1995 MICHIGAN APPELLATE

BENCH BAR CONFERENCE

SUMMARY REPORT

Summarizing Michigan's first appellate bench-bar conference, like preparing for and putting on the conference itself, turns out to be very rewarding work. Most readers of this summary will have participated in the conference and will already know its value. Because it wasn't possible to attend all the different sessions, however, we each missed out on some topics. This summary is a chance to catch up on what we missed. Your copy of the summary is hole-punched to fit in your handbook binder.

For readers who did not attend the conference, a few additional words may help. After more than a year of planning, in October 1995 the judges, justices and court staff of the Michigan Court of Appeals and the Supreme Court came together with the lawyers who regularly practice before them in Detroit's Cobo Convention Center for two days of roundtable discussions on all aspects of appellate practice. All those in attendance received a 300-page handbook of conference materials, which this summary report will not repeat. This report distills the main points, recurring themes, key facts, and most useful observations that emerged from the conference's plenary sessions and almost 50 small discussion groups and larger panel-type presentations.

Each section of the summary report focuses on a specific topic. The session discussions themselves, of course, freely crossed topic lines. The report editors have sometimes deleted points raised in one session because they seemed more central to the topic of another session that also raised them and, on the other hand, sometimes permitted the duplication to stand because the point seemed important enough to warrant repetition. A special section has been added that summarizes proposals for new rules and rule amendments. A brief 'highlights' section begins the report.

One thing everyone who attended agreed upon is that there should be another bench-bar appellate conference, probably in 1997. If you would like to be involved in the planning for that conference, call or write one of the Conference Committee Co-Chairs, Mary Massaron Ross (313-983-4801), James R. Neuhard (313-256-9833) and Patrick L. Rose (517-482-2422).

Can't wait until 1997? In the interim, the Michigan Bar's new Appellate Practice Section, organized just one month before the Bench-Bar Conference, invites you to receive its newsletter and participate in its activities. To join the Section, call Member Services at (517) 372-9033, extension 3026, or Brian G. Shannon at (313) 961-8380.

Brian G. Shannon
Ellen E. Mason
Summary Report Editors

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HIGHLIGHTS

- If you weren't formerly employed by the court of appeals, and maybe even if you were, you will benefit from a close reading of *Internal Operating Procedures* and *Central Research Staff*. There are likely to be at least nuances here you don't know. For example:

  —A simple appeal with a small record may go directly to a panel without a prehearing report; or to a commissioner who proposes an order to a summary panel, which either decides the case without oral argument unanimously or kicks it to advance research for a supplemental report and eventual decision on the regular call.

  —By unwritten rule, motions to affirm and for peremptory reversal are only granted unanimously;

- Notwithstanding that last point, if an application for leave to appeal is accompanied by a request for peremptory reversal, peremptory relief is more likely than a grant of leave (*Applications for Leave to Appeal—Civil*)

- Currently, 80 percent of the filings in the court of appeals are defective (*Administration and Policy*)

- The proposed rule shortening to 7 days the time within which immediate consideration must be sought was criticized on several fronts, which may result in a more workable solution being proposed (*Civil Motions*)

- The time limits for transcript production are often too short for reporters and too long for lawyers seeking interlocutory appellate relief, particularly in domestic relations and criminal cases; this whole area needs rethinking (*Record Production; Family Law; Criminal Practice*)

- The near future may see electronically-generated briefs embedded with excerpts from a "virtual record" and the full text of legal authorities, solving storage problems and enabling judges—especially visiting judges—to take the whole case home with them (*Appellate Court Technology*)

- "Why not let parties stipulate to extend the time for filing the reply brief, just as they can the principal briefs?" and other suggestions for fine-tuning briefing rules (*Briefing*)

- Know your panel, anticipate the hard questions and think about the larger implications of the relief you're requesting (*Oral argument*)

- The pilot program of assisted settlement negotiations in the court of appeals seems promising. There may be ways to fine-tune its effectiveness in more complicated cases (*Appellate negotiations*)

ADMINISTRATION AND POLICY

I. CASE BACKLOG

There are approximately 17,000 cases pending in the court of appeals at any one time. However, the number of cases that have been fully briefed and are awaiting decision by the court—which is how the court measures its backlog—has recently been reduced from 5,000 to 2,500 cases. The waiting time between completion of briefing and oral argument has been reduced from over 24 months to 12-14 months.

II. VISITING JUDGES

A. Use of visiting judges

The use of visiting judges has increased the number of panels that can hear cases each month. The attendees generally agreed that a significant increase in the number of permanent court of appeals judges would be preferable to temporary visiting judges. There was general consensus, however, that authorization for the use of visiting judges is critical not only to the continued reduction of the backlog, but to prevent the backlog from again increasing.

B. Role of visiting judges

Visiting judges, in practice, do not write opinions but essentially act as tie-breakers if there is disagreement between the two court of appeals judges on the panel. It was suggested that, by allowing visiting judges to write unanimous opinions, this might assist the court in reducing the backlog. It was explained that visiting judges typically do not have the time or the resources to write opinions after they are finished hearing cases and have returned to their own courts. Therefore, in the past when visiting judges did have writing responsibilities, the release of opinions was often delayed.

C. Administrative Order 1992-6

Concern was expressed that, in light of Administrative Order 1992-6 (extended by Administrative Order 1995-6, to March 31, 1996), binding precedent could be established by a court of appeals panel consisting of only one permanent court of appeals judge, along with either a retired court of appeals judge or a retired supreme court justice and a visiting trial judge. It was explained that this has only happened when one of the permanent court of appeals judges originally assigned to a panel became ill or was otherwise unavailable on short notice. Except in such situations, it is the policy of the court to have two permanent court of appeals judges on every panel.

III. SUMMARY PANELS

A. Composition

Summary panels are comprised of three permanent court of appeals judges who sit in rotation and decide a total of approximately one hundred cases per month without oral argument.

B. Selection of cases

To be decided by a summary panel, a case must pass three hurdles. First, it must be identified as a one- or two-day case by the court of appeals screener, meaning that it has a short record, relatively simple facts and legal issues covered by established law. Second, the case is reviewed and a report is prepared by an experienced commissioner who can remove it from the summary track and place it on the "regular" case call track if the case is perceived to be inappropriate for summary decision. Third, in cases where oral argument is preserved the summary panel judges must unanimously agree to forgo oral argument. If one judge believes a case is inappropriate for summary decision, it will be removed from the summary call and sent to the regular track for the preparation of a prehearing report and the scheduling of oral argument. Approximately ten percent of the cases originally designated for summary decision are transferred to the regular case call track.

C. Lack of Oral Argument

The drawbacks of the lack of oral argument include the attorney's inability to directly address the court regarding the case and, in some instances, the feeling on the part of clients that the case has not been carefully reviewed. However, it was pointed out that there seem to be fewer motions for rehearing in cases decided by summary panels than those decided by regular panels. This suggests that the screening process has worked well in identifying those cases that do not merit oral argument. All in all, there was a general consensus that the use of summary panels is appropriate and a necessary part of the court of appeals' effort to handle its caseload.

IV. UNPUBLISHED OPINIONS

There was discussion about the fact that most court of appeals decisions are unpublished and that, although such opinions do not have precedential value, many attorneys, circuit judges and federal courts cite and use unpublished court of appeals decisions in deciding Michigan law. The uniform view of the participating court of appeals judges is that unpublished opinions are written in such a way that they should not be used as precedent in other cases. It was suggested that since unpublished opinions have no precedential value it might be more appropriate to simply issue an order in such cases rather than an opinion that may be incomplete or misleading when applied to other cases. However, there was general consensus that the parties deserve a reason or explanation for the outcome of an appeal and prefer such a reasoned explanation to a simple order deciding the case. [*Reporters' note: The January 26, 1996 amendment to MCR 7.212(F), effective April 1, 1996, prohibits the use of unpublished opinions as supplemental authority.*]

V. COURT RULES

A. Defective filings

Before the most recent court rule changes, 50 percent of filings in the court of appeals were defective in one way or another. Since then, defective filings have increased to 80 percent. This imposes an extreme burden on the clerk's office in reviewing the filings and sending letters that identify the defects and advise attorneys of the need to correct them. Because of this, the understaffed clerk's office cannot reasonably continue to "babysit" attorneys who file defective appeals. Although the court is reluctant to prejudice parties because of their attorneys' failure to follow the rules, it is possible that the policy of giving attorneys a liberal opportunity to correct defects may be limited in the future.

Problems can arise when the clerk's office sends one side a defect letter without informing all other parties. Also, some defects do not toll the running of the time period for action by the other side—an appellant's after-the-fact filing of jurisdictional and standard-of-review statements, for example, do not alter the deadline for the appellee's brief. It was explained that the clerk's office does not have the personnel or financial resources to send copies of defect letters to all attorneys in a case or to monitor the tolling of the time to respond. When a corrected brief or application is filed, though, it is reviewed to ensure that the defect was corrected without other, substantive changes.

Some practitioners thought that the clerk's office sometimes imposes a greater burden on itself by imposing stricter requirements than the rules actually require, thereby generating unnecessary defect letters. For example, the clerk's office sends a defect letter if an appeal brief does not cite a "transcript" even though the court rule only requires citation to the "record" (which consists of more than the transcript). In response, the clerk's office pointed out that this can be avoided merely by indicating at the outset that there is no transcript or that it is unnecessary to cite the transcript. Some practitioners thought that not all rule violations are significant enough to warrant defect letters (e.g., an appellant's brief returned because "**Oral Argument Requested**" was not in all capitals or bold letters). The clerk's office responds that it has long struggled with the question, "how strictly to enforce the rules?" Practitioners become more lax if the rules aren't enforced strictly. Once discretion is given, it is difficult to quantify its limits. Overall, the simplest, most effective and fairest way may be to deny the clerk discretion and to strictly enforce the rules.

B. Jurisdictional statement

The court has developed a form of jurisdictional statement that attorneys can use as a checklist to ensure compliance with various procedural rules which are often violated. Hopefully, the use of the form, which may become mandatory after a test period, will resolve some of the major defects contributing to the problem of noncompliance with the court rules. A copy of the jurisdictional statement is included in the conference materials. The view was also expressed that the current "docketing statement" has proven useless.

C. Standards of review

There was considerable discussion about the recent court rule change requiring appellate briefs to set forth specifically the standard of review, supported by citation of authority, for each issue on appeal. It was generally agreed that this is a useful rule because it forces the parties to think about, and address, the standard of review to be used by the court. Often, identification of the standard of review goes a long way toward resolving particular issues.

It was suggested that the court of appeals, in its opinions, should also place more emphasis on the standard of review, particularly since the parties are now required to do so. Many court of appeals opinions do not specifically address the standard of review or identity what standard is being used with respect to particular issues.

It was also suggested that it would be useful for the appellate bar, perhaps through the recently formed Appellate Practice Section of the State Bar of Michigan, to draft a uniform statement of standards of review for common appellate issues.

D. Timing of changes

It was repeatedly pointed out by conference attendees that one of the major reasons for failing to comply with court rule changes is that there is no set time when rule changes go into effect, thus making it virtually impossible for attorneys to always be aware of such rule changes. There was a general consensus that there should be a policy of instituting all court rule changes at a uniform time each year. This could be at the first of the year, or in conjunction with the publication of the court rules by West Publishing Company.

VI. PREHEARING REPORTS

A. Reliance on prehearing reports

A few attendees questioned the extent to which the judges rely on reports prepared by inexperienced research attorneys. The participating judges emphasized that prehearing reports are not proposed opinions and are simply tools to assist the court in deciding an appeal. The ultimate decision in the appeal is made independently by the judges based on the prehearing report, the appeal briefs, the bench memoranda prepared by their own law clerks, oral argument by the attorneys, and discussion and conference with other judges on the panel. In general, the attendees expressed a recognition that the use of prehearing reports is both necessary and appropriate for the court of appeals to process its overwhelming case load.

There was discussion on the possibility of using only individual law clerks assigned to specific judges, rather than a central research division, for the preparation of cases. It was noted that the court conducted an experiment with the use of individual law clerks. The majority of the judges preferred the continued use of a central research division for various reasons, including the fact that prehearing reports have uniform content and are specifically designed to be an objective assessment of the case, rather than the suggested disposition of an individual judge. Moreover, the appeal briefs of the parties and the bench memoranda

prepared by an individual judge's law clerk act as checks on the accuracy and completeness of the prehearing reports. It was noted that, in general, neither the individual judges nor their law clerks are reluctant to disagree with the prehearing reports.

B. Disclosure of prehearing reports

There was some discussion about the possibility of disclosing prehearing reports to attorneys prior to oral argument. A majority of the attendees expressed a belief that this is not practical or necessary. The participating judges indicated that disclosure of prehearing reports is not appropriate because the reports do not reflect judicial input and, in all events, is completely impractical because of the extra burden that would be placed on the clerk's office by such a procedure. It was noted that procedural innovations used in the courts of appeal of other states cannot be easily adopted by the Michigan court of appeals because of the case load per judge, which is several times higher than the next busiest appellate court in the country.

VII. OBTAINING TRANSCRIPTS FROM CIRCUIT COURTS

It was noted that, if the lower court record sent to the clerk's office by the trial court does not include a necessary transcript, the clerk's office will contact the appellant's attorney to obtain a copy of the transcript. Although this is usually not problem in civil appeals, the State Appellate Defender's Office cannot provide an extra copy of the transcript but rather has to give the clerk's office the appointed defense counsel's own copy of the transcript. This is a problem with respect to two particular circuit courts that typically do not provide the transcript to the court of appeals in criminal cases. The criminal defense attorneys suggested that the court should be more proactive in forcing the circuit courts to provide the transcripts as part of the records on appeal. It was explained that, once again, the clerk's office does not have the time or the resources to solve this problem and must rely on the attorneys. Also, the court cannot take any action against a circuit court clerk or court reporter unless a motion is filed by a party to the appeal. Thus, it appears that the burden will remain on defense counsel to ensure that transcripts are available to the court of appeals and to deal with recalcitrant circuit courts.

VIII. CERTIFICATION OF APPELLATE LAWYERS

It was suggested that a possible solution to the problem of noncompliance with the court rules and in improving the quality of appellate representation might be the certification of lawyers to appear in the court of appeals. There was no consensus on this issue, however. The requirements for certification would be minimal, such as a few hours of continuing legal education, and would not be designed to prevent anyone from appearing in the court who wished to do so. Such a certification process, which might be handled through the state bar (not the court of appeals), would ensure familiarity with the appellate court rules and provide a limited body to whom all court rule changes could be mailed directly.

CENTRAL RESEARCH STAFF

I. OVERVIEW

The panel discussed the central research staff's internal processes for handling appeals of right and applications for leave. The clerk's office sends the case to central research after the appeal briefs have been filed (or the time has passed for filing the briefs) and, except for leave applications, when the lower court record is received from the trial court. Applications for leave to appeal go to the commissioners for the preparation of a report and proposed order after the appellee's response brief is filed or the time for doing so has elapsed. Appeals of right and appeals where leave has been granted go to the case screener for a "day evaluation." This evaluation, discussed below in section III, determines whether a case goes to a panel without a report, to a summary panel for disposition by order without oral argument, or to prehearing or advance research for preparation of a report and placement on a regular call with oral argument (if preserved).

II. APPLICATIONS FOR LEAVE AND OTHER DISCRETIONARY MATTERS

After the appellee's response brief is filed or the time for doing so has elapsed, an application for leave is sent to the commissioners' office for the preparation of a report and proposed order. The commissioners are career attorneys and are the most experienced on staff. As a result, they are best suited for making recommendations to the judges on leave applications and other matters of discretionary review. A commissioner reviews the briefs, prepares a report with a recommendation, and submits a proposed order to the motion panel. Commissioner reports include a statement of the facts and issues, and a discussion of the law. The proposed orders are form orders using boilerplate language (e.g., "leave denied because of the failure to persuade us of the need to review the issues at this time") because they are not intended to bind any potential future panels to a specific decision. If a leave application is granted, it proceeds through the court just like an appeal of right.

III. APPEALS OF RIGHT AND APPEALS WHERE LEAVE IS GRANTED

A. Case screening and evaluation

The case screener reviews all civil cases and non-guilty plea criminal cases to determine the number of days it should take an average prehearing attorney to prepare a report in the case. The case screener is an experienced attorney who gives the case a cursory review and bases the estimated evaluation time on the number and complexity of the issues, the length of the record and transcripts, and the length of the appeal briefs. Once the research report is prepared, the case can be sent back for reevaluation if it turned out to be more complex than it seemed at first.

B. Assignment of cases

1. <u>One and two day cases</u>. These are typically simple, straight-forward cases with little or no record and very few issues on matters of well settled law. These may go directly to a panel without a report (where the assigned judge's law clerk

will prepare a bench memorandum prior to the sitting dates) or to a commissioner for the preparation of a report and proposed order for submission on a summary panel without oral argument.

2. Three to six day cases. These cases go to the prehearing division for the preparation of a report and placement on a regular call with oral argument (assuming such has been preserved). Prehearing attorneys are typically recent law school graduates who are supervised by experienced attorneys.

3. Seven day and above cases. These go to advance research for the preparation of reports and then to a regular call with oral argument (assuming such has been preserved). Advance research is comprised of more experienced attorneys who previously worked in prehearing, as law clerks, and frequently in private practice.

C. Format of Reports

The reports prepared by prehearing and advance research follow a structured format. A report begins with a verbatim statement of the issues taken from the appellant's brief. If the issues are not clearly stated or are incomplete, they may be restated. Next, the report includes a complete and accurate statement of the relevant facts. Every pertinent fact must be accompanied by a citation to the record. This is one of the most important parts of the report because it may resolve some issues and it provides the judges with a reliable reference tool. In the following section, each issue is analyzed individually. The discussion of the issue begins with a summary of each party's arguments. The analysis of the issue is divided into three parts: 1) preservation of the issue, 2) standard of review, and 3) discussion of relevant law and application to the facts. The analysis presents both sides of the issue in an unbiased manner and independent research is done on the issues. The last section is a recommendation of disposition on each issue, as well as a recommended overall disposition. The main function of the research reports is to provide an overview of the case to the judges and their clerks on the significant issues, the relevant facts and law.

D. Special types of appeals

1. Guilty Pleas. Guilty pleas that are before the court by an appeal of right are initially screened by the clerk's office. The simplest appeals are placed on case call without the preparation of a central staff report. The remaining appeals are sent to advance research for the preparation of research reports and proposed opinions, and for placement on a retired judge panel without oral argument. The advance research attorneys have discretion to prepare regular prehearing reports (without proposed opinions) and refer the cases for placement on regular case calls if warranted. Further, the retired judge panel may also remove cases from their call for placement on regular calls if they feel the cases warrant oral argument or are more appropriately decided by regular panels of the court.

Guilty pleas that are before the court on leave application are sent directly to advance research for preparation of reports and proposed orders, and for placement

on motion dockets. The reports in these cases are similar to the ones prepared by the commissioners' Office in other leave applications.

2. Cases returned from summary panel. If a summary panel decides that a case is inappropriate for dismissal by order or without the opportunity for oral argument, the case will be sent to advance research for the preparation of a supplemental report and for placement on a regular case call.

3. Termination of parental rights. Advance research prepares reports and proposed orders in these cases for placement on summary panels without oral argument. The advance research attorneys have discretion to prepare regular prehearing reports (without proposed orders) and refer the cases for placement on regular case calls if warranted.

E. Practice tips from research staff

- Cite to the lower court record; if there are no transcripts, say so.

- Make sure exhibits from the trial court are filed.

- Include depositions that were read into the record during trial because they are usually not transcribed by the court's reporter.

- For the statement of the issues: frame each issue carefully and specifically (e.g., "The trial court erred in granting summary disposition because the landowner had notice and a duty to ..."); don't be verbose; use sub-issues where appropriate (e.g., "Defense counsel was ineffective for reasons (A) _____,(B) _____, and (C) _____"); establish a relationship between the issues and the argument.

- Include a summary or an introduction to the argument section of the brief.

INTERNAL OPERATING PROCEDURES
CIVIL AND CRIMINAL

I. CASE OPENING ISSUES

A. The clerk's office checklist. The clerk's office uses a checklist to review claims of appeal (copy in §B "Internal Procedures" of the handbook at page B-3). The clerk recommends use of the checklist by practitioners when filing a claim.

B. New required filing of a docket entry sheet. Parties are required to file a current copy of the docket entry sheet from the lower court, in addition to filing a docketing statement in civil cases. Practitioners often confuse the two requirements and file a docketing statement in lieu of a lower court docket entry sheet and vice versa.

1. Jurisdictional statement is optional. A party may file a jurisdictional statement with the claim of appeal, in addition to the docket entry sheet, although this is optional and not a substitute for the docket sheet.

2. Is docket entry sheet jurisdictional? The claim and filing fee vest jurisdiction. If there are other items missing (e.g., docket sheet or proof of service), then a defective filing letter is sent. These letters go to the filing party only.

C. Filing fees. The filing fee for claims of appeal is $200 per lower court file number. On applications for leave to appeal, the filing fee is $200 per lower court file number and per order appealed from. (For example, if one appeal is being taken from the lower court where 50 case numbers have been assigned to 50 different parties, the filing fee is 50 x $200, or $10,000.) This applies even in cases consolidated below. If you only wish to appeal one file number, make it clear.

1. Debate on filing fee rule. There was a debate as to the court's authority to charge 50 filing fees in a single case. MCR 7.204(B)(2) states only that the appellant shall file "(b) the entry fee." Clearly, the bar is unhappy with the practice of charging a separate filing fee for each lower court number. Is this the equivalent of a judicial speed trap? Some thought this was a court problem and others thought it was a legislative problem because the interpretation is compelled by statute.

2. Solutions to multiple filing fee dilemma.

a. Parties may use only one case number from the lower court and enter into a binding stipulation among the rest of the parties to be bound by the decision in the case number that is appealed. This is workable only when the parties are all represented by the same counsel or who have the same interests and can fashion workable co-counsel arrangement.

b. If you wish to contest this rule, file a "motion to docket" and state in the prayer for relief that you be charged less than the full number of multiple filing fees. This motion could go to a panel. An order denying this motion could go to the supreme court either on an application or on a writ of superintending control.

c. Parties may request by motion that the fee be waived on grounds of indigence. The request should be accompanied by information verifying income. In the case of a prisoner, a copy of the prison account should be attached along with an affidavit stating assets and sources of income.

3. The court charges $50 for filing a motion ***per relief requested.*** (E.g., if you file a "motion for extension of time for court reporter to file transcript," and a "motion to show cause why the court reporter should be held in contempt," you will have to pay $100.)

4. The court does not accept cash. All payments for filing fees must be by check or money order.

D. Multiple party cases. The appellant must account for the lower court disposition of ***all*** parties, even if fewer are involved in the appeal. As a practical matter, you should resolve doubts in favor of service. A party who is not interested in the appeal may write the court and say so. If a letter is not provided by the appellee declaring an intent not to participate in the appeal, cautious counsel should err on the side of serving them.

E. Final order problems.

1. Measuring date. The time for taking an appeal runs from the ***entry*** of the lower court's order. The date is measured from the date of filing the document in the lower court clerk's office and ***not*** from the date when the judge signed that order. When there are conflicting dates, calculate the date from the earlier stamp.

2. Praecipe orders. The final order is usually, but not always, the last order entered in the case. There may be two final orders - a praecipe order and a typewritten order that are both signed by the judge. The court treats praecipe orders as valid. But where there are dual orders, and the praecipe order enters first, the court will calculate the time for taking an appeal from the typewritten order where the party sought the prompt entry of the order.

3. Timely motion for new trial or rehearing. A timely rehearing motion will suspend the effect of the final order until 21 days after the motion is decided. A timely new trial motion also tolls the time for filing a claim of appeal. But only one such motion may be filed to achieve this suspension in a given case. (E.g., you may not move for a new trial, move for rehearing of the denial of that motion, and then claim appeal.)

4. Motions for sanctions or attorneys fees. Such motions do not toll the time for filing a claim of appeal. They must be appealed under a separate claim of appeal (unless they can be resolved within the 21 day period and included in the initial claim). A new claim of appeal should be filed if the lower court enters a sanction award or attorney fee award after the first final judgment has been entered and appealed by one party. [*Reporters' note: Such orders may no longer be appealable of right. See note at page 28, VI(B)(3).*]

5. Motions to dismiss. If the appellant has filed a timely appeal from an order, and claimed an untimely appeal from an earlier order in the same notice of appeal, you may file a motion to dismiss if the clerk's office doesn't catch it first. Such a jurisdictional challenge to the appeal may be raised at any time. Since a portion of the claim of appeal is timely, this motion may be denied. In that event, you may file a motion to strike the appellant's brief if it raises issues relating to the order that was not timely appealed.

6. When in doubt, call ahead. The clerk's office welcomes questions about when to file a claim of appeal, even before any claim has been filed.

7. Difference of opinion with the clerk? If after considering all the facts, court rules and applicable law, you still seek relief that the clerk's office has denied, then you can file a "motion to docket" with a brief explaining why you think you are right in your interpretation of the court rules and case law. The motion will be submitted to a panel.

8. Order certification. Interlocutory orders may no longer be certified as final by the trial court since the amendment to MCR 2.604 that took effect July 1, 1995. Only final orders are appealable of right, except for certain receivership orders.

9. Non-appealable orders. There is no appeal of right from a settlement agreement. Parties to a settlement agreement are not "aggrieved parties" under MCR 7.203.

F. Amendments of claim of appeal. You may file a "corrected" claim of appeal to notify the court of mistakes such as transposed docket numbers or misspelled names of parties or counsel (i.e., typographical errors). But you may not file an "amended" claim of appeal making substantive changes (such as adding a new party to the appeal) after the deadline for filing the claim of appeal has passed.

1. Adding parties. The court rules specifically provide for motions to alter parties to the appeal.

2. Prejudgment orders. Some attendees recommended that the claim of appeal contain standard language stating that the appellant also claims an appeal "from all pretrial and interlocutory orders."

G. Automatic claims of appeal (criminal appointed cases).

1. Measuring date. Automatic claims of appeal are issued by the trial court in orders appointing criminal appellate counsel. The filing date is the date the court issued the order and ***not*** the date on which counsel was requested.

2. Incorrect automatic claim of appeal (criminal cases). The trial court's automatic claim of appeal form sometimes is incorrect. To cure the error, the court of appeals will send a letter to counsel and to the trial court about reissuing the claim of appeal.

H. Emergency appeals. Such appeals generally are handled in the Lansing office. Hence, if possible, file the emergency appeal in Lansing.

1. Judge selection for emergency appeals. The judge selection for emergency appeals is being done on a two year assignment roster.

2. Procedure for emergency appeals. These appeals require personal service for expedited consideration. This means personal service—***not*** Federal Express, facsimile transmission or a messenger service (unless the messenger signs the proof of service). Answers must also be personally served.

3. Receipt of service. The opposing party will generally sign a receipt of service form and one should be provided for signature and filed with the court if possible. The court will generally call opposing counsel to confirm receipt and to set a deadline for filing an answer.

I. Timing problems with transcripts and applications for leave to appeal. Applications for leave are due 21 days after an order is entered under MCR 7.205(A), but if the order is entered at the time of the hearing, it can be difficult to get a transcript that fast. Transcript ordered "for appeal" under MCR 7.210(B)(3)(b) need not be and usually is not produced so quickly. Transcripts ordered without reference to appeal may come faster, but often not fast enough. If the transcript has been ordered, the clerk's office will accept an application before the transcript is done and hold it pending receipt of the needed transcript. When the defect is cured, the application will be deemed timely filed. [*Reporters' note: The January 26, 1996 amendments to MCR 7.205(B), effective April 1, 1996, specify additional categories of transcript required to be filed with applications.*]

J. Late claims of appeal. There is case law authority allowing the court (in its discretion) to treat a late claim of appeal as an application for leave. But, given the modern operations of the court, it is unlikely that this will happen in most cases.

K. November rule change on delayed appeals. Effective November 1, 1995, the time for filing a delayed application for leave to appeal has been reduced from 18 months to one year. This applies to all applications filed on November 1, 1995 and after, ***even if the old 18-month limit was in effect when the order was entered.***

L. Proof of service. The proof of service accompanying a claim of appeal must include a description of all documents sent to the opposing party and their mailing address. Proof of service stamps are only accepted if the stamp appears on a page listing all addresses (e.g., the cover page).

1. Types of service accepted. The clerk's office reminded attendees that there are only two types of service permitted under the court rules: service of process by United States postal mail delivery or by personal service.

2. Change should be considered. The rules do not now permit service via other common carriers (Federal Express, U.P.S., etc.), although a rule change to recognize service by other common carriers should be considered.

M. What to do if time has expired on the claim of appeal. If time has expired, do not file a late claim of appeal. This will cost a filing fee and be dismissed. Counsel will then have to file a delayed application for leave to appeal with a new filing fee anyway. If the time for filing of "right" has expired, file a delayed application that explains the delay as MCR 7.205(F) requires and that concentrates on the merits as all applications should.

II. THE APPEAL IN ITS EARLY DAYS

A. Consolidation of appeals. The court of appeals has an interest in consolidating cases involving the same parties or same lower court number. The court's computer will check for multiple claims of appeal automatically. When a case is administratively flagged for consolidation, an order will be issued by the court within the first few weeks after the filing of a claim of appeal.

1. Patience is helpful. The clerk's office recommends that parties allow the system time to work so that multiple claims of appeal can be consolidated without a motion. A party who believes that automatic consolidation will occur may wish to notify the clerk's office by letter of the multiple claims.

2. If all else fails. After a few weeks, if no consolidation order has been issued by the court, a party seeking to consolidate duplicate claims may wish to file a motion to consolidate. Because two cases are involved, two $50 motion fees must be paid.

B. Cross-appeals. Cross-appeals also need to be from final orders and need to be timely filed under MCR 7.207. Applications for a delayed cross-appeal, like all applications, go to a commissioner. If the case is not too far along in the appellate process, such applications usually are granted. To be safe, of course, file the cross-appeal timely.

C. The filing and treatment of a docketing statement. The docketing statement (not to be confused with the lower court docket entry sheet) must be filed by appellants (and cross-appellants) in civil cases within 28 days of filing the claim of appeal (or cross-appeal).

1. Experimental stages. The docketing statement is still in its developmental stages. It was originally part of a pilot program which was intended to assist the court in spotting issues so as to route cases to particular types of panels. Although that apparently is not being done now, the statement also assists in identifying cases for possible settlement.

2. Circulation of docketing statement. As a matter of course, judges do not see the docketing statement.

3. Amendment of docketing statement. Although the rules provide that docketing statements may be amended, a party must file a motion to make such an amendment.

4. Appellee can file docketing statement. An appellee who disagrees with an appellant's docketing statement can file one too.

5. Dismissal of appeal for failure to file? The court may dismiss an appeal for failure to file a docketing statement.

6. Will docketing statements be treated as binding? It was discussed whether the failure of a party to identify an issue in the docketing statement might ban the raising of that issue in the brief (absent an amendment to the statement). This is ***not*** the present or contemplated practice of the court. But practitioners seems to fear that this use of the statement may be adopted in the future. Practitioners almost universally opposed such an expansion of the use of the docketing statement.

D. Transcripts.

1. What transcripts? The transcript that is required is the one from the lowest court, i.e., where the original substantive decision was made that is being challenged on appeal. This is where the factual record was made. For example, if you are appealing from a circuit court decision denying your appeal from a district court decision, then you file the transcript from the district court. If leave to appeal is granted, then the court will also need the circuit court transcript.

2. Who has the duty to file transcripts? Appellant and the court reporter have a concurrent duty to produce a timely transcript. The court used to police the filing of transcripts. This is no longer the case. A letter will go out from the court to the reporter when a transcript is initially overdue, but appellants cannot expect any other effort from the clerk's office. Counsel does not usually get notice of the warning postcard sent to the court reporter.

3. Make sure the reporter knows you are ordering transcript for appeal. When you place the transcript order, tell the reporter that you are ordering the transcript for appellate purposes. This serves two functions. First, you likely will be billed the statutory rate for appellate transcripts, which is lower

than the normal rate. Second, the reporter will be alerted of the duty to file the transcript in the trial court and notify the court of appeals within the required time. When transcripts are late it is often because the reporter did not know an appeal had been claimed.

4. Make a paper trail. It is always a good idea to copy the clerk's office on correspondence with the court reporter. The clerk will take into account the fact that you are working with the court reporter to solve the transcript problem. Remember: if the transcript is filed late, the attorney will be held accountable. The paper trail may help you establish your lack of culpability.

5. Deposition transcripts. Deposition transcripts should be filed with the trial clerk as exhibits, if they are exhibits.

6. Motions for extension of time. If there are problems, the appellant's counsel can advise the court reporter to move for an extension. Always send a copy of this correspondence to the clerk's office. Calls to the reporter may be helpful, but should always be followed by a confirming letter with a copy to the court. If the reporter is unwilling to do so, then appellant's counsel can move for extensions on behalf of the reporter. As a last resort, appellant's counsel can file a motion to show cause why the reporter should not be held in contempt for failing to file a timely transcript.

7. Dead or AWOL reporter. If a court reporter dies, arrangements should be made to find out whether another reporter can prepare the transcript. If not, a stipulated record sometimes can be prepared under MCR 7.210(B)(1)(e) or the trial court can settle the record under MCR 7.210(B)(2). The same procedure is used when a reporter completely disappears.

8. Exceptional circumstances. If the court reporter has exceptional circumstances justifying a longer than normal extension, try to document the need (e.g., a letter from the reporter's judge).

9. Late transcript orders. Late transcript orders do not toll the time for filing the brief on appeal.

E. Involuntary dismissal docket. The "no progress" docket has been eliminated and replaced with an a "involuntary dismissal" docket.

1. Eligibility for involuntary dismissal docket. A case may be placed on the involuntary dismissal docket for failure to follow any of the court rule requirements. A warning letter is issued first when the defect is procedural.

2. Dismissal of the appeal due to untimely transcript? Yes, this can happen, so be vigilant. The appellant's failure to file a timely transcript will result (eventually) in the issuance of an involuntary dismissal notice. There is no set time for how long the clerk's office will wait before issuing the notice.

3. Response to involuntary dismissal notice. Defect letters may be sent advising parties or attorneys of defects in a filing. A copy is usually sent to opposing counsel. Defective filings are to be cured by the recipient within 14 days. Failure to cure within that time may result in dismissal on the court's own motion. You should respond to such a notice by filing a motion to show cause the reporter, unless you are certain that the transcript will be filed within the notice period. Opposing counsel is usually not notified as to whether and when the defect is cured.

4. Loss of your day in court. Though the former "no progress" docket was actually called in open court before appeals were dismissed, this is not the procedure under the involuntary dismissal docket. If your case is dismissed, file a motion for reconsideration. This may result in reinstatement of the appeal if you can show a lack of culpable negligence.

5. Warnings. Dismissals without warning should occur only at the initial filing stage if jurisdiction is lacking. Dismissals on procedural grounds should be preceded by a warning letter from the court. A procedural dismissal without warning is a good candidate for a rehearing motion.

F. Motions: Filing tips, good practice and unwritten rules.

1. Attachments to motions are critical. The motions panel does not have ready access to the entire court file or the briefs and appendices. Therefore, it is imperative that you attach all papers and documents referred to in the motion that you wish the panel to see. If you do not attach these papers, you can assume that in most cases the judges will not take the extra time to order the file to review.

2. Be concise. Certain motions are presented to judges with commissioner's reports, but most are not. Make every effort to be concise. Remember that it is not unusual for a panel to have to review more than 60 motions in a one- to three-day period.

3. Procedure for deciding dispositive motions. It is, at present, the court's unwritten rule that a motion to affirm or for peremptory reversal can only be granted unanimously. If one judge votes to deny, the motion is denied.

G. Substitution of attorneys. A party may substitute new counsel in the court by stipulation before the briefs have been filed. A motion is required thereafter. In either case, there should be a proof of service on everyone.

H. Bankruptcy stays. When notified of the bankruptcy court's automatic stay, the court will determine whether it can dismiss the appeal without prejudice. If it can, it will. If not, it will require a motion to hold the appeal in abeyance.

III. MID-LIFE OF THE APPEAL: THE BRIEF

A. Timing for 28-day extension stipulation. Stipulations to extend by 28 days the time to file a brief can be submitted after the due date. They are retroactive.

B. Procedures for stipulation. A stipulation for extension of time to file a brief requires an original (not faxed or photocopied) signature for each party. It cannot be signed by "consent." No attorney may sign for another party. But attorneys in one law firm are permitted to sign the name of another attorney within that firm. Signatures do not have to be on the same sheet of paper, so you may submit multiple duplicate stipulations that each contain a single original signature.

C. Clerk's office uses a checklist to examine all briefs for completeness. The two 1995 additions to MCR 7.212(C) often are overlooked. Soon there will be a third:

1. Jurisdictional statements. This section of the brief is mandatory and must be clearly labeled. Noncompliance with this 1995 rule has been common.

2. Standard of review. The court strongly prefers that standard of review sections be clearly labeled as such.

3. Issue preservation. [*Reporters' note: The January 26, 1996 amendment to MCR 7.212(C)(7), effective April 1, 1996, states: "Page references to the record must also be given to show whether the issue was preserved for appeal by appropriate objection or other means."*]

D. Statement of facts in the brief. Briefs that do not cite to the transcript or the record in the "Statement of Facts" section may be rejected as defective. Normally, the brief should contain at least one citation to one transcript, ***unless the absence of record cites is clearly explained.*** The clerk's office recommends at least one pro forma citation to the record, rather than following the explanation procedure because it is easier. If you receive a defective brief notice due to the failure to cite to the transcript, you may respond by inserting record cites into the brief and refiling.

E. Preferred binding for briefs. The original signed brief should have two holes punched at the top, with an ACCO binding or staple. This copy is kept in the clerk's file and any side binding material will be removed and discarded. The required additional copies, however, may be bound on the side.

F. Cross-appeal brief. The time for filing a cross-appellant's brief runs from the date of the filing of the entire transcript ordered for appeal and ***not*** from the filing of those transcripts needed by the cross-appellant. Contrary to a suggestion made at the hot tips session, the cross-appellant needs to be timely on both its appellee and cross-appellant briefs to be endorsed for oral argument on both.

1. One brief or two? Parties may file a single, consolidated brief including both appellee's and cross-appellant's arguments. But at least one judicial attendee preferred separate briefs, believing this made it easier to line up the

issues in the opposing briefs. If you do file a single brief in both appeals, be sure to place all docket numbers on the cover of the brief and indicate clearly in the caption that the brief serves a dual purpose. The contrary is also true. (E.g., if you are filing a separate cross-appeal brief, an appropriate title would be "Plaintiff/Cross-Appellant's Brief in Docket No. 123456.")

2. Consolidated cases get more staff attention. Consolidation of your case will increase the day allotment given to the case in prehearing. This is the estimated number of days it should take for a prehearing attorney to author the report. The more complicated the case, the greater the number of days that will be assigned to it. More complex cases (including many consolidated cases) are given to more experienced prehearing attorneys.

G. Reply brief. The court strictly enforces the time limit for filing reply briefs. An extension by stipulation is ***not*** available; a motion for extension is required.

H. Supplemental authority. [*Reporters' note: The January 26, 1996 amendment of MCR 7.212(F), effective April 1, 1996, has dated some of the text originally included here. The reporters have tried to revise the text in light of the substantially changed rule, retaining what still may be useful.]* A "one-page communication" may be filed without leave of the court if it (1) identifies ***new published authority*** and (2) does not raise new issues or repeat arguments/authorities contained in the principal brief. The panel is unlikely to see the supplemental authority list before argument unless it is filed more than a week in advance.

1. Limits. A supplemental authority list may not refer to cases decided before filing of that party's principal brief or to any unpublished opinions, whenever decided. This rule may be enforced by a non-attorney clerk. There was pre-amendment debate as to whether a supplemental brief could legitimately discuss the impact of new cases on older precedents. Even historical references to older cases often caused rejection. Now there is very little room for such analysis and it is forbidden if it is repetitive. But you may still refer to the appropriate pages of your principal brief to establish a context for the supplemental authority.

2. Exception to these limits. If the court has remanded the case, and the lower court issues a new decision or order on remand, the parties may file supplemental briefs following remand. There generally is no need to file a motion for leave. The rules do not set forth a page limit. New authority related to the remand issues may be cited.

I. Corrections to errors in brief. A party may submit an "errata" sheet correcting typographical errors and other non-substantive omissions in a brief (e.g., the failure to include transcript citations). The "errata" sheet may not be used to make substantive additions to the brief (e.g., you may not add paragraphs, quotations or new citations).

1. Form of errata sheet. If the errata sheet makes minor corrections, you may submit copies of the sheet to be placed in each brief. An original and four copies of the errata sheet (with proof of service) must be filed with the clerk's office.

2. File an entirely new brief? A judicial staff attendee recommended that the entire brief be filed again with the corrections made if they are numerous. It is a good idea to file the errata sheet along with the corrected brief showing the page and content of each correction, along with an affidavit stating that no other corrections have been made. The clerk's office has seen "corrected" briefs filed that contain entire new pages of text. This is obviously improper.

J. Standard 11 brief (criminal appointed cases). If the client wishes to raise issues that the attorney has decided not to raise, then the attorney should file a Standard 11 brief. The court will accept only one Standard 11 brief per case, and so the client should be advised of this fact.

1. Should a motion be filed? No motion need be filed in support of such a brief. There is one exception: If a Standard 11 brief adds additional arguments to an issue already raised, a motion for leave to file should accompany the brief. If the brief is filed by the attorney, rather than the client, the title on the cover should read "Standard 11 Brief."

2. Format. The court prefers, if possible, that counsel retype any brief provided by the client so that it will conform to the court rules.

K. Applications for leave. The 50-page limit for briefs in the court rule also governs the length of applications for leave to appeal to the court of appeals.

11. Copies of briefs and appendices. Remember that the panel judges and court staff will have only copies of your brief and appendices, not the originals. Pay special attention to make sure that ***all*** your copies are readable and that photographs and exhibits copied well. You do not want the judge who writes the opinion in your case to be unable to read the documents you filed because of poor copy quality. This is a common problem for the court.

IV. THE WAIT FOR ORAL ARGUMENT

A. So you have lost oral argument. If you have lost oral argument because you failed to request it on the title page or because your brief was late, you may still file a motion for oral argument.

1. Timing of motion. if you filed late, it is best to file a motion for oral argument after you receive notice that the case will be submitted to a named panel on a date certain and before the motion cut-off date in that notice. A motion filed before that notice is issued will normally be heard and denied on the administrative docket by the chief judge, (unless the brief was timely

and merely failed to request argument). A motion filed after that notice is heard by the panel and is more likely to result in the grant of a few minutes of argument or at least the chance to answer questions from the panel.

2. No bar to a second motion for oral argument. The filing and denial of a motion for oral argument on the administrative docket does not preclude counsel from filing a motion for oral argument with the panel.

3. Practice tip. You can increase your chances of obtaining oral argument by setting forth in detail (1) the reasons that your case is jurisprudentially significant and requires argument, and/or (2) the aspects of your case that make it factually complex or in need of explanation at oral argument by counsel to assist the panel in its decision-making. The more specific and detailed the reasons given for argument, the more likely that the motion for oral argument will be granted.

B. Possible oral argument adjournment? In a true emergency, it is possible to get an adjournment of oral argument after the stated cut-off date. The party should bring a motion to the clerk's office at the courtroom where the arguments are scheduled to be held. In addition, you should file a motion for immediate consideration with a proof of personal service on all parties. Explain the need for an adjournment in great detail.

1. Motion to reschedule. Before the cut-off date, you may file a motion to reschedule the argument for another time during the same period when the panel will be hearing the other cases on the call (e.g., seek to move the argument from Monday to Tuesday in the same week). A motion to reschedule can often be granted where the panel's schedule permits.

2. Likelihood of success. A panel is much more likely to reschedule an oral argument for a different time in the same week than it is to adjourn the argument to a time when another panel would have to duplicate the preparation in order to decide the case. The panel, having read the briefs and invested judicial resources in deciding the case, will not want to waste that effort.

3. Vacation days and conflict notification. If a certain number of days will be a problem for you (e.g., due to a vacation), you may list them and ask the clerk's office that no oral arguments be scheduled in any case in which you are the attorney of record. You need not list the cases pending before the court; just make sure to include your bar number.

4. Practice and use of oral argument tapes. The court does not sell, loan or permit inspection of oral argument tapes by parties or members of the public. The tapes are solely for internal purposes.

V. POST-OPINION MOTIONS

A. There is no "Delayed Motion for Rehearing". The court will not entertain such a delayed motion following the issuance of an opinion in a case.

B. There is no "Motion to Reissue Opinion". If an opinion has not been sent to a party, that party can request an internal investigation of the matter. But the court will not entertain a motion to reissue an opinion so that the time for taking an application for leave to the supreme court can begin to run again.

VI. PUBLISHING IOPS

A. There is interest within the court of appeals in the publication of internal operating procedures (IOPs), if it would assist both the court and counsel. There is also opposition on the theory that IOPs would create rigidity, stifling flexibility. The clerk's office uses its flexibility to resolve "grey areas" in the attorney's favor in most cases.

B. Several judicial attendees at the conference inquired whether practitioners saw a need for the publication of IOPs. They questioned whether the benefits of an IOP manual would justify the expenditure of court resources needed to develop IOPs.

C. There is strong interest within the Bench-Bar Conference Committee and its Internal Operating Procedures (IOP) Committee to continue the efforts begun at this conference to create an informal IOP manual. The belief is that there should be no unwritten rules about matters of practice that affect how practitioners approach the task of advocacy. The publication of unwritten rules levels the playing field between experienced appellate practitioners and the occasional appellate counsel.

D. There were many suggestions about how to achieve greater knowledge within the bar about the court's unwritten IOPs. The IOP committee would prefer a manual approved by the court. But even a manual developed by the committee and distributed without the imprimatur of the court would be helpful to practitioners.

APPLICATIONS FOR LEAVE TO APPEAL (CIVIL)

I. GENERAL INFORMATION ABOUT APPLICATIONS IN THE COURT OF APPEALS

A. Statistics

1. Approximately 2400 applications are submitted yearly to seven commissioners—about 40 percent criminal, 30 percent civil interlocutory matters and 25 percent workers' compensation matters. Because of recent rule changes regarding appeals from administrative agencies and in domestic relations matters, it is expected that applications filed in these areas will increase.

2. There is currently a one-month delay between an application's noticed hearing date and the time a commissioner receives the papers. On average, a decision whether to grant leave is reached 4 to 6 months after the application is filed.

3. The judges agree with the commissioner's recommendation about 90 percent of the time.

4. Approximately 5 percent of applications are granted. Generally, the court will grant or deny leave as to all issues raised. The court is more likely to grant peremptory reversal (which, by unwritten rule, requires unanimity) than to grant leave to appeal.

B. Procedures

1. Commissioners, who are experienced attorneys, prepare reports on most applications for submission to a panel. A commissioner generally has no more than a day to spend reviewing any application.

2. Every week, one commissioner is assigned to handle emergency applications. The clerk's office calls the parties to verify that there is an actual emergency. A few emergency applications go directly to a panel without being reviewed by a commissioner first.

3. Applications are submitted to a panel on Wednesday as part of their motion docket. Typically, the panel receives 35 to 70 motions and applications and tries to decide them by Friday of the same week. Often the judges on a motion docket are not in the same location and utilize telephone conferences and fax machines. Judges sit on motion panels by district, with the court still operating as though there were only 3 districts. Oral argument is rare, but it has happened.

4. There is an internal "issues pending digest," not available to practitioners, that tracks issues in cases where leave has been granted. The court uses the list, in part, to decide whether a case should be held in abeyance because of an issue in a pending case.

5. The court does not consider applications regarding venue issues to be truly interlocutory because it recognizes that if the error is not corrected, it cannot be cured after trial.

6. The court does not give "lesser treatment" to a delayed application for leave to appeal.

7. The court reviews applications for leave from circuit court appellate rulings (referred to as "discretionary appeals") much as the supreme court reviews applications. Summary relief is favored, when possible, over granting the application.

8. Parties should follow the application rules whenever possible, but the court has the power, on motion, to waive a requirement when compliance is not possible.

II. "UNWRITTEN RULES" REGARDING APPLICATIONS

A. Issues raised by cross-appeal after the granting of an application for leave are not required to relate to the issues raised in the application.

B. The clerk's office interprets the court rules to require a statement of jurisdiction and a statement of the standard of review in applications. Also, the clerk's office enforces a 50-page limit on applications.

C. If you wish your application to be joined with applications filed in related cases, or seek to have your case joined for consideration with a pending case, you must serve the parties in those other cases.

D. For emergency matters, or matters with motions for immediate consideration, the caption should include the date by which a decision is needed.

E. If you must submit an application before a required transcript is ready, tell the clerk's office that it has been ordered. The clerk will hold the application pending receipt of the transcript.

III. FACTORS IN HAVING AN APPLICATION GRANTED

A. Advocacy skills are very important at the application stage to convince the court to devote its resources to an interlocutory matter. Even if the court believes there was error, the application will not be granted if the court is not also convinced that the matter must be dealt with now.

B. An application will not be granted if the court believes that the party seeking immediate interlocutory relief is tardy in doing so.

C. The clearer the error, the more likely the application will be granted. If the error is very clear, peremptory reversal is possible if the panel is unanimous.

D. Claiming an issue is one of "first impression" cuts both ways and may increase or decrease the probability of having leave granted.

E. The court emphasizes the complete resolution of cases and does not like "piecemeal" litigation. It is not compelling to say that a trial will be "useless."

IV. TIPS

• Remember that there is no lower court record at the court of appeals at this stage. Attach all documents needed to support your issues (e.g., the order being appealed, any written opinion, transcript pages containing a court's oral ruling, the docket and anything else the commissioner and panel will need to understand the facts and case history).

• If the order from which leave is sought refers to reasons stated on the record and there is, as yet, no transcript, explain the circuit court's rationale in the application.

• To speed up transcript preparation, do not tell the reporter that it is needed for appeal. Otherwise, the reporter may assume that it can be done within 56 days. But document your transcript order in case you have to file an application before the transcript arrives.

• Keep in mind that judges have very little time to devote to consideration of an application—be as concise as possible.

• When seeking extraordinary relief, such as superintending control, make sure that you do not have another remedy (claim of appeal or application). If you do, your extraordinary request will be denied, even though an application might have been granted.

• Always inform the court of related pending cases. Argue that your case will assist in the development of issues in the pending cases, or at least, that it should be held in abeyance pending resolution of them.

• Explain why further development of the issue at trial will not make any difference in the resolution of the issue submitted for interlocutory review.

• Explain at the beginning of the application why the issue is significant and why its importance extends beyond the particular case.

• The statement of facts should recount all facts relevant to the issue, but not necessarily all facts relevant to the entire case.

• Because it is more likely that peremptory reversal will be granted than that an application will be granted, seek peremptory reversal by separate motion filed along with the application. While some judges are not inclined to grant peremptory reversals, such a request may assist in getting the application granted when two judges believe peremptory reversal was appropriate.

CIVIL MOTIONS

I. GENERAL INFORMATION AND CONCERNS

A. The way a motion is titled can be critical. It affects the routing and priority of consideration. Check the court rules carefully to determine what is appropriate.

B. Motion papers stand alone when they are submitted to a panel. If there is a brief on the merits or documents that need to be considered, they should be attached.

C. Unlike the rules regarding briefs, the rules regarding motions have no limits on the number of replies or supplements that can be filed. A party may file as many replies and other pleadings with respect to motions and applications as are deemed necessary.

D. Generally, a decision on a motion is rendered in 3 to 4 months.

E. The clerk's office does take note of attorneys who develop a pattern of filing spurious motions.

F. Questions were raised regarding whether an attorney affidavit is actually necessary in support of all motions.

II. MOTIONS FOR IMMEDIATE CONSIDERATION

A. Comments

1. A motion for immediate consideration changes the "flag" on the case to priority so that the commissioners will report the case sooner.

2. All motions for immediate consideration are initially treated as meritorious motions and are given immediately to the assessment clerk. The clerk has some discretion in noticing the motion for hearing depending on how quickly the circumstances actually require action.

3. Ultimately, every motion for immediate consideration is granted; however, the underlying relief, as to which immediate consideration was sought, may or may not be granted.

4. There are two statuses for expedited motions: emergency and priority. Normally, priority motions can be screened and submitted by the commissioners within one month. An emergency receives the most expedited consideration.

B. Tips

1. To help the clerk's office determine priority, the party seeking relief should clearly set forth, either in the motion, or perhaps even on the cover sheet, a deadline, trial schedule, or other relevant timing aspects of the case.

2. Be sure to clearly set forth the reason that immediate consideration is necessary.

3. A motion for immediate consideration would be appropriate in an appeal from a discovery order.

4. If immediate consideration of an application for leave to appeal will be requested, the motion and application should be filed together since they will be considered as a package.

III. PROPOSED AMENDMENT TO COURT RULES REGARDING MOTIONS FOR IMMEDIATE CONSIDERATION - MCR 7.211(C)(6)

[Reporters' note: This rule proposal seems no longer to be under active consideration, in part because of concerns expressed by practitioners at the Conference. The reporters have abbreviated the summary of the inactive proposal and added discussion of a possible replacement proposal.]

A. Under the proposed rule, a motion for immediate consideration must be filed within 7 days after entry of the order from which relief is sought or the discovery of the need for immediate consideration. The amendment was proposed because of concerns that the motion was being used as a tactic to jam opponents by last-minute filing. This tactic also burdened the clerk's office with the need to process the motions quickly.

B. Practitioners felt the proposal was overbroad and would eliminate meritorious motions where there was good cause for the delay, as when the opponent failed to serve the order for 7 days or when large institutional clients have to process authorization to proceed through a chain of command. Moreover, the proposed rule's jurisdictional elements would be difficult to apply by the clerk's office.

C. A more promising method of addressing the problem may be to adopt a rule that codifies the court's current practice of prioritizing "emergency" motions as they come in, based on when the movant really needs a decision. This task could be made easier by requiring movants to specify a needed action date on the face of the title page.

IV. MOTION TO EXPEDITE

A. A motion to expedite is used to request that a case that is on the docket for disposition on the merits be scheduled more quickly on the case call. It would be inappropriate to use such a motion to seek priority consideration of a motion or an application for leave. In such cases a motion for immediate consideration is required.

B. Practically speaking, absent a statutory basis for priority consideration, the likelihood of a motion to expedite consideration being successful is small.

V. MOTIONS FOR SUMMARY AFFIRMANCE/PEREMPTORY REVERSAL

A. As a rule of thumb, if the court must do any research to decide such a motion, it will be denied. The error must be so obvious, or the ruling so clearly correct, that there is essentially no possible controversy on the issue and therefore, no legal research is needed.

B. Such motions require the unanimous vote of all 3 judges. If one judge has objections to granting the motion, it will be denied.

VI. MOTIONS TO DISMISS

A. Comments

1. Generally, these relate to jurisdictional issues.

2. The clerk's office reviews all claims of appeal for jurisdictional defects; however, the parties should not depend on the clerk's office to catch all defects.

B. Tips

1. This motion is underutilized. Jurisdictional defects are not always caught at initial screening. Such a motion can eliminate a waste of the court's time where a case becomes moot.

2. Practitioners need to watch out for orders that look like "consent judgments"; appellate rights may be unwittingly forfeited.

3. Remember that a judgment on the merits and a post-trial order may each be a final judgment. The claim of appeal must be timely on both. [*Reporters' note: The October 19, 1995 amendments to MCR 7.202 and 7.203, effective January 1, 1996, contemplate a* ***single*** *order that is the "final judgment" and appealable of right, so either the post-trial order will not be appealable of right or the main judgment will not be. Prudent practitioners may want to appeal from both to be sure, perhaps also applying for leave from the later order.*]

VII. MOTIONS TO REMOVE CASE FROM SUMMARY PANEL CONSIDERATION

A. The clerk assigns appropriate cases to summary panels after screening. Usually, cases assigned to summary panels involve a single issue. The summary panel is similar to a motion panel and most often, the "settled law wins."

B. Notice is given to the parties when a case is assigned to a summary panel. A party may file a motion to remove the case from the summary panel.

C. A summary panel may also decide, on its own, to remove the case to the regular docket.

VIII. MOTIONS TO EXTEND TIME FOR FILING BRIEFS

A. Comment: Usually get a decision within 28 days after filing.

B. Tip: If appellee has filed a motion to dismiss or for peremptory reversal, rather than going through the time and expense of preparing a possibly unnecessary appellee's brief, appellee might consider moving to extend the time for filing that brief.

IX. MOTIONS TO STRIKE/CORRECT DEFECTIVE BRIEFS

A. An indication was given that the clerk's office would welcome motions to strike defective briefs.

B. The filing of motions to cure procedural defects in briefs may not merit the cost and effort. The nonmoving party would simply cure the defect, and such defects would seldom, if ever, result in the dismissal of a case. Moreover, such briefing errors may hurt the writer's credibility with the panel that decides the case, but only if the errors have not been corrected before the panel gets the briefs.

C. Filing a motion to require a party to cure a truly defective statement of facts in a brief may be useful. It was suggested that if such a motion were granted, the time for filing the appellee's brief should not start to run until the defect was cured as it would affect how the appellee's brief was written.

CRIMINAL PRACTICE IN THE COURT OF APPEALS

I. APPLICATIONS

A. Guilty plea appeals Procedures for handling these are in the formative stages. For the present, they are being treated like any other application except that retired judges have been assigned to them.

B. Rule anomaly Although the application is due within 21 days, the transcript is not due for 28 days. If counsel can prepare an application without the transcript, it can be filed timely and the court will hold it pending receipt of the transcript. More commonly, however, appellate counsel will be unable to prepare an application without the transcript, resulting in large numbers of delayed applications. Delay is not fatal, but be mindful that the length of the delay will be considered in the decision whether to grant leave. This is an area ripe for a rule change.

C. Untimely claims Practitioners should remember that neither the transcript nor the lower court record will be available to the court in these cases. Practitioners should attach an appendix with all relevant documents.

D. Presentence report Do not send just one copy of the presentence report. Attach it to all copies of your filing. The clerk's office will remove the copy from the original so that confidentiality is protected.

E. Emergency applications Whenever filing an emergency application in an interlocutory appeal, alert the clerk's office that it will be coming. File and personally serve a motion for immediate consideration. Order the transcript immediately. If you delay filing, the court may think there is no emergency or that counsel's delay has created the emergency. [*Reporters' note: The January 26, 1996 amendment to MCR 7.205(B), effective April 1, 1996, alters the transcript requirements.*]

II. MOTIONS

A. Motions to remand are a major part of criminal appellate practice. All motions are sent to Lansing where a short report and proposed order are prepared by a staff member. The report then goes to the district from which it came.

B. All motions must be accompanied by an affidavit. The better practice is to obtain affidavits from potential witnesses because they are more compelling, but counsel's affidavit delineating testimony that would be offered at a hearing is acceptable. Affidavits should be detailed but succinct.

C. The court considers motions without the record, so attach all relevant portions of it—including available trial transcripts. File a separate motion brief with a procedural history. Motion judges have ready access only to the motion and documents filed with it—not the brief on appeal. Some judges read everything; others just read the commissioner's report. The presiding judge will contact the other judges, sometimes in separate calls, often phoning other locations.

D. Remand motions filed with the brief on appeal, although untimely, will be considered.

E. Answers filed after the hearing date will be considered.

F. Untimely motions to remand will be considered as long as they do not involve guideline questions. Be sure and state why the motion is late. One understandable reason is difficulty in obtaining affidavits.

G. The panel at oral argument may not know if a remand was requested and denied. Inform them. The panel may not reconsider a denied motion to remand, so include the issue in the brief on appeal.

H. Rule 11 requires appointed counsel to provide clerical assistance to an inmate filing a pro se motion to remand.

I. On motions to affirm or for peremptory reversal, vote must be unanimous. If there is any room for argument (i.e., if research is needed), motion will be denied.

J. If substituting in as appointed counsel, new counsel has 28 days within which to file new or supplemental brief—less time if case has already been submitted to a panel. These briefs by substituting counsel can be filed without a motion.

K. Credibility of counsel is important. It transcends factual credibility.

L. If appellant does not follow court rules, case can be dismissed under MCR 7.216(a)(10).

M. Three problem areas:

1. On remand, trial courts may make findings of fact and conclusions of law but fail to rule on the substantive issue, placing the court of appeals in a difficult position. Should the remand order be more specific?

2. If the trial court grants partial relief to appellant, appellee must appeal by way of application while the rest of the case is proceeding by claim. The two appeals are not automatically consolidated.

3. Should the time limit for filing motions in the trial be enlarged or is 28 days from the time the transcript is filed sufficient?

N. [*Reporters' note: The January 26, 1996 amendment to MCR 7.211(C), effective April 1, 1996, adds a procedure for confession of error by the prosecutor. In the same set of amendments, MCR 6.429 was amended to establish new requirements for the preservation of issues concerning presentence reports and sentencing guidelines.*]

RECORD PRODUCTION

I. IDENTIFYING REPORTERS/HEARING DATES

A. Comments

• Docket entries sometimes fail to identify the reporter or the dates on which proceedings took place. This makes it difficult to order all the relevant transcript.

• Cases tried piecemeal over many scattered hearing dates can involve multiple reporters, creating special problems summarized in the *Family Law* summary report.

B. Tips

• In circuits that have a court reporter supervisor, call the supervisor to identify a judge's reporter for a particular day.

• Talk to the reporter to find out what happened on a particular day if the docket entry is unclear.

C. Recommendations

• A standardized identification system should be developed to be used by trial court clerks in making docket entries to identify events that occurred in the courtroom.

II. APPELLANT'S BURDEN TO INSURE THAT TRANSCRIPTS ARE TIMELY FILED

A. Comments

• Because of budget constraints, the court has decided to strictly enforce the rule placing responsibility on the appellant for insuring that transcripts are filed as part of the record.

• This change in policy has created an adversarial relationship between attorneys and the court reporters with whom they have to deal on a daily basis.

• Court reporters indicated that from their perspective, the new policy has not changed things much. The biggest change is that now it is the attorneys rather than court personnel that are calling them regarding the timeliness of transcripts.

• Requiring a court reporter to file a motion to extend time with the payment of a $50 filing fee may create a financial hardship for the reporter.

• Approximately 75-85 percent of court reporters are filing their transcripts within the time limits (although some of the filings reflected by this statistic represent filings within a time limit that had been extended by motion).

• Concerns were raised about whether the motion to request extension of time found in the standard court forms book could be copied and completed, or whether the form had to be entirely retyped. Reporters were confused—some had been told this was unacceptable; others have used this procedure on many occasions.

• Filing transcripts on time has become a greater problem since the time was reduced from 91 to 56 days. Reporters find it difficult to meet the 56-day deadline if they are involved in a long trial or successive smaller trials, if they are working on several appellate transcripts at once, or if they cannot get out of the courtroom because they have no replacement. Many felt the 56-day period was too short.

• Counsel frequently do not receive copies of letters the court sends to reporters.

B. Tips

• To avoid being show caused, the reporter should move to extend time.

• Appellant can move to extend the time for filing the transcript. This should be done within the initial 56 day period. Appellant counsel should call the reporter and find out how much more time is necessary to complete the transcript.

• In appeals of large money judgments, accruing interest makes it a matter of client financial interest at the outset of the appeal to insure that the reporter recognizes the need to produce the transcript within the time limits, if not sooner.

• A reporter seeking an extension of time should explain his/her case load and any other obstacles that prevent timely filing of the transcript.

C. Recommendations

• Waive the filing fee for motions to extend time for filing the transcript.

• Reporters should be allowed to file for an automatic extension of time to produce large transcripts without paying the $50 motion fee.

• If the attorney has to file the extension motion, the filing fee should be assessed against the reporter.

• Provide for an automatic extension of time for filing transcripts up to 91 days. This recommendation raised concerns about the chilling effect such a provision could have on appeals from short-sentence convictions. Further, if there was an automatic extension, everyone would use it and the 91-day period would become the norm.

• Change the 56-day period to a 75-day period.

• Kent County's policy is that a reporter who is behind 4,000 or more transcript pages can take him- or herself out of the courtroom on unpaid leave. This policy should be circulated among other circuits. It was noted, however, that it would not

work in many small counties where there simply are no replacements for the court reporters.

III. TRANSCRIPT PRODUCTION FEES CHARGED BY REPORTERS

A. Comments

• The amount reporters can charge for production of appeal transcripts is set by statute and is raised only every 10 to 15 years.

• The pay rate schedule is very low. The federal schedule is twice as high.

B. Recommendations

• The supreme court should set the amount reporters can charge by court rule. Court rules are more easily amended than statutes.

• The present rate statute could be amended to include an annual cost-of-living adjustment.

IV. MULTIPLE TRANSCRIPTS

A. Comments

• Problems can arise when there are multiple reporters who each file forms that could be interpreted by the clerk as indicating that the entire transcript has been filed, triggering the brief clock.

• The clerk's office does have a system on its computer to indicate that multiple transcripts have been ordered. This should prevent the clerk from assuming that the first transcript filed is the only one or the last one.

B. Tips

• To avoid confusion in multiple transcript cases, counsel should send the clerk a letter with the notice of filing that explains additional transcripts remain outstanding.

V. SANCTIONING COURT REPORTERS

Comments

• After a motion to show cause why a reporter should not be held in contempt is filed, the court generally gives the reporter three weeks to respond and then conducts a full-scale hearing.

• A show cause hearing may need to be on the record in order to afford due process.

• Sanctions by the court may include, among other things, fines, decertification or confining the reporter until the transcript is completed.

• A reporter may be brought before the board of review as a result of a complaint. The board attempts to work with the reporter to solve the problem. When a complaint is filed, the reporter has 45 days to respond. The response is sent to the complainant, who may reply. In recent years, the board has not terminated any reporter's certification. Due process considerations require a hearing in order to do so, and the board lacks the funds needed to conduct extensive hearings.

• The federal courts do not use show cause proceedings. They impose an incremental fine. While many judges prefer this system, it was not approved as an alternative in Michigan state courts due to opposition by court reporters.

B. Recommendations

• Sanctions imposed should be uniform throughout the state.

• If a court reporter must be ordered out of the courtroom in order to complete a transcript, the reporter should have to pay the cost of hiring a replacement reporter. Some viewed this as an unfair financial hardship on reporters.

VI. EXHIBITS

A. Comments

• A problem exists where a video tape, which is not transcribed, is shown to the jury. Such tapes are often inaccessible after the case moves to the court of appeals.

• Attorneys face problems when they attempt to file large exhibits with the circuit courts. The circuit courts frequently refuse to accept them due to storage limitations.

• Storage space is also a problem for the court of appeals.

• While the appellant is trying to locate exhibits and videotapes, the time for filing the brief may be running.

B. Tips

• If the brief clock is running while you are having to spend a lot time looking for exhibits, try filing a motion to extend time until the exhibits are located.

• Attach relevant exhibits to the briefs.

C. Recommendations

• Amend the rule to require that only relevant exhibits need to be filed with the circuit court.

VII. TECHNICAL ADVANCES

A. Video Transcription

1. Pros

- Beneficial when substitute reporter is needed.

- Extremely flexible. Judge can start early in the morning or go until late in the evening without inconveniencing a court reporter.

- Complaints decline as judges become accustomed to the video courtroom.

- Arraignments can be conducted from remote locations.

2. Cons

- Someone must be assigned the responsibility of logging in the times when various witnesses take the stand.

- Problems with audibility due to background noise or too many people speaking at once.

- There have been problems where someone has forgotten to turn on the videotape.

- Storage problems: temperature, humidity, magnetic fields, need to be rewound annually, shelf life of only 12 years.

B. Real Time Transcription System

- As the reporter takes down the questions and answers, the words appear on computer monitors placed at the bench and counsel tables. Attorneys can use the system to mark specific spots in the testimony and also to search for specific words. Attorneys can also transmit rough transcript to someone in their office for review via modem while the trial is in progress. This system is being used in Kent County.

BRIEFING

I. TIPS FROM JUDGES

- the brief is far and away the main tool of appellate advocacy
- long briefs are counter-productive; briefs should be written with awareness of the extreme pressures on judges' time
- tell the whole story in the statement of facts rather than leaving some facts out until the argument; a non-argumentative presentation is much more persuasive than an obviously slanted one; misrepresenting the facts damages the credibility of the argument; deal with and don't dodge bad facts
- prehearing sometimes "adopts" either the appellant's or the appellee's statement of facts. It is good advocacy to submit facts that the court might adopt as its own.
- an appellee should consider just rebutting the errors in an appellant's presentation where the appellant has supplied the court with the material facts
- don't automatically file a reply brief without first considering whether it will serve some useful purpose
- remember, some judges draft tentative opinions before oral argument
- supplemental briefs take about two weeks from filing to get into judges' hands, so filing on the eve of oral argument does not help the argument
- only the judge pre-assigned to write an opinion has the record, so attach key portions—but only key portions—of the record in an appendix. This is especially helpful to the other two judges.
- in discussing error, the appellant must also show prejudice
- limit the number of issues to only the best and simplify your statement of them to the extent possible; state your issues precisely enough to convey to the court the specific question it must actually answer
- prehearing attorneys, who are first-year lawyers, have the job of going through the ***entire*** record
- the appellant primarily controls the statement of issues presented and the research staff usually takes the issues from appellant's brief
- the appellee should ***not*** re-order the issues; rather appellee should address problems with the ranking of issues in the argument section of the brief
- "cut and paste" briefs are not effective.

- make sure your briefs "look good." The physical presentation and formatting affect the impression judges have about the quality of the brief.
- take a stand: do not "pussy foot" around
- argue key issues first
- attach a copy of an "on point" unpublished opinion—judges are interested in unpublished opinions
- derogatory comments in the brief about opposing counsel cause you to lose credibility with the court
- another reason not to mislead the court about the facts or law is that, the present case aside, it is likely to affect your future credibility with the court
- keep footnotes to a minimum
- if a case is cited wrong, submit an errata sheet

II. TIPS FROM ATTORNEYS

- facts, more than law, win appeals
- motions to strike: sometimes it is better tactically to let a bad brief stand than give an opponent a chance to fix it
- it is dangerous to ignore apparently frivolous issues—they may not seem frivolous to the court
- MAACS standards require an attorney to appeal any issue that has arguable merit
- the court historically has not been generous in extending the 50 page limit on briefs, but a motion to extend is somewhat more likely to be granted if it is filed with the brief
- in consolidated cases, a party should consider filing a motion with a proposed briefing schedule and asking the court to adopt the schedule so all parties know when their briefs are due
- file a brief in response to an opponent's supplemental brief citing new authority
- to get past the clerk's office, list "Standard of Review" in the table of contents
- do drafts and make revisions for effective briefs
- ask that the opinion be published in your relief requested section

- check cites
- check photocopies: make sure all pages are copied and readable and in correct order

III. TIPS FROM THE RESEARCH STAFF

- frame each issue carefully
- be concise
- be specific -- tell exactly what the issue is
- use sub-issues if necessary
- establish a relationship between the issues and the argument
- cite to lower court record
- do a summary or an introduction to the argument section of the brief

IV. SUGGESTIONS

- as the court of appeals shortens its backlog, the need for supplemental briefs will decrease
- parties should be able to extend the time for filing reply briefs by stipulation
- in criminal practice, the established time frames are unrealistic for appointed defense counsel
- prosecutors in appointed cases should be required to serve two copies of their briefs on appointed defense counsel, so defendants could economically be provided their required copy of the brief
- "Why brief so early?" Moving the time for submitting briefs closer to oral argument would reduce the need for supplemental briefing and still give central research time to process the briefs
- some judges don't like supplemental briefs and would prefer permitting only citation to new cases without allowing briefs concerning their significance; others would revise the rule to allow only a single page discussion of each new case cited [*Reporters' note: The January 26, 1996 amendment of MCR 7.212(F), effective April 1, 1996, permits only a one-page list of published supplemental authority. Discussion of how the new authority applies to the case is permitted.*]
- in criminal appeals, participants thought a rule change should be considered to require that presentence reports be attached to briefs raising sentencing issues

- consider a rule change allowing single spacing of briefs
- the 10-page limit on reply briefs seriously compromises the ability to respond to multiple issues and 21 days is too short a time for response: consider changing the page limit to 15-20 pages and the time limit to 28 days
- the court should send out briefing schedules, like the 6th Circuit does, listing the dates each brief is due
- docketing statements are unnecessary and should be abolished
- an attorney clerk, rather than a non-attorney clerk, should review supplemental briefs to make sure only new authority is cited
- based on the large amount of paper filed, the court should consider recycling
- abolish page limits for briefs: trust the practitioner, it is in their best interest to keep the brief as short as possible so someone will read it
- give the appellant six months from the date of filing the transcript to file the brief with no extensions
- clerks should be trained on established policy to foster more uniform application of rules
- the "catalog issues" used by prehearing should by available to all attorneys

ORAL ARGUMENT

I. TIPS FROM JUDGES

- oral argument can and does change the mind of a judge; it should not be waived; file a motion if lost through a late filing
- know your panel and each judge's prior opinions; direct argument to the concerns of each judge; some judges like being reminded of their pertinent decisions
- give a ***short*** statement of facts or introductory outline at the start of argument to grab the panel's attention; weave other facts into the argument rather than simply reciting them at length
- be cognizant of judicial body language and the mood of the panel
- know the record well
- keep it simple with emphasis on the key point (repeated if necessary); focus on a particular issue(s) which has a chance for success or shows reversible error
- treat questions with courtesy and use them to educate the panel
- think out the importance of the case or the particular issues and discuss the larger consequences of the possible decisions
- don't be misled by the questioning of particular judge; a judge asking you hard questions could really be on your side
- practice answering the ***hard*** questions about your case; have someone act as a devil's advocate
- don't hide the cases against your position—be prepared to address them

II. TIPS FROM PRACTITIONERS

- be focused
- do an introduction so panel knows where you are going
- ask for publication
- if there is a "hostile" judge on the panel, abandon eye contact with that judge and focus on the other two judges
- be flexible, honest and candid
- do not exaggerate, you will "lose" the panel

- prepare for the weakest aspect of your case, be prepared to answer the tough questions but focus on your strong points

III. SUGGESTIONS

- most attorneys seem to favor the panel announcing a "preliminary decision" from the bench before argument

- judges, however, said this poses the risk of a judge who has written a tentative opinion beforehand "locking" him or herself into that opinion and then defending it as a finished product

- both judges and attorneys would like the panel to indicate the issues it would like addressed at the beginning of argument

- the panel should request supplemental briefs if they wish

- the panel should be tough with attorneys who misrepresent the facts or the law

FAMILY LAW

I. PANEL PRESENTATION

A. Oral Advocacy

- it is the important to know the history in ruling on prior family law matters of each panel member assigned to the case.
- it is valuable to be able to give an overview at oral argument on the state of the law pertaining to the case and to have insight into relevant public policy questions.
- address your best argument as quickly as possible and state it succinctly.

B. Brief writing

- make the brief an easily read road map through statutes, case law and authority so that even a new law graduate can understand it, especially as regards procedural matters.
- never infer that a case stands for something that it does not, mislead with quotations taken out of context or distort fact or law.
- always remember in briefing to squarely address the opposition's important authority as conscientiously as you do his stated issues.

C. Appellate procedure

- today the only post-judgment orders in domestic relations cases that are appealable of right are those involving the custody of minors.
- failure to place on the claim of appeal a notice that the case involves the custody of a child may result in the waiver of the custody issues.
- due to the priority given custody cases, the court of appeals does not permit a stipulation to extend time to file a brief in such cases.

II. RIGHT v LEAVE

A. The breakout group discussed the February 1994 rule amendment that makes custody orders the only post-judgment domestic relations orders appealable of right. The consensus was that this places a great burden on the parties and their attorneys, especially those handling appeals in cases they did not try.

1. It is difficult for family law attorneys, who mostly practice alone or in very small firms, to devote large blocks of time to a single client or matter. Accordingly, the 21-day limit for leave applications is taxing to meet.

2. As a result, many lawyers who previously handled post-judgment appeals have either stopped doing so or substantially increased their fees for this work. It was suggested that one way to deal with the 21-day requirement is to timely file a "bare-bones" application along with a motion requesting leave to file a supplemental application once the transcript is obtained and counsel can fully explore the factual and legal issues.

3. Court staff emphasized the absence of a transmitted record and the importance of attaching to the application all needed documents, transcripts and other record materials.

B. All acknowledged the difficulty of obtaining the transcript in a timely fashion in light of the court reporter's other priorities and the low statutory rate for appeal transcripts. To eliminate the latter disincentive, the legislature should increase the per-page transcript fee to a level consistent with the market value.

1. There was considerable concern over the fact that the time for producing "appeal" transcript is significantly longer than the 21-day period for filing the application when the hearing and order are contemporaneous. The consensus was that the time for filing the application should be increased to at least as long as the transcript production time. Although the clerk will accept and hold an application pending receipt of required transcript (*see* ¶I(I) at 13), preparing an application without transcript is often not possible (*see* next ¶).

2. Extending the application time for post-judgment domestic relations appeals may be warranted by special circumstances common to these cases. Unlike appeals for institutional clients, where counsel may represent the same party on the same issues in case after case, an appellant in a domestic relations case may have a strained relationship with trial counsel (frequently involving a competency or fee issue) and so trial counsel—the only source for an accurate summary of the trial proceedings until the transcript is done—may be disinclined to cooperate with appellate counsel.

C. Another significant area of concern is that a divorce judgment, final as to many issues, may not be appealable of right. Divorce lawyers are familiar with the scenario in which a judgment is entered on property and financial issues after an evidentiary hearing, while custody issues are deferred for later determination. When that happens, the judgment is not appealable of right. The flip side is even more troubling. If custody issues are decided separately and first, the custody order is interlocutory and not automatically appealable. The group called for an immediate amendment to the court rules, reasoning that ***any*** final custody order should be appealable of right, irrespective of unadjudicated property issues.

III. UNRESOLVED SUBSTANTIVE APPELLATE FAMILY LAW ISSUES

A. Unofficial alimony guidelines, based on the work of Craig Ross, a Washtenaw County friend of the court referee, are used by various courts and friends of the court throughout Michigan. Should these guidelines be admissible as evidence at

trial? Are they a "learned treatise" that can be used for impeachment purposes? Can a trial court take judicial notice of these guidelines?

1. In at least one unpublished court of appeals decision, a trial court's reliance on the alimony guidelines was affirmed.

2. The problem of first-impression family law issues being treated by the court of appeals in unpublished decisions is compounded by the supreme court's recent abolition of letter requests for publication.

B. The second unresolved substantive issue deals with the ability of the trial court to consider a new spouse's income in alimony and child support modification cases. This issue is linked to whether alimony and child support are for the purpose of meeting a person's basic needs or involve some reasonable sharing of a standard of living. Related issues include requiring the continuation of children in private schools and the requirement that parents share in private school expenses as in other child-related expenses like uninsured medical expenses.

C. The third unresolved issue concerns the impact of *Fletcher* v *Fletcher*, 447 Mich 871 (1994), which requires remand to the trial court for custody determinations regardless of the nature of the error. Many attorneys expressed concern that *Fletcher*'s so-called "mandatory remand" language makes custody decisions virtually unappealable.

D. The final issue deals with the need for the appellate courts to prevent trial courts from trying family law cases piecemeal. The cost of such fragmentation is enormous to the parties, the courts and the attorneys. One by-product is that many divorce and custody appeals involve two or more court reporters. When the transcript is ordered for appeal, the attorney is forced to deal with multiple court reporters, wasting time, adding complexity and increasing costs.

1. Not infrequently a reporter present for only part of a fragmented trial certifies that the complete transcript has been filed, when only that reporter's portion was filed and other reporters' transcripts remain outstanding. This may prematurely start the clock running for the filing of appeal briefs, making it necessary for appellate counsel to go to the expense of filing a motion to reset the brief clock and avoid losing oral argument.

2. Multiple reporters are a special problem in child custody cases, considering the shortened filing periods for the appellant's (28 days) and appellee's (21 days) briefs. The periods are ill-advised given the delay occasioned by transcript preparation in a case with multiple court reporters and a fragmented trial including numerous court dates extending over a year.

3. Child custody transcripts are often the longest of all domestic relations records, frequently exceeding 2000 pages. The shortened briefing time places a real burden on counsel, driving up fees for litigants without substantially

shortening the length of the appeal. There was consensus that the regular 56 and 35 day time limits are preferable in custody cases.

IV. JURISDICTION OF TRIAL COURT PENDING APPEAL

A. Many participants reported continuing problems in enforcement of child support, visitation and custody orders while an appeal is pending. This occurs even when the appeal does not directly affect the judgment provision sought to be enforced. It was felt that MCR 7.208(A) should be amended to clarify that the trial court retains jurisdiction to enforce the divorce judgment.

B. A related issue was whether the trial court has jurisdiction to modify those portions of the judgment that are ordinarily modifiable even though the judgment is on appeal. Family dynamics do not halt pending appeal. Often alimony, child support, visitation or even custody need modification pending appeal. Asking the court of appeals to remand is not always effective, as when the request is not timely. Typically, child-related issues are very time-sensitive and require almost immediate action. There was a sense that the rules should be amended to allow the trial court to enter emergency orders on child-related issues where necessary pending appeal.

1. Child custody appeals were also singled out as particularly problematic when the trial court has ordered a custody modification that disrupts a previously established custodial environment. Even if the court erred, the one-year life of a custody appeal will destroy the custodial environment and create a new one favoring the party who improvidently prevailed below.

2. Some thought the problem was the court of appeals' reluctance to stay pending appeal a change-of-custody order, aside from emergency situations. A stay would preserve the child's stability until the court can review the trial court's ruling. Perhaps the court rules should be amended to bifurcate child custody appeals into two stages. At first, the custody modification order would be stayed automatically pending preliminary briefs on the merits. If, after reviewing these briefs, the court was not satisfied that the stay should continue, the custody transfer would be permitted. The record could then be completed, followed by briefs and oral argument.

C. There was also concern about the difficulty of convincing the court to remand the case to a different circuit judge. It appears that many custody decisions are still made based upon a circuit judge's own morals and values. Reversal and remand to the same judge in such cases may not always bring complete relief.

D. Other issues raised included the need for more explanation of reasoning in orders. Some favor permanent clerks for court of appeals judges to enable clerks to develop expertise in difficult substantive areas, such as family law. There was general uneasiness that the judges rely on clerks and prehearing attorneys, some of whom are recent law school graduates without practical experience.

APPELLATE COURT TECHNOLOGY

I. MAIN TRENDS FOR THE NEXT 3 TO 5 YEARS

A. Virtual Courtroom Judges and attorneys may appear on TV screens in each others' offices and chambers. Attorneys could travel to a central courtroom and have the judge appear on television on interactive computer. Trial courts could have virtual appellate panels appear to resolve emergency interlocutory appeals.

The transcripts, lower court proceedings, lower court records, and exhibits could be kept in electronic digital form and transmitted and accessed simultaneously by trial courts, court of appeals, supreme court and counsel, without necessarily printing copies. The virtual file would contain video transcripts, depositions, audio transcripts, and other multi-media exhibits. At the conclusion of the case, paper copies could be destroyed, thus saving considerable sums in mailing, storage mechanisms (including microfiche) and warehouses.

B. Judicial wide-area net: All courts and public offices in the state could be on the same network and share E-Mail, filings, pleadings, libraries and documents. Appellate clerks would not have to sort, stamp and receive documents. Attorneys in small towns could file on or near deadlines, as attorneys do now who work near the clerk's office. Space in the court of appeals would not be consumed with paper and multiple copies, unless and until the case is submitted for decision either through orals or on a motion. Also, anybody could have remote access to lower court records and files.

C. Brief on appeal: Appeal briefs have not substantially changed since the last century. There is no reason that an electronically-transmitted brief, in addition to the usual form and structure of an appellate brief, could not also use hyper-text to imbed materials now seen only in appendices:

- video and audio transcripts;
- exhibits, printed transcripts and documents; and
- full-text cases, law review articles and other legal reference materials.

All of which could be accessed from the brief, using citations as jumping-off points, and "hot-linking" back to the brief text with a key-stroke.

1. All judges on a panel—including visiting judges—would have equal access to the same resource materials in the brief when attempting to resolve a matter on a peremptory motion or on full submission of the case.

2. The virtual file, again, could be a separate file "accompanying" the brief through "hot links" that would not have one location but could be stored anywhere. The virtual file would include electronic versions of the transcripts, briefs, docket entries, procedural history of the case, video/audio records that have been made below of record materials.

D. Automation: Automation has good and bad points. There are trade-offs. The pressure for automation is mainly cost-driven, but there is no reason that automation cannot improve the quality of representation while at the same time reducing costs.

1. A lawyer's ability to file "to deadline" anywhere in the state, to append full text, and to have the court file readily available is not only a qualitative increase in the power of the brief, but also saves costs in mail and storage. Docketing becomes easier and less costly.

2. One reporter gave an example of emerging new problems. While doing a real-time video deposition with a witness and the witness's lawyer in one city, being cross-examined by a lawyer in another city, the reporter (who was with the witness) noticed the witness's lawyer was giving hidden hand signals to the witness. Ethical considerations and rules will be needed as experience and common sense dictate.

3. Automation demonstrates even further than usual the need for lawyers and judges to interact. Appellate practice already isolates judges and attorneys. Automation also means that judges deliberate and consult electronically, thus reducing the opportunities to get together and discuss cases. The lack of casual and familiar contact could prove to be a negative.

4. Many lawyers, judges and support personnel feel that working and researching on a computer is a "cold" process. Books can be paged through. A lawyer may "drift" through encyclopedias to sub-sections that might be allied but are not right on point. When you ask a question of a computer, it frequently gives you just what you are asking for, nothing more, nothing less.

5. Fads can drive the survival of certain forms of automation. Beta-video tapes were better than VHS, but that did not determine which system survived and thrived. Likewise, certain trends can force developments in automation that may not benefit or support the remainder of the system. A clear example is video transcripts. While video trials without written transcription is much cheaper for counties, the *appellate* record is made for the court *of appeals*. Appellate attorneys in states that use only a video transcript have found that the time spent watching real-time transcripts is enormous. Appellate courts find the use of video transcripts to be very slow and time-consuming, particularly where the entire record has to be reviewed.

6. In Michigan, it was recognized that since usually only a small percentage of the things that occur in a courtroom are actually appealed, transcribing the trial may be less burdensome than was thought. The use of a video record with transcripts only for trial events relevant to the appeal issues allows counties to have most of the benefits without the problems experienced elsewhere.

7. People need to be informed about the benefits and detriments of particular forms of automation before it is implemented. In that way, the best of automation may be obtained and the worst avoided.

II. REAL TIME TRANSCRIPTION

A. In real-time transcription, the judge, attorneys, and, potentially, the jurors and witnesses have access to the record as it is being transcribed. Lawyers can scroll forward or back when they are doing direct or cross-examination. Individuals with hearing difficulty can read the record.

B. The court reporter still has a role: controlling exhibits in all forms and making an accurate record of what the jury actually sees, rather than what the exhibits themselves purport to be. This will become increasingly true as computer reconstructions, remote depositions, remote testimony, live interactive testimony, and video arraignments begin to occur. There will have to be certification of what actually made it into the courtroom and what the jury actually saw or heard.

III. AUTOMATION IN THE COURT OF APPEALS

The court of appeals is shifting from its mainframe system to an IBM compatible PC-based system. Computer-aided research, accessing the court of appeals, accessing the court of appeals' index of cases, and electronic brief filing are real possibilities in the near future.

APPELLATE NEGOTIATIONS

I. The pilot program under MCR 7.213(A)

Under a new court rule, MCR 7.213(A), the court of appeals has recently begun conducting pre-argument settlement negotiations, and has completed a pilot program that implemented the new rule.

James Soltis, a court of appeals' employee, selected cases for the pilot program by screening appeals. One of the criteria used was how far along the case was in the appellate process. It is generally agreed that the earlier cases were selected, the better. The appellate briefs had not yet been filed in almost all the pilot program cases. Deadlines for filing briefs were suspended.

Meanwhile, the court enlisted the support of approximately 20 lawyers experienced in appellate practice or alternative dispute resolution (ADR). These lawyers agreed to act as settlement moderators on a volunteer basis, using (in ADR terminology) a "true mediation" process. This means that the mediator is a neutral and non-judgmental facilitator of settlement who does not assess the validity of the parties' respective positions. The program was designed to facilitate face-to-face meetings between moderators, attorneys and the key decision-makers for the parties.

The pilot program mediators had three possible conclusions: no settlement, complete settlement or a limitation of the appeal issues.

Forty-one cases were selected for appellate mediation. Twenty-one could not be settled and 12 were settled. Of the remaining eight, the mediation process was incomplete but it appeared that at least three other cases would be completely resolved. If that proved to be true, the pilot program's settlement rate would be 37 percent.

The conference participants believed a settlement rate this high was promising. As one judicial panelist pointed out, however, success is a function not just of how many cases settle, but also of ***which*** cases settle. From the judicial standpoint, it is important how well the program can resolve large, complex appeals—cases referred to within the court as "box" cases (the papers occupy entire boxes instead of file folders). Success with these cases would save greater-than-average time for the court and staff.

The implementation of MCR 7.213(A) will not end with the pilot program. The settlement process will continue, although its precise form has not yet been determined. What form should the continuing process take?

II. Future settlement proceedings under MCR 7.213(A)

It is generally agreed that in many cases a great impetus for settling on appeal is the parties' desire to avoid appellate expenses. Most agree that cases should be selected for settlement negotiations early on, before briefing expenses are incurred. While the pilot program took this into account by suspending the time for briefing, the court might also consider another substantial cost in some appeals, the transcripts.

One of the important selection criteria is whether at least one side actively wants to participate in settlement negotiations. The new rule permits an attorney or party to request a conference, but does not promise that the request will be kept confidential. The request, many attendees thought, ***must*** be kept confidential. Few parties would request a settlement conference if their opponents were told of the request. To encourage participation by parties who want to settle, the court should implement some method of protecting secrecy.

Consideration might be given to a "two track" program. In most cases, as noted above, early selection improves the odds of settlement. With "box" cases, however, a second approach might work better. In box cases the stakes may be so great that the expense of briefing becomes a relatively minor consideration. Indeed, the parties may want the issues to be focused through briefing and may have brought in appellate counsel for that very purpose. Settlement discussions in these cases may prove more fruitful ***after*** the appeal is fully briefed.

There was some discussion at the conference about whether to make participation in the program mandatory in "box" cases. If such a policy is instituted, the court should take into account the difficulty of resolving these cases early in the appeal process. This could be done by giving the moderator the additional option of reporting that settlement discussions should be tabled until briefing was complete.

Proposed New Rules and Rule Amendments

This list of proposed new court rules and rule amendments has been culled by the Bench-Bar Conference Committee from the summary report, session notes and other Conference materials. It is offered without endorsement or comment as a tool that may prove useful to justices, judges, court staff, bar sections and bar committees engaged in all aspects of the rule-making process. The proposals are roughly grouped by the subjects they treat, with no attempt to rank them qualitatively. Some of them were very popular with the practitioners and court personnel who attended the Conference; others were advocated by only a few. Readers must decide for themselves which proposals to champion.

I. Administrative/Housekeeping

- Restore the letter request for publication rule.
- Eliminate the requirement for original signatures on stipulations in the court of appeals, making the practice consistent with supreme court and trial practice.
- Permit service by common carriers other than the U.S. Postal Service.
- Modify the docketing statement rule to permit changes in the form at the court's discretion.
- Adopt a rule that states the court of appeals' current unanimity requirement for the grant of peremptory relief and summary decisions.
- Amend MCR 1.201 to specify that new rules and amendments, except where immediate action is needed, shall all become effective on the same date each year (e.g., January 1).
- Adopt a rule for substitution of attorneys in the court of appeals, permitting substitution at any time upon proof of service to all parties of a document signed by outgoing and incoming counsel, without motion or the concurrence of other counsel.
- Further amend MCR 7.202 and 7.203 to clarify whether pending issues related to costs or attorney fees affects the finality of a judgment or order resolving all other issues.
- Require that unpublished opinions be disseminated in the same manner as published decisions (i.e., sent to circuit courts, district courts and Michigan law libraries); and adopt administrative policy allowing Lexis and Westlaw to put unpublished decisions "on-line" with a statement at the beginning of each opinion describing how it may be used.

II. The Record

- Reconcile the time limits for transcript production with the time limits for leave applications.

- Amend MCR 7.210(B) to require that reporters provide certificates when transcript is ordered for an application for leave to appeal.

- Amend MCR 7.205 to reflect the court's practice of accepting and holding applications for leave filed without required transcript on proof that the transcript has been ordered.

- Modify the transcript rules to:
  (1) set the amount court reporters are paid;
  (2) set realistic time limits for the production of transcripts, imposing financial penalties on failures to comply; and
  (3) require reporters to provide ordering party with transcript disk on request, setting the price that may be charged.

- Moderate the MCR 7.209(A)(3) requirement that trial court stay hearing transcripts must be presented to court of appeals with motion for stay.

- Overhaul MCR 7.210(C) in recognition of exhibit storage problems at all levels. Two proposals:
  (1) Permit parties to file with their briefs the exhibits needed to support their positions on appeal; or
  (2) Require the filing of only relevant exhibits, the time for filing to be determined by the court's needs.

- Require prosecutors in appointed cases to serve two copies of briefs and decisions on defense counsel *and* require appointed counsel to forward one copy to client within 7 days of receipt, with a proof of service on the court.

III. Briefing

- Amend MCR 7.212 to encourage the filing of combined appellee/cross-appellant briefs, governed by the existing rule except that the cross-appellant portion of the brief will be deemed timely if filed by the deadline for appellee's brief.

- Amend MCR 7.212(G) to permit a stipulation to extend time like that permitted for the principal briefs.

- Require that the caption of all "emergency" papers state prominently the date by which decision is needed and recognize explicitly the court of appeals' current practice of prioritizing requests for "emergency" consideration.