

Michigan Appellate Bench Bar Conference

Just the Facts: The Importance of Facts and the Appellate Record to Responsible Decision-Making and Appellate Advocacy

Mission Statement

Our mission is to improve the administration of appellate justice in Michigan through conferences designed to encourage an exchange of ideas among Michigan appellate lawyers, judges, and court staff. The Michigan Appellate Bench Bar Conference Foundation believes that this interchange of ideas allows for participants to learn how to better perform their roles in the process and collectively to improve it.

The Michigan Appellate Bench Bar Conference Foundation gratefully acknowledges the significant financial contribution made to this conference by the *DeWitt C. Holbrook Memorial Fund*.

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Schedule of Events

Wednesday, March 27, 2019

5:30 – 7:00 p.m.

Registration and Grand Reception – [*Judea Ballroom, Main Level*](#)

An opportunity to socialize with justices, judges, court staff, and fellow practitioners.

Thursday, March 28, 2019

8:30 a.m.

Registration – [*Grand Foyer, Main Level*](#)

8:30 – 9:00 a.m.

Continental Breakfast – [*Garden Gallery, Main Level*](#)

<p>9:00 – 9:15 a.m. Grande Ballroom Main Level</p>	<p>Welcome Chief Justice Bridget M. McCormack, Michigan Supreme Court Chief Judge Christopher M. Murray, Michigan Court of Appeals Treasurer Timothy Diemer, Jacobs and Diemer Co-Chairs Mary Massaron, Plunkett Cooney, and Phillip DeRosier, Dickinson Wright</p>																																				
<p>9:15 – 10:45 a.m. Grande Ballroom Main Level</p>	<p>Plenary – Just the Facts: The Importance of Facts and the Appellate Record to Responsible Decision-Making and Appellate Advocacy.</p> <p>In this informative and interactive plenary session, a panel of Court of Appeals judges and court staff will discuss various issues relating to the facts and record on appeal, including topics such as correcting or expanding the record, ensuring that the record is complete, the Court’s handling of “box” cases, and the effective use of facts in brief-writing.</p> <p>Moderator: Phil DeRosier Reporter: US Legal Support</p>																																				
<p>10:45 – 11:00 a.m.</p>	<p>Refreshment Break – Nazareth Balcony & Executive Boardroom Hallway, Main Level</p>																																				
<p>11:00 – 12:15 p.m.</p>	<p>Breakout Sessions</p> <p>These breakout sessions will provide an opportunity for members of the bench and bar to further explore issues raised in the plenary session.</p> <table border="0"> <thead> <tr> <th><u>Moderators</u></th> <th><u>Reporters</u></th> <th><u>Locations</u></th> </tr> </thead> <tbody> <tr> <td>Mark Cooney</td> <td>Jonathan Koch</td> <td>Executive Board Room – Main Level</td> </tr> <tr> <td>Nancy Dembinski</td> <td>Trent Collier</td> <td>Nazareth – Main Level</td> </tr> <tr> <td>Stephanie Douglas</td> <td>Mike Cook</td> <td>Ruth – Second Floor</td> </tr> <tr> <td>Paul Hudson</td> <td>Jessica Currie</td> <td>Sarah – Second Floor</td> </tr> <tr> <td>Gaëtan Gerville-Réache</td> <td>Caryn Ford</td> <td>Esther – Second Floor</td> </tr> <tr> <td>Christina Ginter</td> <td>Richard Kraus</td> <td>Kings II – Lower Level</td> </tr> <tr> <td>Matt Nelson</td> <td>Mark Magyar</td> <td>Judith – Second Floor</td> </tr> <tr> <td>Ann Sherman</td> <td>Sarah Nadeau</td> <td>Saumels – Lower Level</td> </tr> <tr> <td>Joanne Geha Swanson</td> <td>Jim Rose</td> <td>Kings I – Lower Level</td> </tr> <tr> <td>Jill Wheaton</td> <td>Jason Killips</td> <td>Wisdom – Lower Level</td> </tr> <tr> <td>Beth Wittmann</td> <td>Conor Dugan</td> <td>The Burger Loft – Second Floor</td> </tr> </tbody> </table>	<u>Moderators</u>	<u>Reporters</u>	<u>Locations</u>	Mark Cooney	Jonathan Koch	Executive Board Room – Main Level	Nancy Dembinski	Trent Collier	Nazareth – Main Level	Stephanie Douglas	Mike Cook	Ruth – Second Floor	Paul Hudson	Jessica Currie	Sarah – Second Floor	Gaëtan Gerville-Réache	Caryn Ford	Esther – Second Floor	Christina Ginter	Richard Kraus	Kings II – Lower Level	Matt Nelson	Mark Magyar	Judith – Second Floor	Ann Sherman	Sarah Nadeau	Saumels – Lower Level	Joanne Geha Swanson	Jim Rose	Kings I – Lower Level	Jill Wheaton	Jason Killips	Wisdom – Lower Level	Beth Wittmann	Conor Dugan	The Burger Loft – Second Floor
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<p>12:30 – 2:00 p.m. Grande Ballroom Main Level</p>	<p>Dewitt C. Holbrook Memorial Fund Luncheon Speaker: Paul Clement, Kirkland & Ellis, LLP, Washington, D.C. Reporter: Phillip DeRosier</p>																																				



Paul Clement is a partner in the Washington, D.C., office of Kirkland & Ellis LLP, and a Distinguished Lecturer in Law at Georgetown University Law Center. Paul served as the 43rd Solicitor General of the United States from June 2005 until June 2008. Before his confirmation as Solicitor General, he served as Acting Solicitor General for nearly a year and as Principal Deputy Solicitor General for over three years. Paul has argued over 90 cases before the United States Supreme Court, including *McConnell v. FEC*, *Tennessee v. Lane*, *Rumsfeld v. Padilla*, *United States v. Booker*, *MGM v. Grokster*, *ABC v. Aereo*, *Hobby Lobby v. Burwell*, and *Jesner v. Arab Bank*. Paul argued six cases this last term alone and has argued more Supreme Court cases since 2000 than any lawyer in or out of government. He has argued more than 100 times in the federal courts of appeals, including in landmark cases like *United States v. Moussaoui* and *NFL v. Brady*.

Paul is a native of Cedarburg, Wisconsin, and a graduate of its public schools. He received degrees from Georgetown University, Cambridge University and Harvard Law School, where he served as the Supreme Court editor of the Harvard Law Review. Following law school, Paul clerked for Judge Laurence H. Silberman of the U.S. Court of Appeals for the D.C. Circuit and for Associate Justice Antonin Scalia of the U.S. Supreme Court. After his clerkships, he went on to serve as Chief Counsel of the U.S. Senate Subcommittee on the Constitution, Federalism and Property Rights.

2:15 – 3:30 p.m.

Law Practice Breakout Sessions

The breakouts will be participatory—not traditional lectures from a panel of speakers. This is what makes the bench bar conference unique. All who attend the breakouts will be encouraged to participate in the discussion.

Criminal

[Nazareth Main Level](#)

[Expanding the Facts on Appeal: Motions to Remand and Judicial Notice](#)

In this session, we will discuss the development of off-record facts through motions to remand, evidentiary hearings, and judicial notice.

Moderator: Katherine Marcuz

Reporter: Jason Williams

[Executive Board Room Main Level](#)

[Evidentiary Standards and Changes in Technology](#)

In this session, we will discuss how changes in technology might affect the court’s standard of review when analyzing video or audio evidence or testimony.

Moderators: Stuart Friedman and Michael Tesner

Reporter: Joel Kershaw

[Sarah Second Floor](#)

[Offense Variables, Juvenile Lifer Resentencings, and Other Fact-Intensive Sentencing Questions](#)

In this session, we will discuss appellate review from fact-driven records in standard felony cases and juvenile life without parole cases.

Moderators: Erin Van Campen and James Benison

	Reporter: Chris Wickman
<u>Ruth</u> <u>Second Floor</u>	<u>Stating the Facts in the Statement of Facts</u> In this session, we will discuss best practices for writing a compelling and accurate Statement of Facts that will aid the court when analyzing the legal issues presented. Moderators: Brad Hall and Linus Banghart-Linn Reporter: David Porter
	Civil
<u>Judith</u> <u>Second Floor</u>	<u>Brief Writing: Basics and Beyond (A)</u> Discussing new trends in brief writing, structure, and presentation, including: shaping the facts, working with a complex record; preservation of issues; standards of review; formulating arguments; and making a forceful case for the relief requested. Moderator: Stephanie Arndt Reporter: Nancy Vayda Dembinski
<u>Samuels</u> <u>Lower Level</u>	<u>Oral Argument: Basics and Beyond (A)</u> How to prepare for oral argument and what to expect; bringing out the salient facts; addressing unfavorable facts; oral argument in the Supreme Court. Moderators: Ann Sherman and Matt Nelson Reporter: Ashley Chrysler
<u>Kings II</u> <u>Lower Level</u>	<u>E-Filing Nuts and Bolts</u> Making the most of e-filing and service. Moderator: Barbara Goldman Reporter: Katharine Gostek
<u>Esther</u> <u>Second Floor</u>	<u>Taking it Up – Applications and Appeals in the Supreme Court</u> When to apply for leave; how to make your case stand out; briefing and argument of calendar cases. Moderator: Tom Ludden Reporter: Jill Wheaton
<u>Kings I</u> <u>Lower Level</u>	Family <u>The Good, the Bad, and the Ugly of Family Law Appellate Litigation</u> This session will explore multiple final order issues prevalent in family law appeals, including whether an order qualifies as a post-judgment order affecting custody, when an attorney fee order is “final,” and handling finality problems created by a trial court bifurcation of decisions. If time allows, record issues in family law cases will be discussed. Moderators: Scott Bassett and Anne Argiroff Reporter: Jennifer Alberts
<u>Wisdom</u> <u>Lower Level</u>	Child Welfare <u>Show Me the Money!</u>

	<p>A discussion about court-appointed fees in termination of parental rights appeals. What are fees currently? What were they ten years ago? Are they reasonable? If not, what can be done about it?</p> <p>Moderator: Liisa Speaker Reporter: John Ceci</p>
<p><u>The Burger Loft</u> <u>Second Level</u></p>	<p>Michigan Supreme Court <u>Mini-Oral Arguments (MOAAs) – How Are They Working?</u></p> <p>This breakout session will provide for a candid discussion of the costs and benefits derived from the increased use of MOAAs in recent years. The discussion will be based on statistical information about the MOAAs as well as analysis of the Court’s orders and opinions issued with and without oral argument and an order granting leave to appeal, and will include a discussion of strategy and tactics in responding to MOAA orders, both as an appellant and appellee.</p> <p>Moderators: Tim Baughman and Eric Restuccia Reporter: Karen Beach</p>
<p>3:30 – 3:45 p.m.</p>	<p>Refreshment Break – <u>Nazareth Balcony & Executive Boardroom Hallway, Main Level</u></p>
<p>3:45 – 5:45 p.m. <u>Grande Ballroom</u> <u>Main Level</u></p>	<p>Plenary – Thinking Outside the Box: What’s Working and What Might be Improved in Our Appellate Courts</p> <p>Are meritorious interlocutory appeals being granted with enough frequency? Is the current process for assigning cases to panels working? Should summary remands be used more often when the record isn’t sufficiently developed? How can our current practice of scheduling and holding oral arguments be improved? This plenary session will tackle these issues and more.</p> <p>Moderators: Joann Swanson and Matt Nelson Reporter: US Legal Support</p>
<p>6:00 p.m. <u>Atrium</u> <u>Lower Level</u></p>	<p>Reception and Dinner (Dinner tables will be hosted by members of the bench)</p> <p>The Appellate Practice Section’s Lifetime Achievement Award will be presented to Retired Chief Judge Michael J. Talbot, Michigan Court of Appeals.</p> <p>Judge Michael J. Talbot retired recently as Chief Judge of the Michigan Court of Appeals and Court of Claims. First appointed to the Detroit Common Pleas Court by Governor William Milliken, Judge Talbot served the people of Michigan on the bench for 40 years.</p> <p>During his tenure, Judge Talbot presided in nearly all levels of Michigan courts and also served on the Judicial Tenure Commission. Most notably, from the bench, Judge Talbot has been recognized for his commitment to guarantee victims a place in court and a voice at sentencing. As an administrator, Judge Talbot has been widely praised for his dedicated efforts to transform the 36th District Court into a more efficient, customer-focused high volume urban court while at the same time balancing their budget. He also created a trial court – the Court of Claims – within the Court of Appeals to hear claims against the state and to decide them consistently and fairly.</p> <p>Off the bench, among many other volunteer commitments, Judge Talbot has chaired the Detroit Archdiocese Board of Review dealing with abusive and errant Roman Catholic priests, was past chair of the Archdiocese Board of Education, and serves as a trustee of Madonna University, Sacred Heart Seminary, and the Archdiocese Endowment Fund.</p>

	<p>History of Prior Recipients</p> <p>1998 Justice Charles Levin 2001 Justice Patricia Boyle 2004 Judge Harold Hood 2007 Judge James Ryan 2010 Kathleen McCree Lewis 2012 Justice Marilyn Kelly 2013 Sandra Schultz Mengel 2015 Justice Michael Cavanagh 2016 Justice Maura Corrigan 2017 Corbin Davis</p>
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Friday, March 29, 2019

7:30 a.m.	Registration – Grand Foyer, Main Level
8:00 – 8:30 a.m.	Continental Breakfast – Garden Gallery, Main Level
9:15 – 10:15 a.m. Grande Ballroom Main Level	<p>Plenary – Technology and the Record</p> <p>What are the effects of technology on the appellate process? Does the role of a reviewing court change when the “record” below consists of more than a printed transcript? What implications are there for standards of review? A panel of appellate judges and practitioners, with input from the audience, will consider these and other questions.</p> <p>Moderators: Barbara H. Goldman, Scott Bassett, and Stuart Friedman Reporter: US Legal Support</p>
10:15 – 10:30 a.m.	Refreshment Break , Garden Gallery, Main Level
10:30 – 11:30 a.m.	<p>Break Out Sessions</p> <p>The breakouts will be participatory—not traditional lectures from a panel of speakers. This is what makes the bench bar conference unique. All who attend the breakouts will be encouraged to participate in the discussion.</p>
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Nazareth Main Level	<p>Expanding the Facts on Appeal: Motions to Remand and Judicial Notice</p> <p>In this session, we will discuss the development of off-record facts through motions to remand, evidentiary hearings, and judicial notice.</p> <p>Moderators: Katherine Marcuz and Jason Williams Reporter: Chris Allen</p>
Executive Board Room Main Level	<p>Evidentiary Standards and Changes in Technology</p> <p>In this session, we will discuss how changes in technology might affect the court’s standard of review when analyzing video or audio evidence or testimony.</p> <p>Moderators: Stuart Friedman and Michael Tesner Reporter: Joel Kershaw</p>
Sarah	Offense Variables, Juvenile Lifer Resentencings, and Other Fact-Intensive Sentencing

<u>Second Floor</u>	<p><u>Questions</u></p> <p>In this session, we will discuss appellate review from fact-driven records in standard felony cases and juvenile life without parole cases.</p> <p>Moderators: Erin Van Campen and James Benison Reporter: Chris Wickman</p>
<u>Ruth</u> <u>Second Floor</u>	<p><u>Stating the Facts in the Statement of Facts</u></p> <p>In this session, we will discuss best practices for writing a compelling and accurate Statement of Facts that will aid the court when analyzing the legal issues presented.</p> <p>Moderators: Brad Hall and Linus Bangart-Linn Reporter: David Porter</p>
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<u>Judith</u> <u>Second Floor</u>	<p><u>Brief Writing: Basics and Beyond (B)</u></p> <p>Discussing new trends in brief writing, structure, and presentation, including: shaping the facts, working with a complex record; preservation of issues; standards of review; formulating arguments; and making a forceful case for the relief requested.</p> <p>Moderator: Kyla Barranco Reporter: Bridget Brown Powers</p>
<u>Esther</u> <u>Second Floor</u>	<p><u>Oral Argument: Basics and Beyond (B)</u></p> <p>How to prepare for oral argument and what to expect; bringing out the salient facts; addressing unfavorable facts; oral argument in the Supreme Court.</p> <p>Moderator: Beth A. Wittmann Reporter: Jesse Depauw</p>
<u>Samuels</u> <u>Lower Level</u>	<p><u>Fast Action – Motions, Emergencies, and Unusual Cases</u></p> <p>Interlocutory appeals and motions; defining and working with an unsettled record; emergency appeals and motions in the Court of Appeals and Supreme Court; delayed appeals; original proceedings in the Court of Appeals.</p> <p>Moderators: Larry Saylor and Joann Swanson Reporter: Patricia Schabath</p>
<u>Kings II</u> <u>Lower Level</u>	<p><u>Dealing With the Facts and the Record</u></p> <p>Presenting complex facts; going beyond the paper record; maximizing the effect of digital briefs.</p> <p>Moderator: Jackie Klima Reporter: Elizabeth Sokol</p>
<u>Kings I</u> <u>Lower Level</u>	<p>Family</p> <p><u>What’s Your Standard (of Review)?</u></p> <p>Reviewing the standards of review in family law cases, exploring the meanings the appellate courts have ascribed to the standards, and discussing what the standard should be in family law cases. If time allows, record issues in family law cases will be discussed.</p> <p>Moderators: Judith Curtis and Liisa Speaker</p>

	Reporter: Rebecca Shiemke
<u>Wisdom Lower Level</u>	<p>Child Welfare</p> <p><u>Keeping up With the Joneses (Cases you Should Know)</u></p> <p>University of Michigan professor Joshua Kay will lead a discussion on cases appellate attorneys need to know and use when writing child welfare appeals.</p> <p>Moderators: Joshua Kay and John Ceci Reporter: Paula Aylward</p>
<u>The Burger Loft Second Floor</u>	<p>Michigan Supreme Court</p> <p><u>Mini-Oral Arguments (MOAAs) – How Are They Working?</u></p> <p>This breakout session will provide for a candid discussion of the costs and benefits derived from the increased use of MOAAs in recent years. The discussion will be based on statistical information about the MOAAs as well as analysis of the Court’s orders and opinions issued with and without oral argument and an order granting leave to appeal, and will include a discussion of strategy and tactics in responding to MOAA orders, both as an appellant and appellee.</p> <p>Moderators: Tim Baughman and Eric Restuccia Reporter: Nathan Scherbarth</p>
11:30 – 11:45 a.m.	Refreshment Break, <u>Garden Gallery, Main Level</u>
11:45 – 12:45 p.m. <u>Grande Ballroom Main Level</u>	<p>Dewitt C. Holbrook Memorial Fund Luncheon</p> <p>Friday’s luncheon will be a special time for advocates and justices, judges, and court personnel to meet each other informally over the meal. Since practice before appellate tribunals is formal and there are few opportunities for bench and bar to talk to each other less formally than in a courtroom argument, don’t miss this chance to spend an hour together getting to know those with whom we work.</p>
12:45 – 1:45 p.m. <u>Grande Ballroom Main Level</u>	<p><u>Plenary: Supreme Court Practice Tips</u></p> <p>In this ever-popular session, justices of the Michigan Supreme Court will provide insight into appellate practice before the Supreme Court.</p> <p>Moderator: Mary Massaron Reporter: US Legal Support</p>