2001 MICHIGAN APPELLATE

BENCH BAR CONFERENCE

SUMMARY REPORT

It's finally arrived – the 2001 Michigan Appellate Bench Bar Conference Summary Report. For those of you who have been patiently waiting – you may exhale.

As those of us who attended the Conference can attest, the 2001 Conference (as the two others before it) gave us valuable insight into the workings of the Michigan Supreme Court and the Michigan Court of Appeals. The Justices and Judges generously participated and candidly shared their views on (among other things) effective briefing and effective argument. They told us the best way to get our cases before the courts and, once there, the best way to tell the courts about our cases.

And for those of us who could not attend each and every breakout session, this summary provides the next best thing: it tells you what was said. Thus, you now have the benefit of the collective wisdom of Justices, Judges, Commissioners and Research Attorneys. And you now have the comments and concerns of the attorney participants.

Much work went into putting this summary together. Each breakout session had its own recorder. The recorders summarized what was said in the session and sent it to the chair of that session's topic. The chair then summarized the recorders' summaries and sent that to the summary report editor. The summary report editor put this report together. Many thanks to those recorders and chairpersons whose reports were so complete.

As the summary report editor, I feel like I've received quite the education through gathering and integrating these summary materials. I'm glad to have had this experience.

The Bench Bar Conference Committee is now planning the next Michigan Appellate Bench Bar Conference. If you'd like to be involved, please contact Co-Chairs Tim McMorrow at 616-336-3577 timothy.mcmorrow@kentcounty.org or Mary Massaron Ross at 313-983-4801 mmassaron@plunkettcooney.com.

And last, but certainly not least, thank you to all of the Justices, Judges, Commissioners, Research Attorneys, Clerk's staff, and attorneys who participated in the 2001 Michigan Appellate Bench Bar Conference. Without all of you, this Conference would not have been the learning experience through the exchange of ideas it has become known for.

Evelyn C. Tombers
Summary Report Editor

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EFFECTIVE APPELLATE ADVOCACY

I. *Applications for Leave to Appeal*

A. Interlocutory Appeals in the Michigan Court of Appeals

Briefing is critical in interlocutory applications for leave to appeal. The court considers several different questions when deciding to grant interlocutory leave. Appellants can and should address these questions in the briefs:

- How obviously wrong is the decision?
- Would the court treat this case as a summary panel case? In other words, would it be appropriate to peremptorily reverse the lower court's decision?
- Is the law unsettled?
- Is this a question of first impression?
- Would bench and bar benefit from clarification?
- Is there enough of a record to decide the question now, or would the court benefit from further development? (*Do not* try to add to the record on appeal.)

B. Applications for Leave to Appeal in Criminal Cases in the Michigan Court of Appeals

In criminal appeals, the court wants to know why it's important to act immediately; the institutional reaction tends to be to wait and take the entire appeal all at once. Many criminal appeals contain "chaff," so it's important to show why your case is different. Your ultimate goal should be to get one judge to see merit in your issue.

Applications for leave to appeal in guilty plea cases are treated the same as other applications for leave to appeal. Some practitioners, however, believe that the court is not granting leave to appeal in guilty plea cases where the issue concerns sentencing departures. According to those concerned, this insulates a significant area of the law from review, and it sends the wrong message to the

lower courts. Finally, some practitioners also observed that the court grants leave more often when the prosecutor is the appellant.

C. Applications for Leave to Appeal in the Michigan Supreme Court

1. Getting the court's attention

In the Michigan Supreme Court, you must grab the attention of at least one justice for the case to get a second look. Accordingly, you need a hook: you need to show the court *why* the case falls within one of the five grounds for granting leave to appeal. Be provocative. Know why your case is "sexy," and exploit it. Reviewing earlier orders on others' applications for leave to appeal allows you to see which justice is intrigued by what topics. This, in turn, allows you to set the hook for that justice.

2. Attachments to the application

Put everything into the application that an interested justice will need to persuade the other justices to grant leave to appeal. This includes the critical portions of the record. The record is difficult to get, so if something is critical to your argument you should attach it to your brief. For example, if your appeal involves a contract, attach the contract to your brief. But don't throw in the kitchen sink. Be discerning.

*3. Writing skills **do** make a difference*

The application itself must be persuasive and succinct. Advocates' writing skills have declined. Writers don't use consistent standard English. Proofreading is sloppy. People don't write clearly. They don't take the time to craft their words and their appropriate order.

II. Cross-appeals

A. Does Filing a Cross-Appeal Affect a Brief's Length?

Filing a cross-appeal could help avoid the ten-page limit on reply briefs. The additional length may benefit the appellant if the appellee raises an issue that the appellant did not raise. At least one judge preferred the separate briefs for the appellee and cross-appellant.

B. Does Filing a Cross-Appeal Affect the Time Allowed at Oral Argument?

The individual panel decides if the cross-appellant is allowed rebuttal time.

III. Motions in The Michigan Court of Appeals

A. Motion Panels

The court of appeals judges generally don't like being on motion call. And because the court itself doesn't have much advance notice of who will be serving on a particular motion panel, it would be difficult to notify practitioners which judges have motion call for upcoming motions or applications. Case assignments are made on short notice. Motions are decided quickly–it's "quick and dirty justice." Judges vote via e-mail and talk about the case only if they disagree.

B. Motions to Strike

Participants expressed two very different views here. Some said that a motion to strike could be a dangerous tactic when opposing counsel has, for example, misstated the facts in a statement of facts; why give opposing counsel an opportunity to correct the error? Call the error to the court's attention at oral argument. Others expressed just the opposite view. An advocate should file a motion to strike when, for example, opposing counsel has tried to add to the record on appeal.

IV. Briefing

A. In General

The brief is where you win your case. You need to make your best case in your brief. Don't rely on oral argument to win your case. The court forms its impressions of the case from the briefs. Recognize and acknowledge the emotional aspects of your case.

Remember your audience. In the Michigan Court of Appeals you have prehearing, your judges, and the judges' clerks. In the Michigan Supreme Court you have the commissioners, the justices, and the justices' clerks. And in the Michigan Supreme Court it is especially important to be familiar with the justices'

views. Look outside your particular issues to get an overall sense of the court's very strong views on, for example, statutory construction. (It's probably a waste of time and space to argue policy over the words of the statute to this court.)

In briefs to the Michigan Supreme Court, you should also address the development of the law because the court is concerned with its proper development. Thus, you shouldn't get caught up in the particular results you want; you should use the law to create the path to those results. The brief should impel those results.

Brevity is important. A shorter brief is more persuasive than a longer one. And although the court rules allow for motions to exceed the court's page limit, those motions are rarely successful and may not be decided before the brief itself is due.

It's a mistake to use the same brief that you filed in the Michigan Court of Appeals again in the Michigan Supreme Court.

B. Introduction to the Brief on Appeal

An introduction, although not mentioned in the court rules, can be useful if done well. Keep the introduction short. Include only the nature of the case, a summary of proceedings, and the errors you claim the lower court made. You can use the introduction to focus the reader's attention.

C. The Statement of Facts

1. A good statement of facts should be a resource for the court and a tool for the advocate.

Be a fact specialist. Know your record. The statement of facts should essentially show your issues. Use it to set them up. A good statement of facts will lead your reader to the conclusion you want. (Then set up your argument section as you did your statement of facts.) And don't forget to use those facts–with references to the record–again in your argument section.

That said, however, you should keep your argument out of the statement of facts. Including argument in a statement of facts tells the judge

that you don't have much to talk about. Save your persuasion for the argument section of the brief.

Discuss the record thoroughly. Be objective, accurate, clear, and concise. Don't omit unfavorable facts; deal with them head-on. A judge may be able to use your statement of facts in the opinion.

Use the statement of facts to tell your story. *Do not* turn your statement of facts into a witness-by-witness summary. Start the statement with the bottom line, and then tell the story chronologically. But one judge remarked that because prehearing gives the judges a chronological statement of the facts, you can take a different, more creative approach to telling the story.

Some judges rely on their law clerk's statement of the facts. Some judges rely on prehearing's statement of the facts. If attorneys would do a better job of summarizing the record, the judges might not rely as heavily on the prehearing reports.

2. Handling misstatements in the statement of facts.

One of the worst things you can do is misrepresent the facts. If opposing counsel misstates the facts, you should use those misstatements to show that the building blocks on which opposing counsel based the argument have crumbled. You should also try to determine if the misstatement in the statement of facts is simply a mistake, an omission, or an intentional distortion of the facts. Indicate the deficiencies in the opponent's statement of facts, but don't focus on what's wrong with them. Be matter-of-fact when you point out the problems.

Other suggestions for how to deal with misstatements include:

- Highlight the errors at the beginning of your own statement of facts and then proceed with an accurate statement of the facts.
- Summarize the errors at the end of your statement of facts in a separate section.
- Include a summary of errors in an appendix to your brief on appeal.

3. *Putting footnotes in your statement of facts*

Some advocates use footnotes for record references in the statement of facts, while others place record references in the text in parentheses. Reaction to the footnote question was mixed. Some find that using footnotes is distracting because the reader must look to the bottom of the page for the record information.

Others believed it's more distracting to have the record references in the text; looking at a footnote is merely a matter of adjusting to the different format. Still others believed that readers who are accustomed to reading briefs can read the text without becoming distracted by the record references no matter where they are.

But add substantive information to the footnote and there's still another problem. "Talking footnotes," those that include information other than the citation to the record, impose an additional burden on the reader. Limiting footnotes in the statement of facts to record citations eases the burden of reading footnotes to ensure that any substantive information is correct.

One advocate suggested using a footnote that contains the record references at the end of each paragraph in the statement of facts. But another advocate pointed out that this might allow the facts to depart to some extent from the actual record. Moreover, including specific references to the source of each fact adds to the statement of facts' credibility.

D. Issues

1. *Using the Bryan Garner "Deep Issue" Format*

The "deep issue" format is a short paragraph that starts with facts, briefly states the law, and then poses a question based on the facts and the law. The answer to that question should be the result the advocate wants.

Use of the "deep issue" also brought mixed reactions from participants. Some believed that using the "deep issue" format focuses the writer and makes the issue easier to read. Others believed that it has some

benefit–especially in trial court dispositive motions and briefs where the "deep issue" can serve as a succinct summary of the facts and argument. At least one judge agreed. The "deep issue" helps because judges struggle with the all caps format with run-on sentences. Using the "deep issue" summarizes the argument and is easier to read.

Others believe that the "deep issue" format invites rhetoric. Providing background information is good, but the issue should highlight the question. The "deep issue" also has a phony look to it because it is a "set up." The statement of underlying fact, the law, and the question are written so that they allow only one conclusion. Some participants found the "deep issue" distracting because of its length. These participants believe that a shorter statement of the issue without the factual component is more effective. In sum, according to one judge, advocacy in the issue statement is less important than a well-written brief. And no matter what format you choose to present your issue, you must spend time crafting the issue statement.

2. Tips for Presenting Your Issues

Exercise professional judgment about what issues to include in your brief. Adding weak claims is an advocacy error. But the court does recognize that the client may insist on including weak issues in the brief.

Put your strongest argument first. You need to signal the focus of your case. Remember, you're competing for the judge's time and attention. The appellee must address all of the appellant's issues in the brief.

Focus on the standard of review first; then make your argument. Don't argue issues that are reviewed under different standards in the same section of the brief.

Using subheadings in a brief helps the reader.

E. The Argument Section

1. Citing unpublished opinions

The distinction between published and unpublished opinions is fading. Because of the various web sites that reproduce the unpublished opinions, unpublished opinions practically don't exist anymore. Should the court redefine "published opinion"?

The problem is that the unpublished opinions tend to be cursory. And although the quality of published and unpublished opinions should be the same, "judges are human." Less effort goes into the unpublished opinion partly because of the court's backlog and partly because of the costs of publication.

Generally, you shouldn't cite unpublished opinions; you should look at the published cases the opinion cites and should use those published cases in your argument. But sometimes an unpublished opinion can be helpful, especially in criminal cases. It tells the court that one of its panels has "said it right before." You can also argue that its reasoning is persuasive. Moreover, the unpublished opinion can help steer the prehearing attorney in the right direction. Don't use too many of them, and always attach a copy of the unpublished opinion.

2. Using citational footnotes in your argument

At least one judge believes, as does Bryan Garner, that all case citations belong in footnotes. That said, the footnotes should include only citations to authority. Substantive information does not belong in a footnote; it belongs in the body of the brief. By keeping substantive information out of the footnotes, the reader is not forced to "drop down" when encountering a footnote number. The courts in Texas are apparently debating adopting citational footnotes.

F. Attachments to the Briefs

Only that judge who is writing the opinion has the entire lower court record; therefore, as with a brief in support of an application for leave to appeal, an advocate should attach important parts of the record to the brief on appeal.

Important parts of the record may include pertinent portions of depositions or trial testimony, jury instructions, contracts, statutes, photographs, and land surveys. Moreover, a judge can simply detach and take attachments along to oral argument. That way, the judge has the attachment right there for easy reference. And if you're relying on cases from other jurisdictions in your argument, you should also attach copies of those cases.

One practitioner suggested a two-tier approach. Create an appendix that contains the pertinent portions of the lower court record, but also attach specific items such as contracts or statutes to the brief. If you opt to create a separate appendix, you should include an index to that appendix.

G. Can Briefing Affect the Your Credibility?

A bad reputation is hard to get rid of; judges remember misleading or evasive arguments. Stay within the bounds of advocacy. When asked if misstatements in a brief's statement of facts caused a judge to mistrust the argument, the judge replied that he requires all facts to be verified. Prehearing attorneys generally don't know the reputation of an attorney or a litigant, so those attorneys generally disregard the identity of the attorney or the litigant.

H. Vexing Dilemmas of Advocacy

- Civil appellants–has the court of appeals become your court of last resort?

- To what extent should an advocate at the court of appeals also be arguing to a higher court? Do you risk diluting your argument at the court of appeals? Is it worthwhile to educate the state appellate court on federal habeas corpus law? (Ramifications of federal habeas corpus law could best be addressed at a judicial institute seminar.)

  > It may be acceptable to write for another court when in a state appellate court with a criminal appeal. The advocate must preserve the federal constitutional issue. And while the advocate should educate the court, the advocate should also draw the line between educating the court and lecturing it.

- Is it important to try to convince the court of appeals to decide the case on the narrowest grounds possible to decrease the prospects of a leave grant in

the supreme court? Can you be so bold as to ask the court of appeals to write an opinion in a certain way to help insulate the decision from further appellate review?

You can try, but be very careful not to offend the court with your request. Make your request subtle (i.e. label it an important preservation issue).

- Should you ask the court for greater relief hoping to get at least the lesser relief? (Ask for the stars to get the moon.)

Try to offer alternatives to the court.

- What should you do if the law is against you?

It's okay to acknowledge the law and ask the court to reexamine it.

- What should you do if the law in Michigan isn't settled?

You should absolutely discuss foreign law, treatises, journal articles and the like.

- What if there's a preservation question?

Tell the court specifically where the issue was preserved for appellate review.

- What do you do if the court of appeals adopts your position but goes too far?

Explain to the supreme court why this did not make a difference.

- How do you call a "bad" lower court judge to the reviewing court's attention?

Judges have reputations, too. But you should talk about the judge's opinion; do not attack the judge personally. In other words, depersonalize it–discuss the product not the person. You can also place information about the particular judge's track record on the

record in the trial court. For example, you could mention that Judge X has been continually reversed on a certain issue.

V. Prehearing Division And Staff Attorneys

A. How the Court Uses the Prehearing Reports

In the court of appeals, it's likely that the first document a judge will see is the prehearing report and not the party's brief. The court recognizes that its prehearing attorneys are relatively inexperienced. Briefs "trump" the prehearing report because the litigants are more familiar with the case. But sometimes the prehearing report provides more information about the record than the parties' briefs do. The prehearing attorneys develop their own statement of the facts, and the reports accurately represent the law and the standard of review. If attorneys would do a better job summarizing the record and presenting the issues in briefs, the court would not rely as heavily on the prehearing reports.

B. Should the Court Share Its Prehearing Reports With the Litigants?

Participants who favor sharing prehearing reports with the litigants say that it would give the attorney the opportunity to correct errors in the report's facts or issues. But, as one judge pointed out, if the facts aren't accurate in the opinion, the advocate can file a Motion for Rehearing and address the factual inaccuracies there.

According to some judges, though, the prehearing report is work on the court's behalf. The prehearing attorney, in effect, acts as another clerk to the judge; therefore, the judge is not willing to share that attorney's work product. In addition, some fear that the nature of the report might change if the report is made public.

C. How the Court Uses Proposed Opinions From its Staff Attorneys

Proposed opinions do not include the facts of the case. The court's staff attorneys are told not to include them in their proposed opinions. Some judges don't read the proposed opinions before the case call. And at least one judge does not read the proposed opinions for those cases that have been assigned to that judge for a written opinion.

VI. Oral Argument

A. The Value of Oral Argument

Always ask for oral argument. Contrary to popular belief, judges want to hear argument. Oral argument can change a judge's mind. It allows the judges to clarify the issues by asking questions. Argument may help clarify what the judge thinks about the case; the judge may arrive at the same conclusion but in a different way. It sometimes causes a judge to see the detail he or she did not see in the brief.

Oral argument is not just a recital of your brief. It's an opportunity for the court to test the theories the brief creates. Oral argument is like a debate–be ready to answer the tough questions. Know the questions that the court will ask. You should be able to answer that "killer" question. When preparing for oral argument wear the hats of both your opposing counsel and the judge.

B. Tips For an Effective Oral Argument

1. Choosing and ordering your issues

Tell the court what you want it to do and why. Hit the important issues first. Choose one or two issues to argue, and omit the minor issues. Your argument is not as effective if you discuss minor issues, too. For the appellee, respond to the appellant's strongest issues.

When preparing for argument, you may want to prepare two different outlines: one containing what you want to say and one handling the worst-case scenario. You may also want to determine what you can and cannot concede if asked.

2. Appearing for oral argument

It irritates the court when advocates who have been endorsed for argument don't appear because some of the judges prepare questions in advance. So if you've been endorsed for oral argument, you should appear. The court is encouraging prosecutors to appear in their appeals.

Even if the appellant has not been endorsed for oral argument, the appellee should appear to present a brief statement of the strongest point and to take questions from the court. It draws attention to your case.

And if you haven't been endorsed, you should nevertheless appear for oral argument. The court may have questions.

3. Presenting your argument

Tell the truth.

The key to an effective presentation is answering the questions the court asks. Judges are generally shocked by the answer, "I don't know; I wasn't the trial attorney in this case." Don't use that answer. Decide in advance what you can concede if you need to concede something. If the court's question indicates a factual error, correct that error. Respond to hostile questions calmly, and answer the question.

Don't merely recite your brief. Deliver something that isn't in your brief: perhaps some new insight into the case.

Do not deliver a jury closing argument. Varying your pace and the tone of your voice and moving around at the podium helps keep the judges involved. Some judges listen better to a speaker who has some passion about the argument than to a speaker who drones on in a monotone.

Simply citing a case name during argument may not bring the specifics of that case to the minds of the judges. It's more helpful if you highlight some of the facts of that case and its holding to jog the judges' memories.

Judges are good at multi-tasking. If you see a judge thumbing through the briefs during your argument, don't assume that the judge isn't listening to your argument.

Avoid embarrassment: know your judges. Know what a judge has written on a particular issue before you go to oral argument. The court of appeals website allows users to search opinions by judge.

You should also be able to pick up cues from the judges during argument so that you can fine-tune your approach to that specific panel. It's a good idea, therefore, to prepare your argument so that you can be flexible.

Do not address the justices or judges as "sir" or "ma'am."

If you need all of your argument time, use it; if not, don't. Appellants–don't forget to reserve time for rebuttal. Of course, if you're "ahead" at oral argument, you may want to stop arguing.

If you're comfortable relying on your brief, tell the court and then invite questions.

If you're concerned about potentially embarrassing questions, let the court know that your client is present for the argument. This may also result in more respectful treatment.

4. Facing that "brick wall" panel

Arrive at court at the beginning of the call so that you can get a sense of the panel–that way you'll see if they're active or not. In general, the panels of judges are more engaged than they used to be. But some judges just don't ask questions at oral argument. Furthermore, some cases are clear cut, and there's no point in asking questions.

To thaw out that cold panel, some participants suggest using an arresting opening phrase. Some judges suggest that you remind them to ask you questions. At the start of your argument, ask the judges if there are any issues they'd like you to address.

If your case is set for the end of the day, be entertaining. Make a brief statement and then invite questions.

5. Using demonstrative evidence at oral argument

As noted earlier, you should attach things like photographs or other visual aids to the brief. You may also use enlargements during oral argument. But contact the clerk's office before your argument to make sure

that what you need will be available in the court room. (According to one participant, though, on one occasion the clerk was not open to advance notice.) You should also tell opposing counsel that you're planning to use a visual aid during your argument.

In at least one instance, a participant tried to use a still photo made from a video tape that was introduced as evidence at trial but was told he could not use the photo.

6. *Telling the advocates how the judges intend to vote and what to focus on in the argument*

Some judges don't want their views known up front; they ask the hard questions and play devil's advocate. With some judges, you can sense which way they are leaning by the tenor of the questions the judge is asking. But other judges have engaged in an ad hoc practice of telling the litigants what to focus on during argument. When asked if they'd like to know where the court was headed with a particular case before oral argument, the participants responded with a resounding "yes."

HIGH, MEDIUM, AND LOW TECHNOLOGY: IMPROVING APPELLATE ADVOCACY

I. The "Low-Tech" Approach – Improving the Look of the Written Brief

A. The "Psychologically Appealing" Brief

Participants examined several samples of type fonts and sizes. A majority favored Times New Roman, 14 point, although almost as many liked the 14-point Arial; only three would choose a 12-point type face, or Courier in any size.

B. A Word Limit Instead of a Page Limit Will Improve the Readability of Appellate Briefs

Participants discussed the merits of a "type-volume" versus a page-length limit on briefs. The federal courts have adopted a type-volume limit, which sets a maximum number of characters, rather than a maximum number of pages, per brief; see FRAP 32(a)(7)(B). A type-volume limit permits more flexibility in formatting pages than a page-length limitation.

With a type-volume limit, it is possible to place all citations in the footnotes (the Bryan Garner method) without reducing the space available for text. The idea is to explain the point of law in the body of the brief and put the citation in the footnote. Garner advocates the "citational footnotes" style because it promotes better thinking and writing and leads to a more readable product. It also helps avoid string cites.

Citational footnotes can also be used for the facts portion of a brief. The Sixth Circuit, however, wants citations to the record included in the text. The Michigan Court of Appeals does not have a policy on it. The clerk's office will accept briefs using citational footnotes, and some judges like them. However, the court is not unanimous on this issue. At least one participant successfully filed a brief in this style with the Michigan Supreme Court. Approximately ten participants had used it in briefs in the Court of Appeals.

A show of hands indicated that no one at the session opposed the adoption of a type-volume limit in Michigan.

II. The "High-Tech" Approach -- The Digitally Formatted Brief

A. CD-ROM Briefs Can Effectively Present Some Types of Evidence

The moderators demonstrated the CD-ROM brief in a case that involved extensive photographic evidence. The same photos were used at the oral argument.

The Sixth Circuit has accepted CD-ROM briefs, which can include hyperlinks within the brief as well as links to opinions, exhibits, photographs, and video and audio files.

B. The Use of CD-ROM Briefs Raises Some Questions

Representatives of the Court of Appeals indicated that most of their computers are not equipped with CD-ROM drives or large monitors, and it will be next year before they are updated. Some judges do not want anything to do with technical advances, but some are very comfortable with them. The court anticipates that it will eventually have to accept CD briefs.

There are also issues related to the standard of review. Traditionally, appellate courts have deferred to trial courts on credibility issues. With a video record available, however, this might be subject to challenge.

III. Electronic Filing of Appeal Briefs

A. Benefits of E-filing

CD-ROM briefs are only an interim stage. The next goal is electronic filing of briefs. The Court of Appeals hopes to have a system operational within one to one-and-a-half years. The idea would be to send an electronic file directly to the court, which could then make it available to everyone at once.

An electronic brief could contain hyperlinks, such as those already available on CDs. In addition, it offers greater formatting flexibility and the opportunity for an oral summary by the author.

B. Concerns related to e-filing

Although technically pleadings are public records, practically speaking, appeal briefs are not widely disseminated. If every document is in electronic format and available to anyone over the Internet, there will be privacy issues to consider.

MICHIGAN COURT OF APPEALS CENTRAL RESEARCH

I. Staff Attorney Functions

A. Senior Research Attorneys

Senior Research Attorneys prepare research reports and proposed opinions. They generally participate in the longer or more complicated cases filed with the court and in the termination of parental rights cases. The reports they prepare contain a statement of the issues raised on appeal, a neutral statement of the facts, a discussion of the pertinent law, an application of the law to the facts, a conclusion on each issue, and a recommendation regarding disposition of the case.

B. District Commissioners

District Commissioners prepare reports on and assist in docketing applications for leave to appeal and certain original actions such as mandamus or superintending control. The commissioners also report on emergency applications and motions.

Some of the commissioners prepare reports in public service commission appeals and in "conflict" cases. The "conflict" case reports analyze the conflicting opinions and make recommendations about whether the Court should convene a special seven-member conflict panel to resolve the conflict.

Because of the large number of applications for leave to appeal filed from motions for relief from judgment brought under MCR 6.500 *et seq.*, commissioners also prepare cover memos and proposed orders for the special motion docket panels that decide these applications. The memos address the conviction offenses, their factual predicate, the trial court's decision on the motion for relief, the defendant's previously filed motions for relief (if any), the timeliness of the motion, and the good cause and actual prejudice requirements for relief.

Commissioner reports are generally less formal and comprehensive than case call reports. They are prepared based only on the pleadings and attachments. The commissioners do not have the lower court record; therefore, applications for leave to appeal should contain, as attachments to the brief, all of the documents necessary for the commissioners to review the applications.

Up until a few years ago, the commissioners were all located in Lansing; therefore, if an appellant filed an emergency motion or application, it had to be mailed to the commissioners before a report could be prepared. This often either delayed resolution of the matter or required judges to decide the matter without the benefit of a commissioner's report. The commissioners are now located at each of the Court's District Clerk's Offices.

Now that the commissioners are decentralized, the court can handle emergency matters more expeditiously and with the commissioners' assistance. Commissioners can now contact the attorneys in the case directly to resolve defects or other problems.

The reports the Central Research attorneys prepare are essential to allow the Court to decide the large number of cases before it.

C. Prehearing Supervisors

The Prehearing Supervisors review all of the prehearing reports prepared by the ten-to-twelve prehearing attorneys in their offices. The supervisors correct them for style and substance before they are sent to the case call panels.

II. Participant Questions and Answers

A. Should the Brief on Appeal Contain Anything Different from the Brief in the Trial Court or the Application for Leave to Appeal?

The court rules restrict the brief on appeal to the same isues that were granted in the application for leave to appeal, unless the order granting leave to appeal states otherwise. Further, the brief on appeal, even though it asserts the same facts and claims as the brief in the trial court, should discuss those facts and claims in light of the applicable standard of review.

B. Do the Research Attorneys Prepare an Updated Report When an Attorney Files Supplemental Authority?

The Prehearing Supervisor will generally forward any supplemental authority to the attorney who prepared the prehearing report. The supervisor asks the attorney to prepare a supplemental report that addreses the new authority if that authority had not been discussed in the original report.

In criminal appeals where the defendant files a Standard 11 brief, the supervisor will also ask the prehearing attorney to prepare a supplemental report.

C. What Happens When a Criminal Defendant Files an In Pro Per Brief Before the Defendant's Attorney Files the Brief on Appeal?

Generally, the Court will not accept in pro per briefs from criminal defendants if the defendant is represented by counsel, except in the Standard 11 situation.

D. Should Research Reports Be Released to the Attorneys Before Oral Argument?

Although this issue regularly rears its head, apparently no one on the Court is particularly willing to allow this to happen. The research reports are the confidential work product of the staff attorneys for the judges. No one would suggest that attorneys should sit in on the judicial conferences after oral argument or listen to discussions between a judge and the law clerk. Accordingly, there should be no claim to see the research reports.

The reason for wanting to see the reports, it's believed, is the perception that the reports are prepared by inexperienced staff attorneys. But things have changed. Many of the current prehearing attorneys have private practice experience; not all of them are recent law-school graduates. And the judges' law clerks are more experienced, too. Most have private practice experience; others have worked for the Court for several years before becoming clerks. Moreover, senior staff attorneys prepare the reports in the longest, most difficult cases.

In general, the judges do not blindly rely on the research reports. Judges have disagreed with the conclusions in the reports. In addition, the judges and their law clerks read the briefs thoroughly (often several times). Finally, the law clerks are required to independently verify the facts in the reports, and this scrutiny helps ensure that a decision isn't based on an erroneous statement of fact in a research report.

E. Should the Court Notify the Litigants Before Oral Argument of the Precise Issues That Concern the Staff Attorneys?

Very few research reports contain suggested questions. And if they did, giving the attorneys in the appeal a chance to respond to the research reports would result in yet another report addressing the attorneys' responses. This could result in an endless cycle. And, considering the high turnover of staff attorneys, it could drain the Court's resources even further if a new staff attorney, unfamiliar with the case, had to get up to speed and report on the responses.

One judge commented that she would occasionally advise the attorneys at oral argument about her initial view on the appropriate disposition of the case. She was wondering if this was a good practice. Responses indicated that it was, as long as the judge articulates the perceived weaknesses of the case. This would allow the arguing attorney to directly address the concern.

F. How Do Litigants Avoid Alienating Court Reporters Yet Produce All of the Record Necessary on Appeal?

The court rules require the appellant to produce the record. During show-cause hearings of court reporters, the judges emphasize to the reporters that it is the Court that is forcing the record production. It is not a problem caused by the attorney requesting the transcripts. Hopefully, that alleviates any backlash by the reporter against the attorney.

G. How Does an Attorney Argue a Weak Issue Without Losing Credibility?

The answer depends on whether the client is present at oral argument. If the client is there, tell the panel. Then proceed with your argument as strongly as you can. Generally, the panel members will understand why you are making the argument and won't try to embarrass you in front of your client. Otherwise, don't make frivolous arguments just because you've preserved the right to oral argument.

H. How Much Time Do the Research Attorneys Spend on Preparing a Report?

A commissioner can produce two reports a day. Of course, that may not be true for longer, more complicated cases. Prehearing attorneys generally spend

three to six days on a case. Senior research attorneys oftentimes work on a case for two weeks or more.

If the case is assigned to a "complex case panel," it is not accompanied by a research report. In those "complex cases," the judges and their law clerks are responsible for preparing a bench memorandum that is circulated to the other panel members. These memorandums also generally take more time to prepare given the length and complexity of the cases.

FAMILY LAW

I. Supreme Court Issues

A. Supreme Court Decisions Made Without Briefs or Argument

The Supreme Court sometimes issues decisions without briefing or oral argument, such as orders in lieu of granting leave to appeal and per curiam opinions rendered on the basis of the application and answer.

Per curiam opinions have precedential value. An order of peremptory reversal does not. Orders in lieu of granting leave, however, are often used for their instructive value, similar to unpublished Court of Appeals opinions.

Because of the possibility of a Supreme Court decision at the application stage, parties interested in filing amicus briefs regarding an issue should file at the application stage, to give the Court information on the significance of the issue.

Participants also asked about publishing dispositive orders from the Court of Appeals, such as orders peremptorily reversing ex parte changes of custody, because these orders could instruct counsel and the trial courts.

B. Applications for Leave to Appeal to the Michigan Supreme Court.

Possible strategies for getting leave granted include: being aware that when one Court of Appeals judge dissents, the importance or controversial nature of an issue becomes apparent and is therefore given weight and requesting publication of a Court of Appeals decision to get more attention for the issue in the Supreme Court.

The Court's understanding of the issues raised in an application may change as the case proceeds through the Court. A case that appeared focused on a certain aspect of an issue at the application stage may appear entirely different by the time of preparation for oral argument.

C. Court Rules

Attorneys are encouraged to offer their opinions regarding proposed amendments to the court rules, including at scheduled public hearings.

It would also be useful to have a "clearinghouse" for amended court rules, so that attorneys would have a central source to go to determine which court rules have been amended.

II. Court of Appeals Issues

A. Attorney Fees

Both trial fees and appellate fees are available under both MCR 7.216 and MCR 3.027, independent of the merits of the case or the client's status as prevailing party. Ways to ask for fees include: 1) by motion, before oral argument, so the Court cannot ignore the request; 2) as an issue in the appeal brief; and 3) possibly as a post-decision motion, especially if the issue was addressed in the brief but not in the decision. One participant noted that the prehearing attorneys may not identify all the issues, especially if the attorney fee issue is raised only in the appellee's brief.

Participants discussed the need to remand to the trial court for a determination of the amount of any fees awarded. One participant asked if the trial court can award fees on appeal if the Court of Appeals decision is silent on the issue. The consensus was that the trial court probably could not award sanctions for a vexatious appeal under MCR 7.216, but that it was still an open issue whether the trial court could award appellate fees on the basis of need under MCR 3.206.

The participants also discussed whether the court rule amendments providing for appeals of right from post-judgment attorney fee awards (MCR 7.203, MCR 7.208) may be read broadly enough to encompass post-trial attorney fee motions in divorce cases. This may arise, for example, where the trial attorney forgot to put in evidence of the fees under MCR 3.206. In addition, the total amount of attorney fees will not be known until after judgment is entered, or later (such as after the QDROs are entered and the parties have executed the necessary documents).

B. Final Order Problems

The group discussed the problem of bifurcated judgments, including: 1) when a divorce judgment is a final order; 2) the effect on a custody appeal of a potentially nonfinal judgment containing a change of custody order; and 3)

whether the general rules on judgments and orders apply to domestic relations cases, in light of MCR 3.211.

Participants also discussed the rule providing for post-judgment appeals of right in child custody cases. The rule specifically mentions divorce and paternity cases. The Court of Appeals is currently enforcing it by permitting appeals of right only in cases with the case code DP or DM, but not in other types of cases in which custody orders may be entered.

C. Delayed Applications for Leave to Appeal

A delayed application for leave to appeal is not a huge disadvantage in a case when there would have been an appeal of right but the deadline was missed. There are practical problems for parties who want to appeal a post-judgment order, including finding appellate counsel who can prepare an application within 21 days.

D. Transcripts

A problem with ordering the transcript in family cases is deciding whether all the hearings should be transcribed, including pre-trial custody and support hearings, discovery hearings, etc. Among the possible resolutions is seeking a stipulation from opposing counsel to order fewer than all the transcripts. Note that transcript fees are taxable costs for the prevailing party.

III. Trial Court Issues

A. Trial Court Jurisdiction During Appeal

Several questions were raised. Can the trial court modify custody orders in an emergency even though the custody order is on appeal? Can or should QDROs be stayed? What happens to continuing spousal support where the support ends, by its own terms, during the appeal? In the last situation, one proposed resolution was a motion to remand, with a motion for immediate consideration, perhaps asking for a remand on only the one issue. Another proposal was a motion to expedite the appeal.

B. Stays in Domestic Relations Cases

It is difficult to get a bonding company to provide a bond in family law cases. It may be possible to use a letter of credit instead of a bond.

C. Circuit Court Problems

Certain practices and procedures in various counties were discussed from the standpoint of whether they are irregularities that do not meet the requirements of due process and the Michigan Court Rules. One example is a Friend of the Court referee taking testimony for pro-con judgments.

CIVIL PRACTICE IN THE MICHIGAN COURT OF APPEALS

I. Cross Appeals

A. Necessity

The necessity of a cross-appeal hinges on whether a party seeks to expand the relief that was obtained in the trial court. The filing of a cross-appeal indicates a willingness to hide nothing and to raise at the very beginning of an appeal the intent to make alternative arguments on appeal. But the practice of expanding the scope of briefing in an appellee's brief in lieu of filing a cross-appeal may cause problems for practitioners and may open the door for requests for the opportunity to file sur-reply briefs.

B. As an Alternative to Remand to Address the Issue

Asserting an alternative basis for affirmance via cross-appeal might have a subtle effect on the Court of Appeals' willingness to address it, rather than remand, where the trial record is not well developed.

C. Transcripts for the Cross Appeal

A cross appellant does not have to order any transcripts on appeal and the Court of Appeals does not charge any fee for filing a cross-appeal.

D. Time Limit for Filing

File a cross-appeal within 21 days of the claim of appeal.

II. Error Preservation

If the issue is important, you need to raise it even if it was not preserved in the lower court. And you should acknowledge the preservation problem but argue an exception to the rule requiring preservation. Finally, consider the possibility of filing a motion to remand to cure the preservation problem.

III. New Authority

A. Disclosure

Ethical rule requires that you tell the court about it.

B. Included in Prehearing Reports

Prehearing reports are prepared very close in time to the oral argument dates in cases, so that usually the prehearing report includes citations to the most up-to-date cases.

C. Unpublished Opinions as New Authority

Some judges indicated that they do not rely on unpublished opinions. However, some judges in the minority felt that since technology allows unpublished opinions to be obtained and disseminated, "all opinions are, in effect, published opinions."

IV. Record on Appeal

A. The Trial Court Record

A deposition that was filed with the trial court, but not attached to the motions and not considered by the trial judge, could be relied on on appeal and would clearly comport with MCR 7.210 (A).

Can you file something after a dispositional hearing and make it part of the record? No. The Court of appeals has stricken attempts to bootstrap materials into the record.

Do matters read into the transcripts become part of the record? All appear to agree that if read into the record only, the document itself does not become part of the record.

B. Augmenting the Trial Court Record

A strategy for augmenting the trial court record is to file a motion for remand in the Court of Appeals to enable counsel to supplement the trial court

record with unfiled deposition transcripts. For example, if the case was decided on summary disposition, ask for a remand so the trial court can consider the evidence.

C. Citation to the Lower Court Record

Court of Appeals staff noted how helpful it is when a brief writer identifies the specific place in the lower court record where deposition testimony is found.

V. Final Orders

A. Consolidated Cases

If two cases are fully consolidated in the trial court and summary disposition is granted in one case, this is not a final order because the other consolidated case is still ongoing.

B. Summary Disposition Order

A summary disposition order disposing of the entire case is a final order and you must file an appeal at that time.

C. Certification of Final Orders

There is no "certification" of final orders any longer under Michigan rules.

D. Make it Clear That the Court Has Issued a Final Order

The attorney who files a claim of appeal must be aware that the clerk who reviews the claim knows nothing about the case, so everything necessary should be attached to the claim to establish that the trial court has issued a final order.

VI. Other Points

A. Electronic Filing in the Court of Appeals

One judge predicted that, within the next two years, the Court of Appeals will be accepting filings by email. "The technology will force us to do this," he noted. He sees two potential problems with such a system, one psychological and the other technical.

B. Responses to Written Questions

One court official indicated he liked the idea of responding to written, as opposed to oral, questions in cases, since he would welcome there being written evidence of what was asked and how it was answered.

CRIMINAL APPELLATE PRACTICE

I. Standards of Review

A. Overview

Standards of review describe the different degrees of deference appellate courts give to different categories of decisions and findings made by lower courts. Standards of review are different from harmless error analysis, which is used once error has been found. Standards of review are used by appellate courts at an earlier stage of review, in determining whether there was error at all.

The materials in the handbook provide a nonexclusive list of specific topics or issues, followed by the standard of review that applies and a supporting case citation.

B. Abuse of Discretion

The *Spalding* standard for finding an abuse is not very useful, particularly in the context of a criminal appeal. Many (both bench and bar) think this is an area for the supreme court to weigh in and provide a more meaningful definition. For some issues, even though the overriding standard of review is abuse of discretion, there may be embedded legal issues reviewed de novo. A common example is the evidentiary issue in which the court's discretion requires application of an analytical process set forth in a court rule.

C. Clear Error

The "clearly erroneous" standard is usually applied to the trial court's fact finding. A finding is clearly erroneous when, "although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed." Mixed questions of fact and law may require both the clearly erroneous and de novo standards of review, or some admixture of them.

D. De novo

The "de novo" standard is usually applied to questions of law, including constitutional questions. Appellate courts do not defer to lower courts on

questions of law, because they are equally well positioned to say what the law is. This undeferential or "fresh" review is commonly called de novo.

E. Harmless Error

Once error is established, the question remains whether it is harmless. There are different tests for harmlessness in criminal cases, depending on whether the error is preserved or unpreserved (forfeited), and on whether the error is constitutional or not constitutional. The only exception, a rare one, is structural error, which is never harmless. Unpreserved error, whether constitutional or not constitutional, is analyzed using the *Carines* test. Preserved nonconstitutional error is analyzed using the *Lukity* test. Preserved constitutional error is analyzed for harmlessness by using the *Anderson* test, the most favorable test for defendants. The tests themselves are summarized in the materials at F23 and F24; a chart showing all the tests appears in an appendix to *Carines*.

II. Post Conviction Hearings

A. Overview

When criminal defendants want to raise on appeal the constitutional claim that their right to the effective assistance of counsel at trial was undermined by counsel's performance, they often need to supplement the record by seeking an evidentiary hearing in the trial court, often called a *Ginther* hearing after a 1973 supreme court decision of that name. This session dealt with how to get such a hearing and what to do with it once it is granted.

B. What is Needed to Obtain a *Ginther* Hearing?

1. Try the trial court first, if possible

A *Ginther* hearing can be requested by filing a timely motion for new trial in the lower court. If an appeal has been claimed, the motion can still be filed in the trial court under MCR 7.208(B) within 56 days after the commencement of the time for filing appellant's brief. After that, the court of appeals must first be asked to remand the matter to the trial court. It is more difficult to get a remand from the court of appeals.

2. Offer of proof in the court of appeals

An affidavit for remand from the court of appeals under MCR 7.211(C)(1)(a)(ii) should allege sufficient information to show the need for a hearing and the merits of the claim. The offer of proof is the key to whether a hearing will be granted.

An affidavit from the trial attorney is not persuasive. If witnesses, expert or otherwise, should have been called, the affidavit should be signed by the witness.

- If you are short of time, submit an unsigned affidavit and then send in the signed affidavit as soon as it is obtained.
- An affidavit from appellate counsel alleging what the witness's testimony will be is not persuasive.
- The affidavit must have sufficient information to allow the judges to make an informed decision regarding the necessity for a hearing and the parameters of the hearing.
- If the claims are obviously of record, you will not get a hearing.
- Something that in hindsight might be a trial option is usually insufficient.

C. Once a *Ginther* Hearing Is Granted

1. Questions to consider

- Should an expert witness, a lawyer, be called?—Federal cases suggest it is inappropriate to call an expert witness to testify on his opinion regarding a substantive issue.
- Will your judge allow an attorney to be an expert?
- Should you talk to trial defense attorney before the hearing?
- Is the defendant aware that the attorney-client privilege is waived?

- Is it possible to keep the issue(s) purely legal so the attorney-client privilege is not implicated?

2. *Role of trial attorney in hearing*

- It's best to admit an error/mistake if something was truly overlooked—honest errors are not a problem.

    - But "rolling over" in an attempt to assist the client in obtaining new trial may be a problem as it may suggest unethical conduct.

- Should a grievance be filed if trial attorney is eager to admit ineffectiveness?

- Should admittedly ineffective trial attorney be kept off appointed counsel list?

- Is trial counsel's position inconsistent with the record or suggestive of fraud?

D. General suggestions

- Trial counsel should keep good records of conversations with client. Document each conversation and send follow-up letters to client regarding what was discussed.

- Keep careful notes of all issues discussed in your file and keep the file because memories fade.

- There is a possibility that federal district courts may hold hearings that should have been held in the trial court.

- Be aware of time limitations in MCR 7.208:

    - (B)(1) No later than 56 days after the commencement of the time for filing defendant's brief, defendant may file motion for new trial in the trial court (copy to the court of appeals).

    - (B)(3) Trial court shall hear and decide motion within 28 days.

- (B)(4) Within 28 days of trial court's decision, the court reporter must file transcript.

- (B)(5)(a) and (B)(6) Defendant's brief must be filed within 42 days after filing of transcript or 42 days after decision denying motion.

E. Suggestions for Practice

- Make sure the trial court and court reporter are aware of the deadlines in MCR 7.208(B)(3) and (B)(4). Put the deadlines in your correspondence.

- If any deadline cannot be met, trial counsel must send a letter to the court of appeals explaining the situation. Court of appeals must be constantly updated.

- Note: MCR 7.208 (motion for new trial after claim is filed) is not subject to motions to extend or stipulations to extend. Should the court rule be amended to make this clearer?

- Judicial Training Institute might want to make this a topic of training.

- Amend MCR 7.208 to allow a longer period of time within which appellate counsel has to file the motion for new trial

III. Sentencing Appeals

A. Legislative Sentencing Guidelines

These guidelines apply to offenses committed after January 1, 1999. The previous judicial guidelines still apply to earlier offenses. The court of appeals' view is that the legislative guidelines are irrelevant to cases that present issues under the judicial guidelines. As before, however, it remains critical to present guideline challenges in the trial court to preserve the sentencing issue.

1. What is appealable?

- Guidelines
- Cells
- Straddle cells

2. When must a sentencing issue be raised to be preserved?

This is an open question, because there is a conflict between the court rule and the applicable statue. There is no decision directly on point yet.

A sentence outside the guidelines invites review.

3. Does the legislation itself invite departures by expecting departures from the guidelines?

Feedback on old guidelines fundamentally changed the new grids.

A "substantial and compelling reason" is a special reason to depart not normally present in a case.

An attorney should seek resentencing before filing an application for leave to appeal, because otherwise scoring errors are waived under the court rule.

The United States Supreme Court has said that ineffective assistance of counsel can be based on counsel's performance at sentencing alone.

Because of the conflict in the rules, prosecutor should answer an application for leave to appeal substantively, not just procedurally.

B. Presentence Investigation Reports

Availability varies between counties. In some counties, counsel and the trial court get the reports a week before sentencing. Some get it five minutes before the sentencing hearing.

C. What is the Standard of Review for Sentencing Appeals Now?

1. Scoring

When a scoring error was not raised below and there was anything in the record to support the score, *People v Mitchell* held that the appellate court would not rescore the guidelines. But that case was under the old

judicial guidelines. Because the new guidelines are legislative, it is arguable that a scoring error is an error of law that must be corrected on appeal. The court of appeals seems to assume that *Mitchell* still applies.

People v Babcock holds that where the legislature does not speak, the common law applies, and this principle by analogy would also apply to scoring deviations.

2. Departures

The *Fields* test: There must be objective and verifiable reasons to depart. A trial court's determination of the existence or nonexistence of facts affecting the sentencing decision is reviewed for clear error. *People v Fields*, 448 Mich 58, 77 (1995).

But the new legislative guidelines provide for only "a" substantial and compelling reason to depart. Is this different from the *Fields* test?

An unpublished court of appeals opinion holds that where the victim approved of the score, there was substantial compliance and this was adequate reason to depart from the guidelines.

Does the rule of *People v Milbourn* still apply'? Judge Talbot seems to say "no" in dictum in *People v Babcock*, a 2001 case.

The amount of the departure (a few months or several years) affects how much justification the trial court needs to depart.

Some probation departments do a poor job of scoring the guidelines.

New software helps with scoring. One vendor, Simplified Sentencing Software Company, sells a program for about $130. Of course, you should still read the rules yourself.

IV. Laying the Groundwork for Habeas Corpus Review

A. Start Thinking of the 1996 Anti-Terrorism and Effective Death Penalty Act (AEDPA) in State Court.

Use federal law in state court briefs. Under 28 USC §2254, a petitioner can use three grounds for relief.

The state court judgment must have resulted in a decision:

- Contrary to clearly established federal law as determined by the United States Supreme Court; or
- Which stemmed from an "unreasonable application" of clearly established federal law as determined by the United States Supreme Court; or
- Based upon an unreasonable determination of facts, in light of the evidence presented in state court.

Most habeas petitions use the "unreasonable application" of federal law standard.

Williams v Taylor, 529 US 362 (2000), held that in order to be successful on habeas review the state court decision must have been "objectively" unreasonable manner of application of clearly established federal law.

In deciding what United States Supreme Court precedent means, you may look at other circuits' treatment of the issue.

B. Time Limit

A defendant has one year to file a habeas petition after he has exhausted state court remedies. This has led to a sharp increase in the number of habeas petitions being filed because prisoners have a "use it or lose it" attitude. This was actually the opposite effect of what Congress envisioned when passing the ADEPA (they thought it would decrease the number of petitions). The number of applications is around 700-800/year in the Eastern District. This means that there is a substantial delay in getting opinions.

C. Exhaustion

The exhaustion requirement is excused only in extraordinary circumstances. Issues must be "fairly presented" to the state court, in order to qualify for later habeas relief.

- In both a factual way and a legal way the issue must be presented the same way. This means in practice that the issue relied on both state and federal law at the state level.

- An assertion of a general denial of due process in state court is not enough.

- A showing of cumulative errors is likewise not enough under the ADEPA.

- Strategy—be specific. Rely on US Supreme Court authority all the way through argument. The main focus should be on federal treatment of the issue.

- Separate each issue into federal and state treatment within brief on appeal.

If defendant did not use federal treatment in state courts on direct appeal, his only available relief is through a 6.500 motion in state court.

D. Advantages of Federalizing a State Issue

- Better standard of review

- Harmless error test changes in habeas review

- Puts state court on notice of "fear of habeas"

E. The Scattershot Approach to Habeas During the State-Court Appeal

This approach seeks to federalize any issue raised. There are different reasons why it is done:

- The client insists
- Counsel has "When in doubt, raise it" attitude
- It's hard to know which issue is right for federal court.

The risk of using the scattershot approach is that meritorious issues buried in "garbage" may go unnoticed.

Knowing what to raise and what to drop is difficult for the novice, but becomes easier with experience and a deeper understanding of the law and what "works."

A prosecutor faced with responding to a scattershot brief has two choices: he can litigate every issue, or he can ignore some issues. The best approach is to address every issue, but treat unmeritorious issues only in a footnote. The tougher brief to beat is one with a very few well-developed issues.

F. Relationship Between Habeas and Direct Appeal

Should you include every issue from state court in your federal habeas petition? Probably not.

- There is a stringent standard in federal court.
- Some issues (state sentencing issues for example) are simply inappropriate to raise in a federal habeas petition.
- Court does look at all the issues, but it is better to cull the garbage from the state appeal brief and raise only those for which there is a good faith basis to raise on habeas.
- If there is a split between circuits, this is a good issue to put in a habeas petition, even though it would go nowhere in a state court.

G. What Issues Are Frequently Found in Habeas Petitions?

Ineffective assistance of counsel is undeniably a federal 6th Amendment claim. The problem arises when the state supreme court has ruled that the error was harmless beyond a reasonable doubt but admits that there was a serious error made by counsel. Under those circumstances, this issue should be addressed in a habeas petition. Be specific about the conduct.

Denial of a right to present a defense, *i.e.*, a state evidentiary ruling prevented the introduction of evidence. Is this a constitutional issue worthy of habeas treatment? Depends on the judge; it pays to know your judge.

What is adequate state ground may vary between panels. For example, in *Doan v Brigano*, 237 F3d 722 (CA6, 2001), the district court granted a certificate of appealability with respect to one issue: "whether the State courts' application of Ohio R. Evid. 606(B) in this case deprived petitioner of a fair trial."

H. Prosecutor's Tactical Issues

Prosecutor assumes a defensive position, essentially defending what happened at the trial court and in the state appellate courts.

When faced with a habeas corpus petition, a prosecutor should look for the following:

- Adequate state ground for the decision. This renders federal relief improbable.
- Forfeited issues.
- Procedural defaults.
- The way defendant now raises the issue is different from how the issue was raised in state court.

EFFECTIVE PRACTICE IN THE MICHIGAN SUPREME COURT: WHAT WORKS AND WHAT DOESN'T

I. Justices' Remarks[1]

A. General Remarks

According to one Justice, this is not the same Court that it was five or ten years ago. This Court's approach is to adhere to its oath, to return to its constitutional architecture. "People speak through the Legislature." Lawyers in Michigan have grown accustomed to asking the Supreme Court to undo what the Legislature has done. Controversial issues, such as abortion and assisted suicide, are best handled by the Legislature, not the courts. The Supreme Court's power is greater than its authority; this Court is very aware of the temptation to misuse its power.

B. Applications for Leave to Appeal

The Court's mission is to clarify conflicted or unclear areas of the law, "so that lawyers aren't confused." And practitioners must understand the Court's workload. The Court receives about 200 to 250 applications for leave in any given month.

The Court is more likely to grant leave to appeal in the following types of cases:

- Cases involving the validity of a statute (especially where a lower court has struck down the statute);
- Cases involving a state instrumentality;
- Cases involving conflicts with other appellate decisions (it is easier to convince the Court to grant relief on this ground than on the ground of error correction).

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[1]The Bench-Bar Committee has decided not to identify the different speakers. Their remarks, however, have been summarized.

- Cases of jurisprudential significance, especially if you can establish that your case represents a recurring problem and if you can explain the problem. The Court is not likely to revisit settled law simply to affirm it. One justice explained jurisprudential significance like this: Think of the Supreme Court as the custodian of the fabric of the law. A jurisprudentially significant case is one in which the fabric is frayed or torn. For example, statements of the standards of review have become frayed. The lower courts and the parties do not cite the original standard as the Court set forth. Instead, the lower courts start citing each other, causing erosion and material changes to the standard of review.

- Cases of jurisprudential significance may include:

    - Cases where a panel asks the Supreme Court to clarify an issue;

    - Cases where inconsistent Supreme Court precedent exists (a situation one Justice finds particularly exasperating);

    - Cases affecting a large number of people or influencing a greater number of trial court decisions;

    - Cases involving a published Court of Appeals decision or dissent;

    - Cases involving an issue of first impression;

    - Cases involving the interpretation of a statute;

    - A criminal case that involves questions of actual innocence;

    - Cases involving substantive, fundamental issues of constitutional law;

    - Cases that implicate modern precedents and trends in the law;

The quality of appellate advocacy may also affect the chances of having leave granted. If the Court is considering in which of a number of cases to grant leave to decide an important issue, a good appellate team in a particular case may increase the chances that a particular case is selected.

The Court appreciates amicus briefing at the leave granted stage. Motions to participate as amicus are usually granted.

C. Error Correction

The Supreme Court is not generally an error correcting court. But when it does try to correct an error, it may do so with less than a full hearing. The present Court still engages in error correction, albeit of a different type of error.

The Court will correct a clear error that has caused a material injustice. Don't try to manufacture jurisprudential significance. A party stands a much better chance of getting an error corrected if the party is honest about the relief sought. So for immediate or interlocutory relief, think in terms of demonstrating the preliminary injunction standard.

D. Effective Supreme Court Briefs

Supreme Court briefs are different from Court of Appeals Briefs.

Think about the reader. Can the reader understand? Let someone else review the brief before it's filed.

Practitioners have no idea how much paper comes through the Court. Cases come to the justices on carts. Thus, the more succinctly an issue can be framed and briefed, the better it is for all concerned.

But being concise does not mean focusing only on how the outcome affects the parties to the appeal. Attorneys should avoid "tunnel vision." Good Supreme Court briefs consider the big picture; they contemplate jurisprudential ramifications. Lawyers should ask themselves if the relief they're requesting has implications beyond this particular case. What are the core issues? What are related issues? What types of issues has the Court decided recently? Attorneys should know that the Court granted leave for the big reasons – not the little ones. Cases are generally selected to clarify an area of law.

In trying to assess the bigger picture in leave granted cases, the Court in its order granting leave has directed the parties to brief specified issues.

Litigants must always be ready to tell the Court precisely how the holding they seek should be stated. Justify the holding for your case and for others that

will follow. Every judge wants to resolve the issue properly. It is the lawyer's job to give the Court the right answer as to what the implications will be after this case is decided.

If there is a published case out there that presents problems, the lawyer "better find a way to get around it." Don't ignore it. Look at when the previous case was decided. Also do not ignore conflicting decisions. Discuss and, if possible, reconcile conflicting Supreme Court decisions. Provide a rational reason for why the Court should go with one decision over another.

E. Effective Supreme Court Oral Arguments

The quality of Supreme Court oral arguments is quite "spotty." Some lawyers do not properly prepare. They don't seem to know the record well. Too often, lawyers use the excuse that they "didn't try the case." They treat oral argument as if it is a "dress rehearsal." Therefore, lawyers scheduled for oral argument should watch videotapes of previous arguments held in similar cases. They will notice a certain "consistency and theme" from the Court.

The "five-minute rule" that the current Court has adopted means that the first five minutes of oral argument belong to the advocate. After that, the justices jump in with questions. The current Court is highly active in asking questions. Oral argument is often completely devoted to answering rapid-fire questions. Practitioners' responses to the "five-minute rule" have varied.

Of course, an advocate may waive the rule and proceed directly into questioning. But it is often effective to use these first five minutes to tell the Court of the "ripple effect" of the case – the big picture. What areas of law and practice will the given case affect? What is the likely effect of a broad ruling?

Finally, advocates should know their justices. Where possible, offer positions consistent with their prior rulings. Moreover, the current Court is very "textual." Where possible, present your arguments in this format.

F. Peremptory Orders Versus Remand Orders

Historically, the Court has chosen to remand cases for further consideration in light of new case law rather than entering peremptory orders disposing of a case. An intervening decision that is absolutely controlling will increase the chances of a peremptory reversal. The current members of the Court are granting peremptory

relief more often than their predecessors did. This may be because the current Court consists of former Court of Appeals judges and they were often frustrated having to revisit a case a second time based on the intervening change in the law. Many of these judges believe that it is better for all to simply decide the issue once and for all.

G. Abeyance Cases

The Supreme Court may abey a case formally or administratively. A formal abeyance occurs when the Court issues an actual abeyance order. Administrative abeyance occurs without an order. A party can move to remove a case from formal abeyance status, and the Court will consider the motion.

H. Vacating Grant Orders

The Court can vacate the order granting leave to appeal and deny leave to appeal for a number of reasons. The two most common are that the issue is not supported by the record or the Court is equally divided on an issue. Sometimes the Court vacates the grant order after oral argument. When the Court is equally divided, it may affirm the decision by an equally divided court rather than vacate the grant order.

II. Commissioners' Remarks

A. Background Information

There are 18 Commissioners; four of the Commissioners do administrative work. The rest do both administrative work and review cases. Those who review cases prepare reports after reviewing the application, the response, and the record.

Most Commissioners have "real world" experience. They have practiced law before coming to the Court. Commissioners are generalists, not specialists, and are not assigned cases based on knowledge of specific areas of the law. Cases are assigned to Commissioners mostly on a "blind draw," with occasional exceptions.

Commissioners currently receive applications for review within three months of filing. Expect most denials within six months of filing. A delay in deciding the application is often a good sign for the appellant.

B. Commissioners' Reports

The Commissioner's report consists of summaries of the facts and proceedings, a report of the parties' arguments, and an analysis. The Commissioners recommend a disposition of the case, and prepare a proposed order. The order in most cases is entered on an "OTE" ("order to enter") date unless a Justice holds it.

These reports generally track the organization of the appellant's application. The only part of the report which is directly copied from the appellant's brief are the point headings. These are reprinted in a section where the appellant's arguments are summarized. A Commissioner will restate these headings elsewhere in the report in a neutral fashion.

Commissioners circulate their reports to other Commissioners for comments. There can, accordingly, be a dissenting Commissioner.

C. Practice Tips

- Your application should establish an introductory framework, which provides a "road map" of the case and where you want the Court to go. Explain immediately what the lower court decided, what the issue is, and what outcome you are seeking. In this way, draw the reader to the application (or brief).

- Supply the Court with everything it needs to understand the issues and facts, so it can focus its limited time and resources on the significance of the issue raised in your application. For example, if your case addresses a contract, attach a clear copy of it.

- Commissioners usually review one case per day, so make your issue clear and your application concise. In other words, keep applications short and to the point.

- If possible, note in your application if leave to appeal has been granted in a similar case. It will then be noted in the Commissioner's report. Since all Commissioners review the reports, similar cases are usually spotted. If you are not sure about other cases, the Clerk's office will tell you what the issue statement says. Commissioners presently have a fairly limited

computerized issue index file where they can check the frequency of an issue's recurrence.

- Hot topics or issues seem to come along at once. The court will look at various applications to decide which one to grant. They may pick the one with the best facts, or with the fewest complications. They may also consider the skill of counsel.

- In general, no stay is needed at the Supreme Court level.

    - See MCR 7.215(F)(1) (no enforcement of Court of Appeals decision until return of record to the Court of Appeals)

    - If the application is timely, the record goes directly to the Supreme Court.

    - The stay bond remains effective through the Supreme Court appeal.

- Appellees must file answers to applications. They must then explain why the case is not worthy of a leave grant.

- When you file a delayed application, the Supreme Court does request the record even if it has been returned to the trial court. For the most part, it is usually enough just to cite to the record. You should still attach essential documents to the application. Also, attach trial exhibits unless you are sure they are included in the trial court file.

- Applications involving an area of law that requires clarification and serves the need for predictability of the law stand a good chance of getting leave granted. The Court understands that lawyers must be able to properly advise their clients on the state of the law.

- The Court tries to resolve all cases held in abeyance after the main case is decided, not necessarily to decide them all, but to set them up for decision later.

- Lawyers arguing before the Court need to know the Justices and formulate their arguments accordingly.

III. Discussion Topics

- Should the Court and bar consider certification of specialties such as appellate practice to improve the quality of advocacy before the appellate courts?

- Do Courts understand the time constraints of private practice?

- Is the 21-day limit for filing an application too short?

    - Some say "no" because (1) the Court is unlikely to grant relief in most cases and (2) even if the time limit is expanded, there will still be requests for additional time. One Justice observed that he has never seen a delayed application denied based solely on the delay.

    - Some note that the 21-day rule makes it difficult to obtain amici support. One Justice observed that the Court welcomes amicus briefs at any time — including at the application level.

- Practitioners raised the problem of the Court of Appeals practice of issuing a flurry of decisions in December. This creates problems for attorneys who want to celebrate the holidays, but need to spend time preparing Supreme Court applications.

- What was the genesis of the 56-day deadline for delayed Supreme Court applications? Is this too short? Is it too long? The rule may have been implemented to alleviate the problem that the Court of Appeals has no room to hold records for longer than 56 days after issuance of its decision.

    Note that the Supreme Court has recently proposed an amendment to MCR 7.302 that changes the time for filing an application for leave to appeal from 21 days to 42 days and eliminates delayed applications for leave to appeal.

    - Due to less volume, delay does not appear to be as much of a problem at the Supreme Court as in the Court of Appeals.

- What is the value of citing authority other than case law, or citing authority from other jurisdictions?

- Citation of treatises or case law from other jurisdictions is appropriate as long as the practitioner follows the correct citation hierarchy (Michigan law first, then other sources).

- Cite cases from other jurisdictions to demonstrate a trend in the law or provide justification for a rule.

- One breakout discussed the effect of how Supreme Court Commissioners have "real world" experience and can understand the practice effect of the Court's decisions on the parties and attorneys involved.

  - With that, should the Court of Appeals model itself after the Supreme Court and hire prehearing attorneys with more practical experience? Is this financially possible? One Justice noted that prehearing attorneys and Supreme Court commissioners serve somewhat different functions. Prehearing reports typically involve routine application of settled law to the facts of a case. Commissioners spend more time assessing the development and effect of trends in the law. Practical experience is thus arguably more important for Supreme Court commissioners than it is for prehearing attorneys.

- Should the Supreme Court adopt a "mailbox rule" similar to the one in the Sixth Circuit?

  - Many lawyers, particularly those in outlying areas, have difficulty getting pleadings to Lansing by due dates. A mailbox rule can reduce filing time and save travel expenses.

  - But, what about dishonest lawyers who "back-date" office postage meters?

- Which is preferable, "deep issues" or traditional issue statements?

  - Notwithstanding Al Lynch's comments, an informal poll among Commissioners resulted in a 50/50 split.

  - Some Commissioners and Justices even skip the issue statements and go straight to the facts.

- If a "deep issue" is done well, it can be helpful.

- Some Commissioners still prefer issue statements to be simple and "bare bones." (See appellant's sample application).

- How does this Court approach *stare decisis*?

  - One justice believes that past Courts have been "disrespective" of legislative pronouncements. He described prior Courts as "rogue," particularly in some areas (such as workers' comp). He rejected the notion that this Court has chosen to act only when it benefits the rich and powerful. The justice stated that "it is not the job of the Supreme Court to be an ombudsman."

- Should a litigant file a supplemental brief when an application is pending and a new case is released that affects or threatens to affect the case?

  - The Court generally accepts such a brief.

  - The Court will be deciding if the new case affects yours, and parties need to ask whether they want to weigh in on the question and be part of the dialogue.

- What are the Court's practices, and litigants' responses, in terms of holding pending applications in abeyance while an issue is decided in another case?

  - A practitioner complained that this practice is used too frequently.

  - There was discussion that the Court should join more cases to the lead case.

- Should a party whose application is held in abeyance seek leave to file an amicus brief in the pending case to directly affect the result?

  - The Court often puts packages of like cases together in the leave grant so that different contexts will be considered.

  - One justice suggested that the participants consider whether remand of cases held in abeyance aids "institutionalization" of the new decision.

- What are the ramifications of the new "letter publication" rule that went into effect April 1, 2001?

    - A justice explained that the 21-day provision limiting letter requests to "parties" was an effort to deal with concerns, raised by one attorney participant, that another rule would wrestle the publication issue away from the litigants. The question was discussed about whether a party may have relied on the fact of an unpublished decision, to support a view that no application for leave should be attempted, and that the letter request may change that. This led to an unresolved inquiry about how many leave grants, percentage wise, arise from published Court of Appeals decisions.

- Given the increased electronic availability of unpublished opinions, should they be precedential? One justice raised the question whether there may be constitutional implications to the current rule rendering unpublished opinions non-precedential.

- Should the Court change its practice of issuing per curiam opinions in response to pending applications?

    - Many lawyers stated that this practice "blind-sided" both the litigants and others effected. Per curiam (PC) opinions can constitute the law on major issues without alerting attorneys, litigants or potential amicus curiae.

- A justice and a commissioner outlined what they see as the current practice on per curiams.

    - They are one of the Court's current set of options for decision-making.

    - There has been no significant change in the number of PCs being released.

    - Sometimes cases start out designated for PC treatment, but as the opinion is written it becomes apparent that the PC route is not proper.

- The PCs help the Court resolve the 2400 plus applications filed each year.

- Attorney participants responded that certain recent PCs did not seem to fit the above guidelines (e.g., the January, 2001 default judgment case and the two tort reform medical malpractice cases).

- Can some mechanism be established to notify the bar when an issue is about to be implicated in some PC decision? There may not be a realistic way to accomplish this task. The Supreme Court must be careful not to forecast its decisions to the public.

- Can some "middle ground" procedure be created between a full leave grant and release of a PC opinion without briefing and oral argument? One attorney participant indicated that the Court may have experimented with that once in the past and, in his opinion, it did not work well.

- In another breakout, practitioners expressed a different view stating that the number of peremptory and PC opinions from the Court has skyrocketed. In that session, a justice indicated that many more draft PCs float around inside the Court for months that ultimately never issue and end up being leave denials.

- Does the Supreme Court consider who the trial court and Court of Appeals judges were on the case? At one breakout, the answer was "yes," at least subliminally.

- At least one practitioner asked the Court to clarify the abuse of discretion standard of review.

- Will the Supreme Court grant sanctions?

  - There is a tradition against sanctions in the Michigan Supreme Court.

  - If you truly want sanctions, you must file a separate motion requesting them.

- A justice encouraged further participation on issues such as those discussed at the Bench/Bar, including at Supreme Court open meetings.

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 grouped by the break-out sessions from which they were proposed. No attempt is made 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. IOPs & Rules

- Appellate Rules 7.101, 7.201, 7.301 are inconsistent. Produce new set of district to circuit appellate rules.

- Promulgate Court of Appeals rule to permit appellant to file reply to the response at Application stage without requiring a motion to do so.

- Adopt Michigan appellate a rule requiring a federal style statement of the case.

- Mailbox box rule for state court appellate filings as in federal appeals.

- Rule to extend due date for timely Supreme Court Applications to 56 days.

- In lieu of Court of Appeals motion for rehearing, promulgate rule allowing one page notice that party intends to file Supreme Court leave application to eliminate rehearing motions that are filed simply to buy more time.

- Rule for Court of Appeals to adopt federal style joint appendix instead of exhibits.

II. Post-Conviction Hearing

- Amend MCR 7.208 to make it clear that MCR 7.208 motion for new trial after claim is filed is not subject to stipulations or motions to extend.

- Alternatively, should MCR 7.208 be amended to allow a longer period of time within which appellate counsel may file motion for new trial.

III. Family Law

- Amend MCR 7.203(A)(3) providing for post-judgment appeals in custody cases to make it clear that there are appeals of right in all cases in which custody orders may be entered.