtan Edward Alain Gerville-Reache, Grand Rapids

Chair-Elect
Joanne Geha Swanson, Detroit

Secretary
Bridget Brown Powers, Petoskey

Treasurer
Stephanie Simon Morita, Farmington Hills

Council

Term expires 2017
Conor B. Dugan, Grand Rapids
Christina A. Ginter, Detroit
Lauren M. London, Ypsilanti
Mark J. Magyar, Grand Rapids
Larry J. Saylor, Detroit
Ann M. Sherman, Lansing

Term expires 2018
Anne L. Argiroff, Farmington Hills
Judith A. Curtis, Grosse Pointe
Barbara H. Goldman, Southfield
Bradley R. Hall, Lansing
Valerie R. Newman, Detroit

Term expires 2019
Scott G. Bassett, Portage
Graham K. Crabtree, Lansing
Phillip J. DeRosier, Detroit
Richard C. Kraus, Lansing
Gerald F. Posner, Southfield

Immediate Past Chair:
Beth A. Wittmann, Detroit

Ex-Officio:
Nancy Vayda Dembinski, Farmington Hills

Commissioner Liaison:
Hon. Michael J. Riordan, Detroit

APS Journal Editors
Elizabeth L. Sokol
e-mail: *liz@korolaw.com*

Nancy Vayda Dembinski
e-mail: *ndembinski@lmdlaw.com*

Bridget Brown Powers
e-mail: *bbrownpowers@brownpowers.com*

Howard Yale Lederman
e-mail: *hylederman@wowway.com*

Lauren M. London
e-mail: *llondon2@emich.edu*

From the Chair
Continued from page 1

you, the Section. Please never take your collegiality for granted. Many of us in private practice compete at some level for business. And those of us not in private practice find ourselves regularly butting heads on issues and even policy with the same attorneys time and again—think of the prosecutors and defense attorneys in the criminal bar. Despite having sufficient reason to disassociate, I doubt I will ever see a body of professionals that works together better for the common good of the practice, and perhaps more importantly, for the administration of justice. I am not the first to make this remark, nor will I be the last, because in the truest sense of the word, your collegiality is remarkable. It has been my tremendous honor to lead such a civil and truly collegial professional body.

A Michigan Perspective on the Art of Oral Argument

By Joanne Swanson

Most appellate practitioners would agree that oral argument before the appellate courts is more of an art than a science. While the ultimate goal is to persuade, the manner of achievement varies by practice area, subject matter, issue, audience, and of course, the personality of the practitioner.

No two lawyers are alike. What works for one lawyer might be difficult or nonproductive for another. Styles of advocacy can be as different as night and day, with the full spectrum on display during a typical case call. Some practitioners come to the podium laden with red-rope files, court rules, and alphabetized cases. Others carry a collated binder, a couple of pages of notes, or nothing at all. Some lawyers are breezy and casual. Others are serious and formal. Some converse. Others lecture. Some just talk. Others talk *and* listen.

What cannot be as easily discerned upon initial observation is what matters most – how well does the lawyer know the facts, the issues, and the law. If left to nothing but his or her cranial devices, how well might the case be argued? Recall that many times the "best laid plans of mice and men"[1] are derailed by a barrage of questions. Knowing your case is key to a successful presentation.

There is always something to be learned about oral argument. On a national scale, advice on the subject is prolific. But what do Michigan practitioners have to say about this pinnacle event in the life of an ap-

Richard Kraus
Civil and Agency Appeals

Valerie Newman
Criminal Appeals

Rob Kamenec
Civil Appeals

Liisa Speaker
Family Law, Child Welfare and Probate Appeals

Mary Massaron
Civil Appeals

peal? How do they prepare and does the approach vary depending upon the court? What do they set out to accomplish? What works and what doesn't? Does argument make a difference in the outcome of the case? I asked five experienced Michigan appellate practitioners to share their thoughts. Excerpts of our interviews are presented below.

Richard Kraus, Civil and Agency Appeals

Preparation

Q When you receive notice of argument, what do you do to prepare, when do you start preparing, and what is the product of your preparation?

A When I receive the case call notice, the first thing I do is take the primary cases and shepardize them to see if there is any supplemental authority to file. Then, and it depends a lot on the case and how voluminous the record is, I read the briefs again and the key cases and statutes, and look at the primary parts of the trial court record, the sections that I think will be important for the argument. Depending on the case I'll start preparing a fairly simple case about a week ahead of time. On a more complicated case, 2-3 weeks ahead, partly because I like to break it up and not do it all in one solid block.

Q Is that so you can think about it in between?

A Yes. I get my best ideas in the middle of the night. Once I've gone through those materials, I tend to take my brief and take the headings, take the key points, the citations and prepare an outline of the brief so that I have all of the key points and the key cites in one shorter document that's available for reference during oral argument. This is so I don't have to dig into the brief in case a question comes up and I don't have the answer in my head. It's sort of a summary version of the brief just so that if I have to quickly pull something, I can get to it without thumbing through the brief.

For the actual argument outline I just tend to have a list of the key points that I want to make and a few key words. I don't write out the argument in any way and generally maybe one sheet for each key argument and usually those sheets are only half full - just an outline with bulleted points, key words, language of a statute, the key things. That's generally what I use when I go to the podium.

Q And that was going to be my next question, what do you take with you when you go to the podium?

A I'll take the summary of the brief. I put everything in a small binder and the binder will have the case call notice. I have a table of contents for my brief, the statement of questions presented, the summary and if there's a key statute or something, I'll have that in there. And then in addition to the small binder, I'll have the four or five sheets that just have the key points and a few word reminders of my argument.

Goals of oral argument

Q And what usually do you set out as your goal? What are you trying to accomplish in oral argument, given that the panel will tell us "we've read your briefs, we understand the facts"?

A It's different, whether appellant or appellee.

Q Good point. Start with appellant.

A As appellant, there are always two things you have to persuade the court of. One is that the trial court erred and the second is that the error is enough for the court to grant relief on appeal.

I tend to focus more on the second aspect of that because explaining why the trial court erred is usually covered in detail in the brief. So my goal is to get to the points that will show the Court of Appeals why it should take some action and grant relief to my client.

In addition, going through the briefs and working through the arguments in almost all cases, I come up with some insight or some analysis that may not come through as clearly as I had hoped in the briefs. Or it may just be the same argument but with a different twist or shade to it. So I always try to come up with something that isn't doing what the court tells you not to do, repeating what's in your brief.

And to some extent it's almost that the way to make an argument in writing is different than the way to make it orally. Sometimes standing up and talking about it, whether it's less formal or more direct, the same argument can just come across differently.

Q What about when you're the appellee, what is your approach?

A As appellee, the one thing that I always look for is whether there is anything in the reply brief that I need to address. And to some extent it's the same thing, picking out the few key points that I know I'm likely going to have to make in response to what they argue.

Q Is your argument or what you're going to say when you get up as appellee crystalized after you hear the appellant's argument?

A I generally have my points mapped out and then as the appellant is arguing, I'll scribble notes into the outline that I have prepared. As appellee, I try to stick to the approach I want to take rather than just follow the appellant's outline or stream of argument.

Heading off the opponent's argument

Q When you're the appellant and you know or believe that there will be some issues the other side has hit upon, will you address those issues in your opening presentation with the idea that maybe you'll take the wind out of their sails or do you wait until rebuttal to see if they bring them up?

A I almost always address them in my opening argument. I never consciously save anything for rebuttal. I figure if it's a point that I should be making, it's better to just do it up front and I think that's what oral argument is especially good for - to take on the other side's issues straight up.

Left-field questions

Q What do you do if you are totally unprepared for a left field question that doesn't really pertain to any issue that was briefed? Have you ever had that happen and how do you usually respond?

A I've had it happen, probably less so now than when I started doing appeals. I think to some extent it's like any other question. You listen to it and try to answer it as best as you can and politely explain why the answer to the question doesn't affect the outcome, if that's the case.

I was at the Sixth Circuit and Judge Merritt started the argument by saying "well the Supreme Court issued this decision yesterday, how do you think it applies." I said it's a red herring. He said "well I think it's dispositive." And it went downhill from there. So, obviously the judge thinks the question is worth asking. You have to deal with it that way.

And I've had a couple of occasions where I've just said I don't know the answer but I can file a supplemental letter by the end of the day.

Rebuttal

Q If you're the appellant and you recognize from the questions to the appellee that your argument is well understood, do you forego your rebuttal time?

A I probably pass on rebuttal half the time. And when I do rebuttal, it's almost always limited to a question that one of the judges asked the appellee and I want to address the question. And I'll say "you know judge you asked this question, I want to add this to that." And sometimes I'll use it to respond to an argument or a statement that the appellee made. I don't have any notes for rebuttal. I don't save things for rebuttal.

Valerie Newman, Criminal Appeals

Reviewing the record

Q How intimately do you go back and familiarize yourself with the record when preparing for oral argument?

A In the criminal defense context, we have to know the record. Our issues are rarely a purely procedural or purely legal analysis. So I would say in this arena in the majority of cases, you do have to go back to familiarize yourself with the record. If the record's short and it's important, sometimes I reread the record. It just depends on the case and how important intimate knowledge of the record is to the legal issues presented. I tend to do a pretty comprehensive statement of facts.

Occasionally when I go back and look at the record again with fresh eyes, I see things a little differently and so it sometimes causes me to focus on a fact that wasn't emphasized in the brief.

Q So as you're going through the process, is it a note taking process or are you just filing it in your memory?

A I generally don't take notes in preparing for oral argument and I don't take anything up to the podium when I argue.

The fluidity of oral argument

A The thing for me with oral argument and oral argument preparation is that you have to be fluid. I think rigidity kills a good oral argument.

Q And tell me how you would define rigidity?

A I think people who write out their entire oral argument and sort of have a script, that's just not helpful. Or people who have 25 bullet points and they've got to hit every single one. So it's not written out but they're going to make sure no matter what question is asked, they're going to find a way to steer it toward one of their bullet points. And it becomes awkward and it becomes clear to the Court that the person's not listening to the question and responding directly to the question.

I always tell my students when I teach that oral argument is a complete misnomer. You don't argue with judges and a good oral argument should be like dinner table conversation. It should be fluid. You should be able to respond to people's questions intelligently and respond in a way that brings people over to your position as much as possible. So, for example I was in the Court of Appeals this morning and the judges, the person who was arguing ahead of me, the judges got really mad at him.

Q Really? Why?

A Because he was saying black letter law states this and the judge looked at him and said "we know the black letter law. You don't need to tell us the black letter law. I asked you already once, tell me why you win." And so that judge wants to know why you win, as do many judges. To me that's an example of rigidity. You sort of have a rote way of approaching things instead of responding to what the judges really want to know; the judges are telling the lawyer what they want to hear and the lawyer is not listening carefully enough to pick up on that cue, give the judges that information in an impactful manner and then stop. That's the other thing I see lawyers have a problem doing.

Q What?

A Knowing when to stop. Sometimes panels are very polite and they'll let you talk to them but they're not listening. And you're not accomplishing anything. If they're not interacting with you, I don't think that you're furthering your goal of trying to prevail.

The purpose of oral argument

Q I think it's hard for a lawyer not to take the stage when you have it and try to pound in every single last little minute that you have. But tell me what your philosophy is on that.

A Oral argument is for judges and I think if we could get across one thing in this article to lawyers that would be the most important thing. Oral argument is not for you and it's not for your client. While we might have clients in the courtroom and you might do more than you know is necessary for the sake of the client, then you tell the Court. Today I had a client's family in the courtroom. I didn't need a lot of time to argue. If my client's family wasn't there, it would have been a quick oral argument. But my client's family was there and I

wanted to do more than a few minutes and I had a panel that I knew would get impatient. So I let them know, "My client's family is here, they've been extremely supportive of him," and they let me argue; they were extremely polite. But I didn't abuse it. I didn't talk for the whole 15 minutes just to put on a show. I don't want to try their patience and their goodwill.

Q That's a very good way of saying, when you don't have that appreciation, you may be trying their patience and goodwill.

A If there are ten double endorsed cases, you know it's going to be a long docket. And so then the judges get irritated with you and you get this reputation of someone who just talks for the sake of talking. I think what people really, really need to understand is that in the long run, you are hurting your reputation. Because if they know that you're the kind of lawyer that's going to get up, say what needs to be said, and say it succinctly, and you're going to be prepared, you're able to answer questions and you don't talk just for the sake of talking, the judges will listen. And they'll engage because they know that you can engage back.

Lawyer instinct

A I think that's the hardest part about teaching people oral argument or writing about oral argument. I think everything is so driven by your case, your opponent, your opponent's brief. There are things that are out of your control that you then have to determine whether or not you think it's worthy of your time to respond to or necessary.

Q Would you say a lot of it is instinctual for you? Some of these decisions are what your instinct tells you?

A Yes, absolutely. For me, I'm a very instinctual lawyer. But I'm also very, very strategic. So I think about things a lot. I said I'll prepare in an hour for an oral argument, that's true in terms of looking at the brief, looking at the opponent's briefs, updating research and figuring out what I want to do. But I think about the argument for days. You have to think about your argument. You have to be mulling it over in your head.

Rob Kamenec, Civil Appeals

Preparation

Q When you're going through this process of appeal, preparing for your argument, are you reviewing everything in the file?

A No. I always start with my brief, whether I'm the appellee or the appellant. My first pass is to figure out where the judge and opposing attorney are going to go. I read through my brief with that perspective. Sometimes that takes less than an hour. I think the most important thing you can do is figure out where the Court's going to go. You don't always get it right but after a while, with significant experience, you get a pretty good handle on where the Court's going to go in the case. It's not just intellectual analysis; experience factors into the equation.

I'll make some quick notes and the notes will usually go into my binder. I'll pick up the opposition's brief and go through that as well, with the same analysis: where are they going to come after me and where don't I have to be as concerned. And then, when I'm done with that, I just start writing.

Q So you're not necessarily coming up with new things that you haven't already argued at this point or are you?

A I think that when you're in the process of writing the briefs, you're down to the weeds or I use the metaphor in the rice patties, and you've got to cover it all, you're laboring away. I'm very comprehensive in my briefing. For that very reason, when I come up for air later on while prepping for the argument, I want to make sure that I'm considering different slants. I'm narrowing down what I need to go through. I want to make sure that I'm considering the perspective of the case from three people or seven people who do not have the same knowledge base about the case that I do.

I want to put myself in the judges' shoes when I'm going through that process or in their stead and say okay, what is it that's going to get the attention of this Court besides what I've got in the brief. What's going to be their perspective? How do I seal the deal at oral argument or if I've got an uphill battle, what do I throw at the Court that's going to make them think twice about ruling against me? And that's where a lot of the oral argument preparation goes.

Q You're not outlining the brief?

A No.

Q Basically you're putting all this information back in your brain and then you're kind of mixing it up and thinking about it and the results of your thoughts, is that what goes into your outline?

A Yes.

Exercising judgment

Q What is your view on preparing with respect to every detail of a transcript or the factual nuances of particular cases?

A My view is that in most cases I'm not going to know everything about every case. It doesn't mean I'm not prepared, I want to make that clear. There have been times I've argued over the facts of cases. There have been times I've been asked something and I don't know and I tell them I don't know. I don't like that, but I'll do it because I have found that the cost benefit analysis of putting my time into other areas is worth it.

Q That's part of the experience, knowing what to devote your time to.

A Correct. I think it's one of the hardest things to impart to people that are less experienced or newer associates who do appellate work. The tendency is to want to know it all and to some extent getting tangled up with knowing it all rather than knowing and really emphasizing what you need to know to win the case. I was just in front of Judge Mark Cavanaugh the other day. He has picked up this moniker that we've had for years, tell me why you win the case. But to do that, often times you have to narrow down what you're going to talk about. Narrow down what you know about. Maybe there's going to be the casualty that you don't know some ancillary fact but so be it. That's the judgment of counsel and that is certainly my attitude.

Being comfortable conversing

Q You mentioned feeling comfortable when you're up there. What do you do and what is your approach to feeling comfortable and confident that you can just have a conversation with the judges?

A At the end of the day I'm not in competition with counsel that much even though it's an adversarial system. I want to win the case but I am having a conversation with the Court. In the course of that conversation, you're an advocate and you are telling the Court why you win or why your opponent shouldn't win. I don't have any difficulty with that. But it is a conversation and I think the judges open up a lot when they think it's a conversation.

I'm not talking about the misplaced joke or the attempt to be humorous where it just doesn't work because that's a disaster. But I am talking about the notion of listening and responding and if you had a question back, asking it. I have no difficulty saying, "Your Honor, this is what I think you asked me. If I'm wrong, let me know. I'm going to answer that and please if that's not enough, ask me again."

It's always going to be the King's English and it's not always going to be the King's prototype of oral arguments that you'd have in the United States Supreme Court. It's not that setting in most cases of an appeal. It always humors me somewhat to have people suggest that all oral arguments and in fact all judges are the same because they simply aren't. Depending on the nature of the case, depending on what court you're in, depending on how well you know the judges and to some extent, depending on your opposition, there are different approaches with different courts.

Four goals

Q To sum up, if you had three rules of thumb that you keep in mind regarding what you want to accomplish in the Court of Appeals, what would they be?

A Tell them why you're there is the first one. Two, I try to be clear. I want to make sure that the Court understands my position. If they rule against me but they understand it, then so be it. If they rule against me and they don't understand it, that's my job. I've got to get them there and there are different approaches to doing that. And the third thing we've already talked about, be comfortable. Have a conversation. I'll add a fourth one too. They hear four, five, six, seven, eight, ten arguments a day. What makes you think they're going to remember your argument more than anyone else's? I'm not about to light off fireworks in the courtroom to

make sure they understand it but I do want to leave them with something that they're going to remember. I want to make sure I get my two, three or four most important points hammered home.

Q What about in the Supreme Court? How does your approach change when you are preparing to argue in the Michigan Supreme Court?

A It changes in this regard. The four things that I identified earlier still apply. I still want to be comfortable, I still want to tell them how I win. I want to narrow down the arguments. I want to do a lot of things like that. But the difference is this. That Court often times is concerned with the policy of the law more than the Court of Appeals. I believe that Court of Appeals judges should, and most do, treat their role as error correcting. No better example of that than Judge Christopher Murray in the Michigan Court of Appeals, who tells you that. That's not per se the only or limited role of the Michigan Supreme Court. I've got to be able to intertwine policy of the law to the extent it's relevant, public policy, the extension of how an opinion in my favor will affect other cases acting as precedent. I've got to have all of that in hand while I argue the case. More so on a calendar case up in the Supreme Court than the shortened arguments on application but nonetheless even on those.

I would say two thirds of the questions from the Supreme Court have to deal with those issues. The policies of the law, how a decision here would play out, consistency with precedent that's already out there, where you're asking for precedent to be altered or how you can justify that.

Liisa Speaker, Family Law, Child Welfare and Probate Appeals

Preparation

Q What do you do to prepare for oral argument?

A Well I start off by reading the briefs and as I'm reading the briefs, I'm creating an oral argument outline of some of the points I am thinking of making at argument.

I try to keep it to two pages, or three if the case is complex or convoluted. I staple the outline to a manila folder and sometimes I have to turn it into a trifold.

Q Does your outline just include the key points of what you want to say?

A No, sometimes I go into factual details. It has record cites and case cites. Sometimes the outline starts off as five pages and I have to whittle it down. I'm trying to make it so that it's usable when I'm at argument. A five-page outline is not going to be very helpful for me when I'm up at the podium. I really want it to be on two pages or at most a trifold that can be right in front of me all at the same time.

And so part of the preparing process is becoming more and more comfortable with the material so I can start deleting and abbreviating more things because I'm comfortable with the material and I don't think I have to have something on the outline to know that I need to bring it up.

Q So when you go up to the podium, you just take your manila folder?

A Yes. Sometimes with more complex cases I have my manila folder and then I'll make a chronology of complex procedure or facts or background, and slip it underneath that second page of my outline.

Q So your chronology would be more factual?

A Facts and procedure. In a lot of my cases, the procedure is really important because the courts are not following the procedure which is why there is an appeal in the first place. So especially in child welfare cases, the procedure is what the case is all about. The dates of when things happened, when people received notice, and when an attorney was appointed -- I want all of that right there with me.

Q As part of your preparation I would imagine anticipating what you are going to be asked, questions that are more reflective of weaknesses in your position.

A I definitely think about what questions they are going to ask, directly for the Supreme Court, maybe it's more indirect at the Court of Appeals. I think about my panel and sometimes I do panel research. I used to always do panel research but now I know some of these judges so much better that sometimes it's just more knowing their personalities.

Practicing the argument

Q What about the difference between your presentation to the Court of Appeals versus the Supreme Court?

A It's really different. For the Supreme Court, I spend a lot more time thinking about what questions they are going to have and why they are looking at this case. I always do a practice round.

Q How do you do that?

A I gather volunteers, send them the brief, and schedule a time. They come to my office or I'll actually stand at a podium and they will ask me questions. We do a break out session afterwards. It's really helpful.

Q So do your anticipated questions probably go beyond the specific impact on your case?

A Oh yes, absolutely. No matter how many questions we come up with the Supreme Court always asks you something you are not expecting and that no one has asked you before.

A silent bench

Q What about the situation where you're at the podium and no one is asking you any questions. I've had one judge suggest that they don't need to hear anything more and you should sit down. What is your view of that?

A My thinking always is that the argument is not for me to recite everything about my case. It's to answer their questions. If they don't have questions I am not going to waste their time but I do want to get a couple of key points for them to think about, even if they don't have a single question. But it's not going to take me that long to get to those key points.

Waiving oral argument

A I don't like when people just get up there and say that we stand on our brief unless the Court has any questions. If I feel like I can stand on my brief and the argument is not going to make a difference, I waive argument but I don't waive until I know who my panel is. I just don't see the point of going there just to stand on your brief. You have to drive to court, things to do to get ready, and what if the panel has questions?

Q What about your opponent?

A I never waive unless they agree to waive also or have already waived. My opponent is not going to be there without me being there to respond, never. But I've had times where I have called the other side and said "I'll waive argument if you do too" and they agree to do that.

Goals of oral argument

Q If you were to give me two bullet point goals of oral argument, what would they be?

A Answer the judges' questions and hit home two to three key points that you want the Court to take away from your case.

Listening to preceding cases

A My time to go to court and sit through other people's arguments is really meditative. I can sit and listen and see what kind of mood the judges are in, what questions they are asking other people, what their mindset is. I recall that once, Judge Murray kept asking people throughout the day "what does the statute say" and it reminded me that I needed to hone in on the statute. So as I was sitting there waiting for my turn, I tweaked the argument based on what the statute said and why the trial court's ruling didn't follow the statute.

Mary Massaron, Civil Appeals

Preparation

Q What do you do when you are preparing for oral argument, how soon do you begin in advance of the argument, and what is the product that comes out of your review?

A How far in advance depends on the complexity of the case and whether it's a case in which I have a client that is going to be doing a moot court. If we are doing a moot court I would try to do the moot court about two weeks before the argument so that there would be plenty of time to revise and refine the argument, but not so far ahead that I would have forgotten it all by the time I get to court. If there is not a moot court then, depending again on the complexity of the case, I am going to be starting a couple of weeks ahead. And what I typically start with is an excerpt of the records, my

own sort of appendix that I like to mark up to help me remember things.

Q Is that something you generally do when you are preparing the brief?

A I generate it early in the case when I'm first reviewing the lower court record in evaluating the appeal which I do typically long before I do the brief. Then I use it when I am doing the brief and I use it again at the point of preparation for oral argument. And ordinarily I would review again the opinion and some of the major portions of the record. Then I go through the brief, read the argument, look up all the record cites, read all the cases and make notes. That can really help, at least from my perspective, to see what the strong arguments are and what the questions are likely to be from the judges. I keep an oral argument notebook that I prepare simultaneously with reading the record.

Q Is it a spiral bound notebook?

A I actually have two spiral bound leather notebooks that I have used for years with dividers and a log at the front. At the very front of the notebook, I keep a short form outline with my very short intro, and then key points with record and case cites. I try to get the whole argument (using key words, abbreviations, and phrases) onto two pages facing each other. This can be kept open so that I don't have to search or flip pages but have everything visible.

Then, I have organized in the rest of the notebook the more extended notes, the lower court opinion, copies of key cases and statutes, and copies of other especially important documents or portions of the record that I may need to refer to during the argument. I use numbered dividers with a table of contents that tells me where everything is so I can find it quickly.

I generally include in my binder a part that recites the best facts for the other side and I include a part that sets forth the other side's best law and how I will respond to it. I really try to think about which case is best for them, the closest for them, and then force myself to think "what is my best answer." It's easy to think you can gloss over those points or hope you can gloss over those points. In the briefing process, you may not have dealt with them in depth. But an active panel can force you to answer questions about them at oral argument. And the failure to have a persuasive answer can completely derail an argument.

So it's very important in preparation to figure out what points may be a stumbling block to your position, where the other side is going to score major points in their oral presentation, and how you are going to regroup or respond. I try to find out whether any of the judges on my panel sat on any of the critical cases and how they approached the issue in those cases.

Moot court

Q You mentioned moot court. When would you have a moot court and when wouldn't you? And when you do have a moot court practice session, how does that come about and who do you use for you panelists?

A I think moot courts are great. I really like to have moot court particularly if it's a big case, a large money judgment, a complicated case, or if it's in the court of last resort. I try to get the client to agree to have moot court and to pay for it. Sometimes they are willing to do that, sometimes not. If they're not I try to informally moot my argument with colleagues in my office. But if the client is willing, I try to hire former judges to sit on the moot court panel or people that I think will have a feel for the kinds of questions that will be posed. I try not to have the panel be all people who are experts in the area of law that the case involves. It's nice to maybe have one person who is an expert on the law or one person who might have been involved in the case (if it's a complicated case) but the judges come at it cold and as generalists, so I think it's important to have people who are going to take that kind of view of the case on your moot. They often focus on different things.

Q What do you usually gain from the moot court?

A I think at its best it helps you to anticipate questions that you might not have seen, points that seem to be clear but that one or another of the moot court judges see as unclear. It also helps you estimate the amount of time it might take to address a certain point in the face of a series of ques-

tions so that you can better gauge how much time you have and how to manage that time during the course of the argument. And I think it helps you refine the language. The English language is incredibly rich and is capable of incredible precision but when we're speaking off the cuff it's very easy to say something that you think is conveying a certain point in a nuanced way and through your word choice, you're conveying something just slightly different but different enough to create problems for your argument. I think those kinds of problems can often be identified in the course of a moot court. And then you can correct and refine how you are going to talk about that point.

Left-field questions

Q Once you are out there, you've done all your preparation, you've anticipated everything you possibly could with respect to questions that might be of interest to the judges and you get a question totally out of left field that you really weren't prepared for. Would you try to answer it off the top of your head? Would you say "I hadn't thought of that"? What would you do?

A It happens. I've had questions, for example, about a particular case that for some reason or another I'm not remembering the details of and I'll say to the court "Your Honor, I don't remember the details of that. If you can enlighten me I could perhaps respond." And ordinarily they will say "oh yeah, this was a case involving x, y and z and the court held whatever, why isn't that controlling" and then you can try to distinguish it or whatever. Or they will ask a question that you simply haven't anticipated. Sometimes it's a question that you have anticipated but it's worded in a different way. It takes a minute or two to figure out what exactly they are getting at. And I don't have any magic bullet for that. I try my best to respond. If it's an entirely new question, an argument or an issue that wasn't raised or briefed by the parties, then I would say to the Court, "Your Honor that wasn't part of the briefing, nobody has raised that point." If I have an answer, I give it but I also may say, "I would very much like to submit a supplemental brief, a letter brief to the court to better address that point."

Arguing in a court of last resort

Q What would you say with respect to how your approach to argument might change if you were in the Michigan Court of Appeals versus the Michigan Supreme Court versus the Sixth Circuit or even the U.S. Supreme Court?

A In a court of last resort, the court has a huge amount of flexibility in how it defines the issue, refines the issue, and deals with past precedent. At that level, the courts are really looking at what the documents say about the Constitution, the statute, the contract they are looking at, the policies of the law, the policies of the common law, or policy factors as to how the decision might play out in the real world. Some judges look at these points more heavily than others and you have to know your court to know how they are going to approach it. When you are in a court of last resort, this has to be a lot of your thinking and presentation.

In the intermediate courts, most of the time the judges are looking for a case that has a principle or a ruling that's either binding or very closely analogous so they can rely on that case and get to the outcome and not be overturned. So the focus of your argument has to be much more on the binding precedent and why the other side's asserted precedent doesn't control your case. That distinction is really fundamental and I've seen occasions in courts of last resort where the advocate hasn't made that mental shift and the justices become very frustrated because they are approaching the case in a particular kind of way and if they thought it was governed completely by solid prior precedent they probably would not have taken the case.

Effect of oral argument

Q How much of a difference do you think oral argument makes in the outcome of the case?

A I think it can make a big difference in some cases. In many cases the judges come into oral argument and they are pretty comfortable with where they are going to be at the end of the oral argument and probably in more arguments than not nothing happens that shifts them from that view. I think that's particularly true because both the Michigan Court of Appeals and the Sixth Circuit and many, many other intermediate courts begin opinion writing

before the argument. In my view that's a pernicious practice but it's well accepted by many, many courts. I think it's pernicious because it encourages judges to prepare somewhat less for your oral argument than the judge with opinion writing assignment. And what that means is that you're not getting as full and rich a consideration of the case by three separate judges coming at it independently.

MOAA versus a calendar case

Q What would you say about the difference in the Michigan Supreme Court between mini oral argument on the application and a calendar case argument?

A Well I would think two things. My understanding of the impetus for allowing for mini oral arguments was the Court's longtime practice of issuing preemptory reversals on a vote of five justices, and what the Court did, as I understand it, was to decide that four justices could do a preemptory reversal but that there would be an oral argument first as a check. That change was made some years ago. But recently the Court has been using this procedure even for matters of first impression. And I think that is not good for the system because all too often the Court takes an important case but then simply denies leave without issuing a full opinion. Or it issues a per curiam which may not be as carefully considered as an authored opinion would be. Also, because the Court shortens oral argument and accepts only a supplemental brief (rather than a main, response, and reply brief), the briefs end up talking past each other. The parties don't have the opportunity to thoughtfully respond to the other side's arguments. I see this as a disservice to the Court, and to the development of the law.

So I think that if a mini oral argument were to be ordered, I would be very concerned that a preemptory reversal was going to follow and I would have one of two strategies. One would be to explain why my position on the ruling was correct. But a second is to explain why the law in the area was more complex than the Court might have appreciated on the basis of the original papers and therefore, why either this case is a poor candidate for them to revisit the law or why they should have a full blown merits hearing so that there is more time for amicus briefs and for the Court to consider the issues. I would be thinking about strategies like that.

Q Is your view that when the Court is considering a peremptory reversal, it is because the law is settled and it is not going to be making any change in the law or advancing development?

A Usually yes. The principal function of the Supreme Court, like most courts of last resort, is to say what the law is and it typically does that in cases where the laws aren't settled or maybe the world has dramatically changed in the area so whatever the law was in the past, it needs to be revisited. They typically don't accept leave to appeal even when there might have been an error if it looks like it's not a horribly egregious error and if it's settled law. But the Court has always maintained some limited amount of error correcting in its handling of the cases that it takes and it's often done that by way of peremptory reversal. So if the Court has announced a new principle of law or interpreted a statute in a particular way and the lower court misapplies it, if the Supreme Court thinks it's an important enough case to correct error even though the law is settled then it would issue a peremptory reversal.

Endnote

1 Adapted from "To a Mouse" by Robert Burns, who in 1785 wrote "The best laid schemes o' mice an' men / Gang aft a-gley," after unintentionally upsetting the nest a mouse had built for winter survival while plowing in the field (or so legend reports). The English version is "The best laid schemes of mice and men/Go often askew." See Wikipedia, To a Mouse at https://en.wikipedia.org/wiki/To_a_Mouse

Originalism-Part Two: The Record

By Howard Lederman

Now that Justice Neil Gorsuch has replaced Justice Antonin Scalia on the US Supreme Court, the Court has two originalism adherents. Justice Thomas is the other adherent. So, on the Court originalism remains relevant but not predominant.

In Part I of this series, we looked at originalism's origins in original intent, its description, its subtheories, and a summary of original intent criticisms.[1] As I wrote, the most well-known originalism description is: "By 'originalism[,]' I mean the familiar approach to constitutional adjudication that accords binding authority to the text of the Constitution or the intentions of its adopters [ratifiers]."[2] Regarding the subcategories, I wrote: "Originalism includes original-intent originalism divided into three subcategories (original framers', original ratifiers', and combined original framers' and ratifiers' intent), original-public-meaning originalism, original-methods originalism, and other variations."[3] Then, I wrote: "Most or almost all originalists agree that [the Constitution's] original meaning was *fixed* or determined at the time each [constitutional] provision was fixed and ratified."[4] Finally, I listed the seven main criticisms of original intent. The two relevant to this article are:

1. Ascertaining a multimember body's, like the Constitutional Convention's, institutional intention was almost impossible.
2. Ascertaining the many state ratifying conventions' institutional intentions was also almost impossible.[5]

For original intent advocates, the intentions of the Constitution's drafters (drafters' intentions) is crucial. Even though modern originalism focuses far more on the ratifiers' intentions, the drafters' intentions remain relevant. In discovering the drafters' intentions, the Constitutional Convention records are our starting point. The convention had a secretary, William Jackson, and he kept an official record, a journal. It contained motions and votes.[6] But he "made some mistakes[,]… omitted various important details, such as the dates of certain votes. Jackson also intentionally destroyed some of the records, either because he did not think them worth saving[,] or because he was seeking to preserve secrecy."[7] At Congress' direction, John Adams later edited Jackson's journal, but not until 1819 was it published.[8]

Eight delegates took their own notes. James Madison attended every convention session and thus every day. He sat close to the Chairperson. He wrote notes every day within a few days of each session. "To refresh his recollection, he relied on William Jackson's Journal" to correct or revise his notes. "In so doing, he may have introduced errors." His notes were not published until 1836, almost 50 years after the convention.[9] The other seven delegates, including Delegate Robert Yates, took notes, some brief, some extensive, of parts of the convention. Yates' notes were not published until 1821, almost 35 years after the convention. The other notes were not published until even later.[10]

"For several decades after the ratification of the Constitution[,] the fading memories of those who had attended the Philadelphia Constitutional Convention supplied the main evidence of the Framers' intent. Even when those memories were fresh, the Framers disagreed vehemently about what the Convention had meant or intended, as the controversy in 1791 over the chartering of the Bank of the United States showed."[11] This situation weakened original intent as the authoritative constitutional interpretation approach.

Madison's repudiation of original intent weakened it even more. "'As a guide in expounding and applying the provisions of the Constitution,' he wrote…, 'the debates and incidental decisions of the Convention can have no authoritative character.'" His discrediting of "original intent is probably the main reason that he refused throughout his life to publish his 'Notes of Debates in the Federal Convention,' incomparably our foremost source for the secret discussions of that hot summer in Philadelphia in 1787."[12] Madison did so for at least two reasons:

- [H]e believed that after all members of the

Convention had died, the Notes 'will be read with less personal or party feelings….'"[13]

- Delaying publication "would allow the meaning of the Constitution to be settled by practice….Second,…delay of publication prevented a knowledge of 'the controversial part of the proceedings of its framers from being misused; he did not wish the record turned into an 'improper account.' FN110"[14]

The Convention refused to publish its journal, because its leaders, Federalists, feared that Anti-Federalists, would use it "'to prevent the adoption of the Constitution.'"[15] During the constitutional ratification campaign, Madison "did not mention or ascribe to the Framers any [significant] intentions or understandings."[16] He advocated multiple sources of constitutional meaning. These included "'the proceedings of the Convention, the contemporary expositions, and above all, in the ratifying conventions of the States.' FN20"[17] Once, when referring to the framers' intent, he corrected himself to refer to the ratifiers' intent. FN21[18]

"The most complete record of the Convention is contained in Max Farrand, *The Records of the Federal Convention* (1911)…reprinted in 1937 with a fourth volume of additional material and a general index. The first two volumes contain the Journals and papers of the Convention" and various delegates' "notes of debates…." The third and fourth volumes contain "plans submitted to the Convention,…and contemporary papers, letters, and newspaper items relating to the Constitution."[19]

During the congressional debate over whether to ratify the 1794 Jay Treaty, Madison repudiated drafters' intent in favor of ratifiers' intent: "[W]hatever veneration might be entertained for the body of men who formed our Constitution, the sense of that body could never be regarded as the oracular guide in expounding the Constitution. As the instrument came from them[,] it was nothing more than a dead letter, until life and validity were breathed into it by the voice of the people, speaking through the several State Conventions. If we were to look, therefore, for the meaning of the instrument beyond the face of the instrument, we must look for it, not in the General Convention, which proposed, but in the State Conventions, which accepted and ratified the Constitution. FN56'"[20]

Accordingly, for original meaning advocates, State Ratification Conventions' intentions (ratifiers' intentions) are the key source of the Constitution's meaning. But Leonard Levy criticized Madison's above position:

"This was an extraordinary, even an inexplicable position for Madison to take in view of the political cacophony and partisanship that characterized the ratifying conventions of the states, and above all, in view of the fact that the proceedings of those conventions were so incompletely and poorly reported. Indeed, Madison in 1796 believed that only the ratifying conventions of Pennsylvania, Virginia, and North Carolina had published their proceedings; the only published proceedings for North Carolina covered its first convention, which rejected the Constitution. That Madison knew the records of only two [ratifying] conventions…subverted his theory about deriving original intent from their records. The proceedings of two other state conventions, Massachusetts and New York, had also been published, but eight other convention records, excepting skeletal journals, did not exist; moreover, all records had gaps, as Madison acknowledged, and, as Madison conceded, inaccuracies….Virginia's records of its ratification proceedings was probably the best of all…. Discerning original intent from only the state ratifying records is nearly impossible, because we have incomplete and unreliable accounts from less than half the states, and Madison could not have really believed that it was possible. Elbridge Gerry accurately asserted that the 'debates of the State Conventions, as published by shorthand writers, were generally partial and mutilated ….' Without a record of the state debates, ratifier intent cannot be ascertained."[21]

Therefore, Levy asserted that the state ratifying conventions' records were even less reliable than the Constitutional Convention's records. In support, he cited the 1954 National Historical Publications Commission report. Its findings were:

- Some conventions had reporters taking notes.
- "The short hand in use…was too slow to permit verbatim transcription of all speeches[.]"
- In preparing their articles for the press, the reporters relied not only on their notes, but on their imperfect memories.
- Different reports on the same events sometimes showed "only a general similarity[.]"
- Different reports on the same events had different details. FN15 FN16 (pp 288-289)[22]

Levy also challenged the earliest known ratification convention historian's, Jonathan Elliott's, publication called *The Debates in the Several State Conventions, on the Adoption of the Federal Constitution.*[23] Levy attacked the title as misleading, because Elliott reported only five ratifiying state conventions' proceedings "plus some fragments of others." Even Elliott recognized that some reported debates "'may, in some instances, have been inaccurately taken down, and in others, probably, too faintly sketched….' FN17"[24] Even Elliott recognized that some reports showed reporter bias. For instance, the Pennsylvania record was biased and inadequate, because the reporter, Thomas Lloyd, who had been in the pay of the Federalists, published only speeches by their two leaders, James Wilson and Thomas McKean, ignoring all opponents of ratification."[25] Elbridge Gerry, an Anti-Federalist member of the Philadelphia Convention, complained about bias: In 1791, he declared before Congress that "the 'debates of the State Conventions, as published by the short-hand writers[,] were generally partial and mutilated….' FN21"[26]

Reading Lloyd's *The Debates of the Convention of the State of Pennsylvania* published in February 1788 would leave the impression that the Convention included "only Federalists…, except that John Smilie made it into Lloyd's *Debates* by interrupting a speech by Wilson. Otherwise, Wilson and McKean seem to be arguing with ghosts. Lloyd eliminated speeches that criticized the Constitution to satisfy Federalist benefactors[,] who planned to circulate his account of the convention debates…to give political colleagues elsewhere arguments to use in defending the Constitution. For that reason, he included only what seemed to be the strongest orations by Federalists. Lloyd's Federalist backers of course had no reason to publicize answers to the Federalists' arguments nor…the criticisms of the Constitution to which Wilson and McKean responded."[27]

Alexander J Dallas, editor of the Pennsylvania Herald, printed some Convention debates and speeches featuring both sides, including the most important date, December 12, 1787. "Then Dallas lost his job. William Spotswood, the Herald's owner, fired him after a hundred Federalists, who apparently decided that his publication of 'Antifederalist' speeches was increasing opposition to the Constitution, cancelled their subscriptions."[28]

But the Pennsylvania situation would change. About 100 years after the Pennsylvania ratification convention, a much more complete edition of the Pennsylvania ratification debates appeared. That edition included other reporters' records and thus more ratification opponents' arguments and speeches. That edition also included statements made outside the convention itself. In 1976, an even more complete edition appeared showing more debates, more pro-and anti-ratification arguments and speeches, and more statements outside the convention. "The Anti-Federalists' pamphlets have been republished."[29] Therefore, Levy concluded that Gerry's position on the Pennsylvania ratification convention reporting was no longer valid.[30]

The Massachusetts ratification convention reporting situation is similar. The reporter apologized for "'some inaccuracies, and many omissions,'" resulting from "'inexperience.' He also doctored some speeches, altering the meaning of the speakers, and provided some spurious speeches as well."[31] Since then, the University of Wisconsin's multi-volume *The Documentary History of the Ratification of the Constitution* has added much to the Massachusetts records.[32]

The Connecticut ratification convention did not leave any known journal. Only newspapers reported the debates. Except for a "brief summary of a speech criticizing federal taxation by General James Wadsworth, covered only Federalist speeches." Enoch Perkins, a Hartford lawyer, took notes, but he could not record everything. "[T]he 'exceedingly prolix' convention debates were beyond his capacity to record….. With a record-keeper like that, there is reason to suspect that speeches by the Constitution's critics were not reported fairly….some spectators in the gallery coughed, talked, spat, and shuffled their feet when critics of the Constitution spoke."[33]

"Federalists also controlled the Connecticut press far more than their counterparts in Pennsylvania." While publishing many essays "supporting the Constitution[,]" Connecticut newspapers published only six essays opposing it "(one local, five from out of state)…and two of these were published at the request of Oliver Ellsworth so he could refute their arguments. Another 'Antifederalist' essay was probably a Federalist fabrication published, again, to make way for a Federalist rejoinder. Even the newspapers' 'squibs'—short items generally copied from other newspapers—favored the Constitution. They praised Federalists, claimed the Constitution's critics wanted to destroy the union, and suggested that ratification was a sure thing."[34]

"New Hampshire's five newspapers reported almost nothing critical of the Constitution…." They supported the Constitution, but carried only "bits of information." The New Hampshire Convention journal "consists of only four printed pages in the *New Hampshire Provincial and State Papers.* Newspaper accounts are brief and incomplete. A reliable record survives of only one speech, a defense of the proposed federal judiciary. The official journal does, however, say how much time the convention devoted to debating various parts of the Constitution, which suggests which provisions the delegates found troublesome."[35]

The New Jersey Convention published a journal revealing little. "It reported, for example, that 'the Convention…proceeded to consider and deliberate upon the proposed Federal Constitution by sections,' without providing any information on what was said. There were no published debates or newspaper accounts of the New Jersey convention, but evidence, including the final votes, suggests that there was virtually no opposition to the Constitution."[36]

Concerning the New York ratification convention reporting, Elliott published Francis Childs' report. Childs was "a novice reporter[,] who apologized for his 'imperfect' presentation of the debates. 'Not long accustomed to the business,' he wrote, 'he cannot pretend to as much accuracy as might be expected from a more experienced hand; and it will easily be comprehended how difficult it must be to follow a copious and rapid Speaker, in the train of his reasoning, much more in the turn of his expression.'"[37] Childs recorded "the debates for only the first half of the state convention's proceedings[,]" and afterward, he recorded only "a skeletal journal of motions."[38]

Compared to the other state ratification convention reports, the Virginia ratification convention's reports were the most detailed. But the reporter was pro-Federalist. Nevertheless, Federalists "James Madison and John Marshall expressed dissatisfaction with the results. Madison informed Jonathan Elliot that he found passages that were 'defective,' obscure,' 'unintelligible,' and 'more or less erroneous.' FN25"[39] Marshall complained that if he had not seen his name prefixed to his speeches, he would not have recognized them as his own." He also complained that the reporter had reported Anti-Federalist Patrick Henry's speeches "worst of all. FN26"[40]

The North Carolina Convention reporter was "an amateur in the employ of Federalist leaders." He reported only on "North Carolina's first convention, which failed to ratify the Constitution." He did not report on North Carolina's second convention, which did ratify the Constitution. Thus, the North Carolina ratification records are far from complete.[41]

Levy challenged the ideas of one uniform interpretation of the Constitution and one uniform explanation of each provision.[42] He cited Justice Joseph Story's, one of the Constitution's earliest historian's, conclusion that even *The Federalist's* authors' views differed on at least some provisions. Story and Levy did not see how we could determine the ratifiers' specific opinions about specific constitutional provisions.[43]

The biased, inadequate, and incomplete ratifying conventions' records undermine original meaning originalism. "[T]he real problems of reconstructing coherent intentions and understandings" from these records "raise serious questions about the capacity of originalist forays to yield the definitive conclusions that the advocates of this theory claim to find."[44] So, these originalists are making definite statements based on indefinite, often biased records. But their statements can only be as valid as their supporting documents and information. Furthermore, as we shall see, original meaning originalism demands one original meaning. If a constitutional provision has more than one valid original meaning, how can original meaning be any more authoritative than any other constitutional interpretation position?

Endnotes

1 Howard Yale Lederman, *Originalism-Part One: From Where It Originated,* 20 Michigan Appellate Practice Journal 3 (Summer 2016), available at http://connect.michbar.org/appellatepractice/newsletter.

2 Lawrence B. Solum, *What Is Originalism? The Evolution of Contemporary Originalist Theory,* (2011), p 2, available at http://www.scholarship.law.georgetown.edu/cgi/viewcontent.cgi?article=2362&context=facpub, quoting Paul Brest, *The Misconceived Quest for the Original Understanding,* 60 BUL Rev 204, 234 (1980).

3 Solum, *What Is Originalism?,* p 28.

4 Solum, *What Is Originalism?,* p 29.

5 Lederman, *Originalism-Part One: From Where It Originated,* p 5.

6 Leonard W Levy, *Original Intent & The Framers' Constitution* (MacMillan Publishing Co 1987), pp 1-2.

7 Gregory E Maggs, *A Concise Guide to the Records of the Federal Constitutional Convention of 1787 as a Source of the Original Meaning of the U.S. Constitution,* 80 Geo Wash L Rev 1707, 171_-171_ (2012), available at scholarship.law.gwu.edu/cgi/viewcontent.cgi?article=1828&context…publications…. *See also* Jack N Rakove, *Original Meanings: Politics and Ideas in the Making of the Constitution* (Alfred A Knopf 1996), p 13.

8 Maggs, *A Concise Guide,* p 171;

9 Maggs, *A Concise Guide,* p 171; Levy, *Original Intent & The Framers' Constitution* pp ix, 1.

10 Maggs, *A Concise Guide,* p 171.

11 Levy, *Original Intent & The Framers' Constitution* p ix.

12 Levy, *Original Intent & The Framers' Constitution* p 1. *See also* Rakove, *Original Meanings: Politics and Ideas in the Making of the Constitution*, p 4 (While urging "his [convention] friends and correspondents to preserve their vital papers," and while preserving his own papers, Madison refused to publish any "first person account[.]"

13 Levy, *Original Intent & The Framers' Constitution,* p 28.

14 Levy, *Original Intent & The Framers' Constitution,* p 28.

15 Levy, *Original Intent & The Framers' Constitution,* pp 3-4.

16 Levy, *Original Intent & The Framers' Constitution,* p 4.

17 Levy, *Original Intent & The Framers' Constitution,* p 5.

18 Levy, *Original Intent & The Framers' Constitution,* p 5.

19 Merrill Jensen, ed, *The Documentary History of the Ratification of the Constitution* (26 Vols) (State Historical Society of Wisconsin 1976), p 31.

20 Levy, *Original Intent & The Framers' Constitution,* p 14.

21 Levy, *Original Intent & The Framers' Constitution,* pp 14-15 (footnotes & citations omitted).

22 Levy, *Original Intent & The Framers' Constitution,* pp 288-289.

23 Jonathan Elliott, *The Debates in the Several State Conventions, on the Adoption of the Federal Constitution* (1st ed 1827).

24 Levy, *Original Intent & The Framers' Constitution,* p 289, quoting Elliott, *The Debates,* Preface to 1st ed.

25 Levy, *Original Intent & The Framers' Constitution,* p 289, citing John Bach McMaster & Frederick D Stone, eds, *Pennsylvania and the Federal Constitution 1787-1788* (Historical Society of Pennsylvania 1888), p 212.

26 Levy, *Original Intent & The Framers' Constitution,* p 289, quoting *Annals of Congress,* 1st Cong, 3d Sess, (Feb 7, 1791), pp 1952-1953.

27 Pauline Maier, *Ratification: The People Debate the Constitution* (Simon & Schuster Paperbacks 2010), p 101.

28 Maier, *Ratification: The People Debate the Constitution,* p 101.

29 Levy, *Original Intent & The Framers' Constitution,* p 289, citing Herbert Storing, III *The Complete Anti-Federalist* (University of Chicago Press 1981).

30 Levy, *Original Intent & The Framers' Constitution,* p 289.

31 Levy, *Original Intent & The Framers' Constitution,* p 289, quoting Samuel B Harding, *The Contest over Ratification of the Federal Constitution in the State of Massachusetts* (Da Capo Press 1970 reprint of 1896 book) p 177.

32 Levy, *Original Intent & The Framers' Constitution,* pp 289-290, citing Wisconsin, *The Documentary History of the Ratification of the Constitution* (University of Wisconsin 1976).

33 Maier, *Ratification: The People Debate the Constitution,* p 137.

34 Maier, *Ratification: The People Debate the Constitution*, p 130.

35 Maier, *Ratification: The People Debate the Constitution,* pp 218-221.

36 Maier, *Ratification: The People Debate the Constitution,* p 123.

37 Levy, *Original Intent & The Framers' Constitution,* p 290, quoting Harold C Syrett, et al, eds, V *The Papers of Alexander Hamilton* (Columbia University Press 1961-1981), note on pp 11-12.

38 Levy, *Original Intent & The Framers' Constitution,* p 290, citing Gaspare J Saladino, *A Guide to Sources for Studying the Ratification of the Constitution of New York State,* printed in Stephen L Schechter, ed, *The Reluctant Pillar: New York and the Adoption of the Federal Constitution* (Russell Sage College 1985), pp 132-133).

39 Levy, *Original Intent & The Framers' Constitution,* p 290, quoting James Madison, Letter of Nov 1827 reprinted in Gaillard Hunt, IX *The Writings of James Madison* (G P Putnam 1900-1910), p 291 & citing James Madison, Letter of February 14, 1827 reprinted in Hunt, IX *The Writings of James Madison,* pp 270-271.

40 Levy, *Original Intent & The Framers' Constitution,* p 290, citing John Marshall, Letter of 1832 to Thomas H Bayly reprinted in Herbert A Johnson, et al, I *The Papers of John Marshall* (The University of North Carolina Press 1974), p 256 FN7.

41 Levy, *Original Intent & The Framers' Constitution,* p 290, citing.

42 Levy, *Original Intent & The Framers' Constitution,* p 15.

43 Levy, *Original Intent & The Framers' Constitution,* p 16, citing Justice Joseph Story, *Commentaries on the Constitution of the United States* (1st ed 1833), pp 388-389.

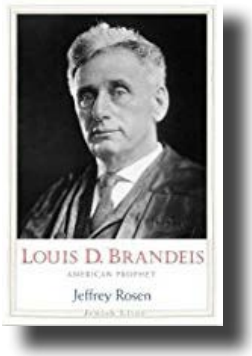
44 Rakove, *Original Meanings: Politics and Ideas in the Making of the Constitution*, p xv.

Recommended Reading for the Appellate Lawyer

By Mary Massaron

This issue's book reviews include a biography of Justice Louis D. Brandeis, and a memoir about the disappearance and brutal death of a young woman, the lasting impact on her family, and the arrest and trial of a suspect decades later.

Louis D. Brandeis: American Prophet
Jeffrey Rosen (Yale University Press 2016)



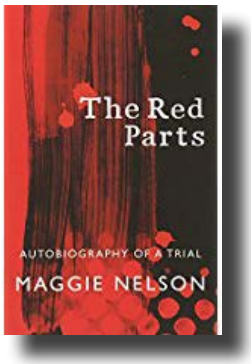
Regular readers of these book reviews know that I often discover new books to read when I listen to speakers at seminars. Recently, I was privileged to attend the annual symposium for state court appellate justices and judges held by the NFJE (National Foundation for Judicial Excellence), a non-profit entity that was established approximately thirteen years ago. I am privileged to serve on its board of directors, and have moderated, spoken at, and participated in many panels during the seminar over the years. This year's keynote speaker was Jeffrey Rosen. His topic was *The Future of Privacy and Speech in a Digital Age*. And in the course of describing some of the new legal issues facing the courts today, Professor Rosen looked several times to opinions of Justice Brandeis, about whom he wrote this book. I read the book when I got home and it is a fascinating and enlightening account of a giant on the Court.

Rosen's thesis is that Brandeis is the Supreme Court justice who is most able to "instruct us in the need for translating the constitutional values of privacy and free speech in an age of technological change." According to Rosen, "Brandeis is the historical figure who represents and blends the ideals of both sides" of the debate between "conservatives and libertarians, who prefer small government and free enterprise, and liberals and progressives, who advocate a more energetic social welfare state…." Brandeis "endorsed Jeffersonian ideals of small government and local democracy but applied those ideals to uphold state regulations that tamed the excesses of big business and monopoly." According to Rosen, Brandeis's judicial philosophy "rested on three pillars: a commitment to judicial deference to legislative experimentation and states' rights; a crusading opposition to the effects of big corporations and big government on American democracy; and a determination to translate the text of the Constitution and the values of the framers into concepts and rulings that were demanded by an era of social and technological change, to interpret the document not just in light of original understanding but also as a synthesis of the history of the United States."

Thus, Brandeis sought to write decisions as narrowly as possible, and to defer to the legislature and uphold state and federal laws "unless they clearly violated the Constitution." Brandeis's approach was also typified by a careful attention to the facts because "nobody can form a judgment that is worth having without a fairly detailed and intimate knowledge of the facts." He was a judicial craftsman devoted to making his opinions both convincing and instructive.

Rosen's book focuses on his character and beliefs. His analysis of the consistent themes that were important to Brandeis is illuminating. And the book is so well-written that it is a joy to read. I highly recommend it.

The Red Parts: Autobiography of a Trial
Maggie Nelson (Graywolf Press 2007)



In a meeting with one of my clients, I was struck by something he said about litigation. My client is a bright, high-energy, successful person who was sued (the nature of the claim is not important here). For you, he said, my suit is business – it's what you do every day. For me – it's my life. As lawyers, we occupy a position of privilege in

this country. We are able to represent the parties in litigation and to try to help them get a just result under the rule of law. But we are also engaged in a profession with intense pressures arising from demands on our time, emotional demands from the stress of taking the legal problems of others on to our shoulders, and the economic pressures of our professional life in a law firm. With all of this, it is easy to lose sight of the personal side of litigation as it is experienced by our clients. By now, you may be wondering what this has to do with a book review.

Maggie Nelson's book is a healthy reminder that each and every person or entity that we represent is not only looking to us for legal guidance and advocacy but is experiencing our criminal or civil justice system in a different way – not as the lawyer who is empowered to act in the process but as the litigant who is being acted upon in a sense throughout the litigation and is often feeling powerless. Understanding this can make us better lawyers. So I highly recommend this book, particularly for those of us who have been practicing law (as lawyers or judges or in some other aspect of litigation) for long enough to have forgotten the intimidating feeling of being in a courtroom as a non-lawyer.

Maggie Nelson is a poet, critic, and nonfiction writer. She wrote a book length narrative poem about her Aunt Jane, who was brutally murdered in 1969. Jane, in her first year at law school, had "requested a ride via the campus ride board at the University of Michigan." Jane was going home to tell her parents she was engaged. She did not know the person she'd arranged the ride with was using an alias. She was shot in the head, and "[a]fter she was dead, or fast approaching death, she was strangled viciously with a stocking that did not belong to her." "Her jumper was pulled up, her pantyhose pulled down, her belongings meticulously arranged between her legs and around her body, which was then covered with her raincoat and abandoned."

For decades, Jane was assumed to have been the victim of a serial killer but no trial took place and her killer was never identified. Maggie Nelson describes a childhood during which her mother rarely spoke about the sister she had lost to murder decades before and yet during which Maggie dreamed "for years of confronting some sinister, composite epitome of male violence and power, the murderer [she] presumed to be Jane's." But in 2004, a detective called her mother to tell her that he thought the investigation was moving to a successful conclusion. This was obviously a shock to Maggie's mother and to Maggie. With this introduction into what was to become an arrest, a preliminary examination, a trial, and a conviction. Maggie Nelson's writing is so vivid that we feel as though we are with her, and part of her family, experiencing all the trauma of the process.

At the first court proceeding, Maggie explains that after thirty-five years, she watched "an overweight, bespectacled, sixty-two-year-old man in a forest-green prison jumpsuit shuffle into the courtroom." As she describes her own reactions, she observes those of her mother "who did not cry" when the medical examiner described three photos of Jane's body. According to Maggie, "[h]er body simply collapsed in on itself. Her shoulders rounded over her, her chest hollowed out, her whole body becoming more and more of a husk. Her knees shaking in spasms." Maggie touched her mother in an effort to give some comfort but "[i]t was clear that she had entered a world beyond touch, a world beyond comfort."

At the trial, as gruesome photos of Jane's body are to be shown, the prosecutor tells the family in advance when they will be shown, offering them the chance to leave the courtroom. Her mother would bend down, telling Maggie "Tell me if I should look." Her grandfather decided to stay and watch throughout. Maggie describes how this was later reported on Court TV. But the book not only covers the trial proceedings; it moves back and forth in time to reveal in all its intensity the impact this crime and this loss had on Maggie's mother, on Maggie, on her Aunt's boyfriend, on the woman who found the body, and on others over many years. The book gives a sense of what it must be like to sit in a courtroom seeing photographs of a loved one's body, after a brutal murder, to hear testimony of a medical examiner, and of the other witnesses connecting the criminal defendant to the murder. She describes how the family spent the time waiting for the verdict, and her grandfather "cracking apart with animal sobs," after the verdict has been read and the jury has been excused. Lieterman, the criminal defendant, offered no apology but maintained his innocence despite his DNA, which was found all over his victim's pantyhose.

Maggie Nelson has written an eloquent heart-wrenching story of grief and loss and family. It is haunting – and after you read it, you will certainly think differently about the experience of litigants in a courtroom, particularly in a criminal proceeding.

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.

Ally Financial, Inc v State Treasurer, et al
SC 154668, COA 327815

Taxation: Whether MCL 205.54i prohibits partial or full tax refunds on bad debt accounts that include repossessed property; whether the Court of Appeals erred in giving the Department of Treasury's interpretation of MCL 205.51i respectful consideration in light of MCL 24.232(5); what standard of review applies to the Supreme Court's review of the Department's decision to required RD-108 forms pursuant to MCL 205.54i(4); and whether the Court of Appeals erred in holding that plaintiff's election forms did not apply to accounts written off prior to the retailers' execution of the forms.

Atlantic Casualty Ins Co v Gustafson
SC 154026, COA 325739

Insurance: Whether the phrase "any property owner" in the insurance policy is ambiguous; whether a property owner must have a commercial interest in the project before the exclusion of injuries to employees or contractors applies to that property owner, what constitutes a commercial interest; and what weight, if any, should be given to the title of the exclusion.

***Board of Trustees of the City of Pontiac Police and Fire Retiree Prefunded Group Health and Insurance Trust v City of Pontiac*, SC 154745, COA 316418**

Municipal: Whether the Court of Appeals correctly concluded that the principles of *LaFontaine Saline, Inc v Chrysler Group, LLC*, 496 Mich 26 (2014), apply to the analysis of the Emergency Manager's Executive Order 225; and whether the retroactive application of EO 225 to extinguish the defendant city's accrued but unpaid contribution to the trust for the 2011-2012 fiscal year was permissible under *LaFontaine*; and if not, whether EO 225 constitutes an impermissible retroactive modification of the 2011-2012 fiscal year contribution under Const 1963, art 9, § 24.

Brown v City of Sault Ste Marie
SC 154851, COA 330508

Governmental Immunity: Whether the Court of Appeals properly applied MCL 691.1404(1) when it concluded that the plaintiff's notice, when read as a whole, was adequate because the notice referenced documents that more fully described the plaintiff's injuries.

Dillon v State Farm Mutual Auto Ins Co
SC 153936, COA 324902

No Fault: To what extent must an injury be described in order to provide notice of injury under MCL 500.3145 and whether the plaintiff or someone on her behalf provided written notice as required by the statute.

***Grass Lake Improvement Bd v Dept of Environmental Quality*, SC 154364, COA 326571**

Administrative Law: Whether the circuit court applied incorrect legal principles when it reversed the Administrative Law Judge's decision under MCL 24.323(1)(c).

Harmony Montessori Ctr v City of Oak Park
SC 154819, COA 326870

Taxation: Whether *Ladies Literary Club v Grand Rapids*, 409 Mich 748 (1980) and *David Walcott Kendall Memorial School v Grand Rapids*, 11 Mich App

231 (1968), continued to provide the appropriate test of what constitutes a nonprofit educational institution under MCL 211.7n.

Iliades v Dieffenbacher North America, Inc
SC 154358, COA 324726

Products Liability: Whether the plaintiff's conduct prior to being injured constitutes misuse of the press machine that was reasonably foreseeable.

***Marik v Marik*, SC 154549, COA 333687**

Family Law: Whether a defendant's father's motion to change the children's school enrollment and to modify parenting time was a "post judgment order affecting the custody of a minor" and therefore a "final order" under MCR 7.202(6)(a)(iii).

Martin v Milham Meadows I Limited Partnership
SC 154360, COA 328240

Premises Liability: Whether genuine issues of material fact preclude summary disposition on the claim that the stairs at issue were not "fit for the use intended by the parties" and whether the defendants failed to keep the stairs in "reasonable repair."

McNeill-Marks v MidMichigan Medical Center-Gratiot
SC 154159, COA 326606

Whistleblowers' Protection Act: Whether the plaintiff's communication with her attorney constitutes a report to a public body within the meaning of MCL 15.361(d) and MCL 15.362 such that it is protected activity under the Whistleblowers' Protection Act, MCL 15.361 *et seq*.

Menard, Inc v City of Escanaba
SC 154062, COA 325718

Taxation: Whether the Court of Appeals exceeded its limited appellate review of a decision of the Michigan Tax Tribunal; and, if so, whether the Michigan Tax Tribunal may utilize a valuation approach similar to that recognized *Clark Equipment Co v Leoni Twp*, 113 Mich App 778 (1982).

Millar v Construction Code Authority
SC 154437, COA 326544

Whistleblowers Protection Act: Whether the plaintiff's claim under the Whistleblowers Protection Act was barred by the 90-day limitation period set forth in MCL 15.363(1).

NL Ventures VI Farmington, LLC v City of Livonia
SC 153110, COA 323144

Municipal: Whether 1939 PA 178, MCL 123.161 *et seq*, MCL 141.121(3), or any other statute authorized the method by which defendant city sought to enforce collection of the disputed liens; and if there was statutory authority, whether the defendant city is prohibited from collecting the disputed liens because defendant failed to place them on the tax roll each year as required by Livonia Ordinance, § 13.08.300.

***Ozimek v Rodgers*, SC 154776, COA 331726**

Family Law: Whether the lower court's order denying the plaintiff mother's motion to change the school district that her child's attends was a "postjudgment order affecting the custody of a minor" and therefore a "final order" under MCR 7.202(6)(a)(iii).

Continued on next page

Appellate Practice Section Mission Statement

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

***People v Anderson*, SC 155172, COA 327905**

Criminal: What manner, in light of *People v Yost*, 468 Mich 122, 128 n 8 (2003); may a magistrate judge consider the credibility of witnesses at a preliminary examination when determining whether to bind over a defendant; whether the magistrate can refuse to bind a defendant over when the evidence conflicts or raises reasonable doubt; and whether the trial court abused its discretion in dismissing the charges.

***People v Bruner*, SC 154779, COA 325730**

Criminal: Whether the admission of a third party's preliminary-examination testimony at the defendant's joint trial with another defendant violated the defendant's constitutional right to confrontation, despite the trial court's redaction of that testimony and limiting instruction to the jury and, if so, whether the error was harmless.

***People v Chatman*, SC 155184, COA 328246**

Criminal: Whether the trial court's questioning of witnesses improperly influenced the jury by creating the appearance of advocacy or partiality against a party.

***People v Collins*, SC 153952, COA 327971**

Criminal: Whether a defendant who was sentenced prior to *People v Lockridge*, 498 Mich 358 (2015), sufficiently waived his constitutional rights to notice and jury proof beyond a reasonable doubt of facts used to score offense variables under MCL 777.1 *et seq*, where those facts were not charged in an indictment or information, but where he pleaded guilty or no contest and stipulated under oath to the aggravating facts in the context of a general waiver of his jury rights.

***People v Douglas-Le Bryant*
SC 154565, COA 325569**

Criminal: Whether the trial court abused its discretion in admitting "other acts" evidence, and, if so, whether the error was harmless; and whether the testimony of three police officers invaded the province of the jury when they testified as to their observations in viewing video evidence.

***People v Horacek*, SC 152567, COA 317527**

Criminal: Whether exigent circumstances authorized the officers' warrantless entry into the defendant's motel room; and, if a constitutional violation did occur, whether the defendant is entitled to withdraw his plea.

***People v Hyatt*, SC 153081, COA 325741**

Criminal: Whether the conflict-resolution panel of the Court of Appeals erred by applying a heightened standard of review for sentences imposed under MCL 769.25.

***People v Kennedy*, SC 154445, COA 323741**

Criminal: Whether the trial court abused its discretion under MCL 775.15 and/or violated the defendant's constitutional right to present a defense when it denied his request to appoint a DNA expert.

***People v Lewis*, SC 154396, COA 325782**

Criminal: Whether the denial of counsel to the defendant at his preliminary examination is an error requiring automatic reversal or whether harmless error analysis applies.

***People v Lopez*, SC 154566, COA 327208**

Criminal: Whether prior testimony is admissible under MRE 804(b)(1) where the proponent of the statement has caused the declarant to be unavailable under MRE 804(a), regardless of any intent by the proponent to cause unavailability; and, if some form of intent is required, what standard should apply when determining whether the proponent's action was intended to cause the delcarant to be unavailable.

***People v Lyles*, SC 153185, COA 315323**

Criminal: Whether the trial court's failure to correctly instruct the jury regarding defendant's evidence of good character was sufficiently prejudicial to warrant a new trial.

***People v Pinkney*, SC 154374, COA 325856**

Criminal: Whether the trial court abused its discretion when it admitted evidence under MRE 404(b) that related to the defendant's political and community activities other than the mayoral recall effort for the purpose of showing the defendant's motive to commit the instant crimes; and whether the Court of Appeals

erred in determining that MCL 168.937 creates the substantive offense of election forgery and is not merely a penalty provision for the specific forgery offenses set forth in other provisions of the Michigan election law.

People v Pippen, SC 153324, COA 321487

Criminal: Whether the defendant was denied the effective assistance of counsel based on trial counsel's failure to adequately investigate and present testimony from a res gestae witness.

People v Randolph, SC 153309, COA 321551

Criminal: Whether a defendant's failure to demonstrate plain error precludes a finding of ineffective assistance of trial counsel and, in particular, whether the prejudice standard under the third prong of plan error is the same as the prejudice standard in *Strickland v Washington*, 466 US 668 (1984).

People v Shami, SC 155273, COA 327065

Criminal: Whether the defendant's activities of mixing different flavors of tobacco to create different flavor combinations to offer customers and repackaging tobacco under his own label rendered him a manufacturer of tobacco under MCL 205.422(m) and, if so, whether the definition of manufacturer in the act satisfied due process by putting the defendant on fair notice of the conduct that would subject him to punishment.

People v Thomas, SC 155245, COA 326311

Criminal: Whether the single photographic identification method used in this case was so impermissibly suggestive that it gave rise to a substantial likelihood of misidentification; and, if so, whether the complainant's in-court identification had an independent basis so that it was not subject to suppression.

People v Traver, SC 154494, COA 325883

Criminal: Whether the trial court erred by providing written instructions to the jury on the elements of the charged offenses but not reading those instructions aloud to the jury; whether the trial court's instructions on the charge of possession of a firearm during the commission of a felony, MCL 750.227b, fairly presented the issues to be tried and adequately protected the defendant's rights; whether the defendant waived any instructional errors when his attorney expressed satisfaction with the instructions as given; what standard of review should be employed in reviewing the Court of Appeals decision to order an evidentiary hearing on the ineffective assistance of counsel claim; and whether the Court of Appeals erred under the applicable standard when it ordered an evidentiary hearing for defendant to establish the factual predicate for his claim that his trial counsel was ineffective for failing to properly advise him of the potential consequences of withdrawing his guilty plea.

People v Wafer, SC 153828, COA 324018

Criminal: Whether the trial court's denial of the defendant's request for a jury instruction on the rebuttable presumption at MCL 780.951(1) of the self-defense act violated the defendant's rights to present a defense and to a properly instructed jury.

People v Wilder, SC 154814, COA 327491

Criminal: Whether the trial court erred by allowing the prosecutor to cross-examine the defendant's wife about his prior firearms-related convictions; whether the prosecutor improperly raised a collateral issue to admit evidence of the defendant's prior felonies through impeachment; and whether any error was harmless.

Spectrum Health Hospitals v Westfield Ins Co SC 151419, COA 323804

No Fault: Whether *Miller v Auto-Owners Ins Co*, 411 Mich 633 (1981), remains a viable precedent in light of *Frazier v Allstate Ins Co*, 490 Mich 381 (2011), and *LeFevers v State Farm Mut Auto Ins Co*, 493 Mich 960 (2013), and if so, whether *Miller* should be overruled.

South Dearborn Environmental Improvement Assoc, Inc v Dept of Environmental Quality SC 154524, COA 326485

Environmental: Whether MCL 324.5505(8) amd MCL 324.5506(14) prescribe the applicable time period for filing a petition for judicial review of the Department of Environmental Quality's issuance of the permit that the petitioners are seeking to challenge; and if not, whether the issuance of that permit was a decision of that agency subject to the contested case provisions of the Administrative Procedures Act, such that the time

Continued on next page

period for filing a petition for judicial review set forth in MCR 7.119(B)(1) applies, rather than the time period established by MCR 7.123(B)(1) and MCR 7.104(A).

Trowell v Providence Hosp and Medical Ctr, Inc
SC 154476, COA 327525

Medical Malpractice: Whether the claims in plaintiff's complaint sound in ordinary negligence or medical malpractice.

***Walters v Falik*, SC 154489, COA 319016**

Medical Malpractice: Whether the Court of Appeals erred in its interpretation of MCL 600.2955(1) and MRE 702; and whether the trial court erred in its application of those evidentiary standards or abused its discretion in granting the defendants' motions to exclude the plaintiff's experts' testimony and for summary disposition.

Wells Fargo Bank, NA v SBC IV REO, LLC
SC 155089, COA 328186

Equity: Whether defendant is a bona fide purchaser for value such that the doctrine of equitable subrogation cannot be applied; whether defendant will be prejudiced by application of equitable subrogation; and whether the limitation period of MCL 600.5801(4) applies to the plaintiff's claim for equitable subrogation.

About the Author

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

Meet Judge Talbot

By Ann M. Sherman

Judge Talbot has been wearing two hats for some time now. Two big hats. As Chief Judge of the Michigan Court of Appeals he is responsible for overseeing the administration and management of that Court—one of the highest-volume state intermediate appellate courts in the country. And as of November 2013 he has also been serving as Chief Judge of the Michigan Court of Claims, which is now seated at the Court of Appeals. (For good measure, he also served for a 14-month period—beginning May 2013—as special administrator of Detroit's 36th District Court, which was experiencing serious financial issues). Fortunately for him and the courts he serves, his many hats fit quite nicely. He has juggled his demanding job responsibilities with a dedication and an energy level that could leave some feeling … well… downright sluggish.

During a recent interview, the Judge generously shared his struggles, triumphs, and vision for these two courts.

We began by talking about his background, because it is so integral to understanding the way he approaches his current roles. He began his career in the '70s as a criminal defense attorney. "There were 4 of us who were partners," he says, "and we all came out of the University of Detroit urban court clinic. My portion of the work was criminal. I was hustling, trying cases, with the older lawyers guiding me along. When you have trials under your belt, you think you can be a judge."

And indeed Judge Talbot could. His first judicial position was in the common pleas court in Detroit. At age 32, he was the youngest judge in Michigan at the time. "The common pleas court" he explained, "was an entry-level court and had all the district court jurisdiction within the City of Detroit. You heard traffic tickets, small claims, civil lawsuits up to $10,000.00, landlord-tenant issues—even real property issues."

From there, Judge Talbot moved to the Recorder's Court, the felony court for Detroit. He recalls a memo-

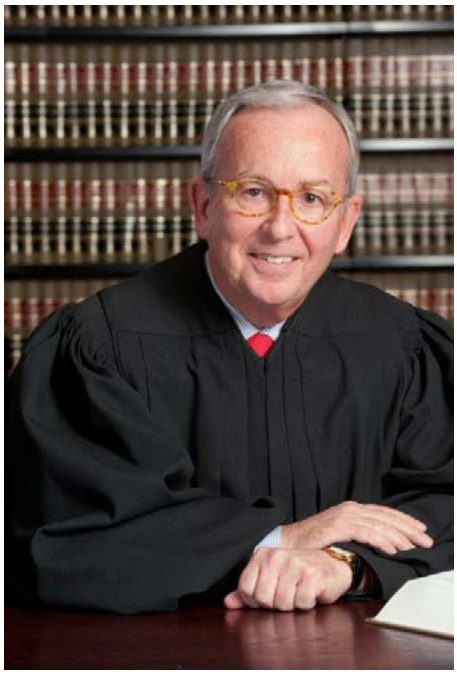
rable case where there were 4 defendants and 4 juries at the same time in the same room, filling the first 3 rows of the jury box. The prosecutor tried the case to those 4 juries and gave 4 separate closing arguments.

From the Recorder's Court, the Judge went to Wayne Circuit Court and, from there, to the Court of Appeals. He is now in his 40th year of judicial service. (Yes, 40 years!) I asked him whether those years had changed his perspective. He readily said "yes." "Your confidence, your certainty are better when you are younger. Now I have less confidence. I worry more and hope I am doing the right thing—because as you get older you have the experience of having blown it, of having made mistakes. And you realize more acutely that people's lives are at stake. You are sensitive to that. If you aren't, you should get the hell out."

Those words reflect remarkable candor and self-reflection. But they also reflect the no-nonsense manner that has led to his reputation as a tough judge. I asked him whether that reputation was deserved. His answer: "Well, over the years I have not been very patient with folks who don't have their act together. That hasn't changed." He is quick to add, however, that litigants and attorneys might see a somewhat softer side to him on the golf course, in church, or on vacation reading a favorite Dickens novel on the beach—places where "you can let things happen, where you're not always directing traffic."

I asked the Judge what experiences were helpful to him in being able to successfully step into an administrative role where he "directs traffic" and is responsible for case management, budget, and personnel issues. His reply was a window into a little-known piece of his past: "I owned a business for a while—a small trucking company. That taught me how to make a living, since we didn't like losing money. The practice of law is a business."

We turned to a discussion about the new Court of Claims. After praising his judges for doing an amazing job, he discussed the administrative challenges. "The volume of cases in the Court of Claims isn't that high. But they are generally all high-publicity cases. So the expectations on the Court of Claims' judges are high—to dispose of the case timely [the Court uses the same procedures that the county courts use, and its goal—in keeping with the standards of the Michigan Supreme Court—is disposition within in year] and to produce a thoughtful result while still continuing their regular load of Court of Appeals work."



Judge Talbot is intimately familiar with those expectations, because from the outset he agreed to serve on the Court of Claims. "I saw that there were tax cases on the docket, and I thought I could help out by reassigning all tax cases to my docket. What I didn't know was that the docket encompassed this very complicated tax issue—the interstate compact. Wow, was that hard work! That impacted some 80 cases."

The Judge also talked about the administrative challenges of running the Court of Claims. "The biggest problem," he noted, "has been staffing." I had to bring on people who were familiar with trial work and trial-court rules. It doesn't really make sense to cause the intermediate court to also be a trial court. But we made it happen. I also dedicated a research attorney to the four Court of Claims judges. And we will soon have e-filing in the Court of Claims. In short, running the Court of Claims is like running a small circuit court."

But, as the Judge acknowledged, some challenges are outside of that court's control. For example, he wonders whether the Legislature will put more and more cases in the Court of Claims. "When the Legislature isn't sure where to put a case, they come up with the Court of Claims. As of April 2017, they have put unlawful imprisonment claims in the Court of Claims. And although those cases are relatively straightforward, they have increased the Court's volume. I don't know where this problem of jurisdiction is going to go in the future."

As for the running of the Court of Appeals, the Judge's assessment was that "the system is working." And he praised the judges and staff as "first-rate people" with whom he has "good collaboration."

Not surprisingly, however, Judge Talbot is not content to let the Court rest on its laurels. "If something

is working, you want it to continue working. But some areas can get better." One of his collaborative efforts has been to ask his judges to evaluate everything the Court is doing to see how they can give the litigants thoughtful opinions that are timely. He has encouraged them to weigh in on everything from length of opinions and discretion in oral argument to the use of orders rather than opinions in some cases. "We are the only court in the nation that allows a stipulation for extension of time. Should that continue?" he queries. "And culturally, we have set it up so litigants expect oral argument. But in intermediate appellate courts around the country, oral argument is not a matter of right. It is discretionary if the court feels the need. I realize that if I try to take that away, it's like stabbing someone in the heart. But in the future we may have to rethink that."

These innovative—and perhaps controversial—suggestions are driven, in part, by the realization that the Court of Appeals will lose 3 judges over the next few years, and maybe more in the future. "Because of the law Governor Snyder signed in 2002," Judge Talbot says, "that is the reality." "We've already lost one, and that means reducing the Court by one or more panels a month." He explains that the Court of Appeals' goal is disposition in 18 months. "We are at 94% now, and 75% are disposed of in 12 months. Will I be able to hit that percentage with a reduction of panels? Not if I fail to make changes." The Judge shakes his head, and for a brief second I detect a hint of frustration. "I can't fix everything," he concedes.

Any frustration quickly gives way to his focus on evaluating the court's performance and fixing what he can. He regularly reviews data on how many cases are on appeal, backlogs on applications, backlogs in a particular district, and how particular cases are "aging," especially parental termination cases. He tells me that every Saturday morning he pours himself a cup of coffee and proceeds to study a detailed report of how each case is moving through the system. "I want to locate problems," he explains.

That attention to detail has led to solutions, both technological and practical—solutions such as immediate electronic delivery of opinions to the parties, virtual courtrooms, expansion of e-filing, and improved availability of current case information. An ongoing effort has been underway to work more closely with the lower courts to get them electronically "in sync" with the appellate courts. And later this year, the Court will be fixing the anomaly of how stipulated extensions affect the "age" of a case. The Judge explained that "when the litigant files a case, the clock starts. But in a case where the lawyers have initiated or agreed to an extension or a series of extensions, that case gets to leap over a later-filed case that has proceeded without stipulations, simply because it has aged more." "This is going to change," he states. "Soon, that earlier-filed case with the extensions will not take priority over a later case that was timely litigated. Instead, it will be, 'when you are ready, we are ready.'" He added, "litigants and attorneys might choose to delay the case, but I'm not going to aid and abet that." The Judge did clarify that some cases—governmental immunity or termination cases, for example—will still take priority and bump other cases that are ready to go.

As the interview wound down, I asked Judge Talbot to share a few tips with attorneys preparing for oral argument in the Court of Appeals. He offered two points of wisdom:

> *First*, "Heed the panel's words when we tell you we know what the case is about. Trial lawyers are used to trial judges who are busy. But regulars in the Court of Appeals know that we can always tell you what the case is about."
>
> *Second*, "Know why you are standing up at the podium. It has to be either to share something new or to make yourself available for questions. If I were to grab a lawyer walking in the courtroom door and ask, 'Why are you here? What is your purpose?' and that lawyer struggled to answer, that same lawyer will inevitably struggle when standing before the panel."

The interview ended with Judge Talbot bounding off to an administrative meeting, both hats in hand. I made my way to Mario's in Detroit, where I ordered Friday's standing luncheon special—the Judge Talbot Mariner's Salad.

About the Author

Ann M. Sherman *is Assistant Solicitor General at the Michigan Department of Attorney General.*

Selected Decisions of Interest to the Appellate Practitioner

By Barbara H. Goldman

Published Opinions

Attorney fees - appeal from administrative review

Miller v Blue Cross Blue Shield of Michigan
__ Mich ___ (Docket no. 154591)

The petitioner was a patient at a nursing home; she had health insurance with Blue Cross. It paid for part of the time she was there, but disputed whether the care she received during the rest of the stay was covered under the policy. She appealed to the Office of Financial and Insurance Regulation (OFIR), which affirmed. She petitioned for review in circuit court, alleging that both Blue Cross and OFIR had not considered all of the relevant medical records. The trial court reversed and awarded attorney fees. Blue Cross appealed from the fee award. The Supreme Court peremptorily reversed.

There is no basis in this case to conclude that respondent presented a position that was "grossly lacking in the requirements of propriety, violated court rules, or grossly disregarded the requirements of a fair presentation of the issues to the court." MCR 7.216(C). Further, the Court of Appeals erred by equating the circuit court's invalid finding of frivolousness under MCL 600.2591 with a finding of vexatiousness under MCR 7.216(C)

Final order - order "affecting custody"

Lieberman v Orr
Docket no. 333816, rel'd 3/7/17

Panel: M. J. Kelly, O'Connell, Beckering

Trial court: Clinton Circuit Court

In a custody case, the defendant (mother) appealed from an order changing the children's schools. She argued that the order "effectively changed primary physical custody of the children." The Court of Appeals held that the order was appealable of right under MCR 7.202(6)(a)(iii), citing *Ozimek v Rodgers*, __ Mich App __; __ NW2d __ (2016) (Docket No. 331726) ("an order affecting a change in schools that also affects 'the amount of time spent between the child and either parent' affects custody and is appealable by right").

Issue not raised - not addressed

Shelton v Auto-Owners Ins Co
___ Mich App ___ (docket no. 328473), rel'd 2/14/17

Panel: K. F. Kelly, Gleicher, Shapiro

Trial court: Wayne Circuit Court

In a first-party no-fault case, the insurer alleged the plaintiff had committed fraud. The trial court granted summary disposition on part of the plaintiff's claim but the basis for its ruling was unclear. The court denied summary disposition on the rest of the claims. The Court of Appeals granted the insurer's application for leave to appeal. It did not address the issue of the "unclear" ruling, because it was not appealed and "neither party asked the court to clarify its ruling or to make a finding of fraud."

Unpublished cases

Jurisdiction - final order

Hoskins v Hoskins
Docket no. 334637 , rel'd 3/16/17

Panel: Hoekstra, Jansen, Saad

Trial court: Oakland Circuit Court

In a custody case where the parties had joint legal custody of the children, the trial court increased the plaintiff's parenting time, changed the children's school and referred a child support issue to the friend of the court. The Court of Appeals held that only the issues related to the parenting time order were appealable under MCR 7.202(6)(a)(iii) (defining as "final" "a post-judgment order affecting the custody of a minor"). The

panel held that the parenting time order "affected" the custody of the children and so fell within the definition in the court rule, but the school-change order did not affect either physical or legal custody under the facts of the case. The court declined to consider the other issues and dismissed those portions of the appeal.

Law of the case - discretionary application

Asphalt Specialists, Inc v Steven Anthony Development Co (On Remand)
Docket nos. 311947, 314658 rel'd 3/21/17

Panel: Beckering, O'Connell, Shapiro

Trial court: Macomb Circuit Court

A construction lien case evolved into a dispute over attorney fees. In a prior appeal (Docket no. 305753), a different panel remanded with directions. The circuit court entered an amended judgment which was the subject of a second appeal by one of the many parties to the case. That panel held it was constrained by the law of the case doctrine. The losing party applied for leave to appeal. The Supreme Court remanded to the Court of Appeals to reconsider in light of another Court of Appeals decision, which preceded the opinion in the second appeal and could have led to a different result. On remand, the panel "exercised its discretion" not to apply the law of the case doctrine "in the interests of fairness." It reversed and remanded, directing the circuit court to reconsider its decision in light of the intervening change in the law.

Law of the Case

Sanctions - motion required

Polytorx, LLC v Naaman
Docket no. 330893, rel'd 4/4/17

Panel: M. J. Kelly, Murphy, Ronayne Krause

Trial court: Washtenaw Circuit Court

The plaintiff was an LLC formed by a U of M student and Naaman, a professor. Later, Naaman went to work for a competitor and allegedly used trade secrets stolen from the plaintiff corporation. The plaintiff sued U of M in the Court of Claims and, simultaneously, sued the professor, two other men and the competitors in another action in circuit court. Two of the individuals did not participate in the Court of Claims case, appearing only to contest personal jurisdiction. The Court of Appeals affirmed summary disposition for the defendants in that case but did not reach the issue of jurisdiction. In a prior appeal, the Court of Appeals held the statute of limitations had expired as to the defendants who did participate and remanded for entry of summary disposition in their favor. The other defendants, who had only contested jurisdiction, argued they were also entitled to summary disposition for the same reason. The trial court agreed and granted their motion. The Court of Appeals held the law of the case doctrine applied to the claims reviewed in the prior appeal and that the other counts were based on the same factual allegations and so should be dismissed as well. The panel declined to consider the personal jurisdiction argument as an alternative basis for dismissal. The court also denied the appellees' motion for appellate sanctions, because it was not contained in a separate motion.

Preservation - issue forfeited

Jordan v State Farm Fire & Casualty Co
Docket no. 329305, rel'd 2/9/17

Panel: Wilder, Cavanagh, K. F. Kelly

Trial court: Genesee Circuit Court

The plaintiff's fire loss claim was denied in part on the basis of a fraud exclusion in a homeowners policy. He sued and the insurer included the exclusion in its affirmative defenses. The plaintiff did not move to strike them or request a more definite statement. At trial, his attorney made an objection to the jury instruction, but stated that the basis for the objection had been raised in chambers. The jury found that the plaintiff did not commit arson but did engage in a "material misrepresentation." He appealed. The Court of Appeals held the issue was forfeited and that, even if it were not, the plaintiff had failed to demonstrate prejudice.

Preservation - "appellate parachute"

Wismer v SB Indiana LLC
Docket no. 328867, rel'd 2/9/17

Panel: Wilder, Cavanagh, K. F. Kelly

Trial court: Lenawee Circuit Court

In a business dispute, the plaintiffs appealed from an order of involuntary dismissal. The Court of Appeals

noted that the appeal involved "the validity and enforceability of the [LLC's] operating agreements," but "neither the validity nor the enforceability of the operating agreements was ever truly disputed at the trial court level." The panel held the plaintiffs could not "harbor an appellate parachute" and did not address the argument.

Appellate attorney fees - prospective award

Bachman v Snowgold
Docket nos. 329892; 332005, rel'd 5/18/17

Panel: Cavanagh, Sawyer, Servitto

Trial court: Livingston Circuit Court

In a post-divorce proceeding, the trial court awarded attorney fees to the defendant (wife) after a discovery dispute. The plaintiff (husband) said he would appeal "unless the defendant agreed to drop the attorney fee." The trial court granted the defendant's request for an advance award of a flat fee for the appeal. The Court of Appeals reversed. "While [*Schoensee v Bennett*, 228 Mich App 305, 316; 577 NW2d 915 (1998)] does support the proposition that appellate attorney fees may be awarded in domestic relations matters, it does not support the proposition that they may be done so prospectively." The panel found it "unwise" to allow advance fee awards, citing both the uncertainty of actual costs and the potential for abuse by "open[ing] the door to using a preappeal award to discourage a party from filing an appeal."

Appellate attorney fees - reasonableness

In re Attorney Fees of John W Ujlaky (After Remand)
Docket no. 330491, rel'd 2/23/17

Panel: Borello, Markey, M. J. Kelly

Trial court: Kent Circuit Court

Ujlaky was assigned to represent the defendant in an application for leave to appeal from a plea-based conviction. He request "extraordinary" fees for it, but his motion was denied. The Supreme Court eventually remanded the case with directions to the trial court to award the fees or explain why they were not reasonable. The trial court did not hold an evidentiary hearing but did issue an opinion, analyzing the fee request in detail but coming to the same conclusion, i.e., that no "extraordinary" fees were due. The Court of Appeals held that the trial court's opinion satisfied the requirement to "articulate its reasons on the record" and it was not required to have held a hearing. It also found that the trial court did not "misapp[ly] the relevant case law . . . or . . . the law to the facts of this case."

Appellate attorney fees - amount

In re Attorney Fees of John W Ujlaky
Docket no. 330464, rel'd 2/23/17

Panel: Borello, Markey, M. J. Kelly

Trial court: Kent Circuit Court

Ujlaky was appointed to represent the defendant in post-judgment proceedings from a plea-based conviction. He filed a motion for resentencing and a delayed application for leave to appeal. He moved for "extraordinary" fees. The circuit court awarded him more than the standard fee schedule for appointed appellate counsel but less than he requested. The Court of Appeals held that the attorney had failed to establish why he was entitled to additional fees, at either the trial court or appellate level. "[E]ven on appeal, Ujlaky has not offered any specific explanation why this case in particular required more time or work than the average guilty-plea case."

Appellate attorney fees - amount

In re Attorney Fees of John W Ujlaky
Docket no. 331067, rel'd 4/27/17

Panel: Beckering, Markey, Shapiro

Trial court: Berrien Circuit Court

Ujlaky represented a defendant in two applications for leave to appeal from no-contest pleas. He requested "extraordinary" attorney fees but did not actually file a motion for them. The trial court granted him only part of what he asked for. The Court of Appeals affirmed, citing the lack of a "formal motion purporting to set forth authority" for the request. The panel also rejected his constitutional claims. "Efforts to raise the county maximums for such fees must be handled in a different fashion than simply filing serial appeals." Judge Shapiro would have remanded for a determination of why the requested fees were not "reasonable."

Continued on next page

Record on appeal - summary disposition motion
Waiver - concession in trial court
Attorney fees - appeal

Fishman-Piku v Piku
Docket no. 328023, rel'd 3/23/17
application for leave to appeal pending

Panel: Boonstra, Cavanagh, K. F. Kelly

Trial court: Oakland Circuit Court

In a domestic relations case, the husband appealed from an award of separate maintenance brought by the guardian of his incapacitated spouse and continued by her estate after she died. He argued that his pretrial motion for summary disposition should have been granted. The Court of Appeals noted that both parties "improperly discuss[ed] evidence admitted at trial" and confined its analysis to "the evidence that was presented to the trial court before it decided the motion for summary disposition . . ." The panel also held that the appellant had waived for appeal the issue of the guardian's standing to file suit, because he "conceded at the hearing on the motion for summary disposition that [the guardian] possessed authority to bring this action." The court did, however, go on to consider the argument, holding that it lacked merit. The majority remanded for a determination of reasonableness of an attorney fee award and indicated that the guardian could move, in the trial court, for appellate fees as well. Judge Kelly dissented from the remand order and would have affirmed the fee award.

Mootness

Davis v Wayne Co Clerk
Docket no. 334989, rel'd 4/4/17

Panel: Stephens, Servitto, Shapiro

Trial court: Wayne Circuit Court

The plaintiffs challenged the affidavit of candidacy of a woman running for the Detroit Community School District board. The election commission agreed with the plaintiffs and voted not to put the candidate on the ballot. She filed suit challenging that decision. The circuit court granted her request to compel the election commission to include her on the ballot. The plaintiffs attempted to appeal that decision but the Court of Appeals held (Docket no. 334823) there was no order to appeal. They then filed a separate action, which the trial court dismissed on the basis of laches. The Court of Appeals held their appeal was moot. It took judicial notice of the fact that the election was over and that the candidate had appeared on the ballot but not been elected. "[E]ven if we were to conclude that the trial court erred in the manner asserted by plaintiffs, the majority of the relief requested by plaintiffs can no longer be granted."

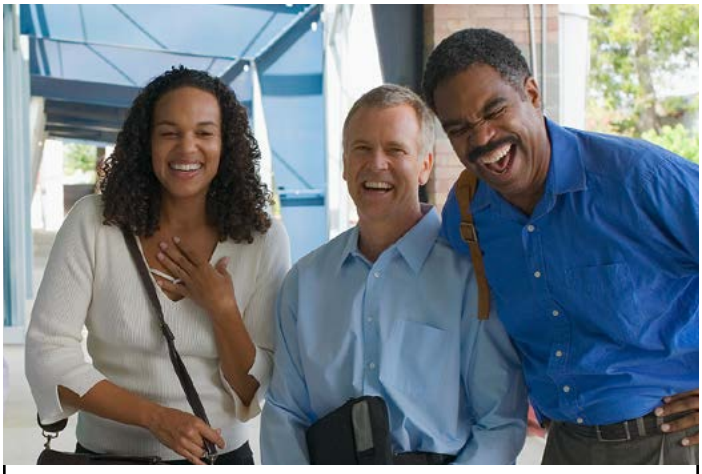
Mootness

Miles v Secretary of State
Docket no. 329943, rel'd 2/21/17

Panel: Murphy, Sawyer, Swartzle

Trial court: Kent Circuit Court

The petitioner's driver's license was suspended for a year. Her motion for a "restricted" license was denied and she appealed. By the time the case reached the Court of Appeals, the year had expired and the court held the appeal was moot. "[W]e cannot provide petitioner with any meaningful relief even assuming that her substantive argument has merit."



Invite someone you know to join the fun.
Invite someone to join the section.

Section membership forms can be found at
http://www.michbar.org/sections