

CHAIRPERSON

Cynthia E. Merry
Merry, Farnen & Ryan, PC
27739 Jefferson Ave.
Saint Clair Shores, MI 48081
(586) 776-5142 (direct)
Fax: (586) 776-1502
cemerrymfr@ameritech.net

VICE-CHAIRPERSON

Robert P. Siemion
Southfield

SECRETARY

Barry J. Goodman
Southfield

TREASURER

Thomas M. Peters
Troy

COUNCIL

Jody L. Aaron
Southfield
Brenda E. Braceful
Detroit
Jose' T. Brown
Flint
Elizabeth L. Gleicher
Royal Oak
Paul J. Manion
Detroit
Brian A. McKenna
Detroit
Jules B. Olsman
Berkley
Paul B. Pedersen
Commerce Township
Bryan J. Waldman
Lansing

EX-OFFICIO

Judith A. Susskind
Southfield

COMMISSIONER LIAISON

W. Anthony Jenkins
Detroit

LOBBYIST

Todd Tennis, Capitol Services Inc.
Lansing

**EDITOR &
MANAGEMENT CONSULTANT**

Madelyne Lawry
Grand Ledge

The views expressed in this Newsletter do not necessarily reflect the views of the Council or the Section. This publication does not represent an endorsement of any comments, views, or opinions expressed herein. Any opinions published herein are opinions of the authors, and will hopefully provide an impetus for further discussion of important issues.

"EXPEDITED APPEALS" IN THE COURT OF APPEALS

APPELLATE PRACTICE IN THE FAST LANE

BY HAL O. CARROLL AND TIMOTHY A. DIEMER, VANDEVEER GARZIA, P.C.

Introduction

Supreme Court Administrative Order 2004-5 takes effect January 1, 2005 and creates an "expedited summary disposition docket" in the Court of Appeals. Under this rule, all appeals from a grant or denial of a motion for summary disposition under MCR 2.116 will be put on a new fast track for resolution. Other appeals will continue to be handled under the existing rules, but the new rules make serious changes for appeals from summary disposition motions, which is about half of the appeals that go to the Court of Appeals.

Highlights

Fast track appeals start in the same way as conventional appeals, with a claim of appeal or an application for leave. Once the claim is filed or leave is granted, though, the goal is to conclude the entire appeal within 6 months. To do this, many deadlines are shortened:

- Cross appeal must be filed within 14 days (down from 21).
- Transcript must be provided within 28 days (down from 91).
- Appellant's brief is due in 28 days (down from 56 or 112 with extensions).
- Penalty for late brief: sanctions after 7 days, dismissal after 14.
- Appellee's brief is due within 21 days (down from 42 or 98 with extensions).
- Trial court motion briefs are to be filed in the Court of Appeals.
- Reply brief is due in 14 days (down from 21).
- Oral argument will not normally take place.
- Opinion is due 35 days after submission of the case to a panel.

Scope

The new procedure applies to all appeals from grants or denials of summary disposition. It applies both to appeals of right and to appli-

cations where leave is granted. But it applies only to orders that address only disposition on grounds stated in MCR 2.116. "Orders that reference other issues between the parties will not be eligible for this track."¹

Effective date

Since the new procedure applies to all appeals filed after January 1, 2005, it can apply to summary disposition motions decided roughly after December 11, 2004, which in turn means it can apply to motions filed in mid to late November.

Supreme Court Administrative Order 2004-5 is to be in effect for two years while its operation is monitored. The rule contains many details and at this point we have only the rule itself and no practical experience for a guide, but the following are the main points, with some suggestions for the practitioner.

Note: The Court of Appeals is expected to adopt IOPs (Internal Operating Procedures) for this procedure, which will likely address details in its application. Watch the court's website for these.

Filing the appeal

Claim of appeal or application. The changes here are not great. The appellant or applicant will still have 21 days from the summary judgment order or the order denying reconsideration.

Cross appeal time is shortened from 21 to 14 days.

PLAN AHEAD: You will likely know ahead

of time whether an appeal from the trial court's ruling is likely, so plan ahead. If a motion has been addressed in several hearings, order each transcript as you go. Set a decision schedule, keep track of dates, and advise the client ahead of time of the shortened turnaround time on decisions regarding the appeal.

Removal from fast track

By motion or sua sponte. The court can remove the case from the expedited track and restore it to the normal docket on its own initiative. The appellant

can file a motion to remove, but must file the motion **with the claim or application.** The appellee's motion to remove must be filed no later than the due date for its brief.

Effect of removal. If the motion is granted, then each party is entitled to file a full brief as in any other appeal, with the normal lengths and time limits. The time limits will start on the date of the order removing the case from the fast track docket.

Ordering the transcript

Appellant's waiver. As before, the appellant must order the transcript of the hearing if one is to be provided, but now

the appellant can waive the hearing transcript. If the appellant waives the transcript, the appellee can order it, within 14 days of service of the waiver.

28 days. Another change is that the court reporter is required to provide the transcript within 28 days from the date it is ordered. The court reporter's fee is set at \$3.00 per page and 50 cents per page for copies, but this is cut automatically to the normal rate of \$1.75 per page and 30 cents per page if the tran-

script is late. This built-in enforcement mechanism should help avoiding the problem of delayed transcripts.

Late transcript. If the transcript is

late, within 7 days, the appellant must file either a motion to show cause or a motion to extend the due date. Filing this motion will toll the due date for the brief and the court's order will specify the new due date.

CONSIDER ordering the transcript at the hearing. It is not clear whether the 28-day requirement for the court reporter applies in this situation, but you can legitimately order it for use in a motion for rehearing. This way, you may well have it when you file the claim or application and be able

"Supreme Court Administrative Order 2004-5 takes effect January 1, 2005 and creates an "expedited summary disposition docket" in the Court of Appeals."

Continued on page 4

to file it immediately. The point is not to save a little on the reporter's fees, but simply to get the transcript as soon as possible.

Docketing statement

No docketing statement is required if the case stays on the fast track. If the case is removed from the fast track, the docketing statement is due in 14 days.

Appellant's brief

Due in 28 days. The serious changes come in the briefing schedule. The times are short and the penalties are severe. The appellant's brief is due 28 days after the later of (1) the filing of the claim of appeal, (2) the entry of the order granting leave or (3) the filing of the transcript. If the transcript is not filed when due, and if the appellant fails to file either motion, the due date for the brief will be calculated from the date the transcript was due. Note, however, that the rule also states that in this situation, the appellant's brief is due 56 days after the claim of appeal is filed or 28 days after leave was granted. Note also that the rule states that the due date for the appellant's brief is **not** extended when the appellee orders the transcript.

ORDER THE TRANSCRIPT. How all of these provisions work together is not entirely clear, but this is no place to test the limits of the rule. By far the safer course is for the appellant to order

the transcript, which should be inexpensive anyway, and avoid the possible questions about timeliness. This also gives the appellant a bit more time to write the brief.

Extension of due date – 14 days. Gone is the liberal rule allowing two extensions of 28 days each on top of an initial 56 days for the appellant's brief, for a total of 112 days. Now, there can be one 14 day extension for "good cause shown." Under conventional procedure, the extension was a matter of right and the motion was pro forma. The motion must be filed **before** the due date and if timely filed, tolls the due date. The motion is to be decided "forthwith."

Penalty for late brief – sanctions and dismissal. In normal practice the only penalty for an untimely brief is loss of oral argument. The new sanctions are more severe. If the brief is filed more than 7 days after the due date, the court "**shall** issue an order assessing costs." That order will contain a warning that the appeal will be dismissed if the brief is not filed "within 14 days after the deadline." After 14 days, dismissal is mandatory: "the Court of Appeals **shall** issue an order that dismisses the appeal and that may assess additional costs." These are mandatory words and every appellant must take them seriously. The rule says nothing about reinstatement on motion.

SUGGESTION: This is where planning ahead can help. Plan on filing on the due date and not asking for an extension. The effort does not justify the benefit, especially where the extension is by permission and could easily be denied. The Court of Appeals may develop a practice of granting requests, but at this point the risk is too great. Let someone else explore the limits of the Court's tolerance.

Length is shortened. The length has been reduced for 50 pages to 35 pages, starting with the statement of facts.

Trial court motion and brief. When each party files its brief, it must also "provide the Court of Appeals with that party's summary disposition motion or response, brief and appendices." The rule does not specify that this be a separate filing, so it should be sufficient to make the trial court motion and brief and each of the trial court exhibits an exhibit to the appellate brief. This means that appellants and appellees need to look at the trial court brief in a different light. It is now a formal part of the appeal process.

SUGGESTION: Put more effort into the trial court brief. It is also to be considered by the Court of Appeals as well as the trial

court. Since it will do double duty, it should be written more to an appellate standard, with more background and explanation of how the issue fits within the broader scope of the issues an appellate court states. Remember, the appellate judges will not be as familiar with your case as the trial judge was.

COMMENT. One difficult tactical issue is how to coordinate the two briefs, *i.e.*, to what extent the attorney should rely on and refer to the trial court argument as opposed to restating it.

Application as brief. Where the appeal is by application, the appellant has the option of relying in its application in lieu of a brief. The appellant does this by re-filing five copies of the application with a letter indicating its intent.

Appellee's brief

Due date – 21 days. The appellee's brief is due "21 days after the appellant's brief is served on the appellee." Presumably this is the date of mailing rather than receipt, so the actual time is shorter than 21 days.

Extension of due date. The rule here is the same as for the appellant – one 14 day extension for good cause shown. The practice tip is also the same: don't count on an extension. Meet the deadline.

Penalty for late brief. The order does not specify a penalty for a late appellee's brief. Pre-

sumably the case will just go forward without it, but it is better not to be the first to explore this territory.

Length. As with the appellant's brief, the length is 35 pages.

Content. Like the appellant, the appellee must also file the trial court motion, brief and exhibits.

Reply brief

Due date – 14 days. The appellant is not required to file a reply brief, but if it chooses to do so, it can file a reply brief within 14 days (reduced from 21) of the appellee's brief.

Length – reduced by half. The reply brief is limited to 5 pages of facts and argument, half the former length.

SUGGESTION:

Consider a counterpoint format, such as "Appellee says . . . but . . ." It is compact and focuses the response for maximum impact.

Oral argument

Notice of submission. The clerk is to notify the parties 7 days after the appellee's brief is filed (or was supposed to be filed) that the case will be submitted as a "calendar case." Note that this date is not tied to the reply brief, but to the appellee's brief.

Oral argument. The new procedure does not expressly forbid oral argument, but it looks as though it will be rare. The reference to a "calendar case" and a separate statement that sets a time limit for the

delivery of the opinion and ties it to "submission of the case to, or oral argument before" a panel indicate that oral argument may be allowed. But there is no right to oral argument and no guarantee the court will grant it. It is likely that oral argument will be much less common in fast track appeals.

SUGGESTION: (1)

Since the practitioner cannot count on oral argument, the briefing assumes even greater importance. The practitioner should try, as far as possible, to anticipate questions a panel might have at oral argument and address them in the brief. (2) Still, there is no reason not to include the standard "oral argument requested" on the cover of the brief.

Opinion

Due date – 35 days. The order requires that the opinion "shall be issued no later than 35 days after submission of the case to or oral argument before a panel."

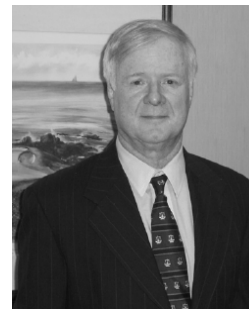
Summary

Whether the rule will succeed in resolving these appeals within the stated goal of 180 days is open to question, which is why the administrative order contemplates monitoring. It is not entirely clear how the new procedure will work in practice, and how the Court of Appeals will apply it. The practitioner,

Continued on page 11

whether appellant or appellee, needs to proceed with extreme care, in light of the severe penalties. For appeals of this type it is best to think of the appeal as starting in the trial court. Planning ahead can provide significant benefits and avoid the substantial penalties that await the unprepared practitioner. ☺

Hal O. Carroll and Timothy A. Diemer practice appellate law in the Appellate Department of Vandever Garzia. Vandever Garzia's Appellate Department provides appellate services on a referral, contract or ghostwriting basis for plaintiffs and defense. Their email addresses are hcarroll@vandevergarzia.com and tdiemer@vandevergarzia.com.



Hal O. Carroll



Timothy A. Diemer

Endnotes

1 Administrative order 2004-5 p 6. The order is available on the court's website.



FAST TRACK APPEALS --- ARE YOU READY?

STARTING JANUARY 1, SUMMARY DISPOSITION APPEALS WILL BE HANDLED ON A "PRIORITY" BASIS IN THE COURT OF APPEALS.

- Briefing time is cut in **half**.
- **No extensions** by stipulation – only by motion, 14 days and for “good cause” shown.
- Costs assessed if brief is 7 days late, **dismissal** after 14 days.

Retain the services of an experienced appellate team with the resources and manpower to handle expedited appeals. Hal O. Carroll, head of the Appellate Department at Vandever Garzia, has 25 years appellate experience representing plaintiffs and defendants in over 260 appeals. Timothy A. Diemer worked as a Research Attorney in the Research Division of the Court of Appeals and gained unique insight into the appellate process by preparing draft opinions for the court.

Appeals can be handled as co-counsel, or on a referral or ghostwriting basis.

Contact Hal Carroll at (248) 312-2909 or hcarroll@vandevergarzia.com,
or Tim Diemer at (248) 312-2969 or tdiemer@vandevergarzia.com.