2007 Michigan Appellate Bench Bar Conference Summary Report

The Bench Bar Conference Committee is pleased to present the 2007 Michigan Appellate Bench Bar Summary Report. This year's conference included insightful panel discussions on issue preservation and the proper presentation of arguments on appeal. Attendees also heard firsthand from Court of Appeals Chief Judge William C. Whitbeck about the Supreme Court's decision to suspend the Court of Appeals' expedited summary disposition docket. Attendees learned why the "fast track" was suspended and had the opportunity to discuss their own experiences with the fast track and possible ideas for reinstating some form of the fast track in the future.

Attendees also participated in numerous breakout sessions, where they discussed oral argument strategy and potential suggestions for improving oral argument in both the Court of Appeals and Supreme Court. In addition, attendees received invaluable information on effective brief-writing, Court of Appeals jurisdiction (i.e., the "final order" rule), original proceedings, and various "hot topics" in criminal and family law appeals.

Finally, attendees had the privilege of hearing advice on oral argument from David C. Frederick, a renowned appellate attorney who has argued numerous cases before the United States Supreme Court and in nearly every federal circuit court of appeals.

In this summary report, the Bench Bar Conference Committee has strived to provide a relatively brief yet comprehensive synopsis of all of the plenary and breakout conference sessions. Hopefully, it will serve as a useful resource as attendees continue on in their practices.

The Bench Bar Conference Committee would like to thank all of those who contributed their time and efforts to make this year's conference a resounding success.

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I. TO DECIDE OR NOT TO DECIDE: DOCTRINES OF APPELLATE DECISION-MAKING

A. Plenary Session

Introduction (Mary Massaron Ross): Both the appellate bench and the bar apply generally understood principles which provide a "steadying" factor in the process of judicial decision-making. On appeal, the issues in the case are "sharpened and refined." This session dealt with situations where an appellate court does not decide an issue that was preserved in the trial court.

Many doctrines of "decision avoidance" have been created: failure to include the issue in the statement of questions presented (MCR 7.212(C)(5)); failure to state the facts on which the issue is premised (MCR 7.212(C)(7)); declining to consider new theories in support of or against the trial court's ruling, because they were not argued to the trial court; and improper briefing where the party did not present the theory in the trial court.

In 2006, the conference planning committee conducted a survey of the bench and bar in which it asked about "decision-avoidance" doctrines. The bar's responses varied widely; the bench indicated that, regardless of whether these doctrines are useful, there was concern that they are not uniformly applied.

A survey of opinions from the Michigan Court of Appeals since 1996 suggests that the court's use of "decision-avoidance" doctrines has increased in recent years.

Doctrine	Number of times applied, 1996-2000[1]	Number of times applied, 2001-2006[1]
Issue not considered because it was not included in the "Statement of Questions Presented"	83	244
Court will not search for a factual basis to sustain or reject party's position	11	109
Facts were not supported by citation to the record	56	134
Court of Appeals' review limited to issues actually decided by the trial court [although in 80% of the cases reviewed, the court did decide the issue anyway]	22	42

[1] See "Shannon's Soapbox," reprinted from the Appellate Practice Section newsletter, Winter 2007, included in the conference materials.

The panel was asked to consider the purpose of each of these doctrines; the harm each is designed to prevent; whether abolition of that harm is a goal worth pursuing and, if so, whether the actual application of the doctrine really advances that goal or, if not, if there is a better solution; and how MCR 1.105, directing that the rules of court "are to be construed to . . . avoid

the consequences of error that does not affect the substantial rights of the parties," should be factored in.

1. Issues of Preservation

Sandra Mengel, Chief Clerk of the Court of Appeals, asked the panel how, when preparing an argument, the attorney should deal with issues of preservation. Judges Hoekstra, Murray, Sawyer and Fitzgerald responded that a lack of preservation "jumps out" when they are drafting opinions or reviewing prehearing reports. Judge Sawyer looks for preservation before anything else, specifically for whether the trial court actually addressed each issue. The judges agreed that it is "very helpful" when the brief makes it explicit where in the record each issue is preserved. Judge Murray likes to use oral argument as an opportunity to verify facts cited in the briefs, if needed to establish that an issue was preserved. Judge Fitzgerald emphasized the importance of oral argument, even if the attorney appears only to answer questions. All the judges agreed that the prehearing attorneys sometimes miss items, which can be resolved during oral argument.

2. Extent to Which the Court of Appeals Addresses All Issues Raised

The next question for the panel was whether every issue raised in the parties' briefs should be addressed in the court's opinion. Judge Sawyer indicated that the judges will try to reach a consensus and may not need to reach each issue, if not all are pertinent to the decision. If, however, the trial court would benefit from guidance on remand, the court may provide it. Judge Hoekstra opposed discussing issues in an opinion where the analysis in the party's brief was insufficient. Judge Fitzgerald suggested that the veteran judges were more inclined to discuss all issues, even if only briefly, so as to minimize the chance of a remand for reconsideration from the Supreme Court. Judge Davis leaned toward omitting issues that were not necessary to the decision of an individual matter. Judge Murray described "decision avoidance" rules as useful, but only in response to "throwaway arguments." If the attorney "threw in" an issue, the court will "throw it back." Judge Hoekstra noted that, before 1996, if the appellant failed to brief an issue adequately, he would likely simply affirm the trial court's decision but that now that unpublished opinions are readily available, there is more of a need to try to deal with every issue raised.

3. Use of "Decision-Avoidance" Doctrines

Kathleen McCree Lewis, representing the practitioner's point of view, asked whether the judges had noticed an increase in the use of "decision-avoidance" doctrines in recent years. Several judges reported seeing them invoked more often in prehearing reports within the last five years. Rosalind Rochkind indicated that there is concern among attorneys that prehearing reports were relying on "decision avoidance" rules and might be unduly influencing judicial decisions. Judge Sawyer indicated that the prehearing staff has "a lot" of influence on unpublished opinions. Judge Fitzgerald considers the prehearing reports a "great guide," but says he reads them after first reviewing the parties' briefs and then again following oral argument. A later comment from the audience, affirmed by Sandra Mengel and Judge Murray, clarified that,

although a prehearing attorney may cite a reason for "decision avoidance," the writer will still evaluate the issue in the report.

4. Additional Questions From the Audience

What effect do "decision-avoidance" doctrines have on jurisprudence? Judge Sawyer said they may be considered in the decision not to publish an opinion. He added that he was pleased that the letter request for publication had been reinstituted, because the Court sometimes needs guidance from the parties as to whether an opinion should be published.

What impact does the court's declining to address an issue have on the attorney-client relationship and potential malpractice liability? Kathleen McCree Lewis described this kind of situation as "difficult," unless the client is sophisticated about legal procedures. It does create at least the possibility of a malpractice claim. Mary Massaron Ross agreed that the effect on the client could be significant. While most clients can accept that an unfavorable decision was made, many are "outraged" if the opinion suggests that the Court will not consider a question because the lawyer did a poor job. She urged the Court to use softer language when it applied a "decision-avoidance" rule. Although the Michigan Court of Appeals is a high-volume court, she would like to see opinions indicate that all issues have been considered, even if the Court simply states that it finds them without merit. In the mid 70s, opinions said "[Appellant's] other issues have been considered and are without merit." Judge Davis spoke of the judges' "profound responsibility" to be careful about what they say and to consider the "unintended consequences" of an opinion. He supported conveying the same decision in a different way.

What effect does it have on the outcome of an appeal to employ a "shotgun argument" technique? Both practitioners disfavored including too many arguments. Mary Massaron Ross quoted Judge Ruggero Aldisert, who has written that no more than two issues on appeal can be "serious." Judges Fitzgerald and Sawyer noted that criminal cases are different from civil appeals. The attorney may be compelled to include even "weak" arguments because the client insists, and it is necessary to preserve all possible bases for a future habeas petition. In a civil case, however, "too many" issues is a "red flag;" selecting one or two issues is preferable. Kathleen McCree Lewis recommended that the attorney make a strategic decision, especially where page limits are a consideration, as to whether omitting an issue would affect the outcome of the appeal.

What is the purpose of the "Statement of Questions Presented" and what effect is there on the appeal if an issue is omitted from it? Judge Sawyer responded that he finds the "Statement of Questions" useful and always looks for it. He also uses it as a guide to determining questions of preservation. He added, however, an issue can be considered even if it is not "specifically" mentioned in the statement of questions. Both Judge Murray and Sandra Mengel recommended that the statement of questions correspond to the arguments made. Judge Murray would like an additional requirement, that every brief include a summary of the case and a brief introduction at the beginning.

What will the Court of Appeals do when a question was raised in the trial court but not decided there? Should an attorney make post-trial motions just to preserve issues for appeal? Judge Fitzgerald felt it would be helpful. Rosalind Rochkind asked what would happen if the

trial court would not rule on the post-trial motion; Judge Fitzgerald indicated the Court of Appeals would go ahead and decide it. Judge Hoekstra, however, said decisions would be made on a case-by-case basis, with the possibility of remanding the case for the trial court to decide. Judge Sawyer prefers to have the trial court decide all issues first and is reluctant to remand while retaining jurisdiction. Judge Murray would decide an issue that was presented to the trial court, even if not decided, but would not decide an issue that was not presented. Kathleen McCree Lewis also thought it was better to remand the case and have the trial court create a record. Judge Fitzgerald said that trial judges do not like remands from the Court of Appeals. Sandra Mengel asked if the judges consider the possibility of a remand from the Supreme Court. Judge Murray prefers to avoid to so-called "bouncing ball" cases, that is, cases with multiple remands and successive appeals.

How does the Court of Appeals treat arguments, cases or principles not considered by the trial court? Kathleen McCree Lewis noted that the role of the appellate practitioner is specifically to shape the issues for decision and to identify nuances of argument. The Court should make use of better focused or articulated arguments. Judge Davis said that he would consider that an issue was preserved if the "problem" was raised in the trial court, regardless of the supporting or opposing arguments, but that the Court of Appeals will not consider an issue that was not raised at all.

When should the appellee file a cross-appeal? Is a cross-appeal necessary only if the trial court's decision was adverse or should the appellee cross-appeal when the trial court did not address an issue? Judge Sawyer said the court will not decide an issue without a cross-appeal. Judge Fitzgerald suggested that the Court can always order supplemental briefs on an issue.

Should a party move for a remand to make an offer of proof? Judge Sawyer's opinion was that there is usually enough information in the record that the Court does not need to remand unless there would be a "miscarriage of justice." Judge Fitzgerald said, however, that the Court does often remand for *Ginther* hearings. Sandra Mengel noted that motions to remand are heard by a separate panel from the one that decides the merits of the case.

Should parties make more use of motions to affirm and motions for peremptory reversal? Both Judges Sawyer, Fitzgerald and Hoekstra indicated that motions to affirm and motions for peremptory reversal are rarely granted, as, for example, when a change in the law has occurred since the trial court's decision. Sandra Mengel suggested that the opportunity for a full hearing is valuable to both the judges and the attorneys.

Are amicus briefs helpful or effective in supporting a party's position? Judge Fitzgerald and Judge Murray answered that amicus briefs are helpful and that the Court will read them. An amicus can provide objective information, such as background and history, and also apprise the Court of the wider impact of its decision. Judge Sawyer commented on a recent amicus brief that was better than the parties' briefs. Kathleen McCree Lewis asked when amicus briefs are helpful. Judge Sawyer said they are useful in some kinds of cases; for example, the Court requested amicus briefs in a recent tax case. The Court can always notify the State Bar of Michigan that it is soliciting amicus input.

Should excerpts from the transcript establishing that an issue was preserved be attached to the party's brief? Judges Murray, Davis and Fitzgerald agreed that a citation to the record was sufficient, but Judge Fitzgerald reminded the audience that, because only one judge will have the full transcript, material from the record necessary for deciding the merits should be quoted or attached.

Is there a problem with referring to facts discussed in the "Statement of Facts" rather than presenting or restating them within the argument of a brief? Judge Davis recommended doing "whatever is most efficient." Judge Murray agreed there was "no risk" to adopting this technique.

How much influence do prehearing reports have on the Court of Appeals judges? The panel could not estimate the percentage of decisions that are consistent with prehearing/central research recommendations. Judge Fitzgerald recalled that it was "85-90%" in 1991, when a survey was conducted. He emphasized that the prehearing staff is made up of the "youngest brightest minds," so that it should not be surprising that their recommendations are followed. Sandra Mengel agreed. Judge Davis spoke highly of the Michigan Appellate Digest and the research division's "institutional database."

Does the Court consider that a legally correct decision may have a "bad result"? Judges Sawyer and Murray emphasized that the Court will follow the law without regard to the ultimate result, but might direct the attention of the Supreme Court or the Legislature to a problem.

Does the Court of Appeals consider the potential of petitions for habeas corpus? Judge Murray indicated that he considered it standard practice in the court to discuss all issues, because of the possibility of a federal court action. Judge Sawyer agreed.

Megan Cavanagh closed the session with a quotation from Henry Steele Commager, that "there are no answers to really important questions."

B. Breakout Sessions on Appellate Decision-Making

1. How Does the Court of Appeals Determine Whether Issues Are Either Not Preserved or Properly Presented?

One view is that issues are preserved when the facts necessary for their resolution have been developed.

Many suggested that the analysis is inherently subjective.

There may be a distinction between the "issue"/"problem," and the "argument" supporting a particular resolution of the "issue" and "problem."

Practitioners feel that "arguments" in support of a position on a preserved "issue" can and should be expanded on appeal. Once the "issue" is preserved, parties should be able to present all of the arguments on that issue (although this may be easier for the appellee).

Arguments can be strengthened on appeal by "refining" the issues.

The general policy of the research department is not to be bound by the framing of the issues by the parties.

Court personnel note that there is no single view among judges nor a "bright line" rule on what constitutes an "issue" or an "argument," or on whether this is a valid distinction.

A new "issue" may be one that requires new proofs, or one that would result in a different remedy.

2. Whether Appellate Courts Should Address Unpreserved Issues

The Court may approach the issue by questioning whether the problem could have been corrected if it had been properly presented to the trial court (i.e., if the issue is being raised by the appellant; for the appellee, the Court may look for any theory to affirm).

The Court may also question: Whose error is being corrected? Is it that of the trial court, or of the attorney?

The Court is aware of the "bouncing ball" effect and seeks to avoid having cases move up and down in the appellate courts with remands to address issues not addressed in first opinion.

An "easy" question might be addressed in the interest of finality.

Issues requiring determinations of fact or presentation of new evidence should be remanded.

The disadvantage of remand is that it extends the pendency of the case.

Each judge has his or her own philosophy; there is no consensus.

3. How to Present Issues So as to Avoid Waiver Doctrines When Writing the Brief

Limit the number of issues presented.

Factors that practitioners must consider to determine the number of issues to be presented include: client expectations; trial attorney expectations; credibility; likelihood of success; the procedural posture (trial versus other); which appellate court you are practicing before.

In criminal cases, more issues may be included because of habeas petitions.

Court personnel indicate that in most civil cases issues are limited to fewer than five; credibility may be hurt if too many issues are included; some suggest it is best to stick to one or two key issues. Some court personnel, however, indicate that if all of the issues are "good" issues, feel free to raise them all.

The number of issues can be reduced by combining them. Prehearing reports sometimes combine issues by restating the arguments.

Consider including a separate section to address issue preservation. Some statement re: issue preservation, not necessarily a separate section, is required by MCR 7.212. Prehearing reports include a separate preservation section.

Tips for stating questions presented:

Consider using a "deep issue" format (multiple sentences) for questions presented – some suggested that prehearing prefers this.

Take care when drafting questions; poorly drafted questions suggest the attorney does not know the case.

Opposing risks to keep in mind: if issues are too specific, may not sufficiently include certain issues; if issues are too broad, may be held not to include specific subissues (example from one practitioner: general issue about "statutory violations" held not to be specific enough to address individual statutes cited in the two subheadings).

Some practitioners draft questions and argument headings broadly so as to "bury" unpreserved issues.

4. How To Address An Opponent's Failure To Preserve Or Present An Issue

Practitioners may have a responsibility to the client and/or the Court to point out the failure to preserve/present an issue. Attorneys seem to be raising the argument more often now.

Court personnel and some practitioners believe it does not make a difference whether the opposing party raises the problem because the Court will address it on its own.

What is the standard for determining whether someone has failed to preserve or present an issue? Some practitioner suggestions: when the opponent should have the opportunity to present new evidence to respond; when the argument is so unclear that it is impossible to understand and adequately respond; when controlling case law or statutes are completely ignored.

Practitioners may need to point out new facts raised by opposing party and, if necessary, request a remand for the opportunity to present new evidence.

Many agree that regardless of whether the appellee points out the failure of preservation or presentation, the merits of the argument also should be addressed because the Court may not agree on the preservation issue.

Prehearing addresses the merits of all issues and would appreciate briefing. Also, demonstrating that the issue has no substantive merit will make the Court feel more

comfortable about declining to address the issue. Some note, however, the risk of stating the opposing party's argument or drawing more attention to the argument by addressing the merits of an unclear or inadequate argument.

Some suggest that rather than explicitly relying on waiver doctrines or citing waiver cases, practitioner could "soften the blow" by briefly stating that the argument is inadequate or lacks analysis or authority and then addressing the merits; one specific suggestion: stating that the "appellant seems to argue X" gets the point across.

Practitioners should consider the "big picture" (whether decisions not addressing the merits are something that we want to have) and think carefully about whether to attack an opponent's position on "technicalities."

Some noted that a sophisticated client may explicitly direct the use of these doctrines if available.

5. Miscellaneous

Some practitioners have found that citation to the record (such as trial or deposition testimony) without extensive quotation has been labeled "inadequate."

Consider using an introduction to state the general theme.

Remember that only one judge has the record. If it is important for the Court to be able to see an exhibit, attach it to your brief.

Should practitioners use joint appendices? Problems include lack of cooperation, the fact that the choice of what to include or omit is part of advocacy, they are costly and wasteful, and they create citation issues.

Larger font for briefs is always welcome.

II. FOR THE RECORD: ENSURING A DECISION ON THE MERITS

A. Plenary Session

1. How to Balance the Need to Effectively Advocate at Trial With the Need to Preserve a Record for Appeal

Judge Sapala indicated that based on his experience as a judge and as a former trial attorney, good trial attorneys who are "doing what they should be doing" are able to properly preserve the record "without even thinking" about doing so. Trial lawyers and trial judges both have a vested interest in ensuring a clean, preserved record – neither wants to try the case again. Judge Sapala suggested that the standard is different in criminal trials than in civil trials – he is more willing to allow attorneys to waive issues in civil cases as opposed to criminal cases where the error may result in a new trial.

Judge Talbot agreed that as a trial judge, he always wanted the record to be preserved so the case would be done.

2. In Cases Where a Summary Disposition Motion is Brought on Three Grounds, But the Trial Judge Grants it Relying on Only One Ground, How Would the Trial Judges React to a Request for a Ruling on Whether Summary Disposition is Also Warranted on the Other Two Grounds?

Judge Rodgers said that if he is asked, and the request is reasonable, and there is a good explanation as to why the ruling is needed, then he would do so. But he has never been asked.

Judge Sapala indicated that he is "not in the business of giving advisory opinions." If one issue will resolve the matter, then that is sufficient, and there is a "need to move along."

3. Unpublished Opinions: Is There Any "Real" Distinction Between an Unpublished Opinion and a Published Opinion?

Judge Sapala suggested that unpublished cases have the power of logic and reason, and can be persuasive. Judge Rodgers observed that unpublished opinions are now widely available via the internet.

Judge Talbot disfavors the citation to unpublished opinions, but said that if there is no published case on point, and the unpublished opinion is on point, then it may be acceptable. He explained that an unpublished opinion is more like a "letter" to litigants, where the goal is to reach the correct result for those litigants as opposed to making law applicable to all.

4. What to Do When an Order is Entered That Disposes of Some Claims or Applies to Only Some Parties, and Parties Want to Appeal as of Right, but Can't Because There Isn't a "Final Order" as to All Parties and/or Claims

When parties would dismiss the remaining parties or claims without prejudice, the Court of Appeals often dismissed the claim of appeal for lack of jurisdiction because the dismissal without prejudice was not "final." But a dismissal with prejudice lets the dismissed parties off the hook, and you may need/want to proceed against them if the order being appealed is reversed. There was consensus among the panel that a good way to handle this would be to stipulate to a dismissal that stated it was with prejudice *unless* the order being appealed is reversed.

5. Offers of Proof

Judge Rodgers commented that neither he nor counsel want to interrupt the case and disrupt the jury to make offers of proof. He makes time after the jury has been sent home for offers of proof to be put on the record.

Judge Sapala said that he does not see as many offers of proof as he used to, and wonders why.

6. Final Thoughts on Issue Preservation

Judge Talbot emphasized that counsel should make sure to avoid a "Law & Order" situation where rulings are made in chambers – and not on the record. This is a frequent problem when parties try to appeal such rulings later.

B. Breakout Sessions on Issue Preservation: For the Record

1. Tips From Court Personnel

Consider using post-trial motions to develop arguments not properly preserved. Recognize, however, that although this may increase the likelihood that the Court of Appeals will consider the issue, the trial court probably will not appreciate this strategy.

Opposing party may attack arguments raised in, or documents attached to, post-trial motions as improper or technically not part of the "record" before the trial court at the time of the initial ruling.

Be aware that prehearing views documents attached to motions for rehearing/reconsideration as relevant solely to the question of whether the trial court abused its discretion in denying rehearing, not for purposes of reviewing the initial ruling.

In the trial court, "chambers" discussions are a problem; trial attorneys should insist upon the presence of a court reporter or make a record afterward of what went on in chambers, even if the judge leaves the bench.

If you can't put it on the record orally, put it on paper and file it.

Make every attempt to at least demonstrate to the Court of Appeals that you tried to create a record.

Try to get appellate attorneys involved at the trial stage.

If filing exhibits after trial is a problem because the circuit court won't accept them, bring a copy of the court rules with you.

2. Providing the Trial Court Record to the Court of Appeals

The Court of Appeals makes requests for missing portions of the record, and may notify attorneys that something is wrong with the record.

Transcript problems: practitioners may need to contact the court reporter's supervisor.

Motions to order the transcript can be filed out of time: they are often granted.

Remember to copy opposing counsel when ordering transcripts.

When there are missing hearings or testimony, try to work it out with opposing counsel and trial court.

The rules may need to be amended to develop a clear procedure for settling the record.

Large appendices are not scanned in at the Court of Appeals.

An issue was raised as to whether appellants should be required to attach the trial court opinion or order being appealed, as with applications for leave to appeal. Some suggest that such a requirement could create a whole new set of problems relating to issue presentation.

3. Whether and How to Raise and Present Issues Arguably Not Preserved Below

Some practitioners feel appellate attorneys should always raise "good" issues (i.e., those issues otherwise warranting reversal) even if they arguably are not preserved below. Arguments in support of that position include:

(a) Finding new arguments is the essence of our role;

(b) We have a duty to the client, not the trial attorney;

(c) Trial attorneys generally do not seem to be afraid of malpractice;

(d) Failure to raise or preserve an issue is not necessarily malpractice, but could be a legitimate strategy decision.

Consider requesting a remand to present additional evidence, if necessary.

Tips for presenting an arguably unpreserved issue in the brief:

(a) Many practitioners feel the problem should be addressed up front, if a challenge is anticipated;

(b) Find something in the record to tie it in;

(c) Use a helpful preservation doctrine;

(d) However, you can attempt to "bury" the issue in a general question presented or argument heading;

(e) But you cannot simply expand the factual record on appeal.

Tips for presenting an unpreserved issue at oral argument:

(a) Focus on the different role of the trial attorney making strategic choices;

(b) Some practitioners have had success arguing that the issue was implicit; that counsel was forced by the actions of opposing counsel or the trial court to make a certain choice; that there was no reasonable opportunity to preserve the issue; or that attempts to preserve would have been futile.

4. The Role of Prehearing/Processing the Appeal

About half of cases go to senior attorneys, and some go to a panel without a report.

Prehearing reports are no longer paper, but are sent through a network.

Prehearing reports will address preservation of issues in a separate section of the report. The research attorneys always go on to analyze the merits of the issue as though preserved.

The reports were restructured to specifically address:

(a) Preservation and presentation;

(b) Standard of Review;

(c) Analysis.

The reason for more focus on issue preservation was that the prehearing report was restructured to address issue preservation. Court personnel felt that it was useful to raise the problem of issue preservation. Highlighting the issue exposed the need for the Court to challenge defects in preservation.

Within the last six months, however, the proposed opinions do not address issue preservation if the opinion analyzes the substance of the issue.

5. What is the Purpose of the Doctrines/Are the Doctrines Meeting Their Purpose?

Court should not have to spend time researching issues not briefed by the parties.

Some feel that the goal of all appellate decisionmaking should be to reach the "right result."

Some suggest that opinions should be "written for the loser" to explain why the loser lost. Declining to address the merits may not fully comport with this goal.

The goal of questions presented may be to identify unpreserved issues by requiring the parties to answer whether the trial court did or did not address the issue below.

Many feel that failure to list an issue in questions presented, when the issue is otherwise adequately briefed, is a "technical" problem that should not result in waiver or forfeiture of a decision on the merits.

Strict enforcement of the "questions presented" rule leads to overbroad questions, or repetition of argument headings.

Most agree that the doctrines are necessarily subjective and will be applied in a nonuniform manner based on the individual judge's interpretation.

May be unfair to the appellee to decide issues that are inadequately briefed.

6. When is a Cross-Appeal Required?

Some practitioners state that, despite concerns that a cross-appeal is necessary, they do not like to cross-appeal because it may be a signal to the Court of Appeals that no one really thinks the trial court's decision is correct.

Possible project: look at statistics for affirmance or reversal of cases in which cross appeals are filed, as compared to cases with no cross appeals, to determine whether a decision is more likely to be reversed simply due to the filing of a cross appeal.

7. Motions for Rehearing/ Reconsideration in the Court of Appeals

Effective grounds include errors in statutory language relied upon, reversal of a key case relied upon, new authority from the Supreme Court, or new legislation.

8. Motions For Peremptory Relief

Some judges have a rule: if it's not three pages, forget it.

Only "no brainers" will be granted.

Most peremptory relief comes on applications, not appeals as of right.

Remember that the Court does not have the record on such motions.

III. ORAL ARGUMENTS

A. The Dos and Don'ts of Effective Oral Advocacy

1. General Tips

Seek to distill your position to one sentence – why do you win. Find the headline of the story, get to the shortest point, boil your argument down to its essence, reduce your words. "Those who don't have a point talk forever."

Keep presentation simple – use oral argument as an opportunity to educate the panel.

Try to maintain a rhythm/tonality that engages the panel.

Do not dodge the Court's questions -- answer the question, which will then start a dialog, and will let you know what the judges are thinking

Allow judges to "save face."

Oral arguments are 90% attitude -- come in with a good argument, a good story, and be prepared, and you'll do fine.

Most attorneys do not listen to the tone or the physical/behavior cues (nonverbal communication) of the judges; "Listening is the key element to oral advocacy"

Get the judges to think that they are the proponent of the thought/argument -- the judge will likely then adopt the idea when meeting with the other two judges in conference.

Need to know when to talk, and when to sit down and be quiet.

Need to adopt own "style" of oral argument, but also to know who you're dealing with at oral argument.

Oral argument is a negotiation.

Never take oral argument personally.

Do not need to respond to every argument -- you must answer questions, but do not have to defend yourself, especially on collateral issues.

Oral argument is about credibility – don't be overly dramatic or attempt to appeal to sympathy.

2. Consider the Makeup of Your Panel

Participants stressed the importance of taking the makeup of the specific panel into account when preparing for oral argument and to be aware of the philosophies of the different judges. The rationales cited included the following:

(a) Precedent;

(b) Helps in determining how to present issues;

(c) Provides a starting point;

(d) Provides a way to make a connection with the judges.

3. Lower Court Record at Oral Argument

Questions at oral argument often focus on the lower court record. Some participants noted that reviewing the record as an appellate attorney versus the trial attorney helps in making sure only the actual record is cited at oral argument. One practitioner indicated that having a small "cheat" sheet of pertinent facts in a notebook (including cue words, client's name, etc.) reminds the attorney of what is contained in the lower court record and comes in handy when the attorney "draws a blank."

Participants discussed the proper course of action if a judge asks a "why" question that invites going outside the record to answer it. First, the judge may not know that the question calls for an answer outside the scope of the record. One must keep in mind fairness to opposing counsel (i.e., opponent can't refute it) and the rules of professional conduct. A good practice is to file a motion for access to evidence. Also, it is important to acknowledge to the court that this is outside the record before providing an answer. If done improperly, a grievance may be filed.

4. Bringing the Client to Oral Argument

The decision includes an evaluation of the following:

(a) Who the client is and the client's interest;

(b) Whether the client has a personal stake in case (easements, property disputes);

(c) Plaintiff/family needs to see due process in "sensitive cases" (i.e. criminal);

(d) Client's need for closure, to understand the limits of the appellate process, and the difference between the trial and appellate process.

If you bring the client to oral argument, it is imperative to discuss proper demeanor with the client before oral argument. Also, the panel should be alerted if the client and/or family member is present.

Participants discussed whether it is proper to bring an injured client to oral argument. On the one hand, bringing an injured client may help the Court realize that the plaintiff is a "real person." On the other hand, there is a line between theory and sympathy. Bringing an injured client to oral argument may indicate an intent to appeal to emotion/sympathy. The Court may

hold back due to presence of the client. Also, it may not be "fair" to bring a sympathetic client to court.

5. Preparation for Oral Argument

Good preparation should begin as early as possible with review of briefing.

Look for new law and update your argument (and inform the Court—follow the rule for bringing copies of unpublished decisions to argument).

Think about the hard questions ahead of time.

Consider doing a moot court/mock argument. Colleague criticisms provide "food for thought." However, mock argument may not be feasible in all types of cases. For example, small firms may be unable financially to hold mock arguments, although the client may be willing to pay for mock argument in high dollar value cases. A good way to control costs is to ask retired judges, law students, etc. to participate.

For Supreme Court arguments, think about the rule of law you want to have adopted and be prepared to state it to the Court.

6. Materials Brought to Podium

Participants generally agreed that the following are materials commonly brought to bring to the podium:

(a) Cheat sheet;

(b) Copies of briefs;

(c) Names of important cases;

(d) Main case(s) with relevant portions tabbed.

7. Materials Brought to Court

The participants were evenly split regarding the proper materials to bring to court. An informal poll indicated that half bring the entire record, and the other half bring just the most important parts.

8. Purpose of Oral Argument

Participants also discussed the real purpose of oral argument. Most view oral argument as an opportunity to answer questions, converse about the case, and highlight key points that may change the judge's mind.

9. Dealing With a "Hostile" Judge and "Silent" Panels

The best practices for dealing with a hostile judge are:

(a) Do not get defensive;

(c) Concede difficulties of case, while keeping in mind your bottom line ("Yes, but . . .," i.e, be direct as to why you still prevail);

(d) Keep in mind that other judges are probably listening – can still try to win their votes

Tips for dealing with a "silent" panel:

(a) Focus on telling your story as succinctly as possible;

(b) Resist urge to keep talking.

10. What to Do As the Appellee if the Appellant Did Not Preserve Argument

It was recommended by one Court of Appeals judge that appellees should make their arguments, but keep them short. Also, advocates should be sure to take hints from the panel about when to stop.

11. Reserving Time for Rebuttal

It was suggested that the appellant should always make some argument and never reserve "all of my time for rebuttal."

Rebuttal should not be used to "sandbag" the appellee.

12. Dealing With Cross-Appeals

Let the panel know up front what the order of argument will be; consider conferring with opposing counsel ahead of time.

13. Dealing With Binding Authority That is Not Favorable

If bound unfavorably by precedent at the Court of Appeals, ask for an opinion identifying the problem and explaining why it is bad precedent. Consider urging the panel to disagree with the decision/declare a conflict if appropriate.

In the Supreme Court, it is more helpful to discuss why the rule of law supports your position, rather than reciting binding precedent—Court of Appeals wants to know if it is bound by precedent.

Always consider how to advance your case even without a win at that stage/court.

B. Effective Oral Argument: Special Strategy and Practical Concerns

1. Can Judges Do Anything to Welcome or Calm Members of the Bar Who Appear for Oral Argument?

One participant reported a recent experience where a member of a Court of Appeals panel specifically welcomed the advocates, which made her feel welcome as a participant in the process. She added that she appreciated that one of the Court of Appeals judges made a comment to diffuse the stress.

Another participant said that comments from the bench, reminding advocates to keep their arguments short, can make advocates feel as if they are unwelcome or wasting the court's time. One member of the Court of Appeals noted that, if the first argument of the day goes long, those who follow tend to take more time, and a judge's comments to litigants about watching their time or being brief are merely intended to respect those who will follow. A pet peeve of some judges is when an advocate says, "I'll be brief and get right to the point," and then doesn't.

2. Has Any Thought Been Given to Reducing Argument Time?

Participants discussed the Supreme Court's practice of holding mini oral arguments on applications (or "MOAs"), which provide for 15 minutes per side. At 30 minutes per side on a calendar case, the Michigan Supreme Court offers one of the longest oral arguments in the United States.

As of yet, there has been no apparent discussion in the Court of Appeals of a reduction in the time for oral argument. A participant commented, however, that more cases in the Court of Appeals were being decided without argument.

3. What About a Fire-Free Zone in the Court of Appeals?

The Court of Appeals experimented with this, and also sent out letters to participants with questions, but some judges felt that the arguments ran long, and that the fire-free zone was not

helpful. In the alternative, a judge can simply say at the beginning of an argument what issues he or she is interested in.

4. What About the Fire-Free Zone in the Supreme Court? General Practice Tips for Oral Argument?

The five-minute fire-free period was established because the Justices were very active in questioning the advocates. The purpose of the period is to give counsel an opportunity to at least get his or her thesis statement out.

It was suggested that the most effective use of the time was for an advocate to lead with the central points, the ones that will be most compelling to the Court. What is the case about? What is your strongest argument? Was the Court of Appeals right or wrong?

Some practitioners waive the fire-free zone, especially in MOA cases where argument is limited to 15 minutes.

Practitioners were also advised that a good way to approach oral argument is to keep it simple and fairly comprehensive. In the Supreme Court, many advocates get tied up in the facts. Most Supreme Court cases are not focused on the facts.

5. When Should a Judge Stop a Litigant From Addressing (or Continuing to Address) a Certain Issue?

Judges do not always feel comfortable stopping oral argument, because one of their colleagues might be interested in what the advocate is saying.

Participants discussed the luncheon speaker's statement that the advocate who is asked the fewest questions often prevails. Right or wrong, participants in the session seemed to think that this was usually the case, although acknowledged that sometimes a judge will ask specific questions to flesh out his or her colleague's objections to a position.

Another practitioner noted that in the Supreme Court, the Justices are very active, and will almost certainly give your opponent as much trouble as they give you.

6. Single Issue Days of Oral Argument?

One participant commented that, in another state, the court would group oral arguments by topic. For example, there would be search and seizure day. The court didn't make this practice public, but the practitioners eventually figured it out.

7. What About the Use of Visual Aids?

Visual aids can be very useful in statutory construction cases and zoning cases. In statutory construction cases, it helps to have the language of the statute in front of the Court during oral argument.

Visual aids add interest, because the argument is then different than what the judges ordinarily see.

One participant recommended that anyone wanting to use a visual aid should call opposing counsel first, and notify the clerk's office, especially if you are considering using a multi-media presentation. Make sure that you can easily set them up and take them down.

Another participant asked about handouts – were they useful at an oral argument? Both judges participating in the session agreed that they were not. Judges are already dealing with a sea of paper, such that a handout would not likely be of assistance.

8. What About Mini-Oral Arguments (MOAs)?

MOAs have been conducted since about 2003. Two types of cases are likely to get MOA treatment: (1) cases where there are not five votes for peremptory relief (only four votes are needed after a MOA); and (2) cases where the Court is not sure of the need to grant leave to appeal.

MOAs tend to get set quickly for oral argument. They have been heard in the past on the Court's Wednesday conference day, and this practice may continue in the future.

MOA cases could be viewed as those types of cases proper for a per curiam or memorandum decision, whereas a grant of leave would be proper for the types of cases resulting in published, authored decisions.

Many advocates do not opt to file a supplemental brief. Practitioners were advised that it would be a good idea for advocates to consider doing so in MOA cases and to pay close attention to any issues specified in the order. The Court almost always directs the parties to the issues in which it is interested.

The advocate should focus on more than just whether leave should be granted; the focus should be on the merits – start out by explaining succinctly why you win. The advocate should anticipate peremptory action.

One practitioner stated that the transcript of a MOA hearing can be useful in preparing for briefing or oral argument if leave is granted.

9. How Often Does Oral Argument Cause a Judge to Change His or Her Mind About the Case?

Typically the judges have their minds made up before oral argument, but the consensus from practitioners and judges is that oral argument definitely can result in a change in thinking; estimates ranged from 5% of the time to "a lot higher" than 5%.

Oral argument can also lead to a change in the Court's reasoning – the way the Court gets to the final result.

10. Should an Advocate Ever Waive Oral Argument?

While the group generally thought that oral argument should not be waived, two participants reported that they had. One did so for logistical reasons, and the other did so for cost and because the opposing party's brief was not of good quality.

Some suggest oral argument should never be waived because it is the client's perception of what appellate practitioners do.

It was noted that, if the appellant has not preserved oral argument, sometimes the appellee will waive oral argument. Occasionally, the Court of Appeals will call someone not endorsed for oral argument and ask that person to appear.

It was suggested that there could be an option of requesting oral argument only if the other side requests it, or only if the Court has questions. This would avoid unnecessary appearances. The problem with the second option (questions only) is that the judges don't get the briefs until oral argument is already scheduled, and so can't determine ahead of time whether they will have questions.

Some prosecutors waive simply because they do not have the capacity to handle so many arguments.

Some people might waive in cases involving a narrow issue.

11. Dealing With Misrepresentations During Oral Argument

One practitioner related his experience with such a misrepresentation, indicating that he filed a motion to correct the error.

To avoid the problem, take notes on the questions asked and check your facts afterward.

If you have made a misrepresentation, consider writing a letter or filing a motion to correct it.

If opposing counsel mischaracterizes facts, filing a post-argument motion may be warranted. Alternatively, counsel could move for reconsideration discussing the misstatements.

12. What Do Litigants Do That Drives Judges Crazy?

Counsel who say that they will be brief, and then are not.

Counsel who avoid answering questions. Questions are not designed to trap a litigant. If the question seems unusual, either the person asking the question is genuinely confused, or that person thinks another judge or justice might be confused. Litigants should not try to "psych out" the question, but just answer it. It is better to know what the Court is thinking, so better to

answer the Court's questions so as to know what is "bothering" the Court about your case. And candidly deal with the weaknesses of the case.

Counsel's reluctance to deal with the weaknesses of a case. All cases have strengths and weaknesses. In oral argument, some advocates appear determined to deny the obvious. Acknowledge a weakness and explain it in terms of the strength of the case. Explain how you win despite the weakness. Acknowledging a problem and conceding that it controls the disposition of the case are two different things.

13. Can One Predict the Court's Ruling From Oral Argument?

General consensus: no, and don't suggest to your client that you can.

Predicting motives behind questions is difficult. The judges may be testing theories or trying to educate their colleagues. For that reason, do not think that because a judge asks a question, that judge is against your issue. He or she may be just tossing you a "softball" to get another vote. It is important to listen and watch nonverbal cues from the judges.

Some attendees advised focusing on the question without being concerned with the motive, but others cautioned to be wary of a trap.

14. Handling Hypothetical Questions

Dealing with hypos requires a lot of preparation.

Hypothetical questions are used to test/define the outer limits of an issue; the Court wants the practitioner to identify a limiting principle; identify a stopping point.

The Supreme Court is doctrinal—wants to find a thesis statement for its opinion.

It is OK to be uncomfortable with a hypothetical, but be prepared enough to handle it (handle the discomfort and handle the hypo).

15. Arguing a Case When Another Attorney Wrote the Brief

A potential problem is not knowing the record as well, and not being in complete agreement with the approach taken in the brief.

It is okay to argue differently than the brief.

It is okay to approach the issue(s) differently, and to tell the Court that you are doing so.

The pinch-arguer: judges generally do not like to see an "experienced" attorney show up for argument when it is the younger attorney who knows the case better and would be more appropriate to argue the case.

16. Dividing argument among multiple parties

Hazards of dividing: everyone goes over, and the last to argue runs out of time.

Advice is to go first if possible.

Always divide by issue, not by time (but be mindful of running out of time).

C. Purpose, Policy, and Procedures of Oral Argument

1. What is the Primary Purpose of Oral Argument?

Answer questions that the Court may have. Education is the best way to persuade. Oral argument provides judges with the opportunity to focus on particularly troublesome issues and talk them through with counsel.

In addition, this is actually the first chance for the parties and judges to look each other in the eye.

Oral argument also gets the advocate known, i.e., putting a face to the writing. Attending oral argument builds credibility and experience. A person can get the experience to do well at the Supreme Court by attending Court of Appeals arguments. At the Supreme Court, oral arguments will figuratively craft the opinion.

2. Are There Times When Oral Argument is Not Needed?

Although at least one person wanted oral argument in all cases, no groundswell emerged supporting such a sentiment. People tended to see little need for oral argument where the law is obvious. On the other hand, oral argument can make a difference in a close case.

One suggestion was that judges could invite parties for oral argument only in cases where they feel it is necessary, and stand on the briefing in other cases, which might make briefing better. Another suggestion was to consider making oral argument available only in cases where the Court is considering reversing the trial court.

Should the Court invite the parties ahead of time to waive? Should the Court be given the right to decide whether or not oral argument will be held in any particular case? The attendees basically nixed the second of these suggestions in criminal cases because oral argument is pretty much the only opportunity for the client and family to see what is happening. (Holding oral arguments can be good for client relations.)

Some people waive oral argument either by letting the Court know that very day or just not bothering to show up. In the end, it was suggested that an IOP be developed saying that lawyers should file a motion to waive by the preceding Friday at the latest. Such a practice would be merely a courtesy and not subject to sanction.

What if both parties failed to request argument, but the panel has outstanding questions about the issues in a case? The panel will order attorneys to answer/show up when they have questions.

3. Failure to Preserve Oral Argument in the Court of Appeals

Should an attorney who filed a late brief still ask to show up to answer the panel's questions? Financial constraints may decide whether a motion for oral argument is filed. Some attendees indicated that the Court of Appeals' denial of such motions serves as a disincentive for them to be filed.

Some attorneys equate the Court of Appeals' permission to appear and answer questions with an outright denial of a motion for oral argument – the attorney has no opportunity to affirmatively present the case.

It was suggested that even if an attorney is not endorsed for oral argument, the attorney should go to court for the case call, ask for time, or let the court know that the attorney is there to answer questions.

4. Sending Questions to the Parties Prior to Argument

Attendees discussed whether the Court should issue questions beforehand about what it wants to discuss. There was concern, however, that logistics would not allow such an approach. The judges will probably not have enough time in advance of argument to issue such questions. In the end, the attendees discussed various ways for the Court to try ahead of time to focus the arguments. No real consensus arose on what to do. Of course, if the Court does do something, then it should (1) do whatever it does as soon before oral argument as possible, (2) do so by order, and (3) specify what it needs. In the end, people agreed that such a situation probably will not occur too often.

Some panels will discuss, at the pre-conference, the issues the panel would like discussed at oral argument and ask the attorneys to discuss that point at the start of the argument.

5. Video Oral Arguments

Attendees also discussed videoconferencing (noting that the Sixth Circuit occasionally does so). In the end, especially given the Court of Appeals' experience with it from a few years ago, few really wanted it. The Court of Appeals does not yet have the technology to particularly make it work. Because of a lag time in people speaking, the lawyers constantly spoke over the judges. Videoconferencing also reduces the human experience. The litigants will often adjust the argument based on facial expressions that can be lost in a videoconference. Of course, such problems are even worse in telephonic oral arguments.

6. Importance of Oral Argument at the Trial Court Level

It was suggested that oral argument is even more important at the trial court level, which provides the first opportunity to win the case. Also, great deference is given to trial court decision on appeal.

Trial court has more discretion, while Court of Appeals is constrained by the record below.

7. Should Oral Argument Time Be Shortened?

Do we need 30 minutes of oral argument? Many people agreed that there could be merit to reducing the time to 15 minutes per side, which might make the attorneys and the Court focus on the important issues.

Judges see 15 cases per day (including as many as 6 that waive argument) – can be a long day.

8. Distinction Between Criminal & Civil Cases – Is Oral Argument More Important In One Arena Than the Other?

Some participants argued that cases are closer in the civil arena, thereby making oral argument more valuable. The reality, however, is that arguments can be made that either arena is the more important.

9. Potential Suggestions for Improving Oral Argument

1) Reduce the time for oral arguments in the Court of Appeals.

2) Develop some type of oral argument waiver rule as a courtesy for the Court.

3) Reduce the fire-free zone in the Supreme Court to about two minutes. Such a change will properly condense the argument and possibly get the Court to more likely honor the fire-free zone.

IV. ISSUES IN CIVIL APPEALS

A. Using and Improving MCR 7.212

7.212(A) – Briefing Deadlines

Practitioners wanted to know why the brief must be filed so early when the case isn't heard for almost a year, requiring a litigant to "relearn" the entire case, increasing cost to clients, and risking "stale law."

Should the Court be strict or flexible? Extensions usually are granted as a matter of course. Generally, court clerks said an extension will be granted if requested within 56 days.

Court staff urged practitioners to use the Court's form for requesting an extension.

7.212(B) – Page Length

Practitioners noted the problem with requiring a motion for extension on page limitations is that an attorney is not going to know ahead of time if additional pages will be needed.

Court staff commented that motions for longer briefs are hard to decide because the standard is so high, requiring "compelling" reasons. Practitioners suggested simply allowing the longer brief first and then deciding if it needs to be sent back and cut down.

Practitioners suggested making the reply brief fifteen pages.

7.212(C)(2), (3) – Table of Contents/Index of Authorities

The table of contents and index of authorities are helpful to both practitioners and court staff, as both are under time pressures. Just make sure they are correct.

7.212(C)(5) – Statement of Questions Presented

Participants were concerned about a number of issues related to the statement of question presented, including: Who do they benefit? Are they a trap? Does the Court read them?

Court staff indicated that the Court uses them to determine what has been preserved in the brief. If an issue is not in the statement of questions presented, the Court will look at whether it is related to one of the questions stated.

Court of Appeals staff noted that the appellant's statement of questions presented is copied into the pre-hearing report and used throughout documents in the Court of Appeals, so the appellee may want to mirror the appellant's statement in its brief. This raised the issue of why allow a "counter-statement of questions presented" if that is the case.

Many practitioners are resorting to the "Garner-style" "deep issue" instead of more succinct questions presented due to the Court of Appeals' seemingly increased use of the doctrine providing that an issue not set forth in the statement of questions presented will not be addressed.

7.212(C)(6) – Statement of Facts

Some questioned why the term "bias" is in the rule when it is somewhat impossible to avoid a "bias" in your statement of facts as an advocate for your position. Some suggested a different word like "objective."

Counter-statement of facts. No one really just "repeats" the appellant's statement of facts, so some practitioners questioned whether it is really necessary for the rule to caution

against it. Some suggested simply stating that an appellee should provide a counter-statement of facts that complies with the record.

7.212(C)(7) – Argument

Issue Preservation. Place before standard of review. Only needs to be 1-2 sentences.

Standard of Review. The "standard of review" requirement is also necessary but the rule is broad. Some people put it in each argument section and some put it set apart at the beginning as a completely different section. What is better? The court staff noted that the judges are used to seeing it set apart.

Unpublished opinions. Should it really be necessary to attach them now that everybody has access to them online?

7.212(E) – Cross appeals

There is currently a debate over whether a cross appeal is required to affirm on different grounds.

Practitioners questioned adopting the Sixth Circuit's method of briefing on cross-appeal, i.e., only have four briefs in sequential order: appellant's brief on appeal; appellee's response and brief on cross-appeal in one document; appellant's reply and response to brief on cross-appeal; and appellee's reply on cross-appeal.

7.212(F) – Supplemental Authority

Practitioners questioned whether the "supplemental authority" rule was outdated, given the amount of unpublished opinions from the Court of Appeals.

Practitioners also suggested that an easy alternative was simply filing a motion to submit unpublished opinions instead of relying on the "supplemental authority" provision.

7.212(I) – Nonconforming briefs

Some practitioners urged that the whole record should be allowed, even if not reviewed by the trial judge, and that briefs should not be stricken as long as they cite to the record, i.e., what is filed with the court clerk.

A party faces a possible motion to strike if it cites deposition transcript pages that were not filed in the trial court – it was suggested that the best practice is to make deposition excerpts exhibits, but then file the entire deposition with the trial court clerk.

Court of Appeals clerks have a checklist and usually will notice a non-conforming brief, such as citing evidence outside the record.

[no rule] – Appendix

Most practitioners were opposed to having a formal appendix requirement in the Court of Appeals and liked the ability to attach what he or she believed was most important to the case.

For applications, the court staff noted that the record is not transferred, so it is very important to attach the relevant record to the application and it is bad lawyering not to.

The ideas supporting an appendix requirement were that without one, you run the risk of briefs being filed without the necessary documents and it would prevent expanding the record on appeal.

Ideas for Revising MCR 7.212

Eliminate statement of jurisdiction.

Lessen the checklist requirements.

Adopt a uniform system of numbering and citing to record.

Eliminate standard of review, although some noted that it is needed for non-specialists; another suggestion was to allow the appellant to place the standard of review at the beginning of the brief to save space.

Shorten page limits, although some noted that complex cases and criminal cases need 50 pages.

10-page reply brief and one-page supplemental authorities are harder requirements to meet.

Eliminate requirement of "answering" questions presented.

A practitioner pointed out that MCR 7.212 does not contain a “reader-friendly” provision, which would advise the writer to write in clear terms, use names instead of “appellant” and “appellee” like in the federal rules. All agreed that this is likely not necessary and makes your brief stand out over others if you do write clearly for the Court. If there was such a rule, practitioners suggested making sure a disclaimer was also there, noting that this is a “suggestion” to avoid defect concerns.

B. "Is That Final?" The "Final Order Rule" and Appellate Jurisdiction

In general, participants in the session discussed the advantages and disadvantages of the current system for defining final orders, which can be appealed as of right to the Court of Appeals. In this connection, participants considered the question from the perspective of both the Court of Appeals and the parties.

The discussion began with consideration of a hypothetical case. A plaintiff sues a defendant, and the defendant asserts a claim for indemnity against a third party. The defendant then moves for summary disposition as to the plaintiff's claim and prevails. The defendant does not, however, dismiss its third-party indemnity claim with prejudice, seeking to preserve that claim in the event that the summary disposition decision is reversed. The plaintiff seeks to appeal the final judgment on its claim.

Under the current versions of MCR 2.604 and MCR 7.202, the plaintiff in this case would not have an appeal of right, as long as the defendant refused to dismiss the third-party claim with prejudice. The plaintiff's only option for an appeal would be to seek discretionary review.

Many participants concluded that this hypothetical case illustrated a serious problem with the current system. In their view, some cases with multiple claims or parties turn entirely upon a single claim. When that crucial claim is resolved, they believe that an appeal of right is warranted. Compelling the parties to wait for the resolution of any other derivative or subsidiary claims does not serve the interests of justice. The parties in such a case are required to endure long delays or to absorb the expense and difficulty of the process of applying for leave to appeal. Several participants described cases where such expense and difficulty were significant.

The participants who took this position favored a rule by which the trial court could certify an order as final and appealable, even if it was not necessarily dispositive of the entire case. Several participants noted that, before 1995, Michigan had such a rule. Under the pre-1995 version of MCR 2.604, the trial court had the authority to certify an appeal of right from an order resolving a single claim in a case with multiple claims and/or parties. This rule was analogous to the current Fed. R. Civ. P. 54. In addition, materials provided to the session participants included court rules and statutes from other jurisdictions in which the use of such a certification procedure was common.

Proponents of this kind of appellate procedure noted that, in addition to facilitating appeals of right, a trial-court certification procedure would promote substantial justice. They contended that the parties are often in the best position to understand the nature of a case and what will promote a just and efficient outcome and that a procedure permitting an appeal after trial-court certification would give the parties greater control over any decision about when an appeal was appropriate.

Other participants pointed out that the Court of Appeals might be burdened by piecemeal appeals if trial courts were given the authority to certify non-final orders as appealable of right. These participants included members of the clerk's office in the Michigan Court of Appeals. Participants who took this point of view suggested that the 1995 amendments to MCR 2.604 were prompted, at least in part, by the judiciary's concern that the Court of Appeals was being overburdened by single cases that gave rise to numerous appeals, each involving a distinct order that was certified for appeal by the trial court. The 1995 amendments purported to streamline procedure in the Court of Appeals by assuring that every issue on every claim in a particular case would be addressed by the Court of Appeals in a single proceeding.

In addition, the amendments gave the Court of Appeals effective control over its own docket. When trial courts can certify issues as appealable, those courts – and, to a lesser extent, the parties – have substantial control over the nature of the scope of the Court of Appeals' jurisdiction. The current rules regarding final orders give the Court of Appeals complete control over its own jurisdiction.

Some participants suggested a procedure designed to combine the advantages of both the pre-1995 and post-1995 systems. In this procedure, a trial court could certify whether an order disposing of a claim warranted an appeal of right. If certification was granted, the party seeking to appeal would submit an abbreviated application for leave to appeal to the Court of Appeals.

The advocates of this proposed procedure suggested that both the parties and the Court of Appeals would benefit from its institution. With a procedure that requires less briefing, the parties would face lower litigation costs and the Court of Appeals would likely have lower administrative costs for interlocutory appeals. In addition, both the Court and the parties would be relieved from the need to submit applications and merits briefs that were, in many cases, duplicative.

There was some discussion of procedural rules used in other jurisdictions under which certain specified categories of orders are immediately appealable of right. Examples of such orders are: orders granting or denying injunctive relief; orders determining child custody or parental rights; and certain probate orders. There was no consensus among the participants regarding whether such rules would be advantageous in Michigan.

C. The Fast Track – Where Do We Go From Here?

1. Why the Fast Track Was Suspended

Judges and court staff explained several reasons why the fast track was suspended. The overall reason was time versus staff size. There were not enough staff members to meet the goals of the fast track. By the end of March 2007, only 9% of fast track cases were being decided within the 180 days and 14% were being decided within 190 days. Given the Court's budget, there was no way to meet the goals of the fast track and it would have been dishonest to continue it.

Questions were raised regarding why summary disposition cases were decided to be placed on the fast track. It was explained that it was a procedural mechanism. At the time of implementation, 50% of the civil docket was summary disposition cases.

The Court was the victim of its own success with the fast track. There was an increase in summary disposition filings because of the shorter amount of time for a decision. The Court allowed practitioners to opt off the summary disposition track, but most practitioners did not utilize this option.

It was discussed whether the target goal was too high. In 2005-2006 the fast track program was successful. By the end of 2006, there was a major decrease in the number of cases

decided within the 180 days. The Court of Appeals has a budget deficit for the 2007 fiscal year. The Court has lost staff members and has not filled these vacancies. The Court currently has 24 prehearing staff attorneys compared to 30 prehearing staff attorneys in 2004.

There was also a general consensus that much of the difficulty in handling the number of fast track appeals was because of a lack of separation between cases that should/could be handled faster and those that could not (i.e., cases that needed to have published decisions and those that were unpublished).

2. Practitioners' Experiences With the Fast Track

Discussions then turned to practitioners' experiences with the fast track. Some practitioners had complaints with the shorter deadline for briefing, and raised several issues:

(a) no "give" time in their practice, especially with the strict and regulated time limits of applications, and then the additional shorter time periods for fast track appeals;

(b) the certainty of procedure is lost because time limits change and vary and are difficult for staffs to keep up with;

(c) the ability to confer with clients regarding issues to be raised is lost;

(d) the ability to fully analyze the issues, law and facts is lost.

It was suggested that a longer briefing deadline and a longer time for the Court of Appeals to render a decision would be beneficial. Perhaps a fast track period of nine months to one year would be more realistic.

Attorneys who dealt with primarily summary disposition appeals found it very hard to keep up with the filing deadlines. Some attorneys thought it was a good concept, but not realistic.

Other attorneys found no problems with the fast track deadlines. They had more clients take appeals because a decision would be rendered within 180 days. There were no complaints with the shorter page limits (35 pages) for fast track cases. Attorneys also had no problems getting complicated matters removed from the fast track.

Some practitioners had concerns that the fast track might be compromising quality in the briefing because of page and time limits, and raised a similar concern that the opinions themselves might be compromised in some way because of the shorter time frames.

The Court noted no real affect on the quality of briefs that were filed under the fast track. There was, however, a possible change in the quality of decisions by the Court in that the shortened time period might be a disincentive to write concurrences or dissents that would more fully illuminate or broaden the reach of a decision on a certain area of the law.

The issue of oral argument was briefly discussed. Although the idea behind the fast track was to dispose of as many fast track appeals as possible without argument, it was suggested by practitioners that oral argument is even more important in fast track cases because it gives a practitioner (and so, the Court) yet another chance to further synthesize the issues and law.

3. Suggestions for Reinstating the Fast Track

Finally, the last part of this breakout session focused on possible ideas for future fast track cases. It was suggested to place certain cases on fast track, such as governmental immunity, statute of limitations, or serious impairment of body function cases, rather than all summary disposition cases. It was then suggested having certain staff members handle these cases and the rest of the staff handle everything else. The Judges and Court staff explained that this "prehearing specialization" would not work because the prehearing staff attorneys would get burned out handling the same type of cases. Further, one of the goals for a prehearing staff attorney is to get exposure to numerous areas of the law and this specialization would defeat that purpose.

It was also suggested that the judges examine the cases in a conference setting and determine the track on a case-by-case basis. It was noted that this judicial screening would require more work for the judges. With the current budget, the solution needs to be something not on the Court's end.

A practitioner suggested that instead of the judges determining the appropriate track, the lawyers could identify the track level. This would be something similar to the criteria used to remove the case from the fast track, i.e., a matter of first impression, first construction of Michigan statute or rule, or complex facts or law. This could be done in a docketing statement filed with the claim of appeal.

It was then recommended that the Court have a volunteer panel that handles fast track cases. This would most likely not work because it might not provide a neutral panel. For instance, if there were a volunteer criminal panel and the only judges that volunteered were former prosecutors it would not provide a neutral panel for the parties.

There was then a lively discussion on the use of orders instead of opinions. In the 6th Circuit and the 2nd Circuit the Judges deliver decisions right from the bench. The Court could have digital recorders in the courtroom to record the opinion. Some attorneys explained that they prefer an opinion, rather than an order, because the opinion provides analysis and reasoning for the client. The opinion is important to a client that loses because at least they can see why the court ruled against them. It was also recommended that attorneys could stipulate to an order.

Finally, there were some suggestions raised, but given time constraints they were not fully discussed. These included having lawyers write proposed opinions, court sending a briefing schedule, finding a way to bypass the prehearing division, and narrowing the field of fast track cases (only have (C)(8) cases, instead of all summary disposition cases).

The overall consensus was to keep the fast track in some form, and that, regardless of the outcome of this particular program, the discussions between the bench and the bar were helpful and essential in moving the whole system forward.

A discussion was had regarding a possible "opt in" program, but the Court administration believed that such a program would create greater challenges:

(a) questions about timing for opting in;

(b) difficulties with having practitioners opt in, and then the Court needing/wanting to remove a case from the fast track.

D. Original Proceedings in the Court of Appeals: When They are Available and How They Should be Brought

1. Most Common Original Actions in the Court of Appeals

Superintending control actions – Typical case involves a party seeking to compel a trial court to enter an order in a pending case. Commissioners participating in this session emphasized the need to show a clear legal duty on the part of the trial court.

Mandamus – These actions typically involve prisoners challenging denials of parole and election cases.

Headlee Amendment cases

Petition to enforce decisions of the Michigan Employment Relations Commission

2. Procedural Issues

Participants discussed how a pending case is required in order for the Court of Appeals to have jurisdiction over an original complaint; its jurisdiction is more limited than that of the Supreme Court, which has general superintending control over all courts.

Commissioners reported that requests for superintending control are rarely granted because appellate relief is usually available; they stressed that superintending control is not available if a direct appeal is available.

Most original proceedings present pure legal issues presented; however, Headlee Amendment cases are fact-intensive.

3. Common Filing Problems

Wrong caption in superintending control cases – Court of Appeals commissioners cautioned not to simply use the lower court caption. The caption should clearly identify that an original complaint for superintending control is being brought against the lower court.

Failure to serve trial court judge or agency.

4. Helpful Resources

Court rules

Sample pleadings

Court of Appeals commissioners and staff

5. Unique Procedural Problems Posed in Original Proceedings

No automatic Supreme Court review – due process issue?

Court rules have numerous gaps; for example, there are no provisions to address service of a summons, discovery matters, the procedures to be followed before a special master in cases involving factual disputes, or the authority of the special master.

Practitioners and the Court typically try to apply general civil procedure rules when possible.

An issue was also raised as to whether some original proceedings implicate the constitutional right to a jury trial, but it was noted that the right of a jury trial is limited depending on the cause of action.

6. Proposed Revisions to Procedures for Headlee Amendment Cases

Participants discussed the Supreme Court's proposal to amend MCR 2.112 and MCR 7.206 and what effect, if any, the revisions would have on Headlee cases. The primary change would be to require alleged Headlee violations or defenses to be stated with specificity, and that documentary evidence supporting a claim or defense be attached. Some expressed concern that such requirements could pose problems because specific information is often not available until a proceeding is commenced and discovery takes place.

E. Do the Write Thing: Make Your Research Matter

1. General Tips

Know your audience. At the Court of Appeals, your first viewer with an application is a commissioner, who is a more experienced attorney. With an appeal as of right, your first viewer is a pre-hearing attorney, who is generally a less experienced attorney. Court staff cautioned, however, that not all cases go to a prehearing attorney but rather go straight to a panel of judges (and their clerks) without the benefit of a prehearing report. Furthermore, it is mistaken to

assume that all prehearing attorneys are first year attorneys; many are senior attorneys with many years of experience. Notwithstanding, all seemed to agree that the any brief should make sense even to a lay person.

Also remember to use your peremptory relief options at the application stage, as it is relief that does not clog the Court's docket.

Court staff suggested using names instead of "appellant" and "appellee"; this eases confusion, especially when there are multiple parties. At the very least, a brief should be consistent in the way it identifies the parties.

Commissioners write one-two commissioner reports on an application a day, so write very concisely. Pre-hearing attorneys are given a set amount of days, but still not much longer.

Editing, editing, editing!

Be mindful of the time constraints on the readers who are in a high-volume business, whether judge, clerk, commissioner or prehearing attorney.

Establish a theme up front. Give a short introduction to grab the reader's attention.

Write your brief as you would want the Court to write the decision.

Use plain language, not legalese.

Key is to make "complex" issues "simple."

Generally speaking, the strongest issue should go first.

2. Sections of a Brief

a) Use of Introductions/ Argument Summaries

From the Court: It's subjective with both the writer and reader, and will depend on the length of the brief. For a 50-page brief or hugely complicated case, an introductory statement is appropriate.

Use the introduction to tell what is coming. Most can be done in less than a page.

While the reaction was mixed, most of the practitioners and all of the court staff thought it was positive to include an introduction either immediately after the Statement of Facts or the Questions Presented.

Some judges appreciate and notice when an introduction focuses on pertinent facts.

b) Statement of Facts

Some participants suggested that a thorough statement of facts tends to make the brief repetitive in the argument section, but some reported using facts sparingly in the argument section to make the brief less repetitive. Others suggested using the argument section of a brief to discuss in more detail facts pertaining to a particular issue.

One recommendation was to use the statement of facts to tell a story that is supported by witness statements or testimony.

Do not argue in the statement of facts.

The pre-hearing attorney creates his or her own statement of facts, which becomes important to the judges.

Good record citation to assist the pre-hearing attorney (or commissioner) helps with your credibility. Some court staff stated that too many statements of fact fail to cite at all, or enough, to the pages in the transcript where testimony can be found, or else paraphrase too broadly (e.g., "see T. 36-70") which is of little help to the reader in finding what they need to find quickly. Some staff said it was acceptable to attach key pages as appendices (especially in applications where the full record is not in the Court's possession). Some practitioners said it was their firms' policy to attach everything (transcripts, depositions, etc.) in order to show the "whole picture."

It was suggested that Court of Appeals commissioners prefer a citation to the record after each statement.

c) Statement of Questions Presented

Some participants agreed that an effective strategy is to "mimic" the language used by the trial court in its order.

Those who used the deep issue technique emphasized strict adherence to the 85-word limit. Some practitioners find it helpful to write deep issues after they have written the brief.

Judges are split on the deep issue method, but more judges prefer the single sentence question presented.

One practitioner compared it to a journalist writing a headline: To be the most effective, the story must be written first, and the headline is attached later.

A practitioner mentioned the paradox of framing too detailed a question presented and inadvertently waiving an issue because of too close attention to isolated, deep issues.

In the view of one Supreme Court Commissioner, an effective question presented is: The issue is "x"; The Court of Appeals held "y"; The Supreme Court should (Affirm/Reverse).

In the Court's view, it enhances a party's credibility when the party just "pulls the trigger" and uses a short question presented.

The prehearing division and/or the Court will often restate, simplify, and edit the questions as presented by the parties. Alignment of the issues presented and arguments is important for constructing the opinion.

The appellee should feel free to restate the appellant's questions presented, but should also do so in the same order followed in the appellant's brief.

The Commissioners cautioned that if a party sets forth an issue in the statement of questions presented, the appellee should be sure to address the issue.

Tips for selecting issues:

How many questions presented should there be in a brief? In civil cases, the fewer the better. General recommendation is no more than three issues. In criminal cases, there are many reasons that more issues may be necessary and there is no general rule.

It can be very helpful to compare or contrast the trial attorney's view of the issues to be raised on appeal with the appellate attorney's view of the issues.

Take advantage of the trial attorney's knowledge of the case to help refine and sharpen the issues on appeal.

In interlocutory applications in the Court of Appeals, make sure to focus on dispositive, outcome determinative error, not just error in general.

Court staff were unanimous in their dislike of the practice of appellees re-ordering the issues as presented by the appellant. Court staff and the judges are used to addressing the issues in the same order as presented by the appellant. A staff member said reordering the issues is a wasted effort, especially considering that the prehearing reports include the appellee's position anyway.

d) Argument

Do not put an argument in a footnote. If an argument is important enough to be made, then it should be in the body of the brief.

The Court of Appeals research staff generally prefers citations in the brief, not citational footnotes.

With block quotes, okay to use but be sure to summarize what the quote says immediately before the quote because most readers skip the quote.

As for sub-headings, most of the practitioners agreed that it was valuable to break down the arguments into sub-sections. Someone reminded the group that certain judges labeled these subdivisions as "Headlines" which gave a preview of what was to come-a good thing for the reader.

As for issue preservation and the standard of review in the argument section, court staff highly recommended the use of subheadings.

3. Research Tips

Do not assume that judges are familiar with the applicable law. Be sure to lay out the controlling statute and/or the key case or cases. Work from the general law to the specific law at issue in your case.

What about using sources other than case law like law review articles, AmJur, CJS? Some Court of Appeals judges like it, but others do not. Can be very helpful if there is not much law in Michigan on the issue. Can be helpful in showing the "majority rule."

What about using unpublished opinions? Some Court of Appeals judges like them, but others do not. Relying solely on unpublished opinions in support of your position is dangerous unless you can point out that there is no published opinion in that particular area of law and a published opinion would be helpful. If the Court issues an unpublished decision between the time briefing is complete and oral argument, file a motion asking the Court to consider supplemental, persuasive authority.

Given the widespread availability of unpublished opinions these days, why does the court rule still require that a copy be attached to the brief? Convenient for the reader.

If citing to the internet, it is okay to attach what you are citing, but it is not necessary. Court research staff is going to re-check your research anyway. Use the internet as a source of factual background only if an extremely reliable/authoritative source.

Most participants considered citation to "Wikipedia" or other collective editing sources to be improper.

May be able to cite the internet for statistics for an issue that supports you if it is from a reliable source, such as a governmental entity.

Use the best source – i.e., cite to a hardcopy rather than "WebMD" for defining a medical term.

4. Common Briefing Mistakes

Disorganization, particularly in the statement of questions presented and the statement of facts.

Legal analysis without proper citations to authority.

Overusing the "shotgun" approach (where many issues are briefed, frequently seen in criminal appeals). In selecting the issues to be briefed, the attorney should first discuss the potential issues with the client and maintain communication with the trial attorneys. Another good practice is to sketch out all possible issues, narrow those issues to the strongest arguments, and then leave off the last issue.

Court staff warned attorneys against inserting "dangling" issues at the end of the brief, for they will be considered abandoned if they are not adequately addressed.

Intellectual dishonesty (misrepresenting facts and/or law) is extremely damaging. In cases of intellectual dishonesty, the options include confronting counsel, and if counsel can't substantiate their brief, following up with a letter to the attorney requesting an amended brief. Although most dishonesty is negligent rather than intentional, attorneys can seek relief with the attorney grievance commission, or file a motion to strike or motion for reconsideration.

5. Responding to Poorly Written Briefs

Some participants suggested that a good method for responding to briefs that are poorly drafted is to use sentences like "It appears that appellant is arguing that . . . ." Then state why that argument fails or lacks merit.

When opposing counsel's statement of facts is slanted or misleading, use sentences like "Appellant's brief asserts on page X that" and then correct the misstatement or provide additional context. Be meticulous in citing to the record when correcting errors.

One commissioner suggested that practitioners always point out defects in opposing counsel's brief, because a pre-hearing attorney who is less experienced may not be as familiar with the general "appellate doctrines," i.e., failure to "prime the appellate pump."

What to do when opposing counsel has clearly attempted to mislead the court? Suggestions include motions to strike but the consensus was that those motions weren't appreciated by the Court as they were rarely granted. Most agreed that it was not beneficial to lower your stance to the borderline unethical attorney's position and just to point out the misleading statements in responsive pleadings and/or during oral argument.

6. Reply Briefs

All participants seemed to agree that such briefs were worthwhile.

Court staff reminded participants that the rules don't permit a further reply to a reply brief.

V. ISSUES IN CRIMINAL APPEALS

A. Criminal Law Rules: The Interplay of Appellate Court Rules and Trial Court Rules

1. New Rules on Time Limits for Application and Motions

The rules have reduced the time to file a motion in the trial court from 12 months after sentencing to six months. But the time to file an application for leave to appeal in the Court of Appeals remains at 12 months.

Participants expressed a concern because of issues that make it impossible to file a motion within six months. The competency of local clerk's offices varies; it is easy to get the record timely in some counties, and difficult in others. Delay can be caused by substitution of attorney. Explaining to clients the different time limits is confusing. In some cases, defense counsel files an application for leave to appeal and a motion to remand, because the issues could not be timely raised within six months due to these practical problems.

One problem noted by all participants is that, though by rule appointment of counsel is supposed to occur within 14 days of a request, this doesn't always happen, and there is no mechanism to enforce the rule; when the appointment of counsel is untimely, the time for filing motions is still running, and often appointed counsel is left with little time in which to file motions.

Defense attorneys were concerned that guidelines issues and other sentencing issues should first be presented to the trial court, but that the current rules often make that difficult. Defense attorneys generally thought that the six-month time limit was unworkable, and that the 12-month limit should be reinstated. Prosecutors generally thought that the time limit on filing motions was fair. But there was agreement that the untimely appointment of counsel should not be counted against the time limit. Possible suggestions for addressing this problem: (1) make the six-month time run from the filing of the plea and sentencing transcript, (2) permit the trial court to grant a reasonable extension of time in cases where the transcripts were filed late or counsel was appointed late, (3) change the triggering date: make the time for filing motions in the trial court run from the date of the appointment of counsel, rather than the date of sentencing.

Another issue raised concerned Standard 4 briefs, filed by defendants when they are represented by counsel. A defendant is allowed one Standard 4 brief. Should a Standard 4 brief be filed in support of an application for leave to appeal? Clarification is needed on the policy concerning Standard 4 briefs; the Court of Appeals' present policy is not consistent.

On appeals of right, some defense attorneys said that they do not receive copies of police reports or other items from defense counsel, and often do not get those items within the 56 days under MCR 7.208(B)(1) to file a motion for new trial in the circuit court. Prosecutors noted that, while they were willing to help defense counsel in obtaining transcripts, exhibits or other items, they did not feel they should have to engage in pre-trial discovery on appeal, which is time consuming and adds to expenses. There was no consensus on what to do on this problem, other than to recognize that it is a problem.

One issue identified is post-*Halbert* cases, where a defendant timely requested counsel, which was denied, and then is appointed counsel after the time for filing post-trial motions has passed. The Supreme Court has in individual cases entered orders setting a time limit for filing motions to run from the appointment of counsel in these cases, but a consistent policy, perhaps a rule or administrative order, was needed to address these cases.

Prosecutors identified one issue on motions to remand: a prosecutor receives 21 days to respond to a motion to remand, which is often filed with the brief of the defendant on appeal. In

some cases, this is simply not enough time; it permits the appellant 4 months for briefing, and the appellee 21 days. One solution suggested was to permit the parties to stipulate to an extension of time for filing an answer to the motion to remand.

2. Electronic Filing

Participants agreed that the electronic filing of transcripts, which is being done in some counties, speeds up the process. There was general agreement that electronic brief filing should be permitted, which would allow hyperlinks to cases and make it easier to file briefs timely. The participants would like to see the mailbox rule, which is used in other jurisdictions, adopted in Michigan.

3. Oral Argument

Pros and cons were discussed on permitting oral or telephone argument. It would save on cost, travel time, and weather delays, and could happen as scheduled without delay. The Sixth Circuit does such arguments, and those who have participated in them said that it works well. There have always been technological impediments to video or telephone arguments, but the technology has improved. It was noted that the Parole Board already uses closed circuit video for hearings, and SADO uses closed circuit video in Upper Peninsula plea and sentencing cases, which is a great savings in time and resources.

The cons to such argument are that there is a loss of person-to-person exchange. In telephone arguments, it is not always easy to know which judge is asking questions. And since the public has the right to be present for oral argument, how does this right fit in with video or telephone arguments? The general agreement was that a pilot program would be good.

Another subject raised was the possibility of separate argument days for criminal cases and civil cases. Other states do this. It has been suggested in Michigan, but never implemented. Most participants thought it would be a good idea and would like to see it implemented. An alternative would be to set criminal cases first in the call; the justification for this is that the criminal cases generally do not take as much time in argument as civil cases. One suggestion was to set arguments for specific times; the Court of Appeals judges noted that this has been tried, but attorneys were not showing up at the scheduled time, and that the status quo is the most efficient way to keep the case call going. The judges also noted that attorneys should give notice if they are waiving argument. They also noted that it is permissible to rest on the brief for some issues, that not every issue need be argued, and that it is permissible to ask the Court what issues it would like addressed or to rest on the brief unless the Court has any questions.

One suggestion was to limit time for argument to 15 minutes, which would be sufficient for most criminal cases

4. Record Production Issues

A common problem is the inconsistency of docket entries; there was agreement that they need to be uniform. And the date of entry on the docket is not always accurate, leading to many problems.

Transcripts were not always all produced when ordered. On appeals of right, there is a mechanism to show cause a court reporter; but one problem identified was that the Court of Appeals cannot show cause a court reporter who does not timely prepare a transcript for an application for leave to appeal, since the Court of Appeals has no jurisdiction. Local courts are reluctant to sanction their own court reporters. A change in the court rules is needed to permit the Court of Appeals to sanction court reporters who fail to prepare transcripts timely in application cases; in any event, some mechanism is needed to insure timely preparation of transcripts in application cases.

Another problem in transcripts is that when a tape is introduced as an exhibit, it is usually not transcribed. A rule change should be adopted to require either that the court reporter transcribe the tape, or that a transcript be submitted with the tape as an exhibit. This would require the parties to agree about what is on the tape, or what is inaudible; but this issue affects all participants, and prosecutors and defense attorneys were in agreement that simply having a tape played, with no record support of what is on the tape, causes problems.

A final problem identified by participants is that voir dire transcripts sometimes do not identify jurors (not necessarily by name, but by number or in some other way) who answer questions during voir dire. It is therefore difficult to tell if an excused juror may have been the one who answered a particular question in a particular way, and creates difficulties in determining if there is any issue arising out of voir dire. The suggestion was made to require court reporters to note some identification of a juror (by juror number would be sufficient) when those jurors answer questions.

5. Exhibits

Getting exhibits to the Court of Appeals is always a problem. The main issue is where they are kept.

Defense attorneys at trial do not always retain copies of exhibits, and even when they do, defense attorneys on appeal sometimes have difficulty in getting them from the trial attorney. Prosecutors noted that they do not usually have the exhibits in their files; they are usually returned to the detective in charge of the case at the conclusion of the trial.

MCR 7.210(C) requires exhibits to be filed with the trial court clerk within 21 days after a claim of appeal is filed. This rule is impractical and usually ignored. Most local clerk's offices do not want the exhibits filed with them. And it is frequently difficult to tell at the beginning of the appeal what exhibits will be important for the Court of Appeals to see. The Court Rule needs to be reexamined and the issue studied to determine the best way to deal with exhibit issues.

B. What Michigan Appellate Criminal Practitioners Need to Know About Habeas (Even if They Don't Do Habeas)

1. Preparing a Case for Habeas Corpus Review From a Criminal Defendant's Perspective

The importance of preserving federal constitutional issues at the state level was stressed. Participants discussed that it was insufficient merely to argue that there was a due process violation. Instead, the federal constitutional argument must be made and citation to controlling United States Supreme Court law is required.

The interaction of the doctrine of exhaustion and MCR 6.500 was discussed and the timing problem noted.

It was stressed that the federal constitutional issue needed to be raised in the Court of Appeals, but it was noted that the issue could also be raised in a motion for rehearing or in a motion to add an issue in the Michigan Supreme Court.

Although one federal district court judge has held that touching upon the federal constitutional issue by arguing that there was a negative impact on the defendant's due process right to a fair trial was sufficient to raise the federal constitutional issue, it was noted that another federal district court judge might have seen the issue differently.

It was noted that where the Michigan Supreme Court denies leave, filing a motion for reconsideration/rehearing raising the federal constitutional issue could preserve the issue. However, this will work only if the Supreme Court specifically says that it is allowing the issue to be raised in this manner; therefore, proceeding in this manner is extremely risky.

The question of raising the federal constitutional issue in the context of a motion for relief from judgment (MCR 6.500) was discussed. Again, it was noted that this creates timing issues and that the defendant remains incarcerated throughout this process, which can take years.

It was noted that the time for filing a petition for a writ of habeas corpus was one year + 91 days (the time for filing a petition for a writ of certiorari with the United States Supreme Court, even if such a petition is not filed.)

There are some tolling provisions that can make the calculations difficult.

2. Preparing a Case for Habeas Corpus Review From a Prosecutor's Perspective

Participants discussed the problem of the federal courts' decisions on petitions for writs of habeas corpus not being communicated to state appellate courts. The substantial increase in the number of petitions being granted was also discussed.

The issue of evidentiary hearings was discussed. It was noted that if a hearing was requested at the state court level and denied, the federal district court would have discretion to hold such a hearing.

It was discussed that the hearing issue must be preserved by showing due diligence to obtain a hearing, identifying facts that support the holding of a hearing, and an adequate offer of proof. The case of *Satterlee v Wolfenbarger*, 453 F3d 362 (CA 6, 2006), was used to illustrate the point. There, the defendant argued that a plea bargain was not relayed to him. The federal district court found the defendant credible and granted the petition. The Sixth Circuit affirmed and certiorari was denied.

From a prosecutorial standpoint, the benefit of having a hearing conducted closer in time by the trial judge should be considered as contrasted to opposing such hearings. Some prosecutors noted that the basis of the motion would control whether they objected. Others noted that if there was no objection on the record by the defense attorney, there is no need for a hearing.

Procedural defaults were also discussed. It was noted that if the state court reaches the merits of the issue without addressing procedural bars, those procedural bars cannot be asserted on habeas review and the federal court will review the claims de novo. In addition, if the merits of the federal constitutional issue are reached, the trial court's rulings are not reviewed de novo, but are reviewed to determine if the state court unreasonably applied United States Supreme Court authority.

Members of the defense bar who raised federal constitutional issues in the state court confirmed that if the Michigan Court of Appeals did not address federal constitutional issues when they were raised, this would result in a de novo review.

C. *Crawford* and Its Progeny: Is the Dust Still Settling?

1. General Points of Discussion

The discussion in this breakout session began with the important point that, if the witness testifies, there is an opportunity for cross-examination and, therefore, *Crawford* is satisfied.

The next question when the witness testifies is whether the rules of evidence are met.

The moderator raised the question of whether *Ohio v Roberts* was dead. The responding participants opined that it was.

2. Is There a Dying Declaration Exception to *Crawford*?

The issue of a dying declaration exception to *Crawford* addressed in *People v Taylor* (COA Docket No. 265788) was not discussed because appellate defense counsel indicated that he was filing an application for leave to appeal with the Supreme Court and Chief Justice Taylor was a participant in this session.

The moderator moved the discussion to the failure to object on constitutional grounds as opposed to hearsay grounds and the standard of review that would be applied.

3. Retroactivity of *Crawford*

The moderator also moved the discussion to the issue of retroactivity of *Crawford* – that issue was decided in *Whorton v Bockting*, 127 S Ct 1173; 167 L Ed 2d 1 (2007), where *Crawford* was held not to be completely retroactive.

4. Testimonial vs. Non-Testimonial Statements

The moderator proposed some hypotheticals to the group concerning the definition of testimonial as opposed to non-testimonial statements:

> The defendant commits an armed robbery and confesses to a friend. The defendant makes the friend promise not to tell the police, but that is the friend's intention.

The group agreed that the statement would be admissible against the defendant. The group agreed that the statement would be admissible against a co-defendant (who was an aider and abettor in the armed robbery who shot the victim).

The hypothetical was then changed so that the defendant confessed to an undercover officer. The group believed that the result would be the same, but some questioned whether the officer's questioning to elicit more information might change the outcome.

The group agreed that *Crawford* did not fully set forth from whose perspective it would be determined whether a statement was testimonial/non-testimonial.

5. Doctrine of Forfeiture by Wrongdoing

The moderator next posed the hypothetical of a domestic violence trial where the victim fails to appear or recants. There was discussion concerning the doctrine of forfeiture by wrongdoing. It was noted that there were several reasons why a victim might not appear, including the cycle of domestic violence, the defendant's threats, her own fear, or because she had lied in her initial report. From a prosecution perspective, it was noted that further police investigation might help to determine the reason the victim failed to appear. It was further noted that jail telephone records might prove helpful as well.

It was discussed that MRE 104 would place the burden on the prosecution to establish wrongdoing by a preponderance of the evidence. The moderator raised the issue of whether pleading with the victim was wrongdoing.

It was also discussed that the standard for wrongdoing under *Reynolds v US*, 98 US 145; 25 L Ed 244 (1879), to satisfy *Crawford* was minimal while the standard under the court rule appeared higher. The moderator also noted the difference between the federal rule on forfeiture by wrongdoing that included acquiescence and our state rule.

It was noted that the issue of forfeiture by wrongdoing was discussed in *People v Jones*, 270 Mich App 208 (2006), which was at page K14 of the handout materials.

6. Admission of Reports

The discussion moved to *Crawford*'s interaction with the admission of reports. One of the participants had an experience where the Court of Appeals found an autopsy protocol non-testimonial because of the statutory duty to prepare such a report. It was a public record and not prepared for purposes of litigation, but because a statute required the same. The doctor who prepared the report was unavailable for trial and another doctor testified as to the report's contents. It was noted that some of the cases discussing this issue drew a distinction between reports that contained factual findings, ruling those to be non-testimonial, in contrast to opinions, ruling those to be testimonial.

The discussion turned to laboratory reports analyzing drugs when the technician who performed the analysis was unavailable. It was agreed that such reports were prepared for purposes of litigation and it was suggested that the drug be retested by a different technician.

The discussion turned to Datamaster results and logs. The result was thought to be the same as for laboratory reports; however, an argument was made that there was an additional reason for testing because a drunk driver could not be allowed to operate his vehicle. Regarding the logs, it was also argued that they were more like a public record. Some participants disagreed, noting that they corroborated the admissibility of the Datamaster result.

The discussion then turned to medical records. The moderator noted that there was an Indiana case which had held such records non-testimonial; however, other states disagreed.

7. MRE 803A (Tender-Years Exception to the Hearsay Rule)

The discussion then turned to MRE 803A (the so-called tender-years exception). Such statements were discussed in the handout on page K-5. MRE 803A requires the child to testify and, therefore, there is no *Crawford* problem. The purpose of this rule in criminal cases was to provide corroboration. One participant noted that the rule in neglect cases was different; however, *Crawford* does not apply in that arena.

8. Admissibility of Hearsay Statements in Domestic Violence Cases Under MCL 768.27c

Regarding MCL 768.27c (admissibility of hearsay statements in domestic violence cases), it was noted that the statute could not override *Crawford* if the declarant did not testify.

9. Excited Utterances

The discussion ended with excited utterances, which are discussed on page K-3 of the handout. The distinction between statements made to meet an emergency as opposed to historical facts was discussed.

VI. ISSUES IN FAMILY LAW APPEALS

A. Tackling Recurrent Problems

1. Settlement Program

This breakout session focused on the appellate pro bono settlement program that was initiated at the last bench bar conference. The Court of Appeals redesigned the docketing statement format for family law appeals. The docketing statement is directed to a volunteer screener who reviews family law cases for settlement suitability with a 3- to 5-day response required. Child custody and parenting time appeals and cases involving domestic violence are deemed unsuitable for facilitation. A case determined to be suitable for facilitation is directed to a volunteer facilitator who has 70 days to facilitate. The facilitator files a report with information and comments. One Court of Appeals judge stated that he rarely looks at the docketing statement and that judges never see the facilitator's report if facilitation fails. There are 102 volunteers in 15 counties and there are 10 screeners. This program is reported to have started well, but settlements have since diminished.

Practitioners complain that facilitation needs to start earlier to save the expense of brief writing, but as the docketing statement does not need to be filed for 28 days until after the filing of the claim on appeal, that delay can result in the practitioner incurring a costly and time-consuming brief. Facilitation does not extend the time for filing briefs, although stipulations to extend the time may be granted for good cause. If briefing has already occurred, the positions may at that point be already so hardened that the case becomes too difficult for the facilitator to resolve. Should facilitation succeed, the effort of preparing for the appeal will have proved unnecessary. The suggestion was that requiring a docketing statement to be filed with a claim of appeal may be too burdensome, but a 14-day, or even 7-day, requirement might be more reasonable to alleviate some cases from having to be briefed as well as facilitated.

A question was raised as to whether a docketing statement limits the issues to be facilitated. The response was that it does not, and that there is no rule against filing an amended docketing statement.

The excess costs to clients are often a bone of contention. Practitioners complain that facilitation causes additional costs to the case on account of preparation time for facilitation and the time attorneys must be out of the office, especially when the facilitator's office is a considerable distance away, adding about 6-8 hours to attorney fees. Also, the non-voluntary nature of program decreases likelihood of success. It was stated that originally about 30%, but now only about 20%, of the cases assigned to facilitation settled. At this time, no one knows why the settlements have decreased but the program is being monitored.

It was noted that facilitation may be beneficial for "bouncing ball" cases that go up and down the ladder between appellate courts and trial courts because such cases so exhaust resources that facilitation may be welcomed.

One opinion was that the facilitation process is growing more complex in practice and practitioners are worried about disclosing information in facilitation. The sense is that confidentiality is not truly secure. Others feel that privacy is increasingly important now that even unpublished cases are on the web, and settlement circumvents the danger.

Although "pro per" and child custody cases are not selected for facilitation, it was suggested that there be an "opt in" choice to facilitate custody cases. Although custody cases would benefit from settlement, they are on a fast track in the appeal process. While parties can agree to extend the time, the policy is to keep custody cases on appeal moving quickly. Also, custody cases may need settlement, but they also often need experts to consult and facilitators are not necessarily qualified for this task.

One suggestion was setting a 7- or 14-day requirement for the docketing statement rather than 28 days. But appellee's attorney may not have "appeared" yet, so there could be a problem. Another suggestion was there be reduced briefing/writing requirements for facilitation to reduce costs, and that facilitator should use more discretion when asking for more information or briefing. Another suggestion is that there be increased awards of appellate attorney fees as sanctions for baseless appeals. It was suggested that practitioners could become more informed regarding the facilitation process through the Family Law Journal and the Family Listserv.

2. Other Issues

An issue was also raised as to the custom of trial courts to give immediate effect to post-judgment custody orders that ignore the 21-day stay. Although MCR 2.614(A)(2)(e) provides for immediate enforcement of pre-judgment custody orders, the rule does not apply to post-judgment decisions. Appellate courts are hesitant to stay of change of custody within 21 days of the trial court's order because of reluctance to undermine the trial judge's decision. Not allowing time for a stay affects the established custodial environment as the appeal proceeds.

There was also a discussion of some trial courts still changing custody without hearings at all, and that due process is being lost in family law.

Finally, there was discussion about an apparently continuing theme of new judges being less educated in family law, about how too many "in chambers" conferences make it hard to have preservation on the record, and about the need for family law attorneys to be aware that they must make motions to admit exhibits into the record and get transcripts of recordings.

B. Right to Appeal, Wrong to Assume

The court rules portion of the family law session primarily covered problem areas in terms of what constitutes an order that is appealable as of right and ways to address situations when the proper interpretation of the court rules is unclear. The main areas of discussion were: (1) defining final orders, and post-judgment orders affecting custody, particularly in change of

domicile situations; (2) post-judgment orders concerning attorney fees; and (3) suggestions for possible ways to handle issues related to the filing of appeals when the court rules are unclear.

1. Defining Orders Re: Claims of Appeal.

While the court rules specify that there is a claim of appeal for all final orders and those post-judgment orders affecting custody, the participants discussed the problems that arise when a Judgment of Divorce is entered that addresses custody but may not be considered a final order. This happens when additional issues remain open, i.e., distribution of property at a later date or when a referral to the Friend of the Court ("FOC") for an investigation and determination of child support is included. The participants were advised that if an issue remains open it is probably not a final order (even though custody may in fact change at that time).

Another problem area is a post-judgment order addressing a motion for change of domicile that may or may not be seen as an order affecting custody. With respect to this issue, it was agreed that when filing an appeal involving domicile, practitioners should focus on the actual parenting time used by the non-relocating parent and the type of change contemplated, and not just what the original order provided regarding the custodial arrangement when the parties first divorced.

2. Post-Judgment Orders Re Attorney Fees

Pursuant to MCR 7.202(7)(a)(iv), a post-judgment order awarding or denying attorney fees and costs under a law or court rule is appealable by right. The question arose whether there is a claim of right with respect to a substantive matter in an action where the court awards or denies attorney fees. Based on the orders included in the materials and discussion, it appears that even if the attorney fees issue fell within the rule noted here, only that part of the order involving fees is appealable by right.

The participants also discussed *Morgan v Higginson*, COA No. 261236, 1-4-07. In *Morgan*, the appeal was allowed to go forward for a determination as to whether a decision regarding attorney fees under MCR 3.206(C) fit within the definition of MCR 7.202(6)(a)(iv), given that an award or denial of fees under this subrule is not dependent upon the validity of the underlying motion. A Court of Appeals clerk indicated agreement with the panel's decision that attorney fees awarded or denied under this subrule did fit within the above final order definition. Unfortunately, he also noted that the orders he reviews at the Court of Appeals do not specifically list MCR 3.206(C) as authority for requested attorney fees. Accordingly, he has to apply the general rule regarding attorney fees given that an unpublished opinion (*Morgan*) is not binding precedent. MCR 7.215(C)(1). He recommends that to ensure that a post-judgment order awarding or denying attorney fees is treated as a final order, a citation to MCR 3.206(C) be included in the body of the order.

3. Suggestions When Uncertain Re Court Rules Application

Another recurring problem is when one is uncertain whether an order does qualify for a claim of appeal or whether it is necessary to file an application for leave to appeal . The

consensus was that, when in doubt, file both. Also noted was that an application is reviewed by a panel immediately and actually can move more quickly through the Court of Appeals.

Another problem that arises is when a case requires the preparation of an application and the transcripts are not available. This is often the case where the transcripts are lengthy and, even though ordered immediately, will not be ready in time to file a timely application; or, it can happen when an appellant waits until the eleventh hour (the end of the initial 21-day period) to file the application and transcripts have not been ordered. The participants discussed the benefit of doing a preliminary application and then filing a motion requesting permission to file a more detailed application after receiving complete transcripts. If this is done, the writer will need to indicate in the facts section that while it is believed the statement is consistent with the record, a supplement with specific cites will be filed upon receipt of transcript. (However there is no way of knowing whether a motion to add to the application would be granted in any given case). Another possibility is having the videotapes of the hearing/trial transcribed unofficially and then submitting official transcripts when ready, although it was noted that not all courts have videos of the hearings. The consensus seemed to be that it is better to wait and do a delayed application when the transcripts are available.