2013 Michigan Appellate Bench Bar Conference Summary Report

The Bench Bar Conference Committee is pleased to present the 2013 Michigan Appellate Bench Bar Summary Report. The theme for the 2013 conference was "Appellate Advocacy in the 21st Century – Bench and Bar Working Together to Achieve Justice Under the Law." The centerpiece of the conference was an advocacy survey distributed electronically to Michigan Supreme Court justices, Michigan of Court of Appeals judges, Supreme Court and Court of Appeals staff, and practitioners, in which they expressed their advocacy preferences regarding virtually all aspects of briefing and oral argument.

The results of the survey formed the basis for an insightful panel discussion among two Supreme Court justices, two Court of Appeals judges, and an experienced appellate attorney, who shared their advocacy likes and dislikes. Conference attendees then had the opportunity to participate in breakout sessions with justices, judges, and court staff, where they further discussed the results of the survey and explored the best approaches to brief writing and oral argument. Other breakout sessions focused on various aspects of advocacy in the criminal, civil, family, and child welfare areas.

At lunch on the first day of the conference, attendees were treated to a presentation by noted appellate lawyer Robert DuBose, who provided his insights into making briefs more effective in an increasingly "paperless world" in which more and more judges are starting to read briefs on screens as opposed to paper. That theme carried over to the afternoon, when a panel of judges, court staff, and "top-tech" lawyers gave attendees valuable tips for preparing better e-briefs. Attendees wrapped up the first day at a reception and dinner where former Court of Appeals Chief Clerk Sandra Schultz Mengel was presented with the State Bar Appellate Practice Section's Lifetime Achievement Award.

The second day of the conference began with a panel discussion by appellate judges and practitioners focused on who has control over an appeal with respect to issues raised and decided, how the answer to that question may change over the course of the appeal, and what this may mean for the appellate process. The panel discussion was followed by breakout sessions where attendees continued to explore these issues.

One of the highlights of the conference was when a truly distinguished panel of ***all seven Supreme Court justices*** provided tips on advocacy before the Court, including how to convince the Court to take a case and the best way to use the first few minutes of oral argument. The conference closed with a lunch presentation by trial consultant Leonard Matheo of Courtroom Performance, Inc., who shared his insights into using effective public speaking skills to present a compelling oral argument.

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. For the first time, the summary report also includes the full transcripts of the plenary panel discussions on Supreme Court advocacy and the use of technology in briefing, so that readers can hear it straight from the source. The report also incorporates Chief Justice Robert P. Young, Jr.'s article, "Effective Supreme Court Advocacy: Advice from the Chief Justice," which was part of the materials that were distributed to attendees.

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

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I. MICHIGAN APPELLATE ADVOCACY: A VIEW FROM THE BENCH AND BAR

A. Plenary Session

1. Results of advocacy survey

To begin the plenary, Megan Cavanagh presented a summary of the survey results, to which there had been a good response. She noted that the specifics of the responses were included in the materials presented to each attendee. The "take-aways" from the survey included the following:

- The judges are split as to whether they like the "deep issue" method of stating the issues presented.

- The judges agree that no more than four issues should be presented in order to retain credibility.

- The statement of facts should not be argumentative and it should be complete. Mis-statements undermine the credibility of the brief.

- The judges are split as whether they want a counter-statement of facts from the appellee.

- The best argument should be presented first, and the appellee should follow the order chosen by the appellant.

- There is some ambiguity about the use of block quotes and the judges generally say that they like them, but also say that they ignore them. They do want to read them for themselves.

- The brief should contain pinpoint citations.

- If facts are repeated in the argument, references to the record should also be repeated.

- Footnotes are fine, but they should not be substantive because they are not always read.

- There is no general agreement concerning whether the length of a brief should be judged by word count or page count. The Supreme Court is, itself, split. The clerks prefer word count. The Court of Appeals prefers word count, but the staff attorneys prefer page count.

- Italics are the preferred method to provide emphasis.

- Poor editing of the brief undermines its credibility.

- If an application for leave to appeal is essentially seeking the correction of an error, it should request peremptory relief, which is more likely to be granted than would a grant of leave.

- At oral argument, counsel should not reiterate the brief, but pick the salient issues to present. "May it please the court" is the preferred opening. The court wants candid responses. Counsel should know the record as well, if not better, than the court. When citing cases that included the participation of one of the judges on the panel, it is fine to indicate that participation. There is no consistent view of the use of visual aids.

- The Supreme Court suggests that counsel consider waiving their "fire free" zone. They suggest that counsel "moot court" their cases before argument, that appellate

specialists be retained, that counsel address the policy implications of their case, and that they be prepared to state what rule they are asking the Court to adopt.

- Practitioners indicated that, if they have multiple arguments scheduled, they prefer them to be on the same day; some liked the idea of specific time slots; some thought that complex cases should be separate from other cases or scheduled for a specific time; more questions would be desired.

- Practitioners would like a rule prohibiting the filing of a response to a motion for rehearing unless requested by the court.

- Practitioners generally did not mind opinions which noted that issues had been abandoned, but disliked it when there was a waiver as a result of failure to include the issue in the statement of issues since this had malpractice implications.

- Practitioners like e-filing, would like it to be mandatory, and would like to see orders and opinions by way of e-mail.

2. Panel discussion

Moderator: Mary Massaron Ross

Panel: Chief Justice Robert P. Young, Jr., Justice Bridget Mary McCormack, Chief Judge William B. Murphy, Judge Jane M. Beckering, Valerie Newman

a) The panel was asked to address three things that they thought would reduce the credibility of a brief

- Mis-stating the facts.

- Argumentative facts.

- Address bad facts and bad law.

- Citation of irrelevant law or citing it out of context.

- Failure of objectivity and failure to recognize the difference between the emotion of the trial court presentation and the objectivity of the appellate court presentation.

- Mis-stating the law, which will make everything else said "suspect."

- Setting forth too many issues.

- Allowing acrimony to creep in.

- Failure to recognize the appropriate standard of review.

- Frustrating the person who is being asked to decide the issue.
- Failure of candor, credibility and honesty.

b) The panel was asked to consider what facts were unnecessary or cluttered the brief

- The story should be told on a linear basis and be complete but concise, allowing the court to orient itself to the case.
- Provide sufficient context without frustrating the court, and this is a judgment call.
- A linear (chronological) approach is fine, but tell it thematically if that tells the story better.
- Tell the story as you would tell it to your neighbor.
- Long briefs are easy to write but hard to read.

c) The panel was asked how to present the facts thematically if the court rule required it to be chronological

- Think outside the box.
- Ignore the rule.
- Interpret the rule in favor of good advocacy.

d) The panel was asked about the need to cite to adverse precedent if it is not published

- It was generally agreed that there is no requirement to cite the court to adverse, but unpublished, precedent.

e) The panel was asked to consider the top three things that could undermine counsel's credibility at oral argument and cause the court to stop listening

- Focus on the judges and don't talk just to hear yourself talk.
- Don't be rude.
- Answer questions directly.
- In the Supreme Court, explain why you are there and what rule you want.

- Concede what you have to concede.
- Don't dismiss the concerns expressed by the court.
- Don't read your argument.
- If you cite a case, explain why it matters and don't read from it.
- Listen to the court and respond without putting off the answer.
- Answer promptly and forthrightly.
- No personal attacks on opponent or the trial court.
- Explain what you are trying to accomplish and you may be able to change an opinion.
- Make your argument tactical and limit it to no more than three outcome determinative issues.
- Don't treat argument as a recital, but as an opportunity to educate.
- Don't be tied to a script.
- Advocate for a resolution and explain why your case is representative if you are before the Supreme Court.

f) The panel was asked the best way to handle what you perceive to be opposing counsel's mischaracterizations

- It depends on how critical the mischaracterization is; be tactical and don't be thrown off your game by your opponent's diversions; if it is critical to your position, respond to it.
- There is more latitude to respond in writing than during oral argument.
- Ignore it if its not important.
- Don't take the bait.

g) The panel was asked whether an issue raised, but to which no response was provided, would be considered to have been conceded

- If it is a substantive issue, the court will not know whether it was skipped because it was deemed too frivolous, or whether it was being avoided.

- The answer may depend on whether the issue is "key" or the context in which the issue arose and whether the opponent is taking a shotgun approach to the appeal.

- It is probably best to signal to the court why there is no response.

h) The panel was asked whether it would help or hurt the argument to provide legal context

- Keep your argument brief and if there is only one relevant case, do not add more just to make the brief longer.

- Shorter briefs are better than longer ones, although they take longer to write, because the court can lose concentration if they are not given a roadmap.

- Briefs should be accurate, brief, and clear.

- Less is more.

- In the Supreme Court, where leave is granted to manage the fabric of the law, the Court may need to know how the law came to be as it is and why the pattern is indistinct.

- Context is not as important in the Court of Appeals, which is an error correcting court and cannot change the law.

i) The panel was asked about the ideal page limit

- Just enough, with ruthless proofreading.

- One page is sufficient if it covers the issue.

- On average, 20 pages, without repetition.

j) The panel was asked about litigants who fail to react to the nonverbal cues given by the court

- Those who don't pick them up are operating on the "recital" mentality.

- It is sometimes hard because there is a panel, and some of the judges may still be interested; when before the Court of Appeals, "learn to count to two."

k) The panel was asked about the use of an appendix

- It is fine if it is giving context.

- It may be considered to be "optional" reading.

- Append the parts of the record you want the court to be sure and see.

l) The panel was asked what made a good amicus brief

- Say something the party has not said.
- Provide a broader perspective.
- Explain the impact of the case and ruling.
- Address the policy issues.

m) The panel was asked about the most beneficial reply briefs

- Use to show deficiencies in the appellee's argument.
- Don't repeat.

n) The panel was asked about effective rebuttal at oral argument

- Deal with the questions that had been directed to your opponent and why you win.
- Even declining to rebut is, itself, a rebuttal.
- Use it to draw the court's attention to one critical thing.

o) There was also a general discussion about the presence of clients in the courtroom

- Most agreed that they were welcome and had a right to be there, but that they should not be used to manipulate the court and should be told how to behave in court, without overt displays against the other side.

B. Breakout Sessions

1. Briefing tips

a) General

Many practitioners begin briefing the argument before the statement of facts, believing that it helps keep the analysis tighter and the brief shorter.

It is important to get the attention of the reader in the first five minutes of review of the brief. Be concise and specific about the errors being asserted and the relief requested.

Use of visuals in the brief can be helpful in certain types of cases, such as real estate.

The judges had no real preference for the type of font used in briefs, as long as it is professional. Instead, what matters is that the font size is at least 12-point and remains consistent throughout the brief. Pay special attention to the font size of footnotes, as some programs may automatically decrease the font size when inserting a footnote.

About 50% of judges read briefs on the computer or a tablet, while the other 50% read from hard copies.

There was consensus that credibility is key. There were several suggestions for increasing credibility:

(1) Point out any inaccuracies in your opponent's brief but do so in a professional manner;

(2) Include record citations after every assertion of fact, both in the statement of facts and the argument;

(3) Include pinpoint cites when citing from, or referring to, cases;

(4) No argument in the statement of facts. The judges in attendance felt very strongly about this and it was deemed one of the most common (and irritating) errors in appellate briefs;

(5) No personal attacks on the judges below or opposing counsel;

b) Length of briefs

Brevity is key. Briefs should be as short and concise as possible. Avoid repetition.

Although there was no consensus, many suggested that briefs should be limited to 30-35 pages if possible. That may be more difficult in child welfare appeals, where cases span several years.

c) Use of an introduction

There was disagreement over whether an introduction is useful. Some think they are helpful to guide the reader and set the stage for the appeal, while others believe that this can be accomplished in carefully constructed questions presented and the statement of facts.

d) Statement of questions presented

Participants discussed the traditional "Whether . . . where" format for questions presented versus Bryan Garner's "deep issue" format, which involves several short declaratory sentences followed by a question. Opinions varied widely on which approach is more effective, but the consensus was to keep the questions presented as tight as possible.

All agree that the questions presented need to be framed carefully, and that the reader loses focus of the question presented is too long. However, it needs to be informative enough to provide factual context. For example, merely stating that the trial court erred in granting summary disposition to the defendant is not helpful for the reader to discern ***why*** the trial court erred in doing so.

There was discussion about practitioners' concerns that special attention must be given to preventing waiver of an issue by making sure that the statement of questions presented is sufficiently detailed. Some suggested that the problem is that the questions presented are getting longer, which reduced their effectiveness. This area may present a potential for a rule change, to allow appellate attorneys to present questions that encompass the issues raised in their brief without being concerned over potentially waiving subsidiary issues that are not specifically stated in the questions presented.

Typing questions presented in all caps is not easy to read. Consider using normal sentence structure, or only capitalizing the first letter of each word.

e) Statement of facts

There were differing views on the optimal length and approach for statements of fact. Some preferred an extensive statement, organized chronologically, but the prevailing view was that the statement of facts should include those facts critical to the issues before the court. The general view was that most statements are organized either chronologically or thematically, with the best approach largely depending on the nature of the case.

Despite some differences, several observations were common to most of the participants. First, proper terminology is essential in the statement of facts, as is accuracy. Second, the appellee should account for and acknowledge an accurate statement of facts by the appellant. Third, it is important for practitioners to examine legal precedents carefully to identify the facts that are most critical to the decision of the issues in their cases.

There was discussion about whether certain, more detailed facts should be reserved for the argument portion of the brief. Some expressed concern that doing so risks important facts not receiving appropriate attention. Many suggested providing enough detail in the statement of facts for context and understanding, and then in the argument section weaving in details as they pertain to each issue.

f) Standard of review

Some suggested not to repeat the standard of review in each argument section, and that it is more effective to do a separate section setting out the review standards for each of the issues being raised.

g) Organization of arguments

If logical, the appellant's organization of the issues and arguments may be an acceptable way to organize the appellee's brief. Some practitioners and judges felt that the appellee should

lead with its strongest argument first, although a case can be made that, particularly in criminal cases, the appellee should begin with the order of relief (i.e., address conviction first and sentencing later).

Court staff seemed to generally agree that it is helpful if the appellee tracks the appellant's arguments. Track each issue, but make your own points. Not all practitioners believed this was always the most persuasive way to present an appellee's case, however, and want to present the issues on appeal in a way that was most persuasive to their clients. For example, if the appellant is arguing negligence occurred, but the appellee argues no duty, the appellee's argument about the issue of duty would naturally precede the appellant's negligent conduct argument.

Many voiced the opinion that an appellee should lead with the argument that won in the trial court, and back it up with your other reasons to affirm, which may be even stronger.

It is helpful if an appellee expressly states when the appellee is addressing, en-mass, multiple issues raised by the appellant. This signals that the appellee recognizes the separate issues, and is not skipping any, but is simply addressing them in a combined fashion.

h) Headings and block quotes

Headings are useful for establishing organization. There was discussion about Bryan Garner's suggestion that headings should be argumentative. Opinions varied on the effectiveness of that approach.

Block quotes were generally accepted as appropriate, although care should be taken to ensure that they are not too long or overused.

i) Footnotes

Participants discussed Bryan Garner's advocacy of placing cites in footnotes. Some believe footnotes make it easier, others believe that citations in the text are easier to read.

Some suggested that the absence of a citation in the text suggests an absence of authority, cured only if someone bothers to check the footnote.

j) Editing

Most agreed that it is important to find time (make time) to re-read your brief, or better yet, have someone else read the brief and give feedback.

Some suggested checking average sentence length in Word to help tighten the brief.

Some participants raised the issue that some clients, and some insurance clients in particular, refuse or balk at paying for editing time, proofreading time, and having someone else read and give feedback to revise the brief and improve it. One out-of-state practitioner commented how his firm, which is strictly an appellate practice, includes editing and proofing

time and activity in its client retainer agreement to make sure they give notice to the client and the client agrees that it will be paid for.

k) Exhibits

In the Court of Appeals, only the judge assigned to write the opinion receives the entire record. Thus, important portions of the record should be included as exhibits to the brief. However, practitioners should take care not to duplicate exhibits.

There was a discussion whether it would be appropriate to substitute an original photo for a poor copy in the official record. The consensus seemed to be that the original photo should be submitted to the court in addition to the official record with a letter indicating the reasons why.

There was also a discussion regarding how to handle audio recordings that are not transcribed. One alternative is to provide the tapes or compact discs themselves to the court with some indication as to where the pertinent information appears on the recording. In the alternative, the parties can have the recording transcribed and stipulate as to the accuracy of the transcription, then provide the transcript to the court.

l) E-filing

The Court of Appeals intends to make e-filing mandatory in the near future. The Michigan Supreme Court is also working on implementing e-filing.

For briefs that are filed electronically, it is extremely important to use bookmarks (especially in appendices) and to make the documents searchable. The court staff encouraged everyone to read the court's "best practice" and e-filing guides on their website.

Practitioners expressed an interest in the ability to retrieve documents online, much like PACER in the federal court system. If such information becomes available online in the future, practitioners should take responsibility for redacting confidential information from briefs and exhibits.

m) Special considerations for applications for leave to appeal

When seeking interlocutory review, it is critical to show why the issue is important and why the appeal cannot wait until entry of final judgment.

When seeking discretionary review in the Supreme Court, the appellant must show why the case is important to the body of law and why the ruling will have ramifications beyond just that particular case. Consider the impact of the Court of Appeals' decision.

Remember to file the transcript as soon as it is received.

When reviewing applications for leave to bring an interlocutory appeal, the Court of Appeals does not have the lower court record, so it is important to attach important documents.

2. Oral argument tips

a) General

It was widely recommended that practitioners appear for argument even if it has been waived due to filing a late brief. The panel may still ask questions.

Some judges suggested that oral argument is considered to be most useful in complex cases, to highlight important issues/facts.

There was some interest expressed in having feedback from the panel in advance of oral argument if the panel has no questions. There was a good deal of discussion about whether it would be helpful to have the panel issue a notice highlighting issues of primary interest. The logistics of something like this, given the short timeline for panel assignment, make it difficult to work out. Perhaps the judges could schedule a pre-argument conference call, with a checklist in mind, to identify key issues. Or perhaps case assignments could be made earlier in the process.

Practitioners should keep in mind that the focus in an argument before the Supreme Court should be on broader policy implications, while arguments in the Court of Appeals tend to focus more on case-specific issues.

b) "Fire-free" zone in the Supreme Court

In arguments before the Supreme Court, the consensus was that the "fire-free" zone should be waived.

c) Client attendance

Participants discussed whether it is appropriate to have clients attend oral argument. Some felt it is a bad idea, but that it is sometimes needed, for example in a criminal or a family law case. There was some sense that the presence of clients increases their trust in the process. There was agreement that preparing the client for the experience was required, including how they must conduct themselves in court and what to expect.

Some believe it is helpful and appropriate to let the court know that clients are present; others believe it is an inappropriate effort to obtain sympathy or otherwise never do it.

d) Presentation

Judges seemed to agree that the best oral advocate is one who educates the court. The purpose of oral argument is to ensure that the judges understand the issues and get their questions answered. The best oral arguments have a conversational tone.

Candor goes a long way.

It is important to be confident and to pick up both the verbal and non-verbal cues being supplied by the panel.

What happens when you are asked a tough question that you do not know the answer to? The judges expressed their opinion that practitioners should not be afraid to ask to file a supplemental brief after oral argument if there is something significant that needs to be addressed.

What happens if you have a cold bench but you want to have a chance to present your case? One judge suggested saying something like, "If I were you, this is the important question that I would want to know the answer to."

Address the issues that seem to be bothering the court. If you can't tell what they are concerned about, just ask them.

Don't answer before a question is completed; stop talking when a question is asked, and don't talk over the judges.

Don't assume all questions are adversarial, listen for the softball and catch it (often prefaced with "so isn't your argument…" or "what you are saying is…")

Never answer "I will get to that later."

Sometimes the best rebuttal is no rebuttal. Most participants agreed that using rebuttal for high impact points was most effective.

e) Use of technology

There was discussion about the use of tablets by practitioners and judges at oral arguments. Some saw the problem as one of a lack of eye contact. Often times when attorneys have a tablet at oral argument, they tend to read from the tablet and fidget with it and their argument suffers and is not as effective. Similarly, it can be discouraging to practitioners when judges look at electronic devices during oral argument. Everyone agreed that the key is that you have to maintain eye contact during orals.

Other than the use of maps, or blow-ups of pertinent statutes or jury instructions or evidence, there does not seem to be a great deal of visual aid use during oral argument.

II. LAW PRACTICE BREAKOUT SESSIONS

A. Criminal

1. Ineffective Assistance of Counsel at Plea Stage

a) Plea stage errors

Preventing *Frye* errors, i.e., where defense counsel fails to inform the defendant of a plea offer, should be relatively easy: have any and all offers put on the record in open court in the presence of the defendant. A court rule requirement to this effect may be useful.

Preventing *Cooper* errors is more problematic as *Cooper* addresses the specific advice that trial level defense counsel gives to the defendant in response to a plea offer. Defense attorneys cannot be made to disclose their advice to the court or opposing counsel due to confidentiality/ privilege. Trial counsel should be encouraged to create a paper record in their files regarding the advice given to the client about any plea offer, e.g., a letter to client or a memo to file.

b) Suggestions for making a record under *Frye*

Create a new Michigan court rule governing (a) plea negotiations, (b) deadlines for extending plea offers, (c) deadlines for accepting or rejecting plea offers, and (d) on-the-record colloquies regarding the potential consequences (e.g., maximum sentence, habitual enhancement, and guidelines range). This suggestion raised concerns about collateral consequences, e.g., *Padilla*/immigration issues, sex offender registration, and restitution.

Create a SCAO form modeled on the Oakland County form that (a) requires the prosecution to put the plea offer in writing, (b) requires defense counsel to certify in writing that he or she has conveyed the offer to the defendant and advised accordingly, and (c) requires the defendant to certify in writing that he is aware of the offer and the potential consequences of rejection. This suggestion raised concerns where defendant has issues with literacy and/or comprehension.

c) Suggestions for making a record under *Lafler*

The attorney-client privilege prevents defense lawyers from placing their advice on the record before trial. It is therefore difficult to know whether a defendant truly understands issues relating to the value of the offer and the significance of the sentencing guidelines.

2. Sentencing Issues, *Miller v. Alabama*, and Juveniles

a) What impact does *Miller* have on Michigan?

For cases post-*Miller*, a mandatory life sentence without parole ("LWOP sentence") may not be applied to a juvenile. All seem to agree that until the Legislature acts, individual judges will conduct hearings to evaluate the *Miller* factors and whether a LWOP sentence for a juvenile is appropriate on a case-by-case basis.

As to the nearly 368 cases that were already final, the question is whether *Miller* should be retroactively applied, and if so how.

Participants discussed the role that the Parole Board plays in these cases after a judge pronounces a "life" sentence and the juvenile becomes parole-eligible after 15 years. Questions discussed: How then does a defendant raise an Eighth Amendment claim on direct appeal? And may a judicial "veto" on a subsequent judge be enforced post-*Miller*?

The impact on the victims was discussed as well. Included in the class of 368 juvenile offenders in Michigan, currently serving a LWOP sentence, are horrific crimes, some of which

were discussed in the group. The victims' families, years later, are confronted with the loss of finality and all that it may imply.

Therefore, the competing interests were discussed, and whether a legislative fix is in order. Although a complete consensus was not reached, the majority seem to agree that hearings would be beneficial—how does the society respond to violent crime and can we accurately predict the ability of a juvenile to rehabilitate as compared with an adult offender and if so, to what extent, and, how? The majority seems to agree that post-*Miller*, aiding and abetting type offenders subjected to LWOP will not stand.

b) Offense variables (OVs)

General sentencing concerns and observations noted:

- Two cases provide that record evidence is required, and it was questioned whether this standard, which originated under the judicial guidelines, is being improperly applied.

- The "any evidence" requirement allows the vast majority of scoring decisions to be affirmed, but it was discussed where this standard originated. The standard is highly deferential.

- There appears to be too a high percentage of sentencing errors occurring. Perhaps practitioners should be afforded more time prior to sentencing to review the PSIR to prevent these errors from occurring.

- Situations appropriate for departures were discussed, including the presence of factors not considered under the guidelines, such as convictions from foreign jurisdictions, or factors that were given inadequate weight by the guidelines.

3. SADO Appellate Project

a) Introduction

In a pilot project with the Court of Appeals, SADO identifies cases needing an expanded opportunity for establishing an evidentiary record. For this limited group of cases, the time period for seeking remand to the trial court is lengthened, as counsel investigates issues such as ineffective assistance of counsel or forensic evidence. The time process allows SADO to investigate the case before being required to file pleadings.

b) Remand practice

- Suggestion of a change to MCR 7.216 – not requiring contemporaneous filing could help get the motion to the ***actual*** panel.

- Suggestion of a rule change for time to run from receipt or filing of transcripts was suggested, similar to MCR 7.205(F)(4).

- Suggestion of reducing the "warehouse phase" in the Court of Appeals process, permitting appellate counsel expanded time to seek remand to develop evidentiary records that could dispose of the case at the trial court level, preserving appellate resources.

4. Practical Considerations for Habeas Cases

There is a question as to whether *Pinholster*, which forecloses evidentiary hearings in federal court where there is a state court merits determination, applies when a state court denies a prisoner the opportunity to create an adequate evidentiary record, i.e., through a state evidentiary hearing. This is the so-called "catch-22." Justice Breyer's concurrence in ***Pinholster*** lends some support to this open question, which is still being flushed out in the federal circuit courts of appeal.

If there is an evidentiary hearing in a state court, and the court makes findings, those findings are ordinarily credited on federal habeas review. Some participants noted that there appears to be an increase in the number of state evidentiary hearings being granted.

The presenters agreed that the most common successful claim on federal habeas review is a claim that a trial court was ineffective for failing to investigate, e.g., failed to look into a potential defense. A state court decision on such a claim that is most immune from an adverse habeas result is one where there is a hearing and credibility findings by the state trial court. Making a compelling case for an evidentiary hearing in state court is important.

A participant questioned the role of factual findings in appellate court opinions. The panelists stated that such findings are – like those of the state trial courts – given deference under AEDPA. Statements of fact in the appellate court opinions are useful.

Other questions arise with multi-part tests, i.e., for ineffective assistance of counsel (with separate prongs requiring a showing of deficient performance and prejudice). Prior precedent from the United States Supreme Court on this point is called into question by the Supreme Court's decision in *Harrington v. Richter*, 131 S. Ct. 770 (2011).

The presenters agreed that pleadings filed by the attorneys in the state courts are likewise reviewed very closely by the federal habeas courts. Sometimes a defendant's attorney does not properly federalize a claim. It was suggested that appellate attorneys, and trial counsel as well, make the nature of the claims or objections more specific. Rather than just cite state evidentiary rules, counsel should note federal concepts like due process, right to present a defense, and right to confrontation. It is important to place federal claims in the statement of questions presented in an appellate brief as well.

The group discussed the parameters of the federal statute of limitations. They also discussed how prisoners can protect themselves from possible violations of the statute when there are claims in the petition that have not yet been presented to the state courts by filing a habeas petition in the federal court and then asking for a stay to exhaust federal claims.

B. Civil

1. Civil Appeals 101

This session was designed to cover the details of handling an appeal, including deadlines, key procedural rules, insider tips, and common pitfalls.

a) Major mistakes cited by the Clerk's Office

The number one mistake cited by the clerk's office was not following the court rules. The clerk's office often sees non-conforming briefs which lack a necessary component, such as the standard of review or a statement of the questions presented. Other mistakes include the failure to file exhibits with the trial court or failing to order the full transcript.

Lawyers should not hesitate to call the clerk's office if they have a question. Be mindful, however, that the clerk's office can only help with procedural questions. The Court of Appeals' IOPs also contain useful information.

b) Jurisdiction – final order requirement for claim of appeal

Jurisdiction must be scrutinized. The fact that the trial court uses the final order language of MCR 2.602 is not determinative. The Court of Appeals independently checks the finality of the order being appealed when the claim of appeal is received.

c) Necessity of separate appeals in consolidated cases

In a consolidated case where one case is dismissed and one case proceeds to final order and then appeal, the Clerk's Office stressed that each case retains its separate identity and two appeals would be required if appellate review is sought.

d) Applications for leave to appeal

Applicants must stress the reason why an interlocutory appeal is necessary. The Court of Appeals does not have the record and some applicants provide little if any documentation to support their applications. It is the appellant's responsibility to provide the record to the court.

e) Delayed applications for leave to appeal

The court considers the length of the delay and the existence of reasons to justify delay. An application which is delayed a short period of time will be treated differently than one which is filed a few days prior to the expiration of the six-month period specified in MCR 7.205(F).

f) Emergency applications for leave to appeal

In an emergency situation, it is important to call the Court of Appeals Clerk's Office to alert them that an emergency appeal will be coming in. The Clerk's Office will be able to advise the court so the judges will be available to consider the application.

If action is required within 21 days, a motion for immediate consideration should be filed. An answer may be filed within the time the court directs. Personal service allows the application to be submitted to the court immediately on filing. MCR 7.205(E)(2).

g) Warning/defect letters

A party receiving a warning letter has 14 or 21 days to cure the defect. Defects in the docketing statement and proof of service will trigger a defect letter. Minor technicalities typically are not the source of a defect letter.

These court-generated letters notify the party of a problem with the appeal and the need to cure the defect. Court staff stressed that these letters should not be ignored because they may result in involuntary dismissal if the defect is not corrected. An involuntary dismissal warning letter gives a party 21 days in which to take action after which the appeal may be dismissed.

Court staff noted that attorneys should contact the court with any issues or questions. They are there to provide information and to be as helpful as possible. Although they do not give legal advice, the staff has a great deal of experience and may have encountered situations similar to the problem the attorney is facing.

h) Transcript issues

As a practice tip, the parties should try to work out any transcript issues.

i) Page limit extensions

Practitioners should ask the court in advance for a page extension, rather than submitting a motion with the brief. If a practitioner does not ask for an extension of pages until the over-limit brief is submitted and the court denies the motion, the court will likely issue a defect letter. The party may then have a limited amount of time to file a conforming brief.

j) Due date extensions

If the opposing party agrees, a 28-day stipulation to extend the time for filing a party's brief may be filed with the court. In addition, on motion, the Court of Appeals will generally grant an additional 28 days in which to file the party's brief. A motion to extend the due date can be filed with the brief. It will be deemed timely filed.

k) Use of introductions in briefing

The group discussed whether introductions at the beginning of a brief are helpful to the court. The consensus was that introductions can be helpful if they are short (1-2 pages max!).

l) Supplemental authority

Supplemental authority is rarely stricken. There is a right to file under the court rule if the supplemental authority is released after the brief is filed.

m) Demonstrative and other exhibits

The Court of Appeals' IOPs suggest that counsel call the court in advance if she or he plans to use a demonstrative exhibit during oral argument. The demonstrative must be a part of the record. Demonstratives can be helpful, especially where the judge does not have the record before oral argument.

Key documents should be attached as exhibits to the brief.

n) Technology

Hyperlinks are currently for internal links only (they cannot link to Westlaw, etc). Over half of the judges on the Michigan Court of Appeals use iPads during oral argument.

o) Standards of review

Elaboration of the standard of review in the brief might be warranted where the standard is more involved (and not just the typical summary disposition de novo review). The applicable standard of review is critical to the court's analysis.

p) Oral argument

At argument, advocates should be aware that the court has a heavy case load and should focus on the primary issue. Advocates should be prepared to address his or her strongest and weakest points.

If a party's brief is filed late, the party forfeits the automatic right to participate in oral argument. A motion to reinstate argument may be filed with the Court of Appeals. If it is filed prior to the case call, the motion will be decided by an administrative panel. If the motion is filed after the case is scheduled for argument, the panel hearing the appeal will decide the motion. A motion seeking to reinstate argument should be filed as early as possible. However, some thought that a party seeking to file such a motion should wait until she or he receives the case call notice; otherwise, the motion will be handled administratively and is more likely to be denied. If the court denies the motion, it may permit counsel to appear to answer questions. Such motions can trigger an attorney grievance.

As a practice tip, even if a brief is late, the oral argument request should still be included in the brief.

2. Innovations for the Appellate Lawyer

This break-out session was designed to address tools for improving appellate advocacy and access to court filings and resources. The participants in this group voted on which of several innovations they found most important. The topics receiving the top votes are discussed below.

a) Online Court of Appeals docket access

A majority of the participants would like to see future online access to appellate briefs in the Court of Appeals, similar to the access currently available for cases where leave has been granted in the Supreme Court.

The court's updated or redesigned website was discussed. Some participants commented on how the docket number search was not quite as user friendly as it was before. When you perform a docket number search, you have to indicate whether it is for the Court of Appeals or the Supreme Court. A search by name gives all of the active and inactive cases. Notably, the "Cases, Opinions, and Orders" tab/link appears at the top on every page, making it easier to navigate to that selection. It may be a matter of time before all public documents are available online. However, there was also discussion as to whether this would decrease the level of privacy, particularly in child custody cases, where some courts do not make all documents available.

b) Access to unpublished Court of Appeals opinions

Participants believed it would be helpful to have access to unpublished cases before July 1, 1996, which is the current cut-off date on the court's website. Many agreed that having broader and equal access to unpublished opinions was important and convenient for their practice. There appears to be a higher volume of unpublished opinions, making online access very important.

The court rules still mandate attaching unpublished opinions to the brief, despite discussion that this was unnecessary due to the access to unpublished Court of Appeals opinions on its website. A judge who is reading a brief may not have immediate or ready access to the online unpublished case cited in the brief, and attaching it is convenient for that reason also.

When using a keyword search, use quotation marks around a phrase or case cite to narrow your search results. Future innovations that participants thought would be helpful included a pending issues digest/index to be able to see what issues are pending before the court which may be similar or significant to other counsel. If counsel could search the court's website for pending issues, counsel could possibly seek to consolidate their case with another case with the same issue or could seek to adjourn their oral argument until a decision was issued on a case pending before the court with the same issue.

c) E-filing in the Court of Appeals

It was noted that ImageSoft is the new vendor to be used for state court e-filing to make it more uniform. ImageSoft is an "e-filing manager," but many state courts, including the Court of Appeals, will also use ImageSoft as their court's e-filing vendor. It is unclear if state courts that are already using a different vendor will be "grandfathered" in or not.

Some participants expressed a fear of not receiving an email with a filing in the appellate court and it was discussed that multiple email addresses can be used/registered as a way to prevent missing an email notification.

There is a docket update lag time that occurs between the time a filing is made in the appellate courts and when it is docketed on the website. There is an instant time-stamp upon e-filing a document in the Court of Appeals (unlike some lower court e-filings, like Oakland County).

There was much discussion about the benefit of, and how to feasibly use, bookmarks when converting to .pdf format from Word or other word processing programs. The Oakland County filing system strips them out. There was discussion that with .pdfs, one can only remove metadata by scanning.

Many participants believed that online trial court dockets should be free to search and that e-filing in the trial courts is convenient.

Several participants noted that the non-standardization in trial court e-filing that currently exists causes some confusion and that certain state court's e-filing sites (like Wayne and Macomb Counties) are generally less favored than others (like Oakland County).

d) Email, smartphones and other devices

Use of smartphones to communicate by email, text, or instant messaging was important to most participants, who found it convenient for quick and mobile communication. Use of smartphones helped many attorneys manage, file, or delete email occurring throughout the day. But there was also a concern about the instantaneous nature of returning or replying to email in a quicker time frame, versus communicating by mail or even fax.

Tablets were also discussed. With bookmarks in .pdf on an iPad, judges can have the entire record available to them at oral argument. Advocates could benefit from this access as well, which is much better than flipping through pages and exhibits.

Participants also discussed how use of email (and the "ping" with each notification) and smartphones can be disruptive, and that they had to have email-free or smartphone-free zones to do research or deep-level reading.

Some attorneys questioned whether the use of email communication with the Court of Appeals could possibly be available in the future.

The increasing expense of keeping up to date with ever-changing technology, and newer versions of software, was also discussed.

e) Access to Michigan Supreme Court briefs

The group commented how there had been discussion on the Appellate Practice Section listserv in favor of keeping an archive of briefs on the Michigan Supreme Court's website. This access to Michigan Supreme Court briefs was important to practitioners who found it incredibly useful. Practitioners voiced a desire to also have applications for leave to appeal available online in the future. There is an ancillary list of Michigan Supreme Court grant cases on the website, and digest of issues pending on leave granted.

f) Advantages of e-filing

Following the luncheon speaker's discussion of paper-reading vs. screen-reading, the group discussed how e-filing made reading on tablets, computers and laptops easy. This makes access to those documents available from several different locations or devices. At this point, use of hyperlinks in briefs is not frequently used. Apparently, there can be a high cost involved in doing so and it takes up more computer memory or makes the document larger for filing.

g) Social media and blogs

Participants commented on the availability of appellate practice blogs, but not many were involved with blogging. News stories about the misuse of social media by court personnel or judges both within and outside of the state were discussed.

h) Future wish-lists

Future wish-lists of the participants included: better and less expensive access to trial court dockets and documents, online trial court case and docket search ability, and a more uniform state-wide PACER-like system to access all documents in all levels of state courts.

i) Research

Research tools like LEXIS and Westlaw were discussed. There was also a discussion of potentially beginning research with other sources such as Google, Casemaker, the Michigan appellate digest and Fastcase.

j) Production

The technical aspects of producing the brief were discussed, including .pdf format and tools that generate a table of authorities.

k) Oral argument

Visual aids are not allowed in the United States Supreme Court and are rare in the Michigan Supreme Court and the Michigan Court of Appeals. Some judges like them.

There was some discussion of whether one could file a motion to get a link to oral argument. Trial court video might also permit one to draw different conclusions than would be apparent from a written transcript. However, it was noted that the Court of Appeals does not make credibility determinations. There was some concern with protecting trial court decision-making.

Having access to oral arguments tapes in the Court of Appeals and Michigan Supreme Court would allow lawyers to improve their performance.

3. Appellate Rules and Procedures

This session focused on recent rule changes, including the entirely new subchapter on appeals to the circuit court. Proposed rules changes were also discussed.

a) Circuit court rules

Most practitioners who have dealt with the new rules felt that they worked well. There was a discussion as to whether the 35-day time period for deciding an application for leave to appeal placed too great a burden on the circuit court judges.

b) Time for filing late applications for leave

Practitioners discussed the proposed court rule change for filing late applications for leave to appeal, which would restore the time period to 12 months rather than 6 months. Sentiment was also expressed that the decreased time period for delayed appeals creates problems particularly in criminal law and family law cases. It also creates problems in the context of multiple appeals where the statute of limitations is an issue. A majority of attendees supported the change.

c) Probate appeals

There was a general discussion regarding jurisdictional issues with respect to probate appeals.

d) Suggested rule changes

Participants discussed rule changes proposed by the attendees. One proposal was to *require that all Court of Appeals cases to be published.* Unpublished opinions are viewed as "advisory opinions" and are not up to the same standards as published opinions. Further, the number of unpublished opinions causes "chaos" in the trial courts. Discussion centered on a possible rule change which would *allow individuals or bar sections to request publication.* Absent the rule change, however, one could contact the trial/appellate counsel to ask if they would consider requesting publication. **Practice tip:** One Court of Appeals judge urged lawyers not to be afraid to request publication, even during oral argument or in the appeal brief, particularly if the issue has little or no published authority or is an issue of first impression.

Another proposal was to *eliminate the requirement that unpublished decisions referred to in the brief be attached*; however, many attendees preferred to retain the requirement that unpublished opinions be attached. Many indicated that attaching unpublished opinions is beneficial for indigent parties as well as non-computer savvy attorneys and/or judges. At the other session, the consensus was that the rule would be eliminated eventually when a sufficient number of judges read the briefs online.

There was also a proposal *to alter the procedure and/or timeline for filing a motion to extend the page limit* for briefs.

A further proposal was to *permit "letter briefs" after argument* (raised by a session attendee who said the Seventh Circuit Court of Appeals has such a rule). This would enable a party to correct an answer made at oral argument or to provide an answer to a question he or she could not answer at argument. Some found this to be an interesting idea, but with the potential for abuse if not limited. A majority of attendees thought it would be a good idea, if limited as to time and length (perhaps only a page).

A suggested rule change was to *alter the definition of final order in MCR 7.202(6)(a) to make more post-judgment orders appealable of right.* This could include orders granting or denying injunctive relief (as in federal court) and declaratory judgments in multi-count cases (when counts other than the count for declaratory relief remain pending). One solution would be to restore to circuit courts the right to declare that such orders are "final" and there is "no just reason for delay" (as with 2.604(B) or FRCP 54(b)). Another solution would be to permit circuit courts to certify controlling questions of law for immediate appeal (as with 28 USC 1292b).

One attendee suggested *better coordination between Chapters 2 and 7 of the court rules on definitions of "entry" and "final order*." With respect to "entry," MCR 2.602(A)(2) and MCR 7.204(A) are inconsistent. MCR 2.602(A)(3) and MCR 7.202(6) are also inconsistent regarding "final order."

e) Multiple filing fees

One attendee questioned the justification for charging two filing fees when two orders are appealed at the same time in the same case. It wasn't clear whether this was required by statute or rule, or just court policy

f) Automatic stays

Should there be automatic stays for venue and similar applications for leave? This was raised, but there was not much discussion on the topic.

g) Court cancellation of oral argument

The issue was whether the Court of Appeals should have the right to cancel oral argument that has been preserved by the parties in cases where the Court concludes argument is unnecessary. The Court's current policy now is to afford argument in all cases where it has been preserved by counsel. The Court's former policy was to submit cases on summary docket without argument. The pros and cons were discussed.

h) Disposal of trial court exhibits

Discussion centered upon whether, under MCR 2.518, the trial court should be required to give notice to parties before disposing of unclaimed exhibits following trial or hearing. The rule contemplates that the parties will have been told to pick up their exhibits at least 56 days earlier.

i) Reply briefs on applications for leave

Attendees discussed whether the proposed seven-day period for filing a reply brief in circuit court appeals is too short (driven by the requirement that the court decide the application within 35 days), when the appellee's brief typically isn't filed until 21 of those days are gone. No one present understood why the time for decision needed to be as short as 35 days (including a circuit court judge). One attendee pointed out that e-filing would help in this situation because the appellant would have a whole week to reply, not just the part of the week remaining after traditional mail delivery.

j) The record

One attendee wondered how to deal with untranscribed tapes and video used at trial (examples are taped confessions and recorded phone calls). Other attendees recommended using a motion to file "in the traditional way."

4. The Art of Seeking Reconsideration

a) General considerations

This session was designed to address the process of seeking reconsideration, why it might be advisable, how it is viewed by the court, and the requirements that must be satisfied. The initial discussion centered on the reasons one might seek reconsideration. For example, reconsideration might be sought when there is an intervening change in the law, when the court's decision reflects error, when a conflicting opinion is released, when the panel is split and a dissenting opinion is issued, when the decision is based upon a mistake of fact, or when the court fails to address an issue or addresses it in a cursory fashion. Judges expressed that the court does not take it personally when an appellant argues that the court erred.

At the Court of Appeals level, some seek reconsideration to give them more time to prepare an application to the Michigan Supreme Court. Additionally, a reconsideration motion permits a Supreme Court appellant to argue that the error was brought to the attention of the Court of Appeals. If the error results from a mistake of fact or the court's failure to note important evidence in the record, a reconsideration motion may permit the Court of Appeals to correct the error. Clerical errors can also be corrected. Reconsideration is also advisable if a favorable Supreme Court decision comes out in the interim. On occasion, litigants might seek reconsideration to preserve an issue that was not previously raised or to present additional evidence that might not exist in the record. When a reconsideration motion is filed, the judges will get the brief and response.

At the circuit court level, reconsideration may be considered if a published case comes out within the 21-day time period for filing. The opinion might be prospective only, but it might cause the court to take another look at the issue. If there are two published decisions on the same topic, the first out prevails. Rarely would the court hold a reconsideration motion in abeyance pending a Michigan Supreme Court case addressing the same issue

At the Supreme Court level, there is a greater likelihood of getting reconsideration if the court ordered peremptory reversal.

There was a discussion of the proposed change in the Michigan Supreme Court reconsideration rule to expressly embrace the criteria of MCR 2.119. Without the change, the court might have more discretion. However, there are policy reasons behind the palpable error standard.

b) Behind the scenes view

When a reconsideration motion is filed, the court will receive a memo if there is new material or something was missed. But the majority of reconsideration motions are screened without a memo. Statistics show that reconsideration is rarely granted. It is rare to convince the court that the law it applied was wrong. Further, a grant of reconsideration only means that the court will look at the issue again. The court's interest may be triggered by unintended consequences, or where it might be necessary to clarify or modify the language of the opinion. It might be more difficult when the result would be the same but the analysis is altered.

Some queried whether a rule should be proposed disallowing a response unless the court directs (as is the case with federal court and lower court reconsideration motions).

There is a two-week period between the time the Court of Appeals judges sign off on an opinion and its release. All three judges must agree to publish. Only parties can request publication, and the court prefers that this be done by letter, rather than via a motion for reconsideration. Prehearing recommends whether to publish. An authored opinion is required if there is a dissent. There have been fewer conflicts panels in the last several years.

C. Family

1. What is the Record on Appeal in Domestic Relations Cases?

a) How to handle confidential records

Psychological Reports

If it is not part of the record below, it does not get to the Court of Appeals. If the trial court relied on a psychological report and it is not in the record, this is error and one should argue for reversal.

Child Interviews

Request that a record be made of the court's interview with a child regarding factor (i), the reasonable preference of the child, and that the record be sealed.

Protecting confidential records

Request a protective order restricting release of records such as psychological reports. If the confidential record is part of the record below, send it to the Court of Appeals under seal.

b) Judicial notice of prior cases

How do you document it below? Get the parties to agree and put testimony on the record about what happened in the prior case instead of paying for transcripts from the prior action.

Questions were raised about what does it mean and what is included when a court takes judicial notice of "a case" or "the file."

c) Transcripts

In post judgment matters, the court rule requires that ***all*** transcripts from the case must be filed with the Court of Appeals. But often, the entire record back to the start of the case isn't relevant to the post-judgment issue before the court. If the other sides objects to providing less than the all the transcripts, remind them that taxable costs are possible to the losing party.

Practice Tip: provide the transcripts back to the initial motion that raised the post judgment issue now on appeal.

d) What is the effect of post-judgment/order changes in the case?

Consider whether the change renders the appeal moot.

e) Friend of the Court referee hearings

Transcripts from a referee hearing must be provided if the trial court relied on them in its decision.

Query: what if the trial court doesn't see or review the transcript? Then it's probably unnecessary to provide them to the Court of Appeals. It was noted that some Court of Appeals judges have never seen referee transcripts in an appeal.

f) What if the trial court relies on years of experience with the parties?

Concerns were raised where a trial court refers to the history of the case or the court's years of experience with the parties. This concern may be addressed in the trial court by making sure that the judge explains the basis and evidence relied on for its decision. The court may refer to specific past motions or orders in the case to support its findings.

g) Exhibits

It is important to make sure that appellate counsel has all of the exhibits and that they were all admitted by the court. This is the appellant's responsibility.

Is there a more effective way to get the exhibits? One suggestion was to ask trial counsel to confirm on the record that all exhibits were returned.

Per court rule, the trial court may dispose of exhibits 56 days after the hearing. This impacts many appeals, especially applications for delayed leave. Query: Should the rule be amended to allow for more time?

h) Motion to change custody denied; no change of circumstances/proper cause found

In many cases, there is no hearing on this threshold issue and it is decided on the pleadings. As a result, it is critical for the trial attorney to file a detailed motion that tracks the best interest factors and with attachments. An appellate attorney facing an incomplete record may have no choice but to file a motion for reconsideration prior to appealing.

i) How to address illegally obtained evidence (surveillance results)

In one case, the trial court indicated it would consider the illegal evidence but would not include it as evidence or part of the record.

Practice tip: On appeal, include the evidence the court relied on under seal.

j) Adding to the record

Can an appeal brief refer to information gathered from the internet or other "expert" opinion sources if it was not used below? It was agreed that referring to a dictionary or other similar resource to define a common word is acceptable practice. But it is not acceptable to add new evidence (add to the record) to fix a hole in the case by referencing some outside source, such as WebMD.

2. Attorney Fees in Domestic Relations Cases?

a) Attorneys Fees under MCR 3.206 (need and ability to pay; violation of a court order)

The trial court can order appellate attorney fees – frequently the trial court will tell the attorney to ask the Court of appeals to award fees; however, determining the amount is a trial court issue, and not an award that the Court of Appeals can make.

MCR 3.206(C) provides that a request for fees can be made "at any time" for the "action." This means that after an appeal a party can request appellate attorneys fees from the trial court. See ***Pierron v Pierron,*** unpublished decision of the Court of Appeals.

MCR 3.206 is not as broad as MCR 2.114 (frivolous filings). The attorney has to point to the court order that was violated (MCR 3.206(B)) or the need of the party (MCR 3.206(A)).

In domestic relations, there generally is no "prevailing party" standard, although the grandparenting time statute, MCL 722.27b(8), is an exception.

b) Effect of request for attorneys fees

A motion for attorney fees for the appeal does not toll the 21-day period for filing an appeal (not a post-judgment motion for new trial, amendment of judgment, or motion for reconsideration),

If the request for fees is denied, it is a separate issue, appealable by right as a final order under MCR 7.202(6)(a)(iv).

The Court of Appeals will likely consolidate the attorneys fees issue with the underlying appeal on the merits of the case. If the court does not do so sua sponte, counsel should file a motion to consolidate briefing deadlines, which will make the deadlines run from the latest date. However, you may not wish to do this for a custody matter because it could delay the custody decision.

Ponte v Ponte - recent development - pre ***Ponte,*** the Court of Appeals said that attorneys fees are only appealable as of right if the underlying proceeding was likewise appealable by right. So even if the fee award is a small amount, there is a better chance of getting the application for leave to appeal granted on the other issues because you are already before the Court of Appeals on an appeal by right.

c) Specific domestic relations statutes permitting attorneys fees

The grandparenting time statute permits attorneys fees and uses the British rule – it is not based on need and ability but it is awarded to the prevailing party and is a potential built-in sanction.

The Michigan Indian Preservation Act also awards attorneys to the prevailing party. Perhaps this statutory provision was enacted as a disincentive to breaking up Native American families.

MCR 3.216(I)(5) precludes sanctions for rejection of mediation in domestic relations cases.

d) Taxable costs

An order from the Court of Appeals for costs can be enforced by a motion in the trial court to enforce the order and then converted to a collectible judgment.

e) Attorneys fees for a vexatious or frivolous appeal

Edge v Edge - the trial court cannot award fees based on the vexatiousness of an appeal. That question can only be decided by the Court of Appeals. MCR 7.216(C). The *Edge* decision, however, did not preclude attorneys fees under MCR 3.206.

Vexatious means that there is no basis in law or fact for the argument.

A motion to deem the appeal a "vexatious proceeding" may be strategically filed before the briefing or afterwards. MCR 7.216(C).

The Court of Appeals may impose costs if the party/attorney's appeal violates the court rules. MCR 7.219(I); see also MCR 2.114.

f) Reasonableness of attorneys fees

Smith v Khouri addresses attorney fee awards and provides reasonableness standards.

The State Bar Economic of Law Practice Survey can be judicially noticed by the courts as to what constitutes a "reasonable" attorney fee.

g) Attorneys fees and bankruptcy

There was a change in the 2005 Bankruptcy Code.

Under MCR 3.206(A), an attorney fee award in a domestic relations action will probably be construed as a non-dischargeable support order, although this question is still open.

It is a good idea to put this language in the attorney fee order.

D. Child Welfare

1. Trends in the Law

In the area of family juvenile law, typically when a parent's or caregiver's rights have been divested, an appeal was futile. Now the Court of Appeals is taking a closer look at the lower court findings supporting the termination of parental rights.

More instruction is being provided in areas that the court was previously not active in. The Court of Appeals is taking a serious look at the issues.

Fundamental rights/strict scrutiny standards may apply. Previously, the rights of incarcerated parents were not actively preserved. Now, reversal may be obtained if parents are

not permitted to participate in the proceeding due to incarceration. There has been good law in Michigan but it wasn't always followed. Now, the Court of Appeals is beginning to reverse terminations.

Efforts are underway in Oakland County to improve representation. There is new legislation regarding the removal of children from the home. The case involving ***Mike's Hard Lemonade*** precipitated the new statute. A child was held in foster care for three days without a hearing. The agency would not give the child to other family members.

2. Oral Argument

A client may be a hindrance at oral argument. A client's attendance may appear to be manipulative. But some clients want to attend. Court staff suggested that the client be told about the hearing and be given the option to attend. It is not patronizing to introduce the client but the court has likely already matched up the attorney and the client. Defense attorneys are sometimes taken aback when a plaintiff appears and are concerned about the effect it will have on the court. The court is not affected one way or the other. A family lawyer should tell his or her client to be there if a child is involved.

Once argument begins, the client's presence is irrelevant. Sometimes the client wants the argument to go a specific way and wants the lawyer to address certain topics. Generally, it is good for unsophisticated clients to see the argument. Some suggested that a client's family should be encouraged to attend (particularly when the client is incarcerated), and that a packed courtroom gives life and vitality to the case.

There was discussion as to why attorneys will sometimes not show up for oral argument. In the criminal context, attorneys might be paid little for attending oral argument. Judges love oral argument. While the decision centers mostly on the briefs, oral argument can sometimes affect the outcome. An appellee should appear for oral argument even if the appellant is not endorsed.

3. Briefs

Child welfare briefs may be more extensive than briefs addressing other areas of the law. Sometimes, the relevant facts span over a period of several years. It takes a considerable effort to condense the brief to 50 pages when the facts alone may require ten pages. Yet, the court does not get many requests to extend the page limits.

Some participants felt that there was no need to have an introduction, and that just as much or more can be said in the questions presented and in the statement of facts. Child welfare termination cases are unique because they are so fact intensive. The standard of review should be brief, even just a single sentence.

One consideration is whether to put all of the facts into the statement of facts or whether to reserve some of the facts for the discussion of the issue and thereby avoid repetition. There should be enough detail in the facts to provide context and understanding, and then weave the

details into the discussion of the issue. The idea is to enable the reader to understand how everything is related.

Citations to the record should be in the argument section if they are critical to the issue. The Court of Appeals Research Division will conduct an independent review of the record. This is an important part of what they do.

No preference was expressed for a succinct versus a deep issue. Issues can be waived if they are not in the statement of questions presented. They should be kept as tight as possible.

4. Other Issues in Termination of Parental Rights cases

a) Removal orders

Parents have an absolute right to appeal from removal orders, but an evidentiary hearing is essential to making a good record from which to appeal.

b) One parent doctrine – *In re CR*

Not dealt with in *In re Mays*. Try to consider whether your parent is an adjudicated parent. Maybe file a motion for placement or request an adjudication hearing to establishing whether the parent is unfit. Your appeal of right flows from the dispositional hearing. Remember that jurisdictional grounds must be appealed after jurisdiction is taken, not at the conclusion of the case.

c) Initial dispositional order appeal – MCR 3.993(a)

Request permission from the trial court to file the appeal (may help with you getting paid as appellate counsel). You, as the appellate attorney, would have to order the transcripts and file the appeal. You may also want to advise your client on the record of their right to appeal after the disposition.

d) *Olive/Metts*

The court did not send the case back for individual findings as to each child – only for the children who were in the relatives' care. The key to the court's decision is that it will take children who appear similarly situated (i.e., in foster care or placement with relatives) and consider whether their circumstances differ.

Many attorneys believe that if a child is with relatives the court cannot terminate parental rights, but that is NOT true. The trial court only has to consider whether they are with relatives and whether that makes a difference regarding the child's best interest. Being with relatives who may want to adopt them could provide the child with permanence and would be in their best interest.

III. TECHNOLOGY PLENARY

Where the Brief Meets the Brain:

Appellate Practice in the Digital Era

MODERATOR:

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Kathy Donovan

Plymouth, Michigan

Wednesday, April 25th, 2013

4:45 p.m.

MS. GOLDMAN: I'd like to welcome everyone to the Technology Plenary Session. My name is Barbara Goldman. I was thinking about this before we started. After our first bench bar conference back in 1994, a main comment that anybody had was that there weren't enough telephones. In 1997, we were all wowed by a demonstration of a CD brief. In 2001 the technology session featured a discussion of fonts and tight volume limits. And in 2003 e-filing was just a glimmer on the horizon. 2007 we didn't really do a

separate technology session, and the latest session the focus was on the mechanics of e-filing, getting your brief in front of the Court.

Now we have an appellate practice community that is increasingly dominated by practitioners, judges and staff whose primary form of communication has always been digital and who expect instant and unlimited access to information.

So in session we're going to try to consider how the age of electronic information affects the practice of appellate law and how to apply technology for effective advocacy.

The panelists are, from my left to right, Judge Kirsten Frank Kelly from the Court of Appeals, Kathy Donovan, the court's technology training and development specialist, Scott Bassett, who manages to practice law in Michigan while living in Florida, and Stuart Friedman whose name you should recognize from his column. Tech Talk in the ATS journal, as well as being joined by Robert Dubose, who presented also during the lunch presentation.

I asked each of the panelists to begin by talking for a few minutes about one thing that they would like to share with this audience while they have the opportunity here. Then we'll have one or two other questions and the majority of the time I expect to devote to questions from the audience.

Denise Divine, who's in the pink over there, has the index cards which she'll walk around and collect and then I'll relay questions to the panelists. Let's welcome our panelists and we'll begin with Judge Kelly.

JUDGE KELLY: Well, thank you. It looks like we had a long day and I can't believe how many of you actually made it here for a technology session, but this is near and dear to my heart. I'll give you some background of iPads in the Court. Chief Judge Murphy provided each judge, made sure each judge had an iPad and the Court loaded onto that the GoodReader application so every single judge has an iPad and every single iPad had a GoodReader application, so we're all focused in on that.

The judges in the Court of Appeals use the iPad in a variety of different ways. For example, I'm a very heavy user of the iPad. I've completely eliminated any kind of paper except for taking a perhaps recirculated opinion with me to oral argument. Now on the GoodReader what we do, what I do is you have a file that has like May 13th case call with three panel members on it. In that file you have case number one through whatever. Case number one is identified by the docket number, the name of the case, like People versus Smith -- I call it Smith -- and who has the writing responsibility on that, and that file,

every single thing that's been filed in the Court of Appeals for that particular case for the oral argument is identified separately, so you have the appellant's brief, the appellee's brief, any exhibits, maybe the PSIR or something like that if it's criminal. That's how I use it and, like I said, each judge has different ways of using it.

If I leave you with the one thing that's critically important as everybody migrates to iPads and electronics is bookmarking. Bookmark your brief, bookmark your exhibits, and I'll tell you why. Justice Young this morning -- I wrote it down -- never frustrate the person you're trying to persuade. If you don't bookmark your brief, bookmark -- like Judge Boonstra, he tends to bookmark it as he goes through if they're not bookmarked. I don't have as much a problem with the briefs but I do with the exhibits. I had a case two months ago and the exhibits were broken down into two sections, A through C and D through Z. D through Z was not bookmarked, it was scanned, and so it wasn't searchable, and it was 329 pages and I needed Exhibit H and I couldn't find Exhibit H because you're dealing with 329 pages, so I finally gave it to my JA and said, "Please find Exhibit H in here." It wasn't in there. It turns out it wasn't even in. Then I thought maybe they attached it A through C. A through C is not bookmarked and when I went to A

through C, the attorney filing it put on a security lock so I couldn't get A through C. H, which I really needed to decide the case, I thought it was a very important exhibit, and it wasn't even attached. So if you're bookmarking it, you're not going to miss attaching Exhibit H that I really need and I don't have to go through 329 pages. So bookmark, bookmark, bookmark. That's the one thing. Kathy will tell you how to do it.

MS. DONOVAN: I was asked to join the panel to share some in insight on what goes on behind the scenes at the Court and provide some tips on what you might want to do to please the judges and the other folks who are reading your document. I will mention on the Court of Appeals website we have two documents you can't print out. One is Preparing a PDF document for Electronic Filing and the other is Ten Topics for E-filing. Particularly, I'm going to mention a few tips and tricks. They're all thoroughly documented in here sort of generically to whatever version of word processor you use and also PDF software. So, in fact, many of the judges are doing what Judge Kelly does, loading at their documents on to the iPad in preparation for case call. It makes a very portable and updatable filing system and it surely is working out great. And that's been a huge learning curve in the last year but I think we're there with many of our

judges.

What they end up with, as she mentioned, is a whole collection of documents and including documents that are scanned by the clerk's office, so if you're wondering, okay, if I'm still paper filing, what happens to those documents, if a brief is paper filed, we are scanning those in the clerk's office, and all of our offices we're scanning briefs, so those are available electronically to all of the judges and it is a gradual process but we're moving in that direction with every piece of paper that comes over the counter. Anything that's scanned in the Court we're actually OCRing or adding that letter of text recognition.

Now you may also wonder what happens with the documents that you're e-filing. They're documented and readily available, but in case you're wondering what they look like on the judge's iPad, they're exactly what you submitted, so if you've used a certain font, if you've used margins or a page layout, that's exactly what they're seeing. That doesn't change.

Keep in mind the file name you use is also the file name that we continue to work with it at the Court, so if you've made it something wild and crazy, we suggest keep it descriptive and not too long. We don't process your e-file documents in any way to make

them searchable and we also don't process them in any way to make them smaller, so that kind of task is on you and, as you can tell, it would be much appreciated and would avoid frustrating the judges.

If you've added any features to your documents to make them more user friendly, if you're adding the bookmarks, we're not going to strip anything of that sort of thing out, so all of that is beneficial, and it basically is what it is when you submit it.

Now, for the judges and the others in the Court who are reading your documents, what makes them easier to open and read and review, keep in mind, like Judge Kelly, many of our judges are reading on an iPad, they're reading on laptops, they're reading on dual monitors in their offices, so it's a real mix and it kind of depends on the judge, but many are reading on screen. They open your PDF documents in Adobe Acrobat on a computer or they're opening them on GoodReader on the iPad typically.

So what do we suggest? First of all, some quick tips. I'll give you a handful and then I'll slide it down because we have some folks here who actually do most or many of all of these tips. One, if your briefs, you're moving them into PDF, convert them electronically directly from the word processor. We don't want you walking over to a scanner, scanning

them and having PDF output that way. Instead, use PDF command in your word processor. The files will be smaller, they will look better and will be fully selectable and fully searchable.

As Judge Kelly mentioned use the bookmarks to use the left navigation tab. Again, if you're not sure how to go about it, there's one way to go about it. When I look at something new, I look at YouTube. Everybody puts videos out. You can learn in a flash how to do a bookmark. Adobe makes it, Adobe TV, to figure out how to make bookmarks and save them with your document.

When it comes to making your document searchable and selectable, because those things go hand and hand, all the judges, everyone wants to spend a little less time trying to locate information and in this day and age we're all used to searching, so whether somebody can pick up your document and work with it depends on whether it's just a picture of your document or whether it actually includes the text and if it's not searchable, obviously they're looking for a particular word or phrase and they have to manually scroll through and try to find it.

At your scanning equipment, a lot of times scanning equipment has a setting that you can apply that will just turn it into a text-based document so look for that setting on your scanning equipment. If

not, you'll open your document in Adobe or one of the other kinds of software and there will be an option to, to use the text, so to go to an OCR typesetting, and you'll choose, for instance, recognize text and then when you save the document, it will be searchable.

It will also be selectable, which is awesome. It will be cleaned up, it will be rotated, so it makes it all the way around nicer to work with. When the text is selectable, many of our judges, and I've worked with a number of them in the last year, they've got the document on their iPad and they're using it to make annotations, so they're using underlining, they're using highlighting, they're adding notes to it, and if your document is not selectable or searchable, then they're unable to use some of those annotation tools, so that's just an another tip along the way.

You'll know if your documents are selectable and searchable because when you open then in Adobe Acrobat or a program like that you'll also be able to use the select tool, the search tool, the copy tool. There's even a read out loud tool. And those tools let you know there's text in the document and it's not just a picture.

On a final note, we encourage you to optimize so the size of your file is reasonable. You

should be mindful of that as you submit your documents because we don't do anything to change that. If your documents are optimized, and again that's a quick command in Acrobat or another program like that, then they're quick to open, they're efficient to store, they're easy for downloading and syncing. It's all going to happen very nicely and overall they're just way more accessible.

We have our documents hosted on servers in Lansing and those documents move to all of our other locations so the smaller it is, the better for us, probably the better for you as well in your whole overall file storage system, so there's commands to optimize scanned documents, commands for file optimizing. Again, they're all in this document. If you don't have a copy, look it up on our website.

Generally, just wrapping up then, saving directly to PDF, using bookmarks, making it searchable, selectable, optimizing, really reinforcing a lot of the ideas that Mr. Dubose brought up this morning, and I'll pass it down.

MR. BASSETT: Just to highlight the importance of making sure you're filing searchable PDF briefs, I was sitting next to Judge Stevens at one of the breakout sessions and she had a brief on her iPad and she was trying to select text about it. She was commenting about how when she was a trial judge she

used to pull selected text out of briefs and whatnot to help her structure and build her opinions because sometimes we actually write things pretty well and sometimes the judges want to use them and she wasn't able to do that using GoodReader on her iPad. I looked over. I was horrified to see it was a brief, obviously, and it even had the two little black dots at the top where it had been hole-punched. It was scanned but not OCR'd, not a searchable PDF, and as we know, the Court doesn't do any post-process filing on the briefs. Does anybody print briefs and then scan to e-file? So the offenders are not in this room. That's a good thing. Another good reason to do this, before my tip -- I have a tip -- another good reason to OCR everything you receive is -- you mentioned the read aloud feature in Acrobat. Actually, for iPhone and for Android phones and for the iPad, any portable device really there are apps you can buy that will take any PDF and read aloud.

One of the things I like to do since I live in Florida, and you don't, is walk on the beach with my headphones and listen to transcripts and briefs. It's not my final review but it's a good preliminary introduction what the substance of the case is all about, and I get to do that while I'm doing something else, and these apps will play any searchable PDF, so that's another reason why you want to have searchable

PDF's on both ends, what you file and what you receive. Of course you can do OCR yourself with Adobe Acrobat and other programs.

I'm going to go up here and show you what I really wanted to talk about. Okay. Now, as appellate lawyers, how do we spend most of our time? It really isn't the research and writing, I don't think. I spend most of my time reading trial court records, reading trials and transcripts and I want to be able to do that in a more comfortable setting. I don't want to be glued to my desk. After all, I live in Florida. I'm going to say that four or five times. I'm sorry. So what I found as an app, and I used to use GoodReader all the time, I think I found a good alternative. It's called iAnnotate PDF for iPad. It's more expensive. Good research, five dollars. This is twice as much money. I think the court has it, some of the judges do, and this has a lot of features. You install it on your iPad and then you transfer your documents over to your iPad and you can read them anywhere you want including on the beach. Did I mention I live in Florida? So what I use to get documents over to my iPad is a great file syncing service called SugarSync. A lot of people use Dropbox. SugarSync has a great interface. It's easier to use than Dropbox. It's a sync in place map so I don't have to drag things into a Dropbox, a

separate folder on my main computer to get them to sync with my iPad. I just right click on my File Explorer view and it brings up your context menu, one of the entries of SugarSync and all I have to do is say add SugarSync and those in a matter of minutes become available on SugarSync servers and I can download that to my iPad. Once they're on my iPad I can pick open. All the pdf's will be listed on open. I pick iAnnotate PDF to open it.

What I did is something like this. This is a transcript from a case, and you can see the menu, tools menu over on the right side, and among the things you can do is you get a highlighter, you get a regular pen, you can type if you want to, and if you're using one of the more recent iPads including the iPad Mini that I use a lot, it's got Siri, voice dictation. I don't even have to type. I can talk in my comments. When I talk about the iAnnotate PDF, all the annotations you make are compatible with Adobe Acrobat back on your desktop computer. So you finish making your annotations, they're going to be there when you get back to your office because you can e-mail your finished product back there.

This is what the annotations look like in iAnnotate PDF as you're going through the process. It's a standard Adobe Acrobat. The window. Or you can hand write if you want to do your annotations that

way, and again these will appear back on your desktop when you e-mail the document to yourself. Or you can do searches. Next window, full text search. I was searching for the word list. I'm not sure why in this case but that's what I was doing. And then when you're done, you can bring up the document in iAnnotate PDF and pick the e-mail, either the annotated document, a flattened document, which means you can no longer modify those annotations, or you can send the original file, if you want to, to yourself by e-mail, and then you've got it back in your system on your desktop and that's it. So you don't have to be stuck to your desk reviewing transcripts, reviewing anything really. A brief, do it anywhere you want. Get out. Enjoy the world, enjoy the sun. Okay. That's it.

(Applause.)

MR. BASSETT: We're going to do a switcheroo.

MR. FRIEDMAN: I think one of the tips we've heard here is invest five dollars, buy GoodReader if you own an iPad and make sure your brief looks correct when it's up on an iPad.

While he's doing that, I was asked to take Mr. Dubose's suggestion and mock up a brief, attempting to incorporate many of the things that he talked about. I used Apples iBook authoring

software. You don't have to tell me that some of the things I've done violate court rules, I already know, and like many of the great ideas today, I'm not sure they would necessarily get by the clerk's office today but in the future it may.

This is a mock-up of a brief I had done as an appellee in the Court of Appeals in a case, and I've changed it around a little bit. I took in mind, first of all, the concept of people get, need to get their information quickly and I've added a bunch of features and obviously changed my formatting.

As you can see, it's two columns, different text formatting, and I've added something that's probably going to be a little bit controversial, and I'd love to hear your opinions on it afterwards. Assuming I don't lock myself out of my iPad, which is a mini oral argument.

My name is Stuart Friedman and this mock oral argument is based on a case I argued against the county prosecutor's office last year, in the technology. In 2007 my client's brother moved in the family home in Oakland County. Less than a year later, the brother absconded on parole. This is 2008.

In 2011, the absconder recovery unit showed up at my client's home, in January. My client greeted them at the door and found an armed SWAT team. My client was dressed only in his underwear. The unit

demanded entry, refused my client's assurance that the absconder brother wasn't present and made him sit, my client, at a table which was very confining in his underwear, after having been declined permission to get minimally dressed. The prosecution relied on the 2007 form consent signed by the absconder brother, and my client's nominal consent was made facing an armed SWAT team, again confined in his underwear.

In this model argument, I would be demonstrating how the U.S. Supreme Court in Bumper versus North Carolina dictated this was not a voluntary consent within the meaning of the 4th Amendment. Since time is limited I'm not presenting the full oral argument here, but I believe this small demonstration shows the power of what a good video argument could do embedded in a tablet presentation.

(Applause.)

MR. FRIEDMAN: Let me show you a couple other things that I tried to tweak in here, including smaller paragraphs, as you can see, a variant of his statement of the case, which I made with his name and fast facts but just a quick sheet that gives you a timeline that way. Instead of a statement of questions presented, an inset summary of my key points for this argument. Pictures obviously can be embedded. You've seen them. Here's the summary of the legal arguments for this issue. And case

citations do appear here.

Here's where I think we have to move beyond Brian Gardner, though, if you put the sites in a footnote, the I jerks around. If you put them back in the text, you've got a problem. I've been playing with concepts to try to deal with it. One of those is a call-out with a citation but that's only going to work once we move beyond paper because at that point, and I suppose with the video as well, your paper copy is not going to be an accurate reproduction of the digital copy, and it's one thing if the digital copy has blue hyperlinks instead of black, the copy filed by your opponent, this is completely a different story. This is just standard text so swiping through it quickly, but, again, I also played with the idea instead of string sites of using tables that give very fast facts about other cases you might rely on.

Obviously, these citations are completely mocked up. And this is the conclusion of the mock brief, but I do want to talk about a couple of the things that I see showing something like getting down in full form and hoping you can take away some of the ideas in the interim. A, we can't mandate that everybody look at briefs on computer or tablets today, and I think that's coming. The Court Rules, I can't even begin to count how many I violated with this brief.

Archival issues, we need to be able to look at documents in 20 years and we need to select if we're going to go beyond PDF or into a format that accomplishes it, something that we know will be readable down the road. It was a big fight to get PDF accepted. I think eventually a lot of these features can be directly implemented in Acrobat and that will die but not at the current standard. We need to adopt, in my opinion, we need to go beyond page limits to word count. As we're moving into our fifties, here, sixties, et cetera, the ability to blow up the type as you read it is one of the beautiful things about reading a brief on a tablet. You don't need a one size fits all font, but the current PDF structure sort of makes that happen. I can make my text really flow based on how bad my eyes are. Ask me in a couple years and the type size will probably be a little bit bigger, and this format also cries out for the dangers of smuggling things into the record. We obviously have our honesty and integrity, but it's just going to be a little too easy to want to link out some web page or something, and we have that problem as it is. It I think it will be a larger problem down the road. Thank you.

(Applause.)

MR. DUBOSE: I have to say, Scott, that's really cool. Movement.

MR. BASSETT: That was Stuart actually.

MR. DUBOSE: I'm sorry. I love the idea of the video arguments. A little bit unconventional. I'm not sure how it fits in our practice but it's a great idea. I don't think we can do it yet, but it's a great idea to have the text with the summary points. I never thought of doing that. I love that it looks more like a book. It's how you see a lot of well done textbooks done these days.

My main piece of advice, though, to get back to Judge Kelly, her advice was bookmark. My main piece of advice is bookmark a lot. And let me tell you what I mean by that. I recently, my family and I went to Italy over spring break and you don't have to carry travel books anymore, if you have. I read -- I downloaded Lonely Planet and I wanted to look up information about Florence, the Uffizi and Duomo and restaurants in Florence. I don't do the bookmarks in Lonely Planet in the Table of Contents, find it both places, and it says Florence, 80 through 220, and then the next bookmark was Pisa, and I couldn't go to the Uffizi and I couldn't go to the Duomo. I had to go through those 200 pages and just flip through with the iPad and hope that I found it and I was flipping through page by page by page, and you have to remember that if you take a brief, which is a really long document, and you put it in a scrolling format like a

PDF -- I mean you're erasing 200 years of technology, you're going back 200 years ago. The early Christians invented this concept called a Codex, which was the book that replaced the scroll, and it's a really neat idea because you can find things more quickly with the Codex or a book, but when you have a brief that's a long document and it's in a PDF. You've basically gone back to the scroll unless you do something to give readers a map, a structure that lets them jump around the document and move around the document. Otherwise, they just don't know where they are, and that's why the bookmarks are so important.

Now, I ultimately think, and Stuart and I are probably on the same page on this -- I often think we'll go beyond the scroll, that we will have briefs that are web pages with multiple -- there will be a home page and each chunk of the brief will be its own page with short text and you'll move from one page to the next like that. We won't have to worry with scrolling and PDF's anymore because I think we'll eventually have briefs that are like websites because that's where the rest of the culture is going. But until we get there we have to have the road map and right now the best thing we have if you're doing some things that judges are going to scroll through is the bookmarks.

MR. BASSETT: You mentioned we'll have

websites. What's interesting about that, how many of you have ever used -- it's a presentation program called Prezi, P-R-E-Z-I, and maybe our briefs will look something like that, be very graphical, and what they do, I don't know if they can find a sample, it's basically got like a central scheme and then it's got spokes coming off that hub and then you click on those and it takes you down a different path, so you could have a central argument and then your various points. School kids are using this and their teachers are using this in classes. You know, take a look at it, prezi.com, P-R-E-Z-I. See what it's like. It's very different from traditional Power Point and very different than a brief but it may be the way we're going.

Are you ready for questions?

MS. GOLDMAN: I think at this point we'll have a chance to start passing out question cards for questions. One of the things I suggested that the panel think about was e-filing has given us the ability to include much larger volumes of material without having to be concerned about things like, you know, is the copier going to jam and how much is the FedEx bill going to be, so I asked each of them to consider, is this affecting advocacy or affecting either the advocate's side or the court's side, should more be included or perhaps is less more, and I

believe Judge Kelly had a comment on that subject.

JUDGE KELLY: Again, it's going to depend on what your issue is. For example, if you're doing a contract case, attach the contract, especially if you're talking about what the language of the contract is. That's very important. But you don't need to attach every single deposition that was ever taken in the case. You know, when you had paper and had the tabs, it was really easy to be able to read your brief and then flip to the tabs at the same time to refer to it back and forth, which is why I say bookmark, bookmark, bookmark, because it's going be easier to go back and forth between it.

If you're going to attach an irrelevant exhibit, you're not going to have the judge read it. If it's a relevant exhibit to what you're talking about, the judge is going to read it. What's nice about e-filing in the courts that have electronic records, that entire record can be loaded onto the iPad for your particular case, so it's not as necessary to have the kind of relevant but not really relevant stuff because it will be in the e-record, it's already going to be on your iPad, but, again, it would be just like paper documents. You're going to always have those attorneys that attach every single thing and the exhibits is that big in paper when your brief's like that, (Indicating.) And then you're

going to have the lawyers who are doing a contract case and don't attach anything, so just use your good sense, and if the judge can navigate the appendix or the exhibits, you're fine.

MR. BASSETT: It reminds me of a custody case that I took up on appeal and the trial attorney, in the closing argument, the judge asked in closing argument, and set a 15 page limit, and the trial attorney on the other side filed a 15-page closing argument with a 200-page appendix, defeating the purpose.

JUDGE KELLY: Right.

MR. BASSETT: This came up in family law break-up. Talking about the record, doing your statement of fact, one thing you don't need to do. I'll give you a family law example. The parties of divorce was entered December 19th, 1997, see Appendix A, and you attach the judgment, and then there was a modification of parenting time three years later, see Appendix B, and of course none of that is pertinent to the central issue in the appeal. It doesn't need to be there, unless there's some specific language in those documents that needs to be referenced. That would probably be quoted from rather than attached. Because somebody got to read it. Just because it's e-filing and we can load up that PDF or multiple PDF's, doesn't mean we have to.

MR. FRIEDMAN: One of the things I learned this morning, I had considered attaching more things because they were convenient and, frankly, at some of the prior sessions of the appellate practice session I had heard, well, judges would like to have the out of state cases attached, judges would like this attached, and I figured that since this stuff was only going into a digital vault, it really didn't matter, and then I learned from one of the clerks this morning that they actually print out all of that stuff and stick it in a file, so where I know that it may take a little time for the trial court filing to get filed with the court, I thought if I filed an unofficial copy of all the transcripts, after all I've got them all scanned, maybe I will save them a little time, and we do it on application already, I mean, so it wasn't a huge jump to figure maybe it would help with the brief on appeal, too. Wrong. It is. And I think that there are some tensions there but right now less is more.

MS. DONOVAN: I would just like to say that if the file, if you decided to compile a lot of stuff and put it all in one file, if it becomes unwieldy for you to open it and work with it, keep in mind it will be the same on our end, so consider ways to make it manageable, not unwieldy. To make it easily accessible is going to be very helpful. If you're

having trouble, it's guaranteed you're going to have to help if we have to put it through different hoops, putting it through the review tool, and you may end up hearing from us if we can't make it work.

MR. DUBOSE: Anything you can do to highlight the important stuff helps the Court, and when you attach fewer exhibits, you're highlighting those exhibits as really important. If I have a long contract, I just like to attach the parts that might be at issue and not the whole contract. You know, it's a 200 page contract and there's one provision at issue. What's the point of those 200 pages?

JUDGE KELLY: I would say attach the whole contract.

MS. GOLDMAN: Difference of opinion.

JUDGE KELLY: You take one thing, it might be something different if you're looking at the context of the entire contract. You can highlight the part that's in issue. Other judges might disagree, but I say attach the whole contract.

MR. BASSETT: I have a concern about just attaching part as well. I mean, it's really in anything. When you have a contract a statute or court rule, if you look at just the sentence, the words you're concerned with, that's tunnel vision and you may not see the entire historical and contextual meaning of that, of that rule, or that contract,

whatever it happens to be. If you don't have the whole thing, it can lead you down the wrong path.

MR. FRIEDMAN: When I cite to, in briefs, to statutes where I know there's going be a fight, wherever I put my ellipses, one technique I use is to use charcoal gray for the text I don't think is important and black for the text I do, which makes it just a little bit lighter, you know what I'm saying, is not important but I'm not hiding from it, I'm not distorting it.

MR. BASSETT: You know, is that consistent -- I don't remember anything in the Court Rules on brief formatting that says text has to be black. Is there anything?

JUDGE KELLY: Can we start pink or blue or something?

MR. BASSETT: I've been tempted to throw some red in some of my briefs.

JUDGE KELLY: No, no.

MR. BASSETT: But the charcoal gray makes sense because Stuart's including the entire statutory language, not artificially cutting out any portion but making clear it's not the central issue. That's a pretty cool idea.

MS. GOLDMAN: Speaking of exhibits, we had a question. There's a difference between being able to save the document you prepared as a PDF and sometimes

you have exhibits that simply are not originally in your control so they have to be scanned if they're going to become PDF's, so how do we strike a balance between retaining the original format of the exhibit, especially if it was not a document, per se, and making it searchable by running it through an OCR program?

MS. DONOVAN: Well, I guess I would talk to that first off. You know on our website and on Tyler Odyssey File and Serve site, we advise against using later versions of Acrobat. Underlying that whole engine is a review tool that requires that the document be compatible with Acrobat 7 or earlier, but I would say that it's fine, really okay to use the later versions 9 and 10 and even 11 now of Acrobat, and what's really nice about that is that with really like one click you get to add the OCR and give it its best shot at recognizing every text character but in the same one click also optimize the documents so you get a very concise, compact document with those kinds of pleadings that have to be scanned in the first place, so those tools are getting better and better for doing all of this.

MR. BASSETT: You may have noticed, if you do an OCR and recognize text in this document using, I think, the later versions of Acrobat, if it was a three megabyte file, fairly large for the amount of

pages filed when you start, when it finishes the OCR process, the file is half or a third or a tenth the size it started, and it's just because you've run the OCR because it's doing all the other work at the same time and optimizing that PDF, so that's what you want to do. It's not going to change the way the document looks. It's going to appear exactly the same to the eye.

MR. FRIEDMAN: The OCR text is actually hidden behind the image of the text, but it's been optimized.

MS. GOLDMAN: I think these two questions might be directed both to Judge Kelly and perhaps first to Mr. Dubose. When you're e-filing a document, how do you strike a balance between making your paragraphs shorter, as you suggested this afternoon, and making them too short so that the document becomes chopped up, and how many subparts would the Court find useful for an argument?

JUDGE KELLY: Well, I use the GoodReader just as I would a brief. You know, I do it, you know, like this, or like this, you know, and I'm laying down on my couch, flipping it through, and then I highlight and I annotate just exactly like I would do a paper brief. I was -- I was interested in the different formats on, talking about the different briefs this afternoon at lunch time, but the way I've always read

briefs has always been the same way. It's not instant information that I want to get. I do want to sit down and study it. We work on one case at a time. Sometimes it may take, you know, several days to get through your briefs and the records. Sometimes, you know, if a one issue criminal case, it may take you a couple hours just to get through something, but I -- I like the format that we've been using. I just think this is such an incredibly effective tool for productivity because you have everything right in one place and it's right at your fingertips. You can get it anywhere you want.

One of the reasons the Court went to the GoodReader system as opposed to iAnnotate, which I think is a really elegant program, is because at the office anything that comes after like -- say something comes in on a Monday, your judicial assistant can load that in what we call the iDrive and we can access that iDrive remotely to be able to download whatever came into the case we happen to be working on and then we don't have the security problems with Dropbox or the icloud or anything like that. It's an internal security thing, which is why we're using GoodReader.

I guess it's a long way of saying I really like the way briefs are now. I like in depth analysis. I like to be able to think about the cases. We have Westlaw Next so we can brief between

the case and Westlaw Next to see what you're talking about and go right back to the brief. I guess it's the right answer. I think you guys do a great job in briefing, by the way.

MR. DUBOSE: I thought short paragraphs, choppy paragraphs, there's a lot of good text, good, thoughtful, well-developed text out there on the web that's done in short paragraphs. It's a different style. There's a difference between statements of fact and argument, and let me address that because I really haven't talked about it much.

A statement of fact, it's shorter but in many ways it's a short story or a novel and it's much more like your traditional late 19th century, 20th century narrative fiction, and I don't, I don't have a problem with longer paragraphs in a statement of facts, assuming people, most people are going to read them like a short story or novel. I think they do. I'm not sure but I think most people read them that way.

It's in the argument section where I think it's so important not to have the long paragraph because most arguments, most paragraphs, each paragraph is its own argument and within it you have subarguments and typically it's rare that you have a string that can run for six sentences where you're slowly developing and not making a different

subargument, and so for me, if that's what you're doing in a paragraph, if you're making multiple different points to support the same overall argument for the paragraph, why not show that to the reader rather than forcing them into this paragraph form that's harder to follow with our logical brains? So in the argument section, I really don't see a problem with either having short paragraphs or paragraphs with visible, structure-like bullet points and list that, make the logic of the paragraph clear to the reader.

MR. BASSETT: We've all been taught never to write one sentence paragraphs. I've been doing that more recently and I like the way it looks. It works, especially after reading all of Robert's work on this subject, and I'm thinking, yeah, especially for screen readers, it does provide a structure that is very useful.

MR. FRIEDMAN: An interesting exercise I did one time is I cut and pasted an article from the New York Times into Word and reformatted it like it was a legal brief and was surprised how short the sentences were.

MR. BASSETT: Yeah. Think, think Hemmingway. It's probably your model for writing a brief. Hemmingway style.

MS. GOLDMAN: I will exercise moderator privilege and ask a question which did not come from

the audience, but what I'd like to know, what's your feeling about briefs that incorporate excerpts? And I would even say sometimes snippets of Interrogatories, trial court records, photos, perhaps video clips that are actually more difficult to read physically than if you had typed the text in and also are not scanned or not searchable because they've been scanned? Anyone on the panel have a comment on that?

MR. DUBOSE: I thought of that before. It depends on how difficult it is to read. One of the best briefs I've ever seen was someone who put a postcard notice from a court at the very front of the brief so it was a photocopy of it. This is before you could paste that sort of thing in Word, a photocopy first page of the brief, and it said "it was because of this postcard notice that was mailed to the wrong address that my client lost her right to appeal." And that's pretty powerful. It doesn't matter how legible that card is. In this case it wasn't all that legible but sort of made the point. Sometimes it's very effective to be able to see the thing but not always. Legibility can be -- In other instances, legibility can be more important.

JUDGE KELLY: I agree.

MR. BASSETT: I saw Stuart's brief of the future and he had a lot of things in there, photographs and whatnot. I think I did my first -- it

was actually a trial court brief in a custody case embedding photographs of a child with my client, doing various activities, you know, a blatant attempt to reach the judge's heart strings, but, you know, you may have purposes for doing that in an appellate brief. One of the problems, of course, is, with a page limit based rule, is it discourages you from doing stuff like that. You put a photograph in, it takes a third of a page and you lost a third of the page that you might need, hopefully not, might need for your argument or actual statement. If we were word based we wouldn't have those issues and we could probably put together better briefs if word limits rather than page limits. Larger more readable files. I'm not getting any younger. Reading glasses.

MR. FRIEDMAN: Once somebody tried that with a gory photo issue in a criminal case and the argument was the photos were, sicked out the clients. The problem was they also sicked out the judge.

MS. GOLDMAN: A short one directed to Scott. Is there an alternative to iAnnotate?

MR. BASSETT: There is a free version iAnnotate available for Android. Not nearly as good as the iOS version, but they're working on it. Right now it's free. Download it and try it. I use -- I think it's called Easy PDF Reader on my Android phone, and let me just make sure that's the name of it -- I

think that's it -- and it's one of the many and that lets me play back PDF's in terms of playing back the audio file and, yeah, it's called Easy PDF Reader. I think it's a four or five dollar Android app and it has not all the features that iAnnotate PDF or iOS has but if you have an Android tablet, Galaxy tablet, Galaxy 10 or whatever, you made the wrong choice, of course, but it would be suitable.

MS. GOLDMAN: I think we'll close up with a couple of kind of quasi-technical points. What's the current status of electronic transcripts? I know there's some come in electronic form and some don't. How is that changing appellate practice both from the court and practitioner's point of view?

MS. DONOVAN: I don't know the answer to that.

MS. GOLDMAN: Any comments from the practitioners?

MR. FRIEDMAN: I don't have a huge problem with it, but I use Macintosh and I'm in some Macintosh legal groups and one of the number one questions I see posted is how do I manage to read that on my Mac, and the answer usually involves some version of emulation of Windows and I see Scott's mouth open here with some comments.

MR. BASSETT: Well, I do think with everything moving to the Cloud, as we call it,

operating systems choices are going to be almost irrelevant in the years to come. It doesn't matter whether you're using a Mac, a P.C., whether you're using -- I just got this Chromebook. It doesn't really have an operating system except a browser, and yet I was here editing Power Points and reading transcripts and things like that because they're stored on the Cloud. Have to have an internet context, of course, to do that or you can download them. We're getting to a point where operating systems will become irrelevant and we'll just access everything in the Cloud, including all of the electronic transcripts and everything else. That's essentially what I do now.

Somebody was talking about they like to have a file, a case file. I don't have any case files. My case files are all in, you know, on my computer back at my office, which is my daughter's old bedroom, when she went to college, and the Cloud, SugarStick and that's my file.

MS. GOLDMAN: I'm afraid we're going to have to conclude on that note. Those who had specific questions about the court's e-filing, the panel will be available. Thank you very much to our panelists.

MS. ROSS: I'd like to echo that. Thanks. This has been a fascinating program and I hope something that started us thinking in more creative ways. We're going to adjourn now.

(Proceedings concluded at 5:56 p.m.)

IV. WHOSE APPEAL IS IT?

A. Plenary

Moderator: Megan Cavanagh

Panel: Justice Brian Zahra, Justice Bridget McCormick, Judge Kurtis Wilder, Mary Massaron Ross

1. The panel was asked to address the tension between counsel and their client

It is important to talk to trial counsel and the client to identify legal issues after an adverse result because they may be wedded to their strategy, which was already unsuccessful, and they may need to consider settling rather than appeal.

There are ethical constraints which must guide the interaction and, particularly where the client is not paying for legal representation, it is important to give them some say in the proceedings.

It is important to educate the clients on the standard of review so that they have a more realistic idea of the possible outcome.

Explain to the client that the court may not resolve every issue that is raised and that it is therefore important to decide what issue is most important to them.

2. The panel was asked how an appellate attorney could best deal with an issue that had not been raised below

Argue manifest injustice.

There is a roadmap to resolve this question in criminal cases; in civil cases it should be assumed that the issue will be considered, and even if first raised during oral argument it should be addressed by opposing counsel.

This issue implicates the question of how judges view their roles, and who owns the law, the public or the parties; the missed issue should be addressed.

3. The panel was asked about the cases where the court reaches out to take an issue

If the issue raises a constitutional concern, it is more likely to be taken.

May happen more often in habeas and parental rights cases.

It is ultimately a question of safeguarding the law (owned by the public), even if the parties do not want it raised.

4. The panel was asked about cases where the parties wanted the court to take on an issue

It must be an unsettled area of the law and even when the parties agree that the issue needs to be resolved, they must convince the court.

Parties get the attention of the court when they agree that the issue needs to be resolved, and at the Supreme Court, it will help if there is a dissenting opinion below or if the trial court has also indicated its agreement.

When the Court of Appeals has denied leave to appeal, it is best to ask the Supreme Court to remand the case as on leave granted.

5. The panel was asked if it was proper for an amicus to raise an issue not raised by the parties

This implicates whether the amicus is a friend of a party or the friend of the court.

Amici can be helpful by giving the court a new framework by one without a vested interest in the outcome of this case.

Amici may be more helpful in the Supreme Court than in the Court of Appeals because of the jurisprudential nature of the issues.

They are viewed as "expert" briefs, as amici may have knowledge that the court does not have.

Although there is not often time for amici to participate in the Court of Appeals, the issues would be limited to those raised by the parties.

6. The panel was asked to consider the impact on a case of attention by the press

Press involvement cannot be avoided and should be considered irrelevant.

Press involvement may be more problematic at the trial level where jurors may react.

Attorneys should be careful saying things publically because, while it will not effect the case, it may adversely effect their reputations.

Attorneys should not respond to each other in the press.

7. The panel was asked about the presence of clients at oral argument, who may need to see the process, even if they lose

Clients have a right to be there and the court would like to know when they are present because, while it will not change the outcome, it may change the tone of the argument.

It is the client's life/case, and they should be present, although not at counsel table.

At least one judge did not care to know if they were present, and viewed it as possible manipulation.

Clients should be coached so that they are not distracting to the court.

B. Breakouts

Civil and criminal law practitioners contributed to the discussion of the various stakeholders who have an interest in the appeal.

1. Deciding whether to appeal

A consideration in deciding whether to appeal is the possibility of setting "bad" precedent. This is less of an issue for individual plaintiffs who have a single case to consider. It is more significant for "repeat litigants" (frequent defendants).

The trial attorney's investment in a case is an issue. Appellate counsel should try to persuade the trial attorney to abandon weak arguments and less important issues, so there will not be too many issues on appeal. Appellate counsel can provide a more objective view of the case. If raising weak arguments is unavoidable should appellate counsel indicate which arguments are the "real" focus? One suggestion is to combine multiple arguments under one heading.

If trial counsel and appellate counsel disagree, it should not be up to the client to resolve the dispute. If there is error at the trial court level, there may be an "inherent conflict" if the appeal is handled by the same law firm. Extraordinary circumstances may require that the appeal be referred to another firm.

2. Identification of issues on appeal

Lawyers should advise the client that new evidence cannot be introduced, that the appeal is decided on the appellate record, and that an appeal is not a re-trial. The group agreed that there is less issue "weeding" in a civil appeal than in a criminal case, and unlike many civil appeals, criminal defense appeals in particular do not usually involve collaboration with trial counsel. Framing issues on appeal for criminal cases may involve discussion of the issues with a crime victim, or a crime victim's family, so they understand what to expect.

There was some discussion about what to do when larger policy implications that could stem from your case conflict with the interests of your individual client. There seemed to be a

split among non-civil practitioners—some believing that the interests of the individual client should always prevail, with others believing that broader policy considerations should weigh more heavily. Civil practitioners agreed that there is an ethical conflict in these situations and that the only solution was for the attorney to step aside and let new counsel handle the appeal.

Additional factors come into play when insurance companies are involved, as their interests may differ from those of the insured who is being represented.

The appellate attorney should work with the trial attorney to identify the issues on appeal. In plea-based appeals, educate the client. The appellate attorney can also provide a "second opinion." In family law cases, the issues must be framed for potential remand.

If the arguments at the trial court level have not been preserved for appeal, appellate counsel has an obligation to consider whether there was possible malpractice by trial counsel. Evaluate "malpractice" vs. "trial strategy." The appellate attorney should exercise professional judgment.

In criminal cases, the attorney is not obligated to raise issues that are not arguable. The attorney should inform the client of the possibility of a "Standard 4" (pro per) brief. The Court of Appeals should then distinguish between arguments raised by appellate counsel and the client's own "Standard 4" arguments. Some criminal defense lawyers try to talk defendants out of appealing a weak issue when they got a great sentence.

Assigned appellate counsel should act as "counselor" as well as "advocate," and listen to the client. The appellant frames the issues for the court. It is preferable for the appellee to track the appellant's issues.

Some appellate attorneys include provisions in their retainer agreement providing that the lawyer has the sole decision-making authority on extensions, stipulations, and which issues will be briefed.

3. The court's identification of new issues not raised by the parties

The court can alter the issues on appeal. Attorneys cannot "set boundaries" for the court. However, pre-argument notice is helpful if the panel adds new issues. Attorneys should also request supplemental briefing. The parties and the court should "work together" to get the correct result. Further, due process considerations arise if parties are denied the opportunity to brief an issue. "Full advocacy" benefits everyone.

Absent a jurisdictional issue, some of the participants opposed the court's identification of issues not raised by the parties.

Some attorneys expressed concerns about legal malpractice where the court decides an issue not presented by the attorneys. This implicates the issue of "whose appeal is it?" Deciding issues not presented can be a problem not only for the litigants, but also for the attorneys who did

not factor these issues into the discussion of likelihood of success or settlement, or did not have an opportunity to brief them.

4. Raising issues most likely to persuade the court versus a shot-gun or kitchen-sink approach

It is important to remember your audience. Will the court likely be more receptive to seeing several focused issues that are thoroughly discussed, and will the court possibly view a "kitchen-sink" approach as being unfocused? There is concern that briefing too many issues will dilute the strongest issues, and leave less pages to argue them.

The Michigan Supreme Court in particular may narrow or expand the issues raised on appeal, thereby focusing on an issue that *they* find most significant. Attorneys should think about whether a basis exists for concluding that the appellate court may find a particular issue more significant than others. For example, has the court been issuing a lot of decisions in a particular area of law lately that touches on an issue you seek to appeal? A party's focus, and that of his counsel, tends to be more narrowly focused on their case, versus the court's broader focus on the legal rules of law that may be affected. The attorneys must keep this in mind.

5. Working with trial counsel

Appellate counsel can work with trial counsel beforehand to discuss trial strategy, ways to preserve the record for appeal, and the danger of making concessions at the trial court level that will negate the possibility of raising an issue on appeal.

Most participants seemed to agree that involving an appellate attorney at the trial level is a good idea, especially to flag for the trial attorney certain issues to preserve or to avoid.

An appellate attorney's discussion with trial counsel may be difficult, awkward or impossible where the appeal involves the ineffective assistance of counsel.

Involving an appellate attorney at the trial level seemed most common in participants who practiced in larger firms, although some criminal appellate practitioners also shared how they counsel prosecutors or trial counsel on what to watch for during trial for appeal purposes.

When the trial counsel hires the appellate attorney to process the appeal, the appellate attorney might not have much contact with the client/party, but instead communicates primarily with the trial counsel.

6. Potential conflicts between appellate counsel and trial counsel, including malpractice implications

Potential conflicts between appellate counsel and trial counsel were discussed. One example may be the need to explain to a client that an issue cannot be successfully pursued on appeal because it was not preserved by trial counsel.

Some see no conflict. Trial conduct is often a matter of strategy, and evaluation of legal malpractice is not the role of the appellate attorney.

Successful legal malpractice claims often involve issues that may be clear and obvious to the client: expiration of the statute of limitations; failure to hire an expert.

There is a difference between being hired to handle an appeal where something has gone "wrong" at the trial (a "claims repair" appeal) and being hired to analyze a possible malpractice claim against trial counsel.

Some believe that appellate counsel has an ethical obligation to advise the client if appellate counsel believes that the client may have a legal malpractice claim against trial counsel. This is based on an ethics opinion.

Some state that, as appellate counsel, they do not offer opinions regarding the viability of any legal malpractice claim against trial counsel, but do advise the client of the statute of limitations/accrual provisions for legal malpractice claims.

Some state that they do not believe it is the appellate attorney's role to assess or evaluate legal malpractice claims at all. Some may refer the client directly to a legal malpractice attorney for this purpose.

Some attorneys advise the client that an issue has been waived, etc., and refer the client to a plaintiffs' legal malpractice attorney for evaluation.

Some considerations in favor of advising the client regarding legal malpractice: (1) many clients, particularly legally unsophisticated clients, may not have any awareness of the unique statute of limitations and accrual provisions (last date of service) for legal malpractice claims. This weighs in favor of advising the clients at least on this limited issue; (2) many attorney legal malpractice insurance policies have unique notice provisions. Failure to notify a carrier at the right time could result in loss of coverage and harm the attorney. Sometimes the solution is to put the carrier on notice while a "claims repair" appeal is being pursued and agree to toll the limitations period for the legal malpractice claim.

The discussion with the client may differ based on the type of case being handled. Attorneys who handle cases involving termination of parental rights state that often the clients are given very basic information about their cases because the clients are not legally sophisticated and do not understand complex discussions of the legal issues. The issue of a conflict between trial and appellate counsel also is less likely to arise in those cases.

7. Amicus curiae

Amici can demonstrate the impact of a particular legal principle and use hypotheticals to illuminate the ramifications of a decision, providing a broader picture of how a particular decision will affect development of the law. Litigants focus on the laws affecting their position. Amici can help show how a decision will impact other statutes and the practical effects of a decision. Amici can also talk about what is happening in other states and how the rest of the country is handling an issue.

It is helpful to be on the same wavelength as amici supporting your party; consequently, a discussion with amici ahead of time is helpful. Appellate counsel must be prepared to respond to the arguments of opposing amici. Generally the response will be raised during oral argument. Appellate counsel must also be prepared to respond to supporting amici arguments with slants on an issue not necessarily raised (or perhaps advocated) by counsel's client. Sometimes an amicus brief will raise and identify an issue or error the parties do not raise.

The participants questioned whether the court views amicus briefs as more objective, and several participants seemed to agree that it depended on the identity of the amici. For example, is the amicus brief being filed by a section of the State Bar, a public interest group or an organization of private creditors?

Amici generally have a much broader view and focus of issues than the parties to the case. While the parties will focus more specifically on legal issues in the context of their particular case, the amici's focus is broader. The Michigan Supreme Court also focuses more broadly on how its ruling will affect the rule of law in the State of Michigan.

An amicus brief should not be filed if it is just a "me too" brief. The goal should be to add to the discussion. But it is also important if the amici simply underscore the importance of the issue.

Whether the amici should allow pre-filing review by the trial attorney was discussed.

8. Client presence at oral argument

Whether the client should attend oral argument was discussed. The client's presence may be an "informal" influence on the court. Judges have differing views on alerting the court to the client's presence. Some think it's a good idea, while others advise against it. The court likes to have clients present so they can see how the system works. However, the client's presence will backfire if it is intended to be manipulative. The presence of clients in the court room should not function as an exhibit. Emotional clients can be lodged in the attorneys' room and listen to the argument over a speaker.

The attorney should address the client's expectations in advance. The client should be informed of the court's protocol. When they understand what will occur, clients may decide not to attend. The court may try to guess who the client is. It will want to know if the client is present. However, know your panel and use discretion regarding whether to directly tell the court the client is in the courtroom or whether to tell the bailiff. A lawyer may want to advise the court if it was the client who asked to be present for the argument.

The court can sometimes help the client to understand the standard for reversal. If the client wants to attend, they should be coached regarding their behavior, courtroom decorum, etc. There is value in allowing the client to see how the process works (although criminal cases may present possible security concerns).

A "debriefing" should occur after the argument. Family members can transmit information directly to an incarcerated client. MGTV broadcasts (archives only) of Supreme

Court arguments and live-stream/web archives (Supreme Court only) are alternatives to the client's attendance at oral argument.

Participants also discussed the involvement of clients in the briefing process. Those representing criminal defendants find it very helpful to meet in person with the defendant, even in prison, to work through the potential issues to be raised. This helps prevent disagreements from arising later.

For civil practitioners, those who represent individuals run into many of the same problems as those representing criminal defendants. People are more likely to research the Internet and come up with their own strategy ideas. One way to help prevent this is to establish early on in the relationship that counsel will ultimately decide what issues to raise. For civil practitioners who represent sophisticated clients, the issues are different. There may be pressure from the trial court attorney—not the client—to advance an issue that was "crucial" below. It is important to clarify and explain the standard of review. Some issues, even if meritorious, are not likely to prevail. It is also important to reiterate that credibility is paramount. When it comes to raising issues, it is very important to not let client relations dictate the raising of an issue that will undermine credibility.

9. Requesting reconsideration

A request for reconsideration should be considered if the court missed an issue, if an issue was only minimally addressed, if the opinion misstates the facts or if there is a dissent.

10. Should the court seek out its own authority?

Participants agrees that the court should not be limited by the parties' presentations and may seek out its own authority.

11. Handling an appeal with no meritorious issues

In criminal cases, attorneys have a duty to file meritorious briefs only. Although it can be difficult to find quality issues in a criminal appeal that will provide any appreciable relief, assigned counsel provides the best chance of success. There was some discussion about ***Anders*** briefs (a brief filed by appellate counsel informing the court that the appeal is frivolous and seeking to withdraw as counsel) and whether they were filed with regularity. ***Anders*** briefs are disfavored by some criminal defense attorneys, who believe that it simply results in them doing the prosecutor's work for them.

One practitioner expressed the philosophy that there is no such thing as a perfect trial and that there are always errors to be raised. Clients also have the option of filing a Standard 4 in pro per brief if they want to raise additional issues that appellate counsel refuses to raise because of lack of merit.

Some expressed that child welfare appeals are difficult because often times there are only frivolous issues on appeal, the stakes are very high, and the appeals happen automatically. Court

staff expressed that they recognize this tension and that these are difficult cases with high interests and that they keep that in mind throughout the appellate process.

12. Malpractice implications when the court comments on unpreserved or inadequately briefed issues

While the court may find it necessary to address waiver/presentation issues, some believe that it is not necessary for the court to go further in stating that an issue *would have* resulted in the grant of relief but for the attorney's failure to preserve/present the issue.

Some believe that the question of whether to pursue a legal malpractice case isn't analyzed from the plaintiff's legal malpractice attorneys' perspective based on the language in the Court of Appeals opinion, but rather objectively on the facts regarding the attorney's conduct and likelihood of success.

There are multiple strong defenses to legal malpractice cases, particularly claims of malpractice by appellate attorneys. Under ***Reinhart v Winiemko***, 444 Mich 579 (1994), the question of whether an appeal would have been successful is a question of law for the court, not for the jury (and not for experts). Attorneys also can make use of the strong "attorney judgment" rule to defend a legal malpractice case.

At the trial level, the "plain error" rule will save for consideration some "unpreserved" issues.

Appellate malpractice cases tend to involve clear issues, such as failure to file a Supreme Court application within the jurisdictional deadline.

13. "Reining in" lawyers who go too far

Another potential issue is opinions that comment critically on an overly long brief, or on an attorney's style or perceived criticism of the trial court. Some believe a court's criticism of an attorney is proper if it is proportionate to the attorney's aggressive tactics or use of language that "crosses the line," and that the judiciary has a role to play in moving the parties, and counsel, toward civility through recognition of and criticism of uncivil behavior. Others believe the court's role is only to decide disputes, not to educate lawyers or "fix" attorney mistakes. Some observed that sanctions and costs are rarely granted in the Court of Appeals.

V. SUPREME COURT ADVOCACY

MODERATORS:

MARY MASSARON ROSS

JOHN BURSCH

PANEL:

Chief Justice Robert P. Young, Jr.

Justice Michael F. Cavanagh

Justice Stephen J. Markman

Justice Mary Beth Kelly

Justice Bridget Mary McCormack

Justice David F. Viviano

Justice Brian K. Zahra

Plymouth, Michigan

Friday, April 26th, 2013

11:00 a.m.

MS. ROSS: Good morning. We are about to start a really special part of our program. We've been having these Appellate Bench Bar Conferences every three years for a number of years but this is the first time that we have had the entire Supreme Court with us all at once to speak with you, and we are absolutely delighted for their support for our conference and their willingness to take time to join us, so let's welcome them.

(Applause.)

MS. ROSS: And I'm not going to go through introductions. I think everyone knows the members of our Supreme Court. Your biographies are in our materials and so I don't want to take our time with the introductions you deserve. I'm just going to go right to questions.

The first thing I thought we would start

with is, and I want to also say this is John Bursch. John is the Solicitor General for the State of Michigan, who's just returned from arguing, I think in the U.S. Supreme Court, and he and I are going to co-moderate. So I have some questions, John has some questions. John's going to be walking around picking up index cards with your questions and we'll use this hour, which I'm sure is going to go entirely too quickly, at least for us.

MR. BURSCH: Megan Cavanagh, there in the back of the room, has the index cards. If you've got a question, please raise your hand and she can get those to you.

MS. ROSS: The first thing I thought we'd start with is kind of a general question and that is to just ask each of the justices to share with us your top three points of what we should do or what we shouldn't do in terms of advocating before the Court, and maybe for this one we'll start with the chief.

CHIEF JUSTICE YOUNG: No. Start with the newbie.

JUSTICE VIVIANO: Of course, of course. I don't think I have a list of three things but what I would encourage you to do is almost I suppose self-evident, although it wasn't to me when I started, is to put yourself in our shoes and think about what we have to think about when we look at a case and

anticipate some of the questions that we're going to ask, things like, obviously goes beyond the impact of the case on the parties that are before the Court, think about the impact on the development of the law, and be able to answer questions like what rule are you encouraging us to adopt. And really show us first that you thought about it from that perspective and then also help us in terms of understanding your position and your client's position in the context of what we, what the Supreme Court does, you know, the limited scope where we operate in terms of looking at long term development of the law and trying to clarify areas of the law that need clarification, so a general observation, I suppose.

MS. ROSS: Thank you. Justice Cavanagh.

JUSTICE CAVANAGH: I agree. No, I think you ought to keep in mind -- I mean we've gone through the briefs, you know, we went through the application stage and we have studied your case prior to oral argument, but the fact remains in almost every instance, you still know your case better than we do, and I think the real key, the real purpose be, and your advantage, you know, in oral argument is to educate us, to explain, certainly on the civil side in areas that are, I won't say obtuse but are complex, to educate us as to your expertise in that area and what you want us to know. That I have always found to be

the most helpful, coming out of oral argument.

MS. ROSS: Justice Zahra.

JUSTICE ZAHRA: I know some of my colleagues here are going to get upset when I tell this because I'm stealing their thunder. I would say waive the fire free zone. It shows tremendous confidence in your position and you want to address the concerns of the Court. Outline your argument for us and then follow your outline to the extent you can in between our questions. That is most helpful.

MS. ROSS: Justice Kelly.

JUSTICE KELLY: I find it helpful when advocates pick up with the colloquy that has preceded them, so it's not particularly helpful to walk up to the microphone and start over, so to speak, when you recognize questions that have been asked of your, of the other lawyer. I find that helpful. Second, I don't think it's particularly helpful to assume that the justices have a predisposed outcome. We typically don't. We typically come into oral argument open to hear what you have to say, and I guess if I have to say a third, I would echo strongly what Justice Zahra just said about outlining. I don't want to embarrass him but the solicitor general does this very well, typically gets up and says, "I have three points to make, one, two, three," and I find that very helpful.

MS. ROSS: Justice McCormack.

JUSTICE McCORMACK: It's hard to be like fifth but I agree with everything that's been said, especially waiving your five minute intro. We know what the case is about and we already have what we think are really important questions that we're going to want you to answer, so don't give up those five minutes of opportunity to answer the questions that we're struggling with. You may as well let us get to those as soon as we can, and then make sure you thought about in advance -- when you sit down after your 30 minutes, you want to feel really confident that you made the three points, probably three at the most that were most important to make and maybe made them a few times so really, really figure out exactly what those top three points are and make sure you've made those, but most of all, be responsive to the questions we're asking.

MS. ROSS: Justice Markman.

JUSTICE MARKMAN: I think it's important to understand that the distinction between oral arguments in the Michigan Supreme Court and oral arguments in our intermediate Court of Appeals is that in our court everything is done discretionarily. We don't have to take any case. So each month we get two hundred cases, none of which we have to take, and I think it's your job to explain why, among those 200 cases, among some very fine briefs and pleadings, among some very

tough disputes and controversies,we should we focus our limited resources upon the case that you're trying to bring. In the end, we try to apply a variety of standards -- what is the state of confusion in the law, how important is this to the next hundred cases, but I think it is important for you to communicate to the court why, among all the cases brought before the Court, we should grant leave on your case.

Secondly, what is the appropriate rule that we should devise for your case? Again, as my colleagues have indicated in various language, we are looking for cases in which our opinion will most help develop the law in Michigan and that means that we have to try to find those cases in which our opinion will have some impact upon a hundred or 200 cases over the next several years, so I think it's important for you to be prepared to communicate to us what is an appropriate rule not just for resolving your case but for resolving future similar cases.

I remember there was one attorney who once came before the Court and I guess in a fairly countrified way, said to us, "You know, I don't -- As long as you get to the result, I don't really care how you get to that result." Well, I understand that, but that's not really the way the court looks upon its responsibilities. It's not simply the results that

are important to an appellate court but the analysis and the means and the process by which we get those results, so I think you need to understand what is important in a court, in an appellate court that does almost all of its business discretionarily. One bonus recommendation, don't ever tell the Court in response to a question, "I wasn't the trial lawyer." We understand you weren't the trial lawyer but, nonetheless, you have to be prepared as if you were the trial lawyer and you have to be prepared as if you know more than each of us does about your own case. Where you don't know more about your own case than we do, there may be something wrong with your preparation.

MS. ROSS: Chief Justice.

CHIEF JUSTICE YOUNG: Well, I had an opportunity to extemporize about these issues yesterday and I don't think I have much different to say. I'll reinforce the issues that I think are really important advocacy points. Never frustrate the person you're trying to persuade. Everything else follows from that premise and it's certainly true, as Justice Markman and some of my other colleagues have indicated, that in our court, because it is discretionary, it isn't about your case and so if you are framing your arguments as though the facts and the circumstances of your case are the most pertinent

issues, you're probably doing a disservice to your client. At least you're not maximizing the opportunity. So it all devolves down to, and I use the dead mouse theory of advocacy. That's what Judge Markman just adverted to. I don't care how you get there, just get there. That doesn't help. And since you're supposed to be there to educate us, you're supposed to be educating us not about where true north is on the compass but how you get to true north from where we are at this point. So, again, I think the most important thing for you to remember is you really are educating us and you ought to be doing your utmost to avoid frustrating us, in fact, enabling us to get to where you think we need to go.

MS. ROSS: One of the things we heard about yesterday was briefing and reading and studying in the age of iPads and technology, and I thought it might be helpful to just share for a minute or two, without giving away any of your secrets, kind of how you handle a merit case from when the briefs are arriving in your office, what do you, you know, what's your process in terms of when you read it or the clerks read it or kind of are you reading on screen, are you reading in the hard copy, do you -- Whatever you'd like to share about that process, and I guess we'll continue coming down the row this way. Justice Viviano.

JUSTICE VIVIANO: Well, my process is evolving.

MS. ROSS: That's fair.

CHIEF JUSTICE YOUNG: How many days have you been on the court?

JUSTICE VIVIANO: About six weeks now. Building a process. My process is going to be paperless like some of my colleagues which means that most of my review is done now on a computer screen. I still like to sometimes print things out. If I'm drafting, sometimes I'll do it in pen and mark up things, sometimes I'll do it on the computer, but I think you have to assume that we're in a transition to an electronic world. We are not all the way there yet but I think soon we will be, and it does change and I haven't really thought about it a lot, and I think it's very interesting that you guys have thought about it some in this conference, how that impacts advocacy and how you present your case to the court and it's something that lawyers at all levels now have to think about, have to deal with. If you're submitting things electronically, which we don't yet do at our court but I'm confident we will be.

CHIEF JUSTICE YOUNG: Maybe we will have a clerk that likes technology.

JUSTICE VIVIANO: Right. So that impacts how you're transmitting your pleadings to the court.

It impacts us. Now, most of our stuff is available, most of the pleadings are available to us electronically, so we have the opportunity actually on our end to start reviewing it in that fashion. Frankly, from our standpoint, and from yours, I think it means we all need bigger computer screens. Folks think about having multiple monitors so you can have things up that you're looking at and have another screen where you're drafting or taking notes, so it really is changing the way we do business, mostly for the good, but I think it is hard to leave the paper world and the world of briefs and tactile enjoyment that we all talk about, so that's what I would think.

MS. ROSS: Thank you. Justice Cavanagh.

JUSTICE CAVANAGH: Well, maybe all fired up in court. I still opt for the hard copies and the lugging of the briefcases. Hopefully I'll improve. At least three of my colleagues are very adept at the electronic world. I have an iPad, I have an iPhone, and I'm sure I utilize fully about three percent of its capacity. But I'm trying to learn and hopefully before I leave this great bench I'll become more adept.

MS. ROSS: Justice Zahra.

JUSTICE ZAHRA: I'm an electronic reader. I try and do as much without paper as possible and I do use two screens. Putting a brief up on one side and

then the ability to take notes. I have a document that I prepare for quick study at oral argument, so I'm essentially sometimes cutting and pasting from briefs or from memos into this document that I then use two nights before arguments begin to refresh where I am on these cases.

I thought yesterday's lunch discussion was pretty insightful about the difference in the electronic reading and paper reading, and I do find that I have to shut down everything else when I'm doing my brief reading, you know. I can't have that e-mail notification pop up. I've got to turn that off. I don't answer my phones or my cell phones are in another room. And I find in this way I'm able to accomplish the deep reading that was discussed yesterday off of a screen.

You know, I don't think it's necessary that we have briefs that look like web pages. I thought that was an interesting concept and it might come to that point, but taking from that, you know, the white space and all of that discussion, what we really need is a brief that is understandable. So many times briefs are written by experts in a particular field and they assume the Supreme Court, they too must be experts, and that's not necessarily the case. Some of us have certain expertise in certain areas but it's not a statement across the board every one of us are

experts in every field of the law, so you have to write your brief in a way that a first year lawyer will understand it, not that we're the lowest common denominator but if I read the brief and I really don't understand it, guess what I'm doing with it? I'm not going to read it again and again to understand. I'll pass it off to one of my law clerks, first or second year and say help me understand this. So I think, whether it's a paper reader or electronic reader, you have to approach your brief with the notion that we are not all experts and we need some basic terms defined for us. We need a little primer on the particular area of law as you start the brief off, just to get our engines started on your topic, and then make it interesting and make it easy to understand.

JUSTICE KELLY: I do a combination of reading on-line and reading hard copies of briefs. I don't really find that reading on-line requires a change in the way that a brief is written. I think that so many things are read on-line these days that people are accustomed to reading on-line and that doesn't require the author to change, any change in the way that things are written.

I prefer not use an iPad in the courtroom. It's kind of the trial judge in me. I think that there's an interchange between the advocate and the

judge that is necessary in a courtroom setting and I find that electronics in the courtroom can detract from that. There is something to a hard copy of a brief or other materials that I still enjoy, so I'm not at this point a hundred percent electronic and I'm not even committed to going there yet, my colleagues notwithstanding, so -- but, again, I echo Justice Zahra. I'm not sure that it requires a different approach in the way that a brief is written. Readability is very important to me and when a brief is not flowing or there's not structure to it, that is far more -- that makes it far more difficult for me, so I want to be able to sit down and read from start to finish a brief and get the real comprehension of it, and I don't think that that needs to be -- I don't think that that needs to be approached from is the reader going to be reading this on-line or not. That to me does not go into the equation.

MS. ROSS: Justice McCormack.

JUSTICE McCORMACK: Yeah, I think that there is such a diverse set of practices up here. All I can add to this is to tell you my own so you know them and I am a hundred percent electronic. Paper might come to my office. If it does, I don't see it, I don't want to see it.

CHIEF JUSTICE YOUNG: Is that the burning?

JUSTICE McCORMACK: Yes. Anything that

comes to our office in paper is immediately converted to an electronic form so I can search it. I can't live without the searchability function of electronic documents. I don't want to have to find page 48. I just want to put the term in and be able to find it. Especially in argument. So my practice is a hundred percent electronic. I've been working that way for a long time so it would be hard for me to convert back to paper. I don't know how helpful all of this is to you to know how different our approaches are, but there you have it.

JUSTICE MARKMAN: Although I take some pride on some occasions having defeated my son in some very sophisticated video games, I'm still not technically proficient. I guess I'm kind of the opposite of Justice McCormack. I try to get everything electronic into hard copy form. At the end of most days, I usually, like Justice Cavanagh, have a briefcase and it's full of briefs and commissioner's reports and my clerk memorandums and memorandums from my colleagues, and I try to read those to the best of my ability over time. We have deadlines each month as to when we have to be responsive to all the new briefs that are coming in. Obviously we try meet those deadlines.

But, you know, when I look at briefs, it

often happens, not always, but it often happens that after reviewing them, I mean I find one to be more trustworthy than the other one, and that trustworthiness may be just kind of a stream of consciousness feeling, but it's also a function of the presentation, the neatness of the brief, the organization and structure, the clarity of the argument, the measured language. I really don't like exaggerations or name calling or ad hominem arguments, and of course the logic of the analysis is critical. While that brief doesn't always prevail, it often is the brief that supplies for me the perspective through which I review the case, so I think the briefs are terribly important. Of course, given that we're granting in the hardest of the cases, I think oral argument is terribly important. I know a lot of appellate lawyers think the justices have all made up their mind in most of the cases that are being argued before them, but again, with respect to a discretionary court that grants on only a very small percentage of cases, you can assume that we feel the cases we've granted on are the toughest cases and, as a result, those are precisely the cases in which the quality of your briefs and the quality of your arguments are the most impactful and sometimes the most dispositive of the direction that we end up

going in.

CHIEF JUSTICE YOUNG: I have written an article on a purpose that's in your materials on my ruminations on all of this. I call that to your attention. They're my distillation of 15 years on the Court for what it's worth. The narrow question is, how do I prepare. Obviously, we have, by the time of the arrival of your briefs, we will have gone through the vetting process to determine whether this is a grant worthy case or not and resolve that issue so we have, to a fair extent, before your briefs arrive, sort of familiarized ourselves, at least at some level, with the issues that we think are uppermost, or at least grant-worthy, so by the time your briefs arrive, each of the justices who participated in those grant conferences are aware of the Court issues.

In my office, well, one of my, each of the cases assigned to a particular clerk, and I have, my practice is to have the clerk go through all of the materials that are associated with the case, the appendices, and produce for me what I call a bench memo, and I take all of that and I prepare to my office or my home office and I use the bench memo.

I've got handicaps for each of my clerks I apply about how well they do certain things, but I use that sort of as a road map for my own independent review of the briefs and I do that in hard, in the

folio. I'm not phobic about technology. I use a lot, the computer a lot. Once, you know, I'm familiar with an opinion one of my colleagues will circulate, I read the original in the hard copy but, you know, subsequent editions are redlined so it's easy to review those on-line, but I find it's hard for me to absorb as well on, on the computer as it is when I'm sitting there -- I find it harder, I mean, when I'm sitting there reading it, I say wait a minute, is that consistent with what they said, and being able to flip back and forth for me is indispensible. I can't do that scrolling. My children probably, and the children on the Court probably can, but I can't.

JUSTICE ZAHRA: Take that as a compliment.

CHIEF JUSTICE YOUNG: It is. There's a generational shift afoot, as you can imagine, so that's how I prepare, and then my clerks, I direct them what materials I want in my bench book and I've got, you know, my notes, my clerk's bench memo, and, you know, the seminal cases and pieces of the appendix that I think might come up and, so I can sit there and flip back and forth, and I've got your briefs under the bench if I need to go to the specific --

Now, Justice McCormack and Zahra and Viviano can do this on their laptops. I think that's amazing. But I can't. And so I don't even try to do that. I don't think it's worth the energy for a

62-year-old to try and accomplish that. I'm okay. I'll drift out with the paper. It works for me and I'll work on my technological growth in some other area where I think it makes a difference.

MS. ROSS: I know we have questions from the audience. John, do you want to ask some of those?

MR. BURSCH: Yes. We've got several good questions and only half an hour. So I'm going to ask you to think of this as a speed round.

CHIEF JUSTICE YOUNG: We don't do speed on the Supreme Court.

MR. BURSCH: Number one, how often have you changed your mind about the result in a case following oral argument?

CHIEF JUSTICE YOUNG: Sometimes.

JUSTICE CAVANAGH: Once.

CHIEF JUSTICE YOUNG: I think this is a serious question. I think it can make a difference, but, again, as I said in this article, you spend a lot of time in a brief. If you think you can come in and change the rotation of the earth in 30 minutes in an oral argument, you're probably not being realistic, but you can tactically focus the argument, but if you haven't laid the groundwork in your brief, it's a pretty herculated task. I've had a couple arguments, boy, I saw something different than I saw coming into the argument and it made a difference.

JUSTICE KELLY: I would like to make a related point. You know, I can recall a case where I've changed my opinion after seeing, change my vote after seeing the opinion.

CHIEF JUSTICE YOUNG: That happens.

JUSTICE KELLY: That happens as well. You ought not think that a vote is cast in stone even after oral argument. Sometimes you see the opinion and it's like, whoa, that's actually not where I want to be on this case, so that can happen as well.

JUSTICE CAVANAGH: When I said once, I would say almost once a month --

CHIEF JUSTICE YOUNG: Yeah.

JUSTICE CAVANAGH: -- where we've come off the bench and a number of us have said, "Wow, I really didn't see that the way it was presented," and it casts a whole different perspective on it. It's swung a balance on the Court in ways that I hadn't thought about going in.

CHIEF JUSTICE YOUNG: Most of the time oral argument is wasted because they aren't tactical, they aren't focused on outcome-determinative issues, they're recitals.

JUSTICE VIVIANO: I have to go back to my time as a trial judge. Oral argument, you come prepared, you have some thoughts on the way you think the case may come out but usually you think of, at

least I try to think of the toughest questions for each side and see how they respond. The set of questions is different now on the Court I'm on now, but I think it's the same sort of idea. If you come in prepared to answer the tough questions, and you actually have something to say on those points, it could move the needle. You know, if someone one of us asks the tough questions and you dodge and avoid, then it sort of confirms what you were thinking before, that there might not be an answer to this question.

CHIEF JUSTICE YOUNG: Next question.

MR. BURSCH: Okay. Aside from "I was not trial counsel" or facts of your hypothetical are not the facts of this case, what are the most common mistakes you see litigants make?

CHIEF JUSTICE YOUNG: Not knowing why they're there. Not knowing -- This isn't -- This is really a profoundly common problem. They think -- The advocate thinks it's about their case and they haven't given a moment's thought to how their case is representative of something broader, how this case will affect not only the cases that have come before but all those that will come after. And time after time, you'll hear one of us, usually Steve or me, saying what is the thesis statement of the opinion you want to issue, and you usually hear in response to that, homina, homina, homina, homina. That's 'cause

they haven't really thought big picture about what this means when you're in the Supreme Court.

JUSTICE VIVIANO: I would say clock management. Basketball game, we have this fancy little clock with a timer on it in my two months there. Everybody gets up, "I want to reserve time for rebuttal." The chief always says, "That's your responsibility," and then I'm sitting there, watching the clock. They say, "I want to reserve ten minutes," and I watch the clock go down from 30 to 20 to ten to seven to five to three to two and time runs out and then rebuttal. So I think it's important to try to stay disciplined and focused and when you're under the sort of withering fired questions of the Court, don't lose your focus. That's really what your strategy is, to come back and be able to answer the other side. You have to have a way of staying focused on that.

MS. ROSS: I'd like to ask a follow-up on that point as an advocate. It is very hard and I agree, you do have to watch your time. If you're under a barrage of questions -- sometimes the argument has a nice rhythm and you can see that you pretty much answered all the burning questions just as the five minutes you reserved are coming up and that's great. But sometimes the barrage is still coming and you can see there are justices whose questions are out there, you don't want to be rude, you certainly don't want to

convey to any justice that his or her question isn't important enough to answer because “I want my rebuttal,” but you can see the clock is winding down. What suggestions would you have for a graceful way to deal with that problem?

CHIEF JUSTICE YOUNG: I think I can just -- Obviously, I'll respond to your questions but I would like to reserve some time. Now, that may carry the day or not, but if you've got colleagues still asking you questions, you better answer the questions. Sometimes, I mean we say that, we'll let you be, but depends. But I think it's entirely okay to say, "Your Honor -- I really -- I want to answer your questions but I would like to have some time to respond," and I think, unless there's something, you know, if one of us is on a tear, we might let you escape. Maybe.

MS. ROSS: Thank you.

CHIEF JUSTICE YOUNG: But I think it's appropriate to raise it.

MS. ROSS: To raise the issue.

JUSTICE CAVANAGH: I think it's incumbent upon the Chief Justice, who has utilized 24 minutes of your 30, to kindly allow a minute or two of rebuttal.

CHIEF JUSTICE YOUNG: That happens on occasion.

MR. BURSCH: All right. What motivated the proposed court rule, applying the 2.116 standard to

motions for reconsideration in the Michigan Supreme Court and what are the two or three things you look for in motions for reconsideration or motions for rehearing, so we can stop filing all the frivolous motions that you don't want to see?

CHIEF JUSTICE YOUNG: "What prompted" is your question?

MR. BURSCH: Yes. What prompted the adoption of the Court Rule and also what are the things you're looking for in reconsideration and rehearing motions?

CHIEF JUSTICE YOUNG: How about sanity? We've imposed this rule on all the other courts and there was a hole in ours. We don't want to hear re-litigation of issues as they've been litigated. Certainly the change in the composition of the Court isn't a justification for reconsideration.

JUSTICE MARKMAN: We basically had a pretty dull choreography where on the motions for reconsideration all the justices would cast their votes in exactly the same way, consistent with how they had voted in the underlying case, and I think we are trying to communicate by this change that this is a court of law in which there is some continuity, in which mere changes in membership don't necessarily result in changes in decision making, and it was an effort to put a much greater, or at least

take seriously, the much greater burden of proof that properly belongs to the moving party to demonstrate that a mistake has been made and to communicate something different to the court, so that if it does choose to change its posture, it will do so on a rational basis as opposed to simply because there's a new member of the Court.

MR. BURSCH: So in the four three cases, should we expect more seven zero denials in motions for reconsideration?

CHIEF JUSTICE YOUNG: I certainly hope so.

MR. BURSCH: All right. At the application stage, what balance do you like to see between appellants between advocating the merits and advocating the jurisprudential significance?

CHIEF JUSTICE YOUNG: Well, if you don't have jurisprudential significance, the probability of success in our court is reduced considerably, isn't it? You have to do both but you have -- almost the threshold is you have to explain why the Court should exercise one of its discretionary grants in bringing it on for more discussion of the merits.

JUSTICE MARKMAN: I think that may be slightly less true in a criminal case in which one can't let an injustice persist and an individual be wrongly incarcerated simply on the basis that there's not 25 other cases that

involve exactly the same kind of issue, but I think the chief justice is correct and it's not that you can never win when there's not a matter of great jurisprudential significance but I think it does lower your prospects very, very considerably.

MS. ROSS: Other comments?

MR. BURSCH: Another application for leave question. Obviously, you're not required to submit all the underlying record documents like you will in an appendex on the merits. What, if any, record materials do you want to see attached as appendices to an application for leave?

CHIEF JUSTICE YOUNG: The necessary ones.

JUSTICE McCORMACK: Can make a difference in whether we grant or not.

CHIEF JUSTICE YOUNG: How can we answer such a question? Obviously, the ones that you think will help.

MS. ROSS: That's fair. I mean, it is a very case specific question.

CHIEF JUSTICE YOUNG: It is.

JUSTICE VIVIANO: I have a thought that goes back to the technology question before that relates to exhibits. It becomes a challenging thing on the computer sometimes to scroll through a hundred pages to find exhibits unless you do, as Justice McCormack

suggested, and do some searching. I think what's happened in my experience now, sort of the recent development, and you all are probably doing some of this, is you pull some of those exhibits into the text of the brief, and I think that can be helpful. If it's not one of the 50 or all 50 exhibits but if you have one or two that are really important, to pull that right into the brief. It certainly helps us with the electronic review to be able to see it in context.

CHIEF JUSTICE YOUNG: Not so good for us troglodytes.

JUSTICE MARKMAN: Several questions about jurisprudential significance. I think everyone here understands what that means, but maybe each of us slightly different interpretations to that phrase. To me something is jurisprudentially significant when, A, there's some significant confusion among the trial courts in Michigan, two, where the impact or our decision will have an impact on a large number of other cases likely to be proceeding through the system in the next couple of years. In my view, cases are also jurisprudentially significant when there's a significant disparity between the written law, whether it's a statute or ordinance or contract or deed. Each of my colleagues I know has his or her own definition of jurisprudential significance, but I think it's important that they have some sense that the justices are at least

looking for that kind of indicia in deciding which cases merit a grant.

MS. ROSS: That's a great point and maybe we could hear from the other justices about the factors or how they approach that, how they would define what's significant. Do you want to -- Justice McCormack?

JUSTICE McCORMACK: Yeah. I'm not sure I have a largely different understanding of it from Justice Markman, frankly. I do think in a criminal case it's not exactly the same, but in a civil case we are, you know, we like to think we're not an error-correction court and we are trying to think about whether this is a place where we need to do something because of the cases that are on their way or because of the confusion that is currently in place in the law, either because of different decisions below or a difference between a statute or a contract or, as Justice Markman put it, the written law and the way the courts have interpreted that written law, so I think I'm pretty close to Justice Markman in how I think about it.

MS. ROSS: Justice Kelly, Justice Zahra.

JUSTICE KELLY: I would like to comment that when I joined the Court I observed, perhaps is the right word, that I thought maybe the Court had been granting a lot in the areas of governmental immunity,

insurance and medical malpractice, and I thought that it was important that our definition of jurisprudentially significant cases expanded beyond just those areas of the law, so I invited discussion at conference on other areas, not just cases involving juveniles but other areas as well, and invited us to think about maybe if we had spoken clearly on, in the area of governmental immunity, if we got another case, did we really have to say once again that the government was immune in this area, so I think that jurisprudential significance is something that we as a court and we as a state need to think broadly about in areas of the law even if they may not impact as many as certain areas, so that's something that I think is important for us on the court.

MS. ROSS: Justice Zahra.

JUSTICE ZAHRA: I agree with the factors articulated by Justice Markman. I don't necessarily tick them off one at a time. I look at a case and ask why is it important to the State of Michigan that we consider this case and I'm often looking first to whether the Court of Appeals opinion is published or unpublished. Even though trial courts and counsel out there will take anything that supports their case, even if it's not a published case, it's becoming more and more significant. Even though I've been referred to as one of the children on the court, when I started

at Dickinson Wright, if you could find an unpublished Court of Appeals opinion that supported your position, it was like finding gold, and these things weren't readily available and now they are much more readily available, so I think that distinction has diminished a bit but still the rule of Court of Appeals must follow the first case, a published decision becomes the law for the entire state unless the Supreme Court takes it, so that's something I consider quite a bit in determination of whether to grant. If there's something I'm not comfortable with in a published opinion, I'm going be far more interested in this case than if the same thing is merely in an unpublished opinion.

MS. ROSS: Other comments from the justices on jurisprudential significance?

CHIEF JUSTICE YOUNG: I'm a visual guy. I told you yesterday I think our job is to manage the fabric of the law, and my view is that wherever that pattern has become indistinct or disordered, that's probably something that is jurisprudentially significant, so if you can articulate why the pattern has become obliterated or confusing, that's kind of how you should be thinking about your task of advocating for jurisprudential significance and there are any number of factors you can weigh in, but that's kind of the big picture, so to speak.

MS. ROSS: Anything else?

JUSTICE CAVANAGH: You know, it's interesting, when I was on the Court of Appeals, I served on the State Bar's Court of Appeals committee, and a big concern back then were unpublished Court of Appeals opinions. There was a great concern voiced by the committee way back then about unpublished opinions provide a haven for lousy opinions that the Court may want to bury or not see the light of day, and it's always struck me as interesting phenomenon. Back then, 80 percent of the Court of Appeals opinions were published and 20 percent were unpublished and that concern was expressed. Today I'm guessing it's totally reversed. About 80 percent are unpublished and 20. But I share my colleagues' assessments as to what, what matters are jurisprudentially significant. An example that comes to mind, I think we are all aware currently, we're starting to see applications involving the medical marijuana law and the confusion in that area that courts have. We've taken a couple cases already, but I'm sure we'll be seeing more of those in the coming year. Those are matters that all of us I think are aware need some, at least some definite pronouncement as to, as to what that very, very mixed up law means or the significance of it.

MS. ROSS: Justice Viviano.

JUSTICE VIVIANO: And I don't have much to

add except again to say mine is evolving. I'm new. I agree with what all of my colleagues have said. It's a much different perspective than the sort of the work of a trial judge which very literally is to deal with every single person who comes to knock on your door. For me to work on developing a filter to decide which cases we should accept and spend time on, I agree with the concerns that were raised about unpublished opinions because I think they carry lot more influence. We say that they're not binding under the rule of stare decisis but when you're a trial judge and there's nothing else out there, the opinions of the three judges in the next court above yours tends to have some influence and they are available now on searches and on Westlaw and Lexis and so they tend to have a lot of influence, and I think that's something we need also to consider when we're looking at things, whether they're jurisprudentially significant.

MR. BURSCH: This is simply yes or no. Would the Court ever consider switching to the blue book style of citations?

CHIEF JUSTICE YOUNG: (No response.)

(Laughter.)

MR. BURSCH: All right. If you have number of cases up on application that all involve the same issue, what kind of factors does the Court consider to pick one or two out of that cache to be the lead

cases?

CHIEF JUSTICE YOUNG: Advocacy is one of them. The better advocate is probably going be preferentially selected. That's one obvious factor. You'd rather have, if you have several cases that all have the same issue, you'd rather have the best argument possible.

JUSTICE ZAHRA: It's not just advocacy, it's also what set of facts best tees up the issue, and we might join cases that it seems like we get to that we deem important, we can apply the law easily to these case, or we might abey, pending a prior case, and those abeyances aren't always public. Sometimes it's an administrative abeyance, sometimes it's a public abeyance, but we're trying pick the case where we can -- not just advocacy but facts and use the facts and the advocacy to develop the area of law in a definitive and understandable way.

MS. ROSS: Justice Markman, you look like you might have a thought.

CHIEF JUSTICE YOUNG: He always has thoughts.

MS. ROSS: I know, I mean that he'd like to share.

JUSTICE MARKMAN: My thoughts were very ably articulated by my colleagues.

MR. BURSCH: We're just about out of time.

Any closing comments on what you want to see or don't want to see in oral arguments? Your last job.

MS. ROSS: Why don't we come down the line starting with Justice Viviano?

JUSTICE VIVIANO: I don't have anything I think to add. My colleagues generally tell me then I should close my mouth. But I look forward to seeing you all when you come before the court. I think, be ready to answer the tough questions, and at this level, the tough question a lot of times is what is it, as Justices Markman and Zahra said, that you want us to adopt and why and be able to speak about that beyond the case that's right in front of us which I think is a hard thing sometimes for lawyers to do as you are very focused on your case and your facts and satisfying your clients, so be prepared to answer the tougher questions.

JUSTICE CAVANAGH: I would echo that. As much as we try to pick only those cases that have jurisprudential significance, I think I would have to admit that every now and then we wind up taking a case that a majority feels an error was made. We probably shouldn't. You ought to recognize, when we take your case, if that happens to be one of those unique error correction cases, and you may not be able to come up with a broad principle, but you ought to be able to recognize that and focus your argument accordingly.

JUSTICE ZAHRA: I'm going to exercise judicial discretion and change the issue presented as given to me by Mary and talk about something totally off that topic and just share with everyone that it shouldn't be lost on the people in this room that this is the first time in the history of this conference that we had the entire court up here for something as meaningful as this and --

(Applause.)

JUSTICE ZAHRA: I wish that you could see this court when we gather for conference or after oral argument. We are a court that really likes each other, we're a court that is absolutely passionate about the law, and if you could see us in conference, I can assure you that it's a court that each and every one of you would be proud of, not just as lawyers but as citizens of the State of Michigan, and I just love my job so thank you so much for letting me do this.

(Applause.)

JUSTICE KELLY: Well, great minds think alike. It was closing argument, so to speak, and I was going to say this is the third legal job I had. I was a partner at Dickinson Wright. As you know, three of my colleagues and I sat on Wayne County Circuit Court, and I've now been here for three years and like Justice Zahra, I love this job, and it's as much, as much as you put into your advocacy and your brief

writing, that's how much we put into the opinion that comes out of the Court and we take great pride in the final product that we author or that we together collectively author, which is the opinion, and so it is a process that you participate in but that we participate in fully and, you know, with everything that we can bring to bear on that process, which is not just our intellect, it is our back and forth, it's everything that we have as, you know, not just jurists now but as lawyers because we advocate for our positions, and it is a tremendous joy. You know, I've only known the good days of the Court, even better now with our two new colleagues, and it is a tremendous joy, so, again, I'm so grateful for this opportunity but just it's a great court and it is a great job, so thank you.

MS. ROSS: Justice McCormack.

JUSTICE McCORMACK: I think, as the almost newest member of the Court, I want to underscore what Justice Zahra and Kelly just said, and from my perspective, I couldn't imagine being more warmly received personally and intellectually by my colleagues on this court, every single one of them, and I have been incredibly satisfied with and have enjoyed the extent to which our conferences and our conversations after conference and before conferences have really been substantive, engaging, and the open

minded reception I've received from every one of my colleagues, and it's important that you hear I'm not sure I appreciate personally how remarkable to have all seven. It feels unremarkable. We're going camping after this, so -- So but that's right, I'm happy to be part of today's conference.

MS. ROSS: Justice Markman.

JUSTICE MARKMAN: Well, if there's a theme we've tried communicating, and I think there is a theme because we're generally in agreement on that, it is that while it's sufficient in the Court of Appeals to demonstrate that the trial court has erred in some regard, it's additionally necessary in the Supreme Court to demonstrate that its limited resources should be engaged in resolving the larger legal issues that lie at the heart of your dispute. This is a court that is very engaged and over my 14 or 15 years on the Court, I found this to be one of the most engaged courts that we have had. We're trying to get the law right and we want you to come to the court with your best briefs and your best argument because that assists us in getting the law right.

One footnote I'd add is that when you use some of these very broad words, vague words like public policy and equity and unfair and spirit, try to give us some more precision as to what you're saying as opposed to thinking that those words by themselves can

form the thrust of a good legal argument. In proper context, perhaps they can, but I think sometimes, at least from my perspective, when those words are used a little bit too freely, it suggests to me that maybe the hard law is not as much on your side as you might like it to be in that case, so I ask you to look at some of these words that are subject to abuse. There's lots of things that are unfair, but I don't think any of us sees our role as simply being on the Court to correct some kind of disembodied fairness unless there's a sense that it's also unfair under the law, so I'd ask you really to look carefully at those kinds of words because I think it's in your interest, I think it's in the court's interest and I think it's in the people's interest in Michigan that we engage in the right kind of decision making and I think you want that decision making to be based on the law, so you can consult with your clients and you can tell them what the law is in the next dispute they may have as opposed to just having to put your finger in the wind and guess at what the Court might do.

MS. ROSS: Thank you, Chief Justice Young.

CHIEF JUSTICE YOUNG: I think Justice Zahra has hit the exactly right note. This is my 15th year on the Court. I have never been prouder to be a member of this court than I am today. I think it is a

court worthy of being your senior court and I'm hopeful that should you have the occasion to come before us, you'll come with your game and to educate us. These are very serious and passionate lawyers and it is a joy to be able to sit down with them weekly and debate the law. We welcome you and look forward to seeing you.

MS. ROSS: Thank you.

(Applause.)

MS. ROSS: I just want to again thank all the members of the Court. I want to particularly thank Chief Justice Young, who has been such a great supporter through the planning process and has assisted us in every possible way in making this conference a success. We are so thrilled that you have come and helped us and engaged in this conversation. And we thank you so much. Thank you.

(Applause.)

(Proceedings concluded at 12:10 p.m.)

Effective Supreme Court Advocacy: Advice from the Chief Justice

Chief Justice Robert P. Young, Jr.
Michigan Supreme Court

REQUIRED DISCLAIMER

I have attempted in this outline to provide general, not exhaustive, guidance on effective advocacy and on practical issues that most advocates are likely to face before the Michigan Supreme Court. My colleagues bear no responsibility for the observations I offer. The views expressed in this outline are solely my own.[1]

I. The Basics

Appellate advocacy in Michigan is not as effective as it should be. Since I joined the Court of Appeals eighteen years ago, I have been stunned by the relatively poor general caliber of advocacy in Michigan's appellate courts. A surprising number of appellate lawyers, in both their written and oral presentations, seem to be unaware of basic advocacy principles. Even some "frequent flyers"—those who argue often in the Michigan Supreme Court—do not seem to know what the drill is.

- **The merits of a case *always* matter; advocacy influences on the margins.**

I think we lawyers sometimes overstate what even excellent advocacy can accomplish. It strikes me that the impact of advocacy is *asymmetrical*: excellent advocacy never hurts but it can rarely overcome a poor case on the merits. However, poor advocacy is frequently fatal. "Adequate" appellate advocacy avoids the common mistakes, but excellent advocacy does more: it can make a marginal case look better than it otherwise might appear to be.

My point here is that an advocate must deal with the case she is given, and the merits of that cause *ought* to control the outcome. Here, I address the indicia of effective appellate advocacy—those lawyer techniques that can enhance rather than reduce the probability of success, whatever the merits of the case might be.

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[1] I would like to thank my law clerk, Christopher Hammer, for his assistance in preparing these materials.

- ***Always* observe the core principles of advocacy: candor, credibility, and honesty.**

Excellent advocacy depends on the integrity of the work product. While it should not need to be restated, it is unfortunately necessary to note that an attorney has an ethical obligation of candor toward the tribunal. MRPC 3.3. Your professional credibility with the court matters. ***Never* mislead the Court, whether on the facts or the law.**

- **Tone matters: Make sure that your "therapeutic rants" end up in your wastebasket, not your brief.**

Use a professional tone when advocating before the Court, whether in your brief or in your oral argument. Credibility can be gained or lost by the tone with which you argue. Whining is seldom well received, and shrill attacks on *anyone*—whether your opponent, the lower courts, or the Supreme Court—will weaken your argument, however meritorious your case. Typically, if a real outrage has been committed, the principle of *res ipsa loquitur* applies: Identify the location of the wreck and explain its consequences in a measured tone, but do not over elaborate on the venality of the author of the carnage.

Two briefs that the Court recently received illustrate advocacy tone blunder. One brief stated that the Supreme Court's contract law precedents constituted "the jurisprudence of hypocrisy," likened those cases to *Dred Scott* and *Plessy v. Ferguson* – "infamous cases eventually consigned to the dust heap of history" – and claimed that they are more typical of "some third-world backwater with either no functioning legal system, like Somalia, or one that is inherently perverted, like North Korea." Another recent brief lectured the Court that judges who "proudly embrace the title of judicial conservative" should recognize the merits of its position. One wonders what advocacy goal was advanced by these shrill attacks. Neither of these advocates helped their clients by using a tone that denigrates or hectors the Court or its members.

- **Know and follow the rules of issue preservation.**

Do not raise issues for the first time on appeal,[2] and do not surreptitiously seek to expand the record on appeal and do not let your opponent do so either.[3] "Expanding the record" includes using evidence that either was never presented at all or was held to be inadmissible by the trial court (except, of course, to argue that the proposed evidence was improperly excluded). One very common mistake is to attach as exhibits to an appellate brief documents that were not included in the lower court file.

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[2] The rules for issue preservation are different in criminal cases. See *People v Carines*, 460 Mich 750 (1999), which outlines the standard by which the Court may grant relief notwithstanding a defendant's failure to raise an issue before the trial court.

[3] See MCR 7.210.

II. Advocacy in Your Brief

A. The Basics

- **The goal of all advocacy is successful persuasion: Never frustrate the persons you are trying to persuade.**

All else proceeds from this core premise of advocacy. Everything you write and orally argue should serve this goal, everything that might frustrate this goal should be eliminated.

- **Write clearly.**

Read *and use* your Strunk & White (or and equivalent work) to perfect basic principles of clear and effective writing. Avoid using needlessly complex jargon. While precise technical terms are often necessary to explain a complex case, your writing should eschew obfuscation and ostentatious sesquipedality.[4]

- **Proofread.**

Errors in your work product can raise questions regarding the substance of your work. The small things do matter—even the physical readability of the brief. (Recall the goal of advocacy.)

Proofreading includes more than merely ensuring at there are no spelling or grammatical errors: it includes making revisions to improve *clarity*.

- **Use a road map to guide the Court through your argument.**

A road map that outlines your argument helps the Court understand the big picture. Prepare an effective table of contents. Any introductory material should point the Court to where your argument is leading. Lay out your facts carefully and as simply as possible. Make the procedural history clear, and outline the relevant case law, statutes, and other authority so that even a new law school graduate unfamiliar with the area of law can grasp the core legal issues you are raising. Finally, place your case in a comprehensible legal and factual context and order your argument so each point flows naturally into the next.

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[4] Literate writing is always a plus but if you use obscure language, you fail the primary task of advocacy: persuading your reader.

- **Get to the point!**

Be concise. Less *is* often more.[5] Chief Justice Roberts aptly remarked that he "ha[s] yet to put down a brief and say, 'I wish that had been longer.'"[6] Parties are entitled under the Michigan Court Rules to submit briefs of up to 50 pages. And although advocates should make sure that they fully articulate their positions in their briefs, if your appeal can be well presented in fewer pages, little is gained by making your reader slog through more than is required to make your point.

- **Guide the Court to all relevant source material.**

Since the Court is frequently operating under significant time pressures, having precise citations in a brief helps us to focus our background research on a case. When asserting a proposition of law, the most helpful briefs contain "jump cites" that refer to a specific page or pages in the case that support the underlying assertion. Similarly, effective advocates cite specific pages in the case record to support their particular factual claims. Because the Court *will* check the underpinnings of counsel's legal and factual assertions, the most helpful briefs will expedite our review by providing precise citations.

- **Recognize and apply the correct standard of review.**

Identify the correct standard of review for each claimed legal error. Appellants sometimes seem to think that the Court reviews every claimed legal error as one requiring review de novo. An argument founded on the incorrect standard of review is immeasurably weakened.

B. Write To Your Audience

- **The mission of the Michigan Supreme Court should influence advocacy strategy.**

How you frame your argument before the Michigan Supreme Court should be influenced by the Court's mission. I believe that the prime function of the Supreme Court is to manage the "fabric of the law" to ensure that the pattern is clear and evolves predictably. In the Michigan Supreme Court, the most important challenge for an advocate is to determine *how your case can be postured as one having jurisprudential significance.* The vast majority of applications for leave to appeal are denied in the Michigan Supreme Court because the issues presented simply have no or little jurisprudential significance.

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[5] Ludwig Mies van der Rohe

[6] Bryan Garner interview with © Chief Justice Roberts, 13 Scribes Journal of Legal Writing 5, 35 (2010).

(By contrast, because the Court of Appeals is an error correcting court that *must* consider almost all timely filed appeals, the most important challenge for an advocate in that court is usually much more mundane: how to get the court to recognize and correct an error.)

- **Your Supreme Court audience consists of generalists.**

When writing a brief that is filed with the Michigan Supreme Court, your primary audience comprises seven Justices, our law clerks, and the Supreme Court's staff attorneys. We are all generalists with varied degrees of previous practice experience. (Some, in what I am calling the "Supreme Court audience," will have only recently graduated from law school and others will not have actively practiced law in any field for many years.)

Many appellate advocates seem either to have forgotten or never realized that, once judges join the bench, (even those Justices who had robust practices) we soon lose a granular knowledge of specific areas of law. And none of us can be expert in all the areas of law represented in the cases that come before us, nor are we familiar with changes that inevitably occur in the actual practice of law after we left practice. More than we may like to acknowledge, our "antique" understanding of the practice of law can affect how we frame and understand issues.

Because we have such varied experiences, the best appellate advocates will not assume that any one of us has a particular degree of expertise in a highly technical area of law or a highly technical factual matter. This consideration is particularly important in cases involving complex, technical statutes. The best advocates will therefore provide adequate contextual background on the technical aspects of the relevant facts and law to assist the Supreme Court audience in understanding the specific issues that their case implicates.

- **Know the Court.**

Judicial philosophy matters. Knowing each Justice's judicial philosophy would seem to be an essential factor in determining how best to frame arguments before the Court. Yet I am surprised by how often lawyers fail to understand why judicial philosophy matters in how a judge approaches decision-making. I have a definite judicial philosophy,[7] as do each of my colleagues. The best advocates factor this consideration into how they frame and develop their arguments.

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[7] Young, "A Judicial Traditionalist Confronts Justice Brennan's School of Judicial Philosophy," 33 OKLA. C. UNIV. L. R. 263 (2008).

C. Effective Brief Writing – The Application for Leave to Appeal

- **Know the statistics that you're up against.**

The Supreme Court receives approximately 2,000 applications for leave to appeal every year. We order peremptory action or remand the case to the Court of Appeals in a small number of instances, and we typically hear oral arguments on only 75 or fewer cases per year. As a result, the default position in applications for leave to appeal is an order of denial.

- **The application stage is most often an advocate's only shot at capturing the Court's attention.**

The advocate's job when petitioning the Supreme Court for relief is to explain why his case should be in that small minority of cases that we take up for closer review.

- **Think about and argue the jurisprudential significance of a case.**

The best appellate advocates will consider carefully why their case is representational of a class of cases in which the patterns of Michigan law have become disordered. As important, they also address *how* their arguments might affect the doctrinal patterns in closely related areas of law and describe why the relief that they seek in the Supreme Court will result in *less* disorder in our law.

- **Understand the broader area of law that your case represents.**

As stated, I believe that the Supreme Court's primary function is to manage the fabric of Michigan law. If we are doing our job well in selecting cases, we will be attempting to choose cases to ensure that the pattern of the law emerges predictably and with a discernable pattern. We should select cases in areas where the pattern of the legal fabric has become disordered, chaotic, or frayed.

For example, when I joined the Court in 1999, in many areas of the law, one could find a Michigan Supreme Court decision to support *any* position a litigant chose to make. In *Nawrocki v Macomb County Road Commission*, for instance, we considered whether the statutory "highway" exception to governmental immunity imposes a duty on state and county road commissions to protect pedestrians from dangerous or defective conditions on the improved portion of the highway designed for vehicular travel.[8] At the time we

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[8] *Nawrocki v Macomb Co Rd Comm*, 463 Mich 143 (2000) km

considered the case, each party relied on Michigan Supreme Court precedent in support of its position—there were two divergent, and contradictory, strands of case law on the books. Our body of law was internally inconsistent, leading to wildly varying results from case to case.[9] In *Nawrocki*, we articulated a single rule of law that attempted to follow the actual statutory language of the highway exception.[10] Successful advocates identify such inconsistencies and provide guidance on how to resolve them.

- **Written appellate advocacy that examines its case with the fabric of Michigan law in mind benefits the Court and, ultimately, everyone in the State.**

At the application stage, the most important advocacy challenge is determining how the case can be best postured as having jurisprudential significance. As a clue to understanding what issues interest the Court, a good appellate advocate will peruse the Court's prior related decisions as well as orders granting leave to appeal, which often include specific issues that the Court requests the parties to brief.

- **Failure to advocate for a case's jurisprudential significance is almost always fatal.**

Many appellate attorneys are so focused on achieving a positive result for their clients that they neglect to think through the implications of the relief that they seek or why they should be entitled to particular relief. While good written advocacy at the application stage will not render a jurisprudentially *in*significant case significant, helping the Court to understand the importance of a particular case may sometimes make the difference between the Court accepting the application and the Court denying leave to appeal.

- **Jurisprudential significance does not always insulate your case from a denial order.**

There are myriad reasons why we might choose not to grant leave in any given case, even a jurisprudentially significant one. For example, our examination of the case may show that the factual record is insufficiently developed on the question that piques our interest. Or we might discover that another issue appears dispositive and resolves the dispute in a cleaner fashion and obviates the necessity of reaching the question of interest. Or we might conclude that the Court of Appeals decision is arguably correct and there is no clear need for the Supreme Court to add its imprimatur.

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[9] See *Nawrocki*, 463 Mich at 166 ("These conflicting decisions must be resolved, in a manner that faithfully interprets and applies the statutory language drafted by the Legislature and adheres to the narrow construction of the highway exception. . . .").

[10] *Id.* at 168.

Be mindful of impediments to reaching the issue you want the Court to reach and address them.

- **Sometimes a half loaf is better than none: Recognize and argue for relief short of a grant.**

Many advocates fail to recognize the availability of relief that does not necessitate a full grant. Where appropriate, we can resolve a case on order—short of full briefing and oral argument. The good appellate attorney will not be afraid to seek alternative forms of relief, such as a remand to a lower court for clarification on a controlling issue, a remand in light of more recent authority, or even a peremptory reversal when the claimed error and underlying law are clear. Indeed, because many cases are *not* jurisprudentially significant, they can be corrected in this way if the error is clear—but only if you ask for it.

D. Effective Brief Writing – The Oral Argument Brief

- **Pay attention to the language of grant orders.**

Often, the Court's orders granting leave to appeal (or scheduling oral arguments on the application) will specify issues that the Court requests the parties to brief. This gives the parties and amici an idea of the issues that captured the Court's interest in the case and offers them the opportunity to examine those issues more fully than they were examined at the application stage. **Be sure that you fully respond to those issues!** (This is a point I never thought that I would have to make, but experience shows that I do.)

- **Consider in advance of drafting your brief the obstacles you face that must be overcome in order to succeed.**

Is there adverse precedent? If so, how well reasoned is it, and has it been criticized? Have there been any recent legislative changes that might alter the legal environment since the question at hand was last examined by the Court? Does the language of a statute support or undermine your position? Outline and address the "problems" posed by your case.

- **Know and anticipate your adversary's arguments.**

The best appellate advocates will have already thought through the other side's strongest arguments. (In fact, at this level, you should know your case well enough to *make* the other side's arguments for her.) Do not ignore arguments that are unfavorable to your case; rather, by anticipating your adversary's strongest arguments, you should address squarely those arguments and explain why they are not fatal to your case. An attorney who

avoids his adversary's strongest arguments does so at his peril; we—his Supreme Court audience—*must* consider the weaknesses in his argument whenever deciding a case.

Consider one of the shortest published Court of Appeals decisions, which occupies exactly one page in the Michigan Appeals Reports. It states:

> The appellant has attempted to distinguish the factual situation in this case from that in *Renfroe v Higgins Rack Coating and Manufacturing Co.* . . . He didn't. We couldn't. Affirmed.[11]

Some cases are just that easy, especially when counsel does not do much to respond to the weaknesses in his argument.

III. The Art of Oral Advocacy

- **Oral argument is a unique and difficult advocacy art.**

It is an *art* because every oral argument should be a *uniquely crafted entity designed for a particular circumstance*. The sad fact is that my experience persuades me that the oral argument is one of the most poorly developed of advocacy skills that lawyers use. From my perspective, oral advocacy appears to be one of the great lost advocacy opportunities. I cannot offer a formulaic recipe for oral arguments, but I do think that there are some core precepts that an advocate ought understand and follow.

- **Do Oral Arguments Matter?**

The answer depends on whether the question is asking if oral arguments typically or frequently cause a Justice to change her mind or whether an oral argument otherwise makes an important contribution to the decision-making process. In my experience, the honest answer is that few oral arguments actually cause a Justice to radically alter his view of a case. However, effective oral arguments—on the margins—can cause a judge to rethink his views of the case.

I think the more important point is that oral arguments provide a judge with an opportunity to *challenge* his thinking about the legal questions at issue. Thus, for me, whether an oral argument—even a very effective one—causes me fundamentally to change my views is not as important as the opportunity it presents for me to work through the issues in a thorough fashion.

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[11] © *Denny v Radar Industries, Inc*, 28 Mich App 294 (1970).

Surely, an effective oral argument can provide a margin of success in a close case. But it would be hard to imagine how even the most brilliantly conceived oral argument could overcome serious substantive legal weaknesses in a case. It is important for you as practitioners to understand that the converse is not true: poor advocacy, including oral advocacy, *can* sunder a case of real merit.

A. The Basics

- **Know the rules of oral argument.**

The current Michigan Supreme Court is a "hot court" – the Justices are engaged and ask a lot of questions. For that reason, the Justices have agreed to withhold questioning of the advocate during the first five minutes of argument. The Justices have read your briefs. This "cease fire" period may be the only time you have to make a coherent exposition of your argument. Do not waste this time with precatory throat clearing. Use this cease fire time to introduce your main points and, most important, explain what you want the Court to do in its opinion. In short, this is the time to frame what you want the Court to do and how we should accomplish that.

Reserve rebuttal time (if you want it). The appellant is entitled to reserve rebuttal time to respond to points that the appellee makes during his argument. Be sure to reserve this time at the outset of your oral argument, or you risk not having any time to respond to the appellee's argument. During your rebuttal period, do not simply rehash the points that you make during your main argument. Pay attention to the questions posed to your adversary and the answers given, and incorporate appropriate responsive positions into your rebuttal.

- **Observe basic hygiene: Avoid distractions that may divert attention from your argument.**

Because an advocate wants the Court to focus on the points being made, the advocate must pay attention to the essential "hygiene" that the occasion requires. One wants the judges' attention riveted to the argument, not the attorney's personal idiosyncrasies of delivery. Odd personal mannerisms—such as fidgeting, waltzing around the podium, speaking in a low or monotone voice—can be very distracting. The best advocates understand that they need to master nerves and work on techniques to reduce the extent to which nervous tics are on display during argument. Practice your arguments before others or record them in order to become more aware of how you look when presenting an argument.

Oral argument is probably not an occasion to make a bold fashion statement. Men should wear a well-pressed suit (or jacket and slacks) and a tie. Women should wear the equivalent. When in doubt about what to wear, opt for more conservative clothes. For good or ill, *how* you present yourself can affect the way that people judge the credibility of

what you say. Making an oral argument in an appellate court is an occasion to display the utmost professionalism; your personal demeanor should suit the occasion.

- **Know the *purpose* of oral argument.**

If an appellate brief provides an advocate the opportunity comprehensively to lay out her argument, an oral argument provides her an opportunity to present the Court with a focused, *highly tactical* presentation on the outcome determinative issues that require resolution favorable to the advocate.

Stated somewhat differently, an effective oral argument should be a distillation of the most critical issues in the case that should drive the Court's decision in the advocate's favor. *A good oral argument should be arresting, have an inexorable focus on the critical issues, and supply the most compelling reasons why the case should be resolved favorably to the advocate.*

- **Preparation is *vital*: BE OVER-PREPARED.**

No Justice should have a better understanding of the record than the advocate but this is a surprisingly frequent occurrence. Know your case *cold*, including the factual record *and* relevant law. Few things are as deflating as having to admit during argument to ignorance of key facts, trial rulings, or controlling authority. Have case citations and record references handy during argument.

I STRONGLY recommend that advocates practice their argument in a moot court exercise. This is an excellent way to "pretest" the core strategy of the argument.

- **Research the Justices' positions in cases involving similar issues.**

The best advocates are always aware whether members of the Court have previously decided issues similar to those involved in the case at hand. As appropriate during argument, refer to any opinions members of the Court have authored (or participated in) that have any bearing on your case. *Be prepared to use a favorable decision or address the problem created by an unfavorable decision.*

- **Briefly frame each major issue before beginning your discussion of it.**

This technique will help the Court better understand the structure of the argument an advocate is making. This is the verbal equivalent of using headings in a brief.

- **Argue only your strongest issues—start with the best.**

At oral argument, you need present a laser-like focus on the *outcome determinative* issues. A shotgun approach only suggests that an advocate has no idea which of his arguments have merit. So advocates should avoid a shotgun approach to covering arguments that will diffuse the impact of the essential points. Rely on your brief for the remaining (weaker) arguments and tell the Court that you are doing so.

B. What to Expect at Oral Argument

- **This is a *conversation* with the Court, not a recital.**

Many advocates approach oral argument as though it were a recital rather than a substantive conversation with the Court. Those who attempt a "recital" tend to flounder.

Oral argument should be considered an opportunity to educate the Justices.

Look at and speak to the Justices, and use an outline, not a script. Advocates bound to their "script" are frequently unable to respond as effectively to the give and take inherent in appellate oral argument. Consequently, *listen to* and *answer* the questions that the Justices ask.

- **Stay calm.**

Avoid pitched arguments with the Justices, but hold your ground if you are being pushed unfairly off of your position. Again, a vigorous moot court exercise is an excellent way to become accustomed to pointed questioning that you may face in Court.

- **Listen closely to the questions asked and address them as directly as possible.**

If you are the appellee, listen carefully to the questions posed to your adversary and incorporate appropriate responsive positions into your argument. But if you are ahead, *don't overreach!*

- **Know your speaking points and stay "on message."**

After answering a Justice's question, return to your point. When he was preparing for oral argument before the U.S. Supreme Court, Chief Justice Roberts would label index cards with each of his main points and then practice transitions by shuffling the cards and transitioning from one random card to the next. Doing so not only helped him to understand how each of his points related to the other, but it also helped him ensure that he could quickly pivot from one point to another during the heat of questioning.[12]

Having a moot court practice can help advocates develop comfort in responding to questioning and discover weaknesses that need to be strengthened.

- **Do not assume that questions are an indication of hostility.**

Most Justices want to find the "right" answer and want to make sure that they understand the relevant issues. Questioning counsel is one of the best ways for a Justice to verify his or her understanding of the case. Be aware that the questions posed by one Justice may be asked for the benefit of another who may be laying quietly in the weeds.

- **Admit that the sky is blue.**

Failure to acknowledge controlling authority and the like simply results in a loss of the advocate's credibility.

- **Deal candidly with surprise.**

If, notwithstanding all of your preparation, you are surprised by an issue raised during argument, ask for the opportunity to file a *short* supplemental brief on the limited topic raised.

C. What to Avoid at Oral Argument

- **Do *not* recite your brief.**

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[12] Bryan Garner interview with © Chief Justice Roberts, 13 Scribes Journal of Legal Writing 5, 23-24 (2010).

One of the most obvious problems that lawyers have with oral arguments is that they misperceive its function and their own role in the process. Too frequently, counsel seek to recapitulate what they have already presented – at length – in their briefs. Regurgitation of a brief is a futile exercise. When the advocate has, at most, 30 minutes to address the critical issues the Court ought to consider, oral argument should be extremely focused and *tactical*.

- **Don't dwell on detailed background facts supplied in your brief.**

At the time of argument, the Justices will have read your briefs *and* probably have a legal memorandum assessing the case. There are better ways of spending your limited time than making an extensive recitation of facts. However, be sure to provide enough facts to assist the Justices to remember the specifics of your case and to marshal those facts appropriately when arguing your main points.

- **You are addressing *judges*, not a jury.**

While passionate advocacy can be effective, *histrionics* directed to the Justices usually are not. Cheap emotional appeals having little to do with the law at issue usually are off-putting and ineffective. One example of this is a recent advocate who urged the Court to "judge up" and avoid caving into "political pressures" in deciding the case.

D. What the Justices Are Thinking

- **It is *not* about your case.**

I know you and your client want to win *your* case, but the Supreme Court's job is to interpret an *area* of the law, not one particular case. Your job is to present a rule of law not just for *your* case, but for the *next hundred cases* like it. Thus, we are thinking about how your case affects other cases, *past and future*.

Many appellate practitioners do not understand that, particularly at the Supreme Court level, the Court cannot resolve the case at hand without addressing broader ambient legal doctrines in which the case arises. Consequently, such appellants tend to argue that their case should be decided on its unique characteristics, oblivious to the fact that, if the case had *no* broader doctrinal implications, it is unlikely the Court would have granted leave in the first instance.

- **Many lawyers tend to ignore doctrinal issues and are blindsided by questions from the Justices that focus on them.**

We are always seeking to understand what a party is asking us to do – either explicitly or implicitly.

> *An appellate advocate must ask two questions: "What rule of law am I asking the Court to apply?" and "Does this rule require a modification of existing law?"* If the answer to the second question is "yes," then the advocate is obligated fully to explore the implications of that change.

I am stunned by the number of times at oral argument an advocate is unable to provide the thesis statement for the rule of law it wishes the Court to adopt. This may be because the advocate has not understood what doctrinal foundations are implicated in the relief they seek or their belief that it is the Court's job to formulate the rule of decision.

It is the *advocate's* job to provide the Court with the rule of law it wishes the Court to adopt in resolving the case. Too many advocates follow what I call the "dead mouse" theory of advocacy: like a housecat bringing a mouse to its owner, they will lay the result they want at your feet and then look at you to figure out what to do with it. Avoid this temptation and explain not only *how* the Court should get to the outcome you seek but also *what* the consequences of our decision will be.

- **The hypothetical question is one of the primary means for testing whether the legal principle urged is logically applicable in the next series of related cases.**

Many lawyers "decline" to answer hypothetical questions on the ground that such questions contain facts or issues that differ from those in their own case. While it is perfectly appropriate to point out the assumptions or facts that make proposed hypothetical questions inapposite, dodging hypothetical questions as "different from my case" frustrates a Justice's ability fully to assess the legal principle at issue. *In my view, generally, a refusal to respond to hypothetical questions suggests that the lawyer simply is afraid to engage in the intellectual exchange that should inform an oral argument.*