2016 Michigan Appellate Bench Bar Conference Summary Report

The Bench Bar Conference Committee is pleased to present the 2016 Michigan Appellate Bench Bar Summary Report. The theme for the 2016 conference was "Shaping the Law: Tools of Advocacy and Decision Making."

The conference began with an interactive plenary session on the ways in which both the bench and bar shape the law. Using an app developed specially for the conference, a "mega-panel" of thirteen Court of Appeals judges participated in an interactive live poll on topics such as approaches to precedent, development of the common law, publication of decisions, statutory interpretation, and judicial restraint. After that plenary session, conference attendees participated in breakout sessions with justices, judges, and court staff, where they further discussed the various issues that the panel addressed.

At lunch on the first day of the conference, attendees were treated to remarks from former United States Supreme Court Clerk General William Suter – a "towering figure" at the Court who served for 22 years as Clerk under two chief justices and 14 associate justices. The afternoon consisted of two plenary sessions that provided attendees with insight into the Supreme Court's and Court of Appeals' Clerk's Office and Commissioners' Office.

The first day also included two plenary sessions focusing on the inner workings of the Supreme Court and Court of appeals. In the first session – "A Day in the Life of the Clerk's Office" – members of the clerk's offices of both courts provided insight into how they handle appeals and original actions, from initiation to resolution. For the second session – "The Commissioners' Office: Behind the Scenes," experienced commissioners from the Supreme Court and Court of Appeals gave a glimpse into the courts' internal processing of applications for leave to appeal and offered tips for avoiding common pitfalls. During both sessions, participants had the opportunity to use the conference voting app to share their experiences on subjects like e-filing, working with the clerk's office, and the timing for decisions on applications.

Attendees wrapped up the first day at a reception and dinner where former Michigan Supreme Court Chief Justice Maura Corrigan was presented with the State Bar Appellate Practice Section's Lifetime Achievement Award.

The second day of the conference began with a presentation on technology tools for appellate lawyers and judges, in which participants were able to once again use the conference voting app to express their own technology preferences and practices. The conference closed with a panel discussion among all seven Supreme Court justices, who provided tips on advocacy before the Court, including requests for leave, merits briefing, and oral argument.

Over the course of the conference, attendees also participated in breakout sessions focused on various aspects of advocacy in the criminal, civil, family, and child welfare areas, such as motion practice, briefing, oral advocacy, and interlocutory and emergency appeals.

In this summary report, the Bench Bar Conference Committee has strived to provide a relatively brief, yet comprehensive synopsis of all of the plenary and breakout conference sessions. The summary report also includes the full transcripts of the plenary panel discussions, along with the polling results from those sessions.

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.

Phillip J. DeRosier
Dickinson Wright PLLC
Summary Report Editor

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SHAPING THE LAW:

TOOLS OF ADVOCACY AND DECISION MAKING

Plenary Session,

Taken at The Inn at St. John's Conference Center,

44045 Five Mile Road,

Plymouth, Michigan,

Commencing at 8:45 a.m.,

Thursday, April 21, 2016,

Before Donna K. Sherman, CSR# 2691.

PANELISTS:

Michigan Court of Appeals, Chief Judge Michael Talbot

Honorable Jane Beckering

Honorable Michael Kelly

Honorable Amy Ronayne Krause

Honorable Michael Riordan

Honorable David Sawyer

Honorable Douglas Shapiro

Honorable Peter O'Connell

Honorable Colleen O'Brien

Honorable Elizabeth Gleicher

Honorable Jane Markey

Honorable Michael Gadola

Honorable Christopher Murray

Moderator, Megan Cavanagh, Garan Lucow Miller, PC

Plymouth, Michigan

Thursday, April 21, 2016

8:45 a.m.

MS. CAVANAGH: Good morning. Judges are making their way to the very long table.

This is, as Judge Talbot said, a bit of an experiment but also hoping for a bit of a treat.

We, a lot of times panels, if we limit it to a couple of judges at a time, here we have 14 of our, of the Court. Uhm, and, so, we're going to get a more representative sample of, uhm, responses and their opinions.

As we indicated, this session is focused on the theme of the conference, and that's The Tools of Advocacy and Judicial Decision-making and how those tools shape the law into what it is, what it should be, uhm, when those tools are used properly, uhm, when they aren't, and what are the limitation of those tools and the effect that they have on our law.

We're going to hear from our panel, Court of Appeals Judges who I'll introduce in a moment. And then we're, following the session, everyone is scheduled into a break-out session, which is a smaller,

more intimate session where we can discuss things with other attorneys, court staff, Judges, Justices.

So, I would like to introduce our panel that we have here from the Court of Appeals.

Uhm, starting here to my left. We have Judge Douglas Shapiro, Judge Michael Kelly, Judge Colleen O'Brien, Judge Amy Krause, Judge Peter O'Connell, Judge Michael Talbot, Judge Elizabeth Gleicher, Judge Jane Markey, Judge Michael Riordan, Judge Michael Gadola, Judge Jane Markey, Judge Chris Murray, and Judge David Sawyer of the Court of Appeals.

(Applause)

MS. CAVANAGH: So, we have in the materials and in the app, you should have a link to it. Where we have the planning group put a lot of time and effort into this and broke this general category down into six sort of more subcategories of tools that shape the law. And you'll see them there in your materials. They include treatment of precedent and issues of first impression, interpretation of constitutions, statutes, contracts, judicial activism, or judicial restraint, if you will, oral argument, error correction, and the management of cases.

And so we're going to explore each of those a little bit further and see how they shape the law.

So, we have a series of questions on the app that, there's ten -- there's ten or 11 of them. And some have already voted.

So, we have, this is good. No, this is good. So we have, we're going to ask the judges. I think everybody has access to these questions and the limits of technology. We're asking only judges to vote on them.

Is that what some of these are?

Okay. Okay. So going forward I should have said it earlier. This is for judges only.

And, so, why don't we start, you're not here to hear from me. You're here to hear from them.

Question one, although unpublished and pre-1993 opinions are not precedential, I consider their analysis and outcome when ruling on appeals before the Court.

So, again, although unpublished opinions and pre-1993 opinions are not precedential, I consider their outcome when ruling on appeals before the Court.

And, we have -- we have nine who agree, two, strongly agree, and three who disagree.

Nobody's neutral about this.

And, obviously, there's been much discussion recently about the change to the rule and the citation

of unpublished opinions. But I don't think we need to, uhm, necessarily talk about that. But I guess, what, ask the panel. What, if at all, or how if at all do unpublished opinions shape the law?

Either for those who disagree that you consider them or those who agree. How do they, in your opinion, do they shape the law? They exist. They're here. What do you think of their importance?

JUDGE BECKERING: The way I answered was disagree and it was because of the nature of the question. The question says, when shaping the law, do I consider the expectation of the parties and the non-parties. To me it's not the expectation of the parties. It is the persuasive value of that.

I may answer that later.

MS. CAVANAGH: That's good.

JUDGE BECKERING: So, yes, I agree on number one.

JUDGE O'BRIEN: On question two, I'll try question one.

JUDGE KRAUSE: I actually said strongly agree, but I don't strongly agree regarding unpublished opinions. But the pre-1993 opinions before the first out rule, I do look at those and I do consider those. I think this is a question where part of my answer

would be, I don't really take into account the unpublished opinions.

However, if I have a party that has relied on an unpublished opinion almost exclusively in their brief and that's what they're talking about, I'm not going to not mention it in my opinion unless I'm forced not to by the reporter's office or something.

I really think it's important to address the lawyers' and the litigants' concerns even if it is from an unpublished opinion. But I will say from me, the pre-1993 opinions are what I was talking about. I think even though they're not precedential, I think that those can actually be very helpful, whereas the unpublished opinions, it would be better if we didn't cite them, because if you knew, when we're talking about an unpublished opinion versus a published opinion, it's a very different conversation. So, I think that there's a reason we don't rely on them as strongly. So, that's my opinion.

JUDGE O'CONNELL: This issue has been one of the great contentions in our Court. Some of us strongly degree. Any help I can get, whether it's an unpublished opinion, especially if it's one of mine, I find it helpful, especially if you cite it to me.

Others on the Court strongly disagree. Simply

because, I think, in part, because of the fact that it was unpublished to start off with. It's not precedential.

I use all available sources whether it's Federal opinions, whether it's unpublished opinions. I think it's helpful in setting a time line to get to wherever the law is going to take us. So I'm on Amy's side. I strongly agree.

JUDGE KRAUSE: Oh, my gosh. We are taking notes, good.

JUDGE O'CONNELL: O'Connell agrees with Krause.

JUDGE O'BRIEN: It's a day to write down.

MS. CAVANAGH: Anyone who strongly disagrees, did they want to share the reasons?

JUDGE GLEICHER: Since I'm the leader of the strongly disagrees. And I'm going to have to strongly disagree with one thing that Judge O'Connell just said. We took a vote on that proposed rule on our court and on our bench, and it was unanimous. So there was no strong disagreement among members of the Court of Appeals as to the proposed rule that the Supreme Court recently finished its evaluation of. And we now have. I do not read, cite, or use unpublished opinions. That's not to say I don't go back to my own sometimes

and cut and paste a standard of review or something like that. But unpublished opinions are not trustworthy sources of the law in my opinion, period. They do not receive the same considered evaluation as published cases do. They do not receive the same attention from judges, frankly, that published cases do.

There are many, many times during the course of the case call that I will read an unpublished case circulated by one of my colleagues and say, I don't agree with everything in this opinion, but I am not going to quarrel or quibble over this or that. The bottom line is correct and I'm going to sign it because I hope that no one else is gonna cite this language that is not strictly correct or does not accurately state the law.

So, that's the most honest answer I can give you.

JUDGE TALBOT: I also strongly disagreed. And I don't like the way the question's structured, because it speaks in terms of, I consider. The first problem is, that it assumes in the brief citings that there's citation to unpublished. That should not be happening.

Even with the modified rule, the change of rule, it is not encouraged. So the minute you start thinking

about, I looked at everything that you cite, we've got a problem. Unpublished are based on published. When you start getting to, and Judge Murray's favorite example, and I don't want to take anything from him, your standard of review. And he actually can show you briefs wherein the standard of review was a citation to an unpublished case. Instead of unpublished cases, out of sheer intellectual laziness.

So, quite frankly, the way the question, I consider their analysis and outcome when ruling. If somewhere along the line there is no case on point that's published, of course we would consider them. But that's a whole different discussion than just pushing a button, today with the luxury of computers, and regurgitating all sort of cases that have some sort of the same common theme. And saying, well, they're of equal weight or value.

If you want to have clients screaming at you, then you just wait for us to have to get everything published which is effectively what you would be asking us to do, because we would be taking so long and so much care with everything we put out. I don't have that luxury. It's a bit of a mash exercise to review errors committed.

And so when we put out unpublished, it is not a

perfect opinion, but it is a letter to the litigant, as Carl Gromek taught it. It's a letter to the litigant, and that's how it should be viewed.

JUDGE MURRAY: Yeah, the only thing I want to say is, I agree with what Judge Talbot and Judge Gleicher said. But, in the question, it lumps unpublished opinions together with pre-1990. And I don't think, it's not a big deal, but to me, there's a vast difference. I mean, pre-1990 opinions are precedential. Under stare decisis, we have to follow them unless there's a reason to reverse them. The only difference is post-1990, we have no discussion. There's a vast difference for the reasons we all know about given the issues over the court rule change and the published pre-1990, which are still precedential.

JUDGE SHAPIRO: No, that was my point.

MS. CAVANAGH: And let's go onto question two. And again, I encourage only judges to vote on it.

But the question is, when shaping the law, I consider the expectation of the parties and non-parties who may have relied on previously espoused but not binding precedent. And, I think, as Judge Murray pointed out, we're talking including the pre-1990 opinions. Has every one had a chance to vote?

45 percent, they agree. Neutral, disagree, and

strongly disagree. So you either you agree or strongly disagree. No strongly agrees.

And I'm wondering, well, if anybody wants to volunteer a comment on there.

JUDGE GLEICHER: Well, why don't I do that?

I do have, let me just start with the paradigm that I feel a little different about unpublished opinion than some of my colleagues. Because I like our court to be consistent. I like when I read our opinions, whether they're published or unpublished, I see a linear path of expectation that when you talk to your client, whatever you see, that you think we're going to be consistent. I don't like to see black one day, white the next. I like to feel that we're consistent, and when you get a panel, no matter what that panel is, you feel that the stand of justice, the foundation upon which our court rests its opinion is solid.

Now, unpublished opinions are not binding, but, they can be persuasive. And I look at those opinions to decide whether or not the analysis in there is solid. So, in this question, shaping of the law, we don't shape the law. We're the Court of Appeals. We're the immediate court of right. We've got to follow the precedent that is ahead of us, before us,

supreme to us.

But there are cases and there are unpublished opinions that are the only ones out there. So, we're not shaping the law. We're interpreting the law and applying the law when sometimes it hasn't been done before. And unpublished opinions are the only ones that have been there.

So, in answer to this question as to what the expectation of the parties are, I don't cater to what I think the expectation of the parties are. I cater to what I think was persuasive authority. And that persuasive authority was somewhere bound in some type of precedential law that may be analogous or applicable to be put into this new setting. And I like to do that, if it fits. If I think the authority is not persuasive, I'm not gonna follow it.

So I think our goal is to get it right. And whether people have the expectations from something prior, if it wasn't valid, I'm not gonna follow it.

Thank you.

Anyone else?

MS. CAVANAGH: And going back in particular to the pre-1990 opinions and how you decide whether to follow them. One of my questions was, uhm, what impact does the age of an opinion or the time that it's been

around have on the persuasiveness and relevance of those decision in your opinion? Is that, the longer they have been in existence indicative of how the law has been shaped already and this is where it's supposed to be or is it, or what considerations come in to lead you to think that it's time to revisit or reconsider those?

JUDGE O'CONNELL: I'm currently writing an opinion where my precedent is 1894.

And since then, our court has managed to screw up the law considerably since 1894. It's branched out two separate ways. So I have to go, relying on Judge Riordan's excellent non-published opinion and it was a concurrence. So I'm relying on his concurrence in an unpublished opinion to directly point, to direct me back to the 1894 case. Although I think Judge Riordan was around in 1894. But I'm not sure.

The answer is, if it's a Supreme Court case, we still have to follow it because it's precedential.

I think the older cases are still precedential and I still use them to get to a particular result, at least the reasons from those opinions if there's nothing else.

MS. CAVANAGH: Thank you.

Anyone else?

JUDGE MURRAY: When I read this question, I was thinking of it in the sense of stare decisis, because if we have a pre-1990 case, maybe it was from 1975 from our court, so it's been around a long time. In fact, Judge Talbot and I had one of those on an election issue. And, uhm, it said something that seemed strange. But it had been around for a long time. And I'm the type of person where I'm not thinking I'm smarter than people who were here before me, so I'm very cautious in trying to overturn something. And, you know, if it's been around that long, the parties, the public have to some extent relied on those pre-1990 decisions to hopefully guide whatever they're doing in life.

But, I think, as Judge Beckering said, you've got to research it, and in our case, there was quite a few cases criticizing the prior case, and so we reversed it. But I'm, very cautiously, I think you have to, because that's the whole point of precedence is to be there for parties and people to make their decisions. I think there's a big difference if you're talking about a case against the rule against perpetuities, I think that rule hasn't changed in a couple of years. And an older case is obviously more bedrock, but in an area perhaps like med mal or no-fault cases, which we

seem to be getting a lot of lately, then maybe not so much. It may be older. It may have been at the time, the case on the issue.

And we don't purposely try to shape the law, as Judge Beckering said, and obviously I completely agree with that. But what does happen with the law, and as you all know, we are people that help with, and just naturally happens, that it evolves as time goes on, and, you know, when legislation is written, not every single issue can be thought of. And so, as we all know, the cases and the issues move on through the law, they do branch out and change and tweak a little bit. And in that respect we do shape it.

JUDGE MARKEY: And finding the history and how all of that is developed is very important for us to try to make wise decisions to look at pre-1990 precedential cases.

And I do respect the opinions of all of my colleagues, and even if they're not published, if somebody has asked us to look at them for their persuasive value, I look at them. I try to get my unpublished cases as right as I get my published cases and I think we all do. We do spend more time on our published cases and that's the way it should be.

So in that respect I try to use all of the

different types of cases as tools with the end result of trying to get the result correct because that's ultimately, that's our goal.

JUDGE KRAUSE: I am a huge fan of history. I actually ended up marrying a history buff, so he loves books about history. So I find the history of the cases to be very interesting to me, personally, and I think it does help me, well, particularly, let me say, with land cases or in re: lake level of lake whatever, those kind of cases, I'm saying I didn't even know we had cases about lake levels until I got here on this court. But when you're dealing with lake levels and you're dealing with land, obviously looking at the history is so important because that type of law is so embedded in our history.

And everything else kind of changes, but the land and the lakes, they don't change a lot.

MS. CAVANAGH: So, and following up now, we're talking about pre-1990 opinions. But as Judge Murray discussed, that, you know, post-1990, you're obligated to follow them. And we have the special panel procedure. And I'm wondering if anybody would comment or give their thoughts on if you think that that is an effective mechanism in which to shape the law differently from what is, you know, currently

existing or precedential? And is it done enough? Is it done too much? Any opinions on that?

JUDGE SHAPIRO: I'm not a big fan of the conflict panel methodology if you have three judges who think one thing and three who think another. I don't know why seven are going to give them a clearer view other than to settle the matter. My own view is if there's a Court of Appeals' panel split, then the Supreme Court should take the case.

JUDGE O'CONNELL: I do everything I can to differentiate it on the facts. But I think the conflict panel slows the system down. Let's get it up to the Supreme Court and have Justice Young and company to resolve the issue because it's going there anyway.

JUDGE SAWYER: It's one of the rare times I agree with Judge O'Connell and Judge Shapiro.

I really think that, I vote against them most of the time. I think they really should go to the Supreme Court. They should deal with them. And that's just my feeling on it.

MS. CAVANAGH: And another thing that I had looked at in the federal system in the en banc rehearing, the original panel participates in the en banc decision, and that is different than the procedure that we currently have. I'm wondering if everybody had

thoughts.

JUDGE SHAPIRO: I guess I should have said, if we heard things en banc, I would be much more comfortable. I don't know why seven judges should be chosen to make the decision. It seems like purely an arbitrary matter in that case.

JUDGE MURRAY: I'm not a huge fan of the conflict panel process, but I like the way it's set up with not including people of the two prior cases, because we already know what they think. It's in writing. And we have seven fresh eyes to look at it and give us a final decision. We all want final decisions. That's what lawyers, from what I understand, love. We get it, and then we ship it on to the Supreme Court and they can review it.

JUDGE TALBOT: I think you heard from some of the responses, and this is not a criticism, why it, don't read too much into it if sometimes when there's an identity of a potential conflict and we don't end up in a conflict panel. That's what you should take from this. There are motives from voting in a particular way which are probably not going to the issue of what's in conflict. And those are probably perfectly valid considerations, but it doesn't, you're gonna get the wrong answer if you think that there's a message there.

It has shown up. That's why you don't see it used very often. I saw a reference that it was two or three years. We have been voting on potential conflicts over the last two or three years. We haven't put the panels together.

And there is a belief, which I think is probably, certainly I would strongly debate, well, why don't we send it up and let the Supremes decide? I don't think that's how we should do it. But there is that. And I think you have to assume that when sometimes you see there is this desire for something to be taken up and taken up quickly.

We used to have a rule, a few of you, a very few of you would remember. When something went up and if there was a timely application, that case was stayed. I mean, that application of a new rule or new principle was stayed until something happened. So in other words, something that could do damage or harm as interpreted by, suddenly, setting everybody free in the prisons, something extraordinary, at least was stayed until there was a review.

Now there's potential for harm I think every once in a while on a case, and I kind of wish we had the old rule, let's stay this for a little bit until we see what the Supreme Court wants to do with something. I

wish we had that back.

MS. CAVANAGH: Thanks.

Let's move on to question three.

Actually, we have split them out, 3A and 3B. So 3A is, which of the following tools for interpreting statutes and constitutional provisions, do you believe is the most important? And 3B will be least important. We have plain language, ordinary significance of the language, traditional tools, such as avoiding superfluous or unnecessary language. Interpreting the absence of an item as intended if a list contains similar items. Another is proper legislative history, as to what legislators or framers meant to accomplish and published appellate interpretations from other jurisdictions.

Those are going to be the same answers for 3B as to what do you consider being the least important tool for interpreting statutes and the constitution.

You need to get this question.

Overwhelmingly, the most important tool, over 83 percent, is plain language. With also then, traditional tools, such as avoiding superfluous language and the like. So that's a fairly clear answer.

And then for 3B, the least important is, at the

bottom end of the screen there, unpublished appellate interpretation, legislative history, extrinsic evidence, extrinsic evidence being the winner. Okay.

Anyone care to expand on why they chose how they chose?

JUDGE SHAPIRO: I'd like to speak because I'm in the majority. I voted for the traditional tools. And had the first choice been language of the statute, I may have voted for it. My own view is that the term plain language has come to mean nothing except that judges do not wish to exercise the requirement that they explain their point of view and rationalize how they came to their conclusions. I agree that the language in the statute is always the most important. But how it became attached to this adjective remains a mystery to me. And I think it serves a negative function because no judge, myself included, can leave all their biases and prejudices behind.

And the only way we can determine whether a judge is acting in good faith and based upon the law, in my view, is by watching their reasoning, interpretation of precedent, and outside sources.

And if what they tell you, the statute says this period, done, that's a dangerous situation. So I strongly believe that the language from the statute is

the number one thing, but that the plain language is elusive and often deceptive.

MS. CAVANAGH: Thank you. Anyone else?

We've heard the rule, tools, not rules. What do you understand the distinction to be between tools and rules and how are these used differently? A related question we had and materials that we couldn't include in here, and maybe something to discuss, how does that, would your answer be different as far as construing contracts, contractual provisions as opposed to statutes where a lot of the same rules are used, but, perhaps differently? Hard and fast rules, or are they tools for guiding you in a particular case and reviewing particular language? Anyone?

JUDGE O'CONNELL: It sounds like a trick question to me.

MS. CAVANAGH: It was not meant to be.

Okay.

All right. Let's go on to question four, if we can. Okay. And this question, and I should have said question three as well, were followed under the, this sort of second general category of interpretation of statutes, constitutions and contracts. And so, question four, policy considerations should never factor into statutory or constitutional interpretation.

Okay. So the disagrees have it. That they should never factor in and they disagree with that. Although, I actually -- and now we've changed. We're closer, fairly split between either strongly agree or disagree.

And so, so I know that we have differing views up here. And I was, wanted to hear what those who answered, strongly disagree, if you're willing to share, what role you think policy should play in considering and construing statutory or constitutional provisions?

JUDGE O'CONNELL: Okay. I'll talk. Something hard for me to do. I answered strongly disagree, only because in 38 years, I've never seen, as a judge, I've become aware of the word, never. It says "never factor." And I've been surprised, when I say, never do this, never do that, and I find myself doing it. So never say never was my simple reason for saying strongly disagree.

JUDGE MURRAY: I took it to be questioning us, if we don't like a policy or we do like the policy, if that's what you're getting at, of course, I think probably most of us would say we don't think it should be considered. That's not our job. It's not the job of the judicial branch. Then, you could also read it, I guess, to say, well, if you're going to read a

statute that seems to be inconsistent with a general policy, what would you do. I would still rule in the way that the language states. And if it's supposedly contrary to the policy, uhm, I would argue it wasn't, because the language is what the policy is.

If it goes contrary to a general policy, then, so be it and let the legislature fix it. That's the way I approach it. And I think that's the safest route for us judges to take.

JUDGE MARKEY: I think it comes in more directly at the time, basically dovetailing into what Judge Murray was saying.

Language can be very complicated. It can have different connotations and different usages. And just how it's meant to be used in a certain sentence or in a certain statute. So if you know a statute has been enacted for a certain reason and a word is used in a way that could be interpreted slightly differently in that context versus another, maybe as a backdoor, as a more indirect way of looking at the language of the way it's written. Subconsciously, we are also reading into it. I don't know if I'm making any sense at all, the way I'm trying to explain my thought processes. I think that we must have some of the policy considerations running around in the back of our heads

when we're looking at what's that definition meant to be.

We try to use the generally accepted way of reading a word and understanding it, interpreting it, use the dictionary definitions, but sometimes there are subtleties to language.

So in a very, very indirect way, that may have some play.

JUDGE BECKERING: The whole idea is you're interpreting a statute. That statute is trying to make it clear. So when we interpret the language of the statute, we have to read it in the context of what it's trying to accomplish. So if the language is clear, even though it defines the intent of the statute, we're bound to follow and make the legislature fix that.

But if there's some nuance in that language you're trying to figure out what it's trying to do, I think context is important to help to interpret the language of that statute that is in keeping with its intent.

JUDGE TALBOT: You know, the reason, to look at the policy considerations should never factor. Are you talking about my policy? Never. It's irrelevant. My policy considerations are irrelevant.

Are you talking about the writers when they passed something, when they passed a statute? Again, it takes

a life of its own once it's passed. Just as opinions take a life of their own once they're passed. If it's there, there's English, I can read English. The policy consideration behind it is irrelevant. You read the English.

MS. CAVANAGH: In a couple of your responses, you said that if the intent of statute or if the policy considerations of why it was enacted is X but the language doesn't do that, how do you arrive at your understanding of what the intent of the statute was designed to do? What do you look to?

Well, I meant, you said if it's, and I think Judge Murray said as well, if I know that the statute was passed intended or this was the intent of the statute to do this, but the language may be contrary to that. And it's not effectuating that. What are you basing your understanding of what the intent of the statute was? What policy it was meant to, or maybe not "policy" is the wrong word, what it was intended to do. Is that making any sense?

JUDGE MURRAY: Well, if I understand your question, I would think it could be something like the preamble to the statute saying we intend to do, blah, blah, blah, or Section One of the general purpose. And then, when you get down to the effective language, it

don't necessarily, if you apply it the way it's written, doesn't accomplish that, that's where you say, legislature, I think you made a mistake. And you need to fix it rather than us fixing what we think you meant. If that's an answer to your question.

MS. CAVANAGH: It is; it is. Okay. Let's go on to question five. And I think we might predict based upon our last discussion of what the answer to this might be.

Is it possible for a judge to separate his or her viewpoints, cumulative whole of the person's life experiences, education, interests, philosophy, from the decision-making process? And this question now we're moving into a, the different -- a different area of, what we call judicial activism or judicial restraint. It appears split between strongly agree and disagree. How about the strongly agree? Now they're going down.

You agree that it is possible to separate it from your decision-making process. And others disagree that you can't do that?

Anyone care to expound?

JUDGE O'CONNELL: We can say, I answered strongly agree. We can say, yes, I can do that every single time because I'm Judge O'Connell and Judge O'Connell can separate his personal beliefs from his

written opinions. Some years ago I wrote a medical marijuana opinion, and as a result of my medical marijuana opinion, I was told that it was a concurrence, that I was totally against medical marijuana. That I didn't like medical marijuana. That it was an awful thing for me to write an opinion that appeared on its surface to oppose medical marijuana, when clearly it was just an opinion based on law.

So I think there's some correlation between how people see your opinion and what the opinion actually says.

Therefore, I would conclude in my own mind based on my own perspective, that, yes, we can separate, but having said that, I don't think that a lot of you who read our opinions would agree, because they're consistently going in some direction. But I'm still going to be of the opinion that when I get on the bench, I stick all my biases and prejudices in the bottom drawer and I go out there and harass Liisa Speaker every chance I get.

JUDGE SHAPIRO: I think the nature of bias and prejudice is that the most important part to accomplish that is to identify your biases and prejudice. They always look neutral to yourself. So I think it requires some introspection and application.

It can be done, but not simply because you think you can do it.

JUDGE KRAUSE: I really appreciate Judge Shapiro's point on, that I think you have to figure out about what your prejudice is and about what your thoughts may be about particular issues. And you have to follow the law. Many times there are cases where you'll see me use the word constrained. I'm constrained to follow this case. That means I'm constrained. I may not like it, but that doesn't matter. I have to follow what the case says because that's my job. And it doesn't mean that that's what I want to do or what I think is right. Sometimes I mean, particularly, on termination of parental rights cases, our review is so limited. There are times I think to myself that isn't what I would do as the trial judge, but I'm not the trial judge. And I was a trial judge for eight years. So it's hard for me sometimes to look at that and say, I don't know why they did that. But that's not the question.

The question is, did they make an error that I need to correct? So I do my best. I answered strongly agree as well. I do my best to keep my thoughts about particular issues out of my opinions and focus on what the law is and the facts of that particular case.

JUDGE KELLY: I think it's a subconscious thing. Nobody wants to say I'm a judicial activist who ignores the law. But there's these subconscious components that form the person you are and without realizing it you are affected by those thoughts. And you have to try to put them out on the table and say, okay. I've got this. I've got that. But nevertheless, there are going to be some instances and some cases where those factors are influencing you without you maybe even realizing it. So I think it's impossible to separate it.

MS. CAVANAGH: Is your prior, your prior experience, your practice experience, whether you were a trial judge, whether you were a litigator, whether you did, is that the strongest sort of influencing factor or are there others?

JUDGE SHAPIRO: That goes more to a philosophy of do you believe, should jurors decide these things. Should we. So that's, I don't know that that's a bias so much as a philosophy. Maybe they're one in the same.

JUDGE KRAUSE: I think everybody's individual experience makes us who we are and makes us the judge that we are. In terms of, how many victims of domestic violence have you met? How many times have you been in

Court and Judge Talbot was in trial court for so long, and saw so many things, I mean, how could that not impact him on this bench? It has to. So I do think that what jobs you've had in the past, the work that you've done. I did corporate reorganizations for a short period of time. When, that was my exciting time in my law career. I think that everything that you do before you get on the bench makes a difference as to what kind of judge you are and how you understand when you're reading a transcript because every time I read a transcript, particularly in criminal cases, I have been in the courtroom during criminal cases as an advocate and as the lawyer, as a judge, so, those are easier for me to understand kind of what's going on.

Whereas, civil cases, and my office looks like it got rearranged, because I have piles of things, and flow charts and trying to figure out who did what where. So I do think that makes a difference. And I think that Judge Kelly has a very good point, too. You can't necessarily put aside your biases, you think you are, but there's always your subconscious. And I think that's for all of us. We're all just people doing the best job we can.

JUDGE O'CONNELL: There's a reason why that graph shows strongly agree and strongly disagree. It's

the big elephant that's sitting right in the middle of the room. Those of you that appear in front of us, generally predict how your case is going to come out by looking at who the panel is. If I'm sitting on a panel with Judge Beckering and Judge Gleicher and myself, it's totally, O'Connell, some of you may say, O'Connell is going to write the dissent and Beckering or Gleicher will be writing the majority opinion.

But let me tell you something. If I'm sitting with Judge Beckering and I'm sitting with Judge Gleicher, what a spirited conversation that we have. It's unbelievable the lengths that those two go to to get the right decision.

Now, we may come out, appearance-wise we may come out with that big elephant I was talking about earlier, but having said that, it's just a wonderful experience to have that type of exchange with judges who have a strong belief in what they're doing.

JUDGE MURRAY: I also think on a somewhat minor issue, it seems to me and I know it applies to me, that one bias that I have a difficulty overcoming as a defense lawyer for ten years, I spent a lot of time writing motions for summary disposition. And you convince yourself that you're always right when you're writing the brief. So I have a different view on the

utility of summary disposition than do some of my colleagues who practiced as plaintiff's attorneys. And I think that's one area where I have difficulty separating my prior experiences and using, you know, an unbiased view when I'm reviewing a case on appeal.

JUDGE KELLY: I don't think the words, genuine issue of material fact and light most favorable to the non-moving party are that complicated concepts. But they mean different things to different people. I don't know that's a bias. As I say, that's a philosophy. Some people think, well, that means that the jury should decide it. Other people say, no. That's not a genuine issue. Reasonable people, I suppose can disagree with that. Even that means something to me.

JUDGE BECKERING: I'll just capstone this. I think in the vast majority of cases, I don't know if this is even working. There are cases that I follow the law that I hate. And I write my opinion and it's disgusting to me because I have to follow this opinion and I don't like it. But that's our job.

JUDGE SHAPIRO: Jane, your opinions are never disgusting.

JUDGE BECKERING: There's case law with which I disagree. But I honor that case law. It is the area

where there needs to be an interpretation. Look at this panel. There's 27 people on our bench, and you all know, we're all dramatically different people. We all come in with different life experiences. So, when we're reading that unpublished opinion and deciding whether it's persuasive or not, we're coming in with our points of view. But I think the vast majority of the time, our goal is to follow the law. And if the law is clear, that's what we do. And to call Judge Jane Markey, Jane Two, as what we call her. It emphasizes how so important it is that we as the third branch of government remain independent. I just love the fact of the diversity in our court in every possible way is there.

It keeps us all challenged. It keeps us all thinking. We can't have a homogenous court because we will not be able to produce the best that we can produce.

We want to bring out the best in each other and to say that when we disagree we're very seldom disagreeable is absolutely the truth. Some of you may see us out for dinner or out chitchatting and you can tell that we are very collegial. And I'm so happy that we work hard to keep that impartiality, that we try to leave our politics, our personal beliefs on many things

and all of those things that we really should not let influence our opinions.

Of course we walk in as human beings with all the biases and warts we all have, and I think everyone in this room appreciates that they really think that we do try to do that, and hopefully we accomplish it.

Yes, we have our idiosyncrasies, some of us more than others, maybe, but it's true, we do try.

JUDGE O'CONNELL: A good example of that was our Lockridge opinion. I had the privilege of writing the majority opinion in Lockridge. Of course, Judge Shapiro proceeded to write a 27-page concurrence opinion, and Judge Beckering proceeded to write a 15-page concurring opinion. And we all disagreed with each other. But we did it politely. We did it nicely, and it went up to the Supreme Court and the Supreme Court proceeded to, I believe, follow Judge Beckering's opinion.

JUDGE MARKEY: I believe they followed Judge Beckering's opinion. A result as far as policy considerations, the whole law got changed. Any of us who do criminal work realize that the policy in the criminal law field that we talked about has been Lockridge. In other words, we can agree to disagree philosophically and on policy reasons.

MS. CAVANAGH: Let's go on to polling question six. And this goes to oral argument. Oral argument should be a tool to assist the Court in deciding a case. And Justice Ginsberg has observed that oral argument is fleeting. Here today and may be forgotten tomorrow after the Court has heard perhaps six or seven subsequent arguments. We're asking if your request for oral argument is helpful to me even if it does not change my decision regarding the outcome of the case. All right. Majority, 45 percent agree, with a couple of strongly degrees. Some neutrals. And some disagree.

So, would anyone care to expound on how oral argument is helpful to them?

JUDGE KRAUSE: When I read Justice Ginsberg, I thought the Supreme Court had audio tapes of their arguments because we do and they're very helpful to go back to when writing an opinion. I don't necessarily take a lot of notes on the bench, but I go back and listen to oral arguments, not every case, but the cases that I need to, I do that, and they're very important in most cases.

JUDGE O'CONNELL: My favorite oral argument is when you appear and say, I stand on my briefs.

JUDGE KRAUSE: Okay. That's not my favorite.

Actually, I just found out that Sandra Lake is joining Liisa Speaker's firm, which is pretty exciting. And Sandra, the story that I tell all the time about her, she didn't know that until this morning. She is thrilled. This was in 2003, I think, maybe 2004. I had just taken the district court bench. I actually had lawyers on both sides. Lawyers on both sides in district court, a big day.

I'm ready. I have my opinion all written out, and Sandra is such an amazing advocate and the way she spoke about her argument and actually almost like a teacher. And I went, and I'm thinking to myself. I think I have this completely wrong. I said, I'm going to take a brief recess. Ran into my chambers. Came back out, and that's what we have to do if you decide to write opinions on everything, went back in, ruled in her favor. Was appealed to the Circuit Court. The Circuit Court affirmed me. I didn't follow it from there.

But it was a real eye-opener to me that I feel that I learn well from reading, but I think that I'm a better, I'm a better listener. When people are talking to me, I feel as though they can teach me things that maybe I didn't pick up from the brief.

I am one who, I wrote out questions, even if

there's no one endorsed for oral argument, I still have a list of the questions because that makes me think about what are my questions about this case and what do I think is most important. So I have a list of questions for every case that I have on my docket even though I may not be able to ask them. It helps me articulate my opinion. So I really enjoy oral argument and I think oral argument is imperative. I believe there are questions that obviously need to be answered. And what I don't need to have is you read the brief back to me.

And I start every call, please don't read your brief back to me. I've read it, read it, read it. But I want to hear what you think is most important. And that's exactly what Sandra did when I was a pretty new district judge. And she changed my mind. So I think that's happened and it's happened to me on the Court of Appeals.

JUDGE O'CONNELL: My favorite oral arguments are discussions, not lectures. Some of you tend to read from your brief. Some of you seem to have a prearranged way to approach it. Let's have a discussion on what the judges, this is what I think are the key issues in the case, and some give and take and you can tell us why. Some of us ask pretty pointed

questions, at least we try to, and just have a discussion.

I hate it when some lawyers come in and the papers are going like this, and they're nervous and they're upset. Relax, and just tell us why you should win your case. And I, too, just like Judge, I can't believe I'm agreeing with Judge Krause twice in one day. I, too, find oral arguments to be one of the better parts of our job, because we actually get to see people.

JUDGE BECKERING: I will attest to the fact that there are oral arguments that I've been to, not often, but it has changed the panel's mind. So I do think they have value. I think you get to the heart of the issue. Sometimes that's because the panel has had a discussion back in in our deliberation room. I vividly remember one with Judge Talbot. He and I were going back and forth on an issue. And we said, hang on, the parties didn't raise it. Let's let them argue their case. But we agreed not to talk about it. Let the parties make the arguments. And pretty soon, he opened up the door and asked the question, then I started asking my question, and we began the debate and we are using the lawyer as a pawn to debate this issue. And we looked at each other and started laughing because we knew exactly what we were doing. But I

think oral argument, don't recite those facts, but I think on really tough cases, that oral argument is extremely helpful.

I have seen it persuade members of the panel. We may be asking the question because we want to persuade our colleague and we want to hear from you why you have the one we agree with. And we want to give you an opportunity, instead of, to be surprised by an opinion. You get up and you argue and then we rule on something, and you say, where did that come from? I want to ask you in oral argument and maybe you don't like it. Maybe you do, to say, here's the problem with your case. Tell us how we get around this. Why are you right on this, to give you a chance, before you may lose your case, to tell us why that's not the right way to view it.

So I do think oral argument is helpful if done correctly.

MS. CAVANAGH: Judge Talbot.

JUDGE TALBOT: Again, it's the way the question is posed is a little awkward to me. Oral argument is helpful. Can it be in a specific case is a whole different response, number one.

Two, it's the definition of what we do in terms of being an intermediate appellate court. This is all

cultural for Michigan. If you go, pick your state, I use Indiana as my favorite. Indiana, judges identify the cases that they would like to have oral argument on. They will then notify the lawyers. The culture in Michigan for so long now it's just baked in, that there will be oral argument. And people kill themselves about all of that, when the work should have been done in the briefing.

So, I've always, I've found that kind of odd, and I'm talking about kill themselves, oh, my God, I'm going to lose the oral argument. The work should have been done already, number one. And oral argument to assist us to be perfectly honest about it. We can define how that assistance should take place, but the work has got to be done in that brief. And I try to explain that sometimes when I see that litigant sitting there, we may not have any questions at all. Because you have a right to come to the Court of Appeals as opposed to a Court that grants leave. And so much in oral argument is kind of a CYA exercise. Oh, the client might be unhappy. Or the client, or I might get a grievance if it's criminal or something of that nature. I guess that's why we're covering, make yourself available for my questions.

In another one, it might be a complicated matter

and we're going to be coming at you with questions. It's just that oral argument shouldn't be some sort of automatic knee-jerk response. It has to be thought through. Why am I having argument here and is there even a value to it? Versus, I have got to try to make myself clear on something that is pretty doggone difficult or is there a question that the judges have that they're struggling on.

It's too simple to have a cookie cutter viewpoint in terms of oral argument. Okay.

MS. CAVANAGH: And following up on that, we used to have the summary panel procedure where not every case did get argument. And the summary panel had called you off of it. And you're like, oh, my God.

Why do we not have it?

Do we agree that we should have it? How do you balance that sort of parties' right to oral argument and the Court's need for it?

JUDGE MURRAY: I was thinking, I thought we had voted in a bench meeting a few years back that everyone should get oral argument. So we stopped doing summary panel. Unfortunately, I was on the losing end of that vote. But that's what we did, so everyone gets to get it even if it's not worthwhile in my view, 80 percent of the cases. We all know there's about

five or six hard cases if we're lucky.

Then we have all the routine cases, the briefs take care of the issues and we're done with it. That's why we don't have it. I wish we did have summary panels. We don't.

JUDGE O'CONNELL: We had summary panel, and we used to get 60 cases on summary panel. I remember where an opinion came out and I read about it on the front page. What panel would be crazy enough to do that? And I had to look up the case and find out I was on the summary panel that issued that opinion. At that point, I decided to vote against having summary panel because I figured, somebody at oral argument would have corrected whatever mistake I made in the course of writing that particular summary panel opinion. Because they came up. It was a report. A prearranged opinion. You'd read it casually. And it was usually a one-issue case and we'd be done. I don't think that's the way for the Court of Appeals to handle cases. So I was against summary panels.

MS. CAVANAGH: Following up on some of the responses that you said of when oral argument is granted in the particular cases is particularly helpful, is when it is more of a discussion. When it is, you are there to hear what questions, whether

judges are, you know, have identified the issues that you think they should or when they haven't.

Given that, what do you suggest, or what is the opinion of if an advocate comes up and rather than present their cases, I'd like to hear what issues you think are controlling. And then we can talk about it. I don't do that very often. Usually because the panel will tell me, you know, here's what we're thinking. But if you're not getting that feedback and you want to hear that, what do you think of that as an approach where the advocate asks, what questions does the Court have?

JUDGE O'CONNELL: Or you could do it in reverse. Some people generally come in and in their oral argument, they say, I want to focus on this one point, which is generally the same point that the panel is focusing on. If you can come in and say, of course, you're going to have to do all your homework in advance. You have to know what the one point is, and I want to address his one point because I know that's where the case turns.

To answer your question, it goes both ways. If you say, hey, what are judges worried about, or the other side could say, here's what I'm worried about, and that would start the discussion. Granted some of

my colleagues don't like that approach.

MS. CAVANAGH: All right. The next question, again, on oral argument, and noting that time allotted for oral argument has decreased in some courts, and some have restricted the numbers and the number of cases in which it's allowed. But the Court allots 30 minutes per side for argument. Should this time be reduced?

JUDGE VIVIANO: No, the time should not be reduced.

JUDGE SAWYER: No, I don't think it should be reduced. I don't think you need to use it all, all the time. You can drone on for half an hour. But usually as you start droning, you've usually missed the issues or you are merely regurgitating your brief. But there are some very difficult cases that, very frankly, you can go over a half hour. I can see that on some very difficult cases. I think a half an hour is fine. I don't think you have to use it all or feel that you're somehow losing out.

JUDGE MURRAY: I voted yes, even though I agree with what Judge Sawyer said.

Because in those somewhat rare cases where a lawyer hasn't been practicing in the Court of Appeals, they see 30 minutes and they're ready for 30 minutes.

So if we cut it to 15 minutes, then they'll be preparing for 15. If we have questions, we'll go as long as we want to go. So I would just do it for purposes of expectations of what's going to happen.

JUDGE GLEICHER: My view is that nothing is broken so why should we fix it. We have case call at ten. We have roughly 15 cases per day. And most panels are finished, gone, by, by, by one o'clock. That means nobody or very few people are using their half hour. That means most people are not using more than about three minutes. I think that the rule has to remain open enough for those cases that require the time to have the time.

JUDGE KELLY: Rare is the person that pleads on for half an hour. I appreciate what Judge Murray is saying. I think in my experience, those are rare. And also as Judge Gleicher says, rare is the case where both sides go on for a half hour. So give them a half hour, but few persons actually use them.

And, the question was asked by Megan, how about somebody coming to us and asking us what we think the issue is. If we start the argument, if I think there's an issue, I apologize for interrupting you, and of course, I want to hear everything you want to say.

However, I really need this question answered. So

if we could just do this and you can go back to whatever else you need. But this is where I'm concerned and that pretty much tells you, it may not be the whole panel, sometimes I don't. And I'll say that. But I think it's pretty clear. And I think 30 minutes is appropriate because some of the cases actually do go longer than about 30 minutes because there's so many questions. So I like keeping it at 30 minutes.

MS. CAVANAGH: I was gonna say, I think one of my more recent helpful oral arguments that I thought is that similar to what Judge Krause said, I think it was Judge Meter who said, I want to hear what you have to say, but I ask, will you address this issue first, then this and then this. It was helpful. And then you have something else to go back to your client. Well, this is, that sort of thing. So, it can be helpful.

Okay. Let's move on to polling question eight. The purpose of error correction is to ensure uniform application of the law and it is, therefore, an important tool in shaping the law. Okay. Most agree or strongly agree. We do have some who disagree. So, what do you see as the Court's role as an error correcting court and how does that shape the law?

JUDGE KELLY: It is our role. I don't know what else our role is. We're called an error

correcting court. So we correct errors.

JUDGE O'CONNELL: I think there should be a quicker way to correct errors. I was talking to Scott Bassett. I don't know if Scott's here or not. But in cases involving child custody, the first thing a trial court judge should do is determine if there's an established custodial environment. And surprisingly enough, some trial courts don't do that. They just jump in to the ultimate decision. And we have to correct that particular error by remanding it back to the trial court.

There should be a system when it's an obvious error, I know you could file a motion for preemptive reversal, but we rarely grant those. But there should be a system for error correcting when the error is obvious. I think we've all had cases where the error is so obvious. You come in and say, Judge, we, know, we know. Why does it have to take six months to a year to get an opinion to send it back, especially in child custody cases?

MS. CAVANAGH: Just following up on that. There is a tool or a mechanism motion for peremptory reversal or motion for affirmance. And I get a lot of that is in the eye of the beholder. You say that should affirm or reverse. Why is it that it does not?

JUDGE O'CONNELL: Why isn't it an effective tool?

MS. CAVANAGH: Maybe other people have different opinions as to its effectiveness.

JUDGE O'CONNELL: It takes three judges to agree that it should be peremptorily reversible. Three Court of Appeals' judges is sometimes a difficult situation. And one side always raises arguments against peremptory reversal. And when you look at the arguments on its face, you say it's a pretty good argument; let's not. Same with affirmance.

Judge Talbot, you might know how often we grant those, but I don't think we grant them very often. Why, because three judges have to agree on that particular issue. And usually, there's some other issues that are involved in the case.

JUDGE GLEICHER: My opinion on that is that the rule should be amended to eliminate that anyway. If we have a right to appeal in this state which we do by constitution, then my own view is that it shouldn't be taken away by three judges who may or may not have accurately pegged the merits of the case based on some preliminary briefing.

Uhm, second, I don't see how if it's such an obvious case we should be bothered by the fact that

we'll submit it for plenary review for a panel and treat it just like every other case.

So I find that court rule, frankly, offensive to the position that there's a right of appeal and I personally vote against them every time for that reason.

JUDGE MURRAY: I disagree with that.

You have a right to appeal. Your appeal has been filed and then we're going to deal with it in different ways. One of which is, if you have a case involving, like Judge O'Connell said, with an obvious error the trial court made, why make the parties wait? Just let them, give them the answer and send it back down. Or if you have a case involving governmental immunity where the law is crystal clear and the trial court screwed up, then just get rid of it. A mistake could be made by three judges on a motion docket. But a mistake could be made by the full Court.

And I see so often cases where I was absolutely convinced that we should grant leave to reverse the trial court because the trial court clearly erred, leave gets granted. The opinion gets generated and the trial court's justifiably affirm. So my first impression was incorrect.

My view is that those motions for peremptory

reversal or for affirmance do not come to our court with the same level of briefing, the same level of analysis and the opportunity for oral argument which we've just discussed can change minds.

But my point is, the successful motions are ones where you don't need all this whole briefing. The issue is so clear. If we get, I think we all agree, if we get a motion to affirm that's this thick, there's no way it's going to happen.

JUDGE GLEICHER: Oh, don't be so sure about that.

JUDGE MURRAY: Us down here, we're talking about it. And I think we agree.

JUDGE GLEICHER: I sit in the second district.

JUDGE MURRAY: I'm with the Grand Rapids people. The cases are deserving which are a very discrete issue where you know what the answer is.

JUDGE SHAPIRO: I think there's the occasional case where peremptory relief is appropriate for that are unique circumstances and it's rare. But I also think without a full record, which we, the motion panel really never has a peremptory motion, it should be very rare.

JUDGE KRAUSE: I'll throw in this, that I

thought we should grant peremptory reversal at one point in a case, and my other two colleagues did not agree. But it did go for plenary review, and the case that came out, in fact, Judge Shapiro was on it. It was an excellent opinion, and probably it was better that way, because then there was case law on point on it. And it was published.

JUDGE SHAPIRO: Probably reversed.

JUDGE TALBOT: There's a couple of things going on here. And it's interesting. Let me see how I can break this thing out.

If we're on motions for a given month, and each of us probably is on motions for our district, six months out of the 12. And it's all stirred up and mixed up, computer-generated. If it's a straight out motion for reversal, I don't have everything. And I either have to start from scratch and in effect do the case, or I'm gonna say, it's not likely I'm going to touch this thing based on some lawyer screaming about, gosh, this is a lousy lawsuit and you should grant this right away.

I'm not going to work that hard. I'm going to be honest with you. Because I haven't got the luxury of two or three days of learning what the hell you're talking about. When that can be done later on. Now,

the other side of it is, on applications where the commissioner looks at something and says, here are the pleadings and here's what the ruling was below. And here's the transcript from below. The judge granted something or other. And the judge got it wrong. And I can pretty much easily look and read a transcript, sure as hell, got it wrong, by the way. You will not see that consistently from district to district. There is an inconsistency from district to district. An inclination as you will versus that lack of inclination of other districts. It's very interesting. I don't say that it's right or wrong, but that is a reality, also.

JUDGE KRAUSE: I did not know that.

JUDGE GLEICHER: I didn't know it, either. But I will say in the second district, we do not get commissioner reports in any cases seeking peremptory relief. Which means we don't get the record. Which means that no one has the record. Which to me means, the answer should be, no, because no one has reviewed the record.

Now, does that mean we can't order the record? Probably we could, but I agree with Judge Talbot, why should we? This is a motion panel. It's not a plenary panel looking at a case.

JUDGE MURRAY: On our motion docket, and this is usually in criminal cases, I can't count the number of times it happens where we peremptorily reverse an application, waive the transcript requirement and just do it.

JUDGE TALBOT: We do that not infrequently. I'd have to think because we're relying on, I don't know, most of the time, we're looking at a transcript. Or it's been filed electronically. We have something to look at to say, yeah, there's not going to be anything more here that could be developed.

JUDGE MARKEY: The caffeine has kicked in.

JUDGE TALBOT: You and I know on someone's motion, that's two different things. One is something that comes by way of an application that a commissioner has written on versus someone's raw motion where I have no commissioner. I have no analysis, I have no nothing, I'm not going to start working on that thing. That's all I'm trying to do is point out the distinction between two creatures.

JUDGE MARKEY: I think there are tools that we underutilize, frankly. Because I always take a practical view. Having been a litigator for a long time as well and a trial court judge, everything you do costs a lot of time and money. And that's kind of

always floating around in my head as well, especially if there's a very blatant procedural error and you see it's a procedural error and you just go, you know, maybe there are certain ones that we should quickly deal with. Save everybody the time and the expense. But we should err on the side of giving you your day in court, your opportunity to be heard.

So I guess I take sort of the middle ground. There are very sharp tools in our kit, and when we draw them out, we better be careful we're using them in the right way.

MS. CAVANAGH: I'm curious on motions to expedite an appeal. Is that perhaps in these cases where even if you contend its clear error, that that's a better vehicle to get a result faster in a case, or no? Same issue because it's on a motion as opposed to briefing.

JUDGE GLEICHER: I'm not sure.

Maybe Judge Talbot can tell us. If a motion to expedite is granted, what's the practical effect of that?

JUDGE TALBOT: Everything is sped up. The schedule for briefing is sped up. The time lines for Julie's people, the research people is sped up. Every step along the way is sped up.

JUDGE O'BRIEN: You might file a joint motion, which I don't think I've ever seen done, but motion for peremptory reversal, and if you don't peremptorily reverse it, please expedite the case so we can get it done. I don't know if the clerk's office would charge you for two motions or one.

JUDGE TALBOT: Expediting makes sense in certain cases but it's a tool that shouldn't be used too often.

We already have, I can defer to some of the folks who are better at this than I am. We have a lot of stuff by the way of court rule or whatever it might be that requires speed. And what happens is, okay, it's a prosecutor's appeal, they're in the pendency of a criminal case. Custody, termination, we can go on. After a while, the exceptions become the rule. One, that's always a risk, but the other is, a good illustration. We have usually one panel in Grand Rapids a month. Okay. If all of a sudden I've got a whole series of termination cases that have to, under the rules, take precedent, they jump over your civil matter, for example. We could, if we aren't careful, we could be jumping over your civil matter for a long time.

So, we have to be careful when we grant fast

track, if you will, on a case. It has to be for a very specific, election matters, have to be dealt with very quickly. That would come as an easy illustration. So we have to be fussy about when we grant them.

MS. CAVANAGH: Let's move on to polling question nine. And this falls under the larger category of management of cases and how, what impact or what effect it may have on shaping law. So number nine, when the parties have missed a dispositive issue, I will rephrase the issue to reflect the dispositive aspect and then address the reframed issue.

Okay. We do have a fairly widespread --

JUDGE TALBOT: Megan, I want to do a little polling. If the party has missed the issue, okay. That's the way this is set up. The issue is just not there, how many of you like to see an appellate court suddenly create the issue out of whole cloth and without giving you an opportunity to respond. Would that bother anybody?

Yeah, I would think so. So, I'm not real thrilled with the way this thing is set up. That it's my task, well, you missed it, so I'll stiff the other side and we'll just go forward and address what we think is the operative issue. That's not what we get paid to do.

JUDGE O'CONNELL: In the trade, we call that

an ambush opinion. And I can't tell you how many trial courts I've talked to that have made a decision, the case goes up, and they get reversed on an issue that wasn't even raised.

But even worse, if neither side has briefed the issue, and I know this has happened to some of you, and then the court rules on an issue that wasn't briefed by either side without giving either party a chance to address that issue. That is, in my opinion, a flat out ambush opinion, and I strongly, strongly say, it shouldn't happen on our court or any court.

MS. CAVANAGH: Okay. Let's get to our last question here. We're going to go into, to get the last one here.

Question ten, although unpreserved issues need not be addressed, I will analyze an unpreserved issue raised by a party on appeal when appropriate. Most strongly agree. A few strongly disagree.

And I suspect that the difference may appear in that, when appropriate, part.

So, what do you believe is -- when it is appropriate and when not.

JUDGE SHAPIRO: I have an underlying issue when I think our rules govern preservation, are variable, unclear, and often far too technical. I

think if somebody objects once, they've objected. They don't need to object twice or three times. I think if the trial judge addressed the issue, it has been preserved. And I think there are very few times that an issue is wholly unpreserved in which case I think it should be a rare exception that it's addressed. But I think one of the problems we have on our court is we too often say something is not preserved when really I think a fair interpretation of the record is that it is preserved.

JUDGE GLEICHER: There are sometimes when an issue is raised and it's not addressed by the trial court because the trial court is either negligent or don't want to address it, or why isn't that --

JUDGE SHAPIRO: That's what I'm saying. When I say "raised," it's assuming the party raised it. Okay. I agree with you.

JUDGE GLEICHER: That's the usual course of our discussions.

MS. CAVANAGH: That's a great way to end the plenary.

(Applause)

(Concluded at 10:33 a.m.)

II. SHAPING THE LAW BREAKOUT SESSIONS

A. Publication of Opinions

- Participants discussed various issues relating to the use of unpublished opinions. Some group members did not use unpublished opinions but felt that if the analysis was good they would argue the analysis without citing to the opinion itself.

- Practitioners discussed the wide availability of unpublished opinions since the Court of Appeals began to include them in its database in 2001. With greater access, these opinions began to be cited more often, including by trial courts.

- The purpose of the unpublished opinion is to advise the parties of the outcome, similar to memorandum opinions in the past. Unpublished opinions are sometimes used inappropriately when a published case is available, or for standard of review, when published cases are readily available.

- In some areas of law such as "open and obvious" and premises liability cases the law is well-established, but unpublished opinions might have the same fact patterns and for that reason be persuasive to the Court. In other areas, however, such as the Consumer Protection Act, there are fewer published cases and attorneys need to use unpublished cases.

- Participants spoke favorably of the new court rule. One practitioner commented that many of the cases where the criminal defendant wins are unpublished, so unpublished opinions help "fill in the gaps." But citing unpublished opinions "can show how the case on appeal fits into the decisions of the Court of Appeals." Other practitioners agreed that unpublished opinions can "fill in the gaps," but attorneys should be careful not to rely on them as if they are precedent.

- Another practitioner said to "avoid them assiduously" and only cite to them if "you have searched in vain for good authority but have failed."

- Practitioners noted that unpublished opinions can be helpful in Supreme Court applications, to show the Supreme Court that an issue is jurisprudentially significant.

- On a related topic, one practitioner was disturbed by a comment at the plenary session that "not as much care given to unpublished opinions." A judge then commented that publishing everything would "slow down the process tremendously."

- Some participants suggested that the Court of Appeals should publish more of its decisions.

- The panel decides early in the process which opinions will be published.

- Opinions that are designated for publication after release are not edited before publication.

- In some other states, the intermediate appellate court disposes of many cases through short unpublished orders. Michigan's tradition is to write unpublished opinions, rather than orders.

- Some judges expressed dismay that so many attorneys fail to provide opposing counsel, and even the Court, with copies of the unpublished opinions being cited.

- A suggestion was made that practice sections of the State Bar should be able to request publication, since a party's attorney may have unique interests affecting whether or not to request publication, while practice sections of the State Bar have overall development of the law as their interest.

- Considerations: Are there areas lacking published opinions? In certain substantive areas of the law there are more unpublished opinions– criminal and family. Not just looking for factual similarity - but also looking for any authority on certain legal points (where there may not be a published case specifically addressing a certain issue).

- In family law and possibly other areas, unpublished opinions are often relied on by trial courts (cited by litigants) - in essence becoming a body of law. Articles discussing/relying on unpublished opinions perpetuate the use of unpublished opinions.

- Trial courts rely on unpublished opinions because it does reflect how three Court of Appeals judges have ruled.

- How does an opinion become published?

  - After the opinion is circulated, any judge can request publication, in which case the opinion will be published.

  - If none of the judges request publication, a party may file a letter request. MCR 7.215(D)(1) (only a party may request publication; this is much narrower than previous versions of the court rule, which at one point allowed others to request publication).

  - A party requesting publication should provide specific reasons (i.e., why the area of law requires guidance).

  - The panel must unanimously decide to publish an opinion at a party's request.

B. Precedence of Pre-1990 Opinions

- One Court of Appeals judge described his view of published, pre-1990 cases essentially as "binding" precedent, except that they are subject to being overruled as warranted just as our "conflict resolution" super-panels currently can overrule an otherwise binding published opinion (except that the standard 3-judge panel can accomplish this result in the case of pre-1990 published opinions).

- When preparing at the trial court level, attorneys should be aware of pre-1990 cases and unpublished case trends, and prepare with all of these cases in mind.

- One judge observed that before 1990 there was no first-out rule. As a result, there were often inconsistent or contradictory opinions. The rule was adopted to address the situation. If a pre-1990 opinion has never been questioned, the judge will consider it. This shows the importance of paying attention to how particular judges approach pre-1990 cases. The judge said that most advocates do not rely on, or question, pre-1990 mases.

- Pre-1990 cases are used for a variety of reasons. They may be the only case on a topic, or they may be consistent with later cases, but contain a more expansive analysis.

C. Oral Argument in the Court of Appeals

- A majority of participants believed that oral argument was helpful and should be retained because it is the last opportunity the parties have to address the Court before it decides the appeal. There might be questions that the attorney could address. If panel members lack experience in a certain area of law, it could assist the judges to analyze an issue in a different light.

- Most participants do not waive oral argument except in rare cases where the other party had not requested it, or had forfeited it.

- Participants believed that it was important to the client, especially individual clients, that the attorney have an opportunity to convince the panel by arguing in person. At its best, oral argument allowed for good discussions between the panel and the attorneys.

- Participants were not in favor of eliminating oral argument even in cases where the legal issues were clear cut. The judges had voted in favor of eliminating summary panels because the majority believed that since the court rule provided for oral argument, all parties should have an opportunity to address the Court.

- There was discussion of the practice, in some courts, of releasing pre-hearing reports to the parties prior to oral argument. One of the arguments in favor of such a practice was that it would allow an attorney to be prepared to discuss issues in which the Court had a specific interest. Preparation time would be reduced and more efficiently use. It would also provide guidance on how the Court was inclined to rule. But one judge noted that

that some panels do not meet until after oral argument, so the judges may not have questions until after that time.

- One practitioner commented that generating a dialogue with the Court is a key to winning a case.

- Another practitioner suggested going to the podium without notes as a method to increase the opportunity of dialogue. In addition, only plan to discuss one or two issues. Look at the other side's brief and hone in on the truly dispositive issue.

- Practitioners commented that it would be helpful to know in advance if the panel is interested in a particular issue for oral argument. "If we knew which issue was bothering the panel, we could focus on that."

- Participants discussed whether oral argument can change the outcome of the case. There was consensus that it is possible, but rare. There was also consensus that whether argument can impact the outcome of the case is "very panel dependent." A judge shared an observation that the personalities of the judges are dramatically different, and advised attendees "Don't give up on oral argument. Judges do change their minds. Judges listen to the audio tape after argument. Judges go into argument with a pretty strong idea of where they are going with their decision."

- Other practitioners feel that oral argument can help bring closure to the litigants and their families.

- If you are not endorsed for oral argument, you don't need to appear, but you may appear, sit at the counsel table and answer any questions from the panel. On rare occasions, where a party has waived (or lost) oral argument, the panel of judges will direct that the clerk's office contact the attorney and ask them to appear and answer questions -- when this occurs it is usually a criminal case, but not always. If and when it happens, show up and answer questions.

- The Court of Appeals experimented with video oral argument, but the parties prefer to appear in person.

- The Court of Appeals used to travel to the UP twice a year for oral argument, and saved cases from the UP so it would have a full case call. This delayed the decision on some cases from the UP, and forced lawyers who were not from the UP to travel there for argument. Now, as an experiment, the Court is hearing cases in the UP only once a year, and hears some cases from the UP in Petoskey or Traverse City.

- Should it be kept in every case? In family law cases, where the cost of legal representation is often an issue, it may be reasonable to save money and utilize summary panels again when the issues are particularly clear.

- There was positive response to the suggestion of resuming or increasing the use of summary panels – given the safeguard that all three judges on a panel must agree.

- Some expressed that the more opportunity to communicate with the judges deciding your case the better, so oral argument should never be eliminated altogether. It is the only opportunity for direct interaction between the judges and the parties' attorneys.

- Should the panel of judges advise the attorneys what specific issues or points they want addressed? Generally, no -- it is the advocate's role to explain why a case should be reversed; and if you're the appellee, it is most likely that the points of interest will be clear by the time the appellant is finished.

- One judge observed that some panels have issued orders requiring the parties to address certain points prior to oral argument (including additional briefing or clarification). That practice may help hone oral argument and be an effective tool in decision making. Some suggested that a better practice might be for the Court to request supplemental briefing if an issue is still unclear after argument.

- The participants discussed bringing clients with them to oral argument.

  - Important to tell the panel that clients (or family of client) are there.

  - The rule of law is based on trust, and it is important that it is clear to the client that he or she is getting a fair shake.

  - It can be important for attorneys to show clients that they are working hard for them, advocating, etc.

  - The worry for some judges may be that bringing clients represents an attempt to manipulate the panel into sympathy.

  - Judges may simply be curious who is present in the courtroom.

  - Worry expressed over occasionally disrespectful tone of certain judges in criminal matters. If this occurs, it may leave clients or family with the idea that their case did not get the respect it deserved.

D. Briefing in the Court of Appeals

- Be restrained in responding to the other side's arguments: "absurd," "disingenuous," and "clearly" are the most overused words in brief writing.

- Don't call the other side names.

- Avoid transitions that really aren't transitions, e.g., "therefore" where the point doesn't actually follow.

- The real problem is attorneys that don't state things honestly. It is appropriate to say things that are debatable, but not if they are untrue.

- If you are advocating an issue in the Court of Appeals in the face of adverse authority, acknowledge that the issue is being raised to preserve it, and to advocate a change in the law.

- Filing a motion to affirm too early gives the appellant a roadmap to the issues for her brief on appeal.

- Are sanctions warranted for a party's poor briefing? Very rarely, but would be warranted for a truly "vexatious" brief (according to the plain meaning of the word), or when there are blatant misrepresentations in the brief.

E. Rules of Statutory Construction

- The "plain language" of the statute or rule was by far the most important method used. Several members found the legislative history to be important and helpful in understanding the issue, even if it was disfavored in terms of interpretation of a statute. It can still provide insight, especially in cases where a law was poorly drafted.

- Dictionaries can be problematic because a definition might differ from dictionary to dictionary.

- Reliance on plain language is one tool - but must look at context.

- Participants discussed the relationship between interpretation of statutes and contracts. The principles often carry over from one side to the other. Some suggested that contract interpretation is more flexible because courts are trying to implement the intent of the parties, whereas they are bound by what the Legislature has written in a statute.

F. Preservation of Issues

- What should the Supreme Court or Court of Appeals do when it finds an issue the parties did not address? There was consensus among practitioners that the Court should order additional briefing.

- One judge's practice is to note that an argument is unpreserved, but address it anyway, especially in a criminal case.

- Lack of preservation seems to be commented on more often in opinions issued in recent years. Some practitioners opined that it is often not justified.

- "A litigant's worst nightmare is a creative law clerk."

- Should a panel address an issue in a case, and even decide the case based on that issue, when neither party raised or briefed it? Some felt that if the issue is not within the statement of questions presented the Court should not address it, although there was a wide spectrum of different views on the matter. There was more agreement that the Court could address the unbriefed, dispositive issue if it was arguably a sub-issue within the scope of a stated question presented. Some felt the panel in such situations should advise the parties and request supplemental briefs.

- There was discussion about whether an issue is preserved when a party raised it in the trial court but there was no ruling by the trial court? There was no clear consensus.

- Multiple individuals expressed concern and shared personal experiences involving "ambush opinions" in which the Court of Appeals raised in its opinion an issue not raised by either party or the trial court.

G. Showing Respect in the Courtroom and in Opinions

- The Court is always ruling against one side or the other, but generally does so politely.

- Courts tend to "go easy" in criminal and child welfare/parental rights cases, where the lawyers have a tough job. But this is also important in civil cases, because the clients read the opinions.

- Some practitioners suggested that it can be disrespectful to tell a party that its argument has no merit; it can be done in a more polite manner while still getting the point across.

- Is there animus toward criminal appellate lawyers defending those convicted of criminal sexual conduct or similar crimes? There should not be – important for everyone to remember that they cannot take such things personally, and everyone is simply trying to do their jobs.

- Criminal appellate lawyers are sometimes tasked with defending the legal system to their clients' families. The legal process is very important in this regard. It is helpful when judges show respect to the attorney, as this makes the family feel as though their case is being fairly considered, and that the system has integrity.

H. The Role of Bias in Decision Making

- Most judges acknowledge that they cannot help but bring their own life experiences to bear in the judicial decisional process, including their biases and philosophy. It's why the Court of Appeals uses a three judge panel and not have a single judge decide an appeal.

- Even judge does his or her best to apply the law.

I. The Role of Policy in Decision Making

- Whether you are an advocate or a judge, there is a tension between achieving a desirable outcome and clarifying the law. The best way to a desirable outcome is to give the Court a straight path.

- An advocate can win the battle for the client but mess up the law for the future. On the other hand, the advocate may lose the battle (or minimize the damage to the client) but end up with clarified law for the future.

- An opinion should be written clearly and cleanly, so it is easy to understand and apply in the future.

- Judicial decisions can have unintended consequences. For example, the law has shifted back and forth over the years between mandatory and advisory sentencing guidelines. Mandatory guidelines are criticized for being too rigid, while advisory guidelines are criticized as too judge-dependent.

- The Court should always address the case on the narrowest possible grounds, especially on constitutional issues. The Court should also Consider whether there is a way to resolve the case other than on the merits – procedural issues.

- Some judges write opinions to "telegraph" to the parties or the trial court how to present the issue so as to obtain a different result. Other judges do not like this approach.

- There is a difference between advocating for a client and advocating for a cause, e.g., NAACP or ACLU.

- A decision can be a public relations issue for the court, e.g., "Murderer Goes Free."

- Participants raise the question of whether one can detach oneself from personal biases.

- Morality and law are closely intertwined – there is inherently a value judgment in the law.

- The Court of Appeals is the intermediate, error-correcting court. Its role is to follow precedent. When the precedent is wrong, this can be pointed out, but you have to respect the system.

- There was discussion as to whether and when there is a "moral tipping point" in which judicial activism is necessary.

J. Technology

- Members of the Court are varied in their use of technology in the decision making process.

- Some judges do everything electronically.

- Bookmarking briefs is very helpful.

- Important to leave white space in briefs for comment and readability.

- Font size and style is an important consideration – use 12+ point font.

- Searchable PDFs are incredibly helpful to the judges.

- Executive summaries with bullet points can also be very useful to give the Court the lay of the land.

K. Motions in the Court of Appeals

1. Peremptory Reversal

- It is very rarely warranted - resolution of the issue presented must be "crystal clear" and not involve a great amount of materials (e.g., if it is a civil case and the brief plus exhibits is 3-4 inches thick, forget it).

- Peremptory relief is less rare on applications for leave to appeal where it is an alternative request for relief ("In lieu of granting leave to appeal. . .").

- Motions are handled by district – it is much easier to handle when Commissioners work up the materials.

- Peremptory reversals are rarely given and have to be unanimous.

- Peremptory reversals make more sense on procedural issues in terms of efficiency, or where the law is very clear (i.e., need to determine whether there is an "established custodial environment").

2. Motions to dismiss

- Typically one judge per district considers the motions. If there is no jurisdiction, there is a good chance the motion will be granted. Otherwise, there is little chance the motion will be granted.

L. Applications for Leave to Appeal

- How does the Court decide which applications warrant the granting of leave to appeal?

- In civil cases, the issue must have an impact on the trial in order to warrant taking it beforehand.

- What are judges looking for in the statement of harm? How did the trial court err? Is the issue important to other cases? Obviousness of error and impact on the case.

M. Case Differentiation

1. Problem: Different types of cases need different speed / procedures

- Termination of parental rights & custody cases need even faster timeframes.

  - Often by the time custody appeals are decided, an established custodial environment will have been established.

  - Motion to expedite might be rejected because the Court already considers custody cases to be fast-tracked.

- In the criminal law area, there are many well-settled issues. Prosecutors suggested that if error favors the prosecution, defense counsel should ask the prosecutor for a stipulation; they may get it. But if error favors the defendant, defense counsel conceded they are unlikely to confess the error.

- Expediting appeals is not appropriate in most civil cases. Maybe in a few cases, like those involving election issues.

2. Potential Solution: Consider permitting peremptory reversal for dead-bang issues

- Could leave more time for more complicated matters.

- Because motions for peremptory reversal are rarely granted, maybe they aren't used when they could be used to deal with easy issues.

- Peremptory reversal motions are not viewed as inappropriate or reflecting poorly on party or counsel.

- Counter-point: Motions can slow the case down, cost more money, cause the Court to spend time. Need to counsel clients that not every motion makes sense.

- When is it better to file a motion to expedite and cite extraordinary circumstances? A panel is more likely to consider it if a criminal defendant is serving time and by the time the panel decides the case, the sentence will have been served.

3. Potential Solution: Consider reinstituting summary panels

- Some believe that many cases are sufficiently straightforward that oral argument is not necessary.

- Others see a public interest in the advocacy system having a time when the judges and the parties are in same room at the same time, and that there's a public perception that argument is necessary in order to get full consideration.

- What can we do?

  - *Could we have summary panels but permit parties to move for argument, with leave freely given?* That way, if people feel like they really want argument, they'll move for it. But people may feel the need to ask for it out of course, putting us in the same place.

  - *Could the panel request argument?* It might not work, in practice, because the judge might not know there's a question until a couple days in advance. In addition, the momentum of the pre-hearing report is overwhelming in the case of summary panels.

  - *Consider a rule that differentiates by practice area?* In most termination of parental rights appeals, oral argument doesn't matter. In criminal cases, on the other hand, maybe oral argument matters more.

  - Counter-point: Different systems might institutionalize a perception that parties with more resources get better access to the courts.

N. Court of Appeals Digest

- General consensus is that everyone loved the Appellate Digest and are sad to see it gone. As a free resource, it helped "level the playing field."

- Some suggested that it may have been discontinued due to a lack of funding, and may have been underutilized. Lack of use may have been an issue of lack of familiarity with it.

- The group discussed ways that the digest could be brought back –

  - Perhaps appeal to the SBM Appellate Section to see if it is interested in contributing to funding?

  - Problems previously experienced with the digest could be addressed.

- Find ways to advertise the digest, if brought back.

- Everyone agreed that they want to see the digest brought back, and that Michigan was cutting edge in having such a research tool available.

III. PLENARY – A DAY IN THE LIFE OF THE CLERK'S OFFICE

Plenary Session, A Day in the Life of the Clerk's Office,

Taken at The Inn at St. John's Conference Center,

44045 Five Mile Road,

Plymouth, Michigan,

Commencing at 2:15 p.m.,

Thursday, April 21, 2016,

Before Donna K. Sherman, CSR# 2691.

PANELISTS:

Larry Royster, Chief of Staff, Clerk of Court, Michigan Supreme Court

Inger Meyer, Deputy Clerk, Michigan Supreme Court

Jerome Zimmer, Chief Clerk, Michigan Court of Appeals

Gary Chambon, Assistant Clerk, Michigan Court of Appeals

Angela DiSessa, District Clerk, Michigan Court of Appeals

Moderator, Sandra Mengel, Retired Chief Clerk, Michigan Court of Appeals

Plymouth, Michigan

Thursday, April 21, 2016

2:15 p.m.

MS. MENGEL: We're going to use polling

questions during our plenary. And the questions are for the audience rather than the panel. Kyle is going to come and give you just a two-minute tutorial on how to find the place on your device where you can be answering questions that we pose on the screen.

KYLE: Well, hello everyone.

We will go to this session here. First, if you're at the home menu, you can see, all the way on the left, you'll click on the schedule. Once you're on the schedule, we'll go to today, Thursday, and scroll down to this plenary. Now, once we get to there, you'll see the actual page is the third one in, and there should be a little section that says, poll questions. I believe this one has six of them. You guys will answer just like any multiple-choice question and click finish and you'll see the results right up here. So that should be the gist of it.

If you have any questions, please let us know.

MS. MENGEL: We'll give you another minute or two to find things. We're excited to be using the polling questions so we can have a better understanding of the audience, and the panel members will be able to use your answers to the questions to scale their comments on what it is that you have a concern about.

The other way we're going to interact with the

audience is through note cards that I believe are on the tables. And, so, some people will be coming around to pick up the note cards from time to time and bring them to me.

As comments are being made by the panelists, if you can think of something that you want to know more about or if you have a question, please write down a brief question, more general than case specific, that will be great, and we'll do our best to fit those in as we get to places in our presentation.

Our goal is to clarify the similarities and the differences between the Court of Appeals and the Supreme Court Clerk's Offices. Sometimes the procedures are very much the same. And sometimes there are differences and we want to help you understand how that works so that your practice is facilitated in both courts.

My goal is to, at this point, right now, introduce our panelists. And we'll have Kyle put up the first three questions, to the extent they haven't already been answered.

Larry Royster is seated fourth from me. He is the Chief Clerk, Clerk of the Court and the Chief of Staff at the Supreme Court as you all may know. He joined the Court of Appeals in 1986 and went to the Supreme Court in 2013. He has extensive experience both

in the research division of the Court of Appeals and is now in the Supreme Court.

Inger Meyer is the Deputy Clerk of the Supreme Court. She's been there for 15 years. Since 2001.

Jerry Zimmer in the middle is the Chief Clerk in the Court of Appeals since 2013, but he's been at the Court of Appeals since 1995.

Angela DiSessa, seated to his right, is the Troy District Clerk. Has been there for 14 years. And has been with the Court since 1990.

And Gary Chambon, who's to my left, is the Lansing Assistant Clerk for seven years, having joined the Clerk's Office in 1994 and working in other divisions.

So there's a great deal of experience here waiting to give you some good answers.

On average, how many times per year are you actively involved in an appeal in the Court of Appeals? One to five times is 39 percent, six to ten times is 15 percent, 11 to 20 times is 13.9 percent. And 21 or more times is 33 percent.

So we have some really heavy users of the Court here. 30 percent.

The numbers are still moving a little, but the percentages don't seem to be changing enormously. About

35 percent, between one and five times, and about 33 percent the most, the 21 and more. As we can see, question number two, this is the Supreme Court question.

Between one and three times is the heavy favorite. 65.8 percent.

Most people here do not go to the Supreme Court all that often, given the relative number of appeals to both courts.

And for question three, we want to know how many have been, how many of you are current or former employees of the Court, either Court. 74 percent, 14 percent, 15 percent at the Court of Appeals. 6 percent in the Supreme Court. 8 percent both Courts.

It's always interesting to know how many people have experience from inside. It can certainly make a difference, I think, in how practice goes.

A Day in the Life of the Clerk's Office.

One of the things that struck me in General Suter's comments was his statement, which may have escaped some of your notice, that he was so elated at the end of the day that the Bush opinion came out that he could barely sleep. And that's probably not too noteworthy to an attorney, but it certainly struck a chord with me. But the work of a Court is rule bound. It's bound by policies. It's bound by IOPs, by people's

expectations, I suppose. But the most fun, from my time there was when we had to handle high visibility emergencies and make stuff up as we went along, not to break rules, but to try to get things done quickly and well so that high visibility, important questions could be answered by our Judges or by the Justices. I'm sure the same is true at the Supreme Court. And that they were facilitated in doing that and the attorneys were facilitated in getting in their filings and having their voices and their clients would know that.

And then the answer would come out as quickly as possible and everyone would receive it in the most efficacious way. And that's so much better now with all the technology that's being used. And we are going to spend a fair amount of time on electronic filings, and implications not just for filing into the Court but filing out from the Court. Sending things out from the Court through that system.

But I know that many of you are probably already on the opinion release email thing that comes out twice a week, and so that you're immediately aware of what opinions have been released.

But the elation of being a Clerk really is, it's really special when you get something done and you do it right, and everybody goes home and says, “Okay,

that was a good day. We did it."

When you start your day at the Court of Appeals, I suppose one of the first things you have to think about is jurisdiction and how does a case come in. When a case starts at the Court of appeals, Jerry Zimmer is going to make some comments about that.

MR. ZIMMER: Thank you, Sandy. I want to acknowledge Sandy being here. She had a hand in hiring or promoting just about everybody that's in a management position at the Court of Appeals, including the three of us. And she's continued to be a resource for us. And thank you for doing that through all these years.

I guess for people who are, very rarely file with the Court of Appeals, we do have a manual in the handouts. It is a 15-page kind of a nutshell, the steps in an appeal and, I think if you look through that, if you're getting ready to file an appeal for the first time or for the first time in a long time, that might be a good place to start.

Another place would be our IOPs, which are internal operating procedures. We keep those updated. They're online. They touch about every aspect of the policies and practices of the Court. Sandy had a big hand in initiating those and keeping those updated in her tenure with the Court. So that's another place you can

check.

But then, I think at the end of the day, if you have any questions, I encourage you to call. Call the Court. Call the Clerk's Office; ask us. We're all, we've all been with the Court for a long time. We can answer just about any question and give you guidance about how to file something. What you need, what papers you need, and hopefully it will smooth the process for all of us that way.

Jurisdiction is a good place to start. I'm not sure where it developed, but the Court at some point in its 50-year history decided that the first thing we would do when a new case comes into the Court is look at the jurisdiction. Make sure we do have jurisdiction. We get different kinds of cases. We get appeals of right that come in as claims of appeal. We get applications for leave to appeal, and then we get original actions. And in each of those cases, we first of all look, an attorney on our staff, typically an assistant clerk like Gary Chambon, will look at that case, look at the paperwork, and try to make a determination whether we clearly don't have jurisdiction. If we don't, we move that case along to an early dismissal so that the parties can move on to a different avenue of relief and those typically go to the Chief Judge.

If you're an appellee who has received a new claim of appeal or an application and you think the Court doesn't have jurisdiction, you might want to wait for that process to complete before you take any action.

You know, give the Court a chance to look at it in the first instance and, in fact, if you do file a motion to dismiss, that will shortcut our review. The court rules say that if you file a motion to dismiss, we essentially can't dismiss on a one-judge order. So you'll have to wait the 21 days for the motion to dismiss, etc.

And I guess I'll just ask Gary right now to, as a new case comes in, we give it a case number, we open a file and we immediately hand it to a person like Gary who works in the Lansing office and he will look at what the aspects of jurisdiction are and make a determination.

MR. CHAMBON: Right.

And one point that occurred to me, if you're the appellant filing a new claim of appeal and sometimes there will be a statute or court rule provision that's rather unusual or obscure, and if that's the basis for jurisdiction from an order that otherwise would not be a final order appealable of right, that's something that would behoove you to make clear in the body of the claim of appeal or the jurisdictional checklist, because, you

know, our initial focus, we're ordinarily going to be looking for, is it one of the typical final orders, and from the appellee's perspective, because we do this initial jurisdictional screening, it makes sense to wait, some short period of time, maybe three weeks, to see if you believe it's manifest, we don't have jurisdiction as an appeal of right before you file a motion to dismiss and put the work into that, when the Court might just dismiss the case on its own, and, also if you do file a motion to dismiss, that would preclude the case being referred to the Court for consideration of dismissal on its own initiative.

MR. ZIMMER: I think the point is that if you think that jurisdiction might by questionable, it might be good to make it as clear as possible in your pleading. Because we don't have a lot to work with. A claim of appeal often comes in on a form, and sometimes we'll have just the register of actions and an order that often can be an order denying reconsideration of the actual final order. We often have to go back and ask for more information, like that final order.

Also, the other thing we're looking at is timing. Did you file it in time? If it comes from a motion, an order denying a motion for reconsideration, you have to consider, did I file that motion for

reconsideration within the 21-day appeal period? And show that to us. Make sure that the register of action shows that. If it's vague on there, you may want to make a note, how you can prove that, and then, again, show you filed your claim of appeal within the 21 days from the order denying reconsideration.

So those are, I guess, some tips.

We do dismiss quite a few appeals. A good seven percent of our appeals that come in get dismissed right out of hand. Those, what would happen is, Gary would do a review and determine, we believe we don't have jurisdiction. At that point, he would do a memo to our Chief Judge and that would get submitted on a Tuesday. And hopefully if you filed on Wednesday, the next Tuesday might, that might go to the Chief Judge and then within a day or so, you'd get an order out in the mail that would say, your case was dismissed, and again, hopefully you could move on from there.

That obviously delays the appeal. You lose your $375. I assume that would make your client unhappy. So again, as a District Clerk, and as an Assistant Clerk, I would often field calls from attorneys who just don't know. Do I have a final order? What should I do?

Obviously we can't advise you that you do or don't have a final order that's appealable in Court, but

you can call and ask, and we will provide you as much helpful information as we can to help you make that decision on your own.

I would, again, encourage you to call the Court if you have a question.

MS. MENGEL: Inger, are there any appreciable similarities for jurisdictional review by the Supreme Court?

MS. MEYER: This is application from the Court of Appeals decision so the big jurisdictional issue is timing. 56 days for a criminal case, 42 in a civil case and 28 in a termination of parental rights. If they are not sure what to count, what is the 56th day, call us. We'll be happy to look at your order and tell you the last possible day it could be filed. If you have any questions about which category, call the Supreme Court Clerk's Office. We answer our phones. You will not get put on a menu, and someone will help you figure out what your timing is.

MS. MENGEL: Jerry, you mentioned claims of appeal and applications. Also, there are original actions.

MR. ZIMMER: We have the three types of cases that come into the Court in any given year. The last couple years, we've averaged about 5700 appeals or cases,

I should say, each year. Over the past five or six years, 56 percent of the cases we get are claims of appeals. Two-thirds of the claims of appeal are civil cases that come in. A third are criminal cases. Appeals by leave that come in as applications for leave to appeal. About 46 percent of our cases over the past five or six years come in that way, appeal by leave. Criminal make up two-thirds of those cases. A lot of them are guilty plea cases, and a third are civil cases. Then we get about two percent a year that are original actions, complaints for writs of superintending control or mandamus I guess would be the largest part of that group.

The claims are handled in the Clerk's Office, claims of appeal when they come in. We open the case. We do the jurisdictional review and then we start the process of trying to gather the record. This includes transcript production, and the briefs. And, you know, one of the things we do is we try to ensure that all of the documents came in with the claim of appeal. If any piece is missing, we'll send a letter and it will give you 21 days to file the missing piece. It may say you are missing the register of actions or we need the final order in the case.

It's something you want to avoid. When we send those defect letters, you should pay attention. Because

if it does go to involuntary dismissal, those orders almost always include a $250 assessment of costs against the attorney. You want to avoid that. I think that looks bad in all respects.

The original actions and the applications go to the Commissioners' side of the office. I'll kind of leave that issue to their plenary session this afternoon. But if those applications are granted, the case then is turned over to the Clerk's Office and we handle it just as an appeal of right. We start looking for the transcript, the briefs, and so it proceeds from there all the way to oral argument and opinion.

MS. MENGEL: Can somebody talk about if you need your appeal to go quickly, your claim of appeal to go quickly, what are your options on filings?

MR. ZIMMER: It's rare. We do get with claims of appeal, we'll get a motion for immediate consideration or a motion to expedite that appeal, I guess that proper term is to "expedite the appeal." And it depends what they're asking for. We've had situations where they want essentially a disposition within a week or a month. It puts it on a superfast track and in that situation, we treat it more, it will go to a panel right off the bat to determine, to dispose of the motion to expedite the case. And they, and that panel can then decide whether or not

to put the case on a special, so to speak, case call that would expedite the complete disposition of the case.

In more typical cases, we get a motion to expedite that will simply say, we want to expedite the briefing schedule and then to be put on the first available case call after that.

So, those go on our motion docket and they're handled in that way.

MS. MENGEL: Is it useful to get a heads up?

MR. ZIMMER: I think the commissioners will talk about this more than we will. This happens all the time. The applications come in and they need immediate action. And I know that they always, because they have the situation happen so often, we advise parties to call the Clerk's Office. Talk to the commissioners. Talk to the Clerk's Office. Tell them this is what I'm planning to do. I need action by next week or what have you, and we can help you by making sure you've got in that file everything you need.

We can make sure that the panel is ready to go to receive that and we can get it docketed as quickly as possible. So, it is a good idea to first contact the Clerk's Office if you can ahead of time, and, secondly, clearly state on the cover of your pleadings, you know, what time frame you're talking about. Why is it an

emergency so you can explain to Judges why you need this action by such and such date.

MS. MENGEL: I want to take a general question. We didn't talk about protocol with that. What we used to do is hold them [the note cards] up, and if somebody, Megan and Mary, I guess, will watch and see if there are any. Perhaps some will come up.

So, Jerry mentioned transcript production as one of the early issues in an appeal and, Angie, I think you were going to address that.

MS. DISESSA: As a lot of you already know, we need to get the transcripts ordered contemporaneously with the initiation of the case. Typically, we will get something with the claim of appeal that says that you've ordered certain hearing dates from a certain court reporter. And we track that in our system. So we are looking for all of the dates that have been listed that have been ordered. And we need to get a stenographer's certificate. The court rule says within seven days, the court reporter is to file the stenographer's certificate with us. If we don't get that stenographer's certificate, then we're looking at issuing an involuntary dismissal warning letter. We call them invol. letters. If you get it to us within 14 days of ordering the transcript, everything's fine. But if we don't get the

steno certificate, then we will send an invol. letter to the appellant because it's the appellant's obligation to file the stenographer's certificate with us to order the transcript.

Typically once we send out the letter, the attorneys are great about getting us the stenographer's certificate and we start monitoring the transcript to make sure they're timely filed.

In the typical civil or criminal case, the court reporter has 91 days to file the transcripts. So our case management system will monitor those cases. Make sure that the transcripts are timely filed.

If they're not timely filed, this is something that the Court does that some people may not know, we actually send a notice to the court reporter saying, your time has run. We don't have your notice of filing transcript. And we generate those electronically. So, the minute we know those transcripts are overdue, an email is sent to the Court Reporter. Typically in Troy, I'll have a fax on my desk the very next day, and we will go ahead and docket the notice of filing and the case moves forward.

If we don't get the notice of filing, again, we will issue an invol. letter. Give the appellant 21 days to file a notice of filing of transcript. If we don't

get something, as Jerry mentioned, then, it's possible that the case could be dismissed. And there's a $250 assessment of costs against the attorney if that happens. We like to avoid that. We will often make phone calls to people and say, hey, we sent you an invol. letter. It's between 23, 24 days, we don't have the notice of filing transcript. Can you fax it to me? Can you email it to me, because we don't want to dismiss people's cases.

But if you can't get the court reporter to file the notice of filing transcript, you can do a couple things. You can ask the court reporter to file her motion to extend time. Lots of times court reporters will do that. They'll do that on their own even before they get our postcard. And you can also, as a last resort, I guess, file a motion to show cause the court reporter.

We used to see a lot of those. It seems that the court reporters are more current lately. We don't have as many in Troy as we used to have. So usually a call to the court reporter will solve the problem.

MS. MENGEL: If your case is dismissed for failure to meet the court rules, is there some recourse that is available?

MS. DISESSA: So if we dismiss your case, you have 21 days to file a motion to reinstate the appeal.

And you need to attach what was missing from the case. If it's dismissed for a lack of a brief for example, you want to attach your appellant's brief with your motion to reinstate. That way you have the best chance of having that motion granted.

MS. MEYER: [At the Supreme Court there is] no record production issue because it's usually applications from the Court of Appeals. Sometimes if it's an application at the Court of Appeals and they didn't order the record, we'll have to order the record from the trial court, but that's something we get directly from the trial court. Any time the application is filed, we always order the Court of Appeals file and trial court records so the Justices have them available to them.

MS. DISESSA: Even the records that are coming electronically are sent up. We have eight to ten counties that are filing electronically. All their civil cases and criminal cases come to us that way. Oakland County, we get an email from the circuit court saying a record's been filed. The person who monitors that opens up that email and can see what was filed, what parts are there in that record and can check it against what we have on our list of transcripts, etc., and then just hit, okay, if it's okay. And it will automatically make that entry in our register of actions and attach the record

itself so not only can we see it, but when it gets to the Supreme Court, they can see it, too. And all Judges who might be on the panel for that case can see it instead of having the single paper file that we have to cart around and get to the right Judge and they might want to trade it back and forth. It's actually a very beautiful automation advance for us.

MS. MENGEL: This kind of brings us back into the stage that we're at. It's a question from the audience. I'm going to ask it now.

Can you talk about filing for emergency stays or relief in both Courts? What are any tricks, any traps? I know this has some overlap with the commissioners but it may also have to do with a case that comes up in a claim.

MR. ZIMMER: Well, for the Court of Appeals, I think that is most applicable to the commissioners. They very often get motions for stay because they're more often than not, it's an interlocutory situation and they're trying to avoid trial or what have you. So they handle that more often. But I guess from the Clerk's Office perspective, following the rules, I guess, would be the main point. That if you look at 7.209, it tells you exactly what you need. You need to have with your motion to stay, you need to have an order that denied a

motion for stay in the trial court and you need to have a transcript of the hearing if there was one that was held on that motion.

And we will defect your motion for stay if you file it without those two things. And the way to get around that is to file a motion asking the Court to waive that requirement. So we very often see a motion to stay come in with a motion to waive the requirements of 7.209. Beyond that, if you're looking, often a stay is looking for an immediate action. You will need a motion for immediate consideration. If you can, call ahead, and we can pave the way for you.

MS. MEYER: The same is true, if now you're going to be filing an application with a motion for immediate consideration, it's helpful if you call us and we can let the Commissioners' Office know that something is coming on this case. In your motion itself, don't make it hard for the Court to understand what the emergency is. If there's a trial on a certain date or the building's going to be torn down, you want that on the cover of your motion for immediate consideration so it's very clear what the actual emergency is.

And I think our procedure's a little different from the Court of Appeals in that the parties are in the best position to know if it really is an emergency. We

do not, as a matter of course, when we get a motion for immediate consideration, call opposing counsel and give them a deadline. We get it into the Court's hands right away, but it's helpful if you're the appellee and the appellant has filed an application with a motion for immediate consideration, you can give us a call and tell us if you plan to file a response and when you will and we'll pass that information along. It doesn't guarantee the Court's going to wait for that. But it's helpful for the commissioner to know they're not planning to file a response or they're going to rely on the [Court of Appeals] brief. Let us know what your plans are. They don't want to be entering a decision if you're planning to answer that afternoon.

I think the key is to let us know if you're planning to file a response and when. And if circumstances change, if you file a motion for immediate consideration because of a trial date and then that trial date gets extended, let us know. It's helpful for the Justices to know that as well.

MR. ROYSTER: I don't believe I'm talking out of school. My sense of the Court is, that they rarely grant motions to stay. It's not that you've got just a trial judge who is being unreasonable, but you also have a Court of Appeals panel that would have denied it. So

coming up to the Supreme Court asking them to do something the Court of Appeals was not willing to do, I think is a little higher burden. And I know we get them frequently. But I probably could count on one hand and not use all the fingers the motions that I can remember being granted.

MS. MENGEL: This reminds me of a question from the Court of Appeals' perspective. What Inger was saying about what the appellee can contribute to this process. If I'm not mistaken, if the appellee knows they're not going to pursue whatever the trial judgment was right away, so that the motion for stay doesn't need to be immediately submitted, is that information that you would want to have?

MR. ZIMMER: My experience is we'll get a motion to stay that says they need to stay execution of the judgment which can happen more with property, they're asking, or they have a motion for immediate consideration. They want a motion for stay heard by tomorrow or whatever, and we'll call the other side and ask them, are you going to file an answer because they're asking for us to stay it by tomorrow? So you've got four hours to do that. And at that point, we will often hear the other side say, well, we're in no position to execute on that judgment right now and we have no plans to do

that.

We will, at times, communicate that to the panel and say, you know, they can't get their answer in today, but they can get it in by tomorrow afternoon. They say they will not be executing on the judgment which is the concern, and so we still submit the motion in time for them to grant it if they want to, the panel, I mean, but they have that information if they want to wait for that answer.

MS. MENGEL: Thank you.

This is another question from the audience that has to do with the early days of an appeal. So I'll throw it in now. If a party is uncertain as to whether or not an order is filed and, therefore, files a claim of appeal out of an abundance of caution, assuming the Court disagrees, will it dismiss the appeal, treat it as an application or hold it in abeyance for a short while and permit the claim of appeal to be amended when the final order is entered?

MR. CHAMBON: Well, I think I feel safe saying, if, for example, it seems apparent to me that there is not jurisdiction over a claim of appeal, I'd refer it to the Chief Judge, and most likely it would be dismissed. Typically those orders advise of the possibility of filing a delayed application.

MS. MENGEL: So the order that goes out dismissing the claim will include some language that talks about your option to file a delayed application.

MR. ZIMMER: You can file a delayed application up to six months beyond the order date. And also that court rule, doesn't come to mind at the moment, but I believe that a court rule changed several years ago, allowing that when you get an order that dismisses your case for jurisdiction, it opens a 14 or 21-day window that you can file a delayed application even if you're past that time period.

MR. CHAMBON: That's pretty unusual for it to be dismissed that far out.

MS. MENGEL: The next thing that is going to come up for many people who are filing in the Court of Appeals is a docketing statement. And this raises the issues of when to file, what are they used for. Can the panel address the new Court of Appeals' mediation pilot project and how that's going?

MS. DISESSA: We all want to talk about the new mediation. A docketing statement is required in all civil cases except for the termination of parental rights cases. It's due within 21 days of the filing of the claim of appeal, so, if you get it in within 21 days, you won't see one of our invol. letters. We use the

docketing statement. We look at the nature and the scope of the case. It sometimes helps us with jurisdiction. It helps us with transcript issues if we're not sure about hearing dates and so on, because there's a section of the docketing statement that deals with that.

Currently, we are using docketing statements to help us determine whether or not a case is appropriate for our new mediation pilot project which started on October 1st of 2015.

Twice a month, docketing statements are being reviewed. We're looking for complex civil cases that may warrant submission to mediation for possible settlement of some or all of the issues. And in the first six months in the program, we've had great success. I think we've had about 35 percent of the cases that have gone into mediation have actually settled. So we're really happy with the way that it's working.

What we're hoping for at this point is that when the docketing statements come in, that they're filled out as fully as possible. And that if the parties are interested in mediation, that they indicate that on the docketing statement.

Much of the cost of the appellate litigation obviously can be avoided if the case can be settled early. So we're kind of looking to get the cases in as

early as possible and see if we can get some of them settled.

One of the things I want to mention is, you can file a confidential request with us to have your case included in mediation. And that request will be reviewed by our Chief Judge. So, if you think your case may be appropriate for mediation, please go ahead and file a letter with us. It will be treated as confidential and it will be referred to our Chief Judge.

MR. ZIMMER: I think we're looking at this point, that year will be up at the end of September, and we're hoping that this will become a permanent part of our operation. The docketing statement was developed in combination with the settlement program, which we discontinued in, I think, 2009. And so that was sitting dormant. We are still collecting the docketing statements in all cases and there were a couple attempts to, should we keep doing that? We have kept it up. And I think people maybe got into the habit of, they don't even look at them anymore. They would just fill them out as minimally as possible and sign them so they don't get a defect letter.

But I think maybe you should take a little more time and look at the docketing statement. Again, if you think the case is something that would, mediation would

help, you should add that to the docketing statement. And, again, I'll just echo Angie and say, we are looking for people to come forward if you think the case might benefit from mediation. We want to know that. We look at the docketing statements. It's often hard to tell what the status of that is. We do have the former settlement director, Dave Baumhart, who comes in and looks at the docketing statements for us and applies the knowledge that he's gained through that settlement program and his own mediation practice.

But it's hard to tell from just the two-page docketing statement. So we will, we encourage any help we can get in that.

MS. MENGEL: And I know we're going to talk about website resources, but there is a form that can be filled in there and printed from it.

MS. DISESSA: They can print it right online and do it.

MS. MENGEL: And they can be filed. Motion practices, there's motions that are decided by one judge. Some by three judges. Sometimes it's probably unknown how panels are determined.

Gary, can you talk a little bit about motion practice generally?

MR. CHAMBON: Well, administrative motions can

be submitted to just one judge and there's one judge in each district who handles those types of motions. Those are motions to extend time to file a brief, a motion to expedite. But motions that seek more substantive relief would go to a three-judge panel such as a motion to remand and a motion to dismiss an appeal.

MS. MENGEL: There are some motions that the Court can rule on without waiting for an answer.

MR. CHAMBON: That's correct. I believe motion to extend time to file a brief.

MR. ZIMMER: Motion to adjourn is another one.

MS. MENGEL: So a party shouldn't be surprised if an order comes out?

MR. ZIMMER: That's caused some consternation where we've issued an order and I'll get a call from an attorney who says, I was preparing my answer. I billed the client, or I want to bill the client for my answer and now you've issued the order. You cut me off. And I'll point them to the court rule. We don't do it very often, and we typically do it only in motions to extend time, which we more often than not don't get an answer to, anyway. But we generally wait the answer period and submit the motion. We have the administrative motion docket which is where those administrative motions are assigned. And the court rule allows the Chief Judge to

hear those motions. And so we developed the practice that the Chief Judge has designated a judge in each district to handle those in that district.

And then we also have the three-judge, a standing three-judge motion panel that sits for a month at a time. We calendar that at the beginning of the year. We set up who those three judges are for each month of the year ahead of time, and they sit and hear any substantive motions. A motion to remand. Motions to dismiss. Motions to affirm. Those will all go to a three-judge panel in addition to applications that the commissioners are working up and any original actions. So that's how we do it. They're all submitted on Tuesdays. If you're waiting for a motion, you should look at the answer date that the opposing side has and then look to the next Tuesday. That would be the date we would generally submit the motion, and then you can probably figure on within the next week after that date, you should get an order on that. Some motions that might be more substantive might take longer, but generally, soon after that date is when you can expect an order on a motion.

MS. MENGEL: Before we leave motions, is there anything at the Supreme Court, any tips or tricks about motion practice at the Supreme Court?

MR. ROYSTER: We have administrative-type motions. Those typically go out on a Tuesday. Those are the same type. There is a substantive-type administrative motion and those are the orders that say "By order of the Chief Justice" where there is a stipulation to dismiss. So those don't go to the whole Court. It is a matter of substance. It seems like motions to extend time, motions to participate as amicus. The rule for extending time is, you can submit the motion along with the late brief if you care to. I think the better practice is to submit it right away when you know you're not going to meet the deadline of filing a response to an application or if it's a brief on a calendar case. But it's not absolutely necessary.

Generally, I think because they are CJ matters, he's generally of the view that we can extend for the period that's allowed under the court rules. The same kind of policy the Court of Appeals applies. If it's a motion to extend a reply, which has a 21-day due date after the answer is filed, if you ask for an extension -- if you ask beyond 21 days, you still have to show good cause.

I recall within the last couple weeks, we got one where I believe it was a reply. They asked for a 60-day extension and gave no reasons. They just asked the

Court, please grant us 60 days. And it was all in one paragraph. And that was denied by the Chief Justice.

It does require good cause. If you've got a busy schedule, we're not asking you to swear with, sign your name in blood or anything, but you do have to show something that would cause you to miss that deadline. And then the extension itself has to be reasonable.

MR. ZIMMER: I would add, we do have a form on our website for a motion to extend time to file a brief. We ask that you to use that if you think that fits within your practice. I don't know whether that works for everybody. But it's a one-page form that has a proof of service down at the bottom. You can fill it out on screen. Print it off and file it. It tries to lead you through what we're going to look at, which would be what brief are you talking about? What specific date do you want the extension to? What are your reasons for the extension? And, so again, I would encourage you to go to the website and find that form and use it if you can.

MR. ROYSTER: If you're an old-time practitioner and have not filed anything recently in terms of extensions or any motions, the amended court rules took effect on September 1. The old way was that you had, as the person who's filing the application would include a notice of hearing, which would establish the

date that the answer was due. Under the court rules, you had a specific minimum period of time. That would be the first Tuesday, no earlier than 21 days thereafter.

Well, that has changed. Now our practice is consistent with the Court of Appeals in that the hearing dates are driven by the court rules. So it's no longer the filing party that would establish, perhaps, in conjunction or not with opposing counsel, a hearing date for filing a response or a reply. So that's just the other thing. You have to look at the court rules, not what's put on the, perhaps, the application itself.

MS. MENGEL: And for people in the room who may not practice very often, can you explain what a MOAA is?

MR. ROYSTER: It's an acronym for Mini Oral Argument on the Application. It's one where the Court directs the court clerk to schedule argument on the application and they're the ones that were mentioned earlier that, actually, I think that was in a breakout session. The full grant, the "full dress cases" as he referred to them, those are the ones with about 30 minutes. The MOAAs are argued on the application. They get 15 minutes per side. And in terms of the results that may come, it can vary. A lot of them are simply denied after argument, which is unfortunate. I think the parties probably think, why did I go through the exercise

and go through the argument to get a leave denied. But it's an option that the Court has had.

Part of that is because, internally, the policy is not to grant peremptory relief. It has to have five of the seven Justices if there are seven Justices seated. If there's less than that, it still requires four. That's the policy that drove the MOAA cases. We will schedule arguments and if something is going to be decided off of MOAA, it can be done by four of the seven Justices.

They also are not -- the Court is not required, or the court rule does not allow you to reargue that case if it's not decided by the end of the Court's term. So the Court goes from October 1 to September 30th, and for the most part, all opinions are issued by July 31st. If they're not issued by then, if it's a calendar case, you have a chance to rebrief and move for reargument.

The Court doesn't like to do that, but with MOAA cases, you don't have that under the court rules.

MS. MENGEL: Okay. Let's circle back one second on mediation. We have a question from the audience. What qualities make a case more desirable for mediation?

MR. ZIMMER: I think the idea that we had for the program was we were looking for, what we call the

"box cases." Generally a large case that takes a lot of time, involves a lot of time from our research department to work up. Involves a lot of time for Judges to deal with. They're typically cases, those cases are, you know, they have a large record. They typically have a large record because they went through trial. So the issues are very well-developed. The parties are very familiar with what those issues are. They're familiar with their opponent. And, so, our thought is, well, if we can get those cases before a mediator, we could save everybody the time, the expense and time of getting the transcript, putting the briefs together, and kind of shortcut the process.

And as you've heard, we've really had some remarkable success, I think, in that. We're trying to refine it every day, each time we do this, to pick better cases or try to identify those cases. We have very little to go on at the beginning. We have the docketing statement that says how many transcripts there are, and says what the issues are, says what happened below, if it went through trial or what have you. And from that, we try to glean whether or not this would be a good case. And any help you could give us in that regard or even a confidential letter to us that says, you know, you didn't pick my case, but I think you ought to.

MS. MENGEL: So complex cases aren't necessarily out, and baby cases in. Or the amount of a judgment doesn't necessarily have an effect?

MR. ZIMMER: No, there are no criteria like that. I guess we're kind of avoiding, I guess custody cases, domestic relations sort of cases. Not that we wouldn't take them if a party approached us, but that was one of the determinations we made to try to avoid, and we often avoid summary disposition cases because we figure they don't fit that model. They're in and out of the trial court early. They don't have a big record and maybe the parties haven't fully developed the record yet or the issues yet.

So, again, we're looking for the commercial sort of large record cases that will involve a lot of time for the Court. And hopefully this process saves everybody; it's a benefit for everybody.

MS. MENGEL: At the end of a case, we have a case call, and we have opinion release. And those both, in one way or another, affect both Courts. If we can spend a few minutes. And I know we want to get to the electronic thing. If we could do another five minutes on this part, and we could move on to electronic filing for the last 15.

MR. ZIMMER: I think anybody who's familiar

with working in the Court of Appeals who knows that the beginning or the end of each month, you get a letter from the Court that says your case is on-call for the next month. So, at the end of the month, we have a deputy clerk in Lansing who's been in charge of our case call program for many years. At the end of each month, she begins to pull those together using the case management system. She randomly draws the cases that are ready and fills the three-judge panels that we have.

I should step back a minute and say at the end of each year, we set up who those panels are going to be for each month of the upcoming year. So, she works with, you know, for example, May just came out. She knows how many panels are going to sit that month. Who they're going to be. What locations. She puts all that information into our case management system and that populates those case call panels with cases. And at that point, the letters go out to the parties alerting you that your case is up in six weeks for oral argument.

And at the same time, Judges, essentially, at the same time they get that information that those cases are now before them.

At that point, once a case is on-call, any motion that comes in, goes to the case call panel. It no longer would go to administrative motion docket or the

regular motion docket panel. It goes to the three judges that have that case on case call.

I'll take another moment here, a tip for you would be to, if you know that you have a vacation coming up, you know you have a case or two that might be getting close, you're at the 15 or 14 month range. You're planning a vacation for the first two weeks of a coming month. You should let the Clerk's Office know that, and we will put that information next to your name in our case management system so when that process goes through our case management system, it will avoid scheduling you for those dates. And too often we have motions to adjourn that come in after cases have been assigned to a case call and we get an attorney that says I have a nonrefundable vacation scheduled for next month.

And at that point, there's a lot of gnashing of teeth in the Clerk's Office, and saying, why didn't you tell us this. Many attorneys in the room are very good about that and have long lists of days they're unavailable, but we do like to know that if we can. We will try to avoid it and help you out.

MR. ROYSTER: We are very limited in the number of cases. There are 12 to 15 cases if it's a three-day call. It's a combination of calendar cases and MOAAs. I would like to re-echo, in the case of vacations, it's

even more pointed for the Supreme Court because when you get the leave granted or MOAA order, you know that case is going to be scheduled at some future point. As soon as you receive it, if you've got any conflicts coming up, please send in a letter or give me a call. Because we have had it where it was scheduled and received notice that the attorney had a vacation planned and paid for for the past year. It's like, well, you knew that this case had been granted leave. Why didn't you notify us? It's one of those things, as soon as you get it, keep us informed as you develop new things.

The other thing to know, it's usual that the Court sits, if the first week of a month is a full week, that is typically when they sit. If it's a partial week, they'll go into a second week. It's on a Tuesday, Wednesday, Thursday. If it's a two-day call, it will be the Wednesday and Thursday; if it's a one-day call, it will be the Wednesday.

If you have a conflict in the third week of July, the Court doesn't sit in July, so you don't need to notify us of that. But if it's, you know, in March, the first week in March and you've got the vacation planned to go on a family vacation because your daughter or son has a school break, please let us know right away. That just won't be scheduled and we'll push it off to April or

whenever you're available.

MS. MENGEL: This is for the Court of Appeals. When assigning cases, does the system look at Judges' areas of expertise?

MR. ZIMMER: No. First of all, I don't think there's any way to program that in. And then, to try to determine what that case will be about, we don't have that kind of information in our case management system, nor do we have any areas of expertise programmed in about our judges. And even if we did have all that, I'm not sure that would be proper.

MR. ROYSTER: I'm sure it was in your time. They tried that one time. They tried to group cases, not because of the panel's expertise, but they tried to group Worker's Comp cases together and no-fault cases. And it was a bust because the issues, although the types of cases were the same, the issues were so diverse, it really didn't create any efficiency. I recall when that happened and it was stopped. It had been mentioned a couple times over the years when I was at the Court of Appeals and the old timers always said it wasn't worth the effort and it died at that point.

Again, it's hard to even do that with a computer. But once the effort was made, it really didn't result in any efficiencies. I don't think the opinions

were any better written. So it was stopped for that reason.

MS. MENGEL: Before we move on to website resources for both Courts, is there anything else -- is there anything else, especially the Supreme Court?

MR. ZIMMER: I would say one of the main sources of contact we have with the public or the practitioners are defects letters, which often are, our attorneys call them love letters from the Court of Appeals. And you know, everybody wants to avoid that. We don't like the work it involves. Having to send the letter. And monitor it. So anything you can do to avoid that, and I think a couple of tips would be, if you go on our website, you can look at your case. I think a lot of people in the room can do that. You can see the register of actions for your case, see what's going on there, and you can also see, because I think one of the main areas for a defect is a proof of service. You didn't properly serve the other side. And often that the address is wrong in some respect. We are going to check your proof of service against the address that we have in our database, and that will be the same one that you can see on the website. So you can check that ahead of time and just go through your pleading and say, do I have all these things straight before I send it in? That will

avoid a defect letter.

MS. MENGEL: Larry or Inger, are there big areas of concern?

Okay. Do you want to talk about the opinion release, the website resources before we get into the e-filing thing, because there's some great stuff on the website that some people may not be aware of.

MS. DISESSA: Our website is great. All of the forms that we talked about today are on our website. Some of the forms you can fill out right online, which is good. You can do a case search on there. You can get the -- get the case call schedule. Information about all of our Judges, the Clerk's Office locations, how to contact the district clerks. Our names and phone numbers. There's so much great information on there. There's a frequently asked questions section that people can go to if you have a question that could be answered in that section. And if not, please feel free any time to call any of the district clerks. We're happy to answer questions. We like talking to the attorneys. They always raise lots of good questions. And if it's a question that we haven't dealt with before, we will discuss that with the other district clerks so that we make sure we can give you guys the best information that's out there.

MS. MENGEL: And probably some of that leads up to amended IOPs. Do you have IOPs at the Supreme Court?

MR. ROYSTER: They're under development. We hope to have something online soon. They're not going to be as extensive as the Court of Appeals. But we do have -- hope to have something in a couple months. Now that I've said that publicly --

MS. MENGEL: Do you want to give us a date?

Website resources for the Supreme Court. You have quite a lot of stuff about the cases that are coming up.

MR. ROYSTER: There are a lot of resources there. A lot of, in terms of if you're new to arguing cases before the Supreme Court. There's a guide to Counsel, again something General Suter mentioned, the Michigan Supreme Court has the same thing. It was developed by a lot of the veteran practitioners here in conjunction with Court staff. Other things, we have whole pages dedicated to the cases that are to be, on either leave granted cases or MOAAs.

We have cases where the orders actually invite amicus. If you're in the probate law section and if you want to look at that and see there's a probate case, you may want to consider writing an amicus brief.

On the other hand, if the case doesn't appear

there, that doesn't mean we would not accept an amicus brief. I think the Court greatly encourages the writing of amicus briefs in any case. But it does in the body of the order itself invite specific groups. Occasionally, it says, we invite interested parties and groups, which to me is a surplus. We do that in every case. But there are a lot of resources, as well as, if there are things that you would benefit by that is not available to you on the website, please give us a call and let us know. We're open to doing almost anything to benefit you. So let us know if there's information that you would benefit from that we could provide to you.

MS. MENGEL: One thing I always liked on the Supreme Court website, was the court rules, and the section on proposed amendments, which often had links to comments that were coming in before they were being considered for approval by the bench. I think if you're watching court rules, that's a really valuable resource.

Okay, can you put up the last three, well, question four? And you guys can go back and look at the devices again. This is on e-filing. We have three questions for you to answer. We're curious to know your level of experience and satisfaction, I guess, with the use of the e-filing system at the Court of Appeals. I'm not sure. Is it in use at the Supreme Court?

It is. And at the Supreme Court.

So polling question four, is which of the following best describes your use of the Court's TrueFiling, e-filing system? And this is the more recent version of e-filing at the Court of Appeals. There were five possibilities. And we have 77 percent who say that have used TrueFiling to both initiate cases and file into existing cases. That's great.

This seem to have stopped moving a little bit. Maybe we can go to number two.

For those who have personally e-filed, how easy was it to issue a new case or file into an existing case?

We're in the range of 30 percent on C, D and E. Neutral, somewhat easy or very easy. 9 percent, is what I'm reading is saying, very difficult. 9 percent said, somewhat difficult. So, the vast majority of people are finding it user-friendly.

And then the last question, those who have personally e-filed, the most difficult thing to do was, register as a user, identify the proper case or the file type, add or verify service recipient. Attach connected documents. And it is, C, adding or identifying a service recipient is 60 percent.

And I understand that the answers to these questions are going to be stored somewhere. Because

those might be valuable to go back to later.

I know there were some topics you wanted to address about electronic filing.

MS. MEYER: That matches what I'm seeing. The biggest thing that people are missing out on, I think, is e-serving opposing counsel at the same time that you e-file with the Court. And I know there's information on the TrueFiling website and there's a lot of user guides. I really want to point you, if you don't remember anything else that we say today, if you do go to the One Court of Justice website, there's an e-filing page. And people who have worked with TrueFiling, we put together three very short how-to guides. So if you want to find the how-to guides, there's one for case initiation that tells you where to click to get to the page that lets you add opposing counsel. You're missing out on so much of the power of e-filing if you're not able to accomplish both e-service and e-filing at the same time.

So I really encourage you to use that. And it gives a little overview of how service works and then it gives you step-by-step instructions. And I think you'll find it helpful. And call either Clerk's Office if you have questions and we can help talk you through it. Once you've done it a few times, I think it becomes second nature. It is hard for case initiations. You don't

automatically get to that page, And that's what the how-to guide explains.

MR. ROYSTER: ImageSoft is here. They are the vendor. They have laptop computers that are set up. They can give you a demonstration on how to do that. It is not a surprise to us that that particular question generated the responses that it did. Because we've gotten, you know, the phone calls and we worked with ImageSoft in developing the system and that's what was most clunky. It is not intuitive. You should know we are working, we continue to work with ImageSoft to create enhancements that will make it easier for you. So hopefully we'll see some revisions to the screens so it will be easier in the very near future to know how to do that.

The other thing is that, at some near future point, we hope to have notifications pushed out through TrueFiling. That will save us a lot of resources in terms of personnel time, stuffing envelopes and the expenses of it. At some point, hopefully by the end of the year, and perhaps even by the end of the summer, we might have e-notifications of Court's opinions, orders, correspondence. It will require you to have an updated email, in that we haven't quite figured out the logistics of making all that happen. But we are committed to

seeing that done in the very near future.

MR. ZIMMER: There's a technology break-out session after this that our IS director and our Lansing district clerk, Kim Hauser, will be at. And I think a focus of that will be e-filing and along with Inger and Larry, Kim and Denise were instrumental in working with ImageSoft which was somewhat a long process to get it the way we want it. And I think the positive response that we see here proves that the work that they've done was valuable.

MS MENGEL: I have two questions from the audience. And I know there were a couple of topics that you want to address. But since these were of specific concern.

One, will it be possible to e-serve time-stamped copies on myself, the filer?

MS. MEYER: You can do that now, as long as you're a case contact, when you click on that. It will have the time stamp on the side. I don't remember the exact date when that change took place. But initially you didn't, but now when you get an email from TrueFiling that has the documents being served. And when you click on that, it should have the time stamp on it.

MS. MENGEL: And why isn't there a list of TrueFiling attorneys to serve like there was on the old

system? This may mean, a list of people who have already qualified or joined the program and inputted their names and addresses to use as service addresses.

MR. ROYSTER: Is this the one where they could go to the COA?

We don't have that. I suppose we can pull it from the TrueFiling data. But you can do a search for the attorneys that are registered users of the TrueFiling and there are different ways to search, with P number, last name, firm name or whatnot. You can get the same information rather than going there and looking at a Court website.

MR. ZIMMER: I think that issue came up when we were in development, and anybody who is familiar, you register with your e-mail address. And previously under our Tyler system, we kept a list of the email addresses for all the registered users in Tyler and you could go to that and find the email address to send to. I'm not an expert on this, and again Kim Hauser and Denise Devine could speak more helpfully on this. But it was the difference in that system that we rely on, TrueFiling's list of email addresses that you've put in to be the address of record for service.

MS. MENGEL: We have about two minutes, so I'm going to ask a couple questions that are on my sheet and

ask for really brief answers. I'm going to pretend I'm back in charge for two minutes.

Midnight filing deadline, yes.

MR. ROYSTER: Yes.

MS. MENGEL: So long as you filed by midnight on the day, it's considered to have been filed by midnight. If it's filed by midnight on Saturday, it's a Monday filing.

MR. ROYSTER: Yes, unless Monday was a holiday. The other thing is, we've had several attempts to file things that really didn't meet the court rule requirements of what was required. It is not just a place holder. It has to meet some minimum threshold. If you're at 11:50 and you still have half a brief to write, you can't just send off what you have and expect it to --

MS. MENGEL: You guys are so picky.

Fees, there's a couple of topics here about fees. E-filing system fee and automated payment service fee.

MR. ROYSTER: Those are statutory fees that the legislature passed and the governor has signed. The e-filing system fee is to fund the statewide e-filing system that will be coming in the near future. It's a $25 surcharge. It applies to any civil action being commenced. Probably more so, of course, in the Court of

Appeals because we rarely see civil cases being commenced in the Supreme Court. But if it is one, a new case initiation at either Court, it could have a $25 surcharge. Except for governmental entities. So there's big carve outs on that. The other part is what's referred to as an automated payment service fee. If you use a credit card or any other financial business type of transaction, there can be up to a three percent charge back to you covering the cost of using the credit card.

Currently we don't have that in place, and we are paying for your use of a credit card. The statute gives us authority to charge that back to you, the actual amount or no more than three percent, and, so, that's coming up in the near future. It could be within a few weeks -- one week perhaps, a couple weeks probably at the most.

The EFS fee, the e-filing system fee, that is in place already. That took effect March 1st. That surcharge is being applied.

MS. MENGEL: There's a topic here about external hyperlinks versus internal hyperlinks, if somebody tries to link to a document outside of their brief or motion, does the system support that?

MR. ROYSTER: It currently does. We had asked that external links not be allowed because of the

potential they could bring in viruses and malware. There was a brief period where ImageSoft was preventing that, but we pulled it back. So, if you're going to send the malware, now is the time to do it. Because we will be putting that back.

Part of the problem is, apparently, it was also stripping out links to email addresses, which there's no potential for getting in a virus under that but it was identifying that. And as soon as the programming is worked out so it only removes external HTTP or HTTS links, but I'm not sure if we have a time frame for that right now.

MS. MENGEL: Is there a time frame for mandatory e-filing or future e-mail notification of the Court's correspondence, opinions and orders?

MR. ROYSTER: No definitive dates.

MS. MENGEL: Aiming towards both of those.

MR. ZIMMER: The notification, we're working on that now, I think, or we're planning for that. I think we have a meeting in a couple of weeks. Our desire is to have that in place as soon as possible and hopefully by the end of the year, if not sooner.

MR. ROYSTER: In terms of mandatory, we would like it to be, but to be honest, I think at the Supreme Court, we've got pretty much full buy-in by all the

attorneys. I know there are a few out there if you haven't done it, see them [ImageSoft] outside here. But almost from the first day, we were getting e-filings by attorneys. Our problem is that our mix of cases is 30 percent civil, 70 percent criminal, and the vast majority of the criminal are in pro per. Most of them are incarcerated. They cannot e-file. So, what the word "mandatory" means is going to be different depending on what type of practitioner you are.

If you're a self-represented litigant, well, of course you don't have to use it.

MS. MENGEL: Thank you so much. It's 3:34. And I'm feeling the room get a little restive. Thank you for listening to the information and asking the questions that you did.

You can see that these are people who are willing to chat with you about anything. Please call any of the offices. It's always been true and I'm sure it continues to be as true today that if you have a question, they will point you in the right direction. If you would have your court rules in front of you, I bet that would be appreciated, too, so they could point you to the right rule and you'd have reference for your future use.

But anyway, thank you so much.

(Applause)

(Concluded at 3:45 p.m.)

IV. LAW PRACTICE BREAKOUT SESSIONS

A. Criminal

1. Unlocking *Lockridge*: The Key to Fact-Finding at Sentencing

a) Do we have a hybrid system?

- That is to say, if a defendant's OVs are scored only using facts inherent in the jury's verdict (i.e., without judicial fact-finding), can a defendant argue that a judge may not depart upward without substantial and compelling reasons? Or, may a prosecutor argue that substantial and compelling reasons are required to depart downward?

- Several participants responded "no." Sentences are only required to be reasonable. Although the guidelines are a good starting point, and a party can argue that the judge *should* sentence within the guidelines, and argue that a departure would unreasonable, there is no longer a requirement of substantial and compelling reasons in the wake of *Lockridge*.

- It is pointed out that there is equivocal language in *Lockridge* -- appearing to hold that the guidelines are always advisory, but also suggesting that the guidelines are advisory if judge-found facts are used to increase the sentencing guidelines.

- Even if we assume that, under MCL 8.5, the *Lockridge* Court got it wrong in imposing always-advisory guidelines, is a trial court free to so hold? If the MSC erred on this point, isn't the only fix with the MSC?

- But again – there is language in *Lockridge* that the MSC *did* intend to keep guidelines mandatory when judicial fact-finding is not employed.

- One participant (defense attorney) said that if a judge were prepared to depart upward, she would make the hybrid-system argument. It is noted that, from an ethical standpoint, defense counsel can argue for or against a hybrid system in different cases, as it benefits the client, but a particular prosecutor's office must be consistent across cases.

- How often does it happen where no OVs are scored using judicial fact-finding? Some participants think it is very rare, others think it is not very rare – maybe one quarter to one third of cases.

- There is a case pending in the Court of Appeals raising this hybrid question. No OVs were scored using judge-found facts and the judge departed downward, over

the prosecutor's objection that substantial and compelling reasons are required. The Court has granted leave. *People v Rice*, No. 329502.

- There are also cases pending in the MSC that raise the question, but he Court may not decide it in those cases.

- For now, the better argument may be, if you want the trial court to stay within the guidelines, is that the guidelines range is presumptively reasonable and more likely to stand up on appeal.

- There may be strategic considerations for a party who wishes to have mandatory or advisory guidelines, to contest or concede OV scores to affect it. (If we have a hybrid system.)

b) Can you make an argument that a within-guidelines sentence is unreasonable?

- MCL 769.34(10) says a within-guidelines sentence shall be affirmed, and the Court of Appeals has held that (10) survives *Lockridge*. But is there an argument in light of *Lockridge*?

- If *Milbourn* is resurrected, an attorney could argue "unusual circumstances" that rendered a sentence unreasonable, even if within guidelines.

- One participant (defense attorney) posits that the guidelines system is one of aggravating factors, not mitigating. And since those aggravating factors are now only advisory, they should weigh less heavily, post-*Lockridge*, than, e.g., considerations of rehabilitation, etc. So arguably *Lockridge* should lower sentences, in general. The participant believes this is most effective for defendants in straddle cells or intermediate sanction cells especially.

c) What about remands on pre-*Lockridge* sentences?

- They say to follow Part VI of *Lockridge*, but the orders say to resentence if trial court would have imposed a "different sentence," but Part VI of *Lockridge* says "*materially* different sentence."

- To a prisoner, one day is material.

- Did the MSC surreptitiously amend what the opinion held?

d) What about a case where a defendant files a brief raising a *Lockridge* claim, but asking for a resentencing rather than a *Crosby* remand?

- The thought is they can't get more than a *Crosby* remand.

e) What do we make of *Terrell*, which remanded for *Crosby* proceedings because the judge thought the guidelines were mandatory, even though the defendant was in the same position as Lockridge was?

- Maybe this makes sense if we don't have a hybrid system – all defendants should get the same relief, the same *Crosby* remand.

- But the *Lockridge* Court explicitly rejected that for Lockridge himself and possibly hundreds of similarly situated defendants, so why should Terrell get more relief than they did?

f) Shouldn't all defendants get resentenced?

- Typically, you get resentencing if you show that the trial court was operating under a mistake of law. Since all these judges were operating under a belief that the guidelines are mandatory, shouldn't all defendants get resentenced?

- One participant thinks so, recognizing that *Stokes* says otherwise, but claiming *Stokes* was wrongly decided.

- Arguably, this ties into whether we have a hybrid system. If we have a hybrid system, then it makes sense to not give people a *Crosby* remand if judicial factfinding did not elevate their guidelines range. And, since the MSC explicitly excluded those defendants from getting *Crosby* remands, this supports the idea that we have a hybrid system.

- Although perhaps they did not intend a hybrid system, but only intend their backwards-looking remedy to cover those who suffered a Sixth Amendment violation, while imposing a broader remedy going forward, going beyond constitutional violations.

- But it is contended that a trial court's mistaken belief that the guidelines are mandatory is itself a constitutional violation, being a violation of a defendant's right not to be sentenced on the basis of inaccurate information.

- Is the mandatory nature of the guidelines "information"? Or does "information" refer to facts about the offense and the offender? There is disagreement.

g) What about the appealability of a no-resentencing decision on a *Crosby* remand? Is there a right to appeal?

- Everyone agreed that this falls squarely within MCR 7.203(A)(1).

- But what do you raise on appeal?

  - Any issues related to the reasons the judge gives for reaffirming the sentence. In most cases, the odds of appellate relief are about zero.

- One participant points out that the burden of proof is different depending on whether the *Lockridge/Alleyne* claim is preserved or unpreserved.

- **The problem is that judges are not giving defendants advice of rights.** In most cases, the defendants are not present at a *Crosby* proceeding. In some cases, there is no hearing, only a letter from the judge.

  - One participant relates that he has mailed his client an advice-of-rights form.

  - But this is something that trial courts need to be aware of, because defendants have the right to appeal, and they need to be making sure that they get their advice of rights.

  - Is anyone seeing defendants getting advice of rights? No one present is.

  - It is okay if defense counsel relays the information to the defendant, but some participants believe that many defense attorneys do not know that there is a right to appeal.

- One participant (defense attorney) had a case where the defendant sought court-appointed counsel but was denied. (The lawyer is going forward pro bono). But then in another case, another circuit court *granted* the motion.

- Another participant (prosecutor, from a different county than the previous two) reported that their circuit has no problem appointing counsel.

h) How do you advise clients on whether to opt out of resentencing?

- Depends on what the sentence was – if low within the guidelines, go for resentencing, if high, opt out. Also could depend on the judge. But you can't make the client listen.

i) There is a lot of discussion within the prisons about filing 6.500 motions after *Lockridge*. Is there an argument on whether *Lockridge* is retroactive?

- There is a case pending in the Court of Appeals out of Genesee County where the trial court held it retroactive. *Burley*, No. 331939.

- Given the non-retroactive nature of *Apprendi* and *Booker*, etc., it seems unlikely.

j) What about the *Steanhouse – Masroor* split? No conflict panel was ordered, so *Steanhouse* controls. How do you argue reasonableness now, post-*Steanhouse*?

- One participant (trial judge) said that they will usually find a reason to depart based on something that would have been substantial and compelling before *Lockridge*, reasoning that if it met that harder standard before, it should be reasonable now. For example, a dismissed habitual offender enhancement. But several defense attorneys pointed out that to consider a dismissed habitual at sentencing would violate the plea agreement. The judge argues that the defendant still gets the benefit of the bargain in other ways.

- One defense attorney relates a case in which the defendant pled guilty to one offense with an agreement that the sentencing court consider uncharged other crimes for sentencing purposes. The trial court imposed a substantial upward departure. Counsel is now arguing that the sentence is unreasonable because it is *higher* than the guidelines would have been if the defendant had actually been convicted of the uncharged acts. That's an argument that the sentence is disproportionate/unreasonable.

- Another defense attorney is pointing to the guidelines grids for more serious crimes and arguing that a sentence that exceeds the high end of those grids would be unreasonable.

- One participant (defense attorney) said that something that used to be substantial and compelling would still justify a departure sentence, but it doesn't work the other way. Just because something was *not* a substantial and compelling reason to depart before does not mean that that factor is *not* a reasonable basis for a departure.

- There is also an argument that, although "substantial and compelling" is no longer required, that "objective and verifiable" still is.

k) If resentencing is ordered, can the judge consider conduct that took place after the original sentencing?

- Yes. A judge cannot consider such facts when deciding *whether* to resentence, but after deciding to resentence, the judge *can* consider such facts when resentencing.

- Defendants should take these things into account in advising clients on whether to opt out of resentencing.

- It is also pointed out that, if a defendant did not get a sentence at the top of the guidelines, gets resentenced, does not have a bad institutional record, but receives a higher sentence, that there's a strong argument for vindictiveness.

l) Once the judge orders resentencing, is it too late to opt out?

- Yes. One defense attorney said that the very first thing they do on receiving a *Crosby* remand is to write to the trial court, asking for time (eight weeks) to get the file and consult with the client.

m) What is the first thing to do when getting a *Crosby* remand?

- As above: One defense attorney said that the very first thing they do on receiving a *Crosby* remand is to write to the trial court, asking for time (eight weeks) to get the file and consult with the client.

- Another defense attorney said it can be a mess – they have one client who has been deported – hard to get in touch!

- One participant (judicial employee) said that their judge immediately issues an order and sets a time limit. If a party asks for more time, they grant it, but at least the process is set in motion.

- What do you argue?

  - One prosecutor said that they file a brief with the trial court recounting the reasons supporting the sentence, and pointing out that they don't depend on the mandatory nature of the guidelines.

  - One defense attorney said that they will sometimes take the opportunity to point out other problems at sentencing, e.g., if trial counsel did a bad job at sentencing.

  - One defense attorney also said that they will point out problems at the original sentence – in one case, the original sentence was pre-*Hardy*, and so argued that there should be resentencing to correct that and score under the right standard.

n) Final Thoughts

- One participant (defense attorney) relates that the post-*Lockridge* environment is very different pretrial. Defendants are in a state of unease because the range of possible sentences is much larger (and runs much higher) than it used to. For this reason, *Cobbs* and *Killebrew* agreements have become much more important in resolving cases through pleas.

- Another defense attorney said that this is a case of "winning the battle but losing the war" – the mandatory guidelines system was "clearly unconstitutional," but now defendants are receiving higher sentences, so the remedy is not good for defendants.

Citations to referenced cases:

Alleyne v United States, 133 S Ct 2151 (2013)
Apprendi v New Jersey, 530 US 466 (2000)
People v Cobbs, 443 Mich 276 (1993)
United States v Crosby, 397 F3d 103 (CA2 2005)
People v Hardy, 494 Mich 430 (2013)
People v Killebrew, 416 Mich 189 (1982)
People v Lockridge, 498 Mich 358 (2015)
People v Masroor, 2015 WL 7459016 (Mich Ct App Nov 24, 2015)
People v Steanhouse, 2015 WL 6394195 (Mich Ct App Oct 22, 2015)
People v Stokes, 312 Mich App 181 (2015)
People v Terrell, 312 Mich App 450 (2015)

2. Mitigation and Litigation in Juvenile Lifer Resentencing Hearings

a) Overview of *Miller* and *Montgomery*

In 2012, the US Supreme Court held in *Miller v Alabama* that sentencing a juvenile (person under 17 in Michigan) to mandatory life without the possibility of parole was unconstitutional. *Miller* discussed several "hallmark features of youth" and case specific factors that need to be explored before imposing sentence against a juvenile. These features and factors include: immaturity, impetuosity, home dysfunction, failure to appreciate risks and consequences, the nature of the homicide, the possibility of rehabilitation, and the level of culpability.

The Court noted that sentencing a juvenile to life without parole "will be uncommon" and it will be the "rare juvenile offender whose crime reflects irreparable corruption."

In 2014, the Michigan Supreme Court held in *People v Carp*, that *Miller* was not retroactive. In 2016, the US Supreme Court in *Montgomery v Alabama* held that *Miller* was retroactive. This holding entitled all of Michigan's juveniles to resentencing.

Michigan has the second highest number of individuals serving juvenile life without parole (JLWOP) sentences at approximately 365.

b) Difference between *Miller* cases and *Montgomery* cases

A *Miller* case is where a juvenile was sentenced to mandatory life without parole and their case was still on direct appeal when *Miller* was released. Or, where a juvenile is facing sentencing after a first-degree murder conviction from here on out. These cases will be more recent, the records will be easier to locate, and the facts of the case will be fresh in the minds of the parties and court.

A *Montgomery* case is where a juvenile was sentenced to mandatory life without parole and their direct appeal was completed prior to the holding of *Miller*. These cases will require

quite a bit more effort and resources to piece back together. Overwhelmingly, the majority of the cases we are dealing with fall into this category.

If the ultimate decision is whether this is the rare juvenile offender that is irreparably corrupt, then the *Miller* factors play a different role in *Miller* cases v. *Montgomery* cases. In *Miller* cases, the *Miller* factors will be used as predictive measures. Rehabilitation will be harder to see, but the facts will be easier to ascertain. In *Montgomery* cases, rehabilitation will be easier to see, but the facts will be harder to ascertain.

c) MCL 769.25a and the August Deadline

After *Miller*, Michigan's Legislature enacted MCL 769.25a, which laid out the procedure to be followed if *Miller* were found to be retroactive.

The statute directs that the prosecution has 180 days from the date the *Montgomery* decision is final to file with the court a list of cases in which they are seeking a life without parole sentence. If the prosecutor does not file for life without parole within that time, the defendant must be resentenced to a term of years. The minimum term must be between 25 years and 40 years and the maximum term is set at 60 years. MCL 769.25(9). The statute states that a hearing on the prosecution's motion must be held as provided in MCL 769.25(6). The statute also gives priority in scheduling resentencings to prisoners who have already served over 20 years. MCL 769.25a(5)(a).

d) What are defense attorneys, prosecutors, and courts doing now?

- **Defense Attorneys**

The State Appellate Defender Office (SADO) is representing 114 of its former clients for these proceedings, and is accepting conditional appointments for those individuals who are not currently represented by counsel. SADO is working hard to gather case documents, review files, communicate with clients and families, and prepare mitigation memos to share with prosecutors. SADO will also share transcripts and case files with prosecutors upon request. SADO is seeking additional funding to handle the looming excessive workloads.

The Michigan Appellate Assigned Counsel System (MAACS) is working to recruit qualified attorneys to handle these resentencing hearings, and is working closely with circuit courts to coordinate the appointment of counsel for the unrepresented.

Ann Arbor Attorney Deb Labelle is leading a group of pro bono attorneys who have volunteered to represent individuals in these hearings. At this time, it is unclear how many individuals are being represented by volunteer attorneys.

- **Prosecutors**

Prosecutors are working hard to gather case documents, review files, and to contact families of victims, in order to make initial assessments before the 180 day timeline of MCL 769.25a, which falls in mid-August.

The Wayne County Prosecutor's Office (WCPO) has the highest number of cases at 147. The majority of these files are pre-1995 and it has been very difficult to get their hands on the files.

Genesee County Prosecutor's Office has 26 cases. They are open to any and all input by defense attorneys.

WCPO has invited defense attorneys to submit any and all information to WCPO to help them make their decisions. They (and some other offices) are open to receiving and reviewing mitigation memos from SADO and other defense attorneys. WCPO and SADO are cooperating in the sharing of case documents to assist in the review of files.

Prosecutors are seeking funding to handle the looming excessive workloads.

Some participants guessed that in the counties with the smaller number of JLWOP sentences, prosecutors would likely seek Life sentences in a higher percentage of their cases than in the larger counties. This may be driven by funding, convenience of locating files, and/or by the smaller county's perception of the seriousness of the crime.

Berrien has 11 cases and indicated this generalization was not true for it. Eaton County is considering the nature of the offense and the individuals' conduct in prison as the primary factors for their initial decision-making.

Some estimated that in all, prosecutors will seek Life in 1/3 – 1/2 of the 365 cases. Discussion ensued as to whether that's what the *Miller* Court had in mind when it said that these JLWOP sentences would be "uncommon" and rare and should be saved for only the irreparably corrupt individual. Prosecutors suggested that the 365 juveniles sentenced to Life without parole have already been culled out of a larger group of child murderers, and the 1/3 to 1/2 estimate takes that into account. If there has been a culling, defense attorneys did not agree that it was a sufficient culling as they are seeing cases where aiders and abettors and those less culpable have received Life sentences while their more culpable co-defendants received a term of years, and are in some cases, already out of prison.

- **Courts**

Many circuit courts are issuing conditional orders of appointment to SADO to represent those who are not currently represented by counsel.

Trial courts are concerned that they may not be getting any guidance from the higher courts as to what the burden of proof is at the resentencing hearings, or whether the rules of evidence apply, or what is proper procedure. This is a matter of first impression and they will have to figure it out as they go.

e) What Happens after August?

- **<u>Resentencing Hearings: Procedure and Costs</u>**

Out of the 365 individuals, approximately over 200 of them were convicted over 20 years ago. This makes re-constructing their files very difficult, time consuming, and resource driven.

Given the numerous non-tangible factors that need to be considered in these cases, everyone agrees that for those cases in which the prosecution is seeking a Life sentence, the resulting resentencing hearings will be extensive and expensive, and will entail a number of fact and expert witnesses.

How do we determine these *Miller* factors at the resentencing hearing? What questions might come up?

- Should prison behavior be a relevant consideration at these hearings? The overall consensus was, yes, as it is one way to shed light on an individual's potential for rehabilitation.

- The group agreed that a psychological profile will have to be a part of all of these hearings.

- How do we establish the factual basis of the conviction? Witnesses will have to be called. If not available, may need to use transcripts of trial testimony. There will be arguments over whether the rules of evidence apply at a sentencing hearing and defense attorneys will argue *Crawford*/hearsay violations. We cannot say whether hearsay is allowed at these resentencing hearings because this is a new issue that we haven't yet dealt with in Michigan. From a prosecutor's perspective, sometimes prosecutors will want to use transcripts, but other times, they will want live witnesses on the stand.

- Are juries better for defendants or judges? Overall consensus was: it depends, and probably not.

- What exactly would the jury be deciding? The Miller factors or the ultimate sentence? Defense attorneys suggested that the jury determines the factors and the judge makes the final sentencing decision. Prosecutors call this having two bites at the apple. Ultimately, this will be clarified by People v Skinner (see below).

- Prosecutors will be calling their own experts in an attempt to counter the defense experts.

- Prosecutors are concerned that there may be too much focus on rehabilitation, making this more like a parole hearing rather than a resentencing hearing. Defense attorneys assert that rehabilitation is a key factor if the court is to determine whether someone is irreparably corrupt, which is the point of the resentencing.

To illustrate the extensiveness and the level of litigation needed at these resentencing hearings, the group pointed to two JLWOP resentencing hearings that have already taken place in Michigan. In one case out of Macomb County, three expert witnesses and two additional witnesses testified at the two-day hearing. In one case out of Berrien County, two expert witnesses and five additional witnesses testified at the two-day hearing. Montgomery cases will be much harder to piece together.

- **Legal Issues Currently Pending**

People v Skinner: Issue is whether there need to be jury findings beyond a reasonable doubt in order for a Life sentence to be imposed. Case is currently pending before COA conflict panel and then case will likely go to the Michigan Supreme Court. Most resentencing proceedings (except for those that can be negotiated) are on hold pending the resolution of this case.

Hill v Snyder: Currently pending in the Sixth Circuit Court of Appeals. Defendant is asking for a separate federal remedy to parole, and arguing that juveniles deserve a meaningful opportunity of parole and that MCL 769.25a is not a sufficient fix because it ignores the *Miller* factors. Lead attorney is Deborah LaBelle out of Ann Arbor.

- **Legal Issues Likely to Arise in the Very Near Future**

What are the key issues on appeal if a Life without parole sentence is re-imposed? Categorical ban; meaningful opportunity for parole; standard of review.

What will the standard of review be for appellate courts reviewing these sentences? Abuse of Discretion? Sufficiency of Evidence? Beyond a reasonable doubt of irreparable corruption?

What if a person is serving a JLWOP sentence and a secondary 60-90 years for the assault? And/or a parolable Life sentence for 2nd degree murder? What are the legal challenges here? Sentenced on the basis of newly inaccurate information? *Wershe* case pending in Western District – no meaningful opportunity for parole for parolable Life sentence committed while a juvenile.

Good Time Credits – statute does not allow for good time credits because of the 60 year max; didn't want anyone to max out and desire was to get the person released through the parole board. But, defense attorneys argue that individuals are entitled to good time credits pre-1994 truth-and-sentencing and they should get those back.

Waivability of jury trial – If *Skinner* provides that a defendant has a right to a jury trial at sentencing, and a defendant wants to waive the jury, does prosecutor have to agree to the waiver? Or can the prosecutor object?

Meaningful opportunity for release: Will individuals whose Life sentences were converted to a term of years sentence actually be given a meaningful opportunity for release by

the parole board? Or will the parole board treat them as parolable lifers, whom many feel do not get a meaningful opportunity for parole.

Is the punishment established in MCL 769.25a of 25 to 40 on the minimum and 60 years on the maximum too heavy of a sentence? Any legal challenges here?

f) What are we doing to help those who are released?

Those who are released by the parole board will get the standard reentry assistance provided to all prisoners upon parole. There was a suggestion from a prosecutor that that this is an area where individuals should be receiving more reentry services than usual.

3. The Challenge of Ineffective Assistance of Counsel Claims on Appeal

a) Action Items

There was a general consensus in support of certain proposed court rule changes. Members of the criminal appellate defense bar expressed a difficulty in even acquiring the case file necessary to craft a timely motion for a *Ginther* hearing in the trial court. Both prosecutors and defense attorneys expressed a preference for having *Ginther* hearings (when necessitated) in the trial court post-trial, rather than waiting for a subsequent motion to remand from the Court of Appeals or in a future federal habeas corpus action. On the basis of this general agreement, the following proposals were suggested and generally agreed upon:

- A longer time period to file a motion for a *Ginther* hearing in the trial court. The current 56-day period is often insufficient to permit the attorney to track down the necessary discovery from trial counsel or to secure affidavits or expert testimony. A suggestion was made that a motion for a new trial should be deemed timely if made within the time extensions granted by the Court of Appeals.

- Include language in the claim of appeal order that requires trial defense counsel must provide the trial file to appellate counsel within a week or two.

- Provide that, in the event of the Court of Appeals remanding for a *Ginther* hearing, the time allotted to file the brief on appeal is tolled during the pendency of the hearing. Currently, the time runs and the defense loses the right to oral argument unless it files a brief, even if the only issues being raised pertain to the ineffective assistance of counsel claims being raised on remand. Similarly, if a motion to remand is granted, the prosecutor must still file a timely brief on the non-remanded issues in order to preserve oral argument and then another brief on the remanded issues. Frequently, prosecutors wait to file a single brief but have then lost the right to oral argument.

b) Preference for motion in trial court versus motion to remand

- For the defense bar, having to ask for leave is an unnecessary barrier.

- The prosecutors also agreed that they would rather have a hearing in state court rather than federal court.

- Prosecutors are often willing to agree to a *Ginther* hearing, but only if there is a colorable issue – fishing expeditions are not favored and will be fought.

c) Discussion about ineffective assistance and guilty pleas

- The defense bar reports clients being pressured by trial counsel to take the plea without the trial counsel doing any investigation. Without an investigation, it is difficult to advise the client about his or her chances of success at trial.

- The defense bar also noted that they are discouraged from challenging pleas because the defendant does not want to take the risk of going to trial and open himself or herself to more serious charges dismissed or reduced during plea negotiations.

- The prosecutor (or defense attorney) should put the final plea deal on the record at trial with the defendant present.

d) Advice by both prosecutors and defense attorneys

- Defense attorneys advised: Make a record, make a record, make a record—Always file a motion for a *Ginther* hearing in order to make a record. And attach an affidavit to the motion as well as transcripts necessary for reviewing the challenges. And secure attendance of witnesses at the hearing. Without a record, you will get nowhere in state court or federal court.

- Prosecutors advised other prosecutors to protect the record against future ineffective assistance claims:

  - Always put the final plea offer on the record.

  - Where a defendant files a notice of alibi witnesses but makes no mention of alibi at trial, the prosecutor should put the existence of the alibi witness notice on the record. The same is true for uncalled witnesses on the defense witness list.

  - A defendant's decision to waive his right to testify should be placed on the record to avoid a later Ginther hearing on that topic.

  - Where a prosecutor makes a discovery demand for a witness list which is produced by the defense in an untimely manner, the prosecutor should not move to prevent the witnesses from testifying (a permitted course of action under the court rule) in anticipation of a claim of ineffective assistance on appeal, except in extraordinary circumstances (i.e., real prejudice from untimely disclosure). Instead, the prosecutor should ask for an opportunity to

have law enforcement speak to the witness(es) and request a continuance if needed.

- Prosecutors should be mindful of redacting irrelevant or unduly prejudicial audio/video played to the jury in light of *People v Musser,* 494 Mich 337 (2013).

e) Trends seen in ineffective assistance claims

- Seems that recently, a more common basis for ineffective assistance claims relates to forensic evidence, including cell phone tower evidence.

- The reason for this increase appears to be resource-related. Defense attorneys do not have the funds required to develop such issues. The State Appellate Defender Office (SADO) has been attempting to make this funding a state concern rather than a county-by-county one.

- There was anecdotal story about a less populous county using the vast majority of its budget on a single case in order to fund necessary expert testimony.

f) Appellate defense attorney concerns

- It is often difficult to comply with the 56-day period to file a motion in the trial court. A major problem is getting the file together in order to acquire sufficient information to bring the motion.

- SADO attorneys said they often have staff solely dedicated to attempting to get discovery, and sometimes even have to file Freedom Of Information Act (FOIA) requests to track down information.

- Trying to talk to trial counsel can be difficult. Trial counsel have hung up on them and avoided phone calls.

- They would like to see greater effort in the defense community to make clear that ineffective assistance claims are not intended to be witch hunts or accusatory – often the appellate attorney is simply doing his or her due diligence.

- Where there appears to be a colorable claim of ineffective assistance based on failure to hire an expert, the available money to hire or even speak to an expert to agree to sign an affidavit is often lacking.

  - The question was asked, "Does the level of payment for non-retained trial work contribute to poor investigations?" The response from the defense bar was unanimously, "Yes."

  - Defense bar concern about the low level of pay for public defenders contributing to lack of reasonable investigations.

g) Prosecutor concerns

- Prosecutors worry about being the ones to provide post-conviction discovery because they may unintentionally leave out discovery and create a new issue that the prosecutor withheld evidence.

- Prosecutors often see *Ginther* hearing/new trial motions lacking any supportive documentary proof. Prosecutors would accede to holding hearings where there are affidavits or other documentary support. Otherwise, the basis for an ineffective-assistance-of-counsel hearing gets very speculative. And because the *Ginther* hearing are often longer than the trial, they create a real burden on prosecutors and the trial court.

- Prosecutors expressed concern that the proposals from the Michigan Indigent Defense Commission will merely create a checklist approach for defense counsel rather than encouraging the exercise of independent professional judgment.

h) Advice by Court of Appeals judges

- In a motion to remand for a *Ginther* hearing, err on the side of attaching documentary evidence—transcripts, affidavits, etc—because it is unlikely that the motion panel judges will have the lower court record. Do not make the Court of Appeals judges dig for the transcripts and other documentary evidence.

- Where the Court of Appeals remands for a *Ginther* hearing, keep the Court informed of the progress of the hearing if it does not proceed within the allotted time period.

- Although permitted, waiving an opening statement, even a cursory one, may be a red-flag of deficient performance.

4. The Importance of Staying in Motion: Effective Motion Practice in the Court of Appeals

a) Motion for Leave to File an Amended Application

Necessary when counsel cannot comply with the 21-day deadline for filing an application for leave to appeal after a trial court's denial of a post-trial motion. MCR 7.205(G)(4).

The criminal defense bar universally expressed frustration that an application for leave to appeal must be filed within 21 days after the denial of a trial court motion, even though the transcripts typically will not yet be prepared by this deadline. This requires filing three pleadings instead of one: (1) a timely application on the basis of counsel's recollection from the hearing, (2) a motion for leave to file an amended application after the transcripts are prepared, and (3) an amended application.

Judges, prosecutors, and court staff were universally sympathetic to this idiosyncrasy, and seemed to prefer the filing of a single document after all transcripts are prepared. This would save considerable resources for the parties and the courts, including the trial courts, which currently must (should) reimburse appointed counsel for filing three pleadings instead of one.

Court staff suggested that a court rule change may be appropriate, so that filing deadline is 21 days from filing of transcripts from trial court proceeding. Prosecutors had no objection to this idea.

One participant indicated that there was a hard fight over this exact issue when the court rule was adopted, but nobody in the room had any recollection or knowledge about the basis for opposition.

Consensus: It would be worthwhile to explore a change to MCR 7.205(G)(4), such that the deadline for filing a delayed application for leave to appeal after the denial of a trial court motion runs from the filing of transcripts, rather than from the date of the trail court's decision.

b) Motion to Remand

> *Often necessary in trial appeals when counsel cannot complete the necessary investigation within the 56-day deadline for filing a trial court motion after the filing of transcripts. MCR 7.208(B)(1).*

There was a lengthy discussion about what factors make a remand motion more likely to succeed. One judge expressed his view that a witness's affidavit accompanying the remand motion is the "gold standard," because it bears some indicia of reliability and allows the court to assess the precise facts that would be at issue at the hearing. But in the absence of an affidavit, a remand motion is less likely to succeed. This judge is not typically persuaded by an "offer of proof" by defense counsel, however the offer of proof is presented.

There was some resistance to this judge's point of view. Defense counsel indicated that it is often difficult or impossible to obtain affidavits from witnesses prior to a hearing. Until a court schedules a hearing, defense counsel has no real subpoena power over the potential witnesses, and cannot compel testimony. Practically speaking some witnesses, such as trial defense counsel, will tell appellate counsel that they will testify if called at a hearing, but will not sign an affidavit gratuitously.

This discussion seemed to educate the judges and court staff in attendance, but there was no consensus toward more flexibility. The prosecutors in attendance were skeptical about the merit of remand motions, particularly those not accompanied by affidavits or other hard evidence.

Some defense attorneys and court staff expressed the view that an "offer of proof" might carry more weight (or be more psychologically acceptable) if counsel presents it on a separately-captioned document, rather than in the body of the remand motion. Others in attendance were skeptical that the form of the offer of proof would make any difference.

There was some discussion about the appropriate standard for resolving motions to remand. Attendees who practice in federal court (including defense counsel and attorney general staff) indicated that the state courts' ability to insulate their rulings from federal habeas review should assume the truth of a defendant's plausible factual allegations. If those facts would justify relief as a matter of law, then the trial courts should remand for a hearing so that the state courts can resolve any factual questions in the first instance, when memories remain fresh and witnesses remain easier to locate.

There was a discussion about renewed motions to remand. Attendees asked whether a merits panel would feel constrained to follow the earlier remand decision of a motion panel. The judges and court staff indicated that the motions panel would never follow the case, so there would never be any concern by judges on either side of the equation. Counsel should not hesitate to re-request a remand from the merits panel even if an earlier motion panel denied the request. There was also discussion about the specific language used in orders denying remand, and court staff indicated that the court generally denies remand motions on the ground that the need for a remand is not apparent "at this time," thus signaling to the parties and the merits panel that the motion panel would not rule out revisiting the remand question at a later time.

Prosecutors were asked, "Why not agree to a remand?" The consensus was that sometimes prosecutors do agree to a remand. When it is a strong issue, the preference is to have it decided by the trial court. But there are sensitive considerations for victims. It is very traumatic to have a hearing and it is important to fight remands and requests for post-conviction evidentiary hearings in some cases.

c) Motion for Reconsideration

There was a short discussion about motions for reconsideration. The judges and court staff indicated that a motion for reconsideration will generally be denied unless there is something really new about the case. Court staff suggested that a motion for clarification may sometimes be a better tool in the right circumstances.

Court staff also explained that a motion for reconsideration is circulated to the panel "cold" – i.e., only with the documents accompanying the motion, but without any work-up from the Commissioners' Office. Judges must request additional documents if necessary.

d) Motion for Peremptory Relief

Generally speaking, judges are hesitant to rule on anything without hearing from opposing counsel. But in some districts, if a case presents a pure issue of law and the law is clear, the court may be willing to peremptorily reverse.

Perfectly acceptable and appropriate to put request for peremptory reversal in a single substantive pleading, like an application, but alert to relief sought up front/early [don't bury it].

The judges and court staff revealed that motions for peremptory relief are viewed very differently in different districts. Whereas the appellate judges of one district might never

peremptorily reverse, the judges of another district might be more willing to do so in appropriate cases.

Judges stated that the outside legal community would be very surprised at the differences in practice and culture between the Court of Appeals districts.

e) Attachment of the Record

Judges and court staff were adamant that it is essential for counsel to attach the relevant record to motions. Transcripts and anything else that may be helpful should be included. Motion panel judges may not otherwise have access to the record, or it may be difficult to get the record. The court strongly encourages the inclusion of record documents with motions.

There were some questions about whether counsel should file the transcripts "unofficially" with an application for leave to appeal, and then rely on those same transcripts throughout the duration of the appeal, even after leave is granted. There was no clear answer to this question.

f) *Anders* Briefs

There was a short discussion about *Anders* briefs. Court staff strongly recommended that Anders briefs should include a statement of facts, which is far too uncommon.

Judges and court staff are disappointed with the poor quality of *Anders* briefs, which often merely declare that there are no arguable issues in the case. Instead, counsel should provide a thorough statement of facts and a short discussion of all possible legal issues.

g) Motions for Bond Pending Appeal

Situation posed when a trial court says that there is something troubling, or that the issue is very good/interesting/important, etc, pursuant to *People vs Smith*, but rules against defendant and defendant is convicted. What happens if you file a motion for bond pending appeal, cite the court's expressed hesitation over the ruling and reference to *People vs Smith*? But then the court says that it has had time to reflect, and has re-read *People vs Smith,* as well as *People vs Jones*, *People vs Brown* and others, and denies bond citing numerous reasons why client loses on the merits of the issue. The concern is that the Court of Appeals will see that expression on the merits on the substantive issue, even if expressed only in the bond context.

h) Motion for Appellate Discovery

This may come up in investigating a claim of ineffective assistance of counsel, or in trying to review something that was never turned over to the defense. Situations discussed included a victim's phone records, or measuring courtroom dynamics in a shackling case.

Consensus:

- ✓ As a practical matter, this isn't significantly different than seeking to expand the record or hold an evidentiary hearing.

- ✓ At some point, finality is an issue, and resources on offices are an important consideration for prosecutors.

i) Motion to Expand the Record

When is it appropriate to make the video/DVD from trial part of the record, or other items, such as PowerPoints or demonstrative exhibits used during the case or arguments? These are not "exhibits", subject to preservation and retention motions.

Sometimes actual exhibits are not adequate for purposes of record review and will need to be inspected as well. For example: 911 tapes that are played but not transcribed. The process for retention and forwarding of actual exhibits to the court and/or successor counsel was discussed, including how best to accomplish this review. Sometimes these actual items must be reviewed, if the subject of an appeal. Sometimes a picture of an item (i.e., a knife, biohazards, etc.) will suffice.

In some cases, record retention can be accomplished early. You can save and print a PowerPoint, and have it admitted as an exhibit. Prosecutors around the state are participating in a training called "The Visual Trial" and are being trained to preserve any PowerPoint used and store it in some form for the file. This practice is highly encouraged as part of the official guidelines for prosecutor training.

Consensus:

- ✓ If it isn't part of the record, and it is an issue on appeal, the court will want to see it.

- ✓ The Court's motion practice is very broad. If it is relevant to the appeal, a motion seeking to expand the record will likely be granted.

- ✓ In some cases, it may even be possible to resolve without a formal motion, which can be costly in terms of both fees and resources.

j) Motion for Judicial Notice

This is part of recent motion practice in the 6th Circuit. Is there a possibility for this type of motion in Michigan? [The situation involved taking judicial notice of the fact that the internet has abundant information detailing how to create a pipe bomb.]

Related issue discussed in passing: What if the panel that takes judicial notice of the point is different from the panel deciding the case?

B. Civil

1. Technology and Appellate Advocacy

a) E-filing update

- The Court of Appeals and Supreme Court now offer an "enhanced" version of TrueFiling which is easier to use; offers both filing in existing cases and new case initiation; and allows for electronic service
- The TrueFiling system is "not intuitive" but instructions are readily available on both the Court of Appeals' and Supreme Court's websites
- File size has been increased to 25 megabytes
- The court's system does not remove formatting from documents
- Document with external hyperlinks will be not be accepted for filing after some modifications currently underway are completed
- Parties should avoid adding an attorney or other contacts from their own firm as "opposing counsel"
- If the lower court record is electronic, it is provided to the Court of Appeals in electronic format
- The court is moving toward mandatory e-filing

b) E-filing tips

- Convert Word or WordPerfect documents into .pdf format using the word-processing program's built-in converter
- Avoid printing documents and scanning them as image files, but a document in image format can be converted to OCR format by Adobe Acrobat
- Use the OCR function if it is necessary to scan a document
- Scan photos in black and white
- Scan at 200-300 dots per inch and use the "optimize" function to minimize file size
- Scan documents right-side-up
- Do not file in both hard copy and electronic format

- Bookmark exhibits but also include an index to exhibits
- An index to exhibits should appear in the body of the brief and at the beginning of the appendix/exhibits
- Attach exhibits/appendix to the brief if possible
- Give documents to be e-filed short, descriptive names
- Avoid special characters in names of documents to be e-filed; letters, numbers and hyphens are acceptable
- Keep credit card information up-to-date
- Choose the right document type from the filing menu to avoid being charged for a motion (e.g., motion to reinstate), application (e.g., application for leave to appeal from a guilty plea) or other filing (e.g., response to a defect letter) that does not require a fee
- If counsel is appointed or a fee waiver is requested, be sure to click the correct button on the "fee" window
- If two or more cases are consolidated, file only in one case, preferably the one with the lowest docket number, but be sure to serve all counsel

c) Electronic service

- There is an "other counsel" look-up feature, but it only includes attorneys or firms that have registered with TrueFiling
- When using the "look-up" function, it is best to enter only the numeric portion of an attorney's P number rather than the name of the attorney or the firm
- If opposing counsel have not registered, encourage them to do so
- If an attorney is not registered, service must be made by mail or by hand
- Service on the trial attorney is sufficient for a claim of appeal

d) What can be improved

- Find a way to keep e-mail from "TrueFiling" from being mistaken for spam
- Find a way to insure that appellate pleadings that are served on a trial attorney are also routed to appellate counsel in the same firm

- Shift from a brief size page limit to a word-count limit, to allow more flexibility in formatting briefs for screen reading

e) Judges' perspectives

- Every Court of Appeals judge has an IPad or IPad Pro loaded with Good Reader
- Per a recent survey, 16 judges use table computers regularly, 11 do not
- They can download briefs and transcripts from the court's computer system
- They can highlight, cut and paste and e-mail excerpts from documents
- They can use their smartphones in an emergency
- Most staff attorneys and some judges still like to use paper at least part of the time
- Although all judges have access to the trial court record, parties should attach important documents, or excerpts from them, to their briefs to insure that the judges see them
- In an application for leave to appeal, parties should attach what they consider important because the lower court record is not available
- A new rule on appendices is being developed
- Motions are more not universally processed in electronic format but are more likely to be than briefs
- More complex motions are likely to be printed
- All administrative motions are handled electronically

2. Civil Appeals: The Basics and Beyond

a) Record production and record on appeal

- The appellant is required to order all the transcripts, even if a particular hearing is not at issue, unless the parties stipulate otherwise.
- Sometimes the panel requests transcripts that were not ordered.
- Circuit court production issues are not uncommon and the court staff is ready to assist and accommodate.
- If a party is having difficulty getting a transcript, or if a certificate of ordering transcript has not been filed, court staff advised calling the clerk's office, which should help get the court reporter on track and get the briefing schedule adjusted.

- Non-record evidence in briefs will still be noted in review by clerks for the court even if a motion to strike is not granted.

b) Unpublished opinions

- Practitioners' use of unpublished cases is intended to be limited to instances with factual parallels, etc.
- Some opinions raising issues of first impression are not published.
- Generally, it is appropriate to point out that the other party relies on unpublished, non-precedential opinions.
- It may be bad form to focus too much on opposing counsel's citation of unpublished opinions without adequate explanation.
- Unpublished opinions seem to be more frequently used in certain areas of law, e.g., condominium law where there are no published opinions on the issue of attorney fees.
- Judges and court staff seemed to agree that the revised MCR 7.215 does not appear to preclude use of unpublished federal authority, just unpublished authority from Michigan
- Use of unpublished opinion at the trial court level is more frequent than at the appellate level, due to dearth of factually-similar published opinions.

c) Exhibits and attachments

- Judges generally prefer that only relevant pages of a transcript be attached.
- Sometimes more context is necessary; some judges are frustrated when only a page or two is attached.
- Highlighting can be helpful.
- Practitioners should use their judgment based on the situation presented.
- Include the order appealed from first in an exhibit packet.
- Include more of the lower court record as attachments to an application for leave to appeal, but avoid duplication.
- Be selective in attachments to briefs in calendar cases, because the Court of Appeals will have the full trial court record.
- Judges and practitioners are divided on the usefulness of attaching lower court briefs as exhibits on appeal.
- It is more common and helpful to attach the lower court briefs to an application than to a merits brief.
- Pasting PDF images into briefs is "implicitly disfavored," because they count against the page limits.

- Hyperlinking to exhibits in briefs can be helpful.
- Bookmarking exhibits is very helpful.
- Judges are divided on whether an index to exhibits, in a separate .pdf file, is helpful.

d) Stays and bonds

- Under the recent revisions of MCR 7.209, the trial court can hold a hearing on a motion for stay by telephone, but this raises problems about filing the transcript when the party seeks a stay in the Court of Appeals.
- The parties can indicate that no transcript was made or seek a motion to waive the requirement of a transcript of the hearing on the motion.
- Applications for leave are typically ruled on in four months, so if the trial date is closer than that, a motion for immediate consideration may be warranted.
- If a motion for immediate consideration is filed after the filing of an application for leave, it is recommended that counsel give the court at least three weeks to process the request and the application.

e) Oral argument

- Oral argument is generally not waived but on occasion may not be necessary.
- Many practitioners would like the Court to advise if argument is not really necessary.
- Summary panels in the past did away with argument but when that was ended, arguments were generally ordered if requested.
- Ideas included adjusting time afforded for argument based upon complexity of issues and notifying counsel if argument isn't really needed, but thus far, the Court is not inclined to make such limitations.
- Credibility matters in oral argument
- Concede weak positions when necessary in order to focus on stronger ones.
- Counsel should focus on important points and answer questions directly.

f) Cross-appeals

- A cross-appeal is necessary when the appellant wants different or greater relief.
- A cross-appeal is not needed simply to raise alternative arguments to the issue on appeal.
- Some panels will review issue on alternate grounds; some will remand for development and ruling before the trial court.

g) Issue preservation

- Including a separate section addressing preservation issues can be helpful where preservation issues are significant, and can help maintain the flow of statement of facts.

h) Applications for leave

- Some rulings are "on the merits" but more commonly are for "failure to persuade the court of need for immediate appellate review."
- Orders issued denying leave on the merits should be raised to the court staff for review as it may be an error.
- Generally the court does not intend to deny an application in a manner which would preclude later appellate review on the merits.

i) Briefing after remand

- If the Supreme Court remands as on leave granted, the parties may file motions for leave to file supplemental briefs.

j) Frivolous appeals

- Sanction for "bad" behavior and frivolous appeals are rare.
- Some participants thought perhaps sanctions should be more common.

3. Interlocutory and Emergency Appeals

a) Court of Appeals

- Applications should be short and sweet – i.e., explain clearly and concisely why relief is needed before trial.
- An interlocutory appeal should be narrowly focused, typically raising one issue, maybe two.
- If you're bring an emergency appeal, make the need for immediate action apparent on the cover page. And keep in mind that "emergency" appeals filed on the 21st day may be viewed with suspicion. File it ASAP.
- <u>Attachments</u>
  - Only provide the Court what it needs to see in order to grant the relief requested.

- If there is a necessary transcript, make sure to expedite it. This is especially critical if the order being appealed references the transcript. On the other hand, if the transcript is not necessary, be sure to let the Court know that as well.

- Commissioners often review applications on their computer, so consider bookmarking your application and exhibits.

- Consider specifically requesting peremptory relief in the application – commissioners and the Court look for ways to deal with an issue as expeditiously as possible.

  - There is no need to file a separate motion.

  - In fact, doing so can even delay the application because the appellee will have an opportunity to answer it.

- Administrative process for interlocutory appeals

  - The application is assigned to a commissioner.

  - Once the commissioner reviews the application and makes a recommendation, it is assigned to a regular motion panel.

- What the Court of Appeals looks for:

  - What is the harm if the Court of Appeals does not address the issue now?

  - How clear is the error that's being claimed?

  - Although the merits are important, some meritorious issues should be fleshed out and appealed after final judgment.

b) Supreme Court

- Harder to obtain interlocutory relief from the Supreme Court. Applicants need to show one of the grounds under MCR 7.305, plus show urgency (e.g., key evidentiary ruling impacting an impending trial). Keep in mind that what the parties think is "urgent" may not be viewed that way by the Court.

- As in the Court of Appeals, it is important to provide the Court with everything it needs to see. And consider asking for peremptory relief.

- Bypass appeals

  - Bypass appeals are very rare, and are reserved for really significant issues when there is no time for the Court of Appeals to decide the matter first (e.g., an election).

- Requires a true urgency and showing why the Supreme Court should decide the issue before the Court of Appeals does.

- A good example is a case in which the issue is controlled by Supreme Court precedent that the Court of Appeals is required to follow. An argument could be made that there is no point to requiring initial review by the Court of Appeals.

c) Motions for Immediate Consideration

- In the Court of Appeals, a motion for immediate consideration should be filed if action is required in less than 21 days (although it is also okay to file one if the date by which action is required falls outside the 21-day period).

  - Good idea to call the Court and give the commissioners a heads-up that an emergency application is being filed.

  - Service through TrueFiling counts as personal service for purposes of having a motion for immediate consideration submitted right away. But if the appellee's attorney is not registered, hand delivery is required (or a stipulation to service by email).

- In the Supreme Court, a motion for immediate consideration should be filed if action is required in less than three months or so.

d) Stays

- In order to seek a stay in the Court of Appeals, the trial court must first have denied a stay (unless you file a motion in the Court of Appeals to waive that requirement).

- Typically the Court of Appeals consolidates the motion for stay with the application and decides them at the same time. If the application is granted, a stay will usually be granted as well.

- The key is to show that harm would result if there is no stay. Sometimes there can be an issue raised in an interlocutory appeal that does not affect the rest of the case.

- The Court of Appeals ordinarily does not defer to a trial court's decision on a motion for stay, and will make its own independent determination.

- Although the court rules provide for ex parte stays, they are routinely denied. There is hardly ever a reason for one.

e) Considerations for Appellees

- File a timely answer.
- In addition to addressing the merits of the application, explain why there is no urgency.
- Fill in any details the appellant may have left out.
- If you're served with an emergency interlocutory appeal, call the Court of Appeals get the lay of the land – when is an answer required, etc.
- There is no need to answer a motion for immediate consideration – they are always granted.

4. Writing to Win – From Basics to Brilliance

a) General advice

- Shorter is better. Chief Justice Roberts once said that he never set a brief down after completing it saying, "I wish there was more."
- Well-edited, very short briefs are usually the strongest.
- Shortening helps make a better brief; it takes longer to shorten but is worth it.
- Court personnel appreciate the extra time spent on editing, shortening and tightening briefs.
- 1.5 pages of introduction is too long, although that might depend on the number of issues.
- Begin questioning the need for everything included when a brief reaches 30 to 35 pages.
- See if each argument is justified. Don't editorialize in facts. The Michigan Supreme Court tries to strip away varnish of lawyers on grain to get to grain and be faithful to it.
- Anything that a writer puts in the brief that only makes it harder for the reader should be eliminated.
- "Every word you use reduces your soul."

b) Remember the audience

- Judges are generalists
- Once a lawyer becomes an appellate judge, it does not take long, regardless of his or her previous specialty, for the judge to become much more of a true generalist.

- Don't assume that the generalist judge or the young clerk knows anything about the legal issue you are writing about.
- Write for a "young, smart" first-year lawyer with no real world experience.
- If a statutory provision is at issue, make it clear immediately

c) Tell a story

- Be interesting.
- Create a conversation-like read.
- Do not omit essential background and context.
- A brief should be a coherent, compelling story; try to "walk" the reader through it
- Do not leave it to the court to "connect the dots."
- Set forth clearly what you want, why and how to get there.
- Try to imbed themes, but do not be too cute about it.
- Transitions are key; tie paragraphs together to the theme
- Try to have an interest-gripping single line that tells the reader what the case is about. Example: "Sometimes taxpayers overpay their taxes."

d) Advocate effectively

- It is critical that a brief work as a functional tool.
- Advocacy is pulling the reader through the brief.
- Briefs are like reference tools or roadmaps.
- Jury-type arguments should not be made on appeal; it is very offensive to appellate judges when counsel treat the reviewing court like a tribunal
- Have a good catch line, good font for ease of reading, a brief introduction, concise arguments, and argument headings that, although they should be complete sentences, should also be short (not multiple lines), easy to read, in a bold font and logical.
- Intermittent reinforcement is the strongest
- A neutral reviewer can find or identify gaps in a brief.
- Consider a moot court argument before writing the reply brief, to help crystallize the issues.
- The federal "Statement of the Case," combining facts and procedure, is a possible model.
- "Think about your closing argument immediately and know what gaps need to be filled/proven throughout the case."

e) Common errors

- Lack of application of facts to law.
- Lack of a theme, like having random notes with no melody.
- Omitting analysis of issue preservation required by court rules.
- Not including references to the record, especially in statement of facts; motions to strike briefs without sufficient record cites are sometimes granted.
- Record cites that are too broad, e.g., 150 pages; they might not get read.

f) Introductions

- Keep to 1-2 pages
- Include identification of the general subject (e.g., contract, personal injury, real property).
- Describe the procedural posture.
- Include arguments for why you win, and what the reader should be looking for when reading the brief.

g) Statement of Questions Presented

- Research attorneys prefer short and concise questions, rather than deep questions. They suspect that a "deep question" is only presenting one party's side.
- Briefs are not rejected based on the "Questions Presented."
- No one wins or loses based on the "Statement of Questions Presented."
- An issue not in the "questions presented" can be considered waived; judges can apply this rule if they want to.
- Issue *refinement* is key for appeals, e.g., what the basis for the trial court's grant of summary disposition was.
- The trial lawyer might have an interest in protecting or defending what he/she did below, which can be awkward for the appellate lawyer.
- Precatory language/background before stating the questions presented can help to set the tone in some cases or give the necessary backdrop for the questions, but it should not be long.

h) Statement of Facts

- The statement of facts needs record citations.
- Facts should be stated objectively, without bias; don't argue in the facts section.
- Overly-colorful language or criticisms of the courts are not well-received.

- Avoid rambling recitations of facts that include unnecessary facts.
- Tell facts as a story, chronologically, not witness by witness.
- Addressing the significance of the facts differently in the argument section, rather than copying them from the facts section.
- Strike adjectives.
- If a fact is dispositive, quote it
- Embed pictures or key evidence, but make sure the pictures are good quality.
- Include procedural history.
- Include context-specific, non-argumentative sub-headings.

i) Footnotes

- Limit footnotes and keep them on the same page.
- Some judges like the authority cited in the text, others like to just read the story without interruption and find cites in the footnotes helpful.
- Many readers cannot help looking down at the footnotes, which is distracting and makes the story choppy.
- In briefs read on-screen, footnoting cites means having to constantly scroll down and back up to read the footnotes.
- Reading comprehension in hard copy is better than on screen.

j) Conclusion

- In court of appeals merit briefs, one sentence requesting the court to affirm/reverse/remand is usually enough.
- In an application for leave to appeal, emphasize why the appeal is jurisprudentially significant.
- In civil cases, it is imperative that the appellant tells the court in first page or two why this case is so special that leave should be granted; each motion panel gets approximately 12-18 applications for leave to appeal a week.
- In an application for leave to appeal, the appellant should address the "substantial harm" from waiting in the first pages; litigation expense is likely not substantial harm.

k) Miscellaneous points

- Sometimes, practitioners face client control problems when it comes to trying to write a very good brief, such as the billing and the cost of the editing and refining necessary for a good brief.

- Appellate lawyers brought in for the appeal post-trial sometimes find a client or trial counsel or both who gang up about what they think has to be included on the appeal.
- It can be helpful, as appellate counsel, to enter the engagement with a disclaimer or upfront understanding that you were hired based on your expertise in appellate matters, so doing it the way you want as the hired appellate counsel versus doing it their way should be respected for optimal results.
- "False" deadlines to stay on track are not very effective.
- Setting up a mock argument by before doing any writing to try frame or crystallize the issues can be helpful.
- Clients should listen to appellate lawyers' advice.
- Having tried cases helps an appellate lawyer to understand the dynamic and quick decision making that goes into a trial when handling the appeal.
- Having tried cases also helps them to understand issue preservation issues, such as when a trial court is getting visibly irritated that counsel continues to make a record for an issue already ruled upon.

l) Supreme Court briefing

- The first challenge to writing an application for leave to appeal is to demonstrate why the issue is jurisprudentially significant.
- Introductions to applications are very helpful to commissioners by informing them about nature of the case.
- The introduction can be key to informing the reader of the most important issue even if the appellee is responding to the appellant's issues in order.
- Commissioners appreciate having the bigger picture set forth in briefs for drafting their reports.
- A commissioner will make an initial recommendation to the Court as to whether it should spend more time on this issue. A commissioner's report is based on the appellant's issues, with introduction, facts/proceedings, and recommendation.
- The commissioner's report must address each of the appellant's issues and arguments.
- If the issue is found to be significant, the appellant's challenge is to persuade the Court of it view of the case.
- The Commissioners' Office likes response briefs to track appellants' issues in order.

- An appellee responding to an application for leave to appeal should highlight missing issues it needs to respond to appellants, but staff does not like getting briefs from that look like they are from different cases.
- The appellee should respond to the issues in the order presented by the appellant as much as possible; it makes it much easier for the commissioners/court to understand.
- If the appellee chooses to address the appellant's issues in a different order, the appellee should make that clear at the outset.
- Make a specific request for what you want the court to rule.
- Consider alternative kinds of relief, e.g., "reverse and adopt the dissent" or "remand as on leave granted."
- The Supreme Court does not look at the "Statement of Questions Presented" closely because the justices identify what questions the court will reach.
- The Supreme Court is more likely to do independent research, outside of the briefs and arguments to find controlling law.
- The Supreme Court does not reject many briefs.
- In leave granted cases, parties should only refer to pages in the appendix; there is only one record, with seven justices.

5. Effective Oral Advocacy: From Preparation to Presentation

a) How to Prepare for Oral Argument

- Important to spend time learning about your panel
- Look at dissenting opinions--the purest voice of an appellate judge
- Search opinions by topic or keyword
- For efficiency, flag issues and develop likely questions and answers as you are drafting your brief
- Appellant may review reply brief first, while appellee may review appellee brief first
- Set up a "moot court" with colleagues--BUT remember to "go with your gut"

b) Requesting an Adjournment

- When filing a motion to adjourn in the Court of Appeals, make a point of stating that you are not seeking a new panel but merely adjournment to a different date before the same panel

- Are such motions granted? One practitioner reported a motion granted when reason given was a broken leg.

- 6th Circuit might move the argument a day or two

- If a conflict arises between two arguments in the Court of Appeals, an informal call may solve the problem (Court may alter the schedule on its own)

c) How to Begin an Oral Argument

- Some suggest asking the judges what they would like to discuss

- Some prefer to give a "roadmap" of the argument: here is the outcome determinative issue and here are the reasons why my client wins

- In Supreme Court, should you waive the five-minute "free fire zone"? Chief Justice Young suggests only highly skilled/experienced advocates "masters of the universe" should waive the "free fire zone," and others should take the opportunity to discuss the outcome-determinative questions and the proposed solution. Most questions in the Supreme Court are not clearly briefed enough for waiver of the "free fire zone" and need to be further defined.

- Note that the "best" advocates at the United States Supreme Court never give up their opportunity to speak without interruption.

d) Problems at Oral Argument

<u>Judge(s) Not Prepared, Not Listening, Or Not Interested</u>

- Arrive early to assess your panel

- Don't assume judges are very familiar with the case; be prepared to give some general background

- Nothing to be done about sleeping/inattentive judge.

- If panel or judge tells you that the other side will win, try to engage them in discussion to find out what the problem is and address it

- Attorneys appreciate judges telling them what the problem is

- If judge tells you are winning and should sit down, consensus is you should sit down

- If judges are battling it out among themselves, let them do so

Multiple Issues--How To Prioritize Or Limit?

- Lead with strongest issue

- Another option: address "problem" up front: here's the problem but here's why that doesn't matter, another avenue into that strong point (example: with premises, law is clear, here's a factual weakness but here's why that doesn't matter under the law)

- As appellant, might consider saving a provocative argument for the end of your discussion so that the appellee will be distracted and focus on that only

- DON'T say that you are abandoning issues at the argument. Just say that you are going to focus on only a few arguments and rely on brief for others.

New Unfavorable Precedent Issued Before Argument

- If it is not favorable to your position, do you have an obligation to mention/provide supplemental authority if your opponent does not?

- Chief Justice Young: don't skirt close to the line on candor; mention unfavorable precedent.

- What is precedent change is in other jurisdictions and not controlling? Maybe only important in the Supreme Court, not in the Court of Appeals. Maybe depends on whether your argument relied heavily on the trend in other jurisdictions or particular cases from other jurisdictions.

- Use the opportunity to explain why the new law is wrong.

Surprise Issue Is Raised By Judge Or By Opponent

- Can make a supplemental brief request. Oral requests during argument not always granted.

- Suggestion that if it is an important issue the request should not be an offhand one but a direct and emphatic request, emphasizing fairness.

- Also can consider filing formal motion for leave to file supplemental brief, perhaps with brief attached.

6. What You Can Do To Make Your Michigan Supreme Court Application More Appealing

a) The percentage of applications granted is small - what can we do to increase the chances of a grant?

- Use the grounds listed in MCR 7.305(B).
- Point out how the case involves an issue of significance to the state's jurisprudence.
- Make sure the issue is preserved.
- Other potential grounds: inconsistent Court of Appeals opinions; issue of law affecting a number of cases; rule developed over time that is not faithful to a statute or the constitution.
- Take time to lay out your area of the law, why the statute at issue is significant, past interpretations, and how the Court of Appeals' interpretation will cause problems in your industry.
- Facts not in the record – use if the Court can take judicial notice.

b) Grant considerations

- Totality of circumstances: does the case deserve the Court's review?
- Not a mechanical process – case-by-case basis.
- Whether the Court of Appeals' decision is in accord with the Court's most recent rulings.
- Two similar cases should be treated the same, regardless whether the cases are published or unpublished.
- Is there a conflict among lower courts?
- Quality of briefing.
- Importance of the subject matter as it pertains to the integrity of the judicial process.
- Two equally-situated criminal defendants should be treated the same – sentencing guidelines are a move in the right direction.

c) Role of amicus briefs

- Is getting amicus support at the application stage important? Commissioners love to see amicus briefs at the application stage. If a group is interested enough to file one, it shows something.

- Note if there is something that is not in the record. Keep in mind the difference between case-specific facts and historical facts that just provide context.

d) Common deficiencies in applications

- Briefs filed in which page numbers not sequential, contain spelling or grammatical errors, contain cut-and-paste errors, or are generally unaesthetic. Such briefs are not immediately viewed as authoritative. Need to show mastery and self-confidence.

- The Court sometimes sees applications that are verbatim copies of the party's Court of Appeals brief.

e) Considerations after the Court grants leave

- May need to show the evolution of the law at issue.

- Should lay out concisely what the Court should do and why. Parties are constantly asked this in oral argument.

- A narrow focus is helpful to the Court.

- Don't just ask for reversal, etc. What rule of law are you requesting?

f) Differences between applications and calendar briefs

- Hold anything back for later? Keep application shorter? Application just to get the Court interested? Or lay out everything?

- Should put enough in the application to get the Court's attention – don't hold back a main issue. You might not need the entire history of the law at this point, but put all your cards on the table.

g) What is useful to the Court?

  - Court wants to know how the rule of law is implicated by the status quo.

  - Balance of considerations – getting the law right vs following existing precedents.

  - When asking the Court to alter the common law – show that it would not upset expectations.

- Consider why your case should capture the Court's attention out of the 200 applications it receives each month.

- *What furthers the rule of law.*

h) Mini Oral Argument on the Application (MOAA)

- Traditionally, Commissioners did not make recommendations for MOAAs – the justices would decide. That has changed because MOAAs have evolved. Commissioners now make a recommendation.

- MOAAs have become a way for the Court to take a more in-depth look at a case.

- MOAAs allow the Court to peremptory action with four votes.

- Cases implicating important matters of policy, or that will have wide-ranging consequences are more suited for a full grant.

- MOAAs are more for cases involving statutory interpretation and issues that are not as consequential.

- Without MOAAs, many such applications would be rejected because the issue is too discreet to devote full briefing and an hour of argument.

- MOAAs give the Court greater flexibility.

i) Meaning behind the amount of time an application is pending

- It could the result of an abeyance. The Court uses both formal and administrative abeyances (e.g., waiting for a decision on a MOAA in another case).

- Commissioners keep an index of cases in which leave has been granted and cases held in abeyance and try to group similar cases together.

- Should the Court let parties know about an administrative abeyance?

j) How much does the Court want with the application?

- Attach anything that is important – links are helpful.

- The Court will get the record (many records are transmitted electronically now).

- Use technology to make it easier for the Court to assess your application – index your brief, use bookmarks, links, etc.

C. Family

1. Jurisdiction 101 – Final Order Issues in Domestic Relations Appeals

a) Bifurcated Judgments and MCR 7.202(6)(a)(i)

What is it?

- This is when the judgment isn't complete; when it doesn't include all required provisions.

- When the court saves issues to be decided later, the order may not be considered final and the parties may not have an appeal of right.

An example:

- Judgment of divorce included a provision to arbitrate division of personal property.

- This may not be a final judgment because one necessary issue – division of marital property – isn't resolved and thus the judgment is not final.

Proposal that may affect final orders:

- There is a proposed court rule amendment that would permit arbitration of personal property post-judgment.

- As discussed above, this raises the question of whether such judgments would be considered final for appeal purposes.

Other scenarios:

- What if the judgment provides that property is divided equally and if there are any disputes, the parties shall submit the issue to mediation. This may be okay because it divides property and provides a mechanism in the event of a disagreement.

- What if the judgment provides that division of personal property shall be arbitrated and arbitration never happens? Arguably there is never a final judgment and any appeal would be by application.

- It may be a bigger problem when child or spousal support is delayed or real property isn't addressed. Or, if personal property includes significant assets; more than the pots and pans.

How to analyze whether an order is final?

- Some suggest that the COA will likely consider a judgment a final order if it provides some mechanism to resolve division of personal property.

- In civil cases, the question is whether the judge considered that the judgment was final.

- But, is that different in family law cases where there are provisions required by court rule to be included in a judgment? This seems to be what *Yeo v Yeo* says. It makes a difference whether it's just missing statutory language vs. where a trial court determination on an issue is necessary, such as a division of real property.

- From the language of the judgment, is something left undecided that's likely to come back to the judge? If so, it's probably not a final judgment appealable by right.

Regarding the second half of the court rule:

- When can you file an appeal after remand?

- If the earlier judgment was final and appealable by right and remanded, you have an appeal of right following the remand decision.

- What if you want to appeal a remand decision that was on an application? Your right to appeal is also by application.

b) Post-Judgment Orders Affecting Custody under MCR 7.202(6)(a)(iii)

When does a post-judgment order "affect" custody?

- Post judgment orders are appealable by right only if the order "affects" custody.

- When in doubt, file an application.

- Some attorneys file both – a claim and application. But it's expensive.

- *Rains* and *Wardell* broadly defined "affecting" custody and state that it's not just orders modifying custody. It includes denials of post judgment motions to change custody; grants of motion to relocate.

- Parenting time? Some orders do not affect custody – such as adding 2 hours. But if the order switches alternate weekends between parents, seems to affect custody.

Do all COA districts analyze post judgment orders the same?

- There are differences between offices because often the decision is subjective – does the order affect custody? Arguably, every decision about children affects custody by affecting a parent's right to make custodial decisions.

Other considerations:

- In 1993, MCR 7.203 (a) (1) was amended to include the "affecting custody" language.

- In responding to a claim on a post judgment order, appellee can challenge jurisdiction in its brief and the COA could recommend dismissal. Most likely, at this stage the case will go to a panel for a decision and opinion.

- Difference between custody and parenting time is becoming more unclear based on case law. It's more about the established custodial environment. Could this change the way the court analyzes post judgment orders?

Case law:

- It appears that the COA is taking a broader view after its decision finding that a move more than 100 miles "affects" custody.

- *Granneman* even more broadly defines it to include a post judgment order awarding grandparenting time.

- What about legal custody? It doesn't affect the physical location of the child. But, many cases include legal custody – the associational decisions are fundamental.

Other decisions that found a post judgment order affected custody:

- *Parent* was school decision.

- *Grange* identifies two components of custody – legal and physical.

- *Lombardo* – appeal of right regarding joint legal custodians' disagreement about decision regarding school.

How does the COA determine jurisdiction? What does it look for?

- Language of the order.

- There's got to be a line between custody and parenting time.

- They make their best jurisdictional decisions. If you don't agree, it can be appealed and/or raised at argument.

How to respond?

- Attorney may file detailed statement of jurisdiction with the claim.
- Maybe the COA will loosen up its definition a bit, but a line must be drawn to exclude minor parenting time modifications.
- Helpful case law including *Granneman, Rains*, which broadens the rule but still inconsistencies remain in decisions.
- Make sure COA clerks are aware of these decisions.
- Consider proposal to modify the court rule.

2. Jurisdiction 201 -- Subject-matter jurisdiction, Personal Jurisdiction, and Venue issues in Domestic Relations Appeals

a) Personal Jurisdiction

Case example:

- Person is in assisted living in another state, brought to MI by family member who initiates family law case. How far can a party go objecting to personal jurisdiction without waiving the objection by appearing? How do you preserve the issue of personal jurisdiction for appeal while not creating jurisdiction?

What does the case law provide?

- *Pecoraro v Wallet*: Did MI or NY have jurisdiction in a paternity case? Father filed in NY and the court found he was the bio dad. Legal husband / father never participated in the NY case; mother did and so there was personal jurisdiction over her. Husband filed a collateral attack in MI challenging NY jurisdiction over him and arguing that MI was not required to follow the NY order. Also, he was necessary party to the paternity determination.
- What if the order was from Canada rather than NY? Same outcome. MI gives comity to foreign orders so long as the order meets due process concerns.
- "Necessary party" issues come up in ROPA cases. Who are the necessary parties?

What if a party misses the issue of jurisdiction?

- In *Wallet*, it was possible to miss the necessary party issue given general rule that orders from another state are enforceable and must be followed.

- What to do: raise lack of personal jurisdiction on oral argument if you find it late.

- *In re Kanjia* – This was a *Saunders* challenge to jurisdiction in a parental rights termination case. (*Saunders* held the one parent doctrine unconstitutional and found that a court must establish jurisdiction over both parents individually.) Here, one parent challenged the court's jurisdiction collaterally at the termination proceeding, which is deemed collateral under child protection law but the court held it was permissible as a subject matter jurisdiction challenge.

b) Subject Matter Jurisdiction – *Funk v Funk*

- This was an unpublished Court of Appeals decision that was not appealed to the Supreme Court.

- The issue was whether the general venue statute (defendant must be sued in his county of residence) applied or the more specific provision in the divorce statute, which allows filing in either county where plaintiff or defendant reside. MCL 552.9.

- Most practitioners have always assumed the specific divorce statute applies.

- <u>Implications of the decision</u>:

  - If the question of which county to file in is a jurisdictional issue, as *Funk* suggests, it can be raised at any time and would result in voiding the divorce judgment. This could have far-reaching implications

  - *Stamadianos* says MCL 552.9 is a jurisdictional, not a venue provision. This may be why *Funk* is correct. There's nothing that removes divorce cases from the general venue statute. Is this language in *Stamadianos* dicta? Was it necessary to reach its decision? The language probably would not have changed the result.

  - If *Funk* is correct, divorce cases must be filed in the county where defendant resides and file the custody where child resides. This is another practical concern resulting in two different court decisions on issues related to the family.

  - Venue challenge – it should be raised as an interlocutory appeal because if you wait until the final judgment of divorce, it's moot; no relief is available from the Court of Appeals.

  - There is a body of law on venue that's not family law related.

- <u>Is there a legislative fix</u>?

- If a similar case went back to the COA (or on appeal to the MSC), the court could find that this is a legislative issue. Or, the court could find that the *Stamadianos* language was dicta and apply the general venue provision to divorces.

- A legislative fix could be simple. Add language to MCL 552.9 to clarify that it addresses venue.

- However, even going to the legislature is a risk.

- Page 15 of materials gives examples of other state statutes and could be models for legislative change.

- Consider approaching Oakland County Bar Association, which has a legislative committee and the SBM Family Law Section to propose a statutory modification.

D. Child Welfare

1. Child Welfare Appeals 101: The Procedure

a) Issues Discussed

- Communications with clients regarding case disposition and case process to the Supreme Court.

- Is there a court rule to guide appellate attorneys on what to do after a case is disposed in the Court of Appeals? Response: "There is a belief that there is no court rule that outlines this."

- Concern discussed regarding attorneys not being able to receive appointments to represent client in the Supreme Court.

- Is it a battle to work with clients who are living in a fantasy and cannot accept the fact that their termination order was entered for substantiated reasons?

- How do we determine which cases are appealable and if not, how do we handle breaking it down with the client?

- How do we deal with clients that don't contact attorneys and attorney reviews their case to find the case meritless"

- Scope of appointments – Are GALs allowed appointments to cases? Response: Yes

b) Judiciary Perspectives

- The Court of Appeals carries a heavy burden when having to decide child welfare appeals.
- Judiciary wonders why they keep receiving appeals with no merit.
- Can a GAL(guardian ad litem) be kept on a case throughout the appellate phase (from bottom to top)? Response: Yes, judiciary most likely wants GAL to be there to brief case if case is subsequently appealed.
- Comment was then made that judiciary believes it is rare to see a GAL involved in an appeal.
- Unaware that GAL can get paid on these cases.

c) Comments/Questions

- Is there a formal or informal practice to assist clients with filing requests to appeal?
- Is there a time delay between when the appeal is filed and when the clerk/courts process the appeal?
- All of the counties file claims of appeal (when requested) on behalf of the client.
- If a claim of appeal is untimely, the Court of Appeals will issue a dismissal order against and the client will have 14 days to file an application for leave to appeal. There is a pro per application that a party can use as a reference.
- The Supreme Court is not there to focus on correcting errors.

d) Additional Comments

- It is not really a good idea to appeal a case without a final order (with an opinion offered).
- Wayne County referees/judges always address appellate rights after any type of order is entered.
- Before disposition, are services offered voluntary?
- The Court of Appeals does not use summary panels anymore, so any party can request oral argument.
- A new published case came out – *In re GACH* – which held that prior terminations used as the sole basis for termination is unconstitutional; parents can

now present evidence in support of their position; a termination cannot occur based solely on prior termination findings.

- Issue was discussed about how it seems that courts are jumping to immediate termination without determining the risk to the child.

e) Duty to Exercise Reasonable Efforts

- Do aggravated circumstances usurp the duty to provide services? Two viewpoints offered. Yes & No.

- The *In re Moss* case is in conflict with *In re Mason* – e.g., they conflict when addressing the issue of the duty to provide services.

2. Child Welfare Appeals 101: The Substance

a) TPC Cases/Comments

- There is outstanding tension and question regarding what can be challenged in TPR cases (see *In re Hatcher, In re Sanders, In re Farris, In re Jones*).

- *In re Collier* is a TPR case where the court agreed to look at the adjudicatory process.

- There is considerable ambiguity in the law about what type of challenges can be put forward in TPR cases.

b) ICWA

- ICWA compliance continues to seem to be a big issue with the courts. Courts are not following notice mandates with ICWA.

c) Prior Terminations

- *In re GACH* is a new case that came out finding that provision L is unconstitutional (prior terminations).

d) Experts

- *In re Yarborough* – due process requires appointment of expert for the parents.

e) Vaccinations

- *In re Deng* (COA 328826) – addresses medical vaccinations.

f) Adoptions

- *In re Jackson* (COA 2252404) – clarified that before finalizing an adoption, the court must cross check any pending appeals on the case.

g) Issues Discussed

- Some counties still do not order/provide transcripts to attorneys in appeals.
- When is counsel appointed to case? Response/Comments:
  - In Wayne County, some referees discourage parents from obtaining an appointed lawyer.
  - In Macomb county, parents are immediately appointed an attorney.
  - In Ionia County, parents must request an attorney before being appointed one.

h) Challenging Removal Orders

- Is there a value to appealing a removal when a parent's rights are terminated and the parent has not seen their child for over a year?
- A good way to challenge a removal is through an emergency motion.

i) Appellate Rights and Representation

- In many counties parents are told they have a right to appeal at the adjudication level.
- A major concern is when people do not have counsel.
- It is disfavored to have the trial attorney handle the appeal of the case.
- In some counties, parties are not notified of their right to challenge an adjudication.
- Is it wise for parents to continue engagement in services if they are appealing? Attorneys have an ethical obligation to advise parents against not engaging in services during pendency of their appeal.
- Attorneys should advise parents to fully cooperate with the service plan during pendency of appeal.
- In the Supreme Court, interlocutory appeals are normally disfavored.

j) Aggravated Circumstances

- Aggravated circumstances includes prior termination.
- There are so many different interpretations as to what aggravated circumstances are.
- Some case law says if the goal is termination, DHHS does not have to provide services.
- The aggravated circumstances statute does not indicate if one has not been terminated, services can still not be offered.

k) Reasonable Efforts Challenges

- Defective summons is an issue that has been brought up.
- Issue discussed regarding DHHS's pattern of failing to following DHS manual.
- How does one address issues involving inexperienced attorneys dealing with filing interlocutory appeals? Response – we should look to do more local training via SCAO.
- With this, a lot of these issues should be able to be rectified promptly.

l) Training Resources

- A lot of SCAO material is online.
- The AG's office has a large book/resource.

m) Additional Issues

- Does a parent have a right to parenting time when there is an adjudication?
- In MN, an attorney cannot be a child's attorney and an GAL at the same time.
- Once disposition occurs, suspension of parenting time is a best interest determination (*In re Laster*).
- Legislation is currently pending providing that when there is a suspension of visits and/or termination, a risk of harm must be shown.
- *Olive/Metts* remands - one person has seen that a case wasn't even remanded after an *Olive/Metts* determination was made.

n) Expert Witnesses (*Yarborough* Case)

- One attorney had a motion granted for fees for an expert.
- One attorney only received $600 in their county for an expert witness fee.
- One county attorney had to go through court administration to potentially receive expert witness fee funding, which turned out to be a flat amount of $600.
- Is it good to provide or not provide names of potential experts to the court and/or the prosecutor? Response: Standard should not be any different for appointed attorney or retained in obtaining an expert.

V. PLENARY – THE COMMISSIONERS' OFFICE: BEHIND THE SCENES

Plenary Session - The Commissioners' Office: Behind the Scenes,

Taken at The Inn at St. John's Conference Center,

44045 Five Mile Road,

Plymouth, Michigan,

Commencing at 4:50 p.m.,

Thursday, April 21, 2016,

Before Donna K. Sherman, CSR# 2691.

PANELISTS:

Daniel Brubaker, Chief Commissioner, Michigan Supreme Court

Shari Oberg, Deputy Chief Commissioner, Michigan Supreme Court

Neal Villhauer, Michigan Court of Appeals

Mark Stoddard, District Commissioner, Michigan Court of Appeals

Jack Walrad, District Commissioner, Michigan Court of Appeals

Moderator, Julie Isola Ruecke, Research Director, Michigan Court of Appeals

Plymouth, Michigan

Thursday, April 21, 2016

4:50 p.m.

MS. RUECKE: Hi, everyone.

My name is Julie Isola Ruecke. I've been at the Court of Appeals for 24 years now, and I was in private practice for a very short period of time before then. And today this is a plenary on the Commissioners Office behind the scenes.

And I'm sure all of you know that the Commissioners work on leave applications and original actions in the Court of Appeals. And the commissioners at the Michigan Supreme Court working on Court applications because that's all that's filed there. And maybe some original actions. We're going to find out today.

I'm kind of having a problem with a cough and all that, so I am going to ask our panel members to introduce themselves with their name, where they work and how long they've been at the Court.

MR. STODDARD: I'm Mark Stoddard. I'm a District Commissioner in the Grand Rapids office. I've

been on the Court longer than any judge currently sitting. I started August 4th, 1986.

MR. VILLHAUER: I'm Neal Villhauer. I'm a District Commissioner in Lansing, and I've been with the Court for 26 years.

MR. WALRAD: My name is Jack Walrad. I'm the District Commissioner for Troy, and these guys are real old. But I've been with the Court of Appeals for almost as long as them.

MR. BRUBAKER: I'm Dan Brubaker. I'm the Chief Commissioner at the Michigan Supreme Court. I've been the Chief Commissioner for three years and I was a Commissioner for ten years before that.

MS. OBERG: And I'm Shari Oberg. I am the Deputy Chief Commissioner in the Supreme Court Commissioners' Office. And I started in 2002.

MS. RUECKE: So the first thing we're going to start off with are two polling questions that we have. The first one is, what is a reasonable time for having an application heard in the Michigan Court of Appeals? And to clarify, that means from the moment that you filed your leave application to when a panel has issued an order either granting leave, denying leave or giving some other relief.

Okay. So it looks like the majority of people

believe that a reasonable amount of time would be three to six months, waiting for an order to be issued on a leave application filed in the Michigan Court of Appeals.

Uhm, 26 percent, less than three months.

62 percent, three to six months.

Okay.

The next polling question is similar, but what is a reasonable amount of time for having an application heard in the Michigan Supreme Court?

Okay. It looks like the majority think that a reasonable amount of time in the Michigan Supreme Court would be six to nine months. The second time picked as far as reasonable would be three to six months.

So my question to our panel members is, Mark and Neal and Jack, what is the average time for having an application heard in the Court of Appeals in each of your offices?

MR. STODDARD: Well, in Grand Rapids right now, in the door, out the door, is about four months. Our biggest problem slowing us down is transcripts. We don't get them in time so we're sitting on cases waiting for transcripts.

MR. VILLHAUER: We're about four months in a Lansing too, right now.

MR. WALRAD: I'd have to say, sorry, in Troy, I think we're a little over four months, maybe five months. You wish it was shorter. I wish it was less than two months, but it's just the sheer volume of things we get and number of staff we have.

MS. RUECKE: Okay. And I'll ask Dan and Shari, what is the average time for having an application heard in the Michigan Supreme Court?

MR. BRUBAKER: Well, the average time is around five months from filing to disposition, but that includes grants, MOAA's. That can fluctuate. The one thing that makes the number higher is if we have a lot of abeyances. People have mentioned Lockridge. We had a lot of abeyances for Lockridge, so for a while, that number was impacted by that because the cases sat around waiting for that decision. But on average, it's about five months from filing to disposition.

MS. RUECKE: Okay. So what are some factors within a filer's control that contribute to delay in processing the leave application in either Court?

MR. VILLHAUER: Curing defects. Getting the transcript. That's about it. I mean, it's kind of like once it's in the queue, we're waiting for your next turn.

MR. WALRAD: I was going to say, a lot of

it's out of the filer's control, because we do have significant backlog that we're just trying to get through. The main thing is a lot of times, like Mark said and Neal just said, it's waiting for transcripts that are almost essential to analyze the ruling they're trying to challenge.

MS. OBERG: For the Supreme Court, again, a lot of it is outside of the filer's control. Sometimes we need to hold up a case because we're waiting for the lower Court record.

One thing, though, that you can do to move things along more quickly when it's an emergency appeal is arrange for personal service on the other side. That will enable us to be able to jump on the case more quickly than if there is some doubt or concern that the other side, the appellee hasn't yet received it.

MS. RUECKE: Okay. So another thing we wanted to highlight is the differences in the roles that the Commissioners play at the Michigan Court of Appeals and at the Michigan Supreme Court. And we're hoping that a couple of these questions kind of flesh that out.

First, I'll ask a general question. How are the District Commissioner Offices' at the Court of Appeals staffed, and do the Commissioners interact with the

public, judges and the clerk's office?

MR. WALRAD: Uhm, well, right now we have two District Commissioners in Troy. And we don't have our own administrative assistant. We generally use the assistant clerks as, the non-lawyer assistant clerks, the clerical staff that the District Court uses. That seems to be working out fairly well. However, we do have to do, the district clerks do, I'm sorry, the District Commissioners do docket review whenever things get filed in our district, and we check for defect and so on. And, then, after that, we wait for answers. We set answer periods with the input of judges. If something needs to be answered more quickly, uhm, when things come up for their turn in line, we do a quick and dirty report on it. Usually with the proposed order. Ship it to the panel, and on the regular motion docket and the panel, it's in judges' hands to decide what to do with the application.

MS. RUECKE: And how often are you having contact with the public?

MR. WALRAD: Just about every day. People call with procedural questions. Lawyers call wanting to know when is this application gonna be considered. A lot of times I have to tell them, oh, it looks like about three months from now. They have questions about

motions for immediate consideration. About what kind of relief the Court can grant and so on. And we get a fair number of calls from people who are representing themselves pro per. Those tend to take up a lot of our time with the pro pers, but I don't know any other way around that.

MR. VILLHAUER: We have two District Commissioners and an assistant who has most of the contact with the public and does an exceptional job. It's Mark McElwee, if you are calling Lansing about cases, and you'd probably much rather talk to him than me. Because he can give you all the answers and is much more social. Contact with judges when we get a request for a commissioner report on something that is not on the regular application docket, we'll have e-mail contacts mostly on cases. That's about it. And most of the contact with the public is through our assistant.

So, you can call us.

MR. STODDARD: Yeah, we also have two District Commissioners in the Grand Rapids office and the Court staff we share with. And we see very little contact. We used to do a lot of card contact, a lot of phone calls, a lot of emergencies. But with the e-filing system, no one wants to call us anymore or

call to our counters, so we're kind of low and lean at the counter over there.

MR. WALRAD: The one thing that brings a point to mind. One thing about e-filing is that it has decreased the amount of contact, direct contact with filers at the counter. And that's not necessarily a good thing when we show up, say, on a Monday morning and one of the assistant clerks plops an e-filed application that's 500 pages and has a motion for immediate consideration that got e-filed, say, I don't know, at six o'clock on Friday. And we didn't know it was coming until I show up in my office Monday morning at eight o'clock. Oh, this is nice. What is this?

Oh, they want action by Tuesday. There is some advantage to filing stuff at the counter, or calling us and warning us. I've got this thing. I need action by next Tuesday. What do you want me to do with this? I'm not going to tell you you can't file it, but I can say file it in Lansing or in Grand Rapids. But, you know, it's always good to give us a heads-up. We're not afraid to answer the phone.

MR. VILLHAUER: Even on e-filing, it takes a step for the clerk to pull it off and then direct it to the right person. So if you call us, we'll know to look for it so we can give people a heads-up to send

it, give it to us directly as soon as it comes in. So, call first.

MS. RUECKE: Okay. So Dan and Shari, I think it's a little different at the Michigan Supreme Court as far as how much contact you have with the public.

MR. BRUBAKER: Yeah, the Commissioners are kind of the intermediary between the Clerk's office and then the Justices' offices. So we prepare Commissioner Reports on the application for leave to appeal that are distributed to the Justices. Our office is staffed with people who have been, you have to be out of law school for at least five years to even apply. Almost everybody there has been out for much longer than that. We're staffed with former law firm partners, such as Shari and myself. We have people from SADO. We have people that are from the AG's office. And one big difference, and I feel bad, because I watched these plenaries, and everybody has said, please call. If you have any questions, please call.

My message is, do not call the Commissioners' office. One clerk referred to us as the black box of the Commissioners' office. But it's not even known outside of our building who's working on what case. What we do is prepare a product for the Justices. If we have any communication after the CR is delivered, we

might get a call from a Justice's clerk asking about something in the CR. That's the Commissioner's Report, or rarely a call from a Justice asking about something. But we have no contact with the public whatsoever.

And it's rare, but if we need something, we go to Larry Royster, in the clerk's office, and he has all the contact with the public.

MR. VILLHAUER: If you have any questions about the Supreme Court Commissioners' office, you can call us, too.

MR. WALRAD: And ask for Mark.

I was gonna say, the big difference is, you guys don't have to do any docket review. Or new applications.

MR. BRUBAKER: That's all done by the Clerk's office. By the time it's assigned to a Commissioner, it's kind of packaged and ready to go for a report.

MR. WALRAD: Yeah, we have to package it ourselves, so.

MS. RUECKE: So, we're going to run two more polling questions. And the question really goes to, you know, finding out how many of you out of the audience have actually spoken to a District Commissioner at the Court of Appeals. Because as we've learned, you will have not spoken to a Commissioner at

the Michigan Supreme Court. And we're curious, how many out in our audience have had contact with them?

So, it looks like approximately 44 percent, 40 percent have actually spoken to a District Commissioner at the Court of Appeals. And 40 percent have not. I don't know if that's because the have-nots have no defects in their leave applications and no questions to ask, but we were just curious how many people had spoken to one of the Commissioners.

Our next question, have you noticed any differences in the way different Commissioners' offices at the Court of Appeals process applications? And I hope there's a very low answer on, yes.

So, the good thing is that people haven't noticed a tremendous amount of difference, which I think is a good thing. These guys are pretty much practicing in the same way, using the same Court rule and there's also a fair number of people, who says I haven't filed enough to notice a difference.

Uhm, in 2015, the Michigan Supreme Court and the Court of Appeals implemented a new electronic filing system developed by Image Soft, called True Filing. The system replaced the e-filing system that had been in place at the Court of Appeals since 2006. So, Dan and Shari, I just wanted to know how do you and the

Commissioners like working with e-filing pleadings? Is there anything you don't like or would suggest to file or consider doing differently?

MS. OBERG: We're learning to like e-filing. It is an adjustment for us. There's much less paper in my office, which is quite nice. And if I lose a brief, which of course I would never do, when it's filed and now that we have all the links on, available for us, there it is again. And that's great. So we're becoming more skilled at working with the electronic document itself, highlighting, marking it with notes.

One thing that our office, when I ask folks what they might like to see more consistently happen with e-file documents, indexes. So an index to the appendix is a very important thing. And if you have mastered index and you're ready for the next step, it's book marks, which are also very useful. I cannot do any of these things, but we appreciate getting electronic documents that have crutches in it that help us move around it more quickly.

We're also, some of us are moving to a two-screen system, which is pretty snazzy. So we can pull your exhibits on one screen and your brief on another, and that's helped us learn with electronic rather than paper documents.

MS. RUECKE: Okay. Neal, Mark and Jack, have you noticed any difference in, since we adopted or have this new e-filing system from the prior one?

MR. WALRAD: I'd have to say, I don't deal with the real business end of that. But It's been almost seamless from my perspective. I mean, we went from, what was it, the Odyssey system to this system. From my end, it looks about the same. I didn't have any trouble adjusting. Which is kind of remarkable for me. I really, I expected more difficulty than what we got. And I don't know how it is from the practitioners' end, and I don't deal with the software or anything, thank God, so I'd have to say, It's been pretty good for me.

MR. VILLHAUER: And we do have dual monitors, so we can work off an electronic document and create our own document on the other screen. So that helps.

MR. STODDARD: I have to echo the bookmark. Please, the more complicated the application, the longer the appendices. It is a nightmare coming back and forth, and even with two monitors, it's quite a --

MR. VILLHAUER: It's good to have a table of contents from your appendices so we can know where to find things and open appendix 7.

MR. WALRAD: I'm going to get into my hate

speech here.

One thing I want to emphasize, since e-filing started, we've seen appendices like, seem to be growing by 20 percent every year. And that's really not that useful for an interlocutory application to file a 500 page appendix with no bookmarks or index to it. Because that means that somebody else has to put that thing on screen and just kind of scroll through it and try to find the pertinent pages. And I don't think anyone really enjoys that. It's not fun to play find the record. So, try to, if you're going to file a huge number of appendices, try to break them up or put bookmarks in them or at least have an index to them so we know what page of the appendix it's on.

MS. RUECKE: Okay. We touched a little bit on this already, but what is the general procedure for processing an application in the Court of Appeals and the Michigan Supreme Court, and how are Commissioners assigned a matter to prepare a report and proposed orders for the panel and for the Justices. As far as the initial review, whether you have the record available, how matters are assigned?

I know that Dan and Shari will say, Larry Royster, please come up and join us, or Inger, because, as they said earlier, it's all the pleadings are brought to

them once they've been filed.

MR. BRUBAKER: Well, what happens is first an application is filed. I should say, this, I'm not talking about priorities or emergencies. Those go through a different system. But if it's a normal application, it gets filed in the Clerk's office. We do have someone in the Commissioners' office who does an initial screening. And that person is just kind of checking to see is the Court of Appeals' opinion published. Is it related to another case, so some initial information gets input on to the system. But then that case won't appear again until I run an assignment sheet. So every week I run a new assignment sheet, and the cases don't appear on my assignment sheet until we have all of the records and the response period has passed, or the response has been filed.

So at that point, I've got my list that are cases ready to be assigned. I have a short description of them. And I assign about three or four of those to each Commissioner per week. And that kind of group, we don't specialize in the Commissioners' office. But if I see a lot of cases involving the same issue, I may try to steer them toward one particular Commissioner just because we want consistency. I'm not going to go through the whole process because it would take a long

time. But there's an attachment that I sent that's in the material that kind of described how the applications move through the Commissioners' office into the Justice's office, and then they either go on, we have what are called regular OTE'S, and the mini-OTE. And the regular OTE, each report has an order to enter date. So that if -- and that's usually at the end of the month. So if a commissioner printed a report, and by print, I mean it gets physically printed and put in a file or electronic files to the Justices' office, the report will say on the upper right-hand side, unless someone objects to the order, this is going to enter on such and such a date in June.

Well, we give them one for the next month. And then the Justices can object or not. If they object, it has to go to conference. If they don't, then the order gets entered. Those would be denials, advances, and so forth.

If the Commissioner is requesting a grant, those go right to the Justices' conference. Those don't go on an OTE. And we have the mini-OTE which are for cases that are time sensitive. A report might get printed on a Wednesday saying that the order in that case will enter the next Tuesday unless a Justice wants to hold that because the Justice is not satisfied with

that particular order or wants to discuss it at the conference.

So there's kind of a long drawn-out process that I won't get into there.

MS. OBERG: Just to add one point, we almost always do have the record. Certain emergencies we won't have it just about because of time constraints. A bypass application. It's probably going to stay in the Court of Appeals, so sometimes we'll go dig it up. But in your run-of-the-mill application for Leave to Appeal, we almost always have both the lower Court Record and the Court of Appeals record when we're preparing our briefs, or our, not briefs, reports.

MR. VILLHAUER: A case goes into Lansing, our assistant usually starts preparation on it. Gets the file started and the docket number assigned. Does a preliminary review of what's there. And then we review for jurisdiction. Is it within six months for a delayed application? Is there an order that has been issued by the Trial Court? Fees, the docket entries, is it a confirming application; is the brief within the 50-day limit? Is the proof of service, I may characterize it as a delayed application, original action, and is it one of the special categories? Is it an interlocutory criminal appeal? Is it a 6500 case?

Is it a prosecutor appeal?

And then we'll enter that information into the system and then the system will prepare a defect letter if there are defects and that will get sent out.

When the defects are cured, it goes on the shelf and mostly by time.

There are two District Commissioners in Lansing, and we take the oldest application other than emergencies or other special actions that we're dealing with. But it's usually just first in, first out. And prepare a report. Our assistant makes copies, gets the pleadings together, goes to a three-judge panel. It's a regular motion docket panel that supports the whole year. And Tuesday morning, they get their motion docket, and then we hear back from them. They either issue the order that we propose or a different one. And then we enter it and give it out to the parties.

MR. STODDARD: We don't get the record with the Court of Appeals applications unless it's an administrative appeal, a termination case. Anything else? Otherwise, we work off what you give us. So whatever is attached to the back of your application and whatever transcripts you supply is what we use.

MR. WALRAD: But don't file the whole darn record. Unless you think we really need it. Because,

again, nobody wants to scroll through 500 pages on a computer screen.

MS. RUECKE: Okay. So you guys prepare Commissioner reports that are sent to Judges that have recommendations as well as statement of facts, discussion of the law set out, and your recommendation.

In evaluating whether to recommend granting Leave to Appeal or to peremptorily reverse in a report, what factors are significant?

MR. VILLHAUER: Well, it varies. I mean, on an interlocutory appeal, it's like, is there a problem that can be solved by granting leave as opposed to, is there some issue that can wait until the end of the case. You know, if summary disposition has been denied and it should have been granted, it's like, well, that's an easy one. Grant it and take the case.

MR. WALRAD: Well, I think we covered this in the interlocutory session. But if you're seeking relief before trial, you should probably have only one or two issues, and they should probably be meritorious and you should probably have a reason for not wanting to go to trial or avoid a final decision on the merits.

If it's some sort of post-judgment appeal like a District Court appeal that was denied by the Circuit Court, then it's just solely on the merits. And,

basically, the Court of Appeals' function is to correct errors. We try to, if we can do that on an interlocutory basis with one order, that's preferable to doing it in a 25-page opinion. And if they need the record more developed, say, after a trial, then your interlocutory application might be denied, because Judges say, well, we'd like to see more of this be developed and maybe some issues will get weeded out if you go to trial on this. And maybe they'll settle and go home. We're concerned with both the merits and with the practical effects.

MR. STODDARD: Sometimes occasionally guidance, if there's something going on that the Court needs to be instructed about, so we'll tell them where they're wrong and where they need to go so we don't have a big mess afterwards.

MR. BRUBAKER: I have kind of a long list. It's a big deal for a Commissioner to recommend a grant in a case. So the first thing we look at are the factors at MCR 3.705(B). Because if none of those factors are met, we're not going to recommend a grant. I'm speaking in terms of us in the Commissioners' office. I'm not saying what the Court's position is or what any particular Justice's position is. Issue preservation is critical. If someone wants us to grant

on an issue and they just raise it for the first time in our Court, that's gonna cut against them. The rest of the factors that I would break down go into good vehicle versus good issue questions and litigants tend to focus on whether it's a good issue or not. But the question whether it's a good vehicle to get to the issue is just as important.

So, Commissioners will look at the quality of the briefing. Is the important issue presented like in a straightforward matter that is going to be easy to get to, or are there potentially dispositive issues that need to be dealt with first in the order to get to the grant worthy issue? Have the lower Courts already addressed the potential issue? If the Court of Appeals have simply denied leave, your chances of getting a grant would be less.

Are there additional facts that need to be considered, and of course, does the Commissioner believe that the Court of Appeals reached the right result? And the fact that the Court of Appeals reached the right result won't always mean that the Commissioner would recommend a denial, but usually it will. Those are kind of, is this a good vehicle, question.

Is it a good issue question, and there it usually boils down to the jurisprudential significance of the

issue. And the way that I've heard that phrased is, is this is a case where the parties are arguing about the rule or are the parties arguing about how that rule applies to the given facts of the case. If what you're arguing about is how the rule applies to the facts, that leans against granting leave.

We also look at, are there inconsistent Court of Appeals opinions. Is the Court of Appeals opinion published? Does the case appear to have wide-ranging impact on an area of law. Is it a first out Court of Appeals case, and if the parties argue persuasively on it, whether the rule that's developed in a particular area of law is faithful to the text of the statute or constitution.

I don't know if you would add anything to that.

MS. OBERG: No, that was a great list.

MR. VILLHAUER: One of the things the Supreme Court loves to do with us, is to remand, for consideration as on leave granted. So, it's like they want us to fill in the blanks on cases all the time. And there's an interesting dynamic between the two Courts. My Court and the Supreme Court. We used to have the Commission reports saying, well, the Court of Appeals really hasn't explained their decision. We'll remand it so they can explain it. And the Court of

Appeals gets that case, and it's like, the Supreme Court remanded it and they didn't give us any explanation on what they've wanted us to do. So we kind of get that going back and forth between the two Courts.

MS. RUECKE: Okay. The next question is, kind of touches on, we talked about processing applications in each of the Courts. How are priorities and emergency applications processed differently other than the obvious, time?

MR. WALRAD: Well, one thing I've noticed is, if you file an emergency application in the Court of Appeals, I mean, I think all three of us, all of us including you have been faced with situations where people have asked for things by the end of the day. And the Court of Appeals can usually turn that around. We don't enjoy it, but we can, if we get an application filed and something's going to happen by five o'clock that we, that they really have to avoid, uhm, we can have very short-term turnaround time. And I think with the amount of analysis the Supreme Court that they put into this, I don't think they can, maybe they can do that in election cases, but I don't think they do that too often.

MS. OBERG: We accept that challenge.

MR. BRUBAKER: She accepts that challenge.

MR. WALRAD: But we tend to get things, I mean the person who's doing the initial docket entry is the person, might be the person who is actually doing the report on it. So we get, I think we get a little bit more familiar and we read it. We consult with the panel and try to determine when we want an answer by. Give notice to the opposing counsel for when we want an answer to that, and try to get everything, you know, try to get all the materials we need to put something together, whether it's a report or a memo and submit it to the panel. And in the past, we've been fairly successful in doing that.

Do you guys have anything to add? I think it's a much simpler process than it would appear to be.

MR. VILLHAUER: I mean, our focus is more limited in that we're just addressing the issue that's presented and you wonder sometimes whether if somebody had taken the time to do an application on a non-emergency basis, if they would have flushed out the issues better, but generally, we just work within the time constraints that we have.

MR. BRUBAKER: We distinguished between priorities and emergency. Priorities are a category of cases that we've decided probably need to be dealt with

sooner rather than later but there's no hard deadline that we have to act by. So priorities would include criminal pretrial matters and custody cases. Any case involving a minor, we want to act more quickly on it. If the case comes in, the Clerk's office will label it as a priority and send me an e-mail saying that one was filed. I will take a look at it. Usually with the priority cases, I wait until shortly before the response deadline before assigning it. So it does get moved up. It doesn't necessarily get moved up to the very front of the line but it will be handled more expeditiously. And Shari does the emergencies.

MS. OBERG: I would encourage you when thinking about emergency in the Supreme Court to really expand your notion of what timing deadline constitutes an emergency. Because every application is reviewed and voted on by all seven Justices. So I can recall a case that was filed at 11 in the morning and was disposed of at 4:30 in the afternoon, but that's a rare and heroic effort for us. If you have a trial in two months, consider that an emergency and go ahead and file a motion for immediate consideration, because that's the trigger. The motion for immediate consideration is what gets your application labeled as one that we need to look at the day it's filed. Don't

bury it somewhere in the first few pages; p.s., we have a trial coming up in six weeks because no one will likely see that in time. So feel very comfortable filing that motion for immediate consideration. When that happens, Inger Meyer sends out an e-mail saying we have a motion. Dan and I discuss it. It's assigned, and we work out a frame for moving it through our office and through the Court so that it can be handled in advance of the deadline.

If our normal procedures for deciding cases are just going to be drawn out, we can send a report on a case straight to conference. We can poll the Justices electronically. So we have means to get orders out more quickly. But, again, I really do encourage you, a lot of people may think that having a trial six weeks or eight weeks out isn't an emergency, but it does merit filing a motion for immediate consideration.

MR. WALRAD: Can I just add something? Given the fact that the Court of Appeals isn't getting around to issuing orders for four months or so, depending on which district you file in, if you have a trial in six weeks, that's cause to file a motion for immediate consideration in the Court of Appeals, too. And if you have a firm deadline of any of that you need in an interlocutory application, don't bury the lead. Put it

on the front. The Court rule says to put it on the front page of the application. But actually, put it on the front page of the application and mention it at the beginning of your statement of facts. Don't put it on the second to last page of the statement of facts, because somebody may miss it.

MR. STODDARD: Or expect us to find it in the register of actions.

MR. WALRAD: We're not going to find it in the register of actions, either. If you have deadlines, please, by all means, mention it, and if we think you're going to need to file for immediate consideration, we'll usually call you. But if you need fewer than two months, chances are you want to bring that to our attention, and you probably want to file a motion for immediate consideration as well.

MS. OBERG: And on that note, if your deadline changes, call your client and share the good luck, but call us next and let us know. Because we will often verify with the Trial Court when there's a statement in papers that there's an urgent date coming up, and we don't like that to be the first time we hear that two weeks ago, they adjourned the trial and there's no date.

So, don't be shy. Call the clerks' office and let

them know. Don't call to our office of course, but call the clerk's office and let them know.

MS. RUECKE: You're finishing an emergency interlocutory application to file in the Court of Appeals but you realize you don't have the written order from the Trial Court's ruling stated on the record at the motion hearing which is required by the Court, MCR 7.205. Trial is scheduled to begin in 10 days, should you -- and there are your choices.

So it looks like the majority answer is C, the second A. And B is at 13 percent.

And actually, the answer is B. You are going to wait to file your application and try to obtain an order even though you might not be able to do so before trial begins. That's because, if you file the application with the Court of Appeals and then you seek a written order and you don't get it for two days after you filed the application, your application is going to be dismissed because it's considered a premature application.

And, C, we do have a generous motion practice in the Court of Appeals and our IOP's do indicate you can file an application without a hearing transcript, but you cannot file a motion to stay without the filing of a written order.

The next question, what is a reasonable time to be allowed for filing an answer to an emergency application?

It looks like most people say seven days. I know that I was a District Commissioner for 14 years, and I know that Mark, Neal and Jack have all delivered the bad news to the appellee that their answer is due in three hours or the next morning, and sometimes we advise people, just make a copy of the pleading that you had filed in the Trial Court. We don't expect it to comply with the Court rule. We realize you're getting jammed here. Just give us whatever you can because the appellant waited 21 days and trial is in two days. We know that it's unfair, that they took that much time to file their emergency application, but we're still going to get it to judges before that trial begins.

So, judges are also aware that the appellee is under a serious time constraint for preparing an answer. And the last polling question is whether you have received timely decisions on emergency applications. I would say, a number of people have said, yes, and some have said, I never filed the emergency application.

But there is that small percent in there that

said, no. And I, in all the years I was a District Commissioner, I was never in a situation where we did not get an order out before the requested emergency deadline.

Any of you found yourselves in that situation?

MR. WALRAD: It's been close. That's all I can say; It's been down to the wire. But I said the panel members do their darndest to get some kind of order out in time. They're all conscious of the deadline. We let them know the deadline and they're very conscientious about getting some form of decision on it. You may not like the decision.

MS. RUECKE: Do you track that, would they bring an emergency order to you, or would that go right to the clerk's office.

MS. OBERG: The way we do it is we prepare our commissioner report so that it goes out so that the Justices are aware of the emergency action in advance of the date. Which is not to say that the Court will elect to issue an order by that date. And, it could be that there were three Justices who would like to stay the trial, but that's not enough votes to stay the trial, and the first conference they can consider it on two days after the trial starts. Or, that's probably a bad example. You should have answered this question.

So, the folks who said, no, are probably thinking of times when they've identified an emergency in the Supreme Court and not received the order until after that deadline passed. Part of that also is because a lot of applications, I think, with deadlines, you identify the deadline for the Court of Appeals. They'll make a ruling and get an order out, and then they have a shorter period of time to come to our Court.

But again, when we receive an emergency application or an application with a deadline, we are getting reports out so that the Justices are aware of the case before the deadline passes.

Those cases are not being lost in the system.

MS. RUECKE: Okay. We're going to have to cut short our questions, but two people brought up questions that I want to ask real quick. Do the Supreme Court Commissioners sometimes include the OTE orders relief that lets the appellant win in lieu of granting the appeal and if so, what can be done to increase the chances of getting that?

MS. OBERG: A peremptory order would go to conference. So those are orders that we could recommend and we do recommend in appropriate cases. But we have two paths that orders travel on, and that

would not go on the OTE. If we're granting grants, MOAA's, that would go directly to conference. I'm not sure if that fully responded to the question.

MR. BRUBAKER: When we were talking about peremptory earlier, one point I should have made, just kind of as a practice point, if you have a split Court of Appeals decision and would be happy with the Supreme Court just reversing for the reasons stated by the dissenting judge in the Court of Appeals, you probably ought to say that. On the other hand if there's something in the dissent you don't like, that's also good information to convey.

But we, yeah, Shari said, if we're going to recommend any kind of peremptory leave that goes straight to the conference.

MS. RUECKE: How often do your recommendations differ from the panel's decisions on applications in criminal cases or civil cases? I don't think we really track that formally.

MS. OBERG: We most commonly would recommend denials and that tends to be what gets entered. But I don't have a figure for, I would say probably about, oh, boy, 15 to 20 percent of the cases that we do get held by a Justice and go to conference.

But the ultimate outcome may well be different

because it only requires one Justice to hold a case. So we just unfortunately, it's an interesting question, but we don't track that data.

MS. RUECKE: Don't you track that data?

MR. WALRAD: I have to say, I try not to. I know some people in the past have kept track of that, and usually there's, we've got a pile of other applications. If I make a mistake, I just move on to the next mistake. That's about it.

MS. RUECKE: Okay. So we're out of time, so, thank you.

This was really, really outstanding.

Thank you.

(Concluded at 5:45 p.m.)

VI. PLENARY – TECH 2016: GADGETS, WIDGETS AND APPS FOR APPELLATE PRACTICE

Plenary Session, Tech 2016: Gadgets, Widgets and Apps for Appellate Practice,

Taken at The Inn at St. John's Conference Center,

44045 Five Mile Road,

Plymouth, Michigan,

Commencing at 9:15 a.m.,

Friday, April 22, 2016,

Before Donna K. Sherman, CSR# 2691.

PANELISTS:

Scott Bassett, Michigan Family Law Appeals

Stuart Friedman, Attorney at Law

Moderator, Barbara Goldman, Barbara H. Goldman, PLLC

Plymouth, Michigan

Friday, April 22, 2016

9:15 a.m.

MS. GOLDMAN: Good morning, again, and thank you for turning out at this hour. Welcome to Gadgets, Widgets and Apps, the latest and greatest in Appellate Technology. Let me reiterate what Mary said about question cards. We do hope to have this as an interactive session. Our panel, as I call them, the cool boys and their cool toys.

MR. BASSETT: One of the things that Stuart said he was going to try to do for this so that I was the uncool P.C. guy and he was the cool Mac guy. You remember John Longton, and what's his name, Justin or Jason something, so I was really hurt by that, because I always pictured myself as being cool, too.

MR. FRIEDMAN: The funny thing, I'm presenting with a P.C. today, and he's got the iPad.

MR. BASSETT: I didn't mean to interrupt.

MS. GOLDMAN: Both of these gentlemen are familiar to many of you. Scott has managed to perfect

the art of practicing law in Michigan while living in Florida. But he does join us in person from time to time. And Stuart, you probably know through Stu's Tech Talk, which is a column that runs frequently in our Appellate Practice Journal.

With that, I will turn the program over to Scott. There's an app for today's session,
Scott and Stuart would like to have some idea of the Mac and Windows users and other characteristics of the audience.

MR. BASSETT: Sure, we're going to take a look at the poll and see all of your votes. Let's take a look here and bring up the results.

This question was, do you review documents and how do you review them?

Interesting, it looks like the vast majority of you are still reviewing primarily on a desktop device. So that's clearly the majority.

One of the things I might want to mention, if you haven't tried Microsoft's new Edge Browser, among the things it allows you to do is write on the screen if you've got a touch screen computer that's got a write mode. So that's interesting. That's almost two-thirds of you still doing that.

But 20 percent, about equally on desktop and

mobile devices. So that's our next category. I'm not sure other or neither, what exactly that means. But maybe we'll get into that. Probably paper. You still do that? It's Earth Day, guys, come on.

All right, composing documents. Let's take a look here. Primarily on a desktop device. I guess maybe document creation is still a desktop computer thing, although we're certainly seeing a greater ability to create documents on mobile devices, laptops or tablets.

All right.

And, to get an idea of what size, firm or organization you're affiliated with. All right. A lot of big firm people here. That's so alien to me. I've never worked in a firm larger than 25 attorneys. But a large percent of you are in 29 to 99 or a hundred plus. But we do have a pretty good representation of small firm and solo practitioner. Actually about half between those two; all right.

And then, how much control do you have over your firm's choice of various devices. Obviously, a lot of you are completely out of control, which is kind of interesting, because if half of you were in solo or small firm practice, I guess you're not deciding what you're using. And I'm a little puzzled by that, but, more than a quarter of you do have the ability to

choose your hardware and file storage. So that's a step in the right direction. All right.

Any comments on the results, Stuart? On those last ones?

This was Stuart's idea, not mine.

Do you want to fill in what you mean by that?

MR. FRIEDMAN: I'm primarily a Mac guy, but so many of my friends and so many people I turn to, it feels like people talk about Windows versus the OSX, the operating system that governs the Macintosh, or Android and IOS, the mobile app or operation as if they are political parties or religions and once you commit to one platform, it is the right platform. The other guy's platform is the wrong platform and I will not vary no matter what.

And I'm submitting the obvious. It's a tool. You should give a presumptive lead to the one you use because you get a little bit more of built-in ecosphere, more of an ability to move ecosphere, but if the platform you have doesn't offer the tools you want, you should move over to the other one for that job.

It's much easier than it used to be. I've been using almost exclusively the Apple operating system since 2007. But you can see a Microsoft Surface

sitting in front of me right now, because I thought that Apple blew it when they released the iPad Pro. But Scott thinks it was the best thing that ever came out. I think that kind of proves there isn't the right answer. There is the answer for you, and all we can do today is really suggest what considerations, what tools you may want to use, but not the gospel according to Stuart and Scott.

MR. BASSETT: I've got a Microsoft Surface Book sitting here that we're showing the slides on. I've got my iPad that we're going to demonstrate some things on. I've got an Android phone in my pocket. But I'll talk about the Sony Digital Paper in just a minute and what that's all about. And you can make them all live and function together.

But one of the things you want to do, especially if you're using an iPad, is make sure you've got a good stylus. There are a lot of different types of styluses out there. What you don't want to do is get one of the styluses that has a soft rubber tip or the metal impregnated cloth tips. It's very hard to be precise with those.

But this particular stylus is only $30, and it does allow much better precision. It's got a big point, but it has a little see-through plastic disk on

the bottom that lets you to actually see what you're writing. And it does feel a lot like writing with a pen on paper. I actually have a different one that I use. And an Apex Stylus. And it's got a very small tip. It's kind of hard to see from here. And it runs by Bluetooth and connects to the iPad that way and gives you a much more precise ability to write.

And I'll talk in a minute about the Microsoft Surface pen that goes with the Surface device right there.

Stuart, do you want to comment on the Surface pen?

MR. FRIEDMAN: Before we do, I wanted to talk about the Apple Pencil, which has come out with the newest generations of iPads, both the iPad Pro and the new 9-inch iPad that just got released last month, and they use Apple's proprietary stylus which like the Microsoft Surface has a very built-in pen-like feature.

If you look at the tip --

MR. BASSETT: Let's find the Apple.

MR. FRIEDMAN: While he's doing that, they write so much more like a writing device you can't believe it. I take my notes in court with it. One of the reasons I went to the convertible so I could use it like a legal pad in a meeting, because when you've got this wall up, even when it's a very small wall between

you and a client, it sends a message that it doesn't when it's laying flat. I notice even in courtrooms, about 40 percent of the courtrooms that sit there and say you need special permission to use technology, that when I'm using it in the traditional mode, writing on it like a legal pad, I'm not called out on it.

Now do the math. That means that 60 percent of people and that includes the ones with the U.S. marshals in their courtrooms often don't see this that way.

But I find it very handy. I also find it very handy when I put my note in the file when a client sees them, it looks like traditional notes and I think in looking at hourly billing and things like that, that that's helpful as well. I know, when I talked to a friend of mine, they said that they liked handwritten documents in the file because they knew that the **attorney actually did it and not the clerk. With my fake British accent. But it absolutely works** wonderfully. It also attaches to a Microsoft Surface which means you don't lose it at easily.

Yeah, like that.

Although, when you put it in your bag if you don't have another case, the wiggling in the bag is going to knock it off. But it's a good way to make sure it

doesn't get lost.

MR. BASSETT: Something that Apple was unable to do with their pencil is that in spite of the function feeling very good, they didn't design it very well. You have to plug it kind of sideways into your iPad to charge it. So they didn't quite get the hang of that.

All right, the Sony Digital Paper. This thing is a fascinating device. It's a 13-inch, basically, it's an e-ink screen. And, it's basically unbreakable.

And, it's very light. And you basically get a full size page view on it. And, it only does one thing, but it does it really well, and that's pdf, which is the document we should all be working with most of the time. Once we created something in Word -- how many use Word Perfect? You can all leave. How many of you have ever heard of Baron Hensley's Microsoft Word lecture for ICLE? If you want to get him mad, and just mention field codes. He'll jump up and down.

It does pdf very well. I have on this every document in all of my open case files are stored on here. If I run out of internal storage, on the back, standard cellphone type micro SD card plugs in. So I've got all the materials, of course, from the

conference. And you just mark, you have a stylus. You mark it up. Then you transfer them back to your computer, and everything is compatible. All your annotations that you've marked up on the documents. So this is what you use to read a lot at a long sitting.

Anybody guess what the problem is with reading on a computer screen or even an iPad or a Microsoft Surface?

What happens to your eyes? They get tired. Because of the backlit screen. That LCD light staring at you. Or LED light, whatever the technology is that's used on your device. This thing uses ambient light in the room. If you're in the dark, you have to have some kind of a lamp or something to shine on it. This is great for reading transcripts. We all read transcripts as appellate attorneys. Sometimes five days, two weeks worth of trial. And you can't do that for more than a couple of hours at a time on a backlit screen. This, you can put in four or five hours before you get much eye strain.

They aren't cheap. I think, when I got this, it was about $1,100 or $1,200, and I got a discount. And now the list price is down to 799 because Sony is trying to make a push. They also use these in Hollywood for the scripts. You can buy one of these, and you're a mild

mannered appellate attorney, and you can pretend you're a Hollywood script writer. Kind of fun.

Pdf is what we should all be working with once we've created the document in Word, not Word Perfect. But if you get paper documents, obviously, you've got to convert them to digital. You want to do that.

Working with crummy scanners is a nightmare. The best desktop scanner is the Fujitsu ScanSnap IX 500. It will wirelessly connect to your phone, to your tablet. You can control it that way. It's duplex scanning. If you get documents, a lot of medical records that come through discovery end up as part of the file once they're admitted into evidence are double-sided. This will scan both sides at one time. It's almost completely jam proof. It's not expensive when you think about what it does. It's $420 typically when you find it online. It comes with the software you need and it's PC and Mac compatible.

Stuart, want to comment on that?

MR. FRIEDMAN: Well, in addition to the software, it's interesting, because Scott and I both arrived at the same scanning choice completely independently and I think that says something. And I I've got a couple on my basement shelf that I've gifted away or we sold way too cheap because they were

mistakes. I now own three of these machines. I don't think I can praise them too highly.

One additional software program I bought was ExactScan for the Mac. It is not as smart as the software that Fujitsu gives you. Fujitsu's brilliance is that it automatically recognizes the documents and knows if it's duplex and will scan duplex. It will know if it's color or black and white. It will automatically trim it, and it makes the most perfect looking scans you can ever imagine. They are as good as something you print on a color laser printer even if you reprint them years later.

It is fast, but it is not the fastest game in town. For that reason, I bought Exact Scan, which gives me a little bit more granular control.

But where it's helpful, when I get a scad of transcripts it's probably twice as fast to scan with that program as the one that Fujitsu gives you. It runs $89, so make the decision.

One of the nice things about the App Store is if you go that way rather than buying them online, and this goes for the Google Play Store, the Apple Store and the Windows store is that the licenses usually include all the devices you own, so I also own a Mac Air 11 R and two Mac desktops. I can use that app on

all three machines on one account.

I carry a portable case that I bought for my ScanSnap. And when I go to client meetings and I do some client meetings in Grand Rapids with respect to appeals. I'm happy to cash your Grand Rapids check as well, and I just take it with me and because it's wireless, I don't even need to cable up. I just use a borrowed conference room.

I use a program for my Windows machine called Connectify that turns it into a mobile hot spot, I fire it up. It's ready to go. I have very few cables and my set up time is like no time at all.

MR. BASSETT: Yeah, there really is only one choice when it comes to desktop-style scanner. One thing you might want to think about if you have a big network scanner such as a photo copier, they cannot scan to search a pdf, unless the underlying OCR layer is there, and that's something that the ScanSnap can be set to do automatically in the settings. And that's what you want to do is to be able to scan that way. So even if you have a big network scanner in some other room, that you use for big jobs, something like this still makes a lot of sense.

MR. FRIEDMAN: Another thing with that, the Scan Snap will automatically attach to your emails,

file, if you want to email it. Save it to the cloud, save it wherever. Because you're exercising control from beginning to the end, fewer mistakes happen.

I had somebody the other day send me his 1099 rather than a document that he intended to send me. It showed up as scan job, one, two, three, four, five, in his Microsoft outlook in Windows and he forwarded to me what he thought was that file. It turned out to be that he forwarded his 1099 to his attorney, so it was no big deal, but you could easily wind up sending something out that you have no business sending out using that process. And that's something I see happen actually more often in the larger firms.

Lifescribe Echo Smart Pen.

No, that was you.

MR. BASSETT: This pen allows you to take notes on a special note pad and then those notes appear on the screen in your portable device, typically an iPad. That's kind of nice if you're at a seminar and you have to have the feel of a pen on paper. You actually get that with that. I like to bypass and go directly with stylus on screen. It works better for me.

MR. FRIEDMAN: It's also helpful for places you're not officially allowed to use computers. You'd

have no problem using this in most courthouses. Obviously, you couldn't take it in the jail or prison for the criminal practitioners.

MR. BASSETT: That's a question to raise. I don't do any federal appellate practice or federal trial Court practice as a family law practitioner, they don't let us in federal court except for on rare occasions. And I've been told that you can't take computers. You can't take tablets in at the certain federal courthouses which is just shocking. I've never had any issues in the Michigan Court of Appeals or the Michigan Supreme Court. The Supreme Court, I never even asked, I just walked in with a laptop or iPad or Sony Digital Paper and nobody seemed to care.

Anybody had issues with any of the Michigan appellate courts in bringing in your technology? Good. I mean that's really good to hear. Our courts tend to be very lawyer-friendly, and that's a good sign.

MR. FRIEDMAN: The good thing I see in federal court, I've heard people say they have no problem bringing in laptops, but you need leave of the court to bring a laptop in but not tablets which is something I don't quite understand because the distinction between the two is absolutely blurry.

MR. BASSETT: This is a nice little device

that actually is the back for a tablet holder, but it's still available on eBay. It's a little thing, Backbone tablet. And it lets you slide a couple fingers to hold it steady. So if you're walking around that's kind of a nice thing.

This is an app called DocReviewPad. Some of you have probably heard of Trial Pad and Transcript Pad, two of the most popular iPad apps. It's expensive for an iPad app. But it's actually kind of cool.

Let me see if I can connect the iPad to the computer here and make the connection, and I will show you the app itself.

All right. Hey, there we go. It will be a little bit of lag as it goes through the multiple wireless connections to get to where we are.

But this is DocReviewPad. And what it lets you do is import documents. And then annotate them, assign issue codes, anything you might want to do. This happens to be one of the sample files that comes from the company that made the software. And I threw in some issue codes. And what you can do is you can go left to right and go through the pages. And you can also go up and down and go through the various documents that you have in your document storage. But you can use a pen if you want

to, to annotate things, so as you go through, you can circle things.

You can highlight if you want to, like that. You can flag issues, so if I wanted this page, of course, it's just a title page, but if I wanted to hit credibility, and then I can export reports and it will show me every page where credibility is a flagged issue.

And, you can do the same thing if the document is confidential. You can tag it as confidential. If it's relevant, to an issue you're working on. So these tag the entire document and these tag the individual pages. So if I was scrolling through here I could add a flag to a page and I can say, okay, need to verify location, whatever the issue was. And you can add that in. That then will appear in the report that you export.

So, that's an interesting app. It's expensive. But it's really good for the kind of review that appellate lawyers have to do. I'll show you the kind of documents that you can bring in. Photographs. You can bring in the proverbial smoking gun. And, of course, just magazine articles, depositions, we've got the Supreme Court rules. All those things can be brought in and go through the pages and highlight as

you think you need to, so, it's an interesting, an interesting app.

There was another one that I wanted to show you called Oral Argument. I think Jim Gross is out here today somewhere. This is a case that he and I argued. I'll never forgive him for beating me in this one, because he doesn't do family law, and I didn't appreciate a rookie coming in and winning an appeal in my area.

This is an interesting app. It lets you kind of put together your argument, and in this case there were three separate issues. So, I was able to do separate pages for the three issues. And then you can create short cuts, like the settlement language. It gives me a pop-up that has the language pulled directly out of the settlement that they placed on the record. That was then translated into a clause in the divorce judgment. And then, that into a Qualified Domestic Relations Order. So I was able to have these pop-ups available if the court were to ask questions. If they had a question about the language, I could quote that. The same thing with cases.

Roth versus Roth was one of the cases. So I had this explanation about what *Roth* stood for. So you've

got that. It's also got a timer. And I had it set at 20 minutes, because when you're arguing against Jim, you want to save at least ten minutes for rebuttal. So, we set it up that way. But it's an interesting app and it's not very expensive. And you don't have to type all this into your iPad. You can create it on your computer and what happens is, you can sync and it goes to all the cases that you have set up on the web interface. And then it syncs to your iPad. That works pretty well.

And then there's one other one that I wanted to show you while I've got the iPad hooked up. Actually, I've got it in a different section. Let me find it. Your Productivity.

This is, I annotated. This is a lot like Good Reader that judges use on their iPads. Liisa, don't look at this. This is from our case that we're arguing in a couple weeks. But it's got some of the same features, like you can highlight sections. This was the trial court's stay motion, which we lost. And I shouldn't say we keep losing these things. People aren't going to refer cases to me.

MR. FRIEDMAN: When I first went to an NACDL and I walked in, the trial lawyer put up all these transcripts, I thought, boy, that's wonderful. If he's

got a transcript, he lost. And in his words, he won the right to appeal.

MR. BASSETT: You can do notes. You can circle things. You can do whatever you want.

One of the things that I think is very cool, you can use the voice recognition to create notes. So, if I wanted to hit this and just grab the microphone, check to see if the motion was filed with proper service.

And, so, it creates this note. So, when you sync this back to your computer, all of this appears in Adobe Acrobat. So it's a really cool app. Good Reader does a lot of the same things that this does, but this is an alternative, and I kind of like the interface a lot better.

All right. That was kind of it with the iPad and the review pad.

Do you want to plug in?

MR. FRIEDMAN: I will in a minute. Because I want to talk about a couple of apps at once. I use Microsoft OneNote. I take my notes in Court. I prepare oral arguments. And when they're scripted and when they've been thought about rather than when my opponent stands up on their feet and gives me an argument I didn't quite expect, I can use Microsoft One Note

to take audible notes in client meetings with consent and later attach bookmarks and tie everything together so I can audio bookmark things from a meeting. OneNote also integrates into the Edge browser that Scott showed you earlier so when you're writing those notes, you're actually writing them into the OneNote web app and you can save them out. So, if you're looking at something on-line, you can integrate all of that in there. It works wonderfully for legal research and I discover that half of my research is starting with Google searches rather than Westlaw searches.

I think probably in another five to ten years, Westlaw may end up getting obsoleted by these tools. But, right now, it's a wonderful place to save my research. And everything integrates nicely.

MR. BASSETT: Have you used the handwriting recognition feature in OneNote?

MR. FRIEDMAN: I've used the handwriting that is similar to Graffiti on the bottom of the screen. If anybody thinks back in the days from the Palm Pilot, you wrote the, like a half upside down L, and you could write things out and they would go into typing. That works.

My handwriting is unfortunately so difficult that

my wife of 30 years has a hard time reading it, let alone a program.

MR. BASSETT: I think that's funny. Let's take a close up. That's ten times better than mine.

MR. FRIEDMAN: Perhaps I need to go try it.

MR. BASSETT: It should work.

MR. FRIEDMAN: As somebody says, his brother is a doctor. I've inherited the same handwriting.

MR. BASSETT: All right.

I'll reshow you, iAnnotate.

Draw Board, this is where we probably should switch the connection here. This is a wonderful program. I love using this. So I'm going to disconnect, and Stuart's going to connect.

There we go.

MR. FRIEDMAN: This is draw board on the screen and it's the Windows equivalent to iAnnotate. If you see the circular device, it's a wheel and you choose the tool that you want and you can mark and highlight just like Scott had showed you. If you use the pen mode, you can write on it in pen mode. You can write on it just like it's text. If you turn around, if you flip the pen upside down, you've got an eraser. So you can erase it right out. And this is what I use when I read a transcript. Quite often I lay down on a

couch and read a transcript and mark it up. And I can save it back, then, to my directory.

Before I jump back there let me show you another tool that I use in the Word document which is not in the Power Point, but called Net Drive. This allows me to virtually attach all my cloud storage. I don't have all those services. I just have them up. I use Dropbox as you see, and I have two terabytes of storage with Dropbox and most tablets don't have two terabytes of storage on them.

So this allows me to connect to it like a virtual drive. It would let me connect to an off drive just as if it was attached to my machine. It connects via data. This device has an LTE modem built in. One other thing, if I ever use the device, I can disconnect it. I do work in Canada fairly regularly, I can shut that connection off and U.S. Customs can't get to all of my files which is rather nice.

Let me show you one other thing before passing it back. When I use to connect to save my data a lot. This program is called Speedify. It bonds the free wifi that's available with my LTE modem and falls back on my modem's data only when it regards the public wifi is too slow or unreliable. It also encrypts everything that goes out over the public wifi so I'm

less subject to interception, which protects privacy and gives me more speed.

MR. BASSETT: One of the things Stuart showed you how you can erase with the back end of the surface pen.

That's something that as nice as it is if you write with the Apple pencil and the way it feels on the iPad pro screen, they didn't build in an eraser.

MR. FRIEDMAN: Wait for version 2.0. $75 to get your eraser.

MR. BASSETT: Let's sync up again

.

You can always count on this not working exactly right all the time.

MR. FRIEDMAN: The distance between the cutting edge and the razor edge is razor thin.

MR. BASSETT: Okay. I think we've got it now.

Okay. We've already talked about Allport. One of the things if you're using an iPad for any kind of productivity work, or editing documents, there used to be a lot of different word processors for the iPad. There's no reason to use anything other than Microsoft Word. Microsoft veteran fans are really upset that the mobile version came out for the iPad and the iPhone

before it came out for the Windows tablets devices. It's excellent. It's got all the essentials that we need. Track changes which is critical to the work we do or sharing drafts around. Can sync with your One Drive cloud storage.

How many of you are using OneDrive to store documents?

That's a surprisingly small number. You get a ton of OneDrive storage free with the Office 365 subscription.

How many of you have an Office 365 subscription?

Well, that's a lot more of you than are using OneDrive. It's a great place to store documents. You get all that free storage. It's available to you wherever you happen to go. And if you have an Office 365 subscription, you get the full set of features.

MR. FRIEDMAN: Before you move on.

Let me pass on a OTIXO. If you've got all your stuff in Dropbox and you want to move to OneDrive, it will do it for you. It's like $10, and it will move all the data from one cloud to another. Run it at night, get up the next morning it's all done. It doesn't have to run through your server. It doesn't have to eat up your bandwidth. It gets done. And I

think we're going to be doing a lot more as we move from one service to another.

MR. BASSETT: I use a service called Cloud HQ. But what it does is it integrates and aggregates all of your various accounts. Got a box account, a Dropbox account, what this does is it allows me, and I think it's $50 for an annual subscription. It allows me to sync my documents, it does it behind the scene automatically. Even though I keep all of my documents in OneDrive, I sync all of my active case files over to Dropbox.

The reason being, that the Sony Digital Paper syncs over wifi every time. I've got another wifi connection live on this, it will reach out and grab all of my current documents that are in Boxnet. Which is a competitor of Dropbox and OneDrive.

I don't need to be limited by choices that individual device makers make as to which services they sync to. I can have accounts on all of them, and then everything syncs across those accounts.

MR. FRIEDMAN: Does that support FTP?

MR. BASSETT: I do not know. Never tried it. I'm not sure.

All right. Word Break. That's what we do for a living. This is a great program. If you ever wanted

to be Ernest Hemingway, this software makes you Ernest Hemingway. Think of short, concise to the point. It's $129 a year. And all you do is when you're done with your documents you click on the tool bar. It's a Word add-in. And you'll see in your Word, and it will say, break, Word Break. It goes through your document and it gives you in Word track changes format all the places where it thinks you can improve the conciseness of your writing. And sometimes it suggests things that will change the meaning, in which case you reject the change. But I end up accepting about three-quarters of the suggested changes that it makes. And it works out really well. One thing that you will never get past Word Break, is the word "that." It hates "that," like wipes them all out of your document. Which is actually usually a good thing. But I highly recommend the software. It's a great way to make your writing better.

There's also an on-line version of this, or a competitor called Hemingway for obvious reasons that will let you upload your documents and do the same thing. I think it's either free or a very minimal cost. This is because it's within Word.

MR. FRIEDMAN: Unfortunately, it does not work for Mac.

MR. BASSETT: It only works for Windows. There are a lot of Microsoft Word add-ins. I've already talked about Microsoft office.

Best authority. This is interesting. How many of you use Microsoft Word's built-in table of authority's function to create your table of authorities?

Okay. Do you really like manually marking your citations? Don't.

There are alternatives. Lexis and Westlaw have alternatives, but I really, it's from a company called Levitt and James. The light version is fine for a solo practitioner like me. It's an annual subscription. And it scans. It's even got standard Blue Book, but it's actually got formats set
up for several states including Michigan's Uniform System of Citation. Once you set up the format you want, the font that you want to use, that sort of thing, it will go through and decide where you want to position your table of authorities.

You click and it builds it and it's there. It requires very, very little editing or modification.

Nobody likes to spend money on software except software that makes your life this much easier. Like Word Break.

You can do it the hard way. I wouldn't do it that

way.

But one feature in Word that is really good is Quick Parts.

How many of you have used Quick Parts in Word? I think Barbara is the one that suggested putting this in the slide. This is where you store all your standards of review and all of the basic arguments that you make in so many cases. This won't mean anything to a lot of you, except in family law, but established custodial environment is, *Blaskowski versus Blaskowski*, 115 Mich. App. 1. I've probably put that in every child custody brief I have every written over 35 years. And that is a Quick Part. So you go up to your list of the Quick Parts and you pick it and, boom, it's right there in your Word document. You need to use it.

Go through a couple of your most recent briefs and open up Word, and go through and copy out your standard of review, and then add them to quick parts. All you do is hit the quick part drop down. And it will be there for future use. A great way to save time.

Obviously, you need to proofread your briefs to make sure that Quick Part actually applies to what you're doing.

This was Stuart's Mac Table of Authorities.

MR. FRIEDMAN: I'm frequently asked how does one do the same thing on a Macintosh. And I gave up. I use a program called parallels that lets me run a full copy of Windows on Mac. And I actually prefer the Levitt and James program. First of all, it's cheaper. But if you want to be, West has gotten the only game I have found in ground, which is Drafting. Westlaw.com. It's a monthly subscription. And you upload your table of authorities, and it's pretty powerful. It's very similar to what Scott said. If you use a font that is not one of the standard fonts, I use a font called Equity, which is the same font they use in law books. Instead of Times New Roman. It knows Michigan citation style. It has a tendency to want to think that every law review, the title of the law review should be all caps. I haven't figured out how to get around that one yet except manually. But it does works.

For the folks who are using Fusion, they've recently announced that they're stopping development on it. So now is probably the time to switch.

MR. BASSETT: Stuart mentioned something that I hesitate to get into because I'm only going to make everybody mad. How many of you have read Andrew Butterick? The Typography for Lawyers book. You will never ever see Times New Roman. It is a horrendous font.

It's difficult to read on screen. It's not -- don't use it. There are so many better alternatives. Even if you have to pay to buy a professional font. He even accepts a couple of free alternatives. One called Charter. If you want to go to typographyforlawyers.com. You can download that font. He has
Cooper Hewitt, a sans serif font that's also a professional quality font. Either one of those would be better than using Times New Roman, or God forbid, Arial, in your briefs.

MR. FRIEDMAN: The only thing he likes almost as little as Times New Roman, which he makes a whole big pitch why we should jettison. Unless, of course, you're in California where it's mandatory.

MR. BASSETT: This is also the Android for Windows tablets. This is an interesting way to run two operating systems.

MR. FRIEDMAN: When I moved from an iPad to a Surface, what I discovered was the one thing that I missed most from my iPad was the applications that I had on the iPad for my New York Times due to the fact that the Kindle application for Windows is still second rate. And Microsoft should be ashamed of itself or Amazon. I decided I had to ride two horses, which lawyers are great at, so I installed a mishmash. DOUS,

the competitor is called blue stacks. What they let you do is run a full-blown version of Android on your Microsoft convertible device. So when you're in tablet mode you can have all the features of the Android operating system. They are not as long right now as Apple when it comes to the tablet applications. They are real close on the phone applications. But too many of them I find for the tablets are oversized versions of the phone apps.

MR. BASSETT: How are we doing on time?

Let's leave time for questions.

I want to mention, Mobile Advantage. Because this is a cool thing. You're not always going to have a full scanner. But you might need to scan things in. There are some great scanning apps for mobile devices, whether it's Android or iPhone, or -- anybody here use a Windows phone? No, I didn't think so. They're like one percent of the market share and falling fast. But there are some great, CamScanner, and Office Lens is actually the one I use because it goes directly into OneDrive. And those work really well. You take a picture of the document. Converts it to pdf. Kind of do, excuse the image, so you get a relatively flat document almost as if you've scanned it on a real scanner. That can be a real lifesaver if you need to

scan in a document.

Actually, my daughter lives in Orlando, but I do her tax return. And of course she neglected to send me her W-2. So she used the scanner to take a picture of it. I was able to print it off and attach it to her tax return.

I do want to mention one thing. This is from Stuart's talk, ChangeDetection.
This is a great thing. Somebody was asking me, how do you keep track of your cases all the time? And this is how you do it.

This is ChangeDetection. And what this does is allow you to set up monitors.
These are my cases. What you do is you just
go to the Court of Appeals docket listings for your case, that particular case, for each individual case. And you copy the URL and plug it in and monitor it. And every day that there's a change in your case, you will get an email, I hesitate to do this because I have no idea what's going to be in here, but you get these things called robot. It tells you
the following page has changed.

So you click on it, and of course, you just scroll to the bottom of the docket listing so you can see the latest thing that has happened. Oh, extension grant.

All right. Why don't we stop there and go to questions.

MR. FRIEDMAN: I was going to say, before he does that, it also works for the Department of Corrections website. So if your client is incarcerated you get an automatic notification when your client has been moved.

MR. BASSETT: I have it set up to pick up changes on the case call page, so as soon as the new month's case call is announced, I get the notification. I can again go to the change and I'll be able to see when the June case call is announced. I'll be able to see that right away.

MS. GOLDMAN: Let me mention, we did assemble some materials that are integrated with the app. Technology changes so fast that they're probably out of date by the time we leave the room, but some of the materials that we've covered today are in there. Some things have been discovered over a month or since we prepared that. Scott and Stuart are, I'm sure, happy to respond to emails or actual old-fashion in-person questions. I can send the Power Point out. If somebody wants it, send me an email.

MS. GOLDMAN: And I will put in a plug. We did a survey of the Court of Appeals and Supreme Court

personnel and got a substantial number of them to respond. That is not integrated with the app this session.

It's the materials for the technology break-out that was yesterday, but it is available.

I'll exercise my privilege to ask the first question, which is if one has the opportunity to buy only one thing, either hardware or software this year, what do you think it should be?

MR. BASSETT: Oh, gosh.

I guess I would say, an Office 365 subscription would be one thing that I would recommend.

MR. FRIEDMAN: That came to mind as well. I didn't like it when I first subscribed to Office 365 because it was another monthly bill, but it keeps you current. It gives you five devices that can have it on and they don't count the tablets in that queue. So, it allows you to work on the go but limiting me to one purchase in a year, my wife must have put you up to that one.

MR. BASSETT: If we're going to do hardware. I don't know what I'd recommend. Probably the Fujitsu scanner. There's no bigger bang for the buck from being able to convert paper quickly. I always tell trial attorneys, can you scan it and send it to me or

upload it to me? But, now a lot of trial attorneys aren't equipped to do that, at least not the solo trial attorneys that I work with.

MR. FRIEDMAN: In our break-out on motions yesterday, the Court of Appeals judge emphasized how much he appreciated when the transcripts were available in pdf format because the attorney and judges not assigned to write the opinion, don't have the record until the very end.

MS. GOLDMAN: The first question is, do you have a preference between OneNote and Evernote and why?

MR. FRIEDMAN: I am tilting towards OneNote. I actually have both. But it's the stylus that has moved me in that direction. I like the filing system better on Evernote. And, programs like the Cloud HQ that Scott mentioned do have a conversion aspect as I was reading in here to move from one to the other.

I think it's really close, and I think Evernote is coming back. They just continue the separate module, and everybody thinks it's being integrated directly in, so watch it. It's going to catch up.

MR. BASSETT: If you're living in the Microsoft universe and you live in Outlook for your e-mail and you use Word all the time, OneNote probably

makes a lot of sense. And it is very well integrated. Like magic, double click on the eraser, and what it will do, it should open Windows. That's what's going on. But, on the Surface pen, it's not doing it now.

Oh, yeah, what I was doing, it had me take notes on the PowerPoint.

So it did open OneNote, but just double click on the pen.

MR. FRIEDMAN: A lot of what Evernote does, it launched a lot of models and it started discontinuing without notice when they didn't get a lot of traction. OneNote doesn't do quite as much at any given moment but it does it well. Evernote seems to be experimenting with a lot of different things and they're subject to quick take-downs.

MS. GOLDMAN: The other question we had is regarding the iPad devices and apps, can you use them on the original iPad?

MR. BASSETT: You know, as you go back in time with the iPads, they become unable.
Can the iPad 2 run IOS 9? These are usually software things? But the pencil will only work in the iPad Pro models. The 9.7-inch that just came out, and the 13-inch one that came out a few months ago. So, if you want to use a stylus, use that nice pencil, the

iPad Pro2 version. The big one and the small one.

MR. FRIEDMAN: The iPad2 is a minimum standard for iPad nine which is the latest operating system. I believe the original iPad stopped working at ISO eight about two years ago.

MR. BASSETT: The iPads are so well-designed and they last so long, that people don't upgrade on a regular basis. Realistically, unless there's something you want to do, like the Pro and the pencil, an iPad, two, three, mine's a fourth generation, which is like four generations old now.

This is before the iPad Air, but it still runs everything that I need to run. So you can do most of the things you can do on an older iPad.

MS. GOLDMAN: I think that we've used up our time. The panelists will be around if you want to waylay them later.

Thank you very much.

(Applause)

(Concluded at 10:15 a.m.)

VII. PLENARY – THE MICHIGAN SUPREME COURT'S VIEW ON JUDGING AND ADVOCACY

Plenary Session: The Michigan Supreme Court's View on Judging and Advocacy

Taken at The Inn at St. John's Conference Center,

44045 Five Mile Road

Plymouth, Michigan

Commencing at 12:45 p.m.

Friday, April 22, 2016

Before Donna K. Sherman, CSR# 2691

PANELISTS:

Chief Justice Robert Young, Jr.

Justice Stephen Markman

Justice Brian Zahra

Justice Bridget McCormack

Justice David Viviano

Justice Joan L. Larsen

Moderator, Mary Massaron, Plunkett Cooney

Plymouth, Michigan

Friday, April 22, 2016

12:45 p.m.

MS. MASSARON: Please welcome the Supreme Court Justices to our plenary session.

All of the Justices have been in, I should say that Justice Bernstein was here for most of the conference but had travel plans so he is unable to join us. So he sends his regrets. You know all the Justices, and I'm not going to spend our time going through each of their biographies which are lengthy and distinguished in every possible way.

I'm just going to move right into it. And John Bursch and Matt Nelson are going to be picking up questions from the audience as well, so if you have questions that you would like to ask, put them down, write them on a card and hold up your hand and one of these gentlemen will pick them up.

What I'd like to start with, we talked a little bit in one of the breakout sessions about the application for leave process. And I'm wondering if you could give us some tips on both sides. If you are trying to get the Court interested in your case, what is the best thing you can do? What might you want to think about, or what are people doing wrong if you see some common errors? And if you're trying to defeat an application, how is the best, what is the best thing you can do along those lines? And maybe we'll start with the Chief.

CHIEF JUSTICE YOUNG: Oh, this is new. I was going to be quiet.

I think if you are filing an appeal, you certainly want to have a very good case for jurisprudential significance. Why this case is one that should arrest the attention of this Court. And then whatever else that you've got to throw into the mix. But that would be, if you don't have a strong case of

jurisprudential significance, you've got to really struggle hard to figure out why we should take the case, if not take it, why we should spend some time.

And sometimes, maybe, instead of asking for the whole loaf, maybe you should ask for a more narrow kind of relief, like a remand or striking a portion of the offending language that isn't controlling in the Court of Appeals' opinion. Things of that sort are easier for the Court to do, than necessarily grant.

Of course, if you are trying to defeat the application, all you're trying to manage, this is nothing more than a run-of-the-mill application, and the law is clear. And why are you spending your time with that?

Other thoughts to add, modify?

This is astounding.

JUSTICE ZAHRA: The other side of the coin to what Bob just said about trying to make it easy for us to give you relief, if you want to defeat that, is to point out to us that our function is not an error-correcting function. Oftentimes that is what we are debating in our conference. Is there an error that should be corrected? But wait a minute, we are not an error correcting court. This isn't our function.

If someone is asking for some error-correcting type relief, point out for us that that's really not our

job.

MS. MASSARON: Justice Markman?

JUSTICE MARKMAN: Well, I use a slightly different word than jurisprudentially significant. I don't think it's unhelpful to use that term, but to me what's really most significant to communicate to the Court is that there's some issue that implicates the equal rule of law that really ought to be reviewed.

That might be, for example, a disparity between the language in the suit and the -- statute and the case law of our jurisdiction. That might be a very outlier type of decision. It may be that there are conflicts between some of the trial courts of the state, or it might be that we have in a particular area, kind of what's akin to what we've called, a Chinese menu, in which the plaintiff class can look at these dozen cases, and the defendant class can look at that line of cases.

In each of these areas, it seems to me, you can make a good argument that the rule of law is not being furthered as much as it possibly can and the Court, at least, has the obligation to take a close look at the circumstances of that case.

Certainly, if you're talking about precedents, you're then going to have to hurdle the Robinson test and apply the Robinson standards. But to me, at least, while

everybody's got their own set of circumstances that kind of amount to jurisprudential significance and I don't think many of us use them mechanically, but we use them as kind of a guidance in focusing on the kind of cases that the highest Court of our state ought to be looking at.

To me it's really a slightly broader definition of jurisprudential significance that focuses on whether or not in some significant way the equal rule of law is not being furthered by the state of affairs that we have in the state at that time.

MS. MASSARON: Thank you.

I don't want to cut off anyone else who wants to speak.

CHIEF JUSTICE YOUNG: We can move on.

MS. MASSARON: One of the things that has come up, and I think would be worth talking about, is the timing of the decision-making in applications for leave which is, I would have to say, much more consistently fairly quickly than it certainly was when I started practicing.

And, related to the timing of the decisions on leave apps are two more specific questions that I think are worth talking about because I think they may reflect changes which relate to the more consistent decision-

making timing.

One is the deferred grant conference. Years ago, we had a discussion from the Supreme Court about their internal process and, at that time the Court held, I think it was quarterly, or three times a year, what they called deferred grant conferences. It's my sense that those might not be going on, but I wonder if somebody would like to talk about that as maybe a change in how you're handling things that allows for a speedier decision.

Or maybe I'm wrong about that. But if you can enlighten us, I think it would be helpful.

CHIEF JUSTICE YOUNG: Well, we have not had deferred grant conferences. This is the process when I began on the Court a hundred years ago, we had an initial vote favoring a grant and then they were collected and brought back periodically, quarterly at some point for us to reconsider whether we really wanted to grant or not. Some cases seemed so obvious that there was no need to bring a deferred grant and they just went immediately to order.

And in more recent years, one, the number of applications that are filed is considerably down, and we haven't found it particularly useful to have multiple turns at the same case, but we recently just had a

discussion about maybe we should slow down and ponder these things, again. So, we might actually reintroduce them just to slow down the decision-making process and make sure that when we grant, this is something that is worthy of the Court's attention.

MS. MASSARON: Thank you, because I think it's helpful because we're all trying to advise our clients, it's seen that the application gets filed, the response gets filed, maybe a reply gets filed and then there's sort of this time, and we know that the Commissioners are looking at it, the Court's considering it, but what happens in that time is a little bit of a mystery and if you can give clients some general sense of the options of what might be happening even though they don't know what's happening with their specific case, it gives them some comfort, and I think it's helpful.

Another aspect that goes to the decision-making at the leave grant stage has to do with abeyances. And I think it would be helpful for people to know the kinds of cases that might be held in abeyance and how that works. I know that there may have been some discussion of things with the Commissioners and with the Clerks, but I know it's also, that's a decision that the Justices make. So somebody might like to touch on that.

JUSTICE VIVIANO: Okay, with the abeyances, I

think it's pretty straightforward. We will look for cases, if there's a case that we're working on, we're going to decide an issue, and that may impact a legal issue that comes up in later or even earlier cases, obviously we want to hold off in deciding that application. We'll hold that case in abeyance either formally, which means sometimes you know about it and sometimes you don't. We call it administrative abeyance, right?

MS. MASSARON: So if there's a long delay when we are advising our clients, and you tell me if this isn't a correct summary, it might be because the Court is really interested, and it might be a case that it's being held in abeyance that something that the Supreme Court is deciding or something that this Court is considering doing on another case.

JUSTICE VIVIANO: I think that's right. There are different factors that come into play. We don't really start looking at the case until we get our report from the Commissioner's office, as you know. And those come after a longer or shorter period, depending on how many issues are in the case and how big the record is and so forth.

And then as we go through our process, the reason we let the Chief answer your question from a

historical perspective, a lot of us are relatively new, but I do think it's been pretty efficient. But cases that take a longer time are, of course, some of the cases that we've dug into and we're exchanging memos on and we're passing from one conference to the next to continue a longer discussion.

I think on the other side, my perception is, again, as a relative newcomer that we do more movement as when we're talking about cases and that's a way for us getting in a little further without getting in too far. As a result we're having more denials after the MOAA stage but we're choosing to use that process in helping us answer that question.

MS. MASSARON: I'm glad you mentioned MOAA's, and I should say, that for those of you who may not know what that means, a mini-oral -- tell me the correct words for that.

CHIEF JUSTICE YOUNG: Mini-oral argument on the application.

MS. MASSARON: And, that is the process that's evolved a little bit, I think over time. I think it would be helpful for people to understand, we can see that there are probably relatively more MOAA's than there were when that process began. But some background about when the Court thinks that's appropriate and whether we

should suggest it or not, would be helpful.

So perhaps one of you might like to address that?

JUSTICE MCCORMACK: All right. All right, yeah, since I've been on the Court, we have used the MOAA's in cases where it's hard to figure out at the stage where we're deciding whether to grant or not, if there is something that this Court should be, could be, or needs to be doing in the mix of questions that are presented in the application.

It provides us an opportunity to get, as David said, help from you all in figuring out, is this something that this Court should be dipping its toes into or should we maybe leave it alone. Sometimes that's a better answer. And it gives us the flexibility to do that and to take a deeper dive into a set of issues that we might be struggling with.

CHIEF JUSTICE YOUNG: From a historical perspective, MOAA's were really a tool that the Court came up with. Our peremptory rules required five votes to issue a peremptory order. And there was a period of time when, as hard as it is to believe now, the Court of Appeals wasn't quite as obedient as it should have been to the law, and sometimes where getting decisions that were, that we thought were an open defiance of cases that

we had issued, and yet when those cases came up, we couldn't get five votes to peremptorily reverse in light of the decision that was being defied.

Over time that became less and less of a concern and has evolved into an opportunity, to take, as Justice McCormack said, a slightly more in-depth look, rather than saying denied when we can't figure it out. And, also, typically involved statutory construction, a less complex question that we think we can figure out with a little help of the parties, particularly if it's a statutory construction question. So that has evolved over time and we're still sort of innovating and feeling it out to see how this should work in our system.

JUSTICE VIVIANO: And I don't think we would be opposed to being invited to grant a MOAA in a given case if you recognize that maybe the case involves a straightforward issue of statutory interpretation that might create a path of less resistance. So from my perspective, tactically, it might not be a bad idea.

MS. MASSARON: I wanted to follow-up on a topic that we talked about yesterday, that I know Justice McCormack has participated in a panel on recently, that is the whole question of public policy, which can be a loaded phrase and has a number of different understandings. And I wonder if you could talk about

your taxonomy of policy and the definition to start our discussion about that.

JUSTICE MCCORMACK: Yes, I'm finding myself too distracted by Prince's death. And I can't believe we're not talking about that.

Is anybody else, like, I don't understand. I changed our whole entire lunch conversation, thank you table whatever you are. I said --

JUSTICE LARSEN: Can I climb in? I was on WJR, and Mary Barra came on after me. And they asked her how she was feeling about the death of Prince. And then Martha Stewart came on and they asked her. I wanted to call back and say, wait, that was the sound track of my childhood, too, and you didn't ask me.

So, now I got to say it and I feel better.

JUSTICE MCCORMACK: I think we might be the only people in the whole country not talking about Prince.

CHIEF JUSTICE YOUNG: Now you see what my life is like.

JUSTICE MCCORMACK: But back to public policy, okay, I actually, a little background music would help.

Yeah, I have to say, I gave a lot more thought to this topic when Mary invited me to be a part of a panel and I knew there were going to be a lot of

thoughtful people there.

Well, no, I'm still prepared, I think. But I have to think a little bit about what to say about it to lawyers. Because I do think it's a bit of a loaded term, public policy. And that's because I think it means a lot of different things to a lot of different people and people have strong feelings about some of those. So my first recommendation to lawyers is, try not to use the term, public policy, and try instead to think about what it is you're trying to communicate.

Because I think what we mean by public policy is shared values. And sometimes there's terrain within shared values that courts are very comfortable talking about when it's the shared value of our own branch. And by that I mean judicial restraint, stare decisis, administratability of a rule, predictability, the shared values of our own branch is an area we're very comfortable talking about and worrying about. And if you talk about those values in those terms, you're going to have our attention.

There's also shared values about the other branches of government and what they may have meant in legislation. For example, and that makes us a lot more uncomfortable because we like to think of ourselves as experts at not reading those tea leaves because it leaves

so much room for us to impose our own preferences for what those shared values might have been. And we like to pride ourselves with not making those moves. And sometimes I think we mean by public policy sort of shared values, the normative shared Values in a constitutional democracy.

And that's like the last category on stare decisis, really. I might feel like my privacy is more Important than your security, or that my finality is more important than your fairness and that's where this gets really complicated. Having said that, there are places where we can't avoid categories two and three, as I've just identified them.

For example, brand new statutes. Sometimes we have to sort out what was meant. We have tools for doing that and we try to be as respectful as we can to the other branch. Brand new applications of the constitution in new ways. Then we have to sort of tiptoe into it. It's another area.

And then, new applications of the common law. And apart from those, we like to stay away from my categories two and three, and category one we're really comfortable in. But when we have to go to two and three, I think it's important that we're careful and deliberate and humble and responsible. Because, we're trying our

best to interpret the values of somebody other than ourselves. And that's the sticky wicket that I think.

CHIEF JUSTICE YOUNG: You had your one denial. This is the Ann Arbor axis that has proliferated.

I think those who are really, it was a good taxonomy. The thing I want to suggest to you as advocates, I think the scariest place I inhabit is the common law. And that is an area where policy driven values matter most. And it is the area that I am more disappointed in the advocacy. I usually have somebody coming before us and saying, hey, we need this extension of the common law, or we need this change in the common law, and somebody says, no, don't do it, and there is absolutely no one addressing the underlying policy implications, where they conflict, how they can be reconciled, and it is astounding to me that advocates come and ask us to make changes and have no prescription for what that change might do and how its unintended effects might be addressed. They don't even acknowledge unintended effects.

So, if you are coming and asking in a proper zone where we actually have the constitutional authority to make policy, you ought to be addressing all of those. I mean, when you do things in the legislature, everybody comes and argues about their self-interests and their

view of the law, or what the law should be. But when we have two litigants there in front of us trying to persuade us to do one or another, all of those other interests in the society are largely absent. And so I expect, correspondingly, the advocates to be doing a much more significant job of trying to tease out what those policy implications are.

MS. MASSARON: Other comments and thoughts about this?

I think it's a term. And we started this way, and I think it's really helpful. Judge Ruggero, I may be mispronouncing his name, a great, great Judge, who has written some wonderful things about opinion writing for judges but also about appellate advocacy for lawyers, says that there are no cases in which policy interests aren't at some level implicated. And they may be the stability policy interests or the stare decisis or the workability of the rule. Or they may be these broader policy interests in common law, and yet rarely in a meeting like this do we talk about it.

So we tried a little bit to talk about it yesterday, and I'm trying to follow-up a little bit today to shed some light.

CHIEF JUSTICE YOUNG: The difficulty, of course, is who gets to make the policy. And I think

that's what Justice McCormack's taxonomy was struggling to define. Unquestionably, the legislature is making policy choices. The question is whether I as a judge have a right to impose a different one, interpretation of the statute. That's one, I mean it used to be that people could come to the Court and say, that's a bad policy, Judge. You ought to do something else. And that's not consistent with my understanding of what my constitutional role is in this Republic.

So, those are the points of friction when you're talking about policy. First of all, you've got to identify who gets to make that policy, and then everything else kind of evolves from it. Okay.

MS. MASSARON: I'd like to go back, now, to the briefing process and talk a little bit about the briefs, and I know that we have heard in various quarters that the briefs that you get are not always as helpful as the Court might like. And I'm wondering if you can share some thoughts, either tips in general about briefing or maybe, and we could have a number of you speak, tips that are specific about the statement of facts, for example. What makes a statement of fact really unuseful or useful? Or the point headings. Do those help you? Are they neutral? Do they take away from the brief?

The argument section, is there, are there

things
that we could be adding in terms of how we develop an argument or not?

And I'm looking for sort of specific pointers that we could walk away and say, okay, next time I do my brief, I'm gonna look at some of these specific pointers and think about them in discrete terms.

So, maybe we could have everybody weigh in with one or two of those. And do you want to start, Justice Viviano? And go down the line.

JUSTICE VIVIANO: You know, as we have this conversation, I think the same sort of answers to every question is, which is, when you're an advocate, you have to remember your audience. And if you get to the Supreme Court, we're asking a different question pretty much than anyone has asked so far about the case. And so, it's almost like when I was a trial judge and the lawyer, every time they are in front of the jury, in jury selection you're advocating your client's position in different ways. Now, at appellate advocacy, every chance you have to interact with us either in writing or orally, you need to be sounding the same themes, helping us to do our jobs. Obviously, we'd like you to get to the point in your brief. As I tell my clerk, sometimes, I don't want to read 25 pages before I figure out what the issue

is. You know, statement of facts, we want the facts that are pertinent to the issue. We don't need all the facts. We don't need a hundred years' worth of history of your client's life and where they were born and all these kinds of things. We're working pretty hard. We have a pretty engaged group here, and we're really interested in digging into the heart of the legal matter.

And it's interesting to me, that we can get to the heart of the matter at different points of the process you might get to it in your brief. We might get to it at oral argument, or we might figure it out after oral argument when we're in conference discussing the case.

But, obviously, the goal of your brief, it's to try to get to the heart of the matter. What I think is interesting about oral advocacy is about how often lawyers when they get to that point in this process will finally have their vision of the case. So they'll go to our Court and they'll argue the case in a way that is different than how they argued it in the brief.

That's probably unavoidable and these cases have lives of their own, and, but, obviously, get to the point, do the best you can, in advocating and telling us why this case should be heard by this bench. Not by the Court of Appeals. Not by a different Court, but by

us.

JUSTICE LARSEN: I don't disagree with anything Justice Viviano just said. It is really important to have a theory of your case that extends beyond: my client should win. And we hear that a fair amount on our bench when we ask, what rule of law should we announce? Or, how would you have us write an opinion in your client's favor? If I want to rule for you, what's the road map? And a lot of times, clients, or counsel says, I don't care as long as my client wins.

And I think, well, that didn't really help me. And you need to get at least four us to agree with you, so you should try and help us. So I think when you're writing a brief, it would be great if every single, you know, if you have two issues, three issues, you tell us, obviously, my client wins because, this articulation of the rule of law supports my client.

Boy, would that be helpful.

CHIEF JUSTICE YOUNG: I think, most of us struggle with the core advocacy skill of telling a coherent, persuasive story. Theme. You called it a theme. I teach a pretrial advocacy class and was trying to formulate a lecture on oral advocacy. And I was dragged the weekend before to see Sleeping Beauty, the ballet. I don't like ballet but my wife does.

And it struck me that, without a single word being uttered, they told a story about Sleeping Beauty and a lot of other children's stories during the course of the ballet.

And I had this epiphany. And I told my class I'd gone to the ballet. And they told a story without words and everybody understood what was going on.

And I said, the problem is, too few briefs can accomplish that same thing.

JUSTICE LARSEN: And, so, now we will no longer have briefing, just interpretive dance.

CHIEF JUSTICE YOUNG: I hate ballet. I really, I think if you thought about your case as a story that has a coherent theme -- coherent theme that I'm supposed to understand and take away everything else that makes it hard for me to be focused on your theme.

I ought to glide, be pulled through your brief without turbulence. If it isn't that good, you need to be editing it.

And having the clear moral of the story, what the law should be and how it deviates from what it is now is the essence of what you should be doing in your written briefs.

JUSTICE MCCORMACK: I don't want to get repetitive, and I don't disagree with anything that's

been said. But just to summarize it. Judges are people, too. Most of us are, and hash tag, oh, no, let's go. I'll explain the cultural references to him after the meeting. We read so many of them, that you would not believe how much we appreciate that brief that really communicates really clearly, even if we ended up disagreeing with it. I like you more just for giving me something that's nice to read. So you want that advantage, probably, right?

But two specific things. I can't stand when people start sentences with, however. And there's nothing I like better than, the only thing I like better than a two-word sentence is a one-word sentence.

JUSTICE ZAHRA: I like a good introduction. A page or two. Remember that when it gets to us, whether it's a MOAA or a full grant, we're pretty familiar with the case, but you need to boot start me to get me thinking about it again. So you filed your application. All of us have read the Commissioner's report. We've considered it in conference. We've decided to go forward, either with the MOAA or a grant. At this point, we have a good idea what the case is about, but we're preparing for argument and there is a lot going on. So picking up a brief and reading a concise and clear introduction is incredibly helpful.

As for the fact section, righteous indignation always turns me off. Passionate jury arguments, might have been great at trial, and I can read your closing argument, but I don't want it in a fact section.

Accurate citation to the record is required but what's better is if you can attach to the brief or put in your appendix the really important portion of the transcript you're relying on. Because getting the records is not always an easy thing when there are seven people that want to look at that record. So if you can provide it to all of us, that is incredibly helpful.

And the final thing I'd say is, write it like you're explaining it to a first-year lawyer. Not that we're at that level but we're going from subject to subject to subject. We don't have the expertise you may have in a given area. You are writing for a jack-of-all-trades at the Supreme Court.

So there are many things, many terms of art that are in the employment area, the family law area, whatever it is, where you might have a better understanding of these things. You assume we know it. I would suggest you should explain it like you're trying to give it to a first-year lawyer.

JUSTICE MARKMAN: My colleagues have left very little for me, but I will take a quick stab at it.

Number one, what defines our Court, in particular compared to the Court of Appeals is our nearly plenary discretionary jurisdiction. So that, requires in order to capture our attention, number one, you have to explain to us why among the 200 or so cases that we get each month we ought to focus greater attention upon your case, and, number two, you need to recognize if we focus on your case, we're doing so in order to try to develop the law and you need to help us fashion some rule in that process.

Number three, you've got to distinguish between the significant and the insignificant. As my colleague has indicated, you're trying to tell a story. Another metaphor, you're trying to paint a picture, and you can't do either if you don't distinguish between the significant and the insignificant.

One way in which that's breached is often by parties raising 11 or 12 arguments of increasingly little significance as opposed to focusing on the two or three principal arguments that they have.

Number four, absolutely avoid caricaturing your opponent. It's unlikely we would be granting on cases in which one side is making frivolous arguments. You ought to operate on the assumption that both sides are making serious arguments. And you impress the Court, I

believe when you respect your opposition's argument.

Finally, number five, make sure that you have a copier that distinguishes between light and darkness.

MS. MASSARON: Thank you. That really has been a helpful presentation.

Do we have questions from the audience?

MR. BURSCH: Question, first question for Justice Markman. We know your proclivity for using dictionaries in plain language cases. Are there some dictionaries that are better to use than others?

A lot of us look at Merriam-Webster online. Where should we be looking and not looking.

JUSTICE MARKMAN: I think when you're looking at terms of art, you want to look at specialized dictionaries and often Black's Dictionary is the proper dictionary to look at. When you're looking at phrases that are not terms of art, I think our default dictionary of the day is Webster's New Collegiate Dictionary, if I'm not incorrect about that.

However, I think any respectable dictionary could be used and the definitions won't be too terribly disparate from one another. The only caveat, of course, is when you're attempting, for example, to share with us what the founders of the federal Constitution intended, you would be better off looking to a more contemporaneous

dictionary of that time period rather than a dictionary from 2015. And conversely, when you're attempting to understand what the legislature intended by its enactment, you would be better off not looking at Noah Webster's dictionary of 1828.

I also note the growth of word usage compilations on the Internet, just broach it, is the existence of cites on the internet that have increasingly captured the uses of terms. What is the scientific name for those?

JUSTICE LARSEN: Corpus linguistics.

JUSTICE MARKMAN: That's an additional resource I want to suggest. Our court hasn't yet relied on these. There are strengths and weaknesses in the corpus approach but it's an alternative to dictionaries in communicating how ordinary persons under ordinary circumstances use words that may be in dispute and in controversy. I don't know what the future is of the corpus approach, but I do know that there's a little bit more propulsion behind this approach than there was a few years ago.

I'm interested in looking to see how effective the corpus approach might be compared to traditional dictionary approaches.

The problem with dictionary approaches is that they don't always order words in any particular sequence

to communicate what the priority definition might be, and they really don't supply the kind of context, again, in which ordinary people in ordinary conversation use those terms.

So, there may be some interest and merit in looking beyond the dictionary to the increasing number of corpuses of various types that are collected on the internet.

MS. MASSARON: I don't want to cut off discussion if anybody else wants to lay up on that.

MR. BURSCH: We had a follow-up for Justice Larsen. Perhaps there might be an anecdote she might be interested in sharing.

JUSTICE LARSEN: I probably won't tell this story as well as I may have once. But when I was clerking for Justice Scalia, he had, he has a very famous opinion in a case called MCI versus A T & T, which was decided in 1993. Or maybe the spring of '94--.

CHIEF JUSTICE YOUNG: Whatever.

JUSTICE LARSEN: Just trying to be accurate, citing the record. In which he has a very strong opinion about dictionaries. And Justice Scalia does not believe that the Third Edition of Webster's is really a dictionary at all.

There are various reasons for that. It's

actually Webster's Third. When it came into the, into existence it was quite a controversy because it's not a top down dictionary. It's a bottom up dictionary. If you're interested in dictionaries, there's a lot of literature written about whether Webster's Third is actually a dictionary.

Justice Scalia is very much of the view that it is not a dictionary and he has an opinion of the Court in MCI versus A T & T.

When I came to clerk for him it was the following year, and I did read all the opinions of the prior term. But, you know, it was kind of a blur. So I turned in my first opinion for him and I pretty much committed treason because I gave him a draft opinion that contained a cite to Webster's Third.

And, he took one look at it, actually, the way Justice Scalia prepared his opinions, when you brought him a draft, you also had to bring him a dictionary cart because we used books. It was a long time ago. We used books. And you brought in a dictionary cart and every single thing that was cited in the opinion had to be in the cart, in order. And you sat next to him on the couch. And he read the opinion. And you gave him the book, and he read the whole case, and he would say yes, or no, or this is terrible, or get me something better,

can't you read, didn't you go to law school or whatever.

So when we got to the part where he saw the cite to Webster's Third, his response was, didn't you read the opinions of this Court before you came here? And I said, well, yes, Justice Scalia, I knew that you had very strong opinions about dictionaries. I just couldn't really remember which one you didn't like.

So, I made sure to only work from the dictionary that you keep on the dictionary stand in your outer office.

And at this point he couldn't believe that that blasphemous book might be residing in his outer office. I could tell he didn't believe me.

He got up and he walked out to his outer chambers and turns out, turns the book over. It's a huge, leather-bound volume. And he turns it over and turns out, I was right. It was Webster's Third.

And so, for a moment, I felt quite victorious. Then he looked at me and he said, this, my dear, is but a trap laid for the unwary.

So that's my experience with dictionaries. I don't know that I would toss out an opinion that cited Webster's Third. But I would say, I have sensitivity around Webster's Third.

MS. MASSARON: Any other comments on

dictionaries?

Do you have other questions?

MR. BURSCH: A simple yes-no. Is the Court using more per curiam opinions rather than preemptory orders these days?

CHIEF JUSTICE YOUNG: Yes.

MR. BURSCH: What is your perspective on advocates taking part in them?

CHIEF JUSTICE YOUNG: Good. If they don't, they are
probably not in a moot before they come to see you.

JUSTICE LARSEN: Moot early but not often.

MR. BURSCH: Speed round, what are the funniest or worst or more memorable quotes from Counsel during your time on the bench?

MS. MASSARON: But don't use names.

JUSTICE ZAHRA: The law according to Hal.

JUSTICE MARKMAN: The best Counsel says.

JUSTICE VIVIANO:

The Chief used the dead mouse theory of advocacy
in the last session.

CHIEF JUSTICE YOUNG: Moving on.

MS. MASSARON: Okay, one thing that we've talked about in different ways in different programs over

the years has to do with persuasive authority. We know the Supreme Court, if you've taken the case, it probably isn't controlling law on point or you wouldn't have taken it. And, so, we may be citing and are citing the opinions of the Court that we're relying on, but we may also often be looking at other kinds of authority.

And I think it would be really helpful to talk about some of the different kinds of authority that are out there. We've had a discussion about Webster's Third. We're all a little more sensitive to that I think, now. But there are other documents out there. One that comes to mind that's been on my mind recently, because I'm a member of the American Law Institute, is the Restatement and the various restatements all of, which differ.

I wonder if any of you might like to comment on the use of the Restatement and considerations that go into whether or not that might in a particular case be a strong or not so strong authority?

JUSTICE VIVIANO: For me, I'm interested in seeing everything. If there's federal authority on point. If there's authority from other states that addressed a similarly difficult issue. Of course, the treatises. The Restatement which mostly just gathers up all these cases in one place. And then tries to establish what may be the majority or minority rule is.

I like to see what other people that have had to approach the same difficult problem, what result they've come to in the past. It doesn't mean that We're going to come to the same result but it's certainly helpful to me to understand the process. We want to see our authority first from our Court and our Court of Appeals. But I'm always open to looking elsewhere, in any recognized legal authority. Am. Jur., ALR, any of those.

JUSTICE LARSEN: I agree. I think, Obviously, from a sovereign state until Michigan can have its own law and it can be different than the law of all the other 50 states and that is our prerogative. And if there's good reason to do that because that's kind of a deal about being a sovereign state.

But if we are the only state that is doing something and 49 other states and Guam and the Virgin Islands do it to the other way, I am interested in knowing that. And I am interested in knowing why it is. Is there a good reason for us to be doing the thing that we're doing?

Because, you know, if there isn't, then maybe we should figure out if they have a good reason. So I am interested in what other states are doing. You've got to be a little careful when it comes to cases involving statutes, though. So a lot of times we'll get briefs

that tell us that, you know, courts in other states have reached this result, but, of course, they're interpreting a statute and the statute doesn't say what our statute says. So that's not very helpful. Now, maybe it is because maybe their statutes say exactly the same words or something like that, but you know, it's probably more helpful in things like the common law.

JUSTICE MCCORMACK: The more the better. When we're trying to figure out what the right answer is, I feel more confident about it.

JUSTICE VIVIANO: Guam and the Virgin Islands. Don't tell my colleagues, but I like law review articles that the dreaded law professors write.

If they're really focused on the same issue and somebody's spent a long time thinking about it surveying the law and has something thoughtful to say.

JUSTICE ZAHRA: I think it's important to cite them. The Restatement may be the answer, but you ought not stop there. If it's a statutory question, you've got to analyze the statute and tell us whether the Restatement is consistent or supportive of your position. But to throw out the Restatement as being dispositive is a dangerous approach.

CHIEF JUSTICE YOUNG: Let me, I think the idea of being omnivorous and taking all data in has a certain

facial appeal, but in my view, it depends on who. And as you suggested, when a statutory interpretation question is before us, it really doesn't matter much unless it's a uniform statute which is when replicated across the country and other courts are grappling with how to interpret the words before us.

But again, if there's just a similar statute replicated in multiple states, I don't care how Minnesota construes its analogous statute unless it's absolutely the same as ours.

To me it depends on what I'm trying to do.

If it's a common law question and since the advocates don't help me very much on that, I'm looking at as much as I can to figure out what the rules ought to be in that area. So, again, I think you have to figure out what the Court's obligation is in a particular case to determine what set of information might be relevant.

MS. MASSARON: Is there a way, if your opponent has cited some of these things, and I'm going to go back to the restatement because there's some projects underway right now that I have a lot of concern about. Let's say, for example, a Restatement, and I'm going to take a hypothetical restatement that's not been adopted.

If a Restatement comes out that's really a principles project, as they call it, I don't know how

many of you study the ins and outs of the Restatement, I know it's covered in law school, but a restatement itself is supposed to be a codification of the majority view of the law, a filling in of gaps and in rare instances, there's a problem with the law occasionally the reporter and the advisers might put sort of a best rule. That's the traditional restatement.

But they also have principles projects, reporters and people are chosen from the ALI membership, and those are sort of who's ever in that group, it's ultimately adopted by the whole body. But it's really driven by that group saying what they think in their view the law should be.

And, if the reporters in the group are having a particular axe to grind, the document that comes out is going to be less trustworthy.

So let us say someone cites a restatement or a law review article or something that is harmful to your position and has these kinds of problems. How much space would you devote to trying to deal with that and how would you approach dealing with that in a brief before your Court?

JUSTICE MCCORMACK: I think that you can trust that, I wouldn't devote a lot of space to that when you have your affirmative case to make to us in your

brief. You can trust that our staffs and we will be able to figure out if it's some crazy ALI project on consent that we know was not adopted by the full membership. Let's hope. But, we can do that homework and we will do that homework, and so, to the extent you want to make sure we know what to look for, you could answer it briefly.

But I wouldn't devote a lot of time responding to what's effectively, you know, an argument that won't have much force with us in any event.

MS. MASSARON: Do we have other questions, Matt or John?

I'm hearing we are out of time. And I want to not keep us overly long. I think this has been absolutely outstanding. I know we are grateful, for coming, being with us, sharing your insights.

(Applause)

CHIEF JUSTICE YOUNG: For our part, we'd like to thank you and Megan Cavanagh and the whole group that put this together. I've been here the whole time and it's been informative for me to kind of hear some of the concerns that appellate advocates have and I hope it's been equally stimulating to you. So you've done a wonderful job yet again.

Thank you.

MR. BURSCH: I think all of you heard, of the hundreds of bar association conference that he's been to, that this is the most well-organized. And for those who come and participate in this, you don't realize all the blood, sweat and tears that go into this process. There's going to be a celebratory part with all the members that Megan and Mary lead, and immediately after, that planning for the bench bar in 2019 begins. Literally, that's how far in advance.

So to thank the two them. We have a few gifts of appreciation, and if you could please give your warm round of applause for them.

MS. MASSARON: The conference is adjourned.

(Conference adjourned at 1:50 p.m.)

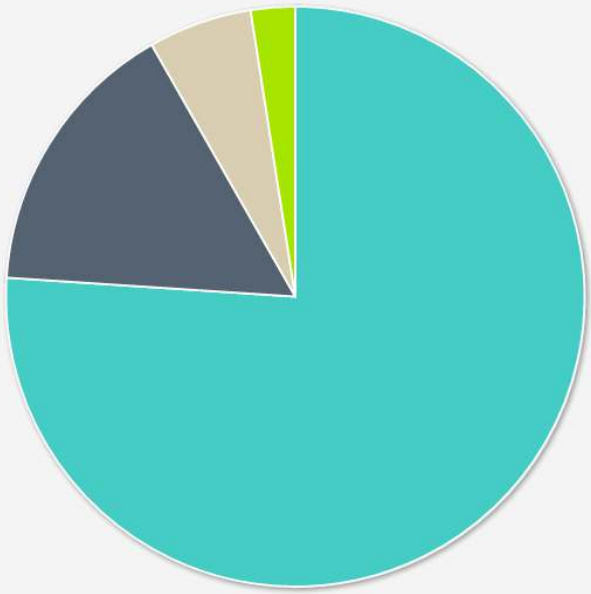
Exhibit A

POLLING RESULTS

Do you COMPOSE documents:

View:

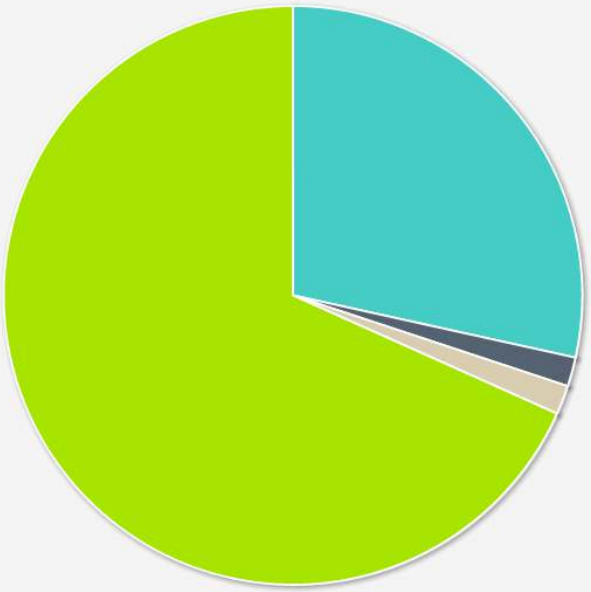
Choices	Results	
Primarily on a desktop device	92	76%
Primarily on a mobile device (laptop or tablet)	19	16%
About equally on desktop and mobile devices	7	6%
Other or neither	3	2%



Do you have control over your or your firm's choice of:

View:

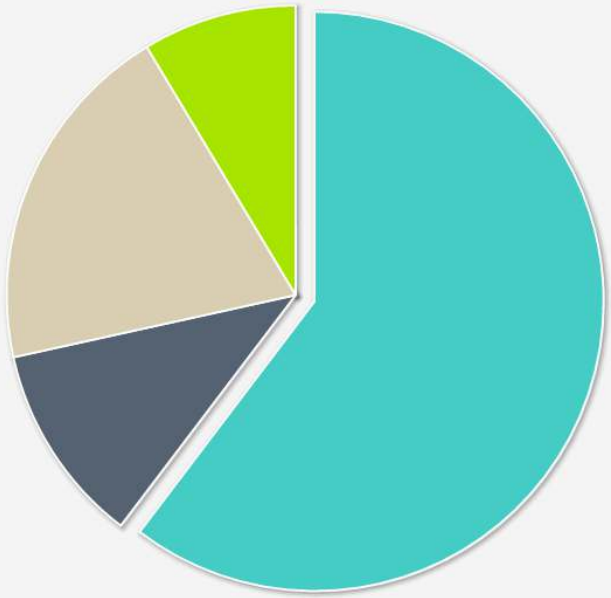
Choices	Results	
Hardware and file storage	35	28%
Hardware only	2	2%
File storage only	2	2%
Neither hardware or file storage	84	68%



Do you REVIEW documents:

View:

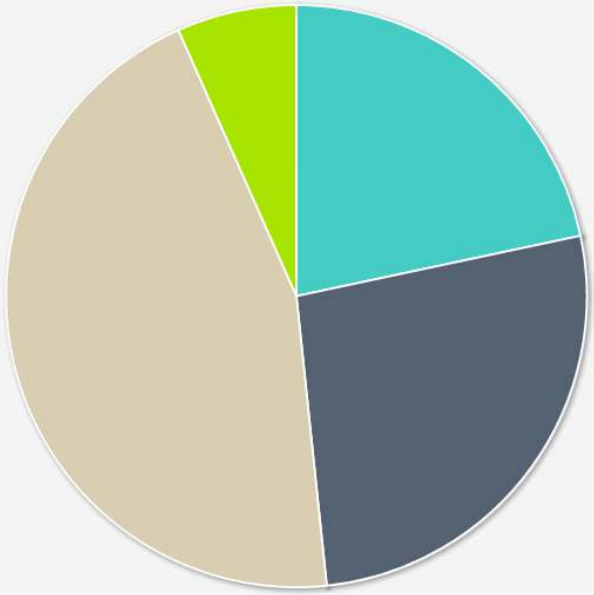
Choices	Results	
Primarily on a desktop device	70	60%
Primarily on a mobile device (laptop or tablet)	13	11%
About equally on desktop and mobile devices	23	20%
Other or neither	10	9%



What size firm or organization are you affiliated with?

View:

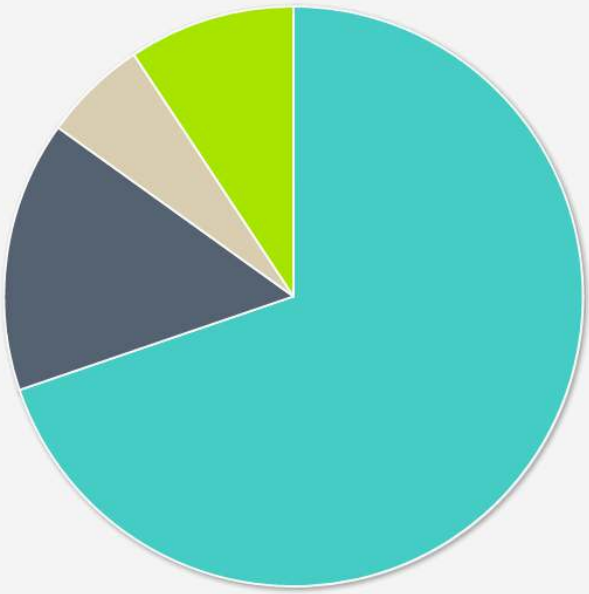
Choices	Results	
Solo practitioner	26	22%
Small (2-10 lawyers) or medium (11-20 lawyers)	32	27%
Large (21-99 lawyers) or very large (100 + lawyers)	54	45%
I am not in practice	8	7%



Are you a current or former employee of the Court of Appeals and/or the Supreme Court?

View:

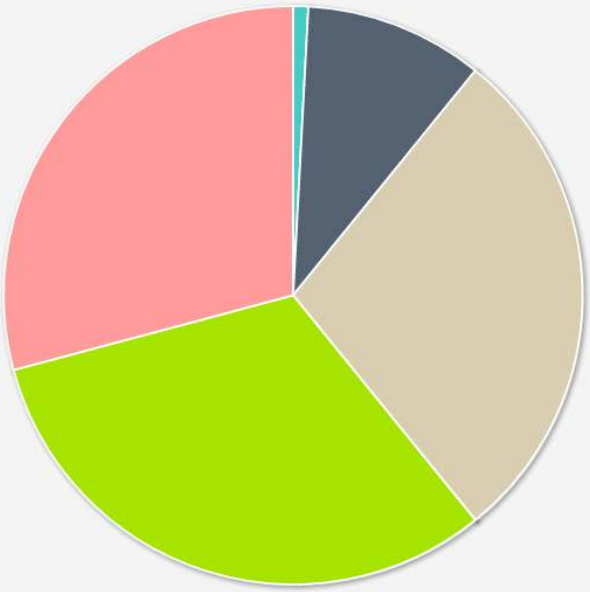
Choices	Results	
I have not worked for either Court	120	70%
I worked for the Court of Appeals only	26	15%
I worked for the Supreme Court only	10	6%
I worked for both the Court of Appeals and the Supreme Court	16	9%



For those who have personally e-filed using TrueFiling, how easy was it to initiate a new case or file into an existing case?:

View:

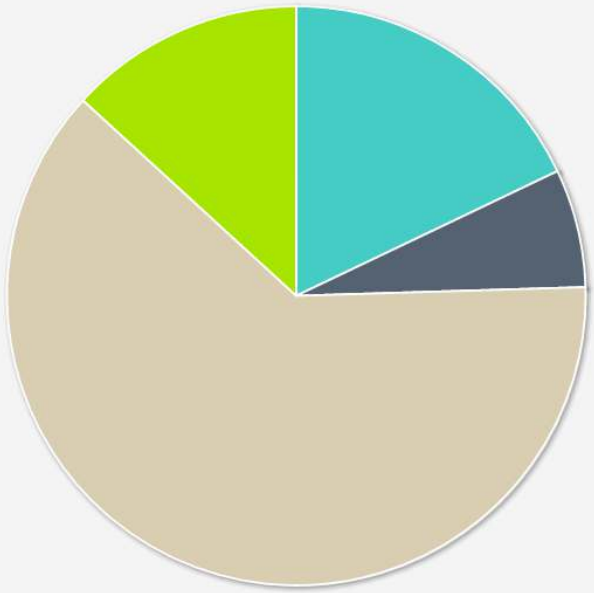
Choices	Results	
Very difficult	1	1%
Somewhat difficult	12	10%
Neutral	34	28%
Somewhat easy	38	32%
Very easy	35	29%



For those who have personally e-filed using TrueFiling, the most difficult thing to do was:

View:

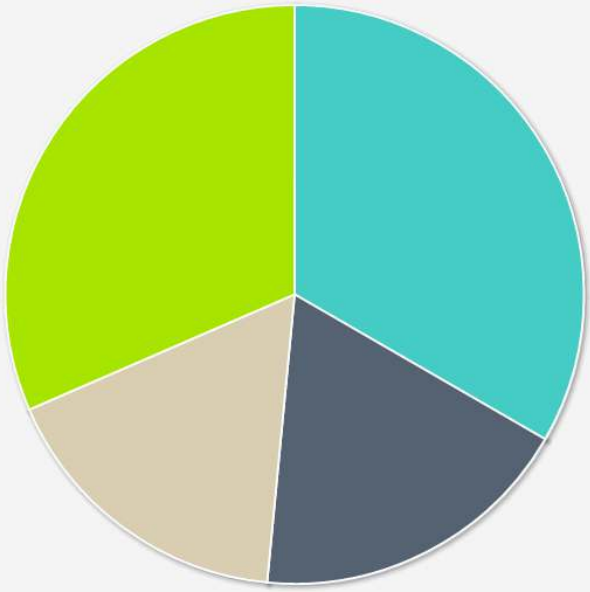
Choices	Results	
Register as a user	19	18%
Identify the proper case or file type	7	7%
Add or verify a service recipient	66	62%
Attach connected documents	14	13%



On average, how many times per year are you actively involved in an appeal in the Court of Appeals?

View:

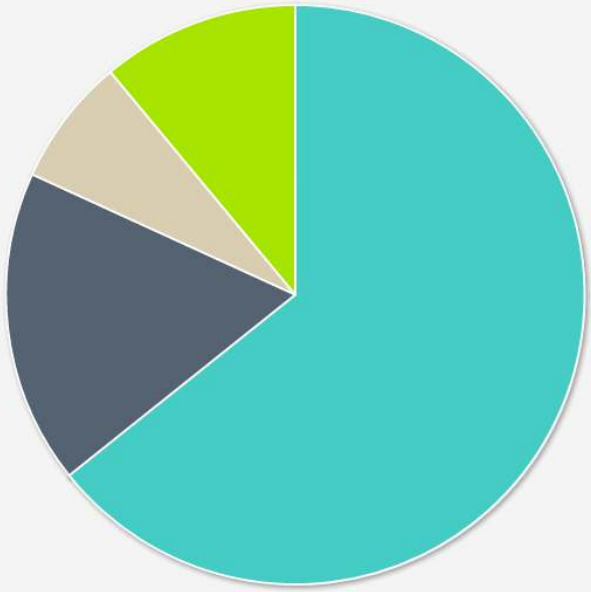
Choices	Results	
1-5	55	33%
6-10	30	18%
11-20	28	17%
21 or more	52	32%



On average, how many times per year are you actively involved in an appeal in the Michigan Supreme Court?

View:

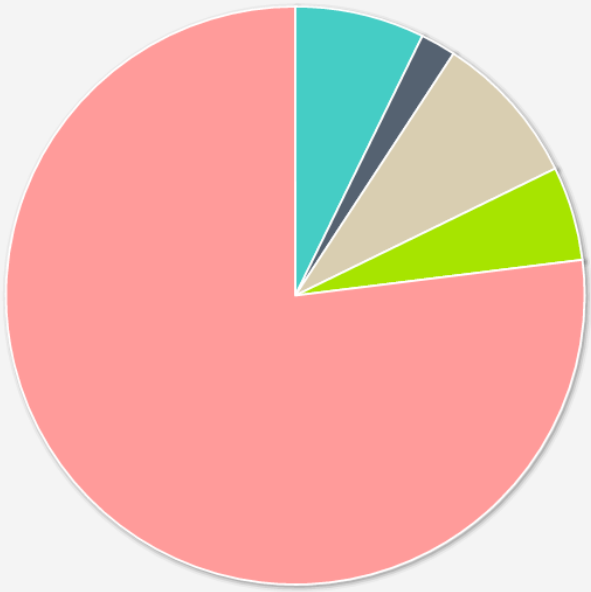
Choices	Results	
1-3	99	64%
4-6	27	18%
7-10	11	7%
11 or more	17	11%



Which of the following best describes your use of the Courts' TrueFiling e-filing system?

View:

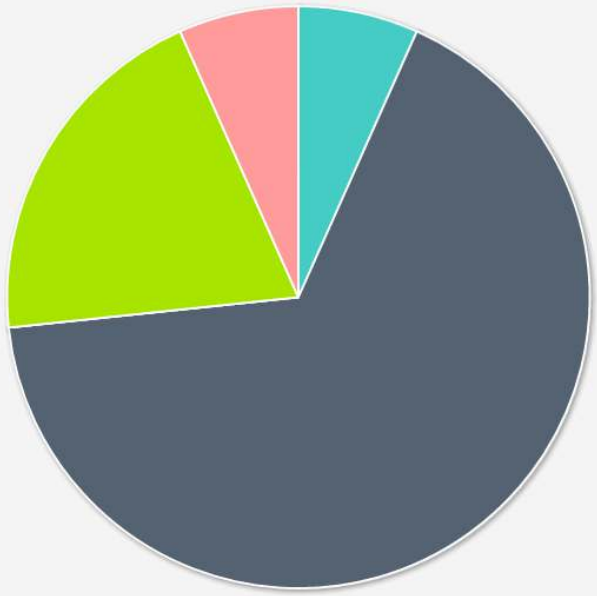
Choices	Results	
I have not used the TrueFiling system yet because I don't have the necessary technology or training.	11	7%
I have not used the TrueFiling system yet because I prefer to file in hard copy.	3	2%
I have used TrueFiling to file into existing cases only.	13	9%
I have used TrueFiling to initiate new cases only.	8	5%
I have used TrueFiling to both initiate cases and file into existing cases.	117	77%



Although unpreserved issues need not be addressed, I will analyze an unpreserved issue raised by a party on appeal when appropriate.

View:

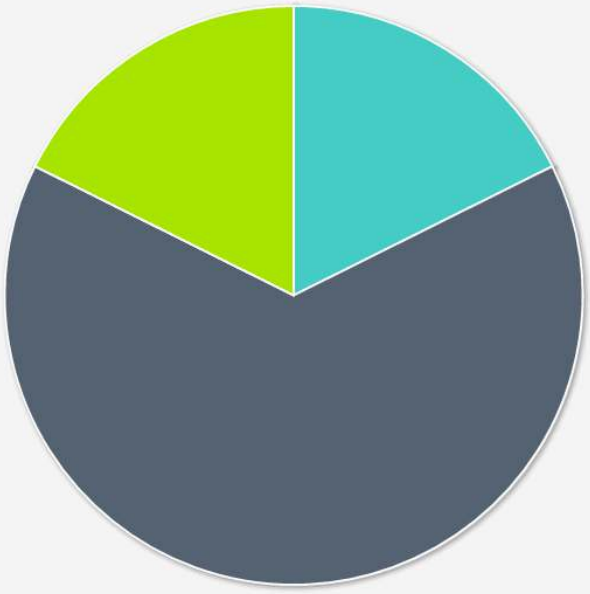
Choices	Results	
Strongly Agree	1	7%
Agree	10	67%
Neutral	0	0%
Disagree	3	20%
Strongly Disagree	1	7%



Although unpublished and pre-1990 opinions are not precedential, I consider their analysis and outcome when ruling on appeals before the Court.

View:

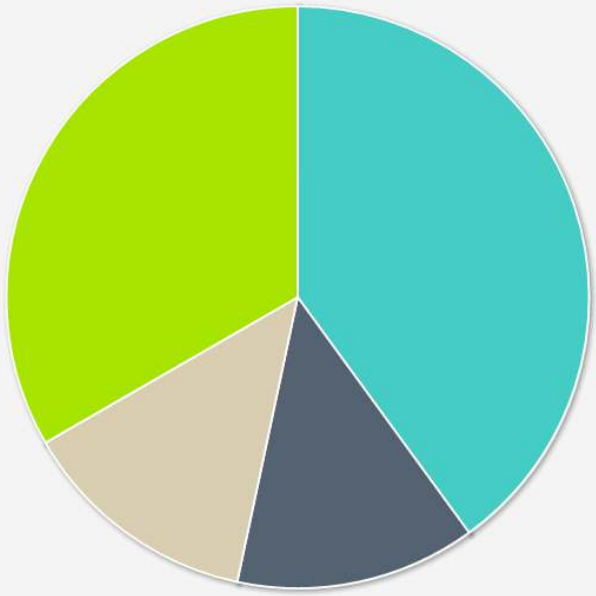
Choices	Results	
Strongly Agree	3	18%
Agree	11	65%
Neutral	0	0%
Disagree	3	18%
Strongly Disagree	0	0%



It is possible for a judge to separate his or her viewpoint (the cumulative whole of a person's life experiences, education, interests, psychology) from the decision-making process.

View:

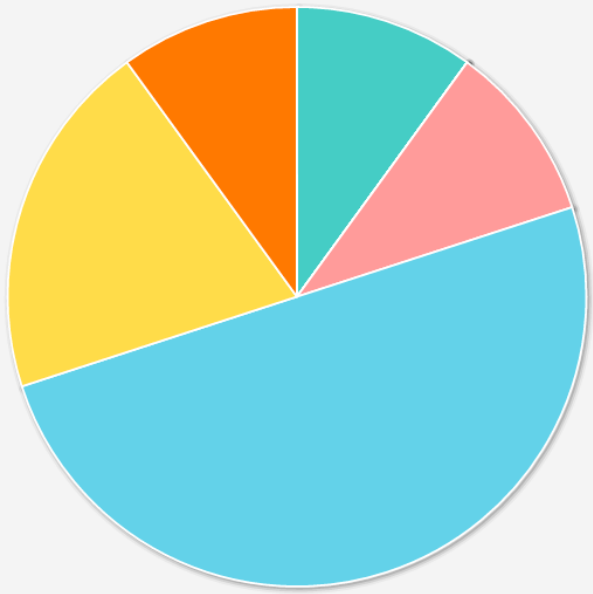
Choices	Results	
Strongly Agree	6	40%
Agree	2	13%
Neutral	2	13%
Disagree	5	33%
Strongly Disagree	0	0%



Which of the following tools for interpreting statutes and constitutional provisions do you believe is the least important?

View:

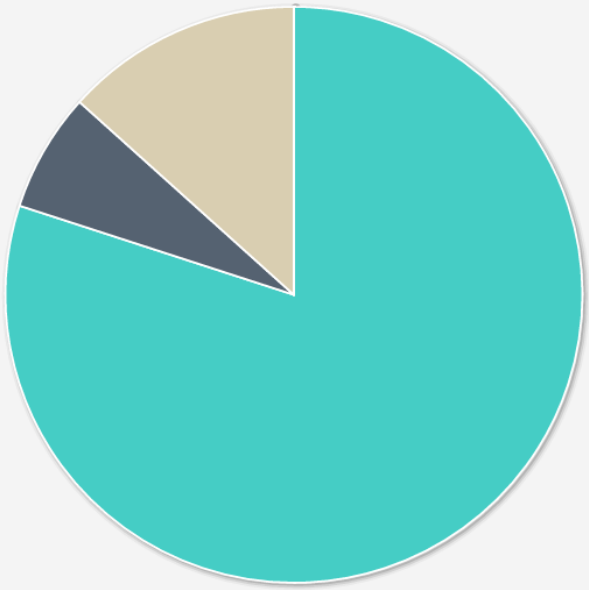
Choices	Results	
Plain language	1	10%
Ordinary significance of the language	0	0%
Traditional tools such avoiding superfluous or unexplained language, interpreting the absence of an item as intended if a list contains simi	0	0%
Grammar and punctuation	0	0%
Legislative history	1	10%
Extrinsic evidence as to what legislators or framers meant to accomplish	5	50%
Unpublished appellate interpretation from same or higher court	2	20%
Published appellate interpretation from other jurisdiction	1	10%



Which of the following tools for interpreting statutes and constitutional provisions do you believe is the most important?

View:

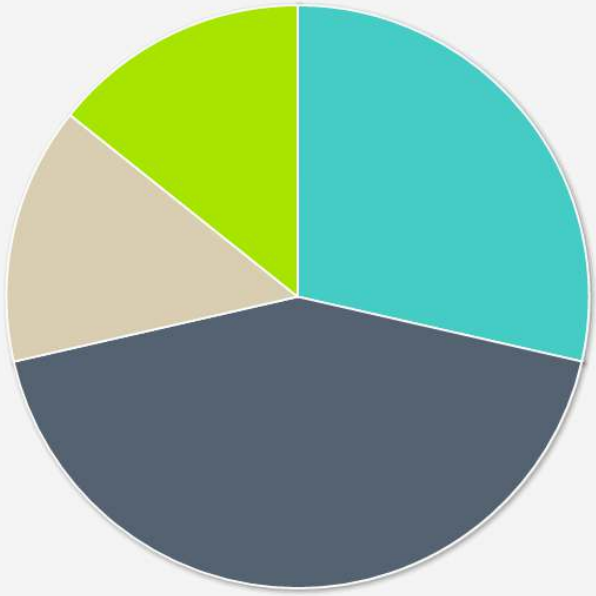
Choices	Results	
Plain language	12	80%
Ordinary significance of the language	1	7%
Traditional tools such avoiding superfluous or unexplained language, interpreting the absence of an item as intended if a list contains simi	2	13%
Grammar and punctuation	0	0%
Legislative history	0	0%
Extrinsic evidence as to what legislators or framers meant to accomplish	0	0%
Unpublished appellate interpretation from same or higher court	0	0%
Published appellate interpretation from other jurisdiction	0	0%



Oral argument is helpful to me, even if it does not ultimately change my decision regarding the outcome of the case.

View:

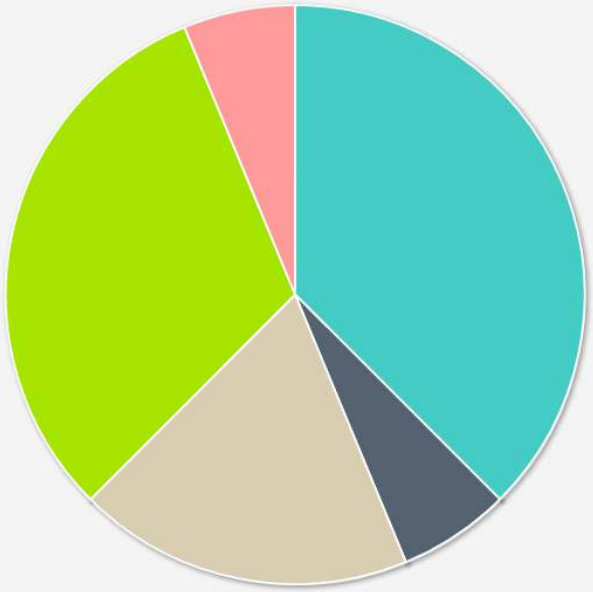
Choices	Results	
Strongly Agree	4	29%
Agree	6	43%
Neutral	2	14%
Disagree	2	14%
Strongly Disagree	0	0%



Policy consideration should never factor in to statutory or constitutional interpretation.

View:

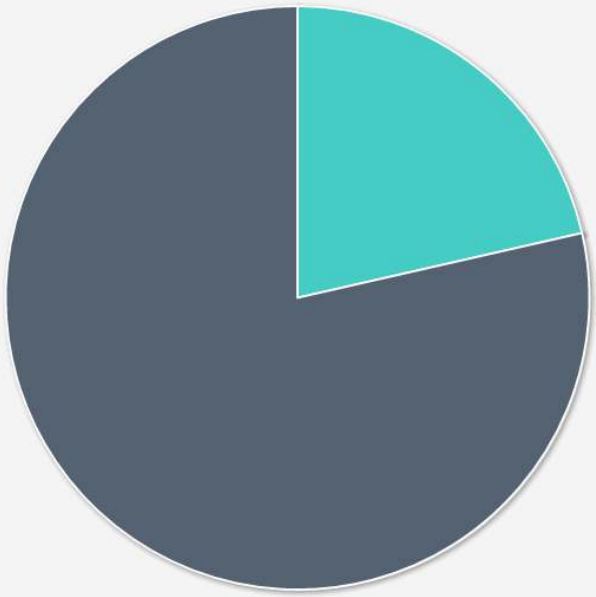
Choices	Results	
Strongly Agree	6	38%
Agree	1	6%
Neutral	3	19%
Disagree	5	31%
Strongly Disagree	1	6%



The time allotted for oral argument has decreased in some courts and other courts have restricted the number of cases in which it is allowed. This Court allots 30 minutes per side for arguments. Should this time be reduced?

View:

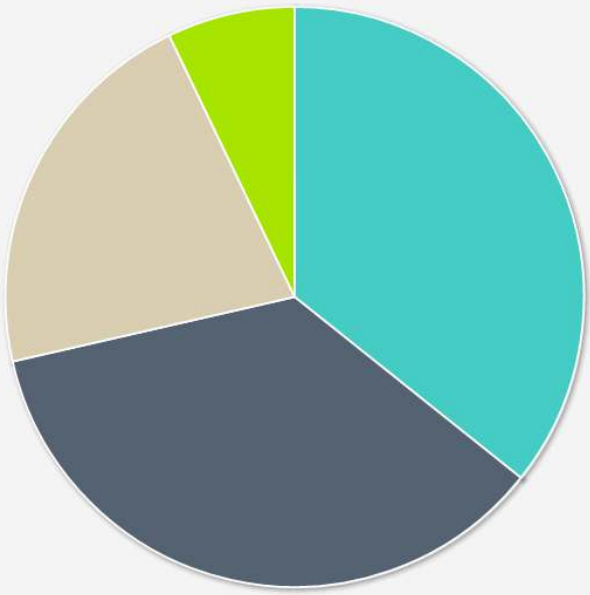
Choices	Results	
Yes	3	21%
No	11	79%



The purpose of error correction is to ensure uniform application of the law and it is therefore an important tool in shaping the law.

View:

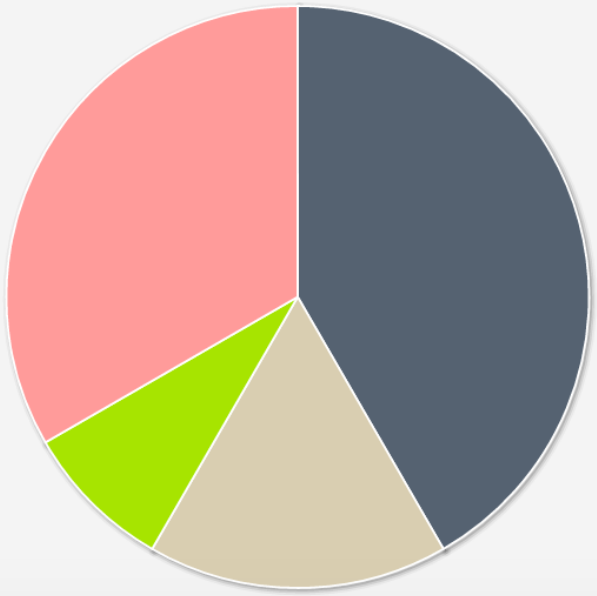
Choices	Results	
Strongly Agree	5	36%
Agree	5	36%
Neutral	3	21%
Disagree	1	7%



When shaping the law, I consider the expectations of the parties and non-parties who may have relied on previously espoused (but nonbinding) precedent.

View:

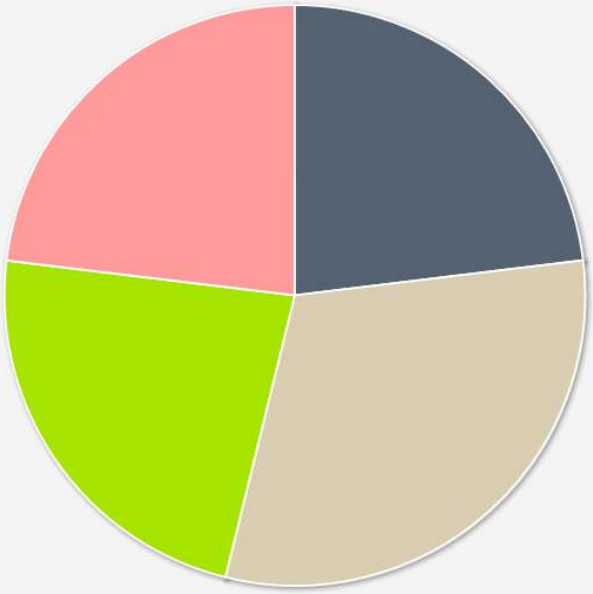
Choices	Results	
Strongly Agree	0	0%
Agree	5	42%
Neutral	2	17%
Disagree	1	8%
Strongly Disagree	4	33%



When the parties have missed a dispositive issue, I will re-frame the issue to reflect the dispositive aspect, then address the re-framed issue.

View:

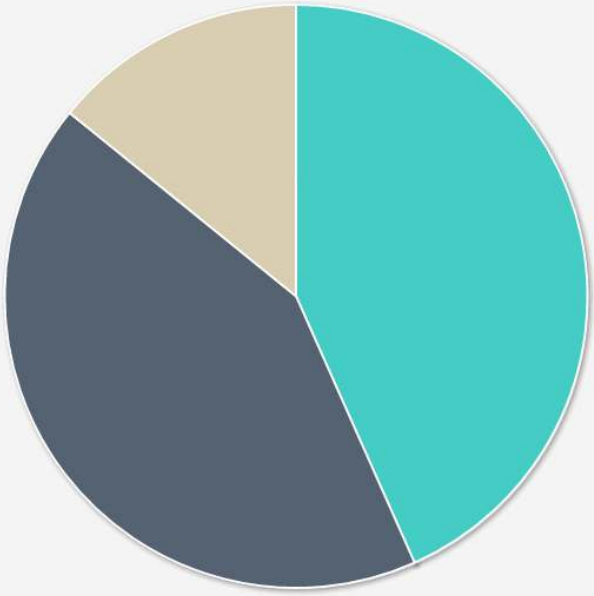
Choices	Results	
Strongly Agree	0	0%
Agree	3	23%
Neutral	4	31%
Disagree	3	23%
Strongly Disagree	3	23%



Before or after you filed or e-filed an application for leave to appeal at the COA, have you spoken on the phone to a district commissioner regarding the filing?

View:

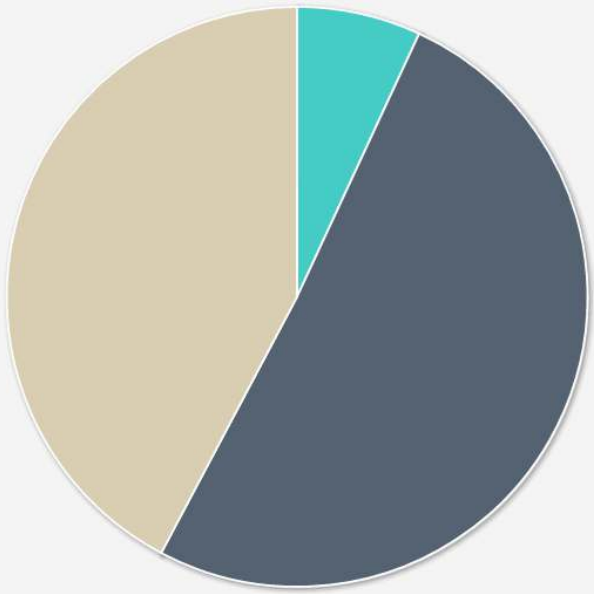
Choices	Results	
Yes.	52	43%
No.	51	43%
I have never filed an application for leave at the COA.	17	14%



Have you noticed any differences in the way different commissioner offices at the COA process applications?

View:

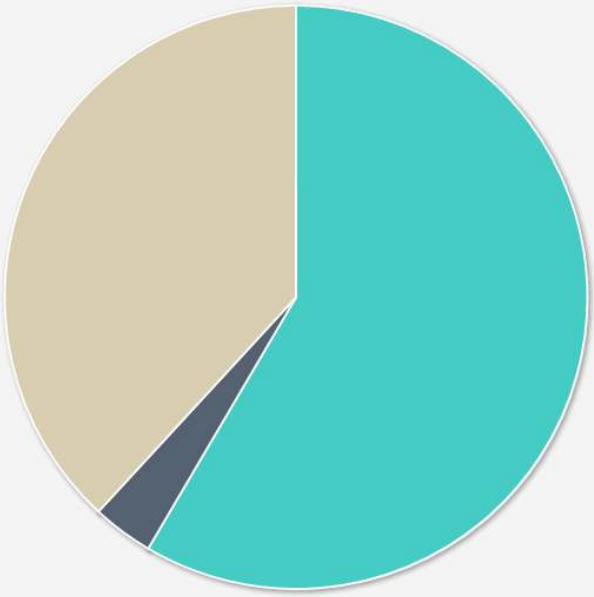
Choices	Results	
Yes.	8	7%
No.	59	51%
I haven't filed often enough to notice if there is a difference.	49	42%



Have you received timely decisions on emergency applications.

View:

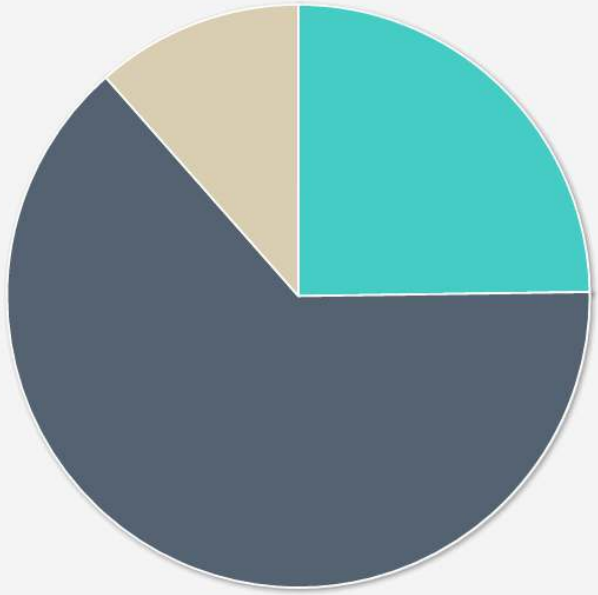
Choices	Results	
Yes.	69	58%
No.	4	3%
I have never filed an emergency application.	45	38%



What is a reasonable time for having an application heard in the MCOA?

View:

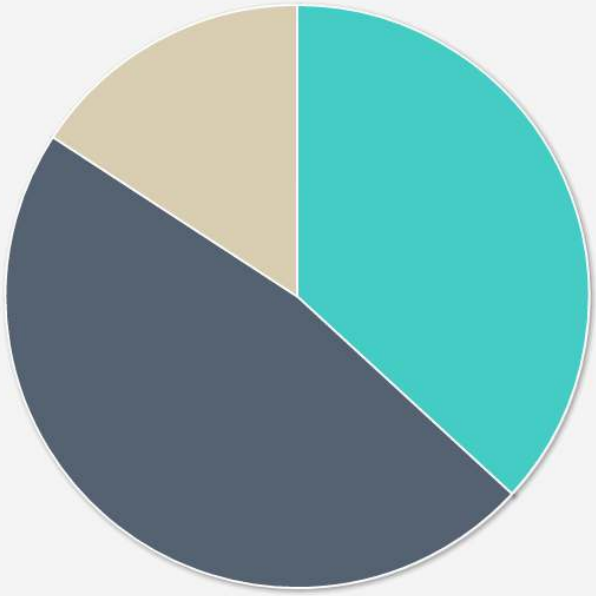
Choices	Results	
Less than 3 months.	28	25%
3 to 6 months.	72	64%
6 months or more.	13	12%



What is a reasonable time for having an application heard in the MSC?

View:

Choices	Results	
3 to 6 months.	42	37%
6 to 9 months.	54	47%
10 to 12 months.	18	16%



What is a reasonable time to be allowed for filing an answer to an emergency application?

View:

Choices	Results	
Less than 7 days.	36	31%
7 days.	61	53%
14 days.	18	16%