2022 Michigan Appellate Bench Bar Conference Summary Report

The Bench Bar Conference Committee is pleased to present the 2022 Michigan Appellate Bench Bar Summary Report.

The conference began with an interactive plenary panel session on "Lessons Learned From the Pandemic." After the opening plenary session, conference attendees participated in breakout sessions with justices, judges, and court staff, where they continued to discuss the various issues that the panel addressed.

At lunch on the first day of the conference, attendees had the pleasure of hearing remarks from Judge Joan Larsen of the United States Court of Appeals for the Sixth Circuit. The afternoon kicked off with breakout sessions on various substantive issues relating to such topics as writing persuasive briefs, applications for leave to appeal, motion practice in the Court of Appeals, effective oral argument, and *amicus curiae* practice. Additional sessions addressed important issues facing practitioners in criminal law, family law, and child welfare appeals.

Attendees wrapped up the first day at a reception and dinner where former Michigan Supreme Court Chief Justice Stephen Markman and longtime Bench Bar Conference Committee Chair Mary Massaron were each presented with the State Bar Appellate Practice Section's Lifetime Achievement Award.

We kicked off the second day of the conference with our traditional Supreme Court panel discussion, with the justices providing tips on advocacy before the Court, followed by more breakout sessions focused on various aspects of advocacy in the criminal, civil, family, and child welfare areas. The conference closed with a panel discussion on the experience with—and the future of—remote oral arguments in the Court of Appeals.

In this summary report, the Bench Bar Conference Committee has strived to provide a comprehensive overview of all of the conference sessions. It includes a compilation of notes taken of each of the breakout sessions by volunteer reporters, as well as the full transcripts of the plenary panel discussions. The Committee would like to thank all of those who contributed their time and effort to make this year's conference a success.

Phillip J. DeRosier
Dickinson Wright PLLC
Summary Report Editor

TABLE OF CONTENTS

I. Plenary – "Lessons Learned From the Pandemic: May It Please the (Virtual) Court?" 3

II. Breakout Sessions: Lessons Learned From the Pandemic 3

A. Breakout Room 1 3

B. Breakout Room 2 4

C. Breakout Room 3 6

D. Breakout Room 4 9

E. Breakout Room 5 11

F. Breakout Room 6 13

G. Breakout Room 7 16

H. Breakout Room 8 18

I. Breakout Room 9 21

J. Breakout Room 10 26

K. Breakout Room 11 29

III. Law Practice Breakout Sessions 30

A. Criminal 30

1. Continuing Issues for Sentencing Juveniles Convicted of First Degree Murder Pursuant to MCL 769.25 30

2. Court Rule Changes Important for Criminal Appellate Practice 35

3. There's an Expert for That 38

4. Oyez+ 44

5. Pandemic Implications on Due Process and Criminal Practice 47

B. Civil 49

1. Writing Persuasive Briefs 49

2. Applications for Leave to Appeal 51

3. Reply Briefs: The Last Word 55

4. Effective Oral Argument 60

5. *Amicus Curiae* Practice 63

6. Motion Practice in the Court of Appeals 70

C. Family 75

1. The Search for Clarity on Post Judgment Final Orders 75

2. Immediate Action Required! Appealing *Ex Parte*, Temporary, and Interim Orders 77

3. Rapid Fire Family Law Wrap Up 80

D. Child Welfare 83

1. Top 20 Child Welfare Cases Everyone Should Know 83

2. The Indian Child Welfare Act (ICWA) After the Fifth Circuit's *En Banc* Decision in *Brackeen v Zinke* 90

3. Reasonable Efforts, Appeals from Removal Orders, and What To Do With Invalid Pleas Following *Ferranti* and *Pederson*? 91

4. Giving the Child a Voice on Appeal: The Importance of the LGAL's Participation in Appeals 96

IV. Plenary – Supreme Court Practice Tips 99

V. Plenary – "Hear Ye, Hear Ye: Remote Oral Arguments in the Court of Appeals" 99

I. Plenary – "Lessons Learned From the Pandemic: May It Please the (Virtual) Court?"

[TRANSCRIPT ATTACHED AT TAB A]

II. Breakout Sessions: Lessons Learned From the Pandemic

A. Breakout Room 1

1. How has appellate argument changed as a result of the use of Zoom for appearances since the pandemic?

For clients:

- Remote appearances offer greater access to clients to watch Court of Appeals and Michigan Supreme Court arguments without the need to travel.
- Remote appearances create a cost savings for many clients who are cost-conscious, such as insurance companies and individual payers.
- In response to concerns that the current procedure of permitting combined in-person/remote appearances created some inherent bias toward larger firms/clients who aren't as concerned about travel costs, court staff in the session indicated that they did not view remote appearances any differently or view remote appearances by counsel when opposing counsel appears in-person as less impressionable.

For attorneys:

- Use of technology such as Zoom appears to be more comfortable for younger attorneys; Court staff noted few issues with younger attorneys in the process.
- One consideration expressed by attorneys who have appeared remotely was the loss of the ability to have true "eye contact" with the panel.
- Another consideration expressed by attorneys who have appeared before a fully remote panel was the inability to get an impression of the panel as a whole.
- Some attorneys expressed a greater comfort level with remote appearances due to the ability to create their own environment with whatever resources they want on their desktop, without having to quickly set up and clean up after in-person appearances.

For the Court:

- Court staff in appearance indicated that they did not see a change in the quality of the arguments between in-person and remote arguments.
- Due to the technical constraints, questions from the panel are more specific and overall, the argument feels less conversational.

- Court staff did note a struggle between balancing the necessary formality of the court with the possible informality of remote appearances and noted the need for counsel to be sure to replicate the court environment in their remote locations, including external noises and use of Zoom desktops to avoid looking at informal home office or dining-room type setups.

2. How have the pandemic and the use of Zoom by trial courts impacted appellate practice and appellate review?

- Court staff noted that many trial courts were not conducting argument on motions that would ordinarily have been conducted in-person and then issuing simply one-line orders reflecting their ruling. This often deprives the reviewing appellate court of the benefit of the trial court's reasoning on an issue, which may result in a remand to permit the trial court to expand its ruling.
- Transcripts from Zoom proceedings have reflected technical issues resulting in loss of words, or in some instances, no recording to use to create a transcript.

3. Miscellaneous issues discussed:

- Some attorneys expressed concern over argument appearances which limit their ability to present fulsome argument when the panel indicates a vigorous desire to avoid repetition of the briefing. Recommendations from the court staff included looking to the presiding judge for guidance and support if remainder of panel evidences impatience with argument.
- Court staff recognized that clients need to know that someone fought for them, even if they don't win, and most judges respect the attorneys' right to present argument for that reason.
- There was discussion about whether the Court of Appeals would ever issue specific questions or issues on which it would like the advocates to focus their argument time, however, while many thought it was a good idea in theory, the current timeline surrounding scheduling arguments does not allow for the reviewing panel to alert the advocates of specific concerns or issues in sufficient time before argument.
- Court staff did suggest that issues raised in argument that were not necessarily explored fully or in same manner as during argument, could be addressed in post-argument briefs, with the permission of the panel.

B. Breakout Room 2

<u>Discussion of Zoom Arguments</u>

The group began by discussing various strategies for practitioners to improve their arguments over Zoom. These included:

- Practitioners should try to avoid using backgrounds that may distract from their arguments, such as living rooms filled with various objects.
- Practitioners should be aware that certain tics and habits, such as expressive gesticulations, are more apparent (and distracting) on Zoom.

Most of the practitioners felt that hybrid arguments (one person in the courtroom, one on Zoom) advantage the person in the courtroom. However, the group mentioned some potential advantages of conducting oral arguments over Zoom. These included:

- Practitioners can have their notes up on their screen.
- Practitioners can use a second screen to conduct research while the other party is arguing.

The group discussed issues that may arise with transcripts from Zoom hearings. These included:

- Sometimes technical issues or background noises prevent the court reporter from preparing complete transcripts.
- As a result, the parties must sometimes work together to settle the record.
    - *Possible aids*: Some software can help separate human voices from background noises. Also, in some cases, referees or judges will have their own notes that can be used as a reference.

Proposed Rules/Suggestions

Various practitioners suggested that courts should make efforts to reduce the wait times for attorneys waiting in a queue for argument. Suggestions for reducing wait times included: (1) hearing all single endorsement cases in one block and (2) having the court's research attorneys suggest to judges the length of argument merited by an appeal to aid the court's scheduling of arguments. Some members of the group were opposed to the latter suggestion, however, because they believed it would be too difficult to predict how many questions judges might have in particular cases.

The group discussed a proposal to have judges pose questions sequentially in order of seniority, and members of the group were almost uniformly opposed to that proposal. Although practitioners noted that this approach would have the benefit of allowing judges and justices who might otherwise be interrupted to present their questions, practitioners were opposed to this proposal because it would hamper their opportunity to present their case. Practitioners further noted that this rule would lead to awkward, stilted arguments.

Members of the group also noted that this proposal would prevent helpful follow-up questions from other judges. One practitioner proposed a hybrid approach, under which argument would begin in a free form and then conclude with sequential questioning. Other members of the group responded that no formal rule would be

necessary to effectuate that hybrid approach, as judges already tend to proceed that way informally.

A couple practitioners suggested that attorneys should be given two to three minutes to speak before judges ask any questions, but the proposal did not receive extended discussion.

Several practitioners proposed and agreed that judges and justices should review briefs ahead of time and identify areas of primary interest, or potentially even specific questions. They emphasized that this would lead to better advocacy, quicker dispositions, and obviate the need for supplemental briefs.

The group discussed whether there should be a minimum internet connection speed requirement for Zoom arguments. Some practitioners were opposed to such a rule because it would reduce access for smaller firms and *pro se* litigants.

One practitioner proposed that courts enable attorneys to appear through virtual reality. Most members of the group were opposed to virtual reality arguments on the ground that this would likely prove expensive and ultimately deny access to smaller firms and *pro se* clients. Other practitioners noted that the process would introduce additional unnecessary distractions.

C. Breakout Room 3

Stories That Occurred During Zooms

- In the early days of the pandemic, there were issues caused by participants not knowing how to use Zoom software. There were issues with resentencing in which an attorney would not be able to effectively communicate with the client because no one knew how to make use of Zoom breakout rooms. Attorneys overcame this obstacle by having everyone leave the room so that a private conversation could occur.
- Everyone was all too familiar with negative stories from the pandemic, including the lawyer who made an obscene gesture during oral argument as reported by national media outlets.
- Internet outages: important to have a contingency plan for when things go wrong during oral argument. A "mobile hot spot" can be used as a backup internet connection, or have a telephone available to participate telephonically if no Zoom connection is possible.
- Check all equipment the night before oral argument, make sure shutter is not closed on camera lens. Make sure to know how to use equipment before oral argument. If room lights are motion activated, consider deactivating the motion sensor so that lights do not turn off in the middle of the argument.
- Make sure court is aware of who will be appearing and/or participating: a criminal case was dismissed for lack of proof because the court did not realize the witnesses were in a breakout room.

- Make sure courtroom has technology available so that individuals appearing in person can see the virtual participants and/or exhibits shared through Zoom and vice versa for identification purposes. Gaps in courtroom technology continues to be an issue that needs to be addressed because there are good reasons to continue virtual proceedings in certain circumstances even when there is no pandemic (i.e., Michigan winters, appellate proceedings occurring in the Lower Peninsula when the parties are all in the Upper Peninsula, etc.).
- Difficulty of holding a witness's or juror's attention during virtual proceedings: the in-person setting is a constant reminder to all participants of the gravity of court proceedings. Attendees are prone to be overly comfortable and/or informal when appearing virtually.
- Inability to reach court personnel by phone during pandemic: knowing the contact information for individual court chambers or chief clerk is important for overcoming the problem of leaving a voicemail on a general inbox and receiving no response.

Differences between Zoom Oral Arguments and Pre-Pandemic or In-Person Arguments

- Practitioners in the Michigan Supreme Court understand the Court's decision to use turn-based questioning but prefer the pre-pandemic style of Justices jumping in with questions as the argument progresses. The Supreme Court's method makes it difficult to reserve time for rebuttal if some Justices ask many more questions than other Justices.
- Many attorneys and judges prefer the YouTube recordings of arguments compared to text transcripts. Video recordings help the viewer understand the body language and other context clues that are not included in a written transcript. Also, video recordings are available much sooner and with less cost than written transcripts.
- Courts are working on addressing issues related to confidential information being disclosed during proceedings due to individuals not realizing the proceeding is being recorded or broadcasted. Courts are also working on making virtual procedure more uniform especially at trial court level.
- Virtual proceedings are helpful for supervisory staff to monitor inexperienced staff. More supervision can occur when travel is taken out of the equation, and there is less pressure when it is not so obvious that a supervisor is observing in the back of a courtroom.
- Clients and victims appreciate video recordings because it demystifies the appellate process.

Trial Court Backlogs

- Lack of jury trials during pandemic has created backlog.
- Practitioners are hesitant to conduct virtual jury trials because of the difficulty of ensuring that jurors and witness are paying attention. Important to limit the number of exhibits used virtually so that effective communication occurs.

- Lack of uniformity between various counties regarding restrictions on in-person proceedings has led to backlogs being more prevalent in some locations compared to others.
- The pressure to settle cases still exists but courts do not have the same tools at their disposal (i.e., adjustments to scheduling order) to motivate the parties to negotiate.
- Judges are under pressure to resolve their dockets, but unclear if that is leading to more dispositive motions being granted. More alternative dispute resolution (arbitration, facilitation, etc.) is being utilized.
- Juror selection impacts trial court backlogs. Trial courts are more likely to permit a juror to leave if they feel uncomfortable with attending in-person proceedings. Courts feel pressure to ensure the parties will not settle on the eve of trial and "waste" an empaneled jury.
- The Court of Appeals will not be pressured into hearing more interlocutory appeals to resolve trial court backlogs. The Court will hear applications based on the merits alone, not the impact an appeal will have on a trial court docket.
- Trial courts would be aided by the Court of Appeals including more/clearer instructions when remand is ordered. Resolving legal questions can ease pressure on trial court dockets, but the trial courts sometimes struggle to understand what issues need resolution when remand occurs.

Tips for Improving Zoom Proceedings

- Using the screen share feature can be very helpful in trial court, but Court of Appeals oral argument is generally not aided by demonstrative exhibits. An exhibit drawing attention to particular words in a large statute can be useful in Court of Appeals, but "simple" is generally "better."
- Court of Appeals appreciates when a party provides a glossary of terms or key for evidentiary record to process briefs faster.
- Develop a deep understanding of all equipment used for virtual proceedings. Presenting information in a way that is best suited for review on Court of Appeals iPads can be very helpful.
- PowerPoint can be helpful in trial court. Court of Appeals may allow use of PowerPoint in some circumstances (i.e., when some participants are virtual and others are in-person) because digital presentation is easier to show on video compared to physical poster board.
- Incorporating important image exhibits directly into brief is increasingly popular option now that the brief must comply with a word limit instead of a page limit.

Lessons Learned for The Future

- Optional remote proceedings in Court of Appeals should be continued when travel is a burden
- Virtual proceedings promote access to justice especially when Court of Appeals does not have enough cases to have Upper Peninsula in person oral argument case call.
- Investment in new equipment is needed, but governments have limited budgets.

- A new court rule might be necessary to establish minimum technology requirements for courtrooms to promote accessibility
- Practitioners prefer the judges to be in-person because it is easier to make eye contact. Future technology may resolve this issue. Being audible is more important than being seen, but continued efforts to improve technology are needed.

Action items

- Courts and court administrators will continue to develop rules and procedures to maximize access to justice.

Solutions

- Continue to permit virtual proceedings where it serves the interests of justice and access to the courts, but continue to emphasize importance of in-person proceedings when feasible

Problems

- Lack of uniformity between courts regarding technology available.

Consensus

- Zoom is generally here to stay.

D. Breakout Room 4

Challenges faced during the Pandemic

This session began by discussing various challenges faced due to the Pandemic. Practitioners discussed how there was somewhat of a generation gap when it came to how easy it was to adjust. Older practitioners had more difficulty keeping up with changes in technology and learning to use Zoom, where younger practitioners often already knew how.

Some practitioners noted that being at a computer rather than in a courtroom was more distracting because they could do so many other things on that computer screen. It was a difficult transition for some people to work from home, and Zoom does not have the same atmosphere as a courtroom does and cannot fully replace it. People were concerned about losing the formality associated with courtroom procedure.

Some people find themselves working alone as the only person in an office or state building, and people have fewer opportunities for social interaction. They are less likely to go out for coffee with a friend.

One practitioner raised the issue that Zoom hearings in some trial courts did not allow attendees to watch proceedings prior to their own. This prevents attorneys from seeing the judge's disposition ahead of their own hearing as they would when they are

physically at the courthouse. Though, other attorneys expressed the opposite, as some courts allow attendees to see the prior hearings as well. This raised the general thought that it would help if virtual procedures were more uniform across the state.

Another practitioner expressed concern that new attorneys are not learning how to do an in-person hearing. Practitioners also noted more aggression from opposing attorneys in Zoom proceedings.

Practitioners found that without being in the courthouse, they speak to other attorneys less often now.

There was some concern about transcripts being worse for Zoom hearings because witness testimony was more likely to be inaudible in the recording. It is more common for there to be omitted speech and errors in the transcripts.

There have also been issues with jury trials and keeping juries representative of the community. Certain people were more likely to stay home due to health reasons, which caused unrepresentative jury pools. Some trial courts required all jurors to wear masks simply so attorneys could not tell their politics based on whether they wore a mask.

Zoom hearings have introduced new problems such as needing to ensure you are muted or unmuted at the correct times. They have also led to more difficulty getting orders signed in a timely manner, because the parties and judge are not all together in person.

Lastly, it was noted that the reduced travel time means fewer billable hours per case for attorneys attempting to meet certain numbers of billable hours.

Benefits of Virtual Practice

In spite of the challenges, practitioners did note that it was useful to be able to work from anywhere. It is helpful when you have a busy schedule and can attend a courtroom that is an hour drive away by just logging into Zoom. This is certainly more efficient when a hearing is expected to take five minutes and is an hour-and-a-half drive away. Generally, Zoom is better for quick motions and appellate proceedings, while in-person is better for trials and evidentiary hearings. Admitting exhibits is difficult through Zoom.

It's also helpful for a client to be able to watch a video of oral argument online. It helps them understand the process and makes it less of a mystery.

Practitioners also noted that the increased familiarity of Zoom has allowed video conferencing to replace telephone calls in some circumstances. Those video calls allow people to get to know each other better than telephone calls would, as well as to see facial expressions you would not see over the telephone. Communication with clients has become easier with Zoom.

Some witnesses are also more willing to testify via Zoom due to the inconvenience of traveling to the courthouse.

Attorneys also noted that it is easier to filing pleadings via email than in person. It is also easier for a new attorney to jump into a meeting as an observer to see what it is like.

General Observations

Some trial courts are still 80% Zoom proceedings. And they do appear to be something that will stay, at least for some proceedings.

E. Breakout Room 5

In discussing virtual or in-person arguments, "access" emerged as the primary consideration. To achieve maximum access for all, a flexible approach to Court of Appeals arguments is preferred. There was a consensus that access to proceedings improves public confidence in decision making.

One retired Supreme Court Justice has been doing research on a national level and observed that virtual proceedings have become the favored format except perhaps in hotly contested cases or those of first impression. Still, access is a prevalent factor even then.

Benefits of a virtual/hybrid approach to arguments:

- Increased representation at oral arguments
- Lowered costs for clients paying attorneys to travel
- Conserving time for attorneys
- Access for incarcerated individuals and those with appointed counsel, SADO
- In the child protection context, less frightening or traumatizing for child witnesses
- The same is true for witnesses/parties in domestic cases and treatment court
- Higher participation of parties in all court levels and less time from work missed for participants – many could take a break from work and participate without having to take an entire day off and forego income
- Video recording of tax tribunal and administrative proceedings preserves a larger record than the scant recordkeeping otherwise created
- Enhances work/life balance

Benefits of in-person arguments:

- Younger practitioners have the visceral in-court experience
- Civility/collegiality among practitioners
- No technical glitches

- No unanticipated interruptions or distractions (for example, dogs, children, virtual backgrounds)
- More formality/tradition
- In trial courts, parties can rely on oral presentations more heavily if motions and briefs are not as developed as appeal briefs (although this can be accomplished via remote argument as well)
- Some conversations that happen in the hallways are as important as what occurs in the courtroom
- More engaging and personal

Experiences/observations of judges in attendance:

- Virtual proceedings allow for uninterrupted access to courts
- Virtual oral arguments were just as effective and were not impaired at all
- Better able to see all the participants and even witnesses testifying on the stand virtually in bench trials, as opposed to sitting next to the witnesses in person
- The above also was true with *Ginther* hearings and other criminal proceedings
- Any sight-line issues encountered can be addressed in reconfiguring the virtual set up
- Witnesses testified seamlessly from across the country with exhibits
- Practitioners seem more prepared with exhibits and access them easier remotely
- The hybrid system works well and never denied a request for remote argument, only delays have been associated with technical challenges involving pro per parties
- Court staff/IT departments have been phenomenal in setting up remote hearings
- Telephonic arguments do not work; there are no visual cues
- Proper demeanor typically has not been a problem
- Screen sharing has been helpful
- Courts have been very understanding of unexpected interruptions
- Courts can and have accommodated practitioners who are arguing one case in person and then need to go into a conference room to participate in a virtual hearing
- Whether a party participates in person or virtually does not affect the substance of the Court's decision

Tips to enrich the virtual experience or bridge the gap so virtual arguments do not "feel" as different as in-person:

- Create a virtual background to minimize distractions
- Enhance connectivity
- Trial courts should schedule more complicated motions separately, not a mass case call

- Plan for the worst – email important documents to the court and parties ahead of time, call immediately if screen/connection is lost

Final thoughts:

- It can be difficult to transition away from past practices
- Some are averse to virtual proceedings because they have not learned enough about it; additional training and resources will help
- We must be willing to evolve as technology evolves
- Consideration should be given for the court we are building for the future where the next generation is tech savvy and very comfortable with the virtual format
- Future courts can be physically engineered to improve virtual and hybrid proceedings

F. Breakout Room 6

The session began with a judge sharing one of his biggest lessons learned—that advocates in the waiting room can see the judges even when the judges can't see those in the waiting room! This is a major change for the judges who speak freely in person before they take the bench. When they are all appearing remotely, that's not the case.

The judge also shared the biggest problem he witnessed with a Zoom hearing. An advocates audio simply didn't work, and no matter what they and the support staff did, they couldn't solve the problem. The case ultimately had to be submitted without that lawyer's argument.

The judge offered two important takeaways from these stories. First, remote arguments can work, but all else being equal, the judges prefer in-person arguments. Second, the remote arguments worked *very* well if these are the biggest problems encountered.

Advocates next discussed hybrid arguments. A few had experienced arguments with one remote judge appearing on a monitor set very much off to the advocate's side, in contrast with the other two judges who appeared in front of them. Advocates reported difficulty reading the room when they couldn't see all of the judges at once, and so hoped that the courts would explore placing the remote monitor in line with the judge's place on the bench. This request was widely echoes by the advocates. Judges reported noticing this problem less because their on-bench monitors solved any problem for them.
Otherwise, both advocates and judges reported that hybrid arguments—with a remote judge, a remote advocate, or both—are going pretty smoothly. The biggest difficulty reported by advocates was consistent: the inability to read the room.

The judges reported that some judges were ambivalent about remote or in-person argument, but that most had a preference and that all of those who did preferred in-person argument. Judges recommended that advocates keep this in mind when requesting a

remote oral argument. Almost all such requests are granted, and the court won't penalize advocates who appear remotely, but some judges simply don't find a remote advocate to be as persuasive as they would be in person. The judge reported not seeing too many requests for remote argument so far.

Few advocates reported that the pandemic had caused them to switch to a more or less paperless approach to practice. The exception was SADO, which has shifted to more of a paperless approach.

At least one advocate related problems with trial courts failing to record hearings or trial days, with the result being that no transcripts were available. The advocate reported that everyone involved worked cooperatively to address the issue. This raised another theme of the discussion: the significant grace that judges and advocates seemed to display toward one another during the last two years.

Advocates report seeing more sections of the transcript marked inaudible or with errors, likely because of the occasional glitch in a Zoom recording. Court staff thinks that there may be a move to recording *all* hearings, which may make it less likely that anyone fails to record them. And the increasing sophistication of transcription software may eliminate these transcription problems and might change or reduce the need for court reporters. Zoom also may be rolling out multitrack recording, which would eliminate transcription problems when participants talk over one another.

A judge noted that it is obvious when a remote advocate has their argument written out on a second screen, and is essentially reading it to the panel. There is then no eye contact with the panel and the judges feel less engaged by the argument. And the advocates don't notice this because they aren't watching the panel. The takeaway: don't do this.

Judges also find it harder to ask questions and interject during arguments. Advocates and staff have noticed fewer questions, too. But the staff wonders if there are some growing pains there, and that questions may increase as the judges become more comfortable with the format of remote arguments. Everyone noted that the three-person MCOA panels had fewer problems with this than the seven-person MSC.

None of the judges or staff are talking about eliminating Zoom. It's here to stay, whether for lawyers who need it for good reason, sick judges, or events like public hearings where more people can more easily participate.

All advocates said how much they appreciate the helpfulness of the court staff. The contrast between the MSC/MCOA staff and the trial-court staffs (one lawyer described a particular trial-court staff as "surly," while another described talking to trial-court staff ass akin to being yelled at) is stark.

Some judicial clerks are still working remotely because they've gotten good at it, and just making "purposeful choices" about when they need to be in person and when

not. A judge said that they preferred having staff in person because they likes the natural in-person dialogue more than email, but gave staff the option to work remotely.

Advocates report that, because so many are working remotely, that they are collecting cell phone numbers from their opposing counsel more often. This makes it easier to reach each other, but has also led to more urgent text messages like "why haven't you signed that stip." Advocates also miss the opportunities to see opposing counsel in person. Everyone considered this effect of the pandemic to be a mixed bag.

Criminal-defense counsel talk about how easy the Zoom technology makes visiting with incarcerated clients. No long trips, no difficulty with prison security, etc. So costs are decreasing. But they are searching for the proper balance between easier remote visits and those important visits which should still be done in person.

A judge reports seeing, during the pandemic, about half as many items on each motion docket, freeing up more judicial time for applications and opinions. The judge is very curious to see how both the motion docket and case call change as the pandemic eases. Right now, cases are 18–20 per call when 30 was more common before the pandemic. The flood may be coming. In that vein, a family-law advocated reported that Zoom hearings are less likely to settle, leading to more court decisions and an expected flood of family-law appeals.

Staff reports that case ages have decreased in both the MSC and the MCOA. MSC watches the MCOA to anticipate case flow. Staff also reports that case filing were decreasing even before COVID. So this may be a larger trend. Tort reform might be part of this, as might the increasing cost of litigation. Also, more criminal cases end in pleas. The backlog in the trial courts may encourage even more pleas.

Staff, judges, and advocates don't think the flood will be horrifically dramatic because there are only so many trial days available, but the case load may stay high for a long time because of that backlog, and because the cases to be tried are harder because the easier ones are settling or pleaing rather than waiting for trial.

One advocate worried that arguments could be downward-spiraling. Some judges don't seem to value argument, and some advocates put 20 hours into prep and then don't get any questions. This advocate worried that more advocates would waive oral argument. But this advocate—supported by many others—thinks argument is very valuable and hope that it will remain so. The judge echoed that last sentiment and expressed that oral argument was their favorite part of the job. The judge added that they really value their in-person conferences with the panel after the case call ends.

G. Breakout Room 7

Zoom Arguments

The group discussed the obvious issues with holding oral arguments on Zoom. Both practitioners and judges alike have war stories about practicing on Zoom. The primary concerns identified were:

- Distractions are more evident (i.e. lawnmowers or dogs barking)
- Verbal ticks and habits (i.e. rocking in a chair, shifting during argument) become more readily apparent while on Zoom
- Failing to keep a poker face during argument is more obvious on Zoom
- Practicing on Zoom feels less formal to practitioners or judges
    - Practitioners sometimes don't act as professionally or aren't as deferential to the court
        - One practitioner shared a story about how opposing counsel gave him the finger during an oral argument because he forgot he was on camera
- There may be issues with transcripts from Zoom hearings
    - Tech issues or people talking over one another can lead to incomplete transcripts
    - Transcripts are now taking longer to accommodate issues and because hearings are lasting longer and it costs clients more money to order those transcripts
        - *Solution*: if an involuntary dismissal warning is sent for failure to produce a transcript, contact the COA to let them know that is the issue
    - Sometimes, the clerk's office is requiring the parties to go back to the trial court to settle the record
- Zoom trials are creating potential issues with juror misconduct – i.e. discussing it with their families, kids being involved in jury deliberations

Most of the practitioners felt that hybrid arguments (one person in the courtroom, one on Zoom) gives the person in the courtroom an advantage. However, one practitioner felt the opposite. Regardless, there was a consensus that being remote vs being in person did not affect the outcome of the case.

The group also recognized that there are certain steps that practitioners can take to improve the effectiveness of Zoom arguments:

- Practitioners should ensure that they have a good camera and good backdrop
- Mimic being in court as much as possible (i.e. dress appropriately, have the camera at the right angle, put your notes up so you don't look down or read)

There are some positive aspects to Zoom/remote oral arguments, such as clients now have greater access to watch oral arguments and there is more sensitivity to how arguments are handled because more people can watch and review. Some practitioners noted that Zoom arguments have allowed more of a discussion – *i.e.* rather than doing "appellant, appellee, rebuttal," the court went back and forth asking questions of the practitioners.

Proposed Rules/Suggestions

One practitioner suggested that certain basic levels of technology should be mandated in courtrooms.

One practitioner suggested that judges could review briefs ahead of time and let practitioners know whether they will have questions and therefore need to come in – *i.e.* perhaps for cases where the judges will have no questions can be on Zoom or don't need to be held at all. Another practitioner suggested that there is a benefit to having oral argument as a matter of course when it is preserved – because you never know if the judges may come up with a question or if you think of a different explanation while preparing for argument. The judges in the room agreed, and even added that sometimes oral argument questions are used to bring a colleague to agree with a certain viewpoint. After some discussion, the majority of participants agreed that oral argument is critical and should be protected.

Some of the practitioners discussed how the "speech" given at the beginning of oral argument (*i.e.* "we've read your briefs, we are familiar with the cases") can sometimes seem like an attempt to dissuade practitioners from giving oral argument. The suggestion was that judges could also say something like "we've already sifted through these issues and we are interested in hearing about X." On this point, the group agreed that practitioners need to understand that oral "argument" is really more of an oral "discussion" and it tends to be more effective when practitioners view it in this manner.

One practitioner suggested that there could be a more lenient supplement authority rule. The majority of participants felt that motion practice in the COA was fairly lenient to begin with and no rules needed to be changed for this.

H. Breakout Room 8

What were people's experiences and preferences doing oral arguments on Zoom?

- One practitioner had her first Supreme Court argument on Zoom. She felt less anxiety doing it from home, but feels that she didn't have the full Supreme Court experience.
- Noticed a big difference in virtual oral arguments in the Supreme Court, with justices taking turns and not talking over one another. There was less of justices playing off of each other. It was not the same conversational experience.
- One appellate judge had only one regular appellate year before pandemic—he has had more Zoom arguments than in-person. He and the lawyers tended to talk more. He liked that he had access to books, records that you wouldn't have in the courtroom. Six months into remote arguments, oral argument was more like in-person.
    - He thinks the ability to appear remotely is invaluable if a client's economic conditions make it possible to have oral argument only remotely.
    - In his view, judges typically know where they're going to go from reading briefs, but at least one case per call is materially affected by oral argument. He can get answers to questions and have more robust dialogue in chambers. He prefers to see lawyers, so they can read each other.
- One practitioner pointed out that proper camera placement can help ensure that judges look like they're paying attention. Court should have more resources to ensure proper camera placement
- One downside of Zoom is that the lag time makes it more difficult to cut lawyers off, and discourages questioning from judges.
    - It's helpful if judges raise hand with question when lawyers are not paying attention to verbal and visual cues. Judges Rick and Krause do this successfully
- Question for the judge—is there a difference in attorneys arguing seated versus standing?
    - He doesn't have a preference; has seen <25% standing. The challenge is to maintain appropriate decorum.
    - Some lawyers feel they are better presenters when standing rather than sitting
    - Sometimes it's hard to see lawyers when they are standing and the camera is full body view—they seem far away
    - Lawyers shared challenges with different camera settings and suggestions, including putting camera on top of monitor
    - No preferred camera angle for Court.

- Benefit from Zoom is there has been a good increase of transparency in appellate decision-making process from having the arguments recorded. The litigant can feel like the panel was prepared, and that the lawyer got a fair chance to argue.
- Reasons for keeping Zoom available as an option:
    - One practitioner thinks it's nice to have Zoom option to avoid travel, but it's a better option for trial court than appeals.
        - In trial court, need in-person to interact with witnesses, do custody hearings, etc.
    - Many prefer in-person, but Zoom has to be an option
    - One new practitioner prefers Zoom, and finds in-person court uncomfortable. It's easier to have conversations with judges in fact-intensive family law cases, and saves clients a significant amount of money
    - One COA staff member liked having staff meetings over Zoom
    - Remote argument improves access to justice
    - If an attorney tests positive for COVID, it would be very unfair to deny oral argument if Zoom option isn't available. Both Court and counsel have prepared for argument.
    - One attorney has been able to practice in other places more easily by appearing remotely. He sees it as a good opportunity for clients to avoid higher attorney fees by hiring Michigan counsel rather than big-city lawyers.
    - One lawyer loves Zoom because she has transcripts on hand and can share her screen instead of doing handouts.
        - She values getting the "pomp and circumstance" out of the way to focus on substance.
        - It's easier to schedule doctors, teachers and other witnesses to testify via Zoom because they don't have to take an entire day off of work.
        - She misses congeniality of in-person appearances.
        - She likes being able to see everyone on one screen instead of not being able to see other judges out of her peripheral vision. She likes judges asking questions in order without being interrupted.
    - One lawyer in a Prosecutor's office is pushing back on appearing for oral argument when travel is required. He thinks he could get guardian ad litems more involved if Zoom was an option.
    - A criminal defense lawyer has a client who's been in jail two years because there's been no movement on his case due to the pandemic. Access to justice is a huge advantage to Zoom, and limited resources make Zoom essential for clients to be able to appear.
    - Someone asked if it would it be useful to have a share screen option during oral argument?

        - One judge found it helpful as a trial judge. Notes that Supreme Court justices are very open-minded to new ideas
    - Appellate Practice Section has discussed being able to share visual aids
    - Screen sharing is helpful in deps, but might be hard to do by Zoom because screen size is small
- Reasons why Zoom is not a preferred option and challenges with Zoom:
    - With Zoom, practitioners miss the experience of watching, talking to people before and after
    - One issue is that large sections of trial court transcripts come back "inaudible" when recorded on Zoom—might need to have better recording technology for courts if we're asking court reporters to transcribe from Zoom recordings
    - Hard to engage, have connection with the panel. Better for transparency, but not as personal
    - An older practitioner remembers when people would resolve motions to compel to avoid going to court. There is no opportunity cost when arguing over Zoom. Being there for settlement conference in person is helpful just to talk. Small trial court matters like scheduling conferences and motions to adjourn would be useful over Zoom
    - Being in-person gives an opportunity to recognize judge's clues, when they're about to ask question
    - One court clerk would prohibit Zoom in all circumstances as incompatible with dignity of court proceedings. The point is that you have to walk past portraits in the Hall of Justice or the local courthouse, which reminds us that we are all heirs to a legal system that dates back a long time, and should be thinking about concepts that legal scholars wrote about. Courthouse architecture and environment is supposed to be intimidating, off-putting
    - Some wish there was a way to inforce decorum for Zoom proceedings
    - One lawyer who is new to appellate practice thinks a lot is lost on Zoom for not having interactions between lawyers. He finds the lack of formality troubling. He's surprised there's not more of an effort to develop better technology than Zoom—easier to moderate, share screens, more intuitive. Court system could be involved in improving tech
    - One appellate judge thinks that the panel will never be more prepared than when the attorneys are before them to answer questions.
        - Zoom is economically advantageous, but can't compare with effectiveness of advocacy of in person—rebuttal, speaking to judges, answering questions. Most other judges feel the same
        - He observes that well over 90% of civil and criminal matters are settled, and you get tough cases settled by discussing cases with opposing counsel in person. He's nervous for younger lawyers who prefer or default to Zoom because it's more economical. He

thinks it impairs their capacity to resolve cases honestly and economically because they are not forming the personal relationships that happen in hallways of courtrooms.
        - Bar association meetings could be more important for in-person interaction if more Zoom proceedings are held. But it can't compare to relationships developed on motion days
    - Final tally: 6 prefer Zoom, 13 prefer in-person

Practitioner wishes for the future

- Mandatory e-filing in trial court
    - Judge--Can't do it because trial courts are funded by county, so county IT departments decide. Headlee Amendment means COA can't require local governments to expend funds for e-filing. A lot of northern MI cases still on paper (20-30 counties). Every county is different
    - One lawyer pointed out that counties aren't the only funding sources for courts, as some district courts are funded by cities
- Better options for providing video evidence to COA
    - Important for body cam videos
    - The court can download everything including player, but clerk's office says that COA won't accept that as filing.
    - Evidence.com suggested as a downloading solution
    - Judge explains that court needs five copies of video because each chambers needs to get it. A thumb drive is given to the judge, but there is only one laptop in Grand Rapids office that you can watch it on. Many times the thumb drive or CD doesn't work
    - Court staff says that they need a way to put it in their docketing system
        - New input software has something to link to computer system
- Difficulty getting trial exhibits
    - Hard to get trial exhibits because trial court doesn't keep them
    - Zoom trials are nice because exhibits are all PDF'd

I. Breakout Room 9

Pros and cons of remote legal work/Zoom use during the pandemic.

- A practitioner who lives in northern lower Michigan and takes on cases as appointed counsel for defendants in criminal proceedings reported that practicing by Zoom has been beneficial. Her community is underserved. She lives some distance away from many courts and would have to pay her own travel costs to appear. Zoom practice allows her to take on many cases that she would not otherwise be able to take.

- Other practitioners noted that Zoom is a huge benefit for those who live outside the state.

- Practitioners noted the increased efficiency of Zoom arguments. Attorneys can avoid long drives and in-person waits and work on other matters while waiting for argument. Practitioners described feeling irritated at returning to court and "wasting time" waiting for hearings.

- Some other practitioners stated that, while avoiding the drive increases efficiency, Zoom is not necessarily more efficient in other ways. They still spend time before and after the argument preparing for and thinking about the argument, not working on other cases.

- A Court of Appeals judge pointed out that efficiency is not the only, or even necessarily most important, goal. While safety is a strong justification, efficiency is not necessarily so. The most efficient method of all would be not to permit any oral argument, but this might not be the best method to achieve justice.

- While access to justice/cost is a serious concern, the judge would support more government funding for attorneys to be able to appear in person.

- The judge also pointed out that in a "lot" of cases, oral argument changes the outcome. Even if oral argument does not change the outcome, it improves the opinions, which is also important.

- Zoom/remote practice creates a problem of inexperienced attorneys not being able to obtain needed experience in in-person arguments.

- Zoom/remote practice may lead to incivility and loss of decorum.

- There seems to be an erosion of personal relationships.

- There is some "chippiness" or hastening to frustration/anger during arguments on Zoom.

- "Chippiness" might be unintentional. What might seem like rude interruptions could be due to delay caused by technical issues.

- People don't seem to collaborate as much as they did before, perhaps because of loss of in person discussions.

- Practitioners are seeing trial courts issue summary disposition motion decisions on briefs only, with no oral argument, and orders without even opinions setting forth the reason for the decision. This is problematic.

- On the government side, if practitioners no longer have to travel because of Zoom, departments likely will see their budgets cut due to reduced travel costs, and no longer will be able to travel even if they want to on some cases.

- Why is in person argument preferred by a judge? Questions seem to be answered more frankly when people are in person looking at you. It is easier to discourse with others.

- Opinions are better when judges discuss cases in person during and after argument. Issuing good opinions is an important goal.

- Attorney: we are a service industry. Remote argument may be more efficient for lawyers, but we have to do what is best for those we serve. If judges say they prefer in person, we have some obligation to appear in person if feasible.

- In person argument is a good thing for lawyers personally, for development of your practice. Name-face recognition is important. Clients want to know the extent of your experience, including in person arguments.

- A better solution to the access to justice problem may be to continue to advocate for better pay for lawyers, not remote practice.

- On the family law docket, most of the clients do not have a lot of money. Cutting out travel costs significantly reduces their expenses. It matters a lot to them.

The future of oral argument

- Is it possible that we will one day have no in person arguments at all?

- Judge suggests it depends on how much judges and attorneys continue to value in person argument.

- Maybe oral argument is not essential in less complicated cases that present well-established legal issues, or could be held via Zoom. Maybe make a distinction for more complex issues.

- But then we have to determine what is more complex, which can be difficult.

Privacy/public viewing

- Zoom creates concerns about some privacy issues. Attorneys have to be careful not say names of minors on Zoom.

- Posting the argument on YouTube can be problematic. People (including parties) see and misunderstand. Arguments go viral.

- There's a distinction between holding argument remotely, versus livestreaming or posting video for remote viewing by clients or public. They are not necessarily intertwined.

- Supreme Court for many years has held in person arguments while livestreaming and posting for later public view.

- Posting on YouTube versus a Court-maintained website may be a different issue. YouTube is a different audience and different setting with "views" and "likes."

Requesting remote argument

- Should agreement of all parties be required; and/or some showing of cause; or a "no questions asked" policy?

- Many advocate for "no questions asked." No one speaks up in support of requiring agreement.

Court technology

- Technology in federal courts is much worse than in state courts. A Zoom hearing in one courtroom may disrupt access for everyone in the building.

- How did Michigan courts do such a good job?

- Zoom licenses were ready to go.

- Court administration/Chief Justices/Judges care about technology and there are good tech teams in place in the clerk's offices.

- Congratulations to Michigan COA, which was only down for argument for one month's case call (April 2020) and back up remotely the next month.

- Has tech prolonged doing work remotely? Many think yes.

Effect of pandemic on "backlog" of cases/appeals

- Question about comments from plenary panel that there may be a deluge of criminal appeals, but not civil appeals.

- Many practitioners disagree. Experience is that civil cases in the trial court are simply sitting and not moving, but not necessarily settling because there is no pressure/trial.

- Criminal practitioners report that though criminal cases are supposed to be the priority, they are not necessarily moving either.

- One practitioner reports that Macomb County judges are having difficulty getting jurors to come in for trials even when parties and Judge are ready to go.

- Judge compares to experience in immigration courts. This is how immigration courts operate all the time: utterly overwhelmed, takes years to process cases.

- Family and criminal practitioners report extreme pressure from trial court judges to settle cases by not scheduling hearings, making decisions; i.e. child will not be returned, so you had better reach an out of court agreement.

Zoom in trial court versus appellate courts

- Zoom at least allows some cases to progress. It may reduce out of court settlements due to lack of in person contact.

- Zoom is an advantage in the trial courts. It may be less of an advantage in the appellate courts.

- In trial courts, there are lots of Zoom hearings, some Zoom bench trials/bench adjudications.

- No one is aware of any Zoom jury trial.

Zoom and the record

- Does Zoom affect creation of the record? Maybe a transcript does not adequately reflect what's actually going on on Zoom, and the hearing should be watched instead.

- Will we still need a transcript in future? Maybe not.

Hybrid arguments

- Hybrid arguments with one judge or attorney on screen, others in person: good technical setup at COA with large screen visible to attorneys and judges and close to bench.

- Still some uncomfortable feeling of "shifting" between judges, and difficult to incorporate remote judge into argument.

Weird Zoom presentation problems

- People who use large hand gestures appear as "hands" coming at the screen.

- People who don't have a good camera angle may show only the top of the head.

- With virtual backgrounds, people who move around a lot disrupt the background, which is distracting.

- Sometimes people have strange things/art on walls behind them that are distracting.

- Body language is more important on Zoom.
- When we are talking we need to deal with discomfort over how we look and/or sound.
- We need to remember to look at the camera, not the screen.
- Facial reactions can seem exaggerated.
- Some of us have had to rethink how we move our hands and try to find other ways to convey that something is important.
- Judge states that it is harder to admonish attorneys for inappropriate facial reactions in remote arguments.
- Other people's conduct or sounds onscreen can be distracting.

Other Zoom/remote topics

- What to do when you have a technical problem? Call clerk's office at COA. Panel can recall the case, or allow you to call in.
- In general, we see much worse behavior in circuit court Zoom hearings. Almost all are respectful/decorous in the COA (except for infamous "giving the finger"). We hope this continues.

Published versus unpublished opinions.

- Family law and criminal practitioners plead for more published opinions to provide guidance and precedent in their respective areas of practice.
- It seems to be more and more acceptable to cite and discuss unpublished opinions.
- Judge suggests more publication requests should be made.
- If a party wants to request publication, it would be better to do so at oral argument, before decision is known.

J. Breakout Room 10

The discussion began with an introduction of everyone in the room that included a description of their current practice area.

The initial topic that we discussed was the manner in which we can communicate more effectively via Zoom. This included a discussion in-person communication versus video presentation. Some members of the discussion group indicated a need to return to in-person trial court presentation. A significant number of the participants indicated that

there are increasing concerns as it relates to appropriate decorum and conduct of advocates who are participating on Zoom, especially in the trial courts. This discussion ended up being rather lengthy.

The discussion then transitioned to whether the group felt that an oral argument via Zoom would yield a different outcome than an oral argument in a live setting. Many of the participants seemed to be of the consensus that the format in which the oral argument is held is not generally determinative. Members expressed a general consensus that it was unfortunate that it took a pandemic to get advocates to participate in remote hearings. There was a general consensus that Zoom increases the expediency upon which judges are able to get litigants to participate in a conference, which therefore increases the expediency of the process. Several participants noted that Zoom seems to increase client participation in family court proceedings. Members who practice in district court indicated that there are definite pros and cons about Zoom participation in district court. In the context of traffic court, the group noted that there are definite benefits as it relates to expediency, participation of the litigants, and an overall sense of access to justice. In misdemeanor events and other preliminary felony events, the group felt that there is an improved decorum to the court and appropriateness when the litigants are required to appear live. Almost all of the individuals who participated in the discussion noted that they would continue to request a hybrid approach to court hearings.

Some of the participants noted that the oral arguments via Zoom could be improved upon if additional features were enabled by Zoom that would enhance the ability of the court's to more effectively navigate large groups of people. This was especially important to the district court practitioners in the room as well as the family court practitioners.

We then discussed the importance of public education as it relates to Zoom appearances in court. Especially as to decorum to the court, appropriate attire, and appropriate location choices. Everyone who participated seemed to indicate that this would certainly benefit the process.

There was also a discussion on the recording of Zoom proceedings as well as the subsequent transcription of these proceedings. There was some discussion on artificial intelligence transcription and whether it would continue to be necessary to have court reporters transcribe these proceedings. The group did not reach any consensus on these points.

We then discussed some means by which Zoom oral argument could be improved upon in the Court of Appeals. One practitioner indicated that they would like the display of the help line during oral arguments. They indicated that they had had a previous incident where they were disconnected mid-oral argument and believe that if that help line number would have been streaming during the oral argument, they would have been more likely to write it down and would have been able to reach the court expeditiously once the technological issue occurred. A member of the Court of Appeals who was present indicated that the Court of Appeals, as the host of the meeting, has the ability to

watch oral arguments for issues such as advocates who fall off the Zoom and are generally aware of it and advise the court of the same.

We then discussed amongst the group methods in which practitioners improve their visual presentation on Zoom. One practitioner indicated that they dual layer their screens so that they can look at their notes while still looking at the judges. Other practitioners describe the various types of screenstands that they use. Another practitioner noted that they put all of their visuals at eyelevel so that it always looks like they are looking at the judges. Another indicated that they prop up their cameras so that the cameras are directly in line with where they are looking on the screen.

Another issue that came up in our discussions of the post-pandemic world of advocacy was the issues in the smaller circuit courts that lack e-filing or accepting of pleadings by email filing. Several practitioners noted that smaller counties are no longer accepting email filings. The group as a whole agreed that all courts should accept email filings, with limited restrictions for exceptionally large documents. They also expressed a desire for e-filing to be expanded to all counties on a uniform system. Several of the practitioners who do indigent criminal work noted that the ability to e-file allows them to provide more services to more clients as they are not required to drive across the state to file certain documents when a court does not allow for paper filing. The indigent defense community in the room also noted that Zoom has allowed them much ability to participate in oral argument as it is no longer as cumbersome of a process to drive around the state to the various Court of Appeals locations.

In discussing the continued ways that we could improve advocacy in the trial courts, one discussion that centered around a hybrid approach was whether praecipes could have section on them for the advocate to request in-person oral argument or Zoom argument. The group seemed rather receptive to this. That said, several individuals noted that very few courts outside the Metropolitan Detroit area actually utilize the praceipe system. Discussion then turned to how courts could communicate the option of Zoom oral argument for motions more effectively to litigants at the trial court level.

We then turned the discussion to the impact that a Zoom presentation has on the dialogue between judge and advocate. Some advocates noted that Zoom unfortunately results in judges not asking certain questions because the moment has passed or litigants not being able to get an answer out quick enough on the Zoom format. Other litigants expressed frustration with being placed in waiting rooms for long periods of time and being unable to watch the oral arguments of the other matters that are simultaneously proceeding. Additionally, they have noted that sometimes they are put in “Zoom jail” where they are looking at the judges host page and are unable to determine when their case might be called for prolonged periods of time, which results in ineffective use of their time as well as fear of getting up to use the restroom or tending to other things as they are afraid they will miss their opportunity for a call. No real solutions were discussed as they were generally viewed as a judge-specific method of handling motion call, but a request was made for some discussion on this issue.

We closed the discussion with a reflection on what we would like to see in the future as far as the incorporation of Zoom technology in litigation. The consensus was that everyone wanted to continue with the Zoom option. Everyone also seemed to want to continue with having the proceedings then available for their clients via YouTube. Everyone agreed that finding some type of a balance is going to be important. Again, we circled back to the need for a hybrid approach. It was recognized that the type of hybrid approach would also be somewhat dependent on the type of court; litigants seem to desire to have in-person oral argument with the Supreme Court, but have an option at the Court of Appeals and the trial court level.

K. Breakout Room 11

The attendees began by sharing "war stories" (some of which might best be described as "horror stories") about virtual court and meeting appearances during the pandemic. Some practitioners' virtual appearances were interrupted by teenagers cursing at their video games in adjacent rooms, clients calling the attorney's cell phone during a Court of Appeals oral argument, and the sound of children singing "Happy Birthday" on a Zoom classroom call in the background.

The attendees then discussed best practices for ensuring smooth virtual court appearances. This includes being mindful of backgrounds and camera positions, including lighting, distracting background art or objects, and camera angle. The attendees agreed it is important to minimize the distractions caused by pets, children, and other household members.

Apart from the distractions, the attendees observed fundamental differences between virtual court and in-person court. It can be difficult to make meaningful eye contact with judges over Zoom, and some attendees noted that it is harder to read judges' body language. During in-person arguments, lawyers can pick up on nonverbal cues indicating that a judge intends to interrupt, but that is more difficult to anticipate virtually – particularly when arguing in the Supreme Court with seven justices. One practitioner recommended pausing a beat after a judge speaks to ensure the judge has finished his or her question. Some attendees also found it hard to measure judges' engagement with their arguments.

The moderator asked whether attendees would prefer Court of Appeals and Supreme Court arguments to be in-person or via Zoom. Zero attendees agreed that oral arguments should *only* be offered in-person. Some attendees cited the advantages that virtual arguments offer to attorneys in remote areas of the state (located far from a physical courtroom) and to attorneys whose clients might be unable to afford to pay for travel to an in-person argument. Requiring in-person attendance may become an equity issue in those cases. One attendee noted the lost productivity when there is an in-person argument because in a small practice, there is no other attorney to do other work.

The attendees recognized the ceremonial aspect of the courtroom and the loss of formality that can accompany virtual appearances, but they also discussed the benefits of virtual appearances, including improved work-life balance for lawyers and judges.

The attendees discussed whether local (county-level) courts should offer facilities and technology for attorneys to appear virtually for appellate argument. Other attendees suggested this was unnecessary, as attorneys should equip themselves with video conference technology as a cost of doing business.

One attendee voiced a preference for "on demand" virtual attendance so that each attorney and client can decide whether in-person or virtual argument is appropriate in a given case. Other attendees agreed with this statement.

The group ultimately reached a consensus in support of "on demand" virtual appearances for oral argument in the Court of Appeals and the Supreme Court. This would make in-person appearances the default but would allow attorneys to elect a virtual appearance without needing to articulate a reason and without requiring consent from opposing counsel.

III. Law Practice Breakout Sessions

A. Criminal

1. Continuing Issues for Sentencing Juveniles Convicted of First Degree Murder Pursuant to MCL 769.25

- Overview
  - In 2012, *Miller v Alabama* struck down the practice of *mandatory* life without parole sentences for those convicted of murder committed before the age of 18. 567 US 460.
  - In 2016, *Montgomery v Louisiana* made *Miller*'s ruling retroactive to cases final on appeal. 577 US 190.
  - MCL 769.25 sets forth the procedure to be followed, post-*Miller*, for juveniles convicted of murder.
  - MCL 769.25a sets forth the law regarding the resentencing of those sentenced to life without parole before *Miller*.
  - Under the new statute, prosecutors may seek life without parole for murder, and courts may impose it. *Miller* struck down the mandatory life without parole sentence but left open the possibility of discretionary life without parole. Courts must consider the factors of youth.
  - A court may impose a term of years sentence (and if the prosecutor does not seek life, must impose one). The minimum is between 25 and 40 years, and the maximum is either 60 or *at least* 60, depending on how the statute is read.

- Question: What is going to happen depending on how *Parks* and *Poole* come out?
    - Context:
        - *People v Parks*, No 162086, and *People v Poole*, No 161529, are both now pending in the Michigan Supreme Court, and were argued in March. Both defendants were 18 when they committed first-degree murder. Both argue mandatory life without parole violates their rights under the Eighth Amendment or article 1, § 16 of the Michigan Constitution, or both.
        - The defendants are asking for mandatory life without parole to be struck down for murders committed before age 25, based on an argument from neuroscience.
        - *Poole* has an extra wrinkle, as his case comes to the MSC on a motion for relief from judgment, so he must show a retroactive change in law.
        - A ruling in favor of the defendants would open up floodgates in terms of new resentencings required for those convicted of murders committed between the ages of 18 and 25.
    - Subquestion: Are we sure that the retroactivity is going to be the same as *Miller*/*Montgomery*?
        - The group did not know, but pointed out that the Court will answer the question right away, since *Poole* is on MRJ rather than direct appeal.
    - Subquestion: Is there a better remedy than a flood of new resentencings?
        - Some are thinking that the Legislature could create a remedy to prevent a flood of resentencings. Perhaps a "parole remedy" rather than a "sentencing remedy."
        - Some states, e.g., California, will have the parole board look at factors, including *Miller* factors, and decide whether to grant parole rather than have a judge decide at a resentencing hearing.

- Question: Are people having trouble finding experts to testify at sentencing/resentencing hearings? Some places are "expert deserts" – it is hard to find experts in that area.
    - One participant described little trouble finding qualified experts. Even if they are not in the area, they can be from elsewhere in the state or even out-of-state, if they have a good c.v., there is generally no trouble having them qualified to testify.
    - Another participant expressed that this might be easier when you have funding, but not as easy when you have to petition the trial court for money to hire an expert.
    - From the defense perspective, there is a pool of money for trial-level experts (not just *Miller* experts but including them), that has been approved to continue for the future.

- Question: There is federal funding for juvenile justice reforms. Do people have thoughts on what is to be done with that money?
    - One participant, a former trial judge, expressed a particular need for mental health counseling, not only for defendants, but for victims, families, and all, but particularly for juvenile defendants, to help them at a crucial time of life.
    - Another participant expressed that the inadequacy of funding has only gotten worse and gets worse each year.

- Question: Are juveniles sentenced primarily being tried under designation proceedings or waiver proceedings?
    - Many were 17, so neither – tried as adults because they are adults under Michigan criminal law.
    - One participant expressed that it varies regionally within the state: designation in some areas and waiver in others.

- Question: What happens to those defendants where the prosecutor does not seek life without parole, perhaps as part of a plea agreement?
    - Note – there are two cases pending in the MSC on this question.
        - Context: in *People v Wines*, the Michigan Court of Appeals held that a sentencing court must consider the *Miller* factors in sentencing or resentencing a juvenile murderer, whether the sentence is life without parole or a term of years. 323 Mich App 343 (2018).
        - In *People v Tate*, No 158695, and *People v Boykin*, No 157738, both argued in January, the Court is considering whether *Wines* was correctly decided and what trial courts must do when sentencing juveniles to a term of years for first-degree murder.
        - The People's position in *Tate* is that there would have been nothing wrong with requiring courts to consider *Miller* factors in this situation but the Legislature did not choose to make that a requirement, so sentences should not be overturned for it.
        - SADO's position is that the state and federal constitutions require courts to consider these factors when sentencing juveniles, even for a term of years.
    - One participant found it mind-boggling to think about the resources needed to do *Miller* hearings rather than standard sentencing hearings for juveniles where a term of years sentence is sought.
    - One participant pointed out that, regardless of *Wines*, a defendant is not precluded from bringing whatever information they need to bring into a sentencing and file a sentencing memorandum.
    - This discussion leads into concerns about how presentence investigation reports are prepared. It is somewhat helpful that defense counsel can have some participation in preparing the PSIRs, but that only goes so far.

Generally the courts are receptive to information provided by defendants in preparing the PSIRs.
    - One participant expressed that, if *Wines* is upheld, this is going to create an incentive to reach sentencing agreements to avoid difficult sentencings. This might even include a post-conviction agreement (as opposed to a plea agreement). Participants said that they have been seeing more of these agreements, and while they fall within a range, they seem to be averaging at about 32 years.

- How, as a defense attorney, do you approach a defendant who is a child to try to explain to them the nature of the proceedings and the potential consequences, to try to advise them and help them through the process?
    - It's always going to be difficult. No real clear answer.

- One participant has noted a racial disparity – almost no white defendants against whom prosecutors have sought life without parole. Others note regional disparity.
    - One participant notes a possible solution from another jurisdiction – all juvenile first-degree murderers get a flat 25-to-life.

- One participant expressed that there ought to be a mechanism built in whereby a juvenile sentenced to life without parole will automatically have that sentence revisited after a certain amount of time to see whether it is appropriate.
    - It is impossible to see into the future and to sentence someone when they are still so young necessarily entails a great deal of uncertainty.
    - Also, sometimes these cases are emotionally charged or politically charged, so there may be an advantage to either putting off sentencing, or having a second sentencing proceeding, after some time has passed.

- How is a defense attorney who pleads out to a sentence greater than 25 years going to protect themselves from a *Ginther* hearing later on? Failure to adequately investigate, etc.
    - Must do due diligence, enough investigation to determine that this sentence is a reasonable one under the circumstances. Also must memorialize it with work product, in the file, get the expert, get the report, figure out if there are mental health concerns, make the record. Need more of a record in the file than a standard guilty plea.
    - Possibly more of a plea colloquy as well.
    - May be useful to compare to plea agreements in death penalty states where the plea takes death off the table.
    - There is also a tension as a defense counsel between putting things on the record to benefit oneself (making a record against a future ineffective-assistance claim) as opposed to benefitting the client.

- One thing that makes this difficult is that often these cases start in juvenile court with one defense attorney and then when it moves to (adult) criminal court, there's a new attorney. The discontinuity can bring problems – it would be helpful to have defense counsel the same throughout the pretrial and trial proceedings.
- One participant said that it is often difficult to know before trial what an appropriate sentence would be, which would make a sentencing agreement difficult to reach at that early stage.

- Related question: How can a 16/17 year old enter into a sentencing agreement at all—if the premise of *Miller* is that minors don't have a fully functioning adult brain, how can they make the commitment to sign away, say, 32 years of their life?
  - A difficult question but a defense attorneys. You have the duty to do the best for your client. But no matter what you do, is there anything that that will prevent someone who pleads guilty as a juvenile from later deciding they no longer want that agreement.
    - One participant mentioned a case pending in the MSC, *People v Stovall*, No 162425, which raises questions like this and others.
    - The opposite problem also exists – a young defendant will reject a plea agreement and roll the dice at trial, and then receive life without parole and later decide he wished he had taken the plea. Is youth a factor in determining whether the plea rejection was voluntary?
  - Would it help to have the parents involved? (In many cases the parents are absent or not helpful.) Even if they're involved, the client is still the juvenile, not the parents.
  - It is also important to note that many of these juveniles have other mental and cognitive issues beyond just their youth.

- Another outstanding question exists in the pending case of *People v Taylor*, No 154994, which asks who (if anyone) bears the burden of proving that life without parole is an appropriate sentence.
  - The defense view is that the prosecution must make the motion for a life without parole sentence, and typically the movant has the burden of proof.
  - The prosecution view is that there is no burden in a sentencing proceeding—the parties argue their cases and the judge sets an appropriate sentence.

- Question: How often is the decision by a prosecutor's office to seek life without parole driven by the preferences of the victim's families?
  - Varies from office to office but in general that will usually be a factor. Sometimes it is not.

- There is pending legislation that, if it passes, would resolve most or all of these questions, by giving all juveniles immediate parole eligibility.
    - Does this violate separation-of-powers by commuting sentences? Probably not – Legislature has power to determine appropriate sentences. And, compare to the Legislature's ability to retroactively change 650-lifers (those convicted of possession of more than 650 grams of cocaine) from non-parolable life to parolable life.

- Question: How are juvenile lifers who have been paroled doing?
    - They're doing really well. They have a recidivism rate of less than 1% - the overall average is more than 30%.
    - There are reentry programs they can get assistance from.
    - One participant asks if, by putting juveniles into prison for decades, we are educating them into a life of crime? The above statistics tend to indicate not.

- Question: Is there any change in MDOC policy based on what programming juvenile lifers are eligible for? (Previously, lifers are generally ineligible for programming.)
    - There has been some change, some spurred by the *Hill* litigation, that has opened up programming, but then with the advent of the coronavirus pandemic, programming has stopped.

- Final note: a judge asks practitioners – if new and controlling authority comes out after briefing is complete, please file a supplemental authority!

2. Court Rule Changes Important for Criminal Appellate Practice

Several members of the criminal bar, judges, and court staff all met to discuss recent court rule amendments and potential proposals for new rules. The rules on the agenda that were discussed in detail by the group included:

- MCR 6.425(A)(2), (E): Defense counsel access to presentence interviews and reports;
- MCR 6.428: Expansion of the restoration of appellate rights provision;
- MCR 6.502(D): Requirement that trial courts provide notice to pro se defendants before recharacterizing a pleading as a motion for relief from judgment;
- MCR 7.208(B): Trial court post-judgment motion deadline now corresponds with appellant's brief deadline; extension of trial court disposition deadline to 56 days; and
- MCR 7.312: Adopting standard MOAA procedures

In addition to the rules on the agenda, the groups had discussions about potential changes to the court rules. Those potential changes included:

- Adopting a rule that counsel be appointed and file supplemental briefing on the issues when the Supreme Court orders the prosecution to respond to a pro per application for leave to appeal;
- Adopting a rule to allow for correction of "objective facts" contained in PSIR at anytime; and
- Adopting a rule to allow defendants to pursue administrative remedies in the MDOC to make changes to the Presentence Investigation Report after the six month deadline.

First, regarding the changes to MCR 6.425(A)(2), (E), several defense attorneys noted they have had issues with being notified by probation department of when an interview is being conducted. They also mentioned not having access to presentence reports in advance of sentencing. Others who had trial practice backgrounds participated in these interviews at this level. Some attorneys suggested filing something in writing with the court and to serve the probation department to ensure that request to be present during the interview is recognized.

For MCR 6.428, some prosecutors expressed the position that rule should be limited to errors by trial counsel and not include errors by the trial court. For these prosecutors, a claim on appeal is lost in system or by the court should not be covered under the rule. Prosecutors holding this position also believed the new rule opens issues with finality of judgments and noted some cases where an individual's right to an appeal is restored years later. Some prosecutors also expressed the position that there should be some documentation about whether a request was sent in outside of an affidavit. The problems with forms being lost by the court seem to be mostly limited to Wayne County, as forms a regularly lost or misplaced in that county.

Other attorneys stated that the new rule covers the concerns listed by prosecutors by limiting its application to "errors by the defendant's prior attorney or the court, or other factors outside of the defendant's control." These attorneys stated that motions usually involved some proof that appeal was pursued in a timely manner and is show through mail records from the prison or jail (if that jail keeps such records). Upon receiving the motion, the rule allows for courts to make a judgment call using language of the rule to decide whether an individual is entitled to restoration of appellate rights in cases where the issue is contested. The group also noted there were no reported appellate decisions addressing this rule change and discussed a possible adoption of a preponderance standard that the defendant must meet before being entitled to relief.

For MCR 6.502, individuals shared concerns regarding the filing of a pro per motion for relief from judgment and duty to give notice to individual that it is a 6.500 motion and 90 days to correct or withdraw the motion. Some prosecutors expressed concern that the courts do not know the rules and do not apply them correctly and it places a burden on the prosecution to inform the court of the court rule. Others say the rule codifies existing law and it provides opportunity for pro per individual to reconsider wasting first 6.500 motion on something minor.

The prosecutors expressing concern with the rule shared that they a regularly not served with motions and then do not take any action unless ordered to respond. These prosecutors said their concern is not with the basis for the rule in the law, but how the rule operates in practice in

larger jurisdictions. The group believed education for the courts on rule is important to ensure compliance.

Finally, some defense attorneys noted a concern about tolling the time to file habeas petitions. Those attorneys noted that if a motion is not properly labeled as a 6.500 and gets sent back to that individual, it does not toll the habeas clock because it is not properly filed.

The group also discussed the recent amendments to MCR 7.208(B). Before this rule change, there was a jurisdictional deadline of 56 days and then all filings after that deadline would be filed in the Court of Appeals. After the amendment to this rule, pleadings can be filed at any time within the time for the brief on appeal.

After the adoption of this rule, individuals reported that there is more trial court work than before. Trial courts rarely grant evidentiary hearings, so many attorneys stated it is common to still file motions to remand in the Court of Appeals to attempt to obtain an evidentiary hearing. Since few trials have occurred because of the pandemic, some attorneys stated they have limited experience with filing motions pursuant to MCR 7.208(B).

Several prosecutors noted they have had limited time to file responses to MCR 7.208 motions. This issue led to a suggestion by prosecutors to amend the rule to allow for adequate time to respond to briefing. These prosecutors stated they experienced pressure from trial courts to respond quickly to defense motions.

Members of the court staff also commented on the changes they have noticed since the amendment to MCR 7.208. According to members of the court staff, there has been a noticeable reduction in the number of motions to remand in the Court of Appeals. One individual reported that there were about a quarter of the motions to remand than before then rule change.

The group also discussed the changes to MCR 7.312, which adopted standard MOAA procedures. Some attorneys suggested the MOAA procedures were relatively indistinguishable from a full leave grant and that the Court appears to use MOAAs in situations where there is a reluctance to have a case where leave was improvidently granted. The MOAA procedure allows court to punt on an issue if there is not a consensus or if they decide the issue does not require an opinion or other action after oral argument. The changes in the rule allow for staggered briefing which is more useful to the Court. A member of the Court stated that MOAAs result in the Court taking on more cases and to have flexibility to deny leave to appeal. The Court also has option to grant leave to appeal, order more briefing, and oral argument.

In addition to the rules on the agenda, there were two proposals for rule changes discussed by the group. The first potential rule change dealt with the situation where the Supreme Court enters an order directing a response from the prosecutor and there is an unrepresented appellant. Prosecutors suggested that counsel be appointed when this order is entered and that they file supplemental briefing on the issues prior to the prosecution filing a response. There was also a suggestion that it would be easier for the prosecutor to respond to a brief filed by an attorney.

The second potential rule change discussed dealt with a suggestion to amend the court rules to expand the time frame for trial courts to make corrections to the presentence investigation report. The problem that gives rise to potential rule is that individuals often seek to correct their presentence investigation report and then lose their MCR 6.500 motion. Some individuals suggested a rule change to allow for changes relating to "objective facts" – such as marital status, date of offense/arrest – at anytime.

Some prosecutors expressed a concern about burden on trial courts for filing of motions to correct presentence investigation report post after the current six-month deadline. As an alternative, some attorneys suggested a potential for rule to pursue administrative relief for the MDOC. In response, individuals noted there were problems with presumption of correctness of report by parole board and corrections are rarely granted. Others stated a concern about separation of powers issues by having an administrative process that is subject to judicial review.

3. There's an Expert for That

Expert testimony has become more of a norm in criminal cases.

What the response has been to *Uribe, Thorpe, Harbison,* and *Hawkins* for prosecutorial practices: Involved testimony from a detective or prosecutor experts where relief was granted for the defendants in form of new trial because of expert testimony going too far into the realm of jury decision-making and witness functioning.

For prosecutors, those cases have defined how to use experts.

Dr. Simms' errors were pointed out over and over again in unpublished cases, but affirmance due to harmless error. This was a problem that was continuously recognized, but it wasn't until *Thorpe/Harbison* until MSC said it was enough.

Another prosecutor perspective: made a list of don't do this, don't say this, stop it. Has done a training with care house and forensic interviewers to train them to stop doing the things they're not supposed to be doing, including vouching. If the defense opens the door, that doesn't mean you walk through it. Object to a defense attorney trying to get that information out.

In any CSC case with no physical evidence, COA is on that immediately if you bring in an expert to testify about typical sexual abuse behavior and how far it goes over that line. It's a he said, she said case. Prosecutors need to be more careful about what the expert is not allowed to say. One prosecutor's office is really careful about using experts in those cases and has to have a strong reason to use them.

With IAC issues, it gets very sticky.

Prosecutors are talking about it with the CSC prosecutors and with the witnesses. In the appropriate case, some of the testimony is valid. There is still some gray area, so things will continue to be challenged.

Gray area: is this helpful to explain behavior and credibility of CSC witness?

One tip: forensic interviewers are no longer called in case in chief, unless needed as a rebuttal witness.

"I believe the child" is not allowed. That is black and white.

Takeaway: prosecutors could make a list of what is allowed and not allowed and train based on that.

Appropriate areas: backed by research and data. Not appropriate: not science or data.

When defense attorney wants to bring in an expert to vouch for the defendant, that's also inappropriate. Based upon this criterion, he did not commit this crime. This too is inappropriate.

Doctors should talk about syndromes, behaviors, and it's up to the lawyers to argue the conclusion.

What makes someone an expert?

- There are not enough *Daubert* hearings in the trial courts. Trial judges, defense attorneys, and prosecutors may have the responsibility to ask for these hearings.
- One area is cell phone data – someone is testifying based on a short training. They can be experts in some areas. But can't be an expert in a scientific discipline without scientific study in that field. Having done it a few times is not a sufficient substitute for expert status.
- How's *Daubert* being applied? Who has the burden?
- *People v Bowden* – interlocutory appeal out of Ottawa County pending in COA. Interesting one to watch because it's the most robust discussion on *Daubert*.

3 dynamics that advance need for *Daubert*:

1. Much more forensic science being used
2. MIDC – millions of dollars for defense experts that is now available
3. A lot of IAC jurisprudence saying these expert witnesses are required

All of this leads to: we should see more *Daubert* challenges, but we don't. Maybe the courts aren't equipped to handle this. The judges may need training on this too because they do have a role.

One view: The practical aspect to the cell phones: defense attorneys might not want to make a big fight for something that is ultimately going to be coming in. Cell phone pinging is seen as being relatively reliable and a lot of times, not an argument.

Another view: Cell phone evidence is very hard testimony to read from the record if you don't have anything that the expert is using to form their testimony. We don't know about reliability of cell phone evidence because it hasn't truly been tested yet.

Perspective from the court: it would be so beneficial to have whatever they were looking at to form their conclusion. It's a problem when appellate lawyers and the court don't have the visual aids that were used at trial. Reading the transcript without any visuals or background information is very difficult.

Whose responsibility is it to request a *Daubert* hearing? There is a system pressure on defense attorneys to acquiesce to a particular expert. That is part of the calculous—not going against the grain. There are a lot of stipulations to almost every expert from the prosecutor too.

Defense attorneys need to also consult with an expert before being prepared to cross-examine an expert and before being able to know if they want

One judge always invited *Daubert* hearings to avoid substantial voir dire in front of the jury. *Daubert* – almost all challenges go to weight, not admissibility. So the way to deal with this from a defense perspective, is to get your own defense expert. It's better for the trier of fact to hear both sides.

In criminal cases, we see defense attorneys trying to work around the prosecutor's experts, rather than combatting it with their own expert.

But what about getting concessions from questioning the prosecutor's expert? Can it be more impactful? Maybe because it is the prosecutor's expert. Or maybe not – because it is a hostile witness. And if you call your own expert, you have to be aware of what cross of your expert will bring.

- But does obtaining concessions from adversary's expert require consulting with your own expert?
- What does it take to do truly informed and competent exam?

Many courts will only give funding for a testifying expert. This is the *Kennedy* case.

In the trial courts, there's a completely different process through MIDC . Every county's compliance plan has an administrator. Fill out the request for the money and send to the public defender's office. Neither the judge nor prosecutor know who you are trying to hire. This is state money. It should be a complete game changer. Retained attorneys can also make the request for experts through that process.

One attorney said it had never occurred to her that she could request an expert for help preparing for cross-exam or preparing for trial, but that she now understands how helpful and necessary that is.

CLE idea for the trial bench: use of expert witnesses at the trial level. When to use (form theory of defense, help prep to cross witnesses), how to request.

What is the role of a trial court or prosecutor in these cases?

How far should a trial court go to intervene? At some point, should a trial judge remove defense counsel if they're being ineffective? No, that's a bridge too far. If a trial judge knows someone should be getting an expert, can they intervene? Say something?

Maybe the trial judge should have a pretrial conference and point out that there is no defense expert without opining further – ways to have the issue brought to the attention of defense counsel without suggesting more.

It's fundamentally unfair if judges/prosecutors know who defense attorneys are consulting with and getting a preview of the defense theory.

May be more opportunity for education of trial judges – there may be hesitancy to have *Daubert* hearings.

Judge shouldn't be able to punt because they don't understand the science. Judge has to understand the science so they can be the gatekeeper to decide if its admissible, not whether it goes to the weight. Attorney has to know science, qualifications, and the judge has to understand science.

Prosecutor should never worry about documenting whether other side is ineffective. It's strategic decision-making and client confidentiality. Judge does have a duty to ensure a fair trial and IAC, due process, and no prosecutorial overstepping.

There is a duty on the court to make sure having a fair trial. Not a duty on prosecutor to delve into what defense attorney is doing.

Prosecutor has some duty to ensure fairness and competency. So where is the middle ground? If they see a pattern of reversals, a middle ground could be reporting them for professional responsibility.

If prosecutor has information that defense counsel is flat out refusing to consult an expert, what should prosecutor do? As a prosecutor, do have opportunity to talk to opposing counsel if they think there's a red flag or situation where an expert needs to be called. They can at least try to help to prevent IAC claims.

Ultimately it's the job of the defense bar to provide effective assistance of counsel. There's a limit on how much judge or prosecutor can interfere. One thing trial judges can

do is to ensure people are well qualified to represent people. But now with MIDC, they're less involved.

It comes down to educating the defense bar – they need to know what they are doing.

Fundamentally, there's a strong presumption that counsel is effective and acting within proper strategy.

Doesn't see a lot of really good mentoring going on for defense attorneys. There needs to be more mentoring. This is a shift that is occurring.

Resources

Need to change the culture and disseminate information – through SADO expert database or through regional managers.

NACDL resource – expert publication – this is a resource all defense attorney should have. These are the resources that should be disseminated.

Prosecutors often get experts from local hospital teams (outside of experts outside of usual suspects). Easier for prosecutor to get a call back than someone in private practice.

The federal public defender office has a massive list of experts for everything.

Listservs – you can get expert referrals.

Other thoughts on whether there should be more *Daubert* hearings

What does MRE 702 require? Can the court raise a *Daubert* hearing on its own? What are the limits of that gatekeeper role?

Judge must be careful not to cross the line when it comes to defense strategy. But gatekeeper job is different. Judges have an independent role there.

Not many criminal cases on *Daubert* – what are the standards for judges? Judges are applying the wrong test under *Daubert*.

We want to educate judges and educate the defense bar about the need for *Daubert* hearings

To the extent that *Daubert* hearings become the norm, you'll get better experts

Civil practitioner noted how he is shocked by how much information is not shared before trial in the criminal context

MRE 703 – basis of opinion *shall* be in the record. Sometimes experts testify to very empirical data – how do we have access to the underlying data

How much money should judges allot for experts? Experts in JLWOP cost a lot of money. Should there be a limit if you can meet the *Kennedy* standard?

But where is the money coming from?

What about when experts won't work for the counties rates?

New Forensic Science Commission that looks toward standardizing fees. And then at least you have a place to begin negotiation.

There are always the disparities between those who have means and those who don't.

If the trial judge is going to decide you don't get all you asked for, and they have sufficient reasons, is that okay?

- System where it doesn't go through the trial judge is preferable
- Judges make people talk to 3 or 4 different experts and get a range
- Prosecutor should not have skin in the game – say that it is the judge's discretion

Competent assistance may involve calling more than one expert -- specific experts for different specialties. This is especially true in complex medical evidence cases namely abusive head trauma cases.

What can we change and what can we do differently?

- More information from experts in the pretrial stage?
- Change in the court rules?
- Require more information from both sides?
- More pretrial motion practice to get information about what an expert is expected to say. Some indication of the substance of the testimony.
- What about obtaining transcripts of prior testimony?
  - PAAM has an expert testimony transcript bank. Does SADO? Yes, SADO has collected searchable transcripts, but not comprehensive.
  - COA has a closed record. They only know things about the expert that have been placed in the record.
- Is there a disconnect between trial and appellate lawyers? How much of what is coming out of the appellate courts is filtering down to the trial bar?

Remands

P v Terry Ceasor – any motion to remand must be offered with an offer of proof and should be made in a separate motion to remand, not just in the relief requested in the brief on appeal.

Remember that the motions panel reviewing a motion to remand doesn't know when merits panel is going to hear the case. Doesn't understand the timing of things.

Also, the Court doesn't have the record yet (or doesn't have access to them?). Need to treat a motion to remand like an application to leave -- attach the transcripts to the motion to remand.

4. Oyez+

General Thoughts

- Michigan Supreme Court is going to make the call with rule changes. Chief Justice is very adamant that Zoom gives access to justice. However, people have an obligation to make an effort to make it to court in-person.
    - Some had the following thoughts;
        - In trial courts, they are appalled by some things they see. Believe it should be left to the trial court to decide whether to use Zoom or require in-person attendance.
        - Some practitioners thought there is the same decorum on Zoom as in person, while others though there was a reduction of decorum. One practitioner noted that those who are often in the Court of Appeals have the same decorum over Zoom; however, because Zoom opened the door to people who would not ordinarily come to the Court of Appeals, there was less decorum among those individuals.
        - Some did not like rules that require trial courts, particularly district courts, to utilize Zoom for certain hearings.

- Zoom for pandemic and inclement weather conditions would be good. Now that we have the technology going forward, it may benefit everyone to allow an attorney to appear via Zoom.
    - There are some things that moving forward post-pandemic, Zoom can be very useful and should be the default. Some examples are status conferences, probable cause conferences, etc.
    - Zoom can be a good option for professionals working together.

- Court of Appeals is now equipped with Zoom for both judges and attorneys to be able to appear by Zoom.
    - The Court has created a forum for the litigants and there is no charge. They just file the form and tell them the reason. For the request. There hasn't been one denied one yet.
    - All kinds of reasons:
        - Covid concerns
        - Caring for family member
        - Scheduled for an argument in different location

There are differences between a Court of Appeals matter and a trial court matter.

- Also are differences between attorneys and the public.
- Where matter before the court is something considered to be short in duration and involves lawyers and the court, would not strongly oppose rules that make Zoom the default.
    - People who have retained lawyers don't have to pay for the travel.
    - When you get into evidentiary hearings and things that will take longer, would defer to trial court on whether to use Zoom or in person.
    - By and large trust the trial courts to make the call and exercise discretion properly.
        - Shouldn't have a court with very little trial experience or judge experience making the rules.

One practitioner's experience in district court is that taking testimony over Zoom is terrible. It is difficult to judge credibility over Zoom.

- One exception may be experts because they are working at a county rate which is usually less than they charge.
    - This results in them being reluctant to travel and some experts older and have covid concerns.
- If parties agree, can be effective to have experts appear by Zoom.
- What should the rule be?
    - Default rule of being in person makes sense.
        - then parties can motion the court for the testimony to be via Zoom.

Several practitioners noted the convenience of being able share exhibits via Zoom in the trial courts.

- Is there some sort of hybrid that could happen in court when doing evidentiary hearings where could do paperless exhibits on the screen?

Some courts operate more efficiently over Zoom while others more efficiently in person.

- Several noted concerns that trial courts may not be using Zoom the correct way causing court dockets to become a "free for all."
- Also, some courts have more resources than others.
    - It would be extremely helpful to provide resources and trainings for lower courts regarding how to efficiently use Zoom
    - A lot of consternation and discomfort comes from the fact that Zoom was forced on us.
    - Having the proper training and resources will make it a benefit rather than how it started as a necessity.
- The overall consensus was that Zoom is a good tool in the trial court for non-testimonial hearings. It gives attorneys the ability to be in multiple courtrooms at once.

<u>Zoom in the Court of Appeals</u>

- One practitioner struggled with reading the room and looking at the camera in order to make sure was making eye contact. When you are there live, you can get

a sense of when the judges have had enough but is harder to see on Zoom. Non-verbal communication is important and somewhat lost on Zoom. It is especially hard to read the room during Zoom or argument in the Michigan Supreme Court, because instead of three boxes, you have seven.

- Some practitioners stated they got fewer questions during Zoom oral arguments than in person while others thought they receive more questions during Zoom oral arguments.
- How prevalent should Zoom be post-pandemic?
    - It supports access to justice for attorneys to be able to liberally request Zoom in the Court of Appeals.
    - Additionally, attorneys are able to do more pro bono work because they can appear on Zoom resulting in a shortened time commitment.
    - From a MAACS perspective with different funding units across the state, being able to efficiently use resources and request Zoom orals is important.
- Overall, Zoom has been an effective tool for oral arguments in the Court of Appeals. Many practitioners expressed a preference for continuing to keep Zoom as an option for Court of Appeals oral arguments.

Zoom in the Supreme Court

- Overall, many felt Zoom oral argument has not been as effective in the Michigan Supreme Court as in the Court of Appeals.
- One suggestion was changing to the layout the Court of Appeals uses where you watch the webinar until you are promoted to a panelist when your case is called.
- There was disagreement about the effectiveness of the justice-by-justice questioning format. Some think it works well and results in more and better questions. Others suggested changes:
    - One suggestion was to use the function on Zoom that allows someone to raise their hand as an indication when a justice has a question.
    - Another suggestion was to put the questions into the chat function and the attorney could answer them as they go.

- There was a consensus that the waiting room used in Court of Appeals oral arguments where you can watch the webinar in real time is preferable to the waiting room used in the Michigan Supreme Court where you are brought into the Zoom without much warning. Additionally, in the Michigan Supreme Court, there is a lag time between the live streaming and the actual Zoom.

Accessibility to Clients/Victims

- Zoom oral arguments provides more accessibility for our clients and our public. Several practitioners noted they now regularly show their clients the oral argument via Zoom after the fact. That's especially helpful for incarcerated clients.

5. Pandemic Implications on Due Process and Criminal Practice

What is the worst violation of due process you saw?

- Defendants sitting in county jail for 2 or more years awaiting trial, due to pandemic.
- Arrest happened in 2018 and trial in 2021.
- A defendant's sentence is complete, but he only pled guilty because of a fear of spending years in jail awaiting trial

Will there be more occurrences of stipulations to appear by video, and what will that mean down the line? Do the norms change, and what are the implications?

- Will this move judges or prosecutors toward *expecting* defendants to waive in person appearance?
- Concern about whether certain rights are even arguably negotiable
- Systemic ineffectiveness here?

Social science supports the proposition that appearing by video can compromise credibility. How might this affect defendants' rights?

- Multiple people expressed concerns of efficiency trumping fair presentation of a case. Worry that courts may want to push trials because of a backlog who won't permit in-person witnesses or defendants if there is time required to do so.
- On the other hand, some district court judges in some counties have been requiring witnesses to appear in person despite serious COVID community spread, presenting prosecutors with health and safety concerns for all those present, including witnesses, victims, defendants, court staff, and attorneys

How has bond been affected during the pandemic?

- Early on in the pandemic, bond was being liberally granted and then the docket numbers rise because there was little incentive to plea since trial were not looming.
- Is there any information about whether granting bond has not jeopardized public safety?
    - Eastern District of Michigan had *very* liberal bond coupled with ample pretrial community supervision
    - Article in Detroit newspaper about how more liberal bond, with sources that individuals released on bond are rarely jeopardizing public safety
    - Ample data in New York after large-scale bond reform has not caused increased in offenses committed on bond

What different kinds of legal claims could arise from pandemic implications?

- Concerns expressed about whether pleas were knowing and voluntary where the defendant pleads after having been incarcerated during the pandemic with no end in sight—were those pleas arguably not borne of full volition?
    - And did the plea ratio change during pandemic? Was that due to "coercion" or because the plea offers from prosecutors were more generous?
- Potential overlapping or cross-cutting issues:

- Speedy trial combined with ineffective assistance where counsel agrees to push back trial dates because of pandemic concerns.
- Concerns expressed about juggling different rights and requiring a defendant to pick and choose where the pandemic has halted jury trial—speedy trial vs. right to confront witnesses

What is going to stick around after the pandemic?

- Prosecutors, where charges are five-year and under felonies, have been more liberal with bond motions
- The pandemic generated at least movement whether, even in some murder cases for example, bond is occasionally granted (or at least considered)

With jury trials coming back, is there a concern regarding fair cross section?

- Maybe not any more than has been the case before the pandemic

Question to prosecutors: whether agreeing to waiving rights to confrontation could create an ineffective assistance claim, any apprehensiveness?

- More seasoned trial attorneys will want to make a better record—asking that trial strategy reasons be placed on the record, for example

Concern about the method of giving advice to a defendant about, say, waiving in-person exam

- Is there pressure about annoying the judge, or making friends/enemies of the prosecutor?
  - Sometimes creates a catch-22 pitting concerns about being "liked" by the bench and protecting the defendant's rights.
- It shouldn't just fall on the defendant to have to fold in the face of this pressure – the Constitution hasn't changed. Which rights can be sacrificed?
- What reforms could be implemented to resolve?
  - Concerns about hard and fast rules which have no give
  - Misdemeanors moving to civil infractions
  - Resource/funding issues for more capital cases
    - But counties that have the biggest problem are counties with lowest resources

How have court records or transcripts and client/witness communication changed because of the pandemic?

- Some transcripts generated by Zoom video where they have many passages of inaudibility
  - Some court reporters have reached out to attorneys to ask what they were saying during the hearing
- Concern about a transcript using "inaudible" where the recording is pretty clear what the words are. What to do in this circumstance?
  - Ask for the audio recording and move to correct the transcript? Maybe take to a private transcriptionist

- The transcript is the record, but perhaps a motion to make the video part of the record.
- As audio/video recording advances and displaces court reporters, courts and particularly appellate courts may need to progress to accept this kind of record evidence
- Supplanting transcripts as the main part of the record raises other issues of deference and standard of review

B. Civil

1. Writing Persuasive Briefs

- **Purpose of the Brief/Consideration of the Audience**

The session began with a discussion about the purpose of an appellate brief and how consideration of the audience could impact the tone and content of the brief. For example, if the case is pending before an intermediate court versus a court of last resort, different arguments might be presented. The intermediate brief might focus more on case-specific results, while a brief written for the highest court would likely include more policy considerations and broader application. Judicial attendees and court staff reminded the group that judges are generalists and require background and explanation of the substantive area of law at issue. Briefs should not shortchange education of the court in the broader context of the substantive law in favor of skipping directly to the more specific issues in the case.

- **Utilization of Briefs by the Court**

Judicial personnel agreed the parties' briefs are very important and the vast majority of briefs are well-written and helpful in framing the issues. A typical process is for the judge to read the briefs, the judge's clerk to read the briefs, and then for a conference to discuss the briefs to occur. Some judges begin with the briefs, some begin with the pre-hearing report, but generally the briefs are a mainstay of deciding the issues presented. Practitioners were advised to clearly detail what is being requested of the court, i.e., what is the error the court is being asked to correct and why was the lower court wrong. Persuasive briefs are sometimes included verbatim in the court's opinion, which should be considered a compliment to the brief writer.

- **Approach to Writing the Brief – The Process**

Practitioners were asked to describe individual approaches to writing an appellate brief. One initial task is identification of the issues. Writing the brief is easier if it is a singular, strong issue. Determination of the issues to be included in the appeal may require negotiation with the client to narrow the issues to the most persuasive as clients sometimes want to include every perceived wrong. Consideration should also be given to how the issue fits into an overall persuasive theme and if it provides a reason the party should win. If the party lost in the court below, drafting the brief typically begins with the trial court opinion, review of the briefs in the underlying court, and determination of the simplest, most direct reason the trial court was wrong. Discussions with trial counsel also frequently precede initial drafting of the brief. Most

practitioners described thinking about the case and considering the most persuasive issues before starting to write.

Briefs on very complex issues might include a glossary of terms or concepts, which judges indicated can be very helpful. There was a general preference that some facts be included with a description of the questions presented to further frame complex issues. Practitioners indicated it is sometimes difficult for clients to understand how much time goes into just thinking about the issues and how to structure the brief before any drafting. Narrowing the issues and editing the language in the questions presented can take a lot of time, and that effort is not always evident to the client in reviewing the finished product.

- **Use of an Introduction**

The group discussed whether to use an introduction and if so how to frame it and when to write it. Most suggested writing the introduction at the end of the process to ensure it includes all information addressed in the brief after the editing process. Judges commented they sometimes see briefs that include arguments beyond those included in the questions presented. The questions should be reviewed at the end of the process to ensure any edits are captured. Suggestions for the location of an introduction included before the facts or after the facts and before the argument.

Discussion also included how much detail to include in the fact section versus weaving the facts into the argument section. Judicial commentary indicated it was acceptable to include facts initially even if it is then necessary to restate them as they are incorporated into the argument section. Practitioners were cautioned not to include argument in the fact section and told it was not persuasive to be argumentative or one-sided in the presentation of the facts. Attorneys are expected to advocate for their clients but lose credibility when arguing in the factual section or are argumentative during oral argument. Judges appreciate when facts not in the party's favor are included and addressed versus being avoided -- practitioners should include both good and bad facts and indicate why they should still win. A timeline is also helpful for a fact-intensive case.

- **Framing the Issues**

The group agreed framing the issues is case-specific and depends on the applicable law and facts. If there is a single, seminal case, most of the brief will discuss that case and how the facts at issue fit or do not fit into the relevant case. If there are many years of consistent case law on an issue, string cites may be used to include them. There are few fixed rules, but it was generally agreed to present affirmative arguments first, then counterarguments – give the correct answer first, use the best cases to support that view, then address counterarguments. The most persuasive briefs take a complex issue and make it simple. Where the court needs to educate itself on a substantive area of law, it can be helpful to simplify and spell out the cases, particularly where the cases are split between those that help and those that hurt the case. Most agreed the issues should be framed affirmatively so the answer to the question presented is "yes."

- **Procedural/Technical Issues**

The status of Administrative Order No. 2019-6 — Briefs Formatted for Optimized Reading on Electronic Displays – was also discussed. This pilot program introduced in 2019 allows parties to file briefs designed to be more readable on electronic displays instead of complying with existing formatting requirements. The practice is voluntary. Members of the bench find the briefs submitted in accord with this rule helpful. Others expressed the view that while the electronic briefing format may be helpful, practitioners should nonetheless have the skills to present briefs in a readable format even without the use of the electronic briefing. Judicial staff noted the court appreciates a well-organized, readable brief but indicated it would not impact determination of the case on the merits. However, the group agreed it is more difficult to absorb the content of a brief if formatting issues are a distraction, and in close cases it could make a difference for that reason.

- **Tone – How to Address the Opponent's Arguments**

The group addressed the issue of how best to manage false statements, inflammatory remarks, or unpreserved issues advanced by an opponent in a brief. The consensus – among the bench and bar – was that taking the high road and remaining professional is the favored approach. While it may be tempting and momentarily satisfying to respond in kind, it is generally viewed as less persuasive. One practitioner described including a chart of what opposing counsel represented in one column and what the transcript actually said in the next column, with hyperlinks to the transcripts. Similarly, if an opposing party argues an issue that was unpreserved, that should be factually addressed with the court, but not with disparaging comments. The bench warned practitioners periodically argue an issue is "unpreserved" without a full understanding of the term -- an issue argued poorly is nonetheless preserved for appellate review and should be addressed by the opposing party in the briefing.

2. Applications for Leave to Appeal

Commissioners were present from the Michigan Supreme Court and the Michigan Court of Appeals.

I. Different types of applications: Interlocutory appeals, applications for delayed appeals after time period passes, delayed applications for interlocutory appeals.

II. Timeframes:
   A. Regular: 21 days from interlocutory orders.
   B. 6 months for delayed applications.
   C. Motions for reconsideration can affect the time period.

III. Attachments.
   A. Where there is a pending court case, the Court of Appeals does not receive the entire court file (particularly where there is no electronic record.
   B. Court will often only have access to what is attached to your applications.

i. Judges really appreciate if applicants attach what they really want the judge to read.
ii. A practitioner should always, where the court rules allow, err on the side of more information.
iii. Random deposition pages are not helpful.
iv. iPad: Judges have iPads, many read the applications and other documents that way, hyperlinking exhibits and bookmarking extremely helpful.

C. Failing to follow formatting rules:
i. Judges can and do live with not following the formatting rules, but it makes it harder on them.
ii. Better to be poorly formatted than to blow your deadline per the commissioners. File what you have.

IV. Emergency Appeals—how to handle.

A. Per the judges, it really helps to let them know a date up front.

B. With true emergency, call court and tell them you are planning on filing.
i. Don't just send emergency application "into ether."
ii. Commissioners can alert panel if necessary, begin research.
iii. If you need action that day, unrealistic to file at 4 pm—try for before noon.

C. When facing an emergency appeal filed by the other side, don't wait to until your deadline to respond, anticipate you may have to file your response early.
i. Usually the clerk will call and give you a response date/time.
ii. With a short turn around, file something brief, and attach your briefs below for the substance. The commissioners will read the attachments.

D. Replies on emergency motions: If you are trying to get action as soon as possible, alert the court at the outset that you are not filing a reply.

E. Motions to stay with emergency applications: The court requires the application to act on any motions, including motions to stay. It lacks jurisdiction to consider motions without an application.
i. In a true emergency, the court can hold the application in abeyance, grant the stay, and give the other side time to respond to the application.
ii. Even better, get everyone to agree to a stay.

F. Motion for immediate consideration.
i. 56-day rule—motion for immediate consideration needed only if action is needed within 56 days.

V. Interlocutory application in the Court of Appeals—about 15% are granted.

A. Upon review of an Application, the judges evaluate the strength of the legal argument versus the alleged harmed.

B. Applications more likely to be granted in certain cases:

   i. When interlocutory appeal could obviate trial or significantly progress the case—beyond saving expense.

      1. One judge noted she is a big believer in judicial economy, while also a big believer in right to a jury trial.

      2. As an interlocutory appeal could drastically reduce trial costs, reduce the length of trial, or dispose of trial altogether, the session also agreed that defense counsel file a larger number of applications.

   ii. Criminal cases that will rise or fall on this issue:

      1. Prosecutor cannot appeal issue after trial.

   iii. Bell rung that cannot be unrung.

C. Applications less likely to be granted:

   i. Summary disposition finding issue of fact.

      1. Judges are reluctant to second guess the trial judge.

   ii. Delay—did you wait until the eve of trial?

      1. One judge present said that this was less of a consideration—if the case should not be tried, she would grant the application.

D. Are there certain issues that are always granted? While judges conceded that issues involving jurisdiction, venues, and privilege are primary, there was no recognizable pattern otherwise. In regards to fear of discovery costs or sanctions, judges did not believe these were inherently compelling. After all, litigation costs money. Applications for issues including statutes of limitations, however, was more of conundrum. Two judges indicated that while they typically defer to trial court judges, such applications need to be carefully assessed to prevent unnecessary litigation. One of the themes surrounding successful interlocutory appeals seemed to be, in true fashion, "it depends."

E. Overall, while sometimes a simple strategy to promote settlement, attorneys and judges believed that a lot of anticipation is required prior to filing an application for leave to appeal. This includes opening the door for cross appeals, and even whether or not to file a motion for reconsideration. While such motions are rarely granted, they have become a valuable tool to buy an appellant more time to prepare its appeal, or develop the record.

VI. Supreme Court applications.

A. Factors for granting:

   i. Most likely candidates: Published opinion with dissent (they do not usually see these in interlocutory appeals).

ii. Very unlikely to grant where there is not a published opinion by the Court of Appeals.

B. Numbers granted are declining.

VII. Requests for specific relief.

A. Supreme Court: Where Court of Appeals has denied leave on an interlocutory appeal, and Supreme Court acts, it will usually remand on leave granted.

i. If you want that relief, best to request it.

ii. If you don't want that, say so.

B. Peremptory reversal—you can ask for that in the application, no need to file a separate motion.

VIII. Denial of interlocutory review for "lack of merit in the grounds presented."

A. This is a denial on the merits per precedent; considered by appellate practitioners to be a major risk in seeking interlocutory leav4.

i. Court staff noted that this risk is minimal in practice:

1. Their practice is to only deny interlocutory review for lack of merit where it doesn't make sense to deny without considering the merits.

a. This is the last opportunity to appeal, as in venue in civil appeals, criminal appeals.

2. Sometimes if there is gamesmanship going on.

B. Need to inform your client of risk that denial could be on the merits.

C. Recourse if this happens:

i. Move for reconsideration in the Court of Appeals.

1. One judge present noted that it is absolutely not futile to seek reconsideration if the court erred; the case load is heavy and sometimes they make mistakes.

2. Easier lift to seek reconsideration of the portion of the order denying for lack of merit than the denial as a whole.

ii. Apply to Supreme Court for remand as if on leave granted to require full review of merits.

IX. Delayed applications for leave to appeal:

A. Delayed applications used to have no time limit; now 6 months from order.

B. Statement of reason for delay is mandatory, but generally not closely scrutinized.

i. Commissioners do not generally care about the reasons.

ii. Can even be counsel's caseload, inability to get transcript or record on time.

iii. Usually only a factor if the reasons are clearly invalid.

X. Motions.

A. Motion to affirm or for peremptory reversal.

i. Rarely sought or granted.

ii. One judge considered peremptory orders to deny the opposing party their right to appeal, very reluctant to grant.

B. Motions to stay.

i. One judge advised that, during their days as a trial court judge, they were happy to stay a case once an application was granted. As long as it wasn't filed on the eve of trial, trial court judges typically don't take an application for leave to appeal personal.

ii. One attorney recalled an occasion where the trial judge advised them to consider filing an appeal on its denial of a motion for summary disposition, and subsequently stayed the case by its own accord. A Court of Appeals judge volunteered that they would be more likely to grant the application if they saw this kind of discussion in the record.

iii. Procedural requirements:

1. Need to request it from the trial court first.
2. Need a transcript and order denying motion to stay and a motion to waive the requirements.
3. Usually requires motion for immediate consideration as well.

XI. Effects of a Denial for Leave to Appeal.

A. Once an application for leave to appeal has been denied, any subsequent claim of appeal as of right does not go to the same judicial panel. Specifically, an interlocutory appeal possesses its own panel, comprised of three judges.

B. If an order denying interlocutory appeal includes any language indicating the order was due to "lack of merit," the judges advised this language could create res judicata issues for future appeals of right. Thus, it was recommended that a litigant file a motion for reconsideration of the order, and request alternative language such as that the panel was "unpersuaded to grant leave."

3. Reply Briefs: The Last Word

- **When to File a Reply Brief**

The moderator began the session by asking the group if there was ever a time to not file a reply brief. The general consensus was that practitioners almost always file reply briefs and could count on one hand the number of times they chose to forgo one – usually when the appellee brief was truly terrible and presented nothing to respond to. On the other hand, one practitioner emphasized that even when there is nothing to respond to, a reply brief is a good opportunity to repeat points.

There was a significant split between civil and criminal practitioners on whether to file a reply. Civil practitioners were very concerned about the risks of not filing them. Criminal practitioners are much less likely to file reply briefs and not to be concerned about failing to file them.

Other practitioners agreed that often it is good to point out what the appellee missed or gave a poor response to, although a tax attorney cautioned against going too far afield addressing "rabbit hole" arguments, meaning arguments made by people who don't understand the law.

Certain practitioners were of the belief that the judges and clerks would read reply briefs first and thus a reply brief should be a "stand alone" brief, but staff from the Supreme Court said this was not true, they in fact read the reply brief last.

Another question was whether the judges view a failure to file a reply brief as a concession. A Court of Appeals judge implied that it would not because, as she explained, she looks at all the filings – starting with the lower court order, then the briefs and records, and then she does her own research. The first read-through of the briefs is for issue spotting and then she focuses on the arguments. The Supreme Court commissioner stated that he does not see the failure to file a reply brief as a concession – essentially, he knows what you would have said. On the other hand, he advised that it is still important to file a reply brief just in case he misses something.

Some of the judges suggested that if there is nothing unanticipated in the appellee's brief, then you don't need a reply.

One practitioner commented that he heard a judge say that the judges notice if you do not file a reply brief. Several attorneys commented that they certainly notice when a reply brief is not filed. One commented that she has experienced occasions where a reply brief is not filed and instead the appellant makes the points at oral argument as a way to sandbag.

There was also general agreement that an attorney should not save anything for oral argument. If you have something worth saying, then say it in the reply.

- **Focus of a Reply Brief**

The moderator next asked what the attorneys try to accomplish when they read the appellee brief. One practitioner said that, at the application stage, it is important to focus on what the other side says about the reasons for denying leave and this should always be addressed in the reply brief.

The next question was whether a reply brief that focuses on one argument means that the attorney lacks confidence in that argument. The Supreme Court commissioner said this was not the case and that he realizes the attorney is trying to address what was raised in the appellee brief. He further commented that reply briefs do a lot of different things.

The next discussion was whether a reply brief should try to respond to every point in the appellee brief. One practitioner commented that she looks for points made by the other side that might give the judge pause and she tries to respond to those items. Or, she might use the reply as a way to synthesize the entire case. Another practitioner said that a reply brief can be used to tell a story and present a theme that can then be used at oral argument.

Another practitioner noted that if he sees a gross misstatement of a fact, he will point it out but not dwell on it. Instead, he lets the record speak for itself. Similarly, another practitioner advised against nit picking every incorrect fact because that becomes annoying, but others agreed that "nit picking" may be called for if the case is fact intensive.

Relatedly, one attorney will point out when the other side does not actually cite to the record. Another said that if the appellee makes a weak argument, he might address it in a footnote to emphasize the weakness.

The moderator next addressed post-application briefing and wondered if the attorneys would keep the same structure for their reply briefs. One practitioner answered that it likely turns out to be the same but you can try to make it seem as though you are coming at the issues from a different angle.

Other comments:

The judiciary has a clear preference for succinct reply briefs. There was general agreement among the bench and bar that a reply brief should not simply repeat what was said in the opening brief. In fact, one judge recommended not filing a reply brief if you did not have anything new to say. Another judge expects to read something new in a reply, but warns she will stop reading reply briefs if she concludes that there is nothing new being said.

A reply brief that points out how salient facts are being misstated in the appellee's brief is very helpful, as long as that is not done in a hysterical fashion. A reply should address any new arguments that were raised in the appellee's brief, but that were not discussed in the appellant's original opening brief.

A reply brief is a good time to raise a failure to preserve argument if the appellee is injecting a new issue into the case that was not raised or decided below. A reply can also identify any items contained in appellee's appendix that are not actually part of the record.

A very good reply brief is one that explains that the appellee is wrong because of reasons 1, 2 and 3. This is also good practice for rebuttal oral argument

It is not possible to address each factual issue in a reply brief because a reply brief is much shorter than an appellee's brief. Both civil and criminal practitioners recommend keeping focused on the big picture and only address several important factual inaccuracies.

The bench and bar agreed that identifying concessions or issues that were not addressed by the appellee can be effective. Specifying what is really in dispute after these concessions and omitted issues is very helpful to the judges.

- **General Approaches to Reply Briefs**

The group continued a general discussion of approaches to reply briefs. One attorney said that she keeps her argument and point headings the same so the Court can follow her organization of the arguments. Another practitioner said he likes to keep the reply briefs under the page limit and just focus on the critical issues, not pointing out every single error in the appellee brief. The Court of Appeals judge agreed that it is best to emphasize why you win; she does not like the nit-picking back and forth.

The next question was, when structuring the reply brief, do the attorneys tend to lead with the hard issues, or focus on the other side's errors? One attorney answered that if the appellee's error was not the most important thing, he would address it toward the end of the brief, unless the error (such as a misstatement of fact) goes to credibility, in which case, it should be addressed first. The point was then repeated that if it is a fact intensive case, it is worthwhile to show the court that the other side does not know what they are talking about.

The moderator then asked what attorneys do when the appellee brief makes a really good point, and the group agreed that you have to address that point in the reply brief. One practitioner added that this is critical at the application stage because otherwise, leave will be denied. One approach might be to knowledge that it is an important issue and that is why leave should be granted.

One experienced practitioner tries to fit the reply brief into the same structure as her opening brief. Other practitioners agree, but you have to recognize when the original structure does not work well for reply. A former Court of Appeals staffer believes that matching up the arguments is very helpful, but also notes that this is hard to do if you are responding to a brief that is not well organized. A judge notes that if you cannot match the sections up precisely, an introductory sentence explaining that this section of reply responds to arguments 3 and 5 of the appellee's brief is helpful.

- **Use of an Introduction**

An introduction can be very helpful, especially if it sets up a structure for the reply brief. For example, appellee's argument is wrong because of A, B and C and then use A, B and C are the headings for the arguments in the reply brief.

- **Proper Scope of a Reply Brief**

The next topic was whether reply briefs are really limited to rebuttal arguments or whether you could bring up something new. A veteran practitioner stated that he was not above stretching the envelope to discuss something new, especially where his opening brief might have

been unclear, and the other side pointed it out. On the other hand, he had also seen attorneys "go off the rails" in their reply briefs. Another attorney commented that she had seen appellants treat the reply brief like an amicus brief where they brought in "the big picture" or cited data outside the record. On one occasion, she filed a motion to strike that portion of their brief. Another attorney commented that he probably would not go as far as to file a motion to strike.

Another attorney commented that in the interest of civility and good practice, we should not sandbag.

In sum, it is possible to raise a new argument, but practitioners need to be candid if they are doing so. The Court of Appeals tends to be generous with a new argument or allowing a sur-reply to be filed as long as counsel explains what they are doing. If not, then the reaction is different.

- **What Do Judges Think Makes for a Good Reply Brief?**

The moderator then asked the Court of Appeals judge what she looked for in reply a brief, that is, what makes a good reply brief? The judge reiterated that she wants the reply brief to focus on dispositive issues and have a good analysis, which might include distinguishing the other side's cases or explaining how those cases actually support your position. The judge further commented that a reply brief should be the starting point for oral argument. She noted that as a practitioner, there were occasions where she did not file a reply brief because the response was garbled and weak – she felt her opening brief stood on its own and was effective.

But practitioners again commented that even where the appellee brief is weak and confusing, a reply brief is a good way to emphasize your strong points. And while you do not want to somehow make the other side's arguments seem stronger when you respond, it is true that sometimes judges and court staff will make the other side's argument for them. Therefore, in a reply brief, it is still important to reiterate your position and say why you win. The Supreme Court Commissioner stated that, when addressing a weak and garbled brief, you should do enough to untangle the arguments and lay it out for the court, but avoid making straw man arguments.

In answer to the question of what make a bad reply brief, the Court of Appeals judge stated that she does not like ad hominem attacks and this hurts your position. She instructed to "show don't tell," and that if you draw her attention to something, she might go back and look at the record. The Supreme Court Commissioner agreed that you should not waste time on attacks and repetition. Practitioners reiterated that they did not care for nit picking or making absurd assertions with no citation to the record.

4. Effective Oral Argument

- **Efficacy of Oral Argument via Zoom**

The first topic discussed was past, present, and future utilization of remote oral argument. The majority of attendees did not feel that remote oral argument (via Zoom) in the Court of Appeals was less effective than in-person argument. However, when one side is not endorsed for oral argument, Zoom does not seem to be as effective.

The judges in attendance believed Zoom arguments are less effective and that in-person argument should be considered the default. However, Zoom will probably remain in the equation in some capacity for the foreseeable future. In criminal cases, for example, Zoom arguments are more understandable.

The group discussed the various challenges Zoom arguments present, including difficulties in establishing a back-and-forth dialogue with the panel, maintaining eye contact with the entire panel, and reading physical cues and non-verbal communication. Not to mention technical difficulties. From the judges' perspective, it is also more difficult to control the flow of argument in a virtual setting.

Request to appear remotely: client budgets; clients like the savings; for incarcerated clients, they appreciate the family being able to watch the argument.

Make sure your real background is appropriate in the event that your virtual background is not working and/or glitching. Drag the Zoom window close to the camera.

- **Particularly Effective Oral Argument**

The group agreed that the most effective oral arguments are natural/conversational, with a superior knowledge of the record. Do not read your briefs and be able to provide sharp answers to questions.

The judges indicated that if you have requested oral argument, it is better to provide some argument rather than simply rest on our briefs. You should provide at least a few points about why you should win.

It is important for attorneys to listen to cues from the Court (i.e., "the Court understands your position…") and alter your argument accordingly. Arguments should succinct. The most effective oral arguments recognize their own weaknesses and explain why their client should prevail nonetheless.

If you are the appellee, use the oral argument as the opportunity to address what was in appellant's reply brief.

If possible, presenting the case in a different angle (if appellant) is a good oral argument strategy.

Smile, be polite, and likable.

Always pay attention to opposing counsel's argument.

Tailor your argument based on the court you're in. For example, in the Court of Appeals, tailor the argument specifically to the facts of your case, whereas in the Supreme Court, emphasis how the legal issue can affect many future cases.

Summarize your case quickly, and know when to sit down.

Although you may have to concede a fact, rarely concede a legal argument, refer the panel back to your brief. If you are going to concede something that negatively impact your case, do so swiftly, do not take too longer to answer or ignore the question.

Sometimes, if the Court's research team picked up on an issue not properly addressed by the briefs and asked about by one of the judges, tell the panel you will answer the question, but request 20-30 seconds (so as to give you time to come up with a cohesive answer).

- **<u>Oral Argument Preparation: Best Practices</u>**

Attorneys discussed several different approaches for oral argument preparation:

  - Identify the 3 strongest points and the 3 most vulnerable points and be prepared to address all. Make 2 outlines: 1 for if no comments; 2 for if conversation goes to specific points, here is how they should be addressed.

  - Re-read the entire record - oftentimes will learn something new from dep transcript on re-review.

  - Tab portions of record that might garner questions.

  - Have someone who hasn't worked on the case before take a look at it. Oftentimes brings a fresh perspective on the major points of the case.

  - Keep note of any additional opinions that may be issued after briefing.

  - Organize your outline by issues.

  - Make Qcards and read them in different orders so you are prepared in the event the judges jump around issues during oral argument.

  - Know the facts well, even the not-so relevant ones.

- Shepardize your cases a few days before oral argument.

- Do not prepare for oral argument a week or more before, prepare a day or two in advance so everything is fresh in your mind

These approaches may vary between prep for the Court of Appeals and the Supreme Court. The Supreme Court presents a different dynamic (because the Court picks its cases) about who has the steeper hill to climb. In the Supreme Court, the appellee may have a more difficult hurdle.

In the Court of Appeals, when an application for leave is granted, you get a little more of a sense that there may be a problem with the trial court's ruling. Conversely, sometimes the panel reviewing the case once leave is granted wonders why leave was granted.

- **Does Oral Argument Change A Judge's Mind?**

This question was directed to the Court of Appeals judges in attendance, who answered that 5-10% of the time oral argument may change a judge's view of the case. Oral argument can make a difference and can also solidify a judge's view of the appeal. The type of case may also dictate whether oral argument may make a difference in the case.

In the Supreme Court, a really strong or a really weak argument may cause the Court to shy away from granting leave.

It is difficult to know how Zoom factors into this.

- **Waiver of Oral Argument**

Most attendees do not waive oral argument. The judges prefer that attorneys provide some affirmative argument, even if minimal.

Waiver seems to more prevalent in criminal cases.

- **Time Lapse Between Briefing and Oral Argument**

The group discussed the possibility in the Court of Appeals of receiving notification from the Court regarding its thoughts on appeal and where questions may lie to increase effectiveness of oral argument. The judges responded that given time constraints, it would be difficult/impractical for the Court of Appeals and Supreme Court to accomplish.

One attorney had a situation in the Supreme Court on a mini-oral argument where the Court asked the parties to address a specific issue in supplemental briefing just a few days prior to oral argument. The attorney appreciated the notice.

Another instance occurred in the Court of Appeals wherein the Court issued an order to the parties that they wanted clarity on a specific point raised at oral argument.

Attorneys have the opportunity to file supplemental briefing after oral argument. In practice, however, this rarely occurs.

Some federal courts issue tentative opinions the parties can view before the oral argument.

- **Judicial Pet Peeves:**

View the questions as coming from a friend and not being argumentative. Questions are being asked for a legitimate reason. There is no need to be defensive. Listen to the question and provide the best, most concise answer.

Understand your argument and know what you can concede.

Try to look at all judges rather than focusing solely on one judge.

It is not necessary to mention the trial court judge by name to the Court of Appeals – the Court knows who the trial judge is.

An attorney should let the judge know if it was on published or unpublished opinion that is relevant to instant appeal.

5. *Amicus Curiae* Practice

Thursday, May 12, 2022 – 4:00 p.m. breakout

How do you pronounce the word "Amicus"?

- Majority pronounces it ah-MEEK-us. Plural is pronounced ah-MEEK-y

What makes a good amicus party? Who does the court want to see as friend of the Court?

- Court of Appeals judges likes to see a group that is credible, been around for a while, and one that has some interest in the matter. For example, ACLU on a civil rights issue. Court of Appeals doesn't want to question why the group is interested.
    - Practice sections of the Bar Association aren't always credible because they are interested in their position only.

- Practitioners – certain types of entities. In a criminal appeal related to a *Miller* hearing – Disability Rights of Michigan filed a brief relating to a 17-year-old undiagnosed schizophrenic whose disability rights were an issue.

Do judges find more credible a group not traditionally a group of interest.

- Court of Appeals judges find it credible when an amicus supports a surprising party. So pro-defendant firm concedes issue for plaintiff or prosecutors for criminal case. Animal law section involved in dog-bite case. Animal law made policy arguments that might not be appropriate for appellant to make.

Why would someone file an amicus brief? What is the judge looking for in the brief?

- Court of Appeals judges belief the best briefs offer a different perspective—not ones that just say, "me, too." For example, Michigan Chamber of Commerce filing an amicus brief in tax matters to focus on policy & ramifications. ACLU saying it will affect rights broadly. The brief cannot just simply focus on a fact-specific inquiry, but must affect broader interest. The Court of Appeals wants to be aware of any unintended consequences of a published opinion.

- Practitioners – Pounding on Restatement 3rd in Torts so that MI adopts it.

- Supreme Court representatives say to think in terms of broad policy. Justice Kelly found an amicus filed by medical society discussing experts very helpful in med mal case. Another example is in an insurance dispute, e.g., with a backed up sewer case. There was damage to sewer pipe by a construction company. Would it be covered by insurance? It was helpful to have an insurance group show interpreting a clause in the policy would impact the industry on the whole.

What about amicus brief that highlights that one side hasn't fully or properly briefed the issue?

- The Court of Appeals distinguishes this from a "me, too" brief because it sets the argument in clear light.
    - "Me, too" briefs are just like stamps and reveal who's lining up on each side.
    - Not "me, too" briefs are ones that bolsters and sheds greater light on an issue and affects the substantive discussion for the State of Michigan.

- Practitioner offered that they may file an amicus brief in a case matters to client but not client's appeal. So we advise clients on what appeals might affect it. Practitioners also would like electronic access to docketing statements to see what issues are being raised. They feel this would lead to more amicus briefs.

- Court of Appeals judges find electronic formatting in pacer ideal. A pre-pandemic pilot program was underway, which the pandemic delayed.

At what point does an amicus brief go too far and introduce new issues into the case?

- Practitioner – sometimes they raise a new issue and take over the case, e.g., a dispute about Clarkston voting in which media coalesced to say FOIA was being interpreted wrong, but didn't address an issue raised below.

- Michigan Supreme Court representatives offered that amicus briefs may be stricken if they raise new issues.

- Court of Appeals reserves the right not to give any weight or consideration to an amicus brief that is unhelpful. But it will hold it against a party if it appears that they hired an amicus.

How do practitioners cope with the discrepancy in court rules for amicus briefs between Court of Appeals rule that forbids new issues from being raised and Michigan Supreme Court rule that doesn't.

- The Michigan Supreme Court commissioner writes up summary of briefs but notes whether the brief raises new arguments. The commissioner makes a recommendation and focuses on issues appellant raised. It considers amicus in light of appellant issue – is there something really important here. Commissioner lays out argument and puts it out there for the justices.

- MSC – they're not coming in from way out of left field. Gives perspective and expands on arguments. Not new issue but an expansion what you'd say on one side or another.

- Parties sometimes file responses to amicus brief or time reply briefs to respond to amicus.

- Practitioner filed an amicus brief in the Michigan Supreme Court – no rule to file a response, but other side filed response. So practitioner filed a motion to allow a reply and/or strike response. Motion to allow reply granted.

Is it helpful for an amicus brief to highlight out-of-state law.

- Consensus is that it is very helpful when there is no Michigan case law.
- Helpful to acknowledge that minority position is better than the majority opinion and why MI should adopt minority position.

How do you coordinate with a friendly party?

- Have to say language not funded by party.
- JS did pro bono work, representing parents in termination cases/abuse and neglect. Didn't want to defend parents, but want to protect an area of law. Reached out to find out if issue was raised, but don't want to get involved in facts. Used mediator attorney.
- A lot of times, just advertising to other parties/groups because people don't know an issue is out there.
- Academic professors can file amicus briefs, but they must be focused on the issue and not they're latest law review article.
- Good example, tax professor explained the whole area of the law and there was a lot of interest in that brief.

Amicus are bound by the record. At what point is the line drawn between record facts and facts generally known, e.g., crime rates, etc?

- If it's something that could be judicially noticed, then the judges don't have a problem.

Do Amici present at oral argument?

- No amicus gives oral argument in COA but sometimes in MSC.
- Probably not useful in COA. It's the briefing.

As practitioners, if an amicus files a brief against you, what do you do?

- Try not to oppose amicus – bad form.
- If you file a brief in opposition it may appear to the Court of Appeals that you have something to hide.

- But yet, sometimes you must, as preservation, if the amicus in opposition bring up a new issue. So practitioners must do it in a way that says, not trying to hide something but amicus is trying to inject new facts or issues that is distracting or unnecessary.
    - File an opposition response early, pointing an expansion of the record. Don't wait till OA because the court has already read it and is only refining their ruling at that point.

Have you ever filed an amicus brief where the party hasn't wanted you to file an amicus brief?

- Sometimes, but joke "with 'friends' like these."

If one of the parties is pro se, and the amicus brief takes over the brief or side of the pro se. Should the Court be appointing amicus?

- Michigan Supreme Court appoints counsel, not amici.

What's the decision making process in appointing counsel?

- At application stage, court order invites all amici who's already filed to refile. If you have a criminal case then you order/invite two sides to do briefing.
- Court of Appeals will invite chamber of commerce or Michigan Municipal league.
    - There is no list of amici, though. But there are frequent groups that file as friends of the court.
    - Are there any "in defense of the prior opinion" amici, is there someone appointed to argue the former position.
    - Attorney General has done a good job of having Solicitor General and Associate Solicitor general to argue both sides

What tone should the brief have? What do you find persuasive?

- No adverbs – not appropriate. Should be calm, neutral, dry. An amicus waiving arms would be not credible.
- Controlled and calm tone. No ad hominem attacks. No bolding, italicizing, underline.
- No outward attacks on court. No overt attacking. No attacking trial judges.

Length of amicus briefs?

- Do not file a 50 page brief. Brief should summarize issues for the court.

- Bring something new to the table.
- Court of Appeals does not feel ethically bound to review amicus briefs. So the amicus brief should be 10, 15, 20 pages, getting straight to the point.

How much time to spend introducing the parties?

- If you're not a well-known amicus, you need to spend some time on interest of parties.
- The most valuable piece of real estate is in the introduction, so state who you are and why your voice matters in the introduction.
- Trim down brief by adopting statement of facts by party you support. No jurisdictional statement required.
- Go for the jugular – don't spend time on issues your organization doesn't care about.
- Conversational – enjoyable to read. If the brief doesn't say anything helpful, then it gets ignored.
- Definitely helps to have an amicus on a case.
- Amicus briefs usually help a great deal in tax cases.
- An amicus brief filed at the application stage is important because it may convince the court to grant the application. Once leave is granted, then the amicus brief should focus on the actual legal issue at hand.
- They may be helpful in a MOAA, too.

Friday, May 13, 2022 – 10:30 a.m. breakout

Michigan Supreme Court

The Michigan Supreme Court is very open to amicus curiae briefs and always grants motions for leave to file them. Under Chief Justice McCormack, the Court has also been open to granting leave for an amicus curiae to participate in oral argument. A motion granting leave to participate in oral argument is more likely to succeed if a party is willing to share part of its time with the amicus curiae.

There was a general consensus that amicus briefs supporting applications for leave to appeal Michigan Supreme Court are helpful because they show that the case is jurisprudentially significant. One experienced appellate practitioner stated that she filed amicus briefs at the application stage as frequently as possible to improve her client's chances of having leave granted. The Internal Operating Procedures for the Supreme Court encourage the filing of amicus briefs at the application stage.

The Supreme Court staff wanted practitioners to be aware that applications for leave to appeal are being decided by the Michigan Supreme Court much quicker at the time of the conference because Supreme Court case filings are down, at least for now. This is perceived to be a result of

trial court filings and decisions slowing down at the height of the pandemic. This situation might now last.

If an amicus curiae has filed a brief at the application stage, then the Supreme Court invites the amicus to file an amicus brief if it grants leave to appeal or decides to hold a Mini Oral Argument on the Application ("MOAA"). In the Michigan Supreme Court, amici are permitted by court rule to answer motions for rehearing so they do not need to seek permission to do so if they have filed an amicus curiae brief.

The Supreme Court staff indicated that if you have an amicus brief, then you should seek leave to file it even if it's after the deadline. The Supreme Court staff recommended that practitioners not spend time responding to request to file amicus brief. Instead, if you want to respond to the issues raised by an amicus curiae brief, move for leave to file a brief responding to the new amicus curiae brief. Sometimes an amicus curiae brief that is filed after oral argument can be beneficial in the Supreme Court. It was not recommended that practitioners do this unless a new issue was actually raised at oral argument.

Michigan Court of Appeals

While amicus briefs are filed less frequently in the Court of Appeals, it also finds amicus briefs to be helpful and is also fairly open to accepting amicus briefs. As a practical matter, it is more difficult to find support from amici in Court of Appeals because many attorneys that prepare amicus briefs are volunteers.

Scope and Content of Amicus Curiae Briefs

There was general agreement among the judiciary, court staff and the practitioners that amicus briefs are very helpful in cases that involve technical issues. This is especially true if the Court does not hear the issue in question very frequently or if the issue is unusual enough that the litigant's own counsel might not fully understand how the issue affects more than their client's own case. The judiciary agreed that amicus curiae briefs can be helpful to them in deciding the case even if the briefs are not expressly cited by the decision or dissent.

There is general agreement among practitioners that they would not file an amicus curiae brief if they could not certify that the brief was not drafted by counsel for a party and was prepared without the financial assistance of any party.

If multiple cases are argued together, which is not unusual at the Supreme Court, then there are usually some difference between the cases, often on the facts. In these cases, it may be useful to file a second amicus curiae brief in the companion case, especially if the brief addresses the differences between the cases and how that affects establishing a rule for deciding the cases.

One controversial issue is that amicus curiae briefs are supposed to be limited to issues raised by the parties. This rule, however, is not always followed in the Supreme Court. One appellate practitioner states that she has filed Supreme Court amicus curiae briefs that raise new issues. Another practitioner reported that he had a case decided based upon argument that raised by

amicus in the last paragraph of a very amicus curiae brief. In that case, the issue was not even discussed at oral argument.

How to find Amicus Curiae Support

The Criminal Defense Attorneys of Michigan and the Prosecutor Attorneys Association of Michigan file amicus briefs if leave to appeal is granted or if the Michigan Supreme Court orders that a Mini Oral Argument on Application will be heard.

The Supreme Court often invites bar associations or sections of the state bar to submit amicus curiae briefs.

Other Michigan groups like the Michigan Defense Trial Counsel and the Michigan Association of Justice file amicus curiae briefs. National organizations like the Defense Research Institute and the Pacific Legal Foundation will file amicus curiae briefs. One caveat is that it can be a time consuming process for getting approval and for preparing the amicus curiae brief so counsel seeking amicus curiae support need to move quickly to obtain amicus curiae support.

Up to two months lead time.

6. Motion Practice in the Court of Appeals

Thursday, May 12, 2022 4:00 -5:30 p.m. breakout

Dispositive motions (e.g., motions to affirm, motions to dismiss, motions for peremptory reversal)

- Do we use them enough? Too much?
- Judges say motions to dismiss are the most common, followed by motions for peremptory reversal; motions to affirm are relatively rare
- Motions for peremptory reversal are disfavored among judges
    - Court of Appeals wants to promote comity with trial courts
    - Court of Appeals is more inclined to remand with instructions and let the trial court take another crack, though the Court of Appeals acknowledges that approach may not always be the most economical
- Family-law attorneys say that they file motions for peremptory reversal quite a bit, particularly when there's a narrow and clean legal issue (e.g., the judge didn't follow the law), and judges agree that motions for peremptory reversal are more appropriate for a clean legal issue
- Attorneys give other examples of where dispositive motions might be appropriate:
    - *Daubert* context (e.g., the trial judge simply didn't address one of the requisite factors in determining reliability of expert testimony)
    - Discovery context (e.g., trial judge orders production of documents over objections based on privilege)

- General consensus among attorneys that there's really nothing to lose
    - Denial of your dispositive motion doesn't preclude you from raising the issue in your appeal brief
    - And you *should* raise the issue again in your appeal brief since the panel that denied your dispositive motion probably won't be the same panel that will hear the appeal
    - from a cost perspective, you can repackage your dispositive motion into your appeal brief; filing fee is an added cost, but that's about it
- Any information about how often these motions are successful? Clerk doesn't maintain statistics in the regular course of business but could pull statistics upon request
- Alternative approach: rather than filing a motion for peremptory reversal, ask for peremptory reversal in your application; not improper; the Court of Appeals can grant alternative relief
- Do dispositive motions actually shorten the appellate timeline? Some say yes
- Lengthy dispositive motions will probably be denied; keep dispositive motions short and concise: "you want a rifle, not a shotgun"
- Are there motions that aren't being filed that would be useful?
    - Judges say "no" without hesitation
    - Attorneys disagree, to some extent; some feel motions to remand are underutilized
        - Motions to remand are used more in criminal than civil arena, usually filed when there's a factual issue or when a judge doesn't make a particular finding
        - Can appellees file motions for remand? Court rule only mentions appellants, but the Court of Appeals will accept motions for remand from appellees
        - A motion for remand is due before the appellant brief, but the Court of Appeals will always accept a late motion for remand (even without a motion for leave to file late motion for remand)
- Despite the deadlines in the court rules, the clerk will generally accept a late motion; feel free to call the clerk to ask if you need to file a motion for leave to file a late motion

Motions for sanctions for vexatious appeals

- You need to file a separate motion; you can't just request sanctions in your prayer for relief in your brief
- Attorneys don't file a lot of these motions; judges agree they don't see a lot of these motions
- These motions are more appropriate with serial, vexatious litigators

Motions for stay versus motions for immediate consideration when filing application for leave to appeal

- Attorneys express frustration that the Court of Appeals will decide motion for stay and application at same time
- As a practical matter, the Court of Appeals won't grant a stay unless the Court of Appeals grants leave
- If trial is on the horizon, you have to file a motion for immediate consideration
- Trial judges generally won't grant stays because they're under enormous pressure to keep their dockets moving; trial courts also assume leave will be denied unless and until the Court of Appeals says otherwise
- Trial courts are more inclined to grant a stay if there's no rush and there's an issue that doesn't involve the merits, such as the statute of limitations
- (Off topic discussion about applications)
    - Court of Appeals doesn't keep statistics as a matter of course but could pull statistics to ascertain success rates
    - Someone heard a 15% success rate at some point, but that was for *all* applications; assumes success rate for interlocutory applications would be even lower
    - Applications in the middle of criminal trials are crazy

Routine motions for extensions

- Most *appellate* attorneys are pretty civil and agreeable, at least on first motion for extension
- Judges say you'll always get 56 days
- Even beyond 56 days, another extension will probably be granted if even minimal cause is shown
- How does the Court of Appeals feel about a motion for extension after the case is on the involuntary dismissal docket? Judges can't answer that
- Some attorneys express frustration that deadlines are essentially meaningless

IOPs

- IOPs say the motions discussed in the court rules aren't the only motions that can be filed
- What other motions do attorneys file?
    - Motions to expedite decision
        - Attorneys note that there's no real guidance about when these motions are appropriate, perhaps because they're generally fact-specific
        - Motion panels might be reluctant to grant these motions because different panels will have to render the expedited decisions (the same is true of motions to extend oral argument)
    - Motions for oral argument (after untimely briefs)

        - Ever worth objecting? General consensus is no
        - Judges sense a strong preference to grant these motions, at least to some extent (may just allow attorney to appear to answer questions)
        - Attorney expresses frustration that late attorney's time cuts into endorsed attorney's time; judges say this should never happen
    - Motions to strike non-conforming brief
        - File motion or raise issue in your principal brief? Over last ten years, clerks have seen a trend toward denying motion with instructions to raise issue in principal brief
    - Motions to expand record

Proposals for changes to court rules regarding motion practice

- None offered

Friday, May 13, 2022 10:30 a.m. breakout

- During this breakout session, attendees – including judges, court staff, and practitioners – discussed procedures and best practices for filing motions in the Court of Appeals.

- Judges and court staff began with an overview of how motions are processed. Administrative motions are decided by the Chief Judge (or another designated judge) following a recommendation from clerks. Administrative motions generally stay within the district in which they are filed.

- Regular (or substantive) motions also typically stay within the district, although sometimes they are decided by judges in a different district. Most regular motions are assigned a commissioner, who prepares a report for the judges' review. Motions to dismiss are assigned to the district clerk for a report. Certain motions – such as motions for stay, peremptory reversal, or to affirm – go "cold" directly to the judges. The panel may request a report from the commissioners for those motions.

- Court staff was asked whether the court has statistics on the number of motions to affirm or for peremptory relief that were granted in the past year. Court staff replied that those statistics are not available, but they are looking into it.

- Applications for leave to appeal, once ready for review, are given to a panel with the regular motion docket, but many variables play into how soon applications are reviewed.

- The moderator inquired as to how many practitioners are filing motions. Practitioners noted the need to file motions to dismiss for lack of jurisdiction sometimes, although the court clerk typically catches jurisdictional issues at intake. It was noted that practitioners should include a statement explaining why an order is a final order if it is not clear. Practitioners agreed that motions to affirm are rare and usually not a good use of money, and the court tends to be skeptical of a motion that denies litigants their day in court. The right to appeal is constitutional.

- Court staff offered other helpful tips, such as ensuring that all parties are included on the caption (even if not appealing).

- The group discussed the risk of filing an application for interlocutory review, where the court could deny the application for lack of merit in the grounds presented, rather than because the court is not persuaded of the need for immediate review. Court staff noted that the court typically won't deny an application solely because it is late (delayed); the court reviews the merits. If the delay affects the merits (i.e., an appeal concerning school-year parenting time where the school year is now over), then the delay might become relevant to the court's consideration.

- The group then discussed specific types of motions:

    - *Motions for Reconsideration*. The group agreed these generally are not likely to succeed, but they provide more time for a Supreme Court application.

    - *Motions to Expedite*. Court staff noted that civil cases can be expedited. For example, if a building is going to be torn down absent appellate review, then expedited review may be warranted. Expedited relief is necessary where monetary relief won't fix the injury later.

    - *Motions for Stay*. Court staff advised that practitioners can file a motion to waive the transcript requirement to allow a motion for stay to be filed more quickly. One judge described his thoughts on a motion for stay like this: If I don't stay this case pending appeal, is it going to foreclose or eliminate a party's rights (property rights or otherwise)? The analysis is fact-specific and looks at how circumstances will shift in the interim. In civil interlocutory appeals, the court often grants the stay to avoid further litigation in the trial court.

    - *Motions for Peremptory Reversal with Applications*. The court staff and judges advised practitioners that there is no need to file both an application

and a motion for peremptory reversal. Instead, practitioners should ask for peremptory reversal in the request for relief.

C. Family

1. The Search for Clarity on Post Judgment Final Orders

History of amendments of final order rule for family law cases:

MCR 7.202(6)(a) defines a final order for purposes of appeal. We discussed the history of this rule, which previously allowed for all post-judgment family law judgments and orders to be appealed as a matter of right. The rule was then amended to limit final appealable orders to matters appealing child custody or post-judgment orders awarding/denying attorney fees. The rule allowing for the appeal of attorney fees was then modified to include any order awarding or denying attorney fees as appealable as a matter of right.

Expansion of what "custody" means for a final order:

Despite the amendment to MCR 7.202(6) to limit final orders that are appealable by right, the interpretation of that rule has been expanding. MCR 7.202(6)(a)(iii) allows for the appeal of a post-judgment order that "grants or denies a motion to change legal custody, physical custody, or domicile." Initially, cases interpreted this language rather narrowly to only matters that very directly alter legal custody, physical custody, or domicile. However, over time there has been an expansion over time such that matters that relate to custody, such as conflicts relating to joint custody including vaccinations and which school a child will attend, qualify as a final order appealable as by right.

How to appeal when it is unclear whether you have a final order:

In some situations, there may not be a consensus of whether the order you seek to appeal constitutes a final order under MCR 7.202(6). For example, a change in a few overnights will not constitute a change of physical custody, but at some point enough of a change of overnights will constitute a change of physical custody. That line between parenting time and physical custody is not always clear.

A practitioner may choose to file a claim of appeal and an application for leave to appeal together. Sometimes a practitioner may choose to file a claim of appeal and hope that it doesn't get rejected on jurisdictional grounds. It may help to include a section in your brief that explains why you believe you have jurisdiction under MCR 7.202(6), especially when it is arguable whether your order falls under this rule as an appeal of right.

Consider the Relief Requested in the Motion:

MCR 7.202(6)(a)(iii) specifically says that to determine whether there is a final order, we must look at whether the trial court grants of denies a *motion* to change legal custody, physical custody, or domicile. This is a bit unusual, as most frequently we are looking at the action taken by the court in its order, whereas here we look to the relief requested by a practitioner in a party's motion. Consequently, a careful practitioner will consider how to frame the issue at the time of drafting the motion to help ensure that the resulting order is a final order appealable by right.

What to do if your Claim of Appeal is dismissed due to a lack of a final order:

Court staff will review your appeal to determine if the court has jurisdiction. If the court staff believes that there is not a final order, the court staff will prepare a proposed order which goes to a judge for review. The judge makes the determination of whether to dismiss the appeal, often times relying on the staff recommendation – but not always.

You can file a motion for reconsideration if your appeal is denied. A motion for reconsideration will then be heard by a three judge panel. Judges sit quarterly on a reconsideration panel.

Because these are administratively handled by orders rather than published opinions, there is not always a lot of guidance to practitioners on this. To the extent practitioners can find the orders, they do not have precedential value, which adds to the challenge of determining with certainty whether a post-judgment order constitutes a final order appealable by right.

What to do if the other side filed a Claim of Appeal on a non-final order:

If you believe that the other side has filed a Claim of Appeal where an Application for Leave to Appeal would be appropriate, you can file a motion to dismiss or a motion to strike based on the lack of a final order. However, there tends to be a preference by the court to allow full briefing on issues. Consequently, such motions are infrequently granted, particularly given that the court staff independently review each case for jurisdiction. However, such a motion will bring the matter before a three judge panel to consider the issue.

Appeal of Attorney fees:

MCR 7.202(6)(a)(iv) allows for the appeal by right of a postjudgment order awarding or denying attorney fees as a final order. Sometimes a trial court may bifurcate an award of attorney fees from the amount of attorney fees, creating

a question of when your claim is appealable and when your time to file your claim begins to run. Although the language of the rule refers to the order *awarding* attorney fees, the court has been consistent in determining that there must be an amount of attorney fees awarded for the order to be appealable.

2. Immediate Action Required! Appealing *Ex Parte*, Temporary, and Interim Orders

Ex parte orders

- Ex parte orders require showing of exigent circumstances. A hearing is held only if objections to the order is filed within 14 days.
- Becomes temporary order if no objections.

Concerns

- 14 days is really short – may be hard to get counsel and formulate a response.
- Even if objections are filed, a hearing may not happen for months, which is especially problematic in custody cases. See O'Brien v D'Annuzzio.
- Judges sometimes develop biases based on what they read in the ex parte motion before hearing from the other side.
- Are ex parte orders regarding custody even appropriate? The statute requires a finding by clear and convincing evidence that a change in custody is in the child's best interests. Entry of an ex parte order changing custody (the established custodial environment) isn't possible. The standard is partly intended to prevent restrictions on custody or parenting time without the court considering evidence of whether it's in the child's best interest.

Temporary and Interim orders

- Usually these are the same unless an order has a time limit, which is rare.
- Usually entered after hearing and consideration of evidence.

What can trial attorneys do when an order changes custody without a hearing?

- Even if the 14 days have passed to object to an ex parte order, file an ex parte motion for immediate hearing on the order. Focus on the procedure – no hearing was provided, and the court must consider evidence before changing custody. This satisfies the irreparable harm required for ex parte motion.
- If it's a temporary order, file a motion to modify. Works best in response to orders other than custody, which requires a showing of a change of circumstances since the last order was entered. Although, a proper cause argument may succeed given the lack of process.

What about filing an immediate appeal?

- May make sense in response to a court's decision to reserve for trial the determination of whether a prenuptial agreement is valid to avoid the expense of a trial.

- Costs are an issue. Do you wait for trial or spend money on the interlocutory appeal?
- Also raises the possibility of preclusion if the court of appeals rules against you and limits your ability to raise it at trial.

Interlocutory appeal of ex parte custody order?

- Concern how the trial judge will respond and treat your case if you appeal.
- File emergency application for leave to appeal.
    - To avoid issue with getting a hearing before the trial court, which in family cases is often spread out over months or years.
- SCAO time rules to complete cases don't apply to post judgment matters.
    - Perhaps the timelines should apply to post judgment matters.

The Court of Appeals often rejects these appeals based on harmless error.

- Years ago, COA was more likely to do peremptory reversal when custody was modified without the court following the proper procedure.
- We need a published opinion laying out why it's so harmful to change custody without following procedure.

Custody threshold Issue – when the trial court fails to make a finding

- Problem – the trail court decides to hold an evidentiary issue on both whether the threshold was met and whether the change in supported by the best interests.
- When appealing this issue, the COA is often willing to find this harmless error instead of finding that the there shouldn't have been a trial with a finding on the threshold issue.
- If the trial court issues an adverse finding on the threshold, consider filing an interlocutory appeal if you believe the facts fail to support the finding and to avoid a trial. But an appeal is costly.
- Or file a motion for a hearing and ruling before the trial judge on the threshold issue only, before moving forward with a best interest hearing. A hearing isn't required on the threshold but if it's disputed, the court can hold a hearing.
    - Consider file it as a motion for summary disposition on the threshold issue.

What do you do when your client benefits from an ex parte order changing custody?

- You may need to concede and agree to remand for hearing on custody.

Trial courts are entering EP motions without making finding that clear and convincing evidence supports suspension of PT.

Relief requested in appeal of ex parte order changing custody without a hearing

- Helpful to include in the request for relief, a request for remand with specific steps the trial court must follow, including a time frame in which to hold a hearing and consider the evidence.
- Standard COA time is 56 days for remand.
- Or, the court could retain jurisdiction, although that's less likely with interlocutory appeals.

Problem – exceptional issuance rule

- Maybe treat these cases – especially change of school – as exceptional issuance cases.
    - File a motion asking for it
    - Or should this be the norm is change of custody, threshold, or school cases? Consider raising this with the court.
    - Include it as a separate section/argument in the brief and not just in the request for relief. Gives it more importance.
    - But this will impact the use of word limits on briefs. Resolve it by including a motion for extension of page limit.

What's required by the court when it holds an evidentiary hearing on a motion for an EP/Temp orders changing custody or parenting time?

- Is it a full review of the 12 best interest factors, or an abbreviated hearing to show the allegations have merit/are met?
- Is it an evidentiary hearing if the judge/referee asks all the questions and prevents attorneys from questioning? Maybe because parties were under oath; but not if attorneys were prevented from participate.

Technical Problems deciding whether to appeal from a hearing on an ex parte or temporary order

- Transcripts
    - Costs may be prohibitive if there are multiple hearings
    - You should request expedited transcripts, but the cost rises, and the reporter may not be able to meet your deadline.
    - Serious due process issue for Wayne County litigants who cannot get timely transcripts within 42 days as required. Also, it takes 2-3 weeks for the court to send required the form to court reporters.
    - Court reports haven't had an increase in cost per page in years. If it changes, it raises costs for litigants.

Further solutions

- Bring these issues before the trial judges in trainings. That's been done the Family Law Institute and other trainings. Often, the sessions are attended by judges who already understand the procedure.
- Mandatory training is coming for judges, and this may be a prime topic.
- Talk to SCAO about imposing time limits on resolution of post judgment trial court matters.

- Wayne County transcript issues – meet with court administrator and chief judge of court and of the family court to seek resolution.
- Seek amended or new court rules. Set up workgroup of appellate practice section. Look at the court rule requiring a hearing on contested custody within 56 days. Perhaps define that a hearing must be evidentiary and a penalty for failure to comply.

3. Rapid Fire Family Law Wrap Up

Recap Session 1: Post-judgment Final Orders

- **MCR 7.202(6)(a)(iii) – post-judgment orders**
  - A final order that is appealable by right includes "in a domestic relations action, a postjudgment order that, as to a minor, grants or denies a motion to change legal custody, physical custody, or domicile."
  - This is a recent amendment to the rule that in effect narrows the scope of post-judgment orders appealable by right.
  - From 2015-2018, the COA saw situations pushing the envelope on the meaning of the former rule. The court saw remands from MSC questioning COA decisions on "affecting custody."

- **Impact of the new language**
  - Changes focus from the effect of the order to the effect/meaning of the motion and the relief requested.
  - This can create problems because sometimes the motion is mislabeled – motion to modify PT is actually to modify custody.

- **How to respond when you're uncertain the order is a final order**
  - File 2 appeals – a claim and leave to appeal. Although, this is costly.
  - File a claim with statement addressing the jurisdiction issue, arguing that this is a final order under the rule definition.
  - Dilemma when the order is unclear: file a claim vs leave
    - May be forced to decide between filing claim or an application. With a claim, you will get a full briefing schedule and argument, but may take longer than an application (change of school).
    - Alternatively, the attorney could file an emergency leave application to get an response quicker. But you give up the client's right to appeal
    - An application may risk a 1-page denial on the merits.
    - Also, more likely to get emergency relief on an application then peremptory reversal in an appeal by right.

- **MCR 7.202(6)(a)(iv) – Attorney fees**
    - A final order also includes "a postjudgment order awarding or denying attorney fees and costs under MCR 2.403, 2.405, 2.625 or other law or court rule."
    - There is an issue of when you can appeal by right a post judgment attorney fee order. The plain language only requires a grant of denial of attorney request.

Bifurcated judgments

- Bifurcated judgments generally are not final order as defined in the court rule and thus not a final order appealable by right.
- Example: all issues are resolved but child support is sent back to FOC. A party may want to appeal custody, or property division, sale of house, but can't by right because it's not yet a final order. Do you file an application and risk denial on the merits?
- May depend on what issue wasn't decided
    - Was the provision not decided required by court rule or statute?
    - Attorney fees alone are appealable by right so it does not make sense to require attorney fees to be completed before filing.
- Is it a final order where a judgment leaves open division of personal property?
    - In the Bonner case the judgment included an order to arbitrate personal property division. The unpublished decision says it's not a final order.

Consider the risk of a denial on the merits of an application

- Consider whether you need the relief faster vs the likelihood of denial on the merits.
- Although these denials are rare, it's a balance.
- Consider filing a motion for reconsideration if denial on the merits is issued.

Solution?

- Appellate attorneys would prefer a rule where all post judgment modifiable orders affecting children are appealable by right.
- Or, that all modifiable post-judgment orders that are entered based on new facts, should be a "final order" appealable by right.
- Cases involving children have importance given the constitutional rights of parents that are at stake and due to the limit of parent-child relationship, which ends when the child turns age 18.

<u>Recap Session 2: Appealing Ex Parte and Temporary Orders</u>

Transcript issues

- Appeals of ex parte or temporary orders are by leave (they are not final orders).
- You need to decide whether to wait to file until getting the transcript or file with a bare-bones statement of facts.

- Family law cases often turn on the facts so are transcript heavy, making transcripts often necessary to an appeal.
- You may be able to file without the transcript where the focus is on the court's failure to follow procedure, such as changing custody without an evidentiary hearing.
    - Need to consider filing an immediate appeal before time passes and creates a new ECE.

Other Topics

What are the numbers?

- Number of filings at COA are finally close to pre-pandemic numbers, having been lower during the prime pandemic years.

Getting documents are a challenge

- Trial exhibits. Trial attorneys don't always have them, and the court isn't required to keep them. Can you recreate the exhibits admitted from the transcript?
- Transcripts. Always a struggle to get timely transcripts

Access to Justice issues

- In child protection cases, court-appointed attorneys have a difficult time processing cases that often require review of hundreds of pages of transcripts, exhibits and other documents. The time it takes isn't reflected in the court-appointed payment scale and low-income clients suffer.
- Costs of transcripts especially to low-income litigants with fee waivers or are self-represented.
    - An appeal may require transcripts from an FOC referee hearing in addition to trial court transcripts. The costs may be out of reach of low-income litigants.
- Consider a rule that makes transcripts (FOC and/or trial court) free to litigants whose fees have been waived by the court under the court rule.

Register of Actions

- Lack of uniformity between courts
    - The court is trying to improve this by creating a state-wide system, but the court's budget request wasn't granted.
- It may include dates where nothing happened, but you have to investigate to be sure you have all hearings and orders accounted for.
- Often cannot tell whether a hearing noted on the ROA was actually held.
- These questions require appellate attorneys to contact trial counsel who may or may not be helpful; raises costs; leads to delays.

Possible Solutions

- Building a Bench (dedicated family court)

- Training (including possible mandatory judicial training).
    - Has FLS considered training for new judges practicing family law addressing hot button issues, such as the procedure to modify custody.

D. Child Welfare

1. Top 20 Child Welfare Cases Everyone Should Know

In re Sanders, 495 Mich. 394, 852 N.W.2d 524 (2014) (individual adjudication)
This case held that due process requires adjudication of a parent *before* a court can exercise its dispositional authority regarding that parent. This holding was based on *Stanley v. Illinois*, 405 U.S. 645 (1972).

In this case, the mother had pled. The father filed a motion for placement. The father received supervised visits, required to follow a service plan, and stripped of his right to have placement or arrange for placement of the children.

The decision notes that a parent's right to direct the care, custody, and control of his or her child free from state interference is a core liberty interest protected by the 14th Amendment unless there is an actual adjudicated issue. Numerous cases were cited in support of that proposition, including: *Stanley v. Illinois*, 405 U.S. 645 (1972*), Smith v. OFFER*, 431 U.S. 816 (1977), *Santosky v. Kramer*, 455 U.S. 745 (1982), *Troxel v. Granville*, 530 U.S. 57 (2000), *In re Brock*, 442 Mich. 101 (1993), *In re JK*, 468 Mich. 202 (2003).

Due process demands procedural protections (e.g., adjudication) before the state can infringe a fundamental right. Recall, Michigan previously followed the one-parent doctrine. If one parent pled, the other parent was automatically on the hook. The one-parent doctrine was determined to be unconstitutional.

In re Dearmon, 303 Mich. App. 684, 847 N.W.2d 514 (2014) (evidence at adjudication)
Evidence obtained after a petition has been filed may be presented at adjudication if relevant to allegations in petition and respondent has notice of evidence. The Petitioner alleged respondent would not leave a violent relationship that endangered the children. The Respondent claimed she had no voluntary contact with the abuser. The jailhouse telephone audiotapes obtained after the petition was filed were introduced as evidence of respondent's intent to maintain relationship with abusive partner.

What does this case not allow? As a hypothetical, think of a case where a petition is filed regarding the uncleanliness of a home. A petition is filed describing those conditions of the home. The parent cleans the home and rectifies the conditions. The parent cannot then submit evidence of the clean home at a hearing because it is not evidence of the condition of the home *at time of filing*.

In re Brock, 442 Mich. 101, 499 N.W.2d 752 (1993) (cross examination and privilege)
Alternative questioning methods, such as an impartial examiner and video deposition, are allowed if regular questioning found likely to be harmful to a child witness. See MCL 712A.17b(13) and MCR 3.923(F)

The right to cross-examination is not absolute. There is no 6th Amendment right to confrontation, because not it is not a criminal proceeding. Both sides can submit questions, but examiner need not ask all of them or follow their wording exactly. Traumatizing a witness is likely to result in poorer truth-seeking, thwarting the goals of cross-examination. Additionally, relevant info that would otherwise be privileged is admissible in a child protection proceeding. (MCL 722.631).

MCL 722.631 creates a broad aggregation of most privileges. This aggregates HIPPA.

A judge can issue a subpoena for a medical professional to testify. Medical professionals most often comply. A subpoena (and testimony) can only seek "relevant information". Information to help the trier of fact related to the issues at hand.

Court ordered therapy is not inherently confidential like non-court ordered therapy.

In re H.R.C., 286 Mich. App. 444, 781 N.W.2d 105 (2009) (in camera interviews)
Courts may not conduct in camera interviews of children in child protection proceedings. Such violates due process in child protection proceedings. *In re Ferranti*, 504 Mich. 1, 934 N.W.2d 610 (2019), reaffirms this holding. This case also held that reasonable efforts are not required if termination of parental rights is the agency's goal, but this portion was dicta and is no longer good law.

Reasonable efforts are always required unless aggravated circumstance. MCL 722.638 explains "aggravated circumstance", abandonment of a young child, criminal sexual conduct involving penetration, attempted penetration, or assault with intent to penetrate, battering, torture, or other severe physical abuse, loss or serious impairment of an organ or limb, life threatening injury, murder or attempted murder, etc.

In re Pederson, 311 Mich. App. 445, 951 N.W.2d 704 (2020) (plea: advise of rights)
The partial omissions of the advice of rights in MCR 3.971(B) do not necessarily require reversal. The facts of the case and the degree of harm must be carefully considered.

MCR 3.971(B)(3) deals with due process protections at adjudication stage. Errors could well require reversal. MCR 3.971(B)(4) says a plea may be used against a respondent in a subsequent termination of parental rights proceedings. The Court of Appeals will weigh the harm of the error, termination of parental rights grounds relied upon by trial court.

If there is a concurrent criminal proceeding and a child protection proceeding, a judge in the child protection proceeding is not required to wait to proceed until the criminal case is finished. A judge can choose to wait or proceed while a concurrent criminal case progresses.

In re LaFrance, 306 Mich. App. 713, 858 N.W.2d 143 (2014) (anticipatory neglect)
Anticipatory neglect only applies if children are similarly situated. Otherwise, such is too speculative. There must be a greater showing of risk or harm. In this case, jurisdiction was based on a father's failure to recognize the infant's serious illness and get treatment. The trial court ordered the termination of parental rights regarding the infant and the three older children. There were no allegations of maltreatment of the older children. The trial court relied on anticipatory neglect (treatment of one child is probative of how a parent may treat other children) to extend its reasoning about the infant to the three older children. *Matter of LeFlure*, 48 Mich. App. 377, 210 N.W.2d 482 (1973). The Court of Appeals rejected the trial court's reasoning due to dissimilar circumstances between the infant and the older children.

Also limited application of MCL 712A.19b(3)(b)(ii) to failure to prevent intentional actions. A Parent with the opportunity to prevent injury or abuse failed to do so and there is reasonable likelihood of further injury if placed in home.

In re Mota, 334 Mich. App. 300, 964 N.W.2d 881 (2020) (termination of parental rights at initial disposition)
In deciding whether to terminate parent rights at initial disposition, the court may consider evidence admitted at the adjudication trial along with additional evidence received during the termination hearing.

Adjudicative and dispositional proceedings can be combined in terminating parental rights at initial disposition cases if findings are distinct. See also *In re Smith-Taylor*, -- N.W.2d --, COA number 356585 (2021).

Courts should be clear about what they are deciding, the applicable standard of proof, the applicable law, and the facts upon which their decisions are based. *In re Jackisch/Stamm-Jackisch* (DV) • -- N.W.2d --, COA number 357001 (2022). The fact that a respondent is/was a victim of domestic violence may not be relied upon as a basis for termination of the respondent's parental rights. See also *In re Plump*, 294 Mich. App. 270 (2011). The perpetration of domestic violence is an appropriate concern. If a respondent's own behaviors directly harms the children or expose them to harm, that's an appropriate concern.

Often clients are faced with "improper supervision" and "failure to protect" substantiations. The consideration needs to be whether the child was an actual victim of "improper supervision" and/or "failure to protect" or what the child placed at risk because of "improper supervision" and/or "failure to protect".

These cases are very fact intensive. An expert witness may be needed to testify regarding the impact upon the child.

The presenter spoke about a case he had where the mother's approach was to claim she too was a victim of the abuser. She was. There were however many opportunities for the

mother to call for help or to leave with the children. She always had her phone on her. She never called for help or attempted to leave the abusive situation.

In re Rood, 483 Mich. 73, 763 N.W.2d 587 (2009) (notice and reasonable efforts)
Parents must have notice of proceedings, an opportunity to be heard, and an opportunity to participate in the case, including services. This court first discussed the constitutionally-protected liberty interests of parents in the care, custody, and management of their children. It also cited *Reist v. Bay Co. Circuit Judge*, 396 Mich. 326, 241 N.W.2d 55 (1976), which is also interesting for its statement that children and parents both have fundamental rights to "mutual support and society," a rare statement of children's constitutional rights.

The right to notice and to be heard was violated in this case by notice errors of the agency and court. The contact information was correct, but the mailings went to the wrong address; there was little attempt to contact and such attempts were often to the wrong number. A service plan was not provided for father. The agency did not follow policies about working with parents to develop a service plan, finding out if relatives were available, implementing a service plan designed to address problems in the case, and parenting time. A service plan is central to reasonable efforts. A service plan is required in all cases unless there are aggravated circumstances.

The Supreme Court has been vague about the constitutional rights of children in child protective proceedings.

In re Mason, 486 Mich. 142, 782 N.W.2d 747 (2010) (incarcerated parents and reasonable efforts)
This case is In re Rood for incarcerated parents.
Incarcerated parents must have an opportunity to participate in proceedings and the reunification process. Incarceration alone is not a sufficient reason for termination of parental rights.

MCL 712A.19b(3)(h) includes three conditions. A criminal history alone also does not justify termination of parental right. Only aggravated circumstances excuse reasonable efforts.

If a child is placed with a relative, the court must consider that as part of the best interest determination for termination of parental rights. A failure to make reasonable efforts creates "a hole in the evidence," rendering termination of parental rights premature.

A court appearance may be by phone. MCR 2.004 (MDOC custody).

A comment was made that some trier of facts believe this case only applies if a parent is in prison, not if the parent is in jail. The consensus is that this case applies to incarceration, no matter where incarcerated.

In re JK, 468 Mich. 202, 661 N.W.2d 216 (2003) (treatment compliance and adoption)
Compliance with a parent-agency treatment plan is evidence of ability to provide proper care and custody. Compliance and a benefit received is required. *In re Gazella*, 264 Mich. App. 668, 692 N.W.2d 708 (2005). The agency must create a plan that is adequate to address the agency's concerns. The failure to do so is the agency's problem.

Don't compare foster homes and parental homes when deciding statutory grounds to terminate parental rights. An adoption cannot be ordered if an appeal is pending.

In re Hicks/Brown, 500 Mich. 79, 893 N.W.2d 637 (2017) (disability)
Services must accommodate a parent's disability pursuant to Americans with Disabilities Act if the agency is aware or should be aware of the disability. If reasonable accommodations are not made, then there can be no finding of reasonable efforts, and termination of parental rights is improper.

The old rule about timeliness of a parent's request for an accommodations cast into serious doubt. Court dismissed it as dicta from COA case (*In re Terry*, 240 Mich. App. 14 [2000]). The old rule required that the request must be made when the initial service plan is adopted or shortly thereafter. The new rule appears to be that there needs to be time to effectuate the accommodations. But agency cannot sandbag.

Some lawyers believe if they reveal a client's disability, it will harm their client's case. This is the wrong approach. You must advocate for services which will benefit your client.

In re Simonetta, -- N.W.2d --, COA number 357909 (2022) (drug use and aggravated circumstances)
Prenatal drug use does not constitute aggravated circumstances under "severe physical abuse" subsection of MCL 722.638, as incorporated by MCL 712A.19a(2). Again, reasonable efforts toward reunification are required unless the court finds aggravated circumstances. Contrary to *In re H.R.C.*, the requirement of reasonable efforts is not eliminated when the DHHS seeks termination of parental rights. See FN 2 in Simonetta. See also FN 2 of *In re Sanborn* (394915/394916), May 13, 2021.

Law refers to "severe physical abuse" of a "child." A fetus is not a child under the Probate Code (for purposes of termination). • But Matter of Baby X allows courts to take jurisdiction based on prenatal neglect (once the child is born).

In re JL, 483 Mich. 300, 770 N.W.2d 853 (2009) (active efforts under ICWA)
Active efforts under ICWA need not be current or related to the child in question, but must be recent and relevant to the problems currently identified. This court rejected the futility test. Active efforts involve affirmative steps, active involvement of agency workers in implementation rather than merely giving a list of services. Additionally, active efforts must be culturally appropriate. Active efforts must permit a current assessment. In this case, the respondent received extensive services in recent termination cases with similar circumstances.

In re Morris, 491 Mich. 81, 815 N.W.2d 62 (2012) (ICWA notice and remedy)
If the court receives information about any criteria on which tribal membership can be based, notice to the tribe and/or BIA is required. This notice should be filed with the court along with a return receipt or proof of service. Parents cannot waive notice requirement or child's membership, because that would waive tribe's rights. The remedy for a violation of notice is "conditional reversal." This case was remanded to comply with the notice provision. If the child is eligible, reverse and pursue ICWA-compliant proceedings. If not, case proceeds. This case offers a thorough overview of ICWA requirements, including eligibility, notice, jurisdiction, tribal right to intervene, standards of proof, and placement preferences.

In re White, 303 Mich. App. 701, 846 N.W.2d 61 (2014) (best interest findings)
If best interests of individual children differ significantly, the court should address those differences in determining best interests. There is no need however for redundant findings. Clarified *In re Olive/Metts*, 297 Mich. App. 35 (2012), which held that each child requires an individual best interests analysis at termination of parental rights. For best interests, consider parent-child bond, parent's parenting ability, child's need for permanency, stability, and finality, advantages of foster home over the parent's home, domestic violence history, compliance with service plan, visit history, child's well-being in foster care, possibility of adoption, as applicable. This is not an exhaustive list.

In re A.P., 283 Mich. App. 574, 770 N.W.2d 403 (2009) (child custody and welfare)
Juvenile court orders supersede any custody orders. Juvenile court orders do not modify or terminate custody orders. The existing custody order goes dormant during the juvenile proceeding. A custody order becomes active again when the juvenile case is dismissed. This court notes that a child has a due process liberty interest in family life, a right to proper and necessary support, education, and care. In other words, a right to a fit parent.

Judges presiding over juvenile cases can also hear custody matters. A custody matter must have its own case number, and custody orders cannot be folded into juvenile orders. All Child Custody Act procedures must be followed, including determination of established custodial environment and best interest analysis under MCL 722.23.

In re Beck, 488 Mich. 6, 793 N.W.2d 562 (2010) (child support)
Termination of parental rights does not end the child support obligation. Parental rights and parental obligations are different. Parental rights are defined in MCL 722.2. The sole parental obligation defined by statute is the obligation to support the child. MCL 722.3. MCL 712A.19b only addresses termination of parental rights, not parental obligations. A court may terminate or modify the child support obligation (or may decline to impose one in a child protection case), but it may also maintain or impose such an obligation.

In re Yarbrough, 314 Mich. App. 111, 885 N.W.2d 878 (2016) (funding for experts)
Courts must give respondents reasonable funds for expert consultation if there's a nexus between the respondents' request and the issues presented and there is a reasonable probability that an expert would be of meaningful assistance.

In this case, seriously ill infant ended up comatose. The radiologists at one hospital found no sign of trauma on the MRI and the CT of brain. Another radiologist read the same scans and found signs of prior trauma. A termination petition was filed.

The parents moved for funds for an expert given the conflict between the doctors. Trial court denied the request. Here, the petitioner's case rested entirely on expert testimony. The Court of Appeals analyzed DP under *Mathews v. Eldridge*, 424 U.S. 319 (1976). The private interest of the parents was determined to be commanding. The state too shares the parents' interest in an accurate and just decision.

The risk of error is very high if parents are not allowed funds for an expert given complexity of evidence. The government's interest in saving money is not substantial enough given the stakes if the funds were denied to these parents. In this case, the conflict between doctors about the complex evidence made the expert witness funds necessary. When a court considers to award funding for expert, it should use the *Mathews v. Eldridge* analysis because "due process is flexible and calls for such procedural protections as the particular situation demands."

In re Ballard, 323 Mich. App. 233, 916 N.W.2d 841 (2018) (parenting time in a juvenile guardianship)
MCL 712A.19a(14) provides a trial court with the authority to order parenting time after a juvenile guardianship has been established. A court can increase, decrease, or terminate parenting time over the course of the guardianship.

See also *In re Prepodnik*, -- N.W.2d --, COA number 352041 (2021): holds that courts can also grant grandparenting time under MCL 722.27b in juvenile guardianship cases. The grandparents must meet the requirements in MCL 722.27b. The guardian is not entitled to the presumption given to a fit parent in a decision to deny grandparenting time.

Classics
In re Jacobs, 433 Mich. 24, 444 N.W.2d 789 (1989): Culpability need not be shown to support jurisdiction due to neglect.

In re Newman, 189 Mich. App. 61, 472 N.W.2d 38 (1991): Agency must give respondents a full and fair opportunity to address identified problems.

In re KH, 469 Mich. 621, 677 N.W.2d 800 (2004): A putative father cannot be a respondent in a child protection case

In re MU, 264 Mich. App. 270, 690 N.W.2d 495 (2005): Proving "criminality" under MCL 712A.2(b)(2) does not require conviction.

In re Moss, 301 Mich. App. 76, 836 N.W.2d 182 (2013): Best interest determination at TPR decisions based on preponderance of the evidence, not clear and convincing evidence.

2. The Indian Child Welfare Act (ICWA) After the Fifth Circuit's *En Banc* Decision in *Brackeen v Zinke*

Michigan Indian Family Preservation Act ("MIFPA")

MIFPA requires DHHS to make active efforts, not just reasonable efforts.

- An expert witness must testify about active efforts made to provide remedial services for the purpose of preventing removal. The expert must also testify that continued placement of the Indian child in the home is likely to result in serious harm to the child.
- The standard for removal is clear and convincing evidence.
- DHHS must consider prevailing social and cultural circumstances.
- DHHS must provide appropriate cultural services for both the child and the parents.
- For example, if a parent follows tribal beliefs, a service other than Alcoholics Anonymous must be utilized.
- This provision applies even if the parent isn't a tribal citizen, as the primary question is whether the *child* is tribal.
- MIFPA and Indian Child Welfare Act ("ICWA") act like a cloak which extends around the whole family and they apply to the child.
- The expert witness could be a Qualified Expert Witness (QEW), but they don't need to be.
- Active efforts to prevent removal do not need to be contemporaneous to the removal request, but they do need to be recent.
- A lack of appropriate active efforts by DHHS is grounds for reversing an order removing the child.
- Under MIFPA, the burden is on DHHS, not the tribe, to provide and prove active efforts.
- Active efforts require more than a referral to services without actively engaging the child and the family.
- There is a statutory list of active efforts, but this list is not exhaustive.
- In order to be considered active efforts, they must be on-going, vigorous, and concerted.
- Active efforts includes reasonable efforts and the list of provisions in MCL 712B.3(a).
- Active efforts includes a diligent search for family members as potential placement.
- DHHS must engage with the tribe early and often and must actively solicit the tribe's advice throughout the proceedings.
- DHHS must offer active assistance to the child's family in finding services.

Brackeen v Zinke

- *Brackeen* is a federal lawsuit filed in Texas challenging portions of ICWA.

- It calls into question 25 USC 1912 and 1915.
- Under these sections, there is a list of placement preferences (1. Extended family, 2. Tribe, 3. Another tribe).
- Would Title 25 be unconstitutional under equal protection considerations?
- The plaintiffs argued that the Congressional power to pass legislation for tribes or family law legislation actually belongs to the states.
- There is a question of preemption or commandeering raised by the lawsuit.
- The loss of ICWA at the federal level likely wouldn't have a significant impact on Michigan due to MIFPA.
- ICWA has been challenged more than the ACA, but those lawsuits are mostly dismissed due to lack of standing.
- In *Brackeen*, the plaintiffs alleged several constitutional issues with ICWA.
- The trial court granted the plaintiffs' motion for summary judgment as to five grounds (equal protection, non-delegation, anti-commandeering, APA, Indian Commerce Clause), but denied as to the issue of substantive due process.
- On direct appeal, the plaintiffs lost on all issues except for standing.
- The Fifth Circuit issued an *en banc* decision in April 21. The various opinions totaled 325 pages.
- There were opinions that the requirements of qualified expert witnesses and active efforts are unconstitutional commandeering.
- There were opinions that Section 1915 recordkeeping to keep track of Indian children in the child welfare system is unconstitutional.
- There were opinions that regulations which accompany ICWA are unconstitutional.
- Following the *en banc* opinions, four different petitions for certiorari were filed with SCOTUS, which granted cert on 7 questions presented.
- Oral arguments will likely be in October or November 2022.

In the meantime, states continue to pass their own versions of ICWA.

3. Reasonable Efforts, Appeals from Removal Orders, and What To Do With Invalid Pleas Following *Ferranti* and *Pederson*?

Service Plans After Removal: *In re Atchley Minor*, Nos. 358503 and 358502.
"The time for asserting the need for accommodation in services is when the court adopts a service plan . . ." *In re Frey*, 297 Mich App 242, 247; 824 NW2d 569 (2012), quoting *In re Terry*, 240 Mich App 14, 27; 610 NW2d 563 (2000). The *In re Terry* Court stated that a parent challenging the adequacy of an accommodation must raise an objection "either when a service plan is adopted or soon afterward." *In re Terry*, 240 Mich App at 26. Consequently, under *Frey* and *Terry*, the earliest point at which a respondent could object to or indicate inadequacy with the case service plan is when the initial case services plan is adopted.

In re Atchley held that "even if a parent does not object or otherwise indicate that the services provided were inadequate when the initial case services plan is adopted, such an objection or challenge may also be timely if raised later during the proceedings."

In this case, respondents did not initially object to or otherwise indicate that the initial case service plan was inadequate. It was not until a later dispositional review/permanency planning hearing, when the respondents challenged the adequacy of the services being provided. The court held that the later objections to the service plan were enough to preserve challenge to the reasonableness of the reunification efforts.

One member of the audience was involved in this case. He indicated that this was the second removal of the child. There was a prior removal of the child in 2019. The parents participated in unification efforts and the child was returned to them in October 2019. The second removal came months later in February 2020. In approximately March or April 2020, the dad was arrested for domestic violence with the victim being the mother. The District Court had issued a non-contact order and yet at hearings (conducted via Zoom) the parties appeared on the same screen.

Substance use was the primary issue for both parents. At a hearing in June 2021, both parents admitted they had used recently. They also tested positive for methamphetamines.

Dad was required to complete services related to domestic violence. Both parents were referred for mental health services. Neither parent took any action to rectify the barriers between him/her and the child.

Both parents argued at trial that they needed more time to complete services but the court terminated their rights.

This case has taught us that a trial court attorney can preserve a reasonableness issue at any time during the lower court proceeding.

Another participant added that at disposition, these parents needed a very specific service plan. That plan should have included a plan related to methamphetamines. Before the parent could have been expected to comply with a service plan, the underlying issue – addiction – needed to be addressed.

The audience member who participated in the case indicated that these parents had access to many services. There were referrals made for the parents at every hearing. The parents were also familiar with services as they had once participated in services because there was a prior removal and reunification. This second go-round, the parents simply chose to do nothing. It was easier to blame the agency then to put forth the effort. For example, the dad indicated he didn't want to participate in domestic violence services through the DHHS so a referral was made to another independent agency, yet dad still did not participate in services.

What is reasonable is determined on a case-by-case basis. Is a mere referral reasonable when someone has a long-term addiction? No. Perhaps instead DHHS needs to make a call and get that parent a bed at an in-patient facility.

Conversely, the parents also have a responsibility to participate in services.

Preserving Reasonableness After Removal:
Regarding reasonable efforts, look to *In re Smith-Taylor Minors*, a Supreme Court Order, COA No. 356585. In this case, the Department failed to create a service plan for Respondent-Mother. The court reversed the termination as to Respondent-Mother. "Reasonable efforts must include 'a service plan outlining the steps that both [the Department] and the parent will take to rectify the issues that led to court involvement and to achieve reunification.'" *In re Smith-Taylor Minors*, SC: 163725 & (58) quoting *In re Hicks*, 500 Mich. 79, 85-86 (2017).

A panelist suggested that if one is analyzing reasonable efforts, it's best to start with *In re Rood*, 483 Mich 73; 763 NW2d 587 (2009).

The DHHS must make reasonable efforts toward reunification. The DHHS can still file a petition at any time, but reasonable efforts must be made. Reasonable efforts can exist from a prior removal.

A panelist pointed out that the issue in these types of cases is that trial court attorneys are not preserving the reasonableness of service plans during the proceedings. Any example of preserving this issue would be an argument that the service plan is not achievable or that services are not available. If trial court attorneys do not preserve this issue, then appellate attorneys cannot raise this issue. A trial court attorney should articulate, on the record, that the service plan is not reasonable and further state, on the record, all the reasons it is not reasonable.

In child welfare cases the trial court record can make or break the case.

Parents attorneys should also participate in the process of crafting a service plan. An attorney should speak up and identify what his/her client needs. Perhaps services are limited in the county of jurisdiction, but services are available in an adjacent county.

Attorneys should be asking to see the referrals allegedly made by the DHHS. Often a caseworker's work is a mere piece of paper that makes it into a file but is never admitted as evidence in a court proceeding. That paper is therefore not part of the record.

Another participant suggested that the court too has an obligation to assess the individuals before it. If the court knows that a parent has a disability, the court should make accommodations to include having the service plan read to that parent.

Failing to preserve the reasonableness of service plans is not the only issue with the lower court record. Too often, the record is not clear on who did what and to whom. Who is the

domestic abuser? Who is the victim? Identifying everyone is important as it relates to the type of service plan created.

The record must be clear. Identify who you are taking about and the person's role in the case. The trial court may be very familiar with the case and while everyone is in the courtroom, it may seem logical to use "him," "her," etc. This lack of specificity creates a terrible record for a higher court.

Visits After Removal:
There was mention that in these removal cases, the "standard" is to immediately deny visits between the child and the parents. Other judges in addiction cases require a set number of negative drug screens before beginning visits. These same judges who immediately suspend visits and/or who set high standards for visits to resume are the same judges who after six months declare that the child and the parents have no bond. Some judges expect attorneys, specifically court-appointed attorneys, to "fall in line" with their decisions. Court-appointed attorneys feel like they cannot "rock the boat." If they do, they are removed from the court-appointed list.

A panelist stated that county judges who set these automatic "standards" should be reported to the Judicial Tenure Commission. An application for leave to appeal should also be immediately filed.

Another panelist proposed that 80% of the neglect cases have substance abuse and addiction issues. Science says that if reasonable efforts does not treat the underlying addiction, then there will be a relapse.

A parent should not have his/her rights terminated merely because of a substance abuse issue. There are parents who use drugs every day and parent their children just fine. To seek termination, the parent's drug use must negatively impact the child. Additionally, the DHHS treats mothers and fathers differently when it comes to substance abuse. Further, the DHHS is often biased. Each caseworker's bias dictates how he/she treats the parents and families and how the case progresses. It is easy to judge someone believing, "I would never do that," or "those are not the actions of a good mother," etc.

A panelist observed that often children blame themselves for the removal. Children want to know their parents are okay. Remember, if the parent has a substance abuse issue the child has likely already been exposed to the parent's addiction. What would be the difference? After removal, parenting time should immediately commence unless there is some psychological harm which would result from visits. An expert should be required to testify as to the alleged psychological harm.

Many parents' attorneys do not object to his/her client receiving suspended contact with the child. Many parents' attorneys are court-appointed attorneys who are not making a lot of money. These court-appointed attorneys are not paid for an application for leave to appeal.

Unfairness After Removal:
There was a consensus that courts need to better support their court-appointed attorneys. There is certainly a shortage of these attorneys. Courts also need to invest more money and resources into their GAL/LGALs. The fees for court-appointed attorneys vary across the state. In some counties, it's very little per hour compared to the work performed.

One participant shared that she used to be a CPS investigator, prior to and after she received her law degree. She reported that the DHHS often does not want to work with parents' attorneys. Trial court attorneys are also fearful of challenging the DHHS because of what might happen to their clients.

Another participant acknowledged that DHHS, even more so than the judge, seems to call the shots. This is not the same scenario as a civil lawsuit where attorneys for each side are on a level playing field. The DHHS dictates the process. Judges give too much deference to the DHHS. The judge should have the leadership role. A judge should not rubber stamp a social worker.

The DHHS is not accountable to anyone. Private agencies too, seem to be accountable to no-one. The DHHS does not monitor these private agencies.

At judge's school child welfare law is taught, but only three hours is spent on this topic. Within that three hours, it is expected that judges will be informed of the process from filing a petition to termination. This is not enough time. Trial court attorneys too need more training. The standards of practice must be consistent across the state.

Prosecutors too often have no experience in these types of cases. If this is apparent, the judge needs to take a leadership role.

A panelist suggested that judges shouldn't be so worried about timeframes. Understandably the courts must make findings on reasonable efforts within a specified time to receive Title IV-E funding. The overall goal however should be to help the families. It is perfectly fine to meet the 30 day timeframe at a disposition and then have another disposition in an additional 30 days.

Another trend noticed by the room is the way that the DHHS treats victims of domestic violence. The DHHS often treats these victims as perpetrators. Victims of domestic violence can appear to be sneaky, deceitful, and confrontational. These were necessary traits to survive. The DHHS however becomes easily frustrated at these victims because of what appears to be defiance and removes the children because of said perceived defiance.

A victim of domestic violence should not automatically lose his/her children merely because of domestic violence. A victim's parental rights can be terminated only upon statutory grounds. *In re S. Plummer*, Minor, unpublished decision, Court of Appeals No.336950, Ingham Circuit Court Family Division, September 19, 2017.

Pleas After Removal:
It is a disservice to take watered down pleas. Entering a plea for purposes of jurisdiction is not logical. The plea needs to be fully developed so that the service plan makes sense. Pleas however are often taken because a court-appointed attorney is not being paid appropriately. Such attorney does not receive reasonable compensation if he/she must proceed to a trial.

4. Giving the Child a Voice on Appeal: The Importance of the LGAL's Participation in Appeals

What does it mean to include a child's voice in the appeal and why is it important?

- The biggest reason this is important is because the case is in the name of the child. The case is supposed to be focused on the child.

It should be known that in both *In re Sanders* and *In re Ferranti*, and in many like cases, the higher court received no briefs from the LGALs. These cases shape and shift the life of a child and yet judges rarely hear from the person representing the child. All GAL/LGALs, in every county, need to be paid for appeals, to draft briefs and to participate in oral argument. Often a child has 6, 7, 8, 9 caseworkers but only one LGAL. Most LGALs are on the case beginning to end.

A discussion took place regarding GAL/LGALs. While some LGALs will go the extra mile, there are others who claim to visit and speak with a child, but never do. It was suggested that perhaps if GAL/LGALs were adequately paid, the court would find that more attorneys would seek appointment for these positions. It was suggested that perhaps Title IV-E funding could be used to compensate LGALs such as it compensates parents' attorneys.

Should LGALs accept the DHHS's brief on appeal by merely stating, "I accept fully the Department's rational and recommendation"?

Consensus: No.

These child welfare cases are affecting generations of people and generations of families.

An LGAL should place on the record what a child has been through and what the child will face in the future.

One participant acknowledged that children often feel they have no voice during these proceedings. Children are rarely asked what they want. A service plan is usually for the benefit of the parents. A child is talked about tangentially, but the focus is always the parents. We must remember that these cases are about the children. This is the most important case of a child's life.

One participant shared insight on a former case. There were seven children, six girls and one boy. An expert testified that upon his assessment of the children, based upon the scoring, these children were the most traumatized he had ever witnessed. The oldest daughter was always the target of abuse. Once she was beaten so bad, it was suspected she was dead. The boy had witnessed this beating. The expert testified that the boy had a *resting* heart rate of 136.

When the LGAL prepared her statement of facts, she detailed within that statement each child's abuse individually. She detailed how the trauma each child suffered and witnessed affected each individual child. In her statement of facts, she included the boy's resting heart rate of 136. All of the LGAL's details regarding the trauma suffered by the children made it into the COA written opinion.

An LGAL can use the expert's testimony and a trauma assessment to gain additional facts to include in a brief. If termination is sought for an injury, describe that injury. In your writing include examples of the amount of pressure which would have needed to be exerted in order to cause said injury.

Often courts place too much emphasis on whether the child and the parent have a "bond." The truth is that most parents and children have bonds. No matter what the parent has done to the child, it is likely that a bond still exists. Rather: we must consider whether that bond is *healthy*. We must consider whether that bond benefits the child.

There was discussion that certain counties do not require an LGAL to complete a report. Additionally, some counties discourage a written report. If that is the case, then the LGAL needs to make a record for purposes of a transcript. An LGAL can do that by asking the expert questions such as "What is the youngest child's resting heart rate?"

A question was asked whether an LGAL should quote from a CASA report. The consensus was to state that the LGAL should state whether the LGAL agrees with the CASA report, but then elaborate on the reasons why by selecting specific parts of the report, identifying the page numbers, and reiterating those pertinent sections on the record. The LGAL can also elaborate on what he/she has seen/heard from the child and why such supports the CASA report.

What do you do if the judge does not want you to make a record?

The LGAL needs to tell the judge, "Respectfully, I am creating a record" and then make the record, "X, Y, Z happened and it impacted the children because…".

The judge may roll his/her eyes. The judge may interrupt you. You must make the best record you can. If the judge persists and will not let you elaborate on the record, you have at least created a record that you had information to share and attempted on multiple occasions to be heard.

You could also try a summary technique whereby you quote important sections from reports filed during the proceeding. You could also try to us the word "appeal" which may convince the judge to allow you to state your position.

Remember you can also make a record by questioning the expert and eliciting the important testimony.

Some attorneys ask the experts "yes" or "no" questions. The lawyer's statements however are not evidence. If the lawyer does this, the LGAL can ask the expert open-ended questions so that the expert can elaborate and create a better record.

A judge proposed that when she asks a lot of questions of an expert she is perceived as advocating for one side or the other. An audience member stated that the judge is allowed to inquire as to all relevant information which aids the judge in determining the child's best interest.

Everyone is always interested in the liberty interest and the constitutional rights of parents, why are we less concerned with affording the children the same equal protections?

If a parent has a right to be a parent, then that parent also has a responsibility to be a parent.

One audience member hypothesized how different it would be if children were able to bring a lawsuit against their parents. A child would have to argue that they have a constitutional right to a (fit and responsible) parent. This is different than a parent's constitutional right to be a parent.

If you have a constitutional right to be a parent, why don't you have the responsibility to parent?

In society, children are defined as minorities, as being vulnerable and as needing someone to make decisions on their behalf. This is true for all children until they reach the age of majority. If that is how we define children, they cannot have the same constitutional rights as parents. If a child's parent abandons that child or does an unspeakable act to the child, from whom does the child seek redress?

It is not the state's obligation to raise the child. Who has that obligation?

What are the challenges in child welfare law?

Overall, the largest challenges in child welfare law seem to be funding, judges not allowing LGALs to create a record, and the lack of the child's voice throughout a proceeding.

The panel also discussed that laws are not truly reflective of the reality of people's lives. One person shared a story of how she adopted her niece. It was impossible after the adoption to keep that niece apart from her parents and other family members. The entire family lived in a small town. The child was always going to interact with her parents and other family members because of the small community. The laws do not recognize that often children who are adopted still interact with biological family members.

Also, consider when a person is arrested on a criminal matter. The arrestee is not asked if he/she is a parent and further if the arrest creates a scenario where a child is now at home unsupervised. The arrestee is not asked if he/she has a vulnerable adult at home who needs him/her for daily living, etc. We need to ask these important questions. As Justice Bernstein said, "Our lives are intertwined by the people in it."

All in attendance agreed they would like to continue this discussion via emails and in future session(s).

A recommendation was made to have the importance of the LGALs in all appeals be a plenary session for the next MABBC event. A participant noted how if lawyers and judges were to learn that the person in whose name these lengthy and important proceedings occur (the child) often is never heard from – never – they would all likely be aghast.

IV. Plenary – Supreme Court Practice Tips

[TRANSCRIPT ATTACHED AT TAB B]

V. Plenary – "Hear Ye, Hear Ye: Remote Oral Arguments in the Court of Appeals"

[TRANSCRIPT ATTACHED AT TAB C]

Tab A

Lessons Learned From the Pandemic:

May it please the (virtual) court?

May 12, 2022

MS. NANCY VAYDA DEMBINKSI: Good morning, everyone. I am Nancy Vayda Dembinski and this is Stefanie Reagan and we'll be your friendly neighborhood moderators for this plenary, which is the "Lessons Learned From the Pandemic: May it please the virtual court?"

I'd like to introduce our plenary panel and then I will turn it over to Stefanie to moderate the first two talking points today, which are "Lessons Learned About Technology," and "Lessons Learned About Communications." And then I will plan to moderate the second section of the points, which are "Lessons Learned About Procedure and the Effect of the Pandemic on the Appellate Process," and "Lessons Learned About the Future," which is kind of a weird tense, but "Lessons Learned for the Future," I guess I should say.

We are very excited to have on our panel today -- let's kick off with Judge David Sawyer, who is going to have a short bio despite his longevity on the court. Judge Sawyer was elected to the Court of Appeals, or to the Court, in 1986. Previously, he was the Kent County prosecuting attorney and a criminal justice teacher at Grand Rapids Junior College. Judge Sawyer received his bachelor's degree from the University of Arizona and his law degree from Valparaiso School of Law. Judge Sawyer, can you wave? Everybody knows who you are but there he is.

Thank you. All right.

Also on our panel today, we have Judge Brock Swartzle. Judge Swartzle was appointed to the Court in 2017. Prior to joining the bench, he was chief of staff for the speaker of the Michigan House of Representatives, as well as the House's general counsel. He served -- I'm sorry, he clerked in the Eastern and Western Districts of Michigan, as well as four years with Judge David McKeague on the Sixth Circuit. In between his government service, Judge Swartzle practiced law at Honigman with the firm's antitrust group. He currently sits on the George Mason Law & Economic Center's Judicial Educational Advisory Board and he teaches at the Michigan State University Law School. Thank you, Judge Swartzle. Everybody knows who you are; give a hand. All right.

And Larry Royster, who carries tremendous weight, apparently, according to Judge Zahra; we don't disagree. Larry Royster is the chief of staff and clerk of the Michigan Supreme Court. Before joining the Supreme Court in 2013, Larry worked for the Michigan Court of Appeals for 27 years as a prehearing attorney, law clerk, research supervisor, research director, and chief clerk. Larry earned a bachelor's degree from the Michigan State University and a law degree from Thomas M. Cooley Law School. You all know Larry. Larry, wave to the camera.

There you go. Thank you. All right.

Also on our panel today is Mary Massaron. You all must know Mary. This is her like -- we almost felt bad asking her to be on the plenary panel because this is her first conference in a long time where she is not actively working to plan the conference and we asked her to be on our plenary. As a matter of fact, she offered to moderate and we almost let her so -- Mary has been an appellate lawyer with Plunkett Cooney, practicing in state and federal courts throughout the country for 30 years. She's a member of the American Academy of Appellate Lawyers, the American Law Institute, the former chair of the Michigan Appellate Practice Section, and the Michigan Appellate Bench Bar Conference Foundation. A regular before the Michigan Supreme Court where she clerked for Justice Patricia Boyle, she currently chairs its Advocates Guild. She has twice received Western Michigan University Cooley Law School's Distinguished Brief Award. She's a past president of DRI, which is the voice of the defense bar and of lawyers for civil justice. Mary, we know who you are; please take your applause. All right.

Moving on, okay, Brad, first, I'm going to apologize to Brad Hall. He gave me his bio and he told me I could shorten it and I did so I apologize, Brad. There's a lot to say about Brad Hall. So Brad has been the

administrator of the Michigan Appellate Assigned Counsel System or MAACS since 2015. MAACS oversees the private assigned counsel roster and is a counterpart to SADO, the State Appellate Defender's Office. Brad has trained Michigan lawyers on many criminal law topics and is a past recipient of the Cooley Law School's Distinguished Brief Award, also. Please give some applause and, thank you, to Brad Hall. All right.

Jordan Ahlers. Jordan, you're alphabetically first but I put you last because I just went by -- you're closest to me, so – Jordan is an associate appellate attorney at the Speaker Law Firm in Lansing. Her practice focuses largely on child custody related matters on appeal, including termination of parental rights appeals, as well as other family law related appeals. Prior to joining the Speaker Law Firm as an attorney, she worked as a law clerk for the Speaker Law Firm. She earned her JD from Michigan State University College of Law and her undergraduate is from Hillside College. Please welcome Jordan Ahlers. All right.

And with that, we'll get into the substance of this plenary. I'll turn it over to Stefanie Reagan.

MS. STEFANIE REAGAN: Thank you, Nancy, and thank you, panel, for volunteering or agreeing or however you want to phrase it.

This morning, we're going to talk about a few lessons learned in various topics. The first one we're going to talk about is technology. All of us had to learn quickly about technology; the Zoom, the good, the bad, and the ugly about it. How you're breaking up and you're frozen and you have no idea that any of that is going on. You're constantly on mute; maybe it's a good thing that people can mute you. And then I'm not a cat; that was one of the most memorable moments of Zoom world.

So I'm going to kick it off to the panel. If anyone has like an interesting story, a memorable or unusual event when you first held a Zoom oral argument or you held a Zoom hearing or took a Zoom deposition. Any thoughts or comments about that?

MS. MARY MASSARON: All right, well, I'll start. I would say a couple of things. One, is of course, when we went into the pandemic, maybe some of you are high techy people; for somebody my age, I think I'm okay. But it's not my area of most comfort. And there was a lot of stress involved in figuring out how to make Zoom work, understanding the different things that could go wrong so that you could fix them, and I'll tell you two stories from the early days of the pandemic.

One was when I was trying to get ready for a Zoom argument, I can't remember if that was Sixth Circuit or in

the Michigan Court of Appeals, in my condo. And the people who do the leaf blowing decided to come and I was stressed out of my mind because it was very loud and I knew it would hear. So I moved from where I normally had my stuff set up to another place and I'm waiting and, of course, I had gotten ready way early and the leaf blowers finished where they were bothering that room and they came to the back of the condo, so I had to move again. And all of that just illustrates the kind of things you don't deal with when you're sitting in the back of the courtroom waiting to be called and that make some aspects of arguing from home, or wherever, a little more stressful.

And the other story has to do with a hearing; I think it had to do with a stay motion. It was not in the appellate court but the trial court. But we were called virtually into this hearing and the lawyer who was on the other side was sort of leaning back in this chair, he had a towel wrapped around his neck, he looked very informal. And the judge said, "What are you doing?" He said, "Well, I was getting a shave." And I was absolutely flabbergasted; the judge was somewhat surprised and actually quite kind, I thought, given the lack of respect for the process. And I tell that story only because I think it's not that informal just because you're in your house and it's a good lesson for all of us that you're not

standing but you are in a formal court proceeding and so you don't want to be sitting back having somebody give you a shave while you're presenting an oral argument before a judge. Okay, those are my stories.

MS. STEFANIE REAGAN: That's great.

HONORABLE BROCK SWARTZLE: My story is -- it does not involve court, our court, it involves moot court and I want to make that very, very, very clear. It does not involve an official court proceeding.

But I had agreed to be a trial judge in a moot court proceeding involving -- Michigan State somehow roped me into this. And it was, I believe, in the fall or maybe in the spring of last year. And I did it from home and so I had my robe, my wife was working from home that day. I said, "Listen, I'm going to be in here for a couple of hours; this is pretty important. You know, keep the dogs under control," that kind of thing. And she did; she did a fantastic job.

And then at around 11:00 in the morning, I needed more coffee and so I took a quick recess and walked out and she just started laughing. And she goes, "What are you doing?" And I'm like, you know, "I'm moot court judging." She goes, "You have flipflops and shorts on under your robe." And I thought, "Well, I'm home. It doesn't matter, you know?" So I had, you know, I was -- I had my up here,

I looked completely professional but, admittedly, I did wear shorts and flipflops for moot court that day. And my wife still talks about that; that she now thinks that's how I do every court proceeding. And I tried to assure her that that's not the truth. Although, if you were at the reception last night, I think I was the only one in shorts, so maybe last night was not the best example.

MS. STEFANIE REAGAN: Anyone else?

HONORABLE DAVID SAWYER: I will say that my only real problem was getting into this and dealing with Zoom is that it's like I'm watching TV all day. And it's really hard, I mean, I got to see a lot of different living rooms, offices, Speaker Law Firm; I get to see the big Mackinaw Bridge behind there. I mean, that was interesting, but it's also distracting and it was really kind of hard to get into a case when you're watching TV. And if you're on the Court of Appeals, one of the problems is that our computers don't have cameras in them so you're on an iPad. And if people argue too long, your power goes way down. And at the start, if you're looking at it and you'll see my - I did it all from my office - you'll see windows behind me. toward the end of the day, you'll see the back of my office behind me because I had to turn around because my cord didn't go long enough to plug it in.

But other than that, I really haven't had too

many problems one way or the other on it, other than I do miss sitting with colleagues.

HONORABLE BROCK SWARTZLE: Mmm-mmm.

HONORABLE DAVID SAWYER: I do miss seeing a courtroom where you really can look at -- it's not like television. You're looking at people; you're able to have a little more interaction. It was different. So I'm glad to get back to what it was. At one point, I was the only person in the State building, so you know, that was my mancave, and so to speak.

As we all know, most of you know – I shouldn't say all – there's certain places you feel comfortable and you study at, you write briefs, or you do whatever. To me, it was my office. I don't think, mentally, I could have gone into it as much if I'm sitting at home. Now, I don't know how it is as a practitioner but I do know it's hard for me, so that's about it.

HONORABLE BROCK SWARTZLE: Following up on Judge Sawyer's comment, so I also take all of my remote oral arguments from my office at the Hall of Justice. But I have – you would laugh if you came in – because I have an extension cord because I have the same problem; my iPad dies. I need a new iPad, Judge Gleicher.

And I also have, like, I have the same four books I use as my stand. And so, you know, every morning or when

we do this, I go get the same four books; I have this little stand. It looks ridiculous but I, along with Judge Sawyer, I much prefer doing official things in my office at the Hall of Justice than trying to do something like that at home.

HONORABLE DAVID SAWYER: The one thing I was going to point out and my wife pointed it out to me. She says, you know, "Can you look straight at -- you're looking up at it." I mean, it's like you're trying to move the thing one way or the other and it's distracting. It's distracting for me when I'm sitting, listening to arguments, and I'm seeing myself.

HONORABLE BROCK SWARTZLE: Mmm-hmm.

HONORABLE DAVID SAWYER: You know, it's different, so. And every once in a while, you're going like this; people are on mute or they're breaking up. Or we have had problems with all of a sudden we can't get somebody in; we've got to adjourn it to another time or move it down the road.

But the one thing I've got to say about the Court of Appeals, our staff was excellent. They really worked hard, they kept people out in the gallery. That first few months, it was hard to remember that when you first get on and they -- we sign on beforehand. You forget there's people out there; you don't even know they're there. And I

think I mentioned once, I said, "This is the first time I've never worn a tie under a robe." Someone starts arguing, he says, "You look okay." I didn't even realize it, so anyway --

MR. BRADLEY HALL: So I have a story, if I could. It's not my case but it's one of my favorite stories to come out of the pandemic. One of my heroes; her name is Latausha Simmons. And lots of you probably know that name because I think I see two people here who represented her and she's been through a district court in Macomb County, Macomb Circuit, Court of Appeals, the Supreme Court, back to the Court of Appeals, back to the Supreme Court. I think she's back in the Court of Appeals now?

But here's why she's my hero. She likes to represent herself. She was, I think, she was convicted of resisting and obstructing a police officer and that conviction was vacated and then reinstated; sort of a legal issue. But she wanted to argue for herself so she filed a motion to present oral argument and she didn't have the equipment to do it. The Court of Appeals granted her motion, set her up at, I think, Cadillac Place -- I don't know; I couldn't tell from the video when I watched it last night. I don't know if it was Jerry helping her out with the mute button or one of the security officers or somebody, but they gave her an opportunity to come in and

give her argument. And it was a full-throated, coherent, logical -- it was a really, really strong argument and she got a published opinion reversing her conviction out of the Court of Appeals. Now, that came back so the case is still alive and she might be, you know, arguing herself pro per in the Supreme Court sometime soon, but that was one of my favorite stories when I was thinking about this last night.

And kudos to the Court of Appeals for saying -- for granting the motion, setting her up with a computer, whatever, in the lobby or a room of the Cadillac Place, and hearing from her and I thought that was just -- that was great. I've seen a lot of arguments where people rest on their briefs and she was pretty impressive. So she's my hero in the pandemic.

HONORABLE DAVID SAWYER: I have one other thing to say. It's that the first time in 36 years – and this is my last year – but anyway, the first time that I've ever had somebody argue from a prison in pro per. It was on a sentencing issue and whether or not Zoom -- if you can sentence versus Zoom or if you had to be in person. So anyway, that's got to be dealt with, but anyway, he argued the case and did a good job. But he argued from one of the correctional facilities, so that was kind of unique and we granted it, there was no problem, but the correctional facility was able to deal with it, which I gave them a lot

of kudos on being able to deal with it.

HONORABLE BROCK SWARTZLE: Well, and I'll follow up with what both Brad and Judge Sawyer said. Our IT staff has been amazing. I think there was just the one month that we had all of our cases submitted on briefs; that was April of 2020. Beginning in May of 2020, we've had oral argument in any case that preserved and, you know, otherwise was granted it. And that is not the same across the country, so our court staff, you know, Jerry Zimmer and the entire clerk's office, has done just a fantastic job.

MS. STEFANIE REAGAN: Thank you. Does the judge -- do the judges on the panel have any tips for practitioners when you have a serious technical malfunction; where you are frozen and you cannot get it back because your Wi-Fi has just gone down and it interrupts oral argument? What do practitioners do or how does the court address that?

HONORABLE DAVID SAWYER: Well, we had one case where that did happen and they ended up on a phone and that's fine. There was no problem with that. I mean, we'll take the time – we'll either adjourn it so they can get on the phone or they'll deal with our technical people on how to turn this on or that on with the computer – so it works out. Just don't worry about it, don't get all flustered about it, it's going to work out. And that was

the one thing I'd say; it's just part of the game, I guess, dealing with it.

HONORABLE BROCK SWARTZLE: I would say make sure you have the phone number --

HONORABLE DAVID SAWYER: Yeah.

HONORABLE BROCK SWARTZLE: -- of the IT person or the person from the clerk's office who you are dealing with so you have a direct number that you can call or an email so that if there is a glitch --

HONORABLE DAVID SAWYER: Yeah.

HONORABLE BROCK SWARTZLE: -- you just immediately contact them. And as Judge Sawyer said, we've all been on panels where we've had to, you know, we've gotten halfway through an oral argument, we had to kind of come back to it or we paused for three, four minutes, and I think we all understand that we're dealing with uncharted territory.

MS. STEFANIE REAGAN: And for what Brad mentioned about a client who doesn't have -- a pro se client who doesn't have access to internet, computer. Do they just get on the phone, too, or can they ask the court for accommodations?

HONORABLE DAVID SAWYER: Well, we had one in Grand Rapids on a case and we set up the courtroom for her to come into and she could -- they had the cameras there so

she could deal with all the judges but she didn't have a computer that she could deal with it. And it was all set up; she never showed. But that could happen, I mean, you can set up for it and our IT staff did an excellent job doing that and, unfortunately, didn't show up for it, but that was it.

HONORABLE BROCK SWARTZLE: Yeah, from what I can tell, our clerk's office bends over backwards to make sure people have their day in court.

HONORABLE DAVID SAWYER: Yeah.

HONORABLE BROCK SWARTZLE: And so, if there's a problem with a particular client not having access to something or other, I have yet to run into an instance where our clerk's office hasn't been able to accommodate in one way or another.

MS. STEFANIE REAGAN: That's excellent. I didn't know about that. For practitioners on the panel and for anyone out in the audience, do you have tips on getting ready for OA and making sure your technology is up to date, maybe updating your Zoom before you get on? And also, do you – since you're in a more casual setting – do you find that getting prepared like you would go to court is something that you do for oral argument remote?

MS. MARY MASSARON: For me, the actual preparation for the argument is pretty much the same. I

still do my argument binder, I still have my points, and my, you know, pages in the record for support and all of that; that's the same.

But I do a couple of things differently. One is I may be wearing a suit jacket and a formal type of a blouse and pearls or whatever seems formal and appropriate but I may be also wearing blue jeans and they don't show and I'm comfortable; I think that's okay.

The other thing that's more, I think, important is I purchased – you can do it with books and I have done it with books – or you can purchase a stand so your laptop is at a good height and angle. And that's really important because you want anyone who's seeing you on this screen to be looking at you sort of face-to-face. And if the screen is going up or down, it's jarring and I think it has a very different impact, so I use that.

And the other thing I've done when I'm arguing at home is I use a sort of cookbook stand, a book stand, and I sometimes put my notes up that way so that if I'm looking at my notes I'm not looking down but I'm looking across. And I hope that when I do it that way, it's more engaging, less like I'm not making eye contact with the judges who I'm trying to talk to in the course of the argument.

HONORABLE BROCK SWARTZLE: I think you just distinguished between private practice and state

government. You have a nice stand; I've got –

MS. JORDAN AHLERS: For us, personally in our office when we first started doing remote argument, Judge Sawyer brought up the fact that we have a painting of Mackinaw Bridge. That's actually in our conference room and we set it up so that we were still able to stand and give oral argument, even when we were doing it remotely, which I found to be particularly helpful because, like Mary said, I think one of the most important things for me is really just making sure that I am centered and that the judges can see me because I can't tell you how many arguments I've seen where there's one little tiny head in the corner of the screen and I just think it's much more effective if you really just try to replicate in person argument as close as possible.

MS. STEFANIE REAGAN: Any questions from the audience?

Moving on to the issues of filing in the lower court, preserving your record and any issues that might arise in the lower court -- that arise in the appellate court, based upon when you're all remote and trying to file things in a lower court where a lower court does not have e-filing, for example. Have any issues come up in appellate work, whether with the bench or with practitioners, about having a complete record due to the

lack of or the delay in getting filings in the lower court record or a delay in getting that up to the appellate court?

HONORABLE BROCK SWARTZLE: Not in my experience but I do know that that is an issue. I have not personally sat on a panel where we've experienced that problem so I'm not entirely sure. I mean, you could always grant a motion to expand the record or you could remand it for the trial court to determine whether to expand the record. But I think that there are processes in place for that.

MR. LARRY ROYSTER: Yeah, I would for the Supreme Court, probably not so much, primarily because we get the records from the Court of Appeals, so I imagine they had some difficulty, especially during the period where they had the, you know, governor's stay at home orders, getting records. But you know, right now our most populous counties that provide, you know, the most appeals, are electronic so we get those records electronically.

For the Supreme Court, there was a period where records were being returned from the Court of Appeals during the tolling orders where automatically, it's flagged for the Court of Appeals when the time has passed for filing an appeal with the Supreme Court so they return the records at that point. And then of course, the tolling order finishes and then the appeals start coming into the

Supreme Court, and yet, those records are returned. So there was a period there trying to get those records back where it was a little bit more difficult.

But I think, you know, except for the period at which the trial clerks were not in the office, you know, may have been a little bit slower but not noticeably slower. And of course, the e-records came to us just as quickly as they ever had, so I don't think the Supreme Court experienced a problem with it.

MR. BRADLEY HALL: For court-appointed appellate work, I think the problems we experienced largely existed before they were just exacerbated. Getting and gathering the records from a trial court, prosecutor's office, trial counsel when people were at home and didn't have access to their files was very, very difficult. And so -- and now, a challenge is getting transcripts in a timely manner. I think everyone knows court reporter rates haven't changed in quite a long time and it's becoming a bigger and bigger problem that we're hearing about from more trial courts; we just don't have anyone to do these transcripts. Meanwhile, somebody's sitting in prison or jail waiting for their appeal and, you know, they're struggling to actually produce or create the record. So these problems existed before but I think the pandemic and inflation and other things are sort of exacerbating the problems in a

challenging way.

MS. STEFANIE REAGAN: And did you take any steps to try -- how would you try to rectify that to get transcripts? Did it affect your ability to do the appeal or did you have to -- were the appeals just taking longer?

MR. BRADLEY HALL: I mean, I think they would affect the ability. I think you would -- sort of, if you have several cases with this problem, I think you just need to kind of triage and find the cases that are most likely to benefit from sentencing relief in an immediate fashion. Those are the cases you need to focus your attention on and sort of prioritize. It's not a position anyone wants to find themselves in where you have to pick and choose which clients or which cases are going to get your attention first. But it takes a lot of work; it can take a lot of work to assemble the records. And so, I think, you know, you do what you can for the people who would have the potential to benefit most quickly.

MS. STEFANIE REAGAN: With regard to transcripts of - whether it be depositions or hearings and they're via Zoom - were there issues, were there gaps in the testimony, because of inaudible and how would you address that? Anyone on the panel?

MS. MARY MASSARON: I haven't experienced that so I don't have anything to offer.

MS. STEFANIE REAGAN: The fact that the deposition or the hearing -- well, hearings were always recorded in a lot of the courts, but with depositions via remote where everyone is in different places, did that ever become an appellate issue? Like the very fact that maybe a witness you didn't really think may have been coached or 'cause he's not in the same room with you or any issues like that arise on the appellate level?

HONORABLE BROCK SWARTZLE: I mean, I think it's always a concern when you have a videorecording, whether someone is on the other side feeding, you know, answers, but that existed before Zoom. I think it's a slight tangent but it's an issue that we're looking at in the Court of Appeals. We have had problems over the years with the video formats that we get -- the formats that we get video recordings sent to us. By all accounts, there is a billion different formats and we have received a billion different types of recordings. And I will get it, I will try to plug it into my Mac, that doesn't work, I'll try to plug it into my PC, that doesn't work. I call down to the clerk's office and I'm like, "What?" And they spend some time on it and, eventually, we can see it. But that is something that we are going to have to work through but the practitioners also may try to help us work through that in terms of giving us the original because we need the

original in its original form but maybe also sending us a copy that is in something that we can actually play.

MS. MARY MASSARON: You know, I'm glad you brought that up because it's been a question in our office from time to time with videocam and other kinds of video things that are part of the record. And the concern is how do we present these? Yes, we'll present the original cause it's part of the record or it's in the trial court record, but how can we make it accessible to the judges so all the judges on the panel can easily see this critical part of the record? And if there is a way for the court to think about what's the best format for us to do that and maybe have conversations with the appellate practice section and have that in the internal operating procedures. I, at least, would find that very helpful because we want to make sure what we send is easy; we don't want it to be a problem for the judges. And I'm sure everybody in this room who represents people on appeal feels the same way. If we got guidance of the best way to do it, we'd all try to do it.

HONORABLE BROCK SWARTZLE: And we are looking at it; I can assure you of that.

MR. LARRY ROYSTER: Yeah, if I could just add. We may have a solution to that. So there's some software out there, it's called Ace Input [iNPUT-ACE], that we just recently purchased, thanks to the Court of Appeals; they

discovered it and talked to me. And so the Supreme Court has this, too, but it was just installed; we haven't even been trained on it yet. But what it supposedly is able to do is take almost any video or audio format and make it readable and then what we would do is basically insert that into a PDF, link the PDF to our case management system, and so anybody with internal access can go to MAPPIS, our case management system, click on that, it'll open, and then play on your screen. So like I said, we haven't even tried it yet so I don't know if it will be the be-all solution but, certainly, the types of variety of formats that I think are most common should work. So I guess, just keep in tune on that and see what happens, but we may have a solution.

MS. STEFANIE REAGAN: We're going to move on to the next topic, "Lessons Learned About Communications." We went from in person, face-to-face, to all being remote and on our tablets and on our computers and in little boxes and so we wanted to investigate how communications between the bench and bar, between clients was affected or maybe provided more access because you're via Zoom or the internet.

Did you feel that the informal communication between the bench and the counsel before and after OA, for example, is something that's missing in Zoom or remote oral arguments?

MS. MARY MASSARON: This is -- I went back for the first time for an in person oral argument last week and it's been so long, I had forgotten the feeling of being in an actual courtroom with actual people. And you can make eye contact and have a conversation on Zoom and, in some ways, that's really easy; you don't have to get in your car, you can do it from wherever in the world you are as long as you have good internet, and so it saves a lot of time. But the feeling of looking at a person in a room is different than the feeling of looking at a person on a screen. I think any of you who may have tried to celebrate, for example, a Thanksgiving dinner during lockdown with family by Zoom know it's a substitute, it's good to have that while you're locked down and you can't be there for somebody's birthday or whatever, but it's not the same. And I do think that being in the courtroom, seeing your colleagues in the courtroom who are regulars who you don't typically see and wouldn't see on Zoom, all of those things are really nice aspects of being back in the live courtroom.

HONORABLE DAVID SAWYER: I think Zoom is taking the fun out of the arguments. I mean, it's -- I enjoy them. I enjoy the people out in front arguing. And of course, the ones in the back are saying hurry up to the ones that are arguing but, again, it puts the flesh on the

bones. And I do think there's importance for looking at somebody or facial expressions or dealing with it. There's no substitute to the actual being in a courtroom; that's my belief.

HONORABLE BROCK SWARTZLE: And I would just use the example, if Zoom was as good as in person, then why are we here? You know, why isn't this on the web and we all sit in our office, clicking in, you know, probably going and doing other things while I'm talking cause they're bored.

But you know, Zoom, I think we have to make a very clear distinction between pandemic-Zoom and non-pandemic-Zoom. During a pandemic, Zoom was a lifesaver. You know, it's -- I don't know how -- frankly, we would have just had a lot of cases submitted on briefs back in the day. But because we had Zoom, we were able to have oral argument and I think that was a huge benefit.

And even now as we're [knocks on wood] exiting the pandemic, we still need Zoom because we still have colleagues, we still have attorneys who test positive, you know, a couple days before and it's seamless with our clerk's office; it's just seamless. And that's very beneficial.

I think once -- but outside of the pandemic context, I think Zoom is a poor substitute for in person

oral argument. It is a substitute but I think it is a poor substitute in most cases. There are some cases; I get it. But in most cases, it's a poor substitute and it shouldn't be the norm outside of a pandemic context, in my opinion.

MS. MARY MASSARON: I would --

MR. BRADLEY HALL: I agree with -- oh, sorry.

MS. MARY MASSARON: Go ahead.

MR. BRADLEY HALL: I agree with all that but I think there are a couple of points I'd love to make. Back in the day, I conducted some telephone arguments in the Sixth Circuit. And if you think Zoom is difficult to read the room, they were horrible. They were awful. I mean, the travel budget probably was appreciative but they were awful. So Zoom is a million times better than telephone arguments; don't ever try that.

I agree with everything that's been said, I think, but I have to say that there are a lot of people in this room who represent an indigent clients in termination cases and criminal cases and others who just aren't paid to travel to Grand Rapids or Detroit or Marquette or wherever to do oral argument. And so, they're either just volunteering and giving up income and, you know, inability to keep their lights on or they're not doing it. And so, Zoom, yes, I agree. And I look forward to the day when every attorney can appear in court and give a robust

presentation in person, in the flesh, in three dimensions and everything and get paid for it adequately. But it just doesn't happen; we're nowhere near that day.

And so, I would rather have a situation where court-appointed lawyers can freely request to appear on Zoom, whether it's to answer questions – though I hate to see that – but whether it's to answer questions or whether it's to give a full-throated argument because they just couldn't do it otherwise. So I'm glad that it's there. I think and I hope that it's going to be one of the sort of lasting things from the pandemic.

HONORABLE BROCK SWARTZLE: And I'd like to just address that. I agree that if the choice is between no oral argument or Zoom oral argument, that Zoom is better. But – and I want to make clear – I'm talking about it from my perspective. I was a practitioner so I understand, you know, Honigman would have been very happy with me billing some extra hours rather than traveling to Cincinnati. But from a judge's perspective, there's nothing better than having a person in person because lawyers act differently when you're three feet away from them than when you are a video call with them. There's less stridency, there's more collegiality, and you'll see them talking as they walk out and you're like, "Oh, I hope this thing settles before we issue this opinion," but whatever. "Please let us know if

you settle it." So from a judge -- from my personal experience, from a judge's perspective, in person is better.

MR. BRADLEY HALL: I agree with that. And I've been blessed to work for very well-funded resource public defender's offices my whole career and have always been able to appear and I will always prefer to appear in person. So --

HONORABLE BROCK SWARTZLE: And I'm happy to support any time you need someone to say, "Yes, get them more money," I'm happy to do that.

HONORABLE DAVID SAWYER: I am curious, that I think we're getting more oral arguments now and I wonder if it's because of Zoom? More people are endorsed. And I'm seeing -- it used to be a lot of waivers and I'm not seeing as many waivers anymore, which is fine with me, but again, I don't know if Zoom allowed that to happen? Because I think there is a point that I'm not driving -- if I'm set to be in Grand Rapids and I live in Lansing, I'm not driving up there for just that for 15 minutes or half an hour and driving back or whatever, or Detroit. So I'd be curious to see if that keeps going when we tone Zoom down?

I don't see Zoom going away because someone's going to -- we just had on my call last -- the last call I was just on was Lansing and we had one Zoom. And the

reason we had the Zoom is somebody two days before tested positive so we, fine, it was on Zoom. So I think it's going to happen, we're going to have it. I just want to see more of it in person. But I'm just curious if we're going to get less oral arguments because of it?

HONORABLE BROCK SWARTZLE: And I will say, you know, something that doesn't directly impact you in terms of whether you're having to come into the court or not. But I really enjoy meeting with my colleagues --

HONORABLE DAVID SAWYER: Yeah.

HONORABLE BROCK SWARTZLE: -- in person in conference after case call.

HONORABLE DAVID SAWYER: Yeah, it's very important.

HONORABLE BROCK SWARTZLE: It's -- you have -- there's much more of a free flow of information going back and forth. You can tell if a judge is really stuck in the position on a particular case or whether, you know, there might be some movement there. But if you're on Zoom, you know, you're doing it from your office, it's just a lot easier to say, "Okay, I'm done," and click out. So --

MS. MARY MASSARON: It's interesting to hear you make that point and Judge Sawyer was making that point earlier before we came up here --

HONORABLE DAVID SAWYER: Yeah.

MS. MARY MASSARON: -- about the interaction between the court, the judges, and it makes me think about – and we've talked about this, I think, in almost every bench bar that we've had over the years – the importance of oral argument and the importance of the court continuing to hold oral argument. Many of us feel, both because of the public function of the court and the judges being in public, focusing attention on a particular case, together at that moment in time, that's a powerful thing and when it happens virtually it loses quite a bit of the power, I think.

HONORABLE DAVID SAWYER: Well, Judge Swartzle is exactly correct. We -- I sat with Judge Murphy, Judge Swartzle, myself, on a case that probably we didn't think was going to be the case or the call; it was a taillight case, so how does that work?

But we sat in conference afterward and argued back and forth this, this and that, and ended up with three different opinions. But again, it's kind of hashing it out, finding out where you are after case call, because we all independently go through the cases, we then list the oral argument independently, and then we sit and hash it out and hopefully one person gets another person to go with them, or all three, or whatever, and it's very congenial but it's fun to get kind of down into it. And then of course, cases

go back and forth after that.

But being with your colleagues is very important; you get to know them a lot better and where you fit in, where they fit in, to the whole thing. So you look at a panel next time and go, "Well, maybe this might be a good panel or a bad panel." Of course, the problem is, as I say, a bad panel, it can turn out to be a great panel, just the cases you get. You just never know.

HONORABLE BROCK SWARTZLE: Well, and for inexperienced attorneys and inexperienced judges, being in person has a lot of ancillary benefits that get lost when you have to do it remote. For attorneys, you know, just seeing how people stand up and their legs aren't shaking and they're not sweating, and you're like, "Oh okay, I could probably get to that point someday."

And just from a judge's perspective, how are you supposed to act on the bench? What are you supposed to say? How are you supposed to, you know, what order do you walk in? Well, that's not a -- that's a deal. And so, these are important small things that are hard to quantify in terms of the benefit but they are important and they're vital. And again, you know, in my -- I see this in a very black and white perspective in terms of pandemic is very much different than hopefully the post pandemic. But to Brad's earlier point, yes, there will be a place for Zoom,

regardless of what happens moving forward.

MS. JORDAN AHLERS: It's one of those --

MS. STEFANIE REAGAN: Jordan, if I could just interrupt --

MS. JORDAN AHLERS: -- experiences that -- yes.

MS. STEFANIE REAGAN: I'm sorry, we've just -- I've had a couple of comments from the crowd --

MS. JORDAN AHLERS: Okay.

MS. STEFANIE REAGAN: -- that they can't hear in the back so make sure that your mics are close to your mouth.

MS. JORDAN AHLERS: Okay. Is this better? Can everyone hear me?

MS. STEFANIE REAGAN: Use your big attorney voices.

MS. JORDAN AHLERS: As one of those less experienced attorneys that Judge Swartzle just alluded to, my boss made the joke this morning that I'm a pandemic baby. I was licensed in the middle of the pandemic so I've done, maybe, 30 oral arguments since I've been licensed and I have done two in person. So I have to agree with Judge Swartzle that I feel like it's almost like my in person presentation has been stunted a little bit, just because I got so used to presenting on Zoom and I'm so comfortable presenting on Zoom, that when I go into a courtroom, it's

almost like there's that added pressure on me now just because, like, I have done so many arguments but at the same time, I still feel so inexperienced.

So, I mean, I think going forward still having Zoom as someone who represents family law clients, the cost is definitely something that we take into consideration when we're deciding whether or not to request remote argument. But going forward, I think getting that courtroom experience, being able to have those conversations for younger attorneys, especially, is going to be extremely, extremely important.

HONORABLE BROCK SWARTZLE: Well, I think we've done – as a bench and a bar – we've done pretty well over the last, you know, during the pandemic, in terms of oral argument. But I also teach at Michigan State's Law School and if you want to see some real problems, go a year and a half, you know, your 1L and half your second L remotely and then they come back in and you start hitting them with a little bit of the Socratic Method and you can just see them like, "What is this?"

And so, I feel bad for anybody who's been in university, K-12, university law school, who's had to do remote learning for a year and a half; it's -- I don't know what the long-term effects will be but the short-term effects have not been good.

MR. LARRY ROYSTER: I will say, for the Supreme Court, there will always be a place for Zoom; the obvious one is our public hearings. We have one coming up next week and it will be by Zoom. If you happen to participate or saw the one from last month, on March 16th, I think we've had our longest one. It went over three hours and that's with three-minute speaking times, so -- and it -- but it had to do with exactly what we're talking about now. The big topic was whether to continue or how to use Zoom.

But it does make very little sense to drive to Lansing for three minutes and then turn around, so I can see those going forward always being by Zoom. At some point, the court will have the ability to do hybrid hearings, whether it's oral arguments or the public hearings. We are hopefully getting that technology in time for the new term that will start in October.

But I can see in oral arguments, as well. I mean, the court usually hears maybe 10 to 12 cases a month and a lot of time and effort is invested in those cases, so they just can't cancel because somebody is all of a sudden unable to drive in because there's a snowstorm in Traverse City or whatever. So I think if we had the ability, likely we'll schedule everything in person because I think that's the preference - definitely the preference for the justices and I believe it's probably the preference for the

attorneys, as well – but it's nice to be able to accommodate that situation if, you know, again, you get that snowstorm or if we get another wave of covid and people have to self-quarantine where they can just come in by Zoom by letting us know that morning, you know, we can accommodate them.

It is, as everybody indicated, it's not ideal but you know, it will help the Supreme Court, especially, because we have just the one location and we had people driving from all over the state and it's the higher stakes that, you know, we want to have that argument that month rather than pushing it off the next month.

And I will say, if you haven't had a chance to see the recording of the March 16th public hearing or haven't read the transcripts, it's definitely worth it because you can see both extremes. The point that Brad made was made by several practitioners that they are able to do pro bono work now that they couldn't do before. And I'm not talking appellate work; it's trial work where I think the bulk of that is done where if they can represent somebody, especially if it's one of those five-minute hearings in a court just to make an appearance, it's an expensive thing for an attorney to take on if they have to drive even within that county the 20 or 30 minutes to get there. So having the ability to just pop in by Zoom and

then go back to whatever you're doing is, I think, very critical.

But you know, it's clear from that hearing that there is definitely a split and the court right now, I guess, is trying to thread the needle and determine where it's most beneficial and should be continued and where the preference or the presumption should be; it should be live.

MS. STEFANIE REAGAN: I have a couple of questions from the audience. One is to the practitioners on the panel: What has been the experience for your clients in being able to participate in remote proceedings? Kind of following up on what Larry was saying. It seems it might be able to facilitate your experience with your client but does your client feel maybe disconnected or what has been the experience?

MS. MARY MASSARON: At least on the civil side, I would say certainly my clients rarely come to oral argument. And my observation in the courts, both the Supreme Court and the Court of Appeals, is that most civil appellate lawyers, clients don't come. Sometimes they do but more often than not they don't come. And they look to the lawyer to tell them what the argument was about, what the questions were, whatever tea leaves you can read from the questions and comments. And they have access to the archived recording, which most of my clients don't watch

but some clients may. And so, I don't think that has really altered too much.

MR. BRADLEY HALL: Our clients are incarcerated so it's kind of wonderful. And this isn't --

HONORABLE DAVID SAWYER: It's wonderful they're incarcerated?

MR. BRADLEY HALL: I mean the -- thank you. It's wonderful they have greater access to this. Thank you, Judge. It's not Zoom court versus in person but everything is on the YouTube page and I think that's just phenomenal. I mean, for our clients, they never could – or very, very seldom – could come to argument or their family members sometimes might. But now they can watch it the next day. We can watch it, over Zoom, and Polycom through the MDOC having client visits because kudos also to the Michigan Department of Corrections for giving us vast, simple access to meet with our clients frequently throughout the course of representation by Zoom. We still love shaking hands, sitting down in a room, building rapport; it's still very important. But we can now meet with clients four or five times during the course of the representation instead of one obligatory trip to the UP to sit down with your client.

So that combined with the YouTube page is wonderful. I think our clients and their families now know much more about their cases and can follow their cases and

can be invested in a way that they couldn't just a couple of years ago.

HONORABLE BROCK SWARTZLE: Well, and that's not going away, even if --

MS. MARY MASSARON: Right.

HONORABLE BROCK SWARTZLE: -- Zoom was, for some reason, not being used anymore. All live, in person is on YouTube to my dismay. I'm looking forward to having somebody do a Tom Cruise on me and I'm doing something crazy and some deep fake video but, knock on wood, that hasn't happened yet. And if I do anything crazy, it was a deep fake.

MS. STEFANIE REAGAN: We are -- I'm going to move on to the next group of topics that Nancy's going to handle. We're running out of time and I appreciate everyone's input so far. Thank you.

MS. NANCY VAYDA DEMBINKSI: All right. Let's take the rest of our time, which is about 13, 14 minutes, to talk first, "Lessons Learned About Procedure and the Effect of the Pandemic on the Appellate Process."

So I think we all know that one of the biggest things was we had jury trials looking like this and then - this is Texas - but then we had this. A question for the panel, and I guess more maybe directed to our judges and to Larry. Civil jury trials - do you miss those on appeal?

No, just kidding.

As far as what you're seeing currently because of the fact that jury trials were not being regularly held, and actually into this year were being disrupted, have you seen that as your tracking, I guess, the metrics on things that are coming in that you're not seeing as many, for example right now, of having to distribute those type of box cases that came from jury trials, is that catching up to the court now? Where for 2020 and a piece of 2021, there weren't the volume of jury trials happening so you're seeing appeals that are, I guess, not the box cases, the smaller volume?

HONORABLE DAVID SAWYER: Well, I've been told by our staff that our box cases are down. And I've been talking to some of our judges and I said, look it, I'm gone next year. You guys are going to get hit by a -- there's going to be a torrent because all of a sudden, the trials are all going to start, especially criminal area; I'm really talking about the criminal. And those cases are all going to come through and there's going to be a lot of pressure put on the Court of Appeals. And so, the judges are going to have to really work hard; probably the end of 2023 into 2024.

HONORABLE BROCK SWARTZLE: You have made that point and you've also made the point that you're leaving,

so -- but yes, I think we fully expect to get hit with a very large volume sometime within the next nine, 12, 15 months; maybe a little bit longer than that, but it's coming.

MS. MARY MASSARON: That's right.

MR. BRADLEY HALL: There's no question. And I'm actually surprised it's taken this long. If you watch the trajectory, it's turned back up. And we're not yet to 2019 levels but it's heading in that direction pretty quickly now. And we, based on the number of appointed trial appeals over the course of the few years and I think the statistics out of district and circuit courts, the cases are pending, we think there are going to be a thousand trial appeals sort of in that bubble. Now, it's yet to be seen how many of those cases were resolved in a manner that they wouldn't have been during a pandemic or that sort of thing but it's not just for the court; it's going to be a crisis for the entire system, which is woefully underfunded. So we're waiting for it and worried about it, as well.

MR. LARRY ROYSTER: And the Supreme Court hasn't seen it 'cause it takes, you know, longer than what we've experienced so far to get those records up to it. But I'm not 100 percent convinced we'll see it in the civil context. I agree with Brad, you know, in the criminal

cases that we'll see it but in the civil, it seems to me like if you have an important case, you don't actually have to wait for the courts. There are alternatives, including, you know, just sitting down and settling the case saying, "Look, we're in covid, this is not going to go away if we stick within the courts." So, you know, I know we'll see an increase in those more difficult box cases but those are also the ones that I think are more likely for people to sit down and say, "We have to resolve this before the three or four years it's going to take to work through the system."

I know on the criminal side though, those that are wanting, you know, the jury trials or whatever, those were put on hold. For us, the Supreme Court, we haven't seen a slowdown in our filings; the percentage has changed pretty substantially, when you think. It used to be 70 percent criminal, 30 civil. And it switched over covid to more 60/40. But our number of filings didn't really decrease all that substantially, at least not due to covid because, again, we get fed by the Court of Appeals and they had a backlog, so you know, they basically kept disposing of them at almost the same rate. So they came to us almost at the same rate. But at some point, I'm sure, the Court of Appeals will experience the, you know, the floodgates open and then a year or two later, the Supreme Court will

get those cases come to us.

MS. NANCY VAYDA DEMBINKSI: And I guess the flipside of that, seeing less back cases, was the Court of Appeals seeing an increase in interlocutory applications since that's what people had to appeal during that time if they were from non-final orders and did you see an uptick in, I guess, acceptances of interlocutory appeals during the past year and a half?

HONORABLE DAVID SAWYER: I've seen less.

MS. NANCY VAYDA DEMBINKSI: Less?

HONORABLE BROCK SWARTZLE: Yeah.

HONORABLE DAVID SAWYER: Yeah, a lot less. We used to have emergency appeals all the time; now it's rare you get one --

MS. NANCY VAYDA DEMBINKSI: Okay.

HONORABLE DAVID SAWYER: -- here now and then.

HONORABLE BROCK SWARTZLE: Yeah, that's been my experience in the fourth district.

MS. NANCY VAYDA DEMBINKSI: Okay.

HONORABLE DAVID SAWYER: And that's the third district.

HONORABLE BROCK SWARTZLE: And I haven't been on as long as Judge Sawyer.

MS. NANCY VAYDA DEMBINKSI: Okay.

HONORABLE BROCK SWARTZLE: But they do seem less

over the last year.

HONORABLE DAVID SAWYER: Yeah.

MS. NANCY VAYDA DEMBINKSI: Okay.

MR. BRADLEY HALL: I have a – maybe it's a practice pointer, I don't know – but I had a conversation with somebody yesterday, who's in this room, who called and said, "They denied my application in less than three weeks. I was not prepared." And for strategic reasons, that mattered. She'd never seen it before and, okay, I wasn't ready for this. How do we -- what do we do? But I assume that means things are getting, applications are getting resolved, much more quickly than they were a few years ago.

MS. NANCY VAYDA DEMBINKSI: That makes sense. Are you seeing, for anyone on the panel, more types of appeals that stem from the fact that proceedings are not in person, whether they're criminal cases, they're delayed, you know, they were by Zoom? I think you mentioned that, Brad, where someone might say, "Look, I want my sentencing in person. By Zoom is not constitutional or acceptable." Are you seeing more of these sort of pandemic-related issues in appeals that you're either handling or seeing come through your court?

HONORABLE BROCK SWARTZLE: Yeah, we've had -- I know I've sat on a panel, I believe it was a speedy trial issue, that involved a delay due to the pandemic, a

criminal case, obviously. And then I know various panels have had to deal with the question of what happens when a criminal defendant doesn't get an in person sentencing? And I think panels have gone in different directions but I think there was recently a published opinion on that issue that someone two doors down may have been on. But it'll go up to the Supreme Court and they'll have to deal with it.

HONORABLE DAVID SAWYER: The Supreme Court will have to decide.

HONORABLE BROCK SWARTZLE: Yeah.

HONORABLE DAVID SAWYER: You know, it goes upstairs.

MS. NANCY VAYDA DEMBINKSI: Another topic that was something we were looking to discuss was I know on the appellate practice section, there was some discussion for a while about hybrid arguments, meaning one practitioner could be in person, one could be remote, there was a format for requesting how to do that. It sounds like just not universal but probably the majority of consensus that in person is preferable but when you do have an attorney that wants to be remote or maybe doesn't want to be but it's necessary for them to be for any reason, have any of you -- can you speak to that experience where you're having this hybrid argument?

I've had it just in a trial court setting where

one of the attorneys was representing an individual who was incarcerated who was brought into the courtroom so they were in person but I was by Zoom. And I had a very difficult time hearing the attorney because the laptop was at the judge so he was great but I could not hear what the attorney was stating. So if any of you could speak to that experience?

HONORABLE DAVID SAWYER: My Wednesday call, we had one individual on the screen and the other individual in the courtroom. And it worked out, I mean, it happens. It would probably be preferable if they were both there, back and forth, but it's something that can be done if you have a problem with covid or something; there's a real reason. And that was just two days before, they said, "Hey, hold it, we can't be there." He said, "Okay, fine."

We've had it with judges, too, where one judge is on television and the other two are there. I mean, it just happens. So that's been a bonus at least with the Zoom that you don't have to adjourn something or do away with it. Everyone gets their day in court, so to speak.

HONORABLE BROCK SWARTZLE: Well, again, I just go back to the clerk's office and our IT department because the courtrooms for the Court of Appeals does allow for relatively seamless hybrid. I was in a case call in Detroit yesterday and the day before and I think both days

we had one judge who was remote and then we had various attorneys, you know, both sides weren't remote; one was in person, one was remote. And it worked. Again, it's -- there's -- I remember specifically, yesterday there was a delay, like a one second delay, between the audio and the video of one of the attorneys, which is the distracting because am I looking at the face? Am I just trying to listen? At some point, I just stopped looking because it was too distracting and I just listened. So it's different but if you would have told me two years ago that we would have had this, I would've said, "I doubt it" and it's pretty amazing.

MS. MARY MASSARON: I would just say – and I've been on panels, you know, before panels in the Sixth Circuit, as well as in Michigan – where in the Sixth Circuit where one of the judges was remote and everybody else was in the courtroom. And I've seen in the courts hear arguments where one attorney is not there and the other is there. And I think it works. And it allows for flexibility, which can be extremely helpful to everyone who might not be able to get there because there's a massive snowstorm or because their child tested positive for covid and they're quarantining or because of whatever reason.

And so, from my perspective, as we move back to a more in person and if the judges are in person, I'm going

to do everything I can to make sure I'm in person. But having that flexibility, I think, is really useful and something we wouldn't have had if we hadn't sort of been through the fire we've been through over the last several years.

MR. BRADLEY HALL: I really appreciate these comments because I remember two years ago, Nancy, when we were having these conversations and there was a lot of fear. Does there need to be a motion fee? Does the other side need to agree? What about gamesmanship? Do we have a video day and an in person day on the call? And it seems like a lot of that has sort of just resolved itself. I mean, we've adapted – you all have adapted and the clerk's office and the courts have adapted – and made it pretty workable. And I hope that that's sort of what we have. I mean, I didn't expect gamesmanship in criminal appeals – I don't know about civil – but just the ability to request and have a fairly liberal standard. If you have a good reason why you can appear by video, yeah, no problem; we'd love to have you that way so I think it's great.

MS. MARY MASSARON: Well, and I'll just say with respect to gamesmanship, and maybe I'm missing something, but I'm not sure how you could game the system by not being there in person. How do -- I don't see how that gives you an advantage. It allows you to appear but it certainly

doesn't put you in a stronger position in some way of making your case than the lawyers who are in court, so --

MR. BRADLEY HALL: If I remember, the fear might have been one lawyer not agreeing to allow the other lawyer --

MS. MARY MASSARON: Right. Right.

MR. BRADLEY HALL: -- to appear virtually when they had a really good reason, so --

MS. MARY MASSARON: And maybe the answer to that - and this will be something for you all to talk about and us to talk about and everybody to talk about in the break outs and then to go into the summary report and through the section - is to change the rules so that if a party wants to appear remotely, there's some process. And as long as the judges are there and whatever, it doesn't necessarily require agreement by the lawyer on the other side.

HONORABLE BROCK SWARTZLE: And that is the rule. We -- there was that debate on whether you had to have everyone agree. And then at some point, we're all just like, "Okay. Nope." You know, you're on the trust basis. If you have a good reason for not appearing in person, good enough.

HONORABLE DAVID SAWYER: We denied one and it's because the practitioner put in and says, "My client has been exposed to covid and he can't, or she can't, come in.

And so, I want to be on Zoom." I said no. If you, the practitioner, have been exposed, no problem. But just because your client can't, they can watch it on YouTube later if they want but, again, the only time we've ever denied it and all three of us denied it.

MS. NANCY VAYDA DEMBINKSI: All right, we have officially probably 11 seconds left according to my -- but I just wanted to, if we do have time, just to take a few -- to wrap it up, the future; "Lessons Learned for the Future." Future, ahead.

If I could ask each of you then – and there's my alarm, see? Maybe starting with Jordan, looking at the pandemic and the lessons learned, what would you hope for the future? Whether it's, you know, we learn this and we like that and definitely not this. It's open mic; what would you -- what's your preference?

MS. JORDAN AHLERS: I think this was touched on a little bit in the last discussion but I think one of the most important things that the pandemic taught us was flexibility and that we need to be flexible in our law practices, we need to be flexible in the fact that, you know, sometimes people test positive for covid the morning of argument and they can't show up. And I think that the courts have, especially, you know, my experience is mostly with the Court of Appeals clerk's office, but they have

been just fantastic about, you know, making sure that everything is running as seamlessly as possible. So I really think that's the biggest takeaway that everyone should take from the pandemic is just that, you know, things happen, be flexible.

MS. NANCY VAYDA DEMBINKSI: I like it. All right, Judge Swartzle?

HONORABLE BROCK SWARTZLE: I guess my takeaway is that it impressed upon me, personally, how important oral argument is and anyway that we can make oral argument better and more accessible is good.

MS. NANCY VAYDA DEMBINKSI: Perfect. Mary?

MS. MARY MASSARON: I would echo that. I've always believed that oral argument is the moment that you have the opportunity in one room to have the attention of the judges who will decide the case. It's your chance to try to persuade them. And hopefully, it's their chance to test their thinking, especially I appreciate it if I get a question from a judge who is having trouble with my argument. And I think the in person arguments, my sense is, that questions were less on Zoom than they are in person. I don't have any empirical basis for that, it may be wrong, but I think it drove home to me, again, the importance of that moment or moments in a courtroom and what a great opportunity it is for all of us, as collaborators in the

process of appellate justice, to talk about how this case should be decided, which we know is so important to our clients.

HONORABLE DAVID SAWYER: I can't add too much more other than I really -- it impressed by me how much I missed sitting with two other colleagues after the whole -- after I've reviewed the case, had my opinions on it, they've done their oral argument, to sit down afterward and really flush it out. I think that's very important; I missed that.

MR. BRADLEY HALL: I had a really kind of heated conversation a couple years ago with Jerry Zimmer and Judge Murray because I was afraid – I don't know why – that this was going to be the end of oral argument. This was somehow, this imaginary boogeyman, was going to use it as an excuse to take it away and that did not happen. I was completely wrong. One call was done on the papers; that's pretty amazing and impressive. So I was wrong about that. We came out of it, I think, in a better place.

But I think the greatest thing is the transparency of the court. We can all watch our judges, our lawyers, our family members; we can watch their cases being argued on YouTube. You don't need to go in and go through security and all those things. It's right there all the time and that's just amazing to me; that's huge. I

don't know if we'd be there without a pandemic but that's a big thing; the transparency that's come out of it.

And I hope the next step – I hope we're getting closer there – is transparency of the record of actions, or you know, the MAPPIS as we call it, or you call it, at the Court of Appeals. We would love to be able to click on all the documents, I think, the public. But I think we made strides in that direction so that's pretty amazing and impressive.

MR. LARRY ROYSTER: As I mentioned, you know, I can see public hearings continuing on Zoom into the future. We'll have that ability to have hybrid arguments if necessary, hopefully beginning next term. I do hope that trial courts continue, even if they are in person, as Brad indicated, to stream them to YouTube, whether it's livestreaming or just recording and posting after the fact.

For the research division of both courts, I think the day will come where we don't have to have transcripts prepared by court reporters. Rather, they'll be transcribed automatically by a software that's running the video side of it. We were in Hillsdale at the end of last month and the recording, the transcription, was remarkably accurate as the speakers were talking. So the day will come where I think it's very easy just to get a transcript from the video recording or the audio recording of it.

It's difficult for us to utilize those now because, you know, it’s very fast to flip through a hard copy transcript and find what you’re looking for. Much more difficult when you’ve got to speed up, slow down, speed up, slow down. But you know, it’ll be nice to have; perhaps the best of both worlds. You’ll have the actual audio and video and then you’ll have the transcript from that that we can utilize and that will make our jobs much easier, so I hope it doesn’t go away entirely.

MS. NANCY VAYDA DEMBINKSI: Wonderful. Thank you for the questions that we didn’t get to. I apologize; we’re just -- we’ve run out of time.

In conclusion, I want to thank the panel. If we could give them a round of applause? Thank you for volunteering your time. On behalf of Stefanie and I, we really do thank you for your volunteering this morning. It’s my understanding there’s going to be a refreshment break and then the plenary breakouts will give everyone more time to talk about even more talking points on this topic that we didn’t get a chance to talk about. And if you are moderating a breakout plenary and you haven’t received the outline of talking points, please see Phil DeRosier - he has those or Matt Nelson.

All right, do you guys want anything or are we good? Okay, 11:00, is that the next? Eleven o’clock,

thank you.

1

10 35:18
100 41:24
11 50:7
11:00 8:19
12 35:18 41:2
13 39:18
14 39:18
15 29:20 41:2
16th 35:5 36:14
1986 2:20
1L 34:17

2

20 36:24
2013 3:20
2015 5:2
2017 3:4
2019 41:8
2020 14:6 40:9
2021 40:9
2023 40:23
2024 40:23
27 3:21

3

30 4:10 33:20 36:24 42:17
36 13:16

6

60/40 42:18

7

70 42:16

A

ability 21:4, 7 35:13,22 36:25 48:17
absolutely 7:20
Academy 4:11
acceptable 44:19
acceptances 43:7
access 15:20 16:12 20:14 24:7,20 37:24 38:8,16
accessible 23:9 51:11
accommodate 16:14 36:2,6
accommodations 15:22
accounts 22:16
Ace 23:24
act 28:20 32:17
actively 4:5
actual 16:24 25:4 26:3
adapted 48:13,14
add 23:22 52:4
added 34:1
address 14:17 21:22 28:13
adequately 28:2
adjourn 11:18 14:21 46:19
administrator 5:1
admittedly 9:1
advantage 48:25
Advisory 3:12
Advocates 4:16
affect 21:4,7
affected 24:19
afraid 52:13
afterward 31:17 52:8
age 6:18
agree 27:6,8, 16,24 28:13 29:4 33:21 41:25 48:10 49:19
agreed 8:10
agreeing 5:24 49:4
agreement 49:16
ahead 27:7 50:10
Ahlers 5:9,19 18:2 33:2,5, 8,12,16 50:17
alarm 50:12
alive 13:5
allowed 29:17
alluded 33:17
alphabetically 5:9
altered 38:2
alternatives 42:3
amazing 14:4 47:12 52:18, 25
American 4:11,12
ancillary 32:11
angle 17:12
answers 22:11
antitrust 3:11
anymore 29:16 39:7
apologize 4:23,24
apparently 3:17
appeal 5:13 19:23 20:22 21:4 23:18 39:25 43:5
appeals 2:19 3:20 5:14,15 7:1 9:17 11:21 12:11, 12,13,20 13:4,8 19:13, 17,20,22,25 21:5 22:14 23:25 37:19 40:11,21 41:11,14 42:20,24 43:4,7,13 44:15,21 46:23 48:16 50:25
appearance 36:22
appearing 49:21
appellate 2:12 4:8,11, 13 5:1,4,11 7:15 18:20,24 19:2 20:10 22:5,8 23:13 36:19 37:20 39:20 45:15 52:1
applause 4:21 5:7
application 44:7
applications 43:4 44:11
appointed 3:3 41:10

appreciative 27:13
April 14:6
archived 37:25
area 6:19 40:18
aren't 27:19 32:13
argue 9:19 12:18 13:18
argued 13:21, 22 31:17 52:23
arguing 7:11 12:3 13:5 17:17 25:23, 25
argument 6:12,25 8:3 12:19 13:1,2 14:7,16 15:14 16:23,25 17:1,23 18:3, 7,15 25:2 26:17 27:1,21 28:8,14 31:5, 6,22 34:8,15 36:11 37:18, 22 38:12 45:24 50:23 51:10,14,20 52:8,14
arguments 10:20 11:12 13:12 18:12 24:25 25:22 27:10,15 29:13 30:5 33:20 34:2 35:14,17 45:16 47:18 51:20
arise 18:20 22:8
Arizona 2:23
aspects 7:11 25:19
assemble 21:16
assigned 5:1, 3
associate 5:11
assume 44:10
assure 9:4 23:21
attention 21:11,14 31:8 51:15
attorney 2:21 3:21 5:12,16 27:25 33:14 36:23 45:20 46:4,6 47:18
attorneys 26:20 32:10, 12 33:17 34:10 36:1 46:1 47:2,6
audience 16:18 18:17 37:9
audio 24:4 47:5
automatically 19:21
Award 4:18 5:7
awful 27:12, 14

B

baby 33:19
bachelor's 2:23 3:23
back 7:7,10, 17 8:2 9:22 10:8 12:11, 12,13 13:4 14:15 15:15 20:2 25:1,19, 24 26:15 27:9 29:21 30:16 31:18 32:1 33:10 34:18 37:1 41:8 43:3 46:12,22 47:24
backlog 42:21
backwards 16:8
bad 4:3 6:4 32:6,7 34:21
bar 4:14,19 24:19 31:4 34:13
based 18:21 41:10
basically 24:5 42:21
basis 49:20 51:22
be-all 24:10
Beginning 14:6
belief 26:4
believed 51:14
bench 3:4 4:14 18:24 24:19,23 31:4 32:17 34:13
bends 16:8
beneficial 26:23 37:6
benefit 21:10,18 26:17 32:21
benefits 32:11
big 9:13 33:14 35:9
bigger 20:18
biggest 39:21 51:3
billing 28:17
billion 22:17
binder 17:1
bio 2:18 4:23
birthday 25:15
bit 20:3,6 31:10 33:23 34:19 41:3 50:18
black 32:23
blessed 29:5
blouse 17:6
blowers 7:6
blowing 7:2
blue 17:7
Board 3:12
bones 26:1
bono 36:18
bonus 46:18
boogeyman 52:15
book 17:18
books 10:24 11:1 17:10,11
bored 26:10
boss 33:18
bothering 7:7
box 40:8,11, 14 42:7
boxes 24:17
Boyle 4:16
Brad 4:22,23, 24,25 5:4,8 14:3 15:18 36:16 41:25 44:18
BRADLEY 12:5 20:10 21:6 27:6,8 29:4 38:3,7 41:6 44:4 48:6 49:3,7 52:11
Brad's 32:25
break 49:11
breaking 6:5 11:16
Bridge 9:14 18:5
briefs 10:13 13:13 14:5 26:15

Brock 3:2 8:6 10:3,18 11:13 14:2 15:3,6, 11 16:7,11 17:24 19:4 22:9 23:20 26:5 28:12 29:9 30:6,11, 15 32:9 34:12 39:3,6 40:24 43:11,17,22, 25 44:23 45:10 46:21 49:17 51:8
brought 18:4 23:4 46:2
bubble 41:14
budget 27:13
building 10:9 38:19
bulk 36:20
button 12:24

C

Cadillac 12:21 13:10
call 15:8 22:20 28:22 29:24 30:12 31:15,20 46:8,24 48:11 52:17
called 7:11, 15 23:24 44:6
camera 3:25
cameras 9:18 15:25
cancel 35:20
can't 6:25 11:17 18:11 25:14 33:9 35:20 46:15 49:25 50:3,23 52:4
car 25:7
career 29:6
carries 3:16
case 9:16 12:6 13:4,22 14:7,18 15:24 24:6,7 30:12, 18 31:8,14, 15,16,20 42:2,4 45:1 46:24 49:2 51:16 52:1,7
cases 14:5 21:8,9,11,14 26:15 27:2,3, 19 31:21,25 32:8 35:18,19 38:25 40:8, 11,14,19 41:12,15 42:1,7 43:1,3 44:16 52:22
casual 16:21
cat 6:8
catching 40:8
celebrate 25:12
centered 18:10
Center's 3:12
chair 4:12 7:17
chairs 4:16
challenge 20:16
challenging 21:1
chance 36:13 51:16,17
change 49:13
changed 20:17 42:15
chief 3:4,18, 22
child 5:13 47:22
choice 28:13
choose 21:13
Cincinnati 28:18
circuit 3:9 6:25 12:11 27:11 41:12 47:15,16
City 35:22
civil 4:20 37:16,19 39:25 41:24 42:1,17 48:17
clear 8:8 26:12 28:15 37:3
clerk 3:18, 21,22 5:16
clerked 3:7 4:15
clerks 20:5
clerk's 14:10 15:7 16:8,14 22:21 26:22 46:22 48:13 50:25
click 24:8 30:21
clicking 26:8
client 15:19 16:12 37:14 38:15,22 49:24 50:3
clients 21:14 24:19 27:18 34:5 37:11, 17,20,25 38:1,3,11,17, 20,24 52:3
close 18:15 33:10
closest 5:11
coached 22:6
coffee 8:20
coherent 13:1
collaborators 51:25
colleagues 10:2 25:17 26:20 30:9 32:2 52:6
College 2:22 5:18,19
collegiality 28:23
combined 38:23
comfort 6:19
comfortable 10:12 17:8 33:24
comment 10:19
comments 6:14 33:7 37:24 48:7
common 24:12
communication 24:22
communications 2:9 24:15,18
complete 18:25
completely 9:1 52:17
computer 13:9 14:23 15:20 16:2
computers 9:17 24:17
concern 22:10 23:6
condo 7:1,8
conducted 27:10
conference 4:5,6,14 18:5 30:12 31:17
congenial 31:24
consensus 45:19
consideration 34:6
constantly 6:7

constitutional 44:19
contact 15:12 17:22 25:5
context 26:25 27:4 41:25
continue 35:9
continued 37:6
continuing 31:5
control 8:17
conversation 25:5 44:5 52:12
conversations 23:13 34:10 48:8
convicted 12:15
conviction 12:17 13:3
convinced 41:24
cookbook 17:18
Cooley 3:24 4:17 5:6
Cooney 4:9
copy 23:2
cord 9:23 10:22
corner 18:13
correct 31:13
correctional 13:23,24
Corrections 38:16
cost 34:5
couldn't 12:22 28:9 36:18 39:1
counsel 3:6 5:1,3 20:14 24:23
counterpart 5:3
counties 19:17
country 4:10 14:9
county 2:20 12:10 36:24
couple 6:16 8:15 17:4 26:21 27:9 33:7 37:8 39:1 52:12
court 2:5,18, 19,20 3:3,19, 20 4:15 7:1, 15 8:1,7,9, 11,22 9:2,4, 17 11:20 12:10,11,12, 13,20 13:4,6, 8 14:9,17 15:21 16:9,22 18:19,20,21, 22 19:1,3,9, 12,13,19,20, 22,23 20:1,9, 13,17 22:14 23:8,11,25 24:1 27:25 30:8 31:2,5,7 35:2,13,18 36:8,22 37:4, 19 38:9 40:9, 21 41:17,21 42:14,20,23, 25 43:3 44:22 45:7,8,25 46:20,23 49:2 50:25 52:21
court-appointed 20:10 28:5
courtroom 7:10 10:5 15:24 25:4, 16,17,20 26:3 33:25 34:9 46:2,10 47:17 51:24
courtrooms 46:23
courts 4:10 20:19 22:3 37:18 41:12 42:3,6 47:17 48:14 50:24
covid 36:3 42:5,17,19 46:13 47:22 49:25 50:22
crazy 39:10, 11
create 20:23
criminal 2:21 5:5 27:19 40:18,19 41:25 42:12, 17 44:16 45:1,3 48:16
crisis 41:18
critical 23:10 37:2
crowd 33:7
Cruise 39:9
curious 29:12,22 30:4
custody 5:13

D

date 16:19
David 2:17 3:8 9:9 10:4 11:6,14 13:15 14:18 15:5, 10,23 16:10 25:21 29:12 30:10,13,25 31:12 38:5 40:13 43:9, 12,16,20 44:2 45:8,11 46:8 49:23 52:4
day 8:14 9:2, 11,22 16:9 26:16 27:10, 24 28:3 38:13 46:20,25 48:11
days 6:23 26:21 30:1 46:14,25
deal 7:9 13:25 14:1,22 16:1,2 32:19 45:2,7
dealing 9:10 15:2,7,16 26:2
dealt 13:21
debate 49:18
decide 45:9 51:16
decided 7:2 52:2
deciding 34:7
decrease 42:19
deep 39:10,12
defendant 45:3
defender's 5:4 29:6
defense 4:19
degree 2:23, 24 3:23,24
delay 19:1,2 44:25 47:5
delayed 44:16
DEMBINKSI 2:1 39:17 43:2, 10,15,19,24 44:3,13 45:13 50:6 51:6,12
Dembinski 2:2
denied 44:7 49:23 50:5
department 38:16 46:22
deposition 6:13 22:2
depositions 21:20 22:3

determine 19:9 37:5
Detroit 27:20 29:21 46:25
didn't 9:24 12:3,19 16:1, 5,16 20:14 22:6 31:14 42:18 48:16
dies 10:23
differently 17:4 28:20
difficult 20:3,15 27:11 42:7 46:4
difficulty 19:14
dimensions 28:1
dinner 25:12
direct 15:8
directed 39:24
direction 41:9
directions 45:4
directly 30:7
director 3:22
disagree 3:17
disconnected 37:14
discovered 24:1
discuss 45:14
discussion 45:15 50:18
dismay 39:8
disposing 42:21
disrupted 40:4
distinction 26:12
distinguished 4:18 5:6 17:25
distracting 9:15 11:10,11 47:6,9
distribute 40:7
district 12:10 41:12 43:18,21
Districts 3:7
doesn't 8:24 15:19,20 22:19,20 28:3 30:7 45:3,21 49:1,15
dogs 8:16
don't 3:17 7:9 8:2 9:18 10:14,15 11:25 12:21, 23 14:24 17:7 20:8,20 21:25 23:16 24:10 25:6,18 26:14 27:15 29:17, 23 34:23 37:20,21,25 38:1 42:2 44:5 46:19 48:17,24 51:22 52:13, 23
doors 45:6
doubt 47:11
DRI 4:19
drive 35:10, 21 36:24
driving 29:18,20,21 36:10
drove 51:23
due 18:25 42:19 44:25

E

e-filing 18:23
e-records 20:7
earlier 30:24 32:25
early 6:23 7:6
earned 3:23 5:17
easier 30:21
easily 23:10
Eastern 3:7
easy 23:16 25:6
echo 51:13
Economic 3:12
Educational 3:12
Effect 2:12 39:20
effective 18:14
effects 34:24,25
effort 35:19
elected 2:19
electronic 19:18
electronically 19:18
email 15:8
emergency 43:13
empirical 51:22
end 9:22 40:22 52:14
ended 14:19 31:18
endorsed 29:14
engaging 17:21
enjoy 25:22, 23 30:9
entire 14:10 41:18
equipment 12:20
event 6:12
eventually 22:22
everyone's 39:16
exacerbated 20:12
exacerbating 20:25
excellent 11:21 16:4,16
excited 2:16
excuse 52:16
existed 20:11,23 22:12
exiting 26:18
expand 19:8,9
expect 41:1 48:16
expensive 36:23
experience 19:4 29:2 34:9 37:10, 13,15 42:24 43:18 45:23 46:7 50:24
experienced 19:6 20:9,11 21:24 33:17 41:23
experiences 33:5
exposed 49:25 50:2
expressions 26:2
extension 10:22
extra 28:18
extremely 34:11 47:20
extremes 36:16

eye 17:22 25:5

F

face 47:7
face-to-face 17:14 24:16
facial 26:2
facilitate 37:13
facilities 13:23
facility 13:25
fact 4:7 18:4 22:1,5 40:3 44:15 50:21
fairly 48:18
fake 39:10,12
fall 8:12
families 38:24
family 5:15 25:13 34:5 38:12 52:22
fantastic 8:18 14:10 51:1
fashion 21:10
favorite 12:6 13:7
fear 48:9 49:3
fed 42:20
federal 4:10
fee 48:9
feeding 22:11
feel 10:12 24:22 31:6 33:22 34:3,21 37:14
feeling 25:3, 9,10
feels 23:18
feet 28:21
felt 4:3
figuring 6:20
file 18:21
filed 12:18
files 20:15
filing 18:18 19:23
filings 19:1 42:15,18
find 16:21 21:9,13 23:15
finding 31:20
fine 14:20 29:16 30:2 46:15
finished 7:6
finishes 19:25
fire 48:4
Firm 5:12,16, 17 9:13
firm's 3:10
fit 32:3,4
five-minute 36:21
fix 6:22
flabbergasted 7:21
flagged 19:21
flesh 25:25 28:1
flexibility 47:20 48:2 50:20
flexible 50:20,21 51:5
flipflops 8:23 9:2
flipside 43:3
floodgates 42:24
flow 30:16
flush 52:9
flustered 14:25
focus 21:11
focuses 5:13
focusing 31:8
follow 14:2 38:25
forget 11:24
forgotten 25:3
form 23:1 51:4
formal 8:1 17:5,6
format 23:12 24:4 45:17
formats 22:15,17 24:11
forward 27:24 33:1 34:4,8 35:12 39:8
found 18:8
Foundation 4:14
fourth 43:18
frankly 26:14
free 30:16
freely 28:5
frequently 38:17
friendly 2:3
front 25:23
frozen 6:6 14:14
full-throated 13:1 28:8
fully 41:1
fun 25:22 31:25
function 31:7
future 2:13, 14 50:9,10,14

G

gallery 11:22
game 15:1 48:23
gamesmanship 48:10,16,22
gaps 21:21
gathering 20:12
gave 4:23 12:25 13:25
general 3:6
George 3:11
get all 14:24
give 3:15 5:7 8:2 13:1 18:7 27:25 28:8
giving 22:25 27:22 38:16
glad 10:7 23:3 28:9
Gleicher 10:23
glitch 15:9
good 2:1 6:4, 7 7:25 13:22 17:12 25:8,14 26:6 32:5 34:25 48:18 49:8,21 51:11
government 3:9 18:1
governor's 19:15
Grand 2:22 15:24 27:20 29:19
grant 19:7
granted 12:20 13:24 14:8
granting 13:9
great 8:5 13:12 32:7 46:5 48:20 51:24
greater 38:8
greatest 52:20

group 3:11 39:14
guess 2:14 15:1 24:12 37:5 39:24 40:5,11 43:2, 7 51:8
guidance 23:19
Guild 4:16
guys 40:16

H

hadn't 48:3
half 29:20 34:17,23 43:8
halfway 15:14
Hall 4:23,25 5:8 10:20 11:4 12:5 20:10 21:6 27:6,8 29:4 38:3,7 41:6 44:4 48:6 49:3,7 52:11
hand 3:15
handle 39:15
handling 44:21
hands 38:18
happen 14:19 16:3 28:3 29:17 30:3 35:4 51:5 52:16
happened 39:11
happening 40:10
happy 28:17 29:9,11
hard 9:12,15 10:16 11:22, 23 32:20 40:22
hash 31:22
hashing 31:19
hasn't 16:14 39:11 41:21
hate 28:6
haven't 9:25 20:17 21:24 24:2,9 36:13, 15 42:14 43:22
head 18:12
heading 41:9
hear 7:4 30:22 33:9,13 46:5
hearing 6:13 7:13,16 13:11 20:19 22:2 36:14 37:3 46:4
hearings 21:20 22:2 35:3,14,15 36:22
hears 35:18
heated 52:11
height 17:12
held 6:12,13 40:3
helpful 18:8 23:15 47:20
helping 12:23
here's 12:14
hero 12:14 13:14
heroes 12:7
Hey 46:15
he's 22:7
high 6:17
higher 36:10
Hillside 5:19
hit 40:16 41:1
hitting 34:18
hold 31:6 42:14 46:15
home 7:11 8:13,14,24 10:15 11:5 17:18 19:15 20:14 51:23
Honigman 3:10 28:17
HONORABLE 8:6 9:9 10:3,4,18 11:6,13,14 13:15 14:2,18 15:3,5,6,10, 11,23 16:7, 10,11 17:24 19:4 22:9 23:20 25:21 26:5 28:12 29:9,12 30:6, 10,11,13,15, 25 31:12 32:9 34:12 38:5 39:3,6 40:13, 24 43:9,11, 12,16,17,20, 22,25 44:2,23 45:8,10,11 46:8,21 49:17,23 51:8 52:4
hope 17:21 28:10,24 48:15 50:13
horrible 27:12
hour 29:21
hours 8:16 28:18 35:6
house 3:5 7:25
House's 3:6
huge 26:17 52:25
hurry 25:24
hybrid 35:13 45:16,24 46:24

I

idea 6:6
ideal 36:7
illustrates 7:9
imaginary 52:15
imagine 19:13
immediately 15:12
impact 17:16 30:7
importance 26:1 31:4,5 51:23
important 8:16 17:9,12 18:9 30:14 32:2,20,21 34:11 38:20 42:2 50:19 51:9 52:2,9
impressed 51:9 52:5
impressive 13:13 52:18
inability 27:22
inaudible 21:22
incarcerated 38:3,6 46:2
including 5:14 42:3
income 27:22
increase 42:7 43:4
independently 31:21,22
indigent 27:18
individual 46:1,9
inexperienced 32:10 34:3

inflation 20:24
informal 7:18,24 24:22
information 30:16
input 23:24 39:16
input-ace 23:24
insert 24:5
installed 24:2
instance 16:13
Institute 4:12
interaction 10:7 31:1
interesting 6:11 9:14 30:22
interlocutory 43:4,7
internal 23:14 24:7
internet 15:20 24:21 25:8
interrupt 33:4
interrupts 14:16
introduce 2:6
invested 35:19 39:1
investigate 24:18
involve 8:7,9
involved 6:20 44:25
involves 8:7
involving 8:11
ipad 9:18 10:22,23
isn't 26:7 38:4
issue 12:18 13:19 19:5 22:5,13 28:25 44:25 45:5
issues 18:18, 19,23 21:21 22:7 44:21
it'll 24:8 45:6
it's 6:7,18 7:24,25 9:11, 15 10:5,16 11:9,10,14 12:6 13:16 14:25 15:1 17:15,21 18:13 19:21 20:18 21:12 22:9,12,13 23:4,8,24 25:3,13,15,22 26:14,21,22 27:3 28:6,7, 8,9,10 29:14 30:2,13,15, 20,22 31:19, 24 33:2,22,25 34:23 35:14, 25 36:1,7,10, 15,19,21,22 37:3,6 38:4, 5,7,9,19 41:3,7,8,9, 14,17 42:10 43:13 44:4 45:21 46:12 47:3,9,11 48:20 49:23 50:14,15 51:16,17 52:24
I'd 2:6 15:1 27:9 28:12 29:21
I'll 5:22 6:15,22 14:2 22:19 48:21
I'm 3:6 4:22 6:8,10,18 7:5 8:15,22,24 9:11 10:7,15 11:11,12 17:8,17,19, 20,22,23 19:6 22:21 23:3,17 26:9 28:9,15 29:9,11,14, 15,18,19 30:4,21 33:6, 18,24 36:19 39:8,9,13 40:15,18 41:6,23 42:23 47:25 48:1, 22,23
I've 11:20 12:2 13:12,17 17:17 18:1,12 29:4 33:7,19, 20 40:13,14 43:9 44:24 45:25 47:13, 17 51:13 52:7

J

jacket 17:5
jail 20:21
jarring 17:15
JD 5:17
jeans 17:7
Jerry 12:23 14:9 52:12
job 8:18 13:22 14:10 16:4
joining 3:4, 19 5:15
joke 33:18
Jordan 5:9, 11,19 18:2 33:2,3,5,8, 12,16 50:12, 17
judge 2:17, 18,22,24 3:2, 3,8,10,14,17 7:19,21 8:4, 10 10:18,23 11:2 14:3,11 15:12 18:3 29:1 30:17,23 31:12,13 33:17,21 38:9 43:23 46:5,16 47:1 51:7,19 52:12
judges 14:12 16:1 17:22 18:11 23:9, 10,17 31:2,7 32:10 39:24 40:15,21 46:16 47:16, 25 49:15 51:16 52:21
judge's 28:19 29:2 32:16
judging 8:22
Judicial 3:12
Junior 2:22
jury 39:22,25 40:3,8,10 42:13
justice 2:21 4:15,20 10:20 11:4 52:1
justices 35:24

K

K-12 34:22
Kent 2:20
kick 2:17 6:10
kidding 40:1
kind 2:13 7:9,22 8:17 9:15 13:23 15:14 21:9 31:19,25

37:12 38:4 52:11
kinds 23:5
knew 7:3
knock 39:10
knocks 26:18
kudos 13:8 14:1 38:15

L

lack 7:22 19:1
Lansing 5:12 29:19,25 35:11
laptop 17:11 46:4
large 41:2
largely 5:13 20:11
Larry 3:16, 18,20,22,25 19:11 23:22 35:1 37:12 39:25 41:21
lasting 28:11
Latasha 12:8
laugh 10:21
laughing 8:21
law 2:24 3:10,11,13, 21,24 4:12,18 5:5,6,12,15, 16,17,18 9:13 34:5,15,22 50:20
lawyer 4:9 7:16 37:22 49:4,16
lawyers 4:11, 20 5:5 28:5, 20 37:20 49:2 52:22
leaf 7:2,6
leaning 7:17
learn 6:3 50:14
learned 2:4, 8,9,11,13,14 6:2 24:15 39:19 50:9,13
learning 34:23
leaves 37:23
leaving 40:25
left 50:7
legal 12:17
legs 32:13
lesson 7:25
lessons 2:4, 8,9,11,13,14 6:2 24:15 39:19 50:9,13
letting 36:5
let's 2:17 39:17
level 22:8
levels 41:9
liberal 48:18
licensed 33:19,20
lifesaver 26:13
lights 27:23
likes 12:14
link 24:6
list 31:21
listen 8:15 47:8
listened 47:9
listening 11:11
live 25:19 29:19 37:7 39:7
living 9:12
lobby 13:10
location 36:9
lockdown 25:13
locked 25:14
logical 13:2
long 4:5 9:19,24 20:18 25:3,8 41:7 43:23 49:14
long-term 34:24
longer 21:5 41:3,22
longest 35:6
longevity 2:18
looked 7:18 9:1
loses 31:10
lost 32:11
lot 4:25 6:19 9:12 13:12,25 21:15 22:3 25:8 26:15 27:17 29:15 30:20 32:3,11 35:19 40:20 43:12 48:8,12
lots 12:8
loud 7:3
love 27:9 38:18 48:20
lower 18:18, 20,22 19:1

M

MAACS 5:2
Mac 22:19
Mackinaw 9:13 18:5
Macomb 12:10, 11
made 33:18 36:17 40:24, 25 48:14
majority 45:19
make 6:20 7:11 8:8 15:3 16:8 23:9,15 24:4 25:4 26:11 27:9 28:15 30:23 33:10 35:10 36:22 48:1 51:10
makes 31:2 44:13
making 16:19 17:22 18:10 30:23 49:2 51:1
malfunction 14:14
management 24:6,8
mancave 10:10
manner 20:16 41:15
MAP 24:7
March 35:5 36:14
Marquette 27:20
Mary 4:2,3,8, 20 6:15 16:24 18:8 21:24 23:3 25:1 27:5,7 30:22 31:1 37:16 39:5 41:5 47:13 48:21 49:6,9 51:12, 13
Mason 3:11
Massaron 4:2 6:15 16:24 21:24 23:3 25:1 27:5,7 30:22 31:1 37:16 39:5 41:5 47:13 48:21 49:6,9 51:13
massive 47:21
matter 4:7 8:24

mattered 44:9
matters 5:13
Mckeague 3:8
MDOC 38:14
meaning 45:16
means 44:11
meet 38:17,20
meeting 30:9
member 4:11
members 38:12 52:22
memorable 6:9,11
mentally 10:14
mentioned 12:1 15:18 44:17
Method 34:19
metrics 40:5
mic 50:15
Michigan 3:5, 8,13,19,20,23 4:12,13,15,17 5:1,5,17 7:1 8:11 34:15 38:15 47:15
mics 33:10
middle 33:19
million 27:14
mind 7:3
minutes 15:15 29:20 35:11 36:24 39:18
missed 52:6, 10
missing 24:24 48:22
Mmm-hmm 11:13
Mmm-mmm 10:3
moderate 2:7, 10 4:7
moderators 2:3
moment 31:9 51:14,24
moments 6:9 51:24
money 29:11
month 14:4 35:5,18 36:11,12
months 11:23 41:3
moot 8:7,10, 22 9:2
morning 2:1 6:1 8:19 10:25 33:18 36:5 50:22
motion 7:14 12:19,21 13:9 19:7 48:9
mouth 33:11
move 7:8 11:9,19 24:14 39:13 47:24
moved 7:4
movement 30:19
moving 4:22 18:18 33:1
Murphy 31:13
Murray 52:13
mute 6:7,8 11:16 12:24

N

Nancy 2:1,2 5:23 39:17 43:2,10,15, 19,24 44:3,13 45:13 48:7 50:6 51:6,12
Nancy's 39:14
necessarily 49:15
neck 7:18
needed 8:19
needle 37:5
neighborhood 2:3
nice 18:1 25:19 36:1
night 9:6,7 12:23 13:7
non- 26:12
non-final 43:6
norm 27:4
notes 17:19, 20
noticeably 20:6
number 15:4,8 41:10 42:18

O

OA 16:19 24:23
obligatory 38:22
observation 37:18
obstructing 12:16
obvious 35:2
October 35:16
offer 21:25
offered 4:7
office 5:4 9:21,22 10:14,20 11:3 14:10 15:7 16:8,14 18:3 20:5,13 22:21 23:4 26:8,22 30:20 46:22 48:14 50:25
officer 12:16
officers 12:24
offices 9:13 29:6
official 8:9 11:3
officially 50:7
open 24:8 42:25 50:15
operating 23:14
opinion 13:3 27:4 28:25 45:5
opinions 31:19 52:7
opportunity 12:25 51:15, 25
oral 6:12 8:3 10:19 12:19 14:6,16 15:14 16:23 18:7 24:24 25:2 26:17 27:1,21 28:14 29:13 30:5 31:5,6, 21 33:20 34:14 35:14, 17 37:17 51:9,10,14 52:8,14
order 19:25 32:18
orders 19:15, 21 43:6
original 22:25 23:1,7
outs 49:12
oversees 5:2

P

pages 17:2
paid 27:19 28:2
painting 18:4
pandemic 2:5, 12 6:17,23 12:7 13:14 20:24 26:13, 19,24 27:4 28:11 32:23, 24 33:18,19 34:14 39:20

41:16 44:25 50:13,19 51:4
pandemic-related 44:20
pandemic-zoom 26:12,13
panel 2:6,16 3:2 4:2,4 5:24 6:10 14:12 16:17 19:6 21:23 23:10 32:5,6,7 37:10 39:24 44:14,24
panels 15:13 45:1,4 47:14
papers 52:17
parental 5:14
part 15:1 23:6,8,10
participate 35:4 37:11
party 49:13
passed 19:22
past 4:18 5:5 43:8
Patricia 4:16
paused 15:15
PC 22:20
PDF 24:6
pearls 17:6
pending 41:13
people 6:8,18 7:1 9:19 10:6 11:16,22,25 12:9 13:12 14:22 16:9 20:14 21:17 23:18 25:4,23 27:17 29:14 32:13 36:4,9 42:8 43:5 50:22
percent 41:24 42:17
percentage 42:15
Perfect 51:12
period 19:14, 19 20:2,4
person 10:9 13:20 15:6,7 18:14 24:16 25:2,9,10 26:6,25 28:1, 20 29:2,8 30:4,11 31:23 32:11 33:21, 22 35:23 38:9 39:7 44:16,19 45:3,17,20 46:3 47:3,25 48:1,11,24 49:21 51:20, 21
personal 29:1
personally 18:2 19:5 51:9
perspective 28:16,19 29:2 32:16,23 47:24
persuade 51:17
phenomenal 38:10
phone 14:19, 22 15:4,21
phrase 5:25
pick 21:13
piece 40:9
place 7:5 12:21 13:10 19:10 32:25 35:2 52:19
places 10:12 22:4
plan 2:10 4:6
play 23:2 24:8
plenary 2:4,6 4:4,7 5:22
plug 9:24 22:19,20
Plunkett 4:9
point 10:8 11:7 19:24 29:18 30:23 32:15,25 35:13 36:16 40:25 42:23 47:8 49:19
pointed 11:7
pointer 44:5
points 2:8,11 17:1 27:9
police 12:16
Polycom 38:14
poor 26:25 27:1,3
pop 36:25
populous 19:16
position 21:12 30:18 49:1
positive 26:20 30:2 47:22 50:22
post 32:24
potential 21:18
power 9:19 31:10
powerful 31:9
practice 4:13 5:12 17:25 23:13 44:5 45:15
practiced 3:10
practices 50:21
practicing 4:9
practitioner 10:16 28:16 45:16 49:24 50:2
practitioners 14:13,16
16:17 18:25 22:24 36:17 37:9
prefer 11:3 29:7
preferable 45:20 46:11
preference 35:24,25 37:7 50:16
prehearing 3:21
preparation 16:25
prepared 16:22 44:8
present 12:19 23:7
presentation 28:1 33:23
presenting 8:3 33:24,25
preserved 14:7
preserving 18:19
president 4:19
pressure 34:1 40:21
presumption 37:7
pretty 8:16 13:13 16:25 34:13 41:9 42:16 47:12 48:14 52:18
Previously 2:20
primarily 19:12
Prior 3:4 5:15
prioritize 21:12
prison 13:18 20:21

private 5:2 17:25
pro 13:5,18 15:19 36:18
problem 9:10 10:22 13:24 14:20 16:12 19:6 20:9,19 21:8 23:16 32:6 46:13 48:19 50:2
problems 9:17 10:1 11:17 20:11,23,25 22:14 34:16
Procedure 2:11 39:19
procedures 23:14
proceeding 8:1,9,11 9:4
proceedings 37:11 44:15
process 2:12 7:23 39:20 49:14 52:1
processes 19:10
produce 20:23
professional 9:1
prosecuting 2:21
prosecutor's 20:13
provide 19:17
provided 24:20
public 29:5 31:7,8 35:3, 14 36:14
published 13:3 45:5
purchase 17:11
purchased 17:10 23:25
pushing 36:12
put 5:10 17:19 40:21 42:14 49:1,24
puts 25:25

Q

quantify 32:20
quarantining 47:23
question 23:4 39:23 41:6 45:2 51:19
questions 18:16 28:6,7 37:9,23,24 51:21
quick 8:20
quickly 6:4 20:8 21:18 41:9 44:12

R

Rapids 2:22 15:24 27:20 29:19
rapport 38:19
rare 43:13
rarely 37:17
rate 42:22,23
rates 20:17
read 27:11 36:15 37:23
readable 24:5
ready 6:24 7:6 16:19 44:10
Reagan 2:3 5:22,23 8:5 9:8 14:11 15:18 16:16 18:16 21:2,19 22:1 24:14 33:3,6,9,14 37:8 39:13
real 9:10 34:16 46:13
realize 12:3
reason 30:1 39:7 45:22 46:14 47:23 48:19 49:8,21
reasons 44:8
received 2:22 4:17 22:17
recently 23:25 45:5
reception 9:6
recess 8:20
recipient 5:6
record 17:2 18:19,25 19:2,8,9 20:23 23:6,8, 11
recorded 22:3
recording 36:14 37:25
recordings 22:16,18
records 19:13,16,18, 20,24 20:1,2, 13 21:16 41:23
rectify 21:3
regard 21:19
regular 4:14
regularly 40:3
regulars 25:17
reinstated 12:17
related 5:13, 15
relief 21:10
remand 19:8
remember 6:25 11:23 47:4 48:7 49:3
remote 10:19 16:23 18:3,21 22:4 24:16,24 32:12 34:7,23 37:11 45:17, 21 47:1,2,3, 16
remotely 18:7 34:17 49:14
replicate 18:14
report 49:12
reporter 20:17
represent 12:15 27:18 36:20
representation 38:18,21
Representatives 3:5
represented 12:9
representing 46:1
represents 23:18 34:5
request 28:5 34:7 48:17
requesting 45:18
require 49:16
research 3:21,22
resisting 12:16
resolve 42:9
resolved 41:15 44:12 48:12
resource 29:5
respect 7:22 48:22
rest 13:12 39:18
return 19:23

returned 19:20 20:1
reversing 13:3
reviewed 52:7
ridiculous 11:2
rights 5:14
road 11:19
robe 8:14,24 12:2
robust 27:25
room 7:7 13:10 18:5 22:7 23:17 25:9 27:12,18 38:19 44:6 51:15
rooms 9:12
roped 8:11
roster 5:3
Royster 3:16, 18 19:11 23:22 35:1 41:21
rule 49:17
rules 49:13
run 16:13
running 39:15 51:2

S

SADO 5:3
sat 19:6 31:13,17 44:24
saves 25:8
Sawyer 2:17, 19,22,24 9:9 10:4 11:3,6, 14 13:15 14:3,18 15:5, 10,12,23 16:10 18:4 25:21 29:12 30:10,13,23, 25 31:12 38:5 40:13 43:9, 12,16,20,23 44:2 45:8,11 46:8 49:23 52:4
Sawyer's 10:19
schedule 35:23
school 2:24 3:13,25 34:15,22
School's 4:18 5:6
screen 17:13, 14 18:13 24:9 25:11 46:9
seamless 26:21,22 46:24
seamlessly 51:2
seconds 50:7
section 2:10 4:13 23:13 45:15 49:13
security 12:24 52:24
seldom 38:12
self-quarantine 36:4
send 23:16
sending 23:1
sense 35:10 44:13 51:20
sentence 13:20
sentencing 13:19 21:10 44:18 45:3
served 3:6
service 3:9
set 7:4 12:21 15:24 16:2,4 18:6 29:18
setting 13:9 16:21 45:25
settle 29:1
settles 28:24
settling 42:4
shaking 32:13 38:18
shave 7:20 8:3
She'd 44:9
she's 4:10,18 12:10,13,14 13:13
short 2:18
short-term 34:24
shorten 4:24
shorts 8:23 9:2,6
shouldn't 10:11 27:3
show 16:5 17:7 50:23
showed 16:3
side 7:17 22:11 37:16 42:12 48:10 49:16
sides 47:2
sign 11:24
Simmons 12:8
simple 38:16
sit 26:8 31:22 38:22 42:9 52:8
sits 3:11
sitting 7:10 8:2 10:2,15 11:11 20:21 38:19 42:4 52:6
situation 28:4 36:2
Sixth 3:9 6:25 27:11 47:14,15
slight 22:12
slowdown 42:15
slower 20:6,7
small 32:20
smaller 40:12
snowstorm 35:21 36:3 47:22
Socratic 34:19
software 23:23
solution 23:23 24:10, 13
somebody's 20:21 25:15
someday 32:15
someone's 29:23
sort 7:17 12:17 17:14, 18 20:25 21:7,12 28:10 41:14,16 44:20 48:3, 12,15
sounds 45:18
speak 10:10 45:23 46:6,20
speaker 3:5 5:12,16,17 9:13
speaking 35:7
specifically 47:4
speedy 44:24
spend 22:21
split 37:4
spring 8:13
staff 3:4,18 11:21 14:3,9 16:4 40:14
stakes 36:10
stand 10:25 11:2 17:11,18

18:1,6 32:13
standard 48:18
standing 8:1
start 6:15 9:20 19:25 34:18 35:16 40:18
started 8:21 18:3
starting 50:12
starts 12:2
state 3:13,23 4:9 5:4,18 8:11 10:9 17:25 36:10
State's 34:15
stating 46:6
statistics 41:12
stay 7:14 19:15
Stefanie 2:2, 7 5:22,23 8:5 9:8 14:11 15:18 16:16 18:16 21:2,19 22:1 24:14 33:3,6,9,14 37:8 39:13
stem 44:15
steps 21:2
stick 42:6
stopped 47:8
stories 6:22 8:4 12:6 13:7
story 6:11 7:13,23 8:6 12:5
straight 11:8
strategic 44:8
stress 6:19
stressed 7:2
stressful 7:12
stridency 28:22
strong 13:2
stronger 49:1
struggling 20:22
stuck 30:17
study 10:13
stuff 7:4
stunted 33:23
submitted 14:5 26:15
substance 5:21
substantially 42:16,19
substitute 25:13 26:3,25 27:1,2,3
sudden 11:17 35:20 40:17
suit 17:5
summary 49:12
supervisor 3:22
support 17:2 29:10
supposed 32:17,18
supposedly 24:3
Supreme 3:19 4:15 12:11,12 13:6 19:11, 19,23 20:1,8 24:1 35:1 36:8 37:19 41:21 42:14, 25 45:7,8
surprised 7:21 41:7
Swartzle 3:3, 10,14 8:6 10:3,18 11:13 14:2 15:3,6, 11 16:7,11 17:24 19:4 22:9 23:20 26:5 28:12 29:9 30:6,11, 15 31:12,14 32:9 33:17,22 34:12 39:3,6 40:24 43:11, 17,22,25 44:23 45:10 46:21 49:17 51:7,8
sweating 32:14
switched 42:17
system 5:2 24:6,8 41:18 42:11 48:23

T

tablets 24:17
taillight 31:15
takeaway 51:3,8
takes 21:15 41:22
taking 21:5 25:21
talk 6:1,3 17:23 39:19 49:10,11 52:1
talked 24:1 31:3
talking 2:8 26:9 28:15,23 35:8 36:19 40:15,19
talks 9:3
tangent 22:13
taught 50:19
tea 37:23
teach 34:15
teacher 2:21
teaches 3:13
technical 14:13,22
technology 2:9 6:3,4 16:19 35:15
techy 6:17
telephone 27:10,14
television 10:6 46:17
tense 2:14
term 35:16
termination 5:14 27:18
terms 22:25 30:7 32:21,23 34:14
territory 15:17
test 26:20 50:22 51:18
tested 30:1 47:22
testimony 21:21
Texas 39:23
Thanksgiving 25:12
that's 8:5 9:3,5 10:17 13:21 14:20 16:16 17:3,8, 9,12 18:5 24:24 25:6 26:3,22 27:16 31:9 32:19 35:7,23 38:10 39:3 41:5 43:5,17,20 46:18 48:15 51:3 52:9,17, 25
there's 4:24 10:12 11:24 16:11 18:12 23:23 26:1,2 28:19,22 30:16 34:1

35:21 40:16, 20 41:6 46:13 47:4,21 49:14 50:11
they'll 14:22 45:7
they're 11:16,25 20:22 21:20 26:9 27:21,23 32:14,21 38:5 44:16 47:23
they've 52:8
thing 6:7 8:17 11:6,10, 20 13:15 15:1 17:9,17 28:24 31:9 32:4 36:23 41:17 52:20
things 6:16, 21 7:9 11:3 17:4 18:9,22 20:25 23:6 25:19 26:9 28:11 32:20 39:22 40:5 44:11 50:19 51:5 52:24
thinking 13:7 51:18
thinks 9:3
Thomas 3:24
thought 7:22 8:24 13:11 28:6
thoughts 6:14
thousand 41:13
thread 37:5
three-minute 35:7
tie 12:2
time 4:5 11:18 12:1 13:16,17 14:21 19:22 20:18 22:22 23:5 25:2,9 29:10 31:9 32:5 34:3 35:15,19 39:15,18 43:5,13 46:4 50:4,8 52:25
timely 20:16
times 27:14 35:7 38:21
tiny 18:12
tips 14:12 16:18
today 2:8,16 3:2 4:2
told 4:23 40:13 47:10
tolling 19:21,24
Tom 39:9
tone 29:22
topic 24:15 35:9 45:13
topics 5:5 6:2 39:14
torrent 40:17
touched 50:17
towel 7:18
tracking 40:5
trained 5:4 24:3
trajectory 41:8
transcripts 20:16,20 21:4,19 36:15
transparency 52:21
travel 27:13, 20
traveling 28:18
Traverse 35:21
tremendous 3:16
triage 21:9
trial 7:15 8:10 19:8 20:5,13,19 23:8 36:19 41:10,14 44:24 45:25
trials 39:22, 25 40:3,8,10, 17 42:13
trip 38:22
trouble 51:19
trust 49:20
truth 9:5
tune 24:12
turn 2:7 5:22 9:23 14:23 32:7 35:11
turned 41:8
TV 9:11,16
type 17:5 40:7
types 22:18 24:11 44:14
typically 25:18

U

ugly 6:5
unable 35:21
uncharted 15:16
underfunded 41:19
undergraduate 5:18
understand 15:16 28:16
understanding 6:21
unique 13:23
universal 45:19
university 2:23 3:13,24 4:17 5:18 34:22
unusual 6:12
updating 16:20
upstairs 45:12
uptick 43:6

V

vacated 12:17
Valparaiso 2:24
variety 24:11
vast 38:16
Vayda 2:1,2 39:17 43:2, 10,15,19,24 44:3,13 45:13 50:6 51:6,12
versus 13:20 38:9
video 12:22 22:15,16 23:5 24:4 28:22 39:10 47:6 48:11,19
videocam 23:5
videorecording 22:10
virtual 2:5
virtually 7:16 31:10 49:7
visits 38:15
vital 32:22
voice 4:19
voices 33:15
volume 40:10, 12 41:2
volunteering 5:24 27:22

W

wait 42:3

waiting 7:5, 10 20:21 41:19
waivers 29:15,16
walk 28:23 32:19
walked 8:20
wanted 12:18 24:18 50:8
wanting 42:13
wasn't 44:9
watch 37:25 38:13,14 41:7 50:3 52:21,22
watched 12:22
watching 9:11,16
wave 2:25 3:25 36:3
ways 25:6
wear 9:2
wearing 17:5, 7
web 26:7
Wednesday 46:8
week 25:2 35:4
weeks 44:7
weight 3:16
weird 2:14
well-funded 29:5
weren't 40:10 47:2
Western 3:7 4:17
we'd 23:19 48:19
we'll 2:3 5:21 14:21 23:7 35:23 41:24 42:1,6
we're 6:1,2 15:16 20:19 22:13 24:14 26:18 28:3 29:13 30:3,4 34:7 35:8 39:15 41:8,19 42:5 49:19
we've 11:18 14:6 15:12,13 19:6 31:3,4 33:6 34:12,13 35:6 41:22 44:23 46:16 48:4,13 50:4
what's 23:12 50:16
white 32:23
who's 17:13 34:21,22 44:6
Wi-fi 14:15
wife 8:14 9:3 11:7
windows 9:21
woefully 41:18
wonderful 38:4,5,8,24
wood 26:18 39:10
work 6:20 14:25 18:24 20:11 21:15, 16 22:19,20, 23,24 24:12 29:5 31:16 36:18,19 40:22 42:10
workable 48:15
worked 3:20 5:16 11:21 46:10 47:3
working 4:6 8:14
works 14:24 47:19
world 6:9 25:7
worn 12:2
worried 41:19
worry 14:24
worth 36:15
wouldn't 25:18 41:16 48:3
would've 47:11
wrap 50:9
wrapped 7:18
write 10:13
wrong 6:21 51:22 52:17, 18

Y

year 8:13 13:17 34:16, 23 40:4,16 42:25 43:8 44:1
years 3:8,21 4:10 13:16 22:14 31:4 39:2 41:11 42:10 44:12 47:10 48:5,7 52:12
yesterday 44:6 46:25 47:4
younger 34:10
Youtube 38:10,23 39:8 50:3 52:23
you'll 9:20, 21,22 28:23
you're 5:9,10 6:5,7 7:10, 24,25 8:3 9:16,18,20 10:6 11:8,9, 15 16:21 18:21 24:20 25:14 28:21, 24 30:8,19,20 32:14 37:1 40:2,6,10,25 44:21 45:23 49:20
you've 40:25

Z

Zahra 3:17
Zimmer 14:9 52:12
Zoom 6:4,9, 12,13,20,24 9:10 13:19,20 16:20 21:21 22:12 24:20, 24 25:5,13, 18,21 26:6, 11,13,16,19, 25 27:11,14, 24 28:6,14 29:14,17,22, 23,25 30:1,2, 19 32:25 33:24,25 34:5 35:2,4,9,12 36:5,25 38:9, 14,18 39:6 44:17,19 46:3,18 50:1 51:21

Tab B

Supreme Court Practice Tips

May 13, 2022

MR. MATTHEW NELSON: Good morning, everyone. Thank you so much for joining us. I'm happy to say that as one of the folks who helped put the conference together, I had some input to ensure we didn't start at 8:00 like some of the other conferences I go to. I just -- that's just way too early. Mary just clapped for me. I think there was a year where I had to do one at 8:00; I was the plenary leader that Mary drafted for an 8:30 opening on this and I've remembered that ever since.

So a couple of housekeeping notes before we get to our main event here; our Supreme Court plenary. The first is in the app, you're going to see an event stream and there are a lot of pictures from the last few days. So if you haven't checked that out in the app, please do. With regard to the final panel today, we would like to start that panel 15 minutes early so we can be done a little bit earlier, unless there's anyone who disagrees with us being done a little early? So we will -- while you're eating dessert, we will try to have the panel come up. I apologize to the panelists if that crunches your dinner a little bit but I think the ultimate result is worthwhile.

Finally - and Phil, I left my binder there. Would you mind passing me my binder? Finally, so yesterday, we thanked our main sponsor, the DeWitt C.

Holbrook Memorial Fund and they do a phenomenal job supporting our conference and have for years. They make so many of our scholarships possible. We also had record fundraising from law firms this year. I think the law firms were happy to have an in person conference back, as well, and we received record support. And we want to thank all of them and, specifically, our platinum sponsors, Butzel, Dickinson Wright, Foster Swift, Honigman, the Kitch firm, Plunkett Cooney, Speaker Law, Tanoury, Nauts, McKinney & Dwaihy - and I'm sorry if I've mispronounced that - the Zausmer firm, and finally, the appellate practice section of the state bar. All of them are platinum sponsors. We have additional sponsors; they've been scrolling - well, they were scrolling up on the right and the left - but wanted to thank them.

Also wanted to thank Commercial Surety Bound Agency. If you saw these notepads on your table, they came from our friend Dan Huckabee. Dan, if you could stand up? Dan has been a supporter of this conference, comes out from California to join us, so thank you, Dan.

And with that, I'm going to introduce my colleague, Gaetan Gerville-Reache from Warner Norcross who is going to moderate the panel this morning.

MR. GAETAN GERVILLE-REACHE: Good morning, everyone, I'm Gaetan Gerville-Reache. It is my distinct

honor and pleasure to present our plenary panel this morning.

We have Chief Justice Bridget McCormack. We have Justice Richard Bernstein, Justice Brian Zahra, Justice Megan Cavanagh and Justice Elizabeth Welch. Thank you for joining us. I'm certain that one of the reasons this is one of the most popular events that we have at every bench bar is because, for once, we're the ones asking you the questions and you have to answer and thank you for doing that because it's not as much part of your job as it is ours when we have to do it.

First, I want to welcome Justice Welch, especially, this is her first bench bar conference; thank you for joining us.

JUSTICE ELIZABETH M. WELCH: Absolutely.

MR. GAETAN GERVILLE-REACHE: We're wondering if you could start by answering one of the first questions, which is just maybe share some reflections that you have on, you know, joining the bench, insights into - from the bar from the perspective of a new justice.

JUSTICE ELIZABETH M. WELCH: Great, thank you. Thank you, Gaetan, and thank you, everyone, for having me. I've had the privilege of meeting many of you the past couple of days and that has been fantastic. Many of you, I obviously met on Zoom, so I am like my own kids who were in

college and graduated from college during a pandemic and they all started their jobs on Zoom and I started my job on Zoom. So that's an interesting way to be new. We made it work, I think remarkably well, actually, but I was sharing before the session started that one of the things that was really hard being new to any organization, I think for anyone, particularly if you're part of a bigger organization, is sort of figuring out who's who? You know, obviously, I know my colleagues but they all have clerks and so there would be, you know, names and memos, but I hadn't had the opportunity to meet many of them. I maybe would run into them in a hall and sort of have to guess who they are once we were in person. But also, all the staff at SCAO. I did not know -- I would have names from people and because I had never ever to this day - I still haven't really had a proper tour of the building - so it, because of the nature of how everyone's working, so I figured it out but it just took a little longer and you don't realize how much organizationally, how you organize things by where people sit and who they work for. And when you don't have any concept of that and you just have names on Zoom, you have to sort of piece it together so I did a lot of googling to figure out people's titles and where they worked and what they did for us, you know, so that just was a little more delayed because I was online.

But you know, we made it work. I met many of you on Zoom when you were appearing before us. I obviously got to know your names through briefs, as well, but obviously, being with you all is just an absolute delight. I also have to thank the organizers. I have -- my step-son's graduating from college tonight in Missouri so I'm catching a flight right after this to make sure I get there in time and you all organized the timing on this to allow me to participate because I really wanted to make sure I could introduce myself to you all properly and say hello.

So overall, it has been fantastic. Obviously, I have amazing colleagues. I remain -- I think one of the things that many people don't realize when you're a practitioner is that there's all this sort of invisible behind the scenes work that we don't know, necessarily, what everyone's doing. But now that I see it, I just have such profound appreciation, obviously for our clerks, but also for SCAO and all the work they're doing in the courts and we'll probably get an opportunity to talk a little more about that. But just incredible intellect, dedication, incredible experience; people coming to work for SCAO to make sure our courts work better. And it has really been a privilege to get a front, you know, a front-eye view on that work and really appreciate it at a whole new level. So yeah, I think that's it, Gaetan.

MR. GAETAN GERVILLE-REACHE: Thank you. Thank you.

JUSTICE ELIZABETH M. WELCH: Yeah.

MR. GAETAN GERVILLE-REACHE: Ah, we did call this, "Supreme Court Practice Tips," but this is a perfect opportunity to satisfy curiosities about what's going on in court and so the first topic I'm going to talk about here is case load. Wondering, you know, it appears that the case load in terms of the total argument grants is ramped up. You know, what explains that increase in arguments? Is it just you've got a good batch of cases? Is it a deliberate decision to take more cases? And I wonder if, Chief Justice McCormack, you would start? I'm probably going to, with each question, maybe try to give different turns but you take that one.

CHIEF JUSTICE BRIDGET MARY MCCORMACK: So you're saying -- can everybody -- is my mic working? Yeah. So you're saying there are more grants or MOAAs ordered? Is that what you're telling me?

MR. GAETAN GERVILLE-REACHE: That's what it seems; maybe it's not true.

CHIEF JUSTICE BRIDGET MARY MCCORMACK: News to me. I believe you. There's no reason not to believe you; I think you would know. But I can't -- I don't have any reason to explain that. I don't think that there's an

increase in applications. I did, myself, count how many opinions we've issued this term and how many are left to come and the opinions are up so you must be right but I have no idea. Does anybody else know? Or have thoughts? No, we don't know.

JUSTICE ELIZABETH M. WELCH: I mean, I guess what it means is it's not like we're like, "Oh, we need to take more cases."

MR. GAETAN GERVILLE-REACHE: Right.

JUSTICE ELIZABETH M. WELCH: We literally -- I mean, the process is, "Is this a case we need to take?" It's not, "Oh, we just have too much."

MR. GAETAN GERVILLE-REACHE: You've got a good [inaudible], right?

JUSTICE ELIZABETH M. WELCH: Yeah.

MR. GAETAN GERVILLE-REACHE: Well, and for follow-up to this and, Justice Bernstein, you can start with this one if you want, but how -- do you think the court is taking enough cases, too many cases, just the right amount? Do you have anything on that at all?

JUSTICE RICHARD BERNSTEIN: Well, I'm always of the -- I'm always of the belief that we should be taking more; that's just my spirit. I happen to love oral arguments; I happen to think that the more cases that we take, the better. You know, a person that I have always

been close with was Justice Markman and he and I would always talk about that. Which is, you know, when people come to work with us as clerks, they -- I believe they should be writing as many opinions as possible. So I just feel that the more that we're in the game, the better it is.

And also, like I say, is you know, I have to comment on this because, you know, the Chief and I have had a lot of fun with this topic, is we're very close friends but this is the one issue that we, you know, probably disagree on, is that I am adamant believer of in person; that things should be in person as much as possible. We have a little bit of a back and forth on that, which is not personal, but just something that we just kind of disagree over. But I think in answering that question, I just think the more that people are together, the more that people are in the courtroom, the more the people are in the building, I realize that there is, you know, benefits and cons to, you know, in person versus Zoom, but I think in answering your question as it pertains to kind of opinions and all these kinds of things, I think that really goes hand-in-hand with the fact that people should be together, people have a community, people should be in the courthouses, and we should be there as much as possible. We should use Zoom as an accommodation if it's necessary but our default

should always be in person and we should be doing as many oral arguments as possible and we should be doing as much activity as we can because that's what makes this job great.

CHIEF JUSTICE BRIDGET MARY MCCORMACK: I need a rebuttal.

MR. GAETAN GERVILLE-REACHE: Yes, absolutely. And anytime a question is answered, if there's a different view, please jump in; go ahead and jump in.

CHIEF JUSTICE BRIDGET MARY MCCORMACK: I couldn't agree more and in our court, in person is actually better; there's no doubt about it. When you have to protect people's health, you can't do that. But I actually completely agree with Justice Bernstein. The only place I disagree is where access to justice is improved when people can use other platforms. The credibility of the profession and the rule of law is at stake and we have to focus on that so we have lots of data about how defaults have dropped in cases where people who can't afford to navigate their justice problems with lawyers - which is most people - default rates dropped significantly. And I think Justice Bernstein cares as much about that as I do, so I actually think we agree more than we disagree. In person is best in our courtroom.

MR. GAETAN GERVILLE-REACHE: Okay. Any other

thoughts?

JUSTICE RICHARD BERNSTEIN: This is going to be a fun conversation.

CHIEF JUSTICE BRIDGET MARY MCCORMACK: I've got lots of data we can start talking about.

MR. GAETAN GERVILLE-REACHE: Any other thoughts on the caseload?

JUSTICE MEGAN K. CAVANAGH: Yeah, I was just -- we were looking just before this session; I was talking with Dan and looking at the numbers from the last number of years and our filings are down; I think pandemic-related. We haven't sort of gotten the wave back up yet. I don't even know if the Court of Appeals has quite gotten there either yet? But it does -- I don't know if maybe you asked us like in November if it would feel like the numbers are high? But maybe near the end of the term the numbers feel very high of opinions and arguments right now? But it does -- it does seem -- I think it's not, at least on my part and I think in general, if a case merits argument and an opinion, we're going to hear it, regardless of sort of numbers wise. I mean, we're not going to turn stuff down because we have -- that needs to get decided because we have too many cases.

MR. GAETAN GERVILLE-REACHE: Justice Zahra?

JUSTICE BRIAN K. ZAHRA: So I've said in a couple

of dissents to orders that I think the court's been doing a little too much error correction by order. I'm old school; I think the court of last resorts should be focusing on the most jurisprudentially significant things in our state and when we focus on correcting errors in unpublished cases - or what I would say perceived errors because not all of us always agree that it's error but a majority does - and we focus on perceived errors and resolving that, it's taking away from the cases that are more jurisprudentially significant. So I pointed that out in a couple of dissents; I don't know if that's going to change. But if it doesn't, I'll continue to point it out.

JUSTICE MEGAN K. CAVANAGH: Can I have a little rebuttal on that one, too? So I agree, we are not absolutely an error-correcting court, and we have obviously different opinions in different cases about what is error and what requires correcting. It's a very different - for me - a very different decision when you have somebody sitting in jail or prison to say, "Well, we don't correct errors," or you know, somebody's child has been taken from them or they haven't gotten the process or a child is at risk so, you know, the case - the types of cases - that we hear are significant and important, critically important, to people's lives. So you know, there are different types of, I guess, what can be considered error correction in

different cases, so --

JUSTICE BRIAN K. ZAHRA: So, rebuttal?

JUSTICE MEGAN K. CAVANAGH: Yes.

JUSTICE BRIAN K. ZAHRA: You know, I'm a former trial judge and I think sometimes when it gets up two levels and you get up to the Supreme Court, it looks very different from what it was at the trial court. And I do believe that we have to give discretion to our trial courts and we are looking for an abuse of discretion and that's why sometimes I don't even find error. And I think it's very different what we see at the Supreme Court; it doesn't necessarily look completely like what it did at the trial court. And I'm not saying that it's right here or it's right there but the trial judges are on the front line, they had the parties in there, they heard the arguments, to the extent evidence was taken, they had the opportunity to judge the credibility of those witnesses. And so, I'm one that's less reluctant to find abuses of discretion. And I think what appears to be error isn't necessarily so, from my perspective as a trial judge.

MR. GAETAN GERVILLE-REACHE: Well, this dovetails well with the next topic, which is how do we get you to hear our cases? Applications --

JUSTICE BRIAN K. ZAHRA: Claim error.

MR. GAETAN GERVILLE-REACHE: With the

applications, what do you consider to be -- to make for an effective application and, Justice Zahra, you want to start that one off?

JUSTICE BRIAN K. ZAHRA: Well, from my perspective, I think we need to -- you need to focus on why this is important to the State of Michigan, right? And that was something that Justice Markman would always harp on in oral argument: Why is this case important, not just to you, but to the next 100 cases that come through? So in an application, it is important for you to explain - not so much why this is important to your client; you're benefiting your client when you tell us why this is important to the State of Michigan.

And of course, it's going to be easier to get our attention if it's a published Court of Appeals case but even if you're taking an appeal from an unpublished Court of Appeals case, if you've got a dissent, that's helpful, because the lower courts saw it differently, at least one -- one saw it differently in the lower courts. So that's when I would say focus on the big picture and why this is important to the state and to the jurisprudential fabric of our state.

MR. GAETAN GERVILLE-REACHE: Any difference of opinion there?

JUSTICE MEGAN K. CAVANAGH: No.

MR. GAETAN GERVILLE-REACHE: All right. It's often said that the request for relief is not given the attention, perhaps, it deserves. In an interlocutory appeal where the Court of Appeals has denied leave, should the parties specifically ask the court to remand to the Court of Appeals as on leave granted? Or should they just ask for granting of leave? Or should they ask for a MOAA, specifically?

JUSTICE MEGAN K. CAVANAGH: I can -- I would -- if the Court of Appeals has denied leave, I certainly would ask for it. I think in most cases, if we are inclined to take it or we're interested in the issue or think something needs to be looked at, if the Court of Appeals hasn't looked at it, I would say in most cases we're going to ask them to take a look at it because, I mean, I think we all agree but that is a critical part in this whole process, right? That's three more judges who have looked at it and it's more briefing and refining of arguments and discussion of the issues.

So I think it would, you know, I'm trying to remember, like I think I would ask for everything under the sun when I would put under relief, you know?

JUSTICE ELIZABETH M. WELCH: For sure.

JUSTICE MEGAN K. CAVANAGH: I mean, preemptory reverse, you know, remand to the Court of Appeals, but

absolutely, I think that that's fine to ask for. I don't know about asking for a MOAA? I think if you want the court to hear it, I mean, I think that's sort of implied.

MR. GAETAN GERVILLE-REACHE: Okay. Any different view?

JUSTICE ELIZABETH M. WELCH: No, I agree with that entirely. I think as a practical matter, obviously we will often remand back to the Court of Appeals if they have not looked at it, so that's just sort of a given. But certainly asking the court to get to the merits, it's perfectly fine and we'll obviously send it back to the Court of Appeals if they haven't looked at it and we think it would be helpful.

JUSTICE BRIAN K. ZAHRA: I don't think you need to actually ask for remand as on leave granted. In the interconference behind closed doors there's a party that finds this important and they want to grant or MOAA and whoever it is can size up where the votes are going. And so, the last pitch in a three-two count is, "Well, let's just remand to the Court of Appeals as on leave granted."

So it's not necessarily that you have to ask for it; I think that the interplay on the court is such that, you know, we can see when a case is important to us where it's going and if you aren't going to get the MOAA then, you know, there's that nice fat pitch down the middle to,

you know, remand as on leave granted and it often will, you know, carry the day.

MR. GAETAN GERVILLE-REACHE: Is the burden on the appellant to get that kind of relief a little lighter because the court is not taking the case? It doesn't -- perhaps, is the jurisprudential significance matter less if it's just remanding for the Court of Appeals to make a decision?

JUSTICE BRIAN K. ZAHRA: Not at all.

JUSTICE MEGAN K. CAVANAGH: No, I mean, I think it has to be in the sort of stage in our review of it where either, you know, the court has already flagged it, the commissioner's office, or it has one of, you know, it's at conference because either the commissioner's office has, from the get go, recognized that this is a jurisprudentially significant issue or it's at conference because one or more of us have recognized that sort of at the application stage.

So it's not, "Well, the Court of Appeals hasn't looked at this case. It's like any other case; send it back to them to do the work." It has already sort of crossed that threshold of the significant issue.

JUSTICE ELIZABETH M. WELCH: Right. And what I was -- it also, a remand as on leave granted will often be a 7.0 You know, there's not -- nobody's -- there sometimes

are objections to that but for the most part, people -- it's what Justice Zahra was saying; it certainly a position where no matter where you come out on the merits in the end, everybody's like, you know, the Court of Appeals hasn't looked at this, it's super important, let's have them take a look first.

JUSTICE BRIAN K. ZAHRA: I think it reflects a respect for the Court of Appeals.

JUSTICE ELIZABETH M. WELCH: Absolutely.

JUSTICE MEGAN K. CAVANAGH: Yeah.

JUSTICE ELIZABETH M. WELCH: I agree with that.

MR. GAETAN GERVILLE-REACHE: So this is more of a technical question but we, as you know, as officers of the court and wanting to present the best case for the court, want to make sure that we're providing the court all the information that it needs. Do you have a preference or an expectation in terms of how the key record documents are packaged with the application? I've seen some people attach it as exhibits, some people provide an appendix. Is there something that works better for the court? And maybe that's a commissioner problem and we should ask them but I'm wondering if you care?

Justice Cavanagh, can you start with that?

JUSTICE MEGAN K. CAVANAGH: It probably is a commissioner question. I will say that, particularly with

the pandemic, right, when we couldn't go into our offices, I mean, we will get, you know, the file from the Court of Appeals, the physical file, if we need to do that and sometimes we have to. I find it, like I will go onto MAPPIS, our system, and so if -- and it will be hyperlinked and with the application to be able to look at the records. So that's helpful for me. That doesn't mean that we don't look at the record if it's a paper file and frequently, we do. But I find it more convenient to have it attached to the application. I know that was always what I did when like filing in the Court of Appeals, right, where they don't get the record, that I think it's critical in the Court of Appeals to attach it to your app. But just for ease of filing, now that everything is - or so much -in our court is available online, it's helpful to have it attached so that I can go look at it.

JUSTICE ELIZABETH M. WELCH: Yeah, Gaetan, I do -- - that is a great commissioner question, you know, just what they could – 'cause they are the first ones to sort of touch everything. And then, you know, our clerks jump in next and then we jump in. You know, that is certainly something during the pandemic, I, you know, more than once heard challenges of getting a hold of records, you know, hard copies of things or just, you know, so that was definitely a barrier. People figured it out but, yeah,

that's a great, I think, commissioner question, too.

MR. GAETAN GERVILLE-REACHE: Turning to MOAAs --

JUSTICE BRIAN K. ZAHRA: We're addicted.

JUSTICE MEGAN K. CAVANAGH: And the first step is admitting that you're addicted.

MR. GAETAN GERVILLE-REACHE: How does the court decide when a case deserves a full leave grant or just a MOAA? What are the factors that you would say influence that decision? Justice Welch?

JUSTICE ELIZABETH M. WELCH: First of all, I just want to say that this all pre-dated me, okay? So I came in and --

JUSTICE BRIAN K. ZAHRA: You're just as addicted as the rest of us.

JUSTICE ELIZABETH M. WELCH: Yes. You know, I think -- I mean, some of this is sometimes, you know, just votes around the table. I think sometimes people can be like, "Well, I can get on board with a MOAA; I'm not sure I want to do a full grant because otherwise maybe I'd be a deny." And so, I do think it's a way -- I think it's been a way to get more consensus; to get more people in front of us. And I think that's -- I actually agree with Justice Bernstein and Justice McCormack's earlier comments that, you know, the more people we can have in front of us in person or online, if we had to be, is a good thing. And so

that is, I think, a positive side.

So I think largely a lot of it has to do with that. It's a way to get consensus so that folks can get in front of us; not always. You know, a grant certainly there are issues that are clear import that we all feel, you know, cross that threshold that it should be a full grant. Not to say that MOAAs aren't important; many of you know they're very important. But I know, it's sort of a process that's gotten blended together and it makes it really hard for the practitioners and we know, so -- appreciate that.

MR. GAETAN GERVILLE-REACHE: Any other thoughts?

JUSTICE MEGAN K. CAVANAGH: I was just going to say, I don't -- I don't think it's a secret, when we were talking about it in some of the breakouts yesterday, I think the things -- all the things that you probably already think of that go into that decision, right? Is it a published decision? Is it -- are we convinced at the stage that we're looking at it at a conference, right, before -- with just an app and a response, you know, no amici, no further sort of refining of supplemental briefing on it. Is it an issue that we think the Court of Appeals or the lower courts got it right even though, you know, and -- so we have an aversion to LIGing. I heard somebody say yesterday it's like -- a MOAA is like we're dating but not married. And a LIG is like a divorce, right? So we don't

-- and we have an aversion for it, I think, to LIGing on cases.

But so I think that that factors into it. I agree that I think it allows us to -- it's an opportunity to hear more cases, which I think is helpful to us, I think it's helpful to the bar, and obviously, the end and most important is the people that we serve. So I -- and I have said this, I think I said it to Gaetan yesterday, I mean, by the time that we are at oral argument and have, you know, are looking at these cases, I mean, I frequently have to look back to the, you know, the whatever, the itinerary or the schedule or whatever and figure out is this a MOAA or a grant? Like, I mean, I don't -- I mean, it does, you know, factor into what the decision will be, what that will look like? Is it an opinion? Is it an order? How narrow can that be? But I mean, certainly in the preparation for it for oral argument and looking at the issues and looking at the briefs and trying to surmise the significance of it, I look at them the same as I do grants.

JUSTICE ELIZABETH M. WELCH: Yeah, I agree with that.

MR. GAETAN GERVILLE-REACHE: When we're seeking review of an unpublished decision, what are the best strategies for making a case that that is an appeal that should be heard by the court? Chief Justice McCormack?

CHIEF JUSTICE BRIDGET MARY MCCORMACK: Back to me? Well, I think -- I'm not sure it's -- I have an answer that's any different from the one Justice Zahra gave you earlier about --

MR. GAETAN GERVILLE-REACHE: Okay.

CHIEF JUSTICE BRIDGET MARY MCCORMACK: -- you know, any application? It's true that a published decision is probably a stronger starting point from which to get our attention because we want to make sure we're comfortable with that published decision in each case and an unpublished decision, even if wrong, is one we are more likely to let go.

But it's also the case, as Justice Zahra said, that sometimes an unpublished opinion will draw our attention to some lack of clarity in the larger area of the law that this particular case might give us the opportunity to provide clarity, right? So it's not -- I think telling us that the Court of Appeals got it wrong in this particular case is not your best strategy but showing us that this particular decision is a good way for us to bring some clarity that would make it easier for the bench and bar, I think, is probably your best shot. People might have different views but that's mine.

JUSTICE BRIAN K. ZAHRA: One of the flagging criteria for my clerks when we're reviewing these, if it's

unpublished, are there other unpublished opinions that aren't totally consistent with that opinion? So you know, just like a split in circuits, the Court of Appeals - as a former Court of Appeals judge - you might feel comfortable letting something go, even though publication rule would say you should publish it; it involves a constitutional question, it involves an interpretation of a statute. But you're just -- the briefing wasn't good in the Court of Appeals, you're not sure if this is the right answer, so notwithstanding the rule, you let it go as an unpublished case. And so, if there's different results involving the same statute all unpublished, that's something that will peak my attention and interest.

JUSTICE ELIZABETH M. WELCH: Yeah, and I'll just piggyback on that. One of the things I know that always gets my attention is when a litigant says, "This opinion is already having an impact; we're already seeing the other lower courts basically following it," or maybe, you know, the Court of Appeals likewise, so that certainly is something that's a consideration, as well.

JUSTICE MEGAN K. CAVANAGH: I think sometimes there's a benefit to -- I think there's, in a lot of cases, to having maybe not straight up conflicting Court of Appeals opinions but having panels sort of work that out. I think that's an important aspect of the intermediate

appellate court is to sort of have this kick around a bit in the Court of Appeals and see how different panels handle it under different factual situations, which obviously, that's always a consideration, too, right? I mean, like the issue might be interesting or important but it's not factually the best case to decide the issue. Maybe because, you know, it's not going to make a difference in this particular case or the facts are, you know, I don't know, they vote against it. But sometimes, I think there are certain issues that it makes some sense to have, like have some disagreement in the Court of Appeals, and see how that works out.

MR. GAETAN GERVILLE-REACHE: Okay. There have been some amendments to the rules and now under MCR 7.312(K), which governs supplemental briefing and instructs that,"For cases argued on the application, parties should focus their argument on the merits of the case and not just on whether the courts should grant leave."

That would seem to suggest that the parties should be briefing both the merits and why the courts should grant leave in their supplemental briefs. Is that what your expectation is or your preference? How do you look at it and, probably going along with that question, is when you're -- are you expecting this to be a standalone brief or that you just refer to that? Or is any supplement

a misnomer or do you expect it to go with the application and merely supplement it?

Sorry that was such a long complicated --

JUSTICE MEGAN K. CAVANAGH: No, I mean, I absolutely -- I mean, I don't know when I would ever be in a situation where I wouldn't argue the substance or to have the opportunity to argue that in front of us so I would absolutely include the merits in it.

And in most cases, they're intertwined, right? I mean, like the reason why like we shouldn't take this case or we should take this case is because of the significance or the lack of significance of the merits, right? So in most cases they are intertwined. I wouldn't -- I wouldn't do, you know, just the sort of procedural question. I will say, I remember it was this term that there was -- there was a supplemental brief that I was like, "This one is so true to the rule." Like, they didn't even sort of give like a background of what the issue or the case was. It was like picking up from your order; I'm just going to argue exactly what you said. Like, I had to go back -- I was like, I don't even know what this case is about. Like, I mean, you have to, you know, sort of put it in context. You don't want to repeat everything that you said in your original app or response but I would include it in that.

And I think, just before I forget, that part of

the, I think, the benefit - and we've seen it happen a number of times - of a MOAA is it's an opportunity then where we will grant after it. It's not the normal course that we do but this will dovetail into my thing that I think oral argument matters. And that when you have a MOAA, you have the opportunity to now finally see what some of the issues are or something that needs to be looked at further and then you have the opportunity to grant after that.

JUSTICE BRIAN K. ZAHRA: We're addicted to MOAAs. When we grant MOAAs it's because of the merits. We're not granting MOAAs because we really want to know whether we should grant. So focus on the merits. It happens maybe once every two terms where we say, all right, now that we've peeled the onion here, there's still a couple of questions --

JUSTICE ELIZABETH M. WELCH: Yeah.

JUSTICE BRIAN K. ZAHRA: -- we need additional briefing on and that's when we will do a grant. We'll do a grant because after the MOAA, there's still some significant questions that remain unanswered. But for the most part, the overwhelming majority of our MOAAs are because we were interested in the merits; not at all a question of, "Gee, maybe we should ask for supplemental briefing because we should grant on this." Do you disagree with that?

JUSTICE MEGAN K. CAVANAGH: No.

JUSTICE BRIAN K. ZAHRA: Okay.

JUSTICE MEGAN K. CAVANAGH: No.

JUSTICE ELIZABETH M. WELCH: Yeah. I actually -- Justice Zahra summarized exactly what I was going to say. That, you know, for the most part we, you know, we get to the merits - occasionally deny - but I think many of you know we get to the merits quite often. And then this, exactly what Justice Cavanagh just said, you know, certainly there could be an opportunity where we'll grant and then we'll issue another order inviting you back to provide us with more information.

MR. GAETAN GERVILLE-REACHE: From the standpoint of your satisfaction, it sounds like you would prefer to not have to go back to the application; you'd rather just have those issues that were requested to be briefed, all fulsomely briefed, in the supplemental brief and maybe touch on the reasons for granting leave. But that's what you would all prefer; is that fair? And not have to go back to the application to see what was said?

JUSTICE MEGAN K. CAVANAGH: Well, to be fair, we do go back to the applicant; certainly, by the time of a MOAA. I mean, we have the application, we have the response, we have, you know, your supplemental briefs, we have amicus briefs; we have all of it and we read all of

it. But I think -- I don't know why you would ever miss an opportunity to make your point, make your argument, on the merits on the substance of the issue to us. I think -- and put it in context of whether, you know, granted that we've, you know, an issue that we're interested in, we may decide it now or point out where, you know, there may be more; maybe we've missed an issue that you think is significant. I mean, I would even - I'm not going to encourage this - but I used to -- like, I would, like if they didn't -- if the court didn't grant a MOAA on a particular, you know, you've got a two issue brief and they only grant it on one, maybe not reargue the issue that we haven't asked for a MOAA but you might want to put it in context of your other issues, too, of whether or not to do something with it if you think your other issue is stronger.

JUSTICE ELIZABETH M. WELCH: Yeah, and I actually -- that's a really good question, Gaetan, and this is this confusing part about the process. From a practical standpoint, so the way it works is we all get together for conference, usually once a week, and we review, you know, all the filings. And you know, there's lots of different filters and ways it gets to us. But obviously, that application is the first thing we're all looking at to make a decision if we're even going to take the case.

Then it's -- I mean, it could be six months to

nine months to sometimes a year before we see it again. And it's funny because a lot of times we don't remember case names. We'll have to say, "The one with." I feel like it's a Friend's episode. "The one with a" whatever, like, you know, and then you're like, "Oh, right, right. Oh, right, it's been a while." So I certainly think that when you're back before us that having it all in one document is certainly helpful because we've definitely looked at the past documents but it is certainly helpful to pull it all together and, obviously, the order obviously is specifying what we're specifically interested in but certainly refreshing our memory. We can go back and reread all those briefs but certainly we're most focused on the brief that you filed for argument.

JUSTICE BRIAN K. ZAHRA: Let me just say, I would suggest that you write a supplemental brief with the goal of getting us everything we need --

JUSTICE ELIZABETH M. WELCH: Yeah.

JUSTICE BRIAN K. ZAHRA: -- to never go back to the application. If after reading the supplemental brief I've got to go back to the application, I'm disappointed; there's something not there. The job -- the brief hasn't done the job. So I would definitely recommend you try to write that brief with the notion that no judge is ever going to have to look back at my application.

JUSTICE ELIZABETH M. WELCH: I second that.

MR. GAETAN GERVILLE-REACHE: And here comes the trick question that Chief Justice McCormack requested for this panel.

CHIEF JUSTICE BRIDGET MARY MCCORMACK: I said trick question for Justice Bernstein though; not for me.

MR. GAETAN GERVILLE-REACHE: If a fulsome brief is what is expected, why do the parties get a lot less time to provide it?

JUSTICE RICHARD BERNSTEIN: That's a great question.

JUSTICE ELIZABETH M. WELCH: 'Cause you've already done it.

JUSTICE RICHARD BERNSTEIN: You know what? I have to answer that question. That's a great question. And honestly, here's the great thing is that you have to look at it from this perspective: You have certain justices like me who want to make sure you have all the time that you possibly can so you're absolutely right. Like, it's a great question, which is basically, you're looking at this in the same capacity and the same fashion but what I usually do, which I – 'cause you know, I really enjoy the oral argument process. I mean, especially when you're blind, you really are captivated by it because so much is presented with the energy or the spirit and the passion

that the litigators have and there's something about it. And I think all of you should be so proud of the work that you do and you should be proud of the impact that you have and you should be proud of just the quality that you present.

And honestly, my perspective on it is that, you know, in answering that question, I'm the one person that will usually ask questions like this: Do you have anything else you would like to say? Or is there any other information that we should have? And the reason that I enjoy doing that is because, primarily, is because you guys do such a great job of advocacy and you work so hard to prepare. And because you put in that work and because you put in that effort and because you put in that time, I want to hear what you have to say. So for all intents and purposes, you know, I do realize that question, which is, well, why is it half the time? But usually, if you watch the proceedings, there's always one justice - I might be the guilty one on this - that will ask a lot of questions to make sure that you have the time that you need to be able to make sure that when you go back to your client - this is just something I'm always kind of, you know, focused on - is that when you go back to your client, you want to be able to make sure that your client says to you, "Hey, if we win or lose, you did a great job. You really

did a great job." And I would imagine that the one thing that your clients don't want to see is, "Oh, how come you didn't say this?" or "How come you didn't say that?" So I think it's always best to err on the side of making sure that you get to have a full record, that it's complete, and that no matter what happens, no one - especially your client - isn't going to say to you, "Boy, I really wish you had argued this or answered that."

I have to say one other quick thing about this because I think this is so important. I think one of the things that we have to look at as a Supreme Court - because I think this is incredibly unfair; I think we need to figure out a way to do this - is that when all the attorneys come up, they always say, "I'd like to leave three minutes or five minutes for rebuttal." Of course, it's a perfectly reasonable request that you have. And I think that the thing that if I was, you know, having to be in your situation, the thing that would drive me crazy, that would make me crazy, is when you say I would really like to have three minutes or five minutes or whatever it is for rebuttal and then you get to the end and you're trying to save that three minutes for rebuttal and then someone like myself asks you a question and says, "Oh, I'd like to ask you this." And then after I ask you a question, you of course have to answer the question and

then your three minutes is gone.

So I think that we need to -- that's why I like to sometimes be the one that just asks the question and says, "Hey, do you have something else you want to say?" Just to allow for the fact that if someone is consciously doing everything they can to watch the clock and watch the time, I think that we have to look at the fact that it's kind of beyond your control if you're doing the best that you can to regulate your time but then you get asked a question that you have to answer and then we tell you, "Oh, but you're out of time." So I think we have to really look at that because, you know, if it's not within your control, you shouldn't be penalized for it. And I think that that's something that we should really look at and address as we kind of move into the future.

JUSTICE BRIAN K. ZAHRA: Richard, you just described yourself as the problem, not the solution.

JUSTICE RICHARD BERNSTEIN: I was actually being -- I was actually being nice because I try not to ask questions toward the end. I will try to ask my questions in the beginning.

JUSTICE BRIAN K. ZAHRA: But you always do.

JUSTICE RICHARD BERNSTEIN: Which then -- which then will usually result in, if that's the case, what it'll usually result in, especially if the -- especially if the

opposing side basically kind of puts on an argument and, you know, makes a pretty intense assertion, then I do think it's important - I think the Chief is very good at this, as well - I think we really do try to make sure that people have a chance to be heard. And I think that it is a priority of this court and I think that we do that for the most part.

JUSTICE BRIAN K. ZAHRA: Perhaps, just ask Gaetan if he has any other questions?

JUSTICE MEGAN K. CAVANAGH: Can I just say, about the rules and this is like my plug, like I know that -- I think the rules are structured generally such that, you know, the appellant is going to have more time in the initial part, right? 'Cause that makes sense; they have to put their issues together, they have to gather the record, they have a number of things to do. The appellee has a shorter period of time because they are, you know, defending against the appeal and the issues and the record created by that so it makes some sense to do less than that.

I think one of the benefits of recent changes to the MOAA order - it used to be frustrating to me that you would file briefs simultaneously - because, you know, you would pass in the night and sometimes you weren't even responding or offering helpful things. So the fact of

staggered briefing is helpful. But if -- and in fact, I was sitting in a breakout yesterday with some of the criminal rule changes and it was pointed out to me, you know, a difference of sometimes, depending I think probably in the term when we grant a MOAA order, that the appellant will have sort of a bigger chunk of time and then the opposing side gets whatever it is, 21 days or something like that? And you know, that might be different in February than it might be in October, depending, you know, if it's going to be heard that term and that may affect the dates, at least that initial date.

But all of that is to say that if it's not working in practice, then that is absolutely something that we are open to hearing and we have a very generous and wide open administrative proceeding. I mean, literally anybody can open an administrative file and tell us that, you know, this might look good on paper but here's why it doesn't work in practice. And so, you know, offer some constructive feedback of maybe that the rule needs to get changed. I'm not saying this one does but if it does.

JUSTICE ELIZABETH M. WELCH: Yeah, I actually -- she just segued exactly to what I was going to remind everybody here, and I mean everybody. A lot of people don't really know how our administrative rule changing process works. You have section leadership, obviously, who

are in touch with the court when there's an issue about a rules change that affects the appellate bar. But you are sitting at your desk and you're working on something and you're like, "Gosh, this is really unclear," or "This rule is really stupid because this is not how it works in practice."

We need to know that and there's a process for that. And literally, it can be you let your section chair know and then they can contact our administrative counsel and open a file; really, truly, that's the only way we know something's not working. And so, yes, please let us know if that happens.

MR. GAETAN GERVILLE-REACHE: Thank you. And so, when we're talking about - we're still on the subject here of the supplemental briefing - there's often a statement, and this is just by way of again clarifying what's expected, there's a statement that says there should not be a mere restatement of the application in a supplemental brief. I take it that that basically means, look, we gave you an order that says brief these four issues; we don't want you to just cut and paste your application in. But does it mean something other than that?

JUSTICE MEGAN K. CAVANAGH: I don't think so. I mean, it's an art, right? It's how we -- I mean, we are artists for lack of a better word in writing appellate

briefs. You can include everything that we need and that you want us to see in that supplemental brief without merely cutting and pasting your application or your response.

It has -- the mere fact of even a MOAA order has changed sort of the landscape of some of the argument from the application stage even so you can give us a complete picture of, you know, the procedural and factual history and the legal issues and, you know, all of that without merely cutting and pasting your app.

MR. GAETAN GERVILLE-REACHE: Okay. We have about five minutes left. I hope it's okay if we go over a little bit; we did get started a little bit later. If you have questions and we've been collecting some of those, I can't promise we'll get through them all but I just wanted you to know that questions are welcomed.

We -- I just want to touch real quick on oral argument here. And we did touch on that just now but with respect to Zoom, in particular, do you see any of the traditions that were used in Zoom - maybe the sequential questioning - carrying over into how it is done in person?

CHIEF JUSTICE BRIDGET MARY MCCORMACK: No.

JUSTICE MEGAN K. CAVANAGH: When we first got -- when we first got back in person in March, I found myself sitting there and was like, "Okay, when's the Chief going

to call on me?" And then I was like, "Oh wait, I don't have to do that; I can just speak up."

JUSTICE ELIZABETH M. WELCH: And remember, that's the only way I started so I was like totally like, "Oh, I've got to jump in; I'm not getting called on."

JUSTICE MEGAN K. CAVANAGH: [Inaudible]. Yeah, but I will say - and I know that this has been mentioned before, not necessarily oral argument but our administrative hearings - that has been, the ability to do that remotely and through virtual proceedings, has increased participation rather than, you know, sending somebody to Lansing or not sending anybody at all to speak for three minutes. We actually get better participation and then, you know, so that process has improved. And I think that will likely stay going forward, but --

CHIEF JUSTICE BRIDGET MARY MCCORMACK: I mean, eventually we'll be able to do that in a hybrid format, I bet.

JUSTICE MEGAN K. CAVANAGH: Yeah.

CHIEF JUSTICE BRIDGET MARY MCCORMACK: We'll be able to take comments from people who are far away and it doesn't make sense for them to drive to Lansing to speak for three minutes but we really want to hear what they have to say and be able to use the courtroom, as well. Remote technology is on the verge of getting a whole lot better

and there's a lot of national pilots going on to figure out how to make that work for litigants and lawyers in a way that will really help us all going forward.

JUSTICE ELIZABETH M. WELCH: You know, it's just interesting, I know Judge Yates is here; he and I judged a national high school mock trial last weekend in the finals. I have to say, I mean, they weren't, the kids weren't in person, but -- I mean, it would have been better in person, of course, but I have to say it worked pretty remarkably well. They had a big screen on the podium and we were in person as judges and the litigants, we could see everything on the big screen. It was really -- it wasn't terrible, as a substantive.

JUSTICE RICHARD BERNSTEIN: I have to say I absolutely hate Zoom. I want to be very clear: I absolutely hate everything about it. And I think what people - and again, we'll go around and around on this and we can have this discussion and I think it's a vibrant and energetic discussion that's going to be with us for a while - but I don't think what people have come to understand is that for people who are blind, they really can't use the product; people who are blind cannot use Zoom. We just can't do it. I mean, it is just a visual medium that is designed for sighted people. So when you're not able to see, you are for all intents and purposes, pretty much

excluded. Someone has to be next to you so that they can set up the product.

Imagine - I want you guys to think about it - imagine if you try to go on Zoom and you can't see. How do you even get on the platform and navigate the platform and navigate the process without having somebody that's going to be next to you to assist you? And then when you're on it, you have to know where to look but you're blind so you don't really know where to look. So you constantly have to have someone that's going to be helping you navigate through that process.

Now my perspective on this - and I realize that I'm kind of a lone voice on this - but I will kind of keep fighting this literally until the end; I will not give up on this. I will fight this until I'm dead; that's how much I care about this issue. And the reason I care about it is that there are so many people that have severe disabilities that have been -- and I understand, we can go back and forth on this. But community is life and life is the community; it's just that simple. At the end of the day, I realize that we can make a discussion and we can have this conversation about convenience and we can have this conversation about efficiency and we can do all that.

But here's the deal: At the end of the day, our lives are defined by the people that are in it and our

lives are defined by our relationships. They're defined by having the opportunity to go to work and be with people that you care about. They're defined by the conversations that you have. They're defined by human interaction. That's really why we do what it is that we do. We are not meant to be people who live in isolation. We are not meant to be people who are not around other people. Every aspect of human life comes down to how you relate and how you interact with others. It's why we're happy, it's why we're joyous, it's why we basically find meaning and purpose and value in our lives.

And I'll just simply conclude by saying this. The reason that I feel steadfast - and I understand that Zoom can be used in certain context and, again, I'm going to go back to what I said in the beginning - what it really comes down to is what is the default position? The default position should be -- I've been doing disability rights my entire life. The default position should be that everything is in person; that is the default. The default is that we function as a society where people interact in person; that is your default. The accommodation, which is what people who are involved in disability rights focus on, is if a person is uncomfortable for whatever reason being in person, you accommodate them; you make an accommodation. Zoom is an excellent accommodation for people that cannot

be in person. But the standard there should be that everything is in person unless an accommodation needs to be made.

And I'm just simply going to end by saying this, and it's very important, is that you know, those conversations matter. Things like, "How are you doing?" "How are your kids doing?" "I heard your parents are struggling." "I heard that you're facing some challenges." You know, that's what friendship is built on; it's built on those communications, it's built on those friendships, it's built on that. And it doesn't matter if it's the court or a business or whatever it is, I think it's incredibly shortsighted to be basically removing that human interaction from people. And I think the reason that it's significant is because it matters in our profession, in your profession, in every profession; that when you sit down at a table with somebody, when you come on Zoom, it's just right to the point. You don't find out about how your friend is doing. And then what happens is is that human side of the work gets lost and you forget that you actually like the people and you forget that you care about the people and you forget that you're actually friends with these people. And what happens is that in every situation, when you're far removed from people, animosity builds, frustration builds, tension builds. Have you ever noticed

you might be frustrated over a situation or someone said this or did that in any circumstance but the minute you see them, the minute that you're with them in person, you automatically go back and say, "Yes, I really like this person." "Yes, I really care about this person."

CHIEF JUSTICE BRIDGET MARY MCCORMACK: I mean, it depends, right?

JUSTICE RICHARD BERNSTEIN: So that's my perspective. So if I hope candidly and I'm pretty intense about this, I hope that we use Zoom only when necessary, but we really refocus and double our efforts on making sure that society comes back so that we can be together as one.

JUSTICE BRIAN K. ZAHRA: Getting back to your --

CHIEF JUSTICE BRIDGET MARY MCCORMACK: Can -- I think that was -- I think that we had a session on this yesterday and I missed it and I wish Justice Bernstein was there because he has a lot of views. And I wish I was there, too, but it sounds like you guys had a great conversation and we're really grateful for all the input we've gotten. There's a lot of data from which we can actually make smart decisions about how to use remote platforms going forward and it's absolutely got to be the case that people who can't use them have to have an opportunity to appear in person. The courts are for the people; they're not for the judges. I love all of you;

they're not for you either, right? They're for the people who have to navigate justice problems. So however we can do that best is what we have to do.

But that wasn't -- I think your question -- what was your question, Gaetan?

JUSTICE BRIAN K. ZAHRA: The question was about sequential questioning.

CHIEF JUSTICE BRIDGET MARY MCCORMACK: Sequential, yeah.

JUSTICE BRIAN K. ZAHRA: And whether that could carry over and I've got to tell you, I enjoyed that.

CHIEF JUSTICE BRIDGET MARY MCCORMACK: He liked it.

JUSTICE BRIAN K. ZAHRA: I found it --

CHIEF JUSTICE BRIDGET MARY MCCORMACK: Me, too.

JUSTICE BRIAN K. ZAHRA: I asked more questions when I had the floor until I gave it up. We're in live argument, I ask a question and somebody else decides my question isn't quite what they wanted to hear answered --

CHIEF JUSTICE BRIDGET MARY MCCORMACK: No.

JUSTICE BRIAN K. ZAHRA: -- and they jump in.

JUSTICE ELIZABETH M. WELCH: Yeah.

JUSTICE BRIAN K. ZAHRA: So in live arguments, I don't ask as many questions; I listen and exchange with my colleagues. Where when we actually had the opportunity,

"Do you have any questions?" "Yes, I do." And I have the floor until I'm ready to give it up and I enjoyed that and I found it much more beneficial for me in oral argument with that format.

JUSTICE MEGAN K. CAVANAGH: Yeah, and I will say I think -- I thought, as envisioning as a practitioner, to be able to focus on one person asking you the question, completing their question --

JUSTICE ELIZABETH M. WELCH: Yeah.

JUSTICE MEGAN K. CAVANAGH: -- being able to complete your answer and do it. One of the downsides though is that you're giving up that flow, right? You're giving up that interaction and sometimes, you know, you have four points and I'm stuck on two but I don't get to ask you a question until after you've figured on four and I think there's a natural tendency sometimes to be like, ugh, whatever, you know, the moment's passed sort of thing.

JUSTICE ELIZABETH M. WELCH: Yeah.

JUSTICE MEGAN K. CAVANAGH: But if it's something that we want to ask and we have that, I mean, we have no problem bringing you back to that issue. So I think there are pluses and minuses. It was a necessity with, you know, seven justices and two attorneys on Zoom; we couldn't all sort of open it up. I think the Court of Appeals is different; it is more of the traditional sort of free fire.

And so that was just the reality but I don't think it necessarily translates back to in person; there's just inability with seven of us on the bench but --

CHIEF JUSTICE BRIDGET MARY MCCORMACK: I -- there's no -- yeah, I don't see how I could --

JUSTICE MEGAN K. CAVANAGH: No.

CHIEF JUSTICE BRIDGET MARY MCCORMACK: -- keep -- I'm not going to tell Justice Bernstein his questioning time is over; I'm just not going to do it. It's never going to happen, right? He can ask as many questions as he wants whenever he wants.

MR. GAETAN GERVILLE-REACHE: So we have about five minutes left. I wanted to switch to some fun, maybe you know, get to know you, get to know us questions.

First of all, and this came from out there, this is from Barrett Young: What are some of the worst things that attorneys will not stop doing? Whether it's in oral argument or briefing or the applications or what have you, what are some of the worst things that they will just not stop doing?

JUSTICE ELIZABETH M. WELCH: I feel like I'm new; I don't have enough of a sense so I'm going to defer to my colleagues 'cause so far I haven't seen anything that bugs me that much.

JUSTICE MEGAN K. CAVANAGH: Visual aids at oral

argument are very, very rarely used well. That's not to say that they can't be but, I mean, think long and hard and be really, really intentional about whether or not, you know, a visual aid is actually going to assist your argument. Not answering questions -- like, not answering the question; doing the like, "I think what you're saying is this." And you know, that sort of thing is -- I remember always my former mentor was saying like, you have to be able to anticipate what the hard question is, acknowledge what you -- it's not your strongest point, right, or what your weakness is or what you have to give up and then be able to explain why you still win or why your point, you know, should carry the day anyway. And if you're not sort of doing that - because it tends to be the questions we're going to ask are those, that hard question or the weakness in your case - and so not directly addressing it is, you know, you tend to lose the audience then if you don't answer the question.

MR. GAETAN GERVILLE-REACHE: Who is -- well, any other -- anything further on that? Okay. Who is your favorite - and we'll just go sequentially here starting with Chief Justice McCormack - who's your favorite writer on the court? Whose opinions do you admire for their clarity, style, wit, what have you?

CHIEF JUSTICE BRIDGET MARY MCCORMACK: I love

them all equally like my kids.

JUSTICE MEGAN K. CAVANAGH: Good answer.

CHIEF JUSTICE BRIDGET MARY MCCORMACK: Easy one. Next? Richard?

JUSTICE RICHARD BERNSTEIN: Oh, I'm the same.

JUSTICE BRIAN K. ZAHRA: I think Justice Thomas.

JUSTICE MEGAN K. CAVANAGH: I admire the Chief's writing style; it's very accessible. And I think that that's important, particularly at our level; tries to distill it down and, as we all know, it takes a lot more time to say less and to say only exactly what you need and what you mean and I think she does, in general, a very good job at that.

CHIEF JUSTICE BRIDGET MARY MCCORMACK: Awe.

JUSTICE MEGAN K. CAVANAGH: I'm not saying that just because she's the Chief.

CHIEF JUSTICE BRIDGET MARY MCCORMACK: All right, maybe I love Justice Cavanagh's writing.

JUSTICE MEGAN K. CAVANAGH: Thank you. Thank you.

JUSTICE ELIZABETH M. WELCH: Yeah, actually, I agree with that. And the reason is because our Chief is very, very committed to making justice very accessible in everything she does, whether it's the administrative side of the courts or just the opinions. And that is certainly

something that it's a little bit of a learning curve as a lawyer when you're writing; we get sort of stuck in how we write. And I see many of you, with your briefs, are very good at this as well. Really distill -- it's really a gift to take something that's very complicated and distill it down to, "Can my mom read this?" So I actually now really - when I get a first draft or an opinion and we're working together with our clerks and we're rewriting - I find myself with each draft, stripping out legalese as much as possible and really, really trying to think -- like, I like tax issues; I'm actually the person who likes tax stuff. And that's hard; that's really hard sometimes to explain. But I find myself trying to like distill things down into simpler terms. And I do think the Chief has sort of mastered that art; I'm still getting better at it.

The other thing - I know I chatted with some of you the other night; we were joking about this - about I'm still struggling, I do it sometimes, can I start a sentence with "and" and "but?"

CHIEF JUSTICE BRIDGET MARY MCCORMACK: Yes, you can.

JUSTICE ELIZABETH M. WELCH: She does it a lot; I know she does.

CHIEF JUSTICE BRIDGET MARY MCCORMACK: But not "however." Not "however," right.

JUSTICE ELIZABETH M. WELCH: That's funny. Like, I find myself now as a -- it's just like everything, right? The more you read or the more style you read, you find yourself sort of naturally doing that so I am doing that more now.

MR. GAETAN GERVILLE-REACHE: Maybe one more question. There -- any comments on the recent news of the drafts being leaked from the Supreme Court and, you know, that risk on your court?

CHIEF JUSTICE BRIDGET MARY MCCORMACK: I think better -- is there one more question? Let's go --

MR. GAETAN GERVILLE-REACHE: There is -- there are other questions.

CHIEF JUSTICE BRIDGET MARY MCCORMACK: Let's go to the next one.

MR. GAETAN GERVILLE-REACHE: We'll go to the next one. We've -- so someone wrote that they've noticed a wide open practice with respect to amicus briefs and that sometimes you see just prose and sometimes you see a well-developed scholarly brief. Is -- do you still find it helpful to have prose discussion from, perhaps say, a reputable source but did not provide any scholarly research? Is that still helpful to you in understanding the point of view or not?

CHIEF JUSTICE BRIDGET MARY MCCORMACK: I actually

like all -- I mean, I don't find them all compelling but more amicus briefs are, to me, always helpful and I read every single one of them and I think I generously grant argument to anybody who asks for it, as well. You're right; some turn out to be more helpful than others but for me, I'm always looking for help from organizations that might have an ability to put a dispute in context that I wouldn't have appreciated without it.

JUSTICE MEGAN K. CAVANAGH: Right. No, I think - and particularly depending on the issue - but a lot of times, like bar sections or, you know, that can, again, that question of like, you know, at this sort of theoretically or intellectual level, this issue may be, you know, such but here's how this actually gets played out in the real world, you know, in Wayne County on a Friday morning and cattle call sort of thing. Like, it matters. That to me is extremely helpful and so I appreciate that, particularly from sections of the bar. But I think amicus briefing is incredibly helpful, particularly those that can say things -- they're not limited to the record of or the particular arguments or preservation issues or what have you that the parties are. So being able to put it in another context, more information, and bigger picture is always helpful information. And you know, if it's included or supporting an app, I think that that, you know, that

that certainly is a factor to consider when reviewing an issue of other outside parties finding it significant or finding problems from the lower court opinion, then that's helpful information to know.

JUSTICE ELIZABETH M. WELCH: Again, and I think it's that simplifying something. Sometimes the parties, of course you're advocating for your party and your party alone. You know, the amicus is going to be sort of that bigger picture and some of them are very well done and help distill one of those complicated issues so you sort of, you know, read the party's briefs and then you move on to amicus, and you're still a little like, "This is confusing; I'm trying to get a handle on it." And certainly, I've had it where I'm reading an amicus and going, "Oh, okay, now I get it. Now it ties," sometimes they tie things together beautifully. Obviously, not just a cut and paste of what the parties have already argued; that's not super helpful. But you know, maybe just a little different lens on things can be very helpful.

JUSTICE RICHARD BERNSTEIN: The reason I love this job is because every day you get to learn something new. How many jobs do you get to have where every day you get to come in and you get an opportunity to learn about something you didn't know about before? You learn about everything from how industrial processing works, you learn

about how everything from a nuclear power plant to environmental regulations, to children in protective issues. I mean, there's really -- it's -- there's very few jobs where basically you have the opportunity to cover such a gamut of information and where you have the opportunity to learn about so many different things. I mean, everything from criminal to civil to child welfare; there's really nothing that we don't touch and there's nothing that we don't have an opportunity to be a part of.

And I think that when you look at the question that you asked is that I think really the general essence of what I think the panel is saying is that we love to learn. No one's going to do this job who isn't naturally curious. And I think when you have that general excitement for curiosity, about what it is that's before you, the more amicus you get, the better. Because really, what this comes down to is having an opportunity to get as much experiential learning as you possibly can. So the more information we get, the better it is.

And the thing I can promise you - which I'm sure you already know - is we read everything. We internalize everything. And so, anything that is submitted to us, goes to us. We understand it, we appreciate it, and we learn it. And I think it is a very valuable process to have.

MR. GAETAN GERVILLE-REACHE: With that, we want

to thank you for your time; taking time out of your busy day to come --

CHIEF JUSTICE BRIDGET MARY MCCORMACK: Thank you, Gaetan.

MR. GAETAN GERVILLE-REACHE: -- and talk to us. Thank you so much.

47:17
audience 48:17
automatically 44:4
aversion 21:23 22:1
Awe 49:14

B

back 3:5 8:14 9:13 11:12 16:8,11 17:21 22:11 23:1 26:20 28:11, 15,20,22 30:7,12,19, 21,25 32:21, 23 38:24 41:18 42:15 44:4,12,13 46:21 47:2
background 26:18
bar 3:12 4:9, 14,20 22:6 23:22 37:2 52:11,18
Barrett 47:16
barrier 19:25
basically 24:18 31:20 35:1 37:19 42:10 43:13 54:4
batch 7:11
beautifully 53:16
beginning 34:21 42:15
belief 8:22
believer 9:11
bench 4:8,14, 19 23:21 47:3
beneficial 46:3
benefit 24:22 27:1
benefiting 14:12
benefits 9:18 35:21
Bernstein 4:5 8:17,21 10:14,22 11:2 20:23 31:6, 10,14 34:18, 23 40:14 44:8,16 47:8 49:5 53:20
bet 39:18
big 14:20 40:10,12
bigger 5:7 36:6 52:23 53:9
binder 2:23, 24
bit 2:17,21 9:13 25:1 38:13 50:1
blended 21:9
blind 31:24 40:21,22 41:8
board 20:18
Bound 3:16
Boy 33:7
breakout 36:2
breakouts 21:14
Brian 4:5 11:25 13:2,4, 24 14:4 16:14 17:9 18:7 20:3,13 23:24 27:10,18 28:2 30:15,19 34:16,22 35:8 44:13 45:6, 10,14,16,21, 23 49:6
Bridget 4:4 7:16,22 10:5, 10 11:4 23:1, 6 31:5 38:22 39:16,20 44:6,14 45:8, 12,15,20 47:4,7 48:25 49:3,14,17 50:20,24 51:10,14,25 55:3
briefed 28:16,17
briefing 15:18 21:20 24:8 25:15,20 27:19,24 36:1 37:15 47:18 52:19
briefs 6:3 22:18 25:21 28:24,25 30:13 35:23 38:1 50:3 51:18 52:2 53:11
bring 23:20
bringing 46:21
bugs 47:23
building 5:16 9:17
builds 43:24, 25
built 43:9, 10,11
burden 17:3
business 43:12
busy 55:1
Butzel 3:8

C

California 3:20
call 7:4 39:1 52:16
called 39:5
candidly 44:9
can't 7:24 10:13,19 38:14 40:21, 23 41:4 44:23 48:2
capacity 31:21
captivated 31:24
care 18:22 41:16 42:3 43:21 44:5
cares 10:22
carry 17:2 45:11 48:13
carrying 38:21
case 7:8,9 8:11 11:19 12:22 14:8, 15,17 16:23 17:5,20 18:14 20:7 22:24 23:10,13,16, 19 24:11 25:6,8,17 26:10,11,18, 21 29:24 30:3 34:24 44:23 48:16
caseload 11:7
cases 7:11,12 8:8,19,24 10:19 11:23 12:5,9,16,22 13:1,23 14:9 15:11,14 22:2,5,10 24:22 25:16 26:9,13
catching 6:6
cattle 52:16
Cavanagh 4:6 11:8 12:13 13:3 14:25 15:9,24 17:10 18:10,23,24

20:4 21:12 24:21 26:4 28:1,3,9,21 35:10 37:23 38:23 39:6,19 46:5,10,19 47:6,25 49:2, 7,15,19 52:9
Cavanagh's 49:18
chair 37:8
challenges 19:23 43:8
chance 35:5
change 12:11 37:2
changed 36:20 38:6
changing 36:24
chatted 50:16
checked 2:14
Chief 4:4 7:13,16,22 9:8 10:5,10 11:4 22:25 23:1,6 31:3,5 35:3 38:22,25 39:16,20 44:6,14 45:8, 12,15,20 47:4,7 48:22, 25 49:3,14, 16,17,22 50:14,20,24 51:10,14,25 55:3
Chief's 49:7
child 12:20, 21 54:7
children 54:2
chunk 36:6
circuits 24:3
circumstance 44:2
civil 54:7
Claim 13:24
clapped 2:6
clarifying 37:16
clarity 23:15,17,21 48:24
clear 21:5 40:15
clerks 5:9 6:17 9:3 19:20 23:25 50:8
client 14:11, 12 32:21,23, 24 33:7
clients 33:2
clock 34:6
close 9:1,9
closed 16:16
closest 4:3
colleague 3:22
colleagues 5:9 6:12 45:25 47:23
collecting 38:14
college 5:1 6:6
comfortable 23:9 24:4
comment 9:8
comments 20:23 39:21 51:7
Commercial 3:16
commissioner 18:21,25 19:18 20:1
commissioner's 17:13,14
committed 49:23
communications 43:10
community 9:23 41:19,20
compelling 52:1
complete 33:5 38:7 46:11
completely 10:14 13:12
completing 46:8
complicated 26:3 50:5 53:10
concept 5:21
conclude 42:12
conference 2:3 3:2,5,19 4:14 17:14,16 21:18 29:20
conferences 2:5
conflicting 24:23
confusing 29:18 53:12
cons 9:18
consciously 34:5
consensus 20:21 21:3
consideration 24:20 25:4
considered 12:25
consistent 24:2
constantly 41:9
constitutional 24:6
constructive 36:19
contact 37:9
context 26:22 29:4,13 42:14 52:7,23
continue 12:12
control 34:8, 12
convenience 41:22
convenient 19:9
conversation 11:3 41:22,23 44:19
conversations 42:3 43:6
convinced 21:17
Cooney 3:9
copies 19:24
correct 12:19
correcting 12:5,17
correction 12:2,25
couldn't 10:10 19:1 46:23
counsel 37:9
count 8:1 16:19
County 52:15
couple 2:10 4:24 11:25 12:10 27:15
court 2:11 7:5,7 8:19 10:11 11:13 12:3,15 13:6, 7,11,13 14:15,16 15:4,5,6,10, 13,25 16:2,8, 10,12,20,22 17:5,7,12,19 18:4,8,14,15, 20 19:2,11, 13,15 20:6 21:21 22:25 23:18 24:3,4, 8,19,23 25:1,

2,11 29:10 33:11 35:6 37:1 43:11 46:24 48:23 51:8,9 53:3
courthouses 9:23
courtroom 9:17 10:24 39:24
courts 6:18, 22 13:8 14:18,19 21:22 24:18 25:18,20 44:24 49:25
court's 12:1
cover 54:4
crazy 33:18, 19
created 35:19
credibility 10:16 13:17
criminal 36:3 54:7
criteria 23:25
critical 15:16 19:12
critically 12:23
cross 21:6
crossed 17:22
crunches 2:20
curiosities 7:6
curiosity 54:15
curious 54:14
curve 50:1
cut 37:21 53:16
cutting 38:3, 10

D

Dan 3:18,19, 20 11:10
data 10:18 11:5 44:20
date 36:11
dates 36:11
dating 21:24
day 5:15 17:2 41:20,24 48:13 53:21, 22 55:2
days 2:13 4:24 36:7
dead 41:15
deal 41:24
decide 20:7 25:6 29:5
decided 11:22
decides 45:18
decision 7:12 12:18 17:8 20:9 21:16,17 22:14,23 23:7,10,11,20 29:24
decisions 44:21
dedication 6:20
default 9:25 10:21 42:16, 18,19,21
defaults 10:18
defending 35:18
defer 47:22
defined 41:25 42:1,3,4
delayed 5:25
deliberate 7:12
delight 6:4
denied 15:4, 10
deny 20:20 28:7
depending 36:4,9 52:10
depends 44:7
deserves 15:3 20:7
designed 40:24
desk 37:3
dessert 2:19
developed 51:20
Dewitt 2:25
Dickinson 3:8
didn't 2:4 26:17 29:9,10 33:3 53:24
difference 14:23 25:7 36:4
differently 14:18,19
dinner 2:21
directly 48:16
disabilities 41:17
disability 42:17,22
disagree 9:11,14 10:15,23 27:25
disagreement 25:11
disagrees 2:17
disappointed 30:21
discretion 13:8,9,18
discussion 15:18 40:18, 19 41:21 51:21
dispute 52:7
dissent 14:17
dissents 12:1,11
distill 49:10 50:4,5,13 53:10
distinct 3:25
divorce 21:25
document 30:8
documents 18:17 30:9
doesn't 12:12 13:11 17:5 19:7 36:17 39:22 43:11
don't 5:18,20 6:13,15 7:24, 25 8:5 11:12, 14 12:11,19 13:10 16:1,14 19:8,12 21:13,25 22:13 25:8 26:5,21,23 29:1 30:2 33:2 36:24 37:20,23 39:1 40:20 41:9 43:18 45:24 46:14 47:1,5, 22 48:18 52:1 54:8,9
doors 16:16
double 44:11
doubt 10:12
dovetail 27:4
dovetails 13:21
downsides 46:11
draft 50:7,9
drafted 2:8
drafts 51:8
dramatic 4:3

draw 23:14
drive 33:18 39:22
dropped 10:19,21
Dwaihy 3:10

E

earlier 2:17 20:23 23:4
early 2:6,16, 18
ease 19:14
easier 14:14 23:21
Easy 49:3
eating 2:19
effect 4:3
effective 14:2
efficiency 41:23
effort 32:14
efforts 44:11
Elizabeth 4:6,16,21 7:3 8:6,10,15 15:23 16:6 17:23 18:9,11 19:17 20:10, 15 22:20 24:14 27:17 28:4 29:16 30:18 31:1,12 36:21 39:3 40:4 45:22 46:9,18 47:21 49:21 50:22 51:1 53:5
encourage 29:8
end 11:16 18:4 22:6 33:21 34:20 41:14,20,24 43:4
energetic 40:19
energy 31:25
enjoy 31:22 32:11
enjoyed 45:11 46:2
ensure 2:4
entire 42:18
environmental 54:2
envisioning 46:6
episode 30:4
equally 49:1
err 33:4
error 12:2,7, 16,25 13:10, 19,24
error-correcting 12:15
errors 12:5, 6,8,20
essence 54:11
event 2:11,12
events 4:8
eventually 39:17
everybody's 18:4
everyone's 5:17 6:16
evidence 13:16
excellent 42:25
exchange 45:24
excitement 54:14
excluded 41:1
exhibits 18:19
expect 26:1
expectation 18:17 25:22
expected 31:8 37:17
expecting 25:24
experience 6:21
experiential 54:18
explain 7:25 14:10 48:12 50:12
explains 7:10
extent 13:16
extremely 52:17

F

fabric 14:21
facing 43:8
fact 9:22 34:5,7 35:25 36:1 38:5
factor 22:14 53:1
factors 20:8 22:3
facts 25:8
factual 25:3 38:8
factually 25:6
fair 28:19,21
fantastic 4:24 6:11
fashion 31:21
fat 16:25
favorite 48:21,22
February 36:9
feedback 36:19
feel 9:5 11:15,16 21:5 24:4 30:3 42:13 47:21
fight 41:15
fighting 41:14
figure 5:23 22:12 33:13 40:1
figured 5:17 19:25 46:15
figuring 5:8
file 19:2,3,8 35:23 36:16 37:10
filed 30:14
filing 19:11, 14
filings 11:11 29:21
filters 29:22
final 2:15
finally 2:23, 24 3:11 27:6
finals 40:6
find 13:10,18 19:4,9 42:10 43:18 50:8,13 51:2,3,20 52:1
finding 53:2, 3
finds 16:17
fine 16:1,11
fire 46:25
firm 3:9,11
firms 3:4,5
flagged 17:12
flagging 23:24
flight 6:7
floor 45:17 46:2
flow 46:12
focus 10:17 12:5,8 14:5, 20 25:16 27:13 42:22 46:7

focused 30:13 32:23
focusing 12:3
folks 2:3 21:3
follow-up 8:17
forget 26:25 43:20,21,22
formal 13:4
format 39:17 46:4
forward 39:15 40:3 44:22
Foster 3:8
found 38:24 45:14 46:3
free 46:25
frequently 19:9 22:10
Friday 52:15
friend 3:18 43:19
friends 9:9 43:22
friendship 43:9
friendships 43:10
Friend's 30:4
front 6:23 13:14 20:21, 24 21:4 26:7
front-eye 6:23
frustrated 44:1
frustrating 35:22
frustration 43:25
full 20:7,19 21:6 33:5
fulsome 31:7
fulsomely 28:17
fun 9:9 11:3 47:13
function 42:20
Fund 3:1
fundraising 3:4
funny 30:2 51:1
future 34:15

G

Gaetan 3:22, 24,25 4:22 6:25 7:1,4,20 8:9,13,16 10:7,25 11:6, 24 13:21,25 14:23 15:1 16:4 17:3 18:12 19:17 20:2,6 21:11 22:8,22 23:5 25:13 28:13 29:17 31:2,7 35:8 37:13 38:11 45:5 47:12 48:19 51:6,12,16 54:25 55:4,5
game 9:5
gamut 54:5
gather 35:15
gave 23:3 37:19 45:17
Gee 27:23
general 11:19 49:12 54:11, 14
generally 35:12
generous 36:14
generously 52:3
Gerville-reache 3:22, 24,25 7:1,4, 20 8:9,13,16 10:7,25 11:6, 24 13:21,25 14:23 15:1 16:4 17:3 18:12 20:2,6 21:11 22:22 23:5 25:13 28:13 31:2,7 37:13 38:11 47:12 48:19 51:6,12,16 54:25 55:5
gift 50:4
give 7:14 13:8 23:16 26:17 38:7 41:14 46:2 48:11
giving 46:12, 13
goal 30:16
good 2:1 3:24 7:11 8:13 20:25 23:20 24:8 29:17 35:3 36:17 49:2,12 50:4
googling 5:23
Gosh 37:4
governs 25:15
graduated 5:1
graduating 6:6
grant 16:17 20:7,19 21:4, 6 22:13 25:18,21 27:3,8,11,13, 19,20,25 28:10 29:10, 11 36:5 52:3
granted 15:6 16:15,20 17:1,24 29:4
granting 15:7 27:12 28:18
grants 7:9,18 22:19
grateful 44:19
great 4:21 10:4 19:18 20:1 31:10, 15,16,20 32:12,25 33:1 44:18
guess 5:12 8:6 12:25
guilty 32:19
guys 32:11 41:3 44:18

H

hadn't 5:11
half 32:17
hall 5:12
hand 9:22
hand-in- 9:21
handle 25:2 53:13
happen 8:23, 24 27:1 47:10
happy 2:2 3:5 42:9
hard 5:6 19:24 21:9 32:12 48:2,9, 15 50:12
harp 14:7
hasn't 15:13 17:19 18:5 30:22
hate 40:15,16
haven't 2:14 5:15 11:12 12:21 16:12 29:12 47:23
health 10:13
hear 11:20 12:23 13:23

16:3 22:4 32:15 39:23 45:19
heard 13:15 19:23 21:23 22:25 35:5 36:10 43:7,8
hearing 36:14
hearings 39:9
helped 2:3
helpful 14:17 16:13 19:7,15 22:5,6 30:8,9 35:25 36:1 51:21,23 52:2,5,17,19, 24 53:4,17,19
helping 41:10
here's 31:16 36:17 52:14
Hey 32:25 34:4
high 11:16,17 40:6
history 38:8
Holbrook 3:1
hold 19:23
honestly 31:16 32:6
Honigman 3:8
honor 4:1
hope 38:12 44:9,10
housekeeping 2:10
Huckabee 3:18
human 42:4,8 43:13,20
hybrid 39:17
hyperlinked 19:6

I

idea 8:4
imagine 33:1 41:3,4
impact 24:17 32:3
implied 16:3
import 21:5
important 12:23 14:6,8, 10,11,13,21 16:17,23 18:5 21:7,8 22:7 24:25 25:5 33:10 35:3 43:5 49:9
improved 10:15 39:14
inability 47:3
inaudible 8:14 39:6
inclined 15:11
include 26:8, 24 38:1
included 52:24
increase 7:10 8:1
increased 39:11
incredible 6:20,21
incredibly 33:12 43:12 52:19
industrial 53:25
influence 20:8
information 18:16 28:12 32:10 52:23, 24 53:4 54:5, 19
initial 35:14 36:11
input 2:4 44:19
insights 4:19
instructs 25:15
intellect 6:20
intellectual 52:13
intense 32:15 35:2 40:25 44:9
intentional 48:3
interact 42:9,20
interaction 42:4 43:14 46:13
interconferenc e 16:16
interest 24:13
interested 15:12 27:23 29:5 30:11
interesting 5:3 25:5 40:5
interlocutory 15:3
intermediate 24:25
internalize 54:21
interplay 16:22
interpretation 24:7
intertwined 26:9,13
introduce 3:21 6:10
introduction 4:2
invisible 6:14
inviting 28:11
involved 42:22
involves 24:6,7
involving 24:11
isn't 13:19 33:7 45:19 54:13
isolation 42:6
issue 9:10 15:12 17:16, 22 21:21 25:5,6 26:18 28:11 29:3,5, 7,11,12,15 37:1 41:16 46:21 52:10, 13 53:2
issued 8:2
issues 15:19 21:5 22:17 25:10 27:7 28:16 29:14 35:15,18 37:20 38:9 50:11 52:21 53:10 54:3
itinerary 22:11
it'll 34:24
it's 4:11 7:21 8:7,12 9:25 11:18 12:7,8,17 13:10,13 14:14,15 15:1,18 16:10,21 17:7,13,16, 19,20 18:2,5 19:8,12,15 20:20 21:3,8, 13,24 22:4,5 23:2,7,13,17, 25 25:5,7 27:2,3,11

29:25 30:2,4, 6 31:19 33:4, 5 34:7,12 36:10,12 37:24 38:12 40:4,18 41:20 42:9,10 43:5, 9,10,11,12, 14,17 44:22 46:19 47:9,17 48:10 49:8,24 50:1,4 51:2 52:24 53:6 54:3
I'd 20:19 33:14,23
I'll 12:12 24:14 42:12
I'm 2:2 3:10, 21,25 4:7 6:6 7:7,13 8:21, 22 12:2 13:4, 13,17 15:20 18:22 20:18 23:2 26:19 29:8 30:21 32:7,22 36:20 39:5 41:13,15 42:14 43:4 44:9 46:2,14 47:8,9,21,22 49:5,15 50:11,15,17 52:6 53:13,14 54:20
I've 2:9 3:10 4:23 11:4,25 18:18 30:21 39:5 42:17 45:11 53:13

J

jail 12:19
job 3:1 4:11 5:2 10:3 30:22,23 32:12,25 33:1 49:13 53:21 54:13
jobs 5:2 53:22 54:4
join 3:20
joining 2:2 4:7,15,19
joking 50:17
joyous 42:10
judge 13:5, 17,20 24:4 30:24 40:5
judged 40:5
judges 13:14 15:17 40:11 44:25
jump 10:9 19:20,21 39:5 45:21
jurisprudential 14:21 17:6
jurisprudentially 12:4,9 17:16
justice 4:4, 5,6,13,16,20, 21 7:3,13,16, 22 8:6,10,15, 17,21 9:1 10:5,10,14, 15,20,21 11:2,4,8,24, 25 12:13 13:2,3,4,24 14:2,4,7,25 15:9,23,24 16:6,14 17:9, 10,23 18:2,7, 9,10,11,23,24 19:17 20:3,4, 9,10,13,15, 22,23 21:12 22:20,25 23:1,3,6,13, 24 24:14,21 26:4 27:10, 17,18 28:1,2, 3,4,5,9,21 29:16 30:15, 18,19 31:1,3, 5,6,10,12,14 32:18 34:16, 18,22,23 35:8,10 36:21 37:23 38:22, 23 39:3,6,16, 19,20 40:4,14 44:6,8,13,14, 16 45:2,6,8, 10,12,14,15, 16,20,21,22, 23 46:5,9,10, 18,19 47:4,6, 7,8,21,25 48:22,25 49:2,3,5,6,7, 14,15,17,18, 19,21,23 50:20,22,24 51:1,10,14,25 52:9 53:5,20 55:3
justices 31:17 46:23

K

key 18:17
kick 25:1
kids 4:25 40:7 43:7 49:1
kind 9:14,20 17:4 32:22 34:8,15 35:1 41:13
kinds 9:21
Kitch 3:8

L

lack 23:15 26:12 37:25
landscape 38:6
Lansing 39:12,22
largely 21:2
larger 23:15
law 3:4,9 10:17 23:16
lawyer 50:2
lawyers 10:20 40:2
leader 2:8
leadership 36:25
leaked 51:8
learn 53:21, 23,24,25 54:6,13,23
learning 50:1 54:18
leave 15:4,6, 7,10 16:15,20 17:1,24 20:7 25:18,21 28:18 33:14
left 2:23 3:15 8:2 38:12 47:13
legal 38:9
legalese 50:9
lens 53:18
letting 24:5
let's 16:19 18:5 51:11,14
level 6:24 49:9 52:13
levels 13:6
life 41:19 42:8,18
lig 21:25
ligging 21:23 22:1
lighter 17:4
likes 50:11
likewise 24:19
limited 52:20
listen 45:24

literally 8:10 36:15 37:8 41:14
litigant 24:16
litigants 40:2,11
litigators 32:1
live 42:6 45:17,23
lives 12:24 41:25 42:1,11
load 7:8,9
lone 41:13
long 26:3 48:2
longer 5:18
looked 15:13, 14,17 16:9,12 17:20 18:5 27:7 30:9
lose 32:25 48:17
lost 43:20
lot 2:13 5:22 9:9 21:2 24:22 30:2 31:8 32:19 36:23 39:25 40:1 44:17,20 49:10 50:22 52:10
lots 10:18 11:5 29:21
love 8:23 44:25 48:25 49:18 53:20 54:12
lower 14:18, 19 21:22 24:18 53:3

M

made 5:3 6:1 43:3
main 2:11,25
majority 12:7 27:22
make 3:2 6:7, 9,22 14:1 17:7 18:15 23:9,21 25:7 29:2,23 31:18 32:20,21,24 33:19 35:4 39:22 40:2 41:21 42:24 44:21
makes 10:3 21:9 25:10 35:2,14,19
making 22:24 33:4 44:11 49:23
MAPUS 19:4
March 38:24
Markman 9:1 14:7
married 21:25
Mary 2:6,8 7:16,22 10:5, 10 11:4 23:1, 6 31:5 38:22 39:16,20 44:6,14 45:8, 12,15,20 47:4,7 48:25 49:3,14,17 50:20,24 51:10,14,25 55:3
mastered 50:15
matter 16:7 17:6 18:3 33:6 43:6,11
matters 27:5 43:15 52:16
MATTHEW 2:1
Mccormack 4:4 7:13,16,22 10:5,10 11:4 22:25 23:1,6 31:3,5 38:22 39:16,20 44:6,14 45:8, 12,15,20 47:4,7 48:22, 25 49:3,14,17 50:20,24 51:10,14,25 55:3
Mccormack's 20:23
Mckinney 3:10
MCR 25:14
meaning 42:10
means 8:7 37:19
meant 42:6
medium 40:23
meet 5:11
meeting 4:23
Megan 4:6 11:8 12:13 13:3 14:25 15:9,24 17:10 18:10,24 20:4 21:12 24:21 26:4 28:1,3, 21 35:10 37:23 38:23 39:6,19 46:5, 10,19 47:6,25 49:2,7,15,19 52:9
Memorial 3:1
memory 30:12
memos 5:10
mentioned 39:7
mentor 48:8
mere 37:18 38:5
merits 11:19 16:10 18:3 25:17,20 26:8,12 27:11,13,23 28:7,8 29:3
met 4:25 6:1
mic 7:17
Michigan 14:6,13
middle 16:25
mind 2:24
mine 23:23
minuses 46:22
minute 44:2,3
minutes 2:16 33:15,20,22 34:1 38:12 39:13,23 47:13
misnomer 26:1
mispronounced 3:10
missed 29:7 44:16
Missouri 6:6
MOA 15:7 16:2,17,24 20:8,18 21:24 22:12 27:2,5, 20 28:23 29:10,12 35:22 36:5 38:5
MOAS 7:18 20:2 21:7 27:10,11,12, 22
mock 40:6
moderate 3:23
mom 50:6
moment's 46:17
months 29:25 30:1
morning 2:1 3:23,24 4:2 52:16
move 34:15 53:11

N

names 5:10, 14,21 6:3 30:3
narrow 22:15
national 40:1,6
natural 46:16
naturally 51:4 54:13
nature 5:17
Nauts 3:9
navigate 10:19 41:5,6, 10 45:2
necessarily 6:15 13:12,19 16:21 39:8 47:2
necessity 46:22
NELSON 2:1
news 7:22 51:7
nice 16:25 34:19
night 35:24 50:17
nobody's 17:25
Norcross 3:22
normal 27:3
notepads 3:17
notes 2:10
noticed 43:25 51:17
notion 30:24
notwithstanding 24:10
November 11:15
nuclear 54:1
number 11:10, 19 27:2 35:16
numbers 11:10,15,16, 21

O

objections 18:1
occasionally 28:7
October 36:9
offer 36:18
offering 35:25
office 17:13, 14
officers 18:13
offices 19:1
one's 54:13
onion 27:15
online 5:25 19:15 20:25
open 36:14, 15,16 37:10 46:24 51:18
opening 2:8
opinion 11:20 14:24 22:15 23:14 24:2,16 50:7 53:3
opinions 8:2, 3 9:4,20 11:17 12:16 24:1,24 48:23 49:25
opportunity 5:11 6:19 7:6 13:16 22:4 23:16 26:7 27:2,6,8 28:10 29:2 42:2 44:24 45:25 53:23 54:4,5,9,17
opposing 35:1 36:7
oral 8:23 10:2 14:8 22:9,17 27:5 31:23 38:17 39:8 46:3 47:17,25
order 12:2 22:15 26:19 28:11 30:10 35:22 36:5 37:20 38:5
ordered 7:18
orders 12:1
organization 5:6,8
organizationally 5:19
organizations 52:6
organize 5:19
organized 6:8
organizers 6:5
original 26:24
overwhelming 27:22

P

packaged 18:18
pandemic 5:1 19:1,22
pandemic-related 11:11
panel 2:15, 16,19 3:23 4:1 31:4 54:12
panelists 2:20
panels 24:24 25:2
paper 19:8 36:17
parents 43:7
part 4:11 5:7 11:18 15:16 18:1 26:25 27:21 28:6 29:18 35:7,14 54:9
participate 6:9
participation 39:11,13
parties 13:15 15:5 25:16,19 31:8 52:22 53:2,6,17
party 16:16 53:7
party's 53:11
pass 35:24
passed 46:17
passing 2:24
passion 31:25
past 4:23 30:9
paste 37:21 53:16
pasting 38:3, 10
peak 24:13
peeled 27:15
penalized 34:13
people 5:14, 20 6:13,21 9:2,16,17,22, 23 10:15,19, 20 18:1,18,19 19:25 20:17, 21,24 22:7 23:22 35:4 36:23 39:21 40:17,20,21, 22,24 41:17, 25 42:2,6,7, 20,22,25 43:14,21,22, 23,24 44:23, 25 45:1

people's 5:23 10:13 12:24
perceived 12:6,8
perfect 7:5
perfectly 16:11 33:16
period 35:17
person 3:5 5:13 8:25 9:11,12,19 10:1,11,23 20:25 32:7 38:21,24 40:8,11 42:19,21,23, 24 43:1,2 44:3,5,24 46:7 47:2 50:11
personal 9:14
perspective 4:20 13:20 14:5 31:17 32:6 41:12 44:9
pertains 9:20
phenomenal 3:1
Phil 2:23
physical 19:3
picking 26:19
picture 14:20 38:8 52:23 53:9
pictures 2:13
piece 5:22
piggyback 24:15
pilots 40:1
pitch 16:19, 25
place 10:14
plant 54:1
platform 41:5
platforms 10:16 44:22
platinum 3:7, 13
played 52:14
pleasure 4:1
plenary 2:7, 11 4:1
plug 35:11
Plunkett 3:9
pluses 46:22
podium 40:10
point 12:12 23:8 29:2,6 43:18 48:10, 13 51:24
pointed 12:10 36:3
points 46:14
popular 4:8
position 18:2 42:16,17,18
positive 21:1
possibly 31:19 54:18
power 54:1
practical 16:7 29:18
practice 3:12 7:5 36:13,18 37:6 51:18
practitioner 6:14 46:6
practitioners 21:10
pre-dated 20:11
preemptory 15:24
prefer 28:14, 19
preference 18:16 25:22
preparation 22:16
prepare 32:13
present 4:1 18:14 32:5
presented 31:25
preservation 52:21
pretty 35:2 40:9,25 44:9
primarily 32:11
priority 35:6
prison 12:19
privilege 4:23 6:23
problem 18:21 34:17 46:21
problems 10:20 45:2 53:3
procedural 26:14 38:8
proceeding 36:15
proceedings 32:18 39:10
process 8:11 12:21 15:16 21:8 29:18 31:23 36:25 37:7 39:14 41:6,11 54:24
processing 53:25
product 40:22 41:2
profession 10:16 43:15, 16
profound 6:17
promise 38:15 54:20
proper 5:16
properly 6:10
prose 51:19, 21
protect 10:12
protective 54:2
proud 32:2,3, 4
provide 18:19 23:17 28:12 31:9 51:22
providing 18:15
publication 24:5
publish 24:6
published 14:15 21:17 23:7,10
pull 30:10
purpose 42:10
purposes 32:16 40:25
put 2:3 15:22 26:22 29:4,13 32:13,14 35:15 52:7,22
puts 35:1

Q

quality 32:4
question 7:14 9:15,20 10:8 18:13,25 19:18 20:1 24:7 25:23 26:14 27:23 29:17 31:3,6, 11,15,20 32:7,16 33:23,25 34:3,10 45:4, 5,6,18,19 46:7,8,15 48:6,9,15,18 51:7,11 52:12 54:10
questioning 38:21 45:7 47:8
questions 4:10,18 27:16,21

32:8,19 34:20 35:9 38:14,16 45:16,24 46:1 47:10,14 48:5,15 51:13
quick 33:9 38:17

R

ramped 7:9
rarely 48:1
rates 10:21
read 28:25 50:6 51:3 52:2 53:11 54:21
reading 30:20 53:14
ready 46:2
real 38:17 52:15
reality 47:1
realize 5:18 6:13 9:18 32:16 41:12, 21
reargue 29:12
reason 7:23, 25 26:10 32:10 41:16 42:13,23 43:14 49:22 53:20
reasonable 33:16
reasons 4:7 28:18
rebuttal 10:6 12:14 13:2 33:15,21,22
received 3:6
recent 35:21 51:7
recognized 17:15,17
recommend 30:23
record 3:3,6 18:17 19:8,12 33:5 35:15,18 52:20
records 19:7, 23
refer 25:25
refining 15:18 21:20
reflections 4:18
reflects 18:7
refocus 44:11
refreshing 30:12
regard 2:15
regulate 34:9
regulations 54:2
relate 42:8
relationships 42:1
relief 15:2, 22 17:4
reluctant 13:18
remain 6:12 27:21
remand 15:5, 25 16:8,15,20 17:1,24
remanding 17:7
remarkably 5:4 40:9
remember 15:21 26:15 30:2 39:3 48:8
remembered 2:9
remind 36:22
remote 39:24 44:21
remotely 39:10
removed 43:24
removing 43:13
repeat 26:23
reputable 51:22
request 15:2 33:16
requested 28:16 31:3
requires 12:17
reread 30:12
research 51:23
resolving 12:8
resorts 12:3
respect 18:8 38:19 51:18
responding 35:25
response 21:19 26:24 28:24 38:4
rest 20:14
restatement 37:18
result 2:21 34:24,25
results 24:11
reverse 15:25
review 17:11 22:23 29:20
reviewing 23:25 53:1
rewriting 50:8
Richard 4:5 8:21 11:2 31:10,14 34:16,18,23 40:14 44:8 49:4,5 53:20
rights 42:17, 22
risk 12:22 51:9
rule 10:17 24:5,10 26:17 36:3,19,24 37:4
rules 25:14 35:11,12 37:2
run 5:12

S

sake 4:2
satisfaction 28:14
satisfy 7:6
save 33:22
SCAO 5:14 6:18,21
scenes 6:15
schedule 22:12
scholarly 51:20,22
scholarships 3:3
school 12:2 40:6
screen 40:10, 12
scrolling 3:14
secret 21:13
section 3:12 36:25 37:8
sections 52:11,18
seeking 22:22
segued 36:22
send 16:11 17:20
sending 39:11,12
sense 25:10 35:14,19

39:22 47:22
sentence 50:18
sequential 38:20 45:7,9
sequentially 48:21
serve 22:7
session 5:5 11:9 44:15
set 41:2
severe 41:17
share 4:18
sharing 5:4
she's 49:16
shorter 35:17
shortsighted 43:13
shot 23:22
shouldn't 26:10 34:13
showing 23:19
side 21:1 33:4 35:1 36:7 43:20 49:24
sighted 40:24
significance 17:6 22:18 26:11,12
significant 12:4,10,23 17:16,22 27:20 29:7 43:15 53:2
significantly 10:21
simple 41:20
simpler 50:14
simplifying 53:6
simply 42:12 43:4
simultaneously 35:23
single 52:3
sit 5:20 43:16
sitting 12:19 36:2 37:3 38:25
situation 26:6 33:18 43:23 44:1
situations 25:3
size 16:18
smart 44:21
society 42:20 44:12
solution 34:17
somebody's 12:20
something's 37:11
sort 5:8,12, 22 6:14 11:12,20 16:3,9 17:11, 17,21 19:19 21:8,20 24:24 25:1 26:14, 17,22 36:6 38:6 46:17, 24,25 48:7,14 50:2,14 51:4 52:12,16 53:8,10
sounds 19:5 28:14 44:18
source 51:22
speak 39:2, 12,22
Speaker 3:9
specifically 3:7 15:5,8 30:11
spirit 8:23 31:25
split 24:3
sponsor 2:25
sponsors 3:7, 13
staff 5:13
stage 17:11, 18 21:18 38:7
staggered 36:1
stake 10:17
stand 3:18
standalone 25:24
standard 43:1
standpoint 28:13 29:19
start 2:4,16 4:3,17 7:13 8:17 11:5 14:2 18:23 50:18
started 5:2,5 38:13 39:4
starting 23:8 48:21
state 3:12 12:4 14:6,13, 21,22
statement 37:15,17
statute 24:7, 12
stay 39:15
steadfast 42:13
step 20:4
step-son's 6:5
stop 47:17,20
straight 24:23
strategies 22:24
strategy 23:19
stream 2:12
stripping 50:9
stronger 23:8 29:15
strongest 48:10
structured 35:12
struggling 43:8 50:18
stuck 46:14 50:2
stuff 11:21 50:11
stupid 37:5
style 48:24 49:8 51:3
subject 37:14
submitted 54:22
substance 26:6 29:3
substantive 40:13
suggest 25:19 30:16
summarized 28:5
sun 15:22
super 18:5 53:17
supplement 25:25 26:2
supplemental 21:20 25:15, 21 26:16 27:24 28:17, 24 30:16,20 37:15,18 38:2
support 3:6
supporter 3:19
supporting 3:2 52:25
Supreme 2:11 7:5 13:6,11 33:11 51:8
Surety 3:16

surmise 22:18
Swift 3:8
switch 47:13
system 19:5

T

table 3:17 20:17 43:17
takes 49:10
taking 8:19, 22 12:8 14:16 17:5 55:1
talk 6:19 7:7 9:2 55:5
talking 11:5, 9 21:14 37:14
Tanoury 3:9
tax 50:11
technical 18:13
technology 39:25
telling 7:19 23:17
tend 48:17
tendency 46:16
tension 43:25
term 8:2 11:16 26:15 36:5,10
terms 7:9 18:17 27:14 50:14
terrible 40:12
thanked 2:25
that's 2:5 5:3 6:25 7:20 8:23 10:3 12:11 13:9,18 14:17,19 15:17 16:1,3, 9 18:21 19:7 20:1,22 21:9 23:3,23 24:12,20,25 25:4 27:19 28:18 29:17 31:10,15 34:2,13,24 37:10 39:3 40:19 41:6, 10,15 42:5 43:9 44:8 48:1 49:9 50:5,12 51:1 53:3,17 54:15
theoretically 52:13
there's 2:17 6:14 7:23,25 10:8,12 16:16,25 17:25 24:11, 22 27:15,20 29:21 30:22 32:1,18 37:1, 7,15,17 40:1 44:20 46:16 47:2,5 54:3, 7,8
they're 6:18 21:8 26:9 42:1,3,4 44:25 45:1 52:20
they've 3:13 51:17
thing 20:25 27:4 29:23 31:16 33:1,9, 17,18 46:17 48:7 50:16 52:16 54:20
things 5:5,19 6:13 9:12,21 12:4 19:24 21:15 24:15 33:11 35:16, 25 43:6 47:16,19 50:13 52:20 53:15,18 54:6
Thomas 49:6
thought 46:6
thoughts 8:4 11:1,6 21:11
three-two 16:19
threshold 17:22 21:6
tie 53:15
ties 53:15
time 6:7 22:9 28:22 31:8,18 32:14,17,20 34:7,9,11 35:13,17 36:6 47:9 49:11 55:1
times 27:2 30:2 52:11
timing 6:8
Tips 7:5
titles 5:23
today 2:15
tonight 6:6
topic 7:7 9:9 13:22
total 7:9
totally 24:2 39:4
touch 19:20 28:18 37:1 38:17,18 54:8
tour 5:16
traditional 46:25
traditions 38:20
translates 47:2
trial 13:5,7, 8,12,14,20 40:6
trick 31:3,6
true 7:21 23:7 26:17
turn 11:21 52:5
Turning 20:2
turns 7:15
types 12:22, 24

U

ugh 46:16
ultimate 2:21
unanswered 27:21
unclear 37:4
uncomfortable 42:23
understand 40:20 41:18 42:13 54:23
understanding 51:23
unfair 33:12
unpublished 12:5 14:16 22:23 23:11, 14 24:1,10,12

V

valuable 54:24
verge 39:25
versus 9:19
vibrant 40:18
view 6:23 10:9 16:5 51:24
views 23:23 44:17
virtual 39:10
visual 40:23 47:25 48:4
voice 41:13
vote 25:9
votes 16:18 20:17

W

wait 39:1
wanted 3:15, 16 6:9 38:15 45:19 47:13
wanting 18:14
Warner 3:22
wasn't 24:8 40:12 45:4
watch 32:17 34:6
wave 11:12
Wayne 52:15
ways 29:22
weakness 48:11,16
week 29:20
weekend 40:6
Welch 4:6,13, 16,21 7:3 8:6,10,15 15:23 16:6 17:23 18:9,11 19:17 20:9, 10,15 22:20 24:14 27:17 28:4 29:16 30:18 31:1,12 36:21 39:3 40:4 45:22 46:9,18 47:21 49:21 50:22 51:1 53:5
welcomed 38:16
welfare 54:7
well- 51:19
weren't 35:24 40:7
we'll 4:3 6:19 16:11 27:19 28:10, 11 30:3 38:15 39:17,20 40:17 48:21 51:16
we're 4:9,16 8:7 9:5,9 11:20,21 15:12,14 18:15 20:3 21:18,24 22:22 23:9,25 24:17 27:10, 11 29:5,23,24 30:11,13 37:14 42:9 44:19 48:15 50:7,8
we've 8:2 27:1,15 29:4, 7 30:8 38:14 44:20 51:17
what's 7:6 37:16
when's 38:25
who's 5:8 48:22
wide 36:14 51:17
win 32:25 48:12
wise 11:21
wit 48:24
witnesses 13:17
wondering 4:17 7:8 18:22
word 37:25
work 5:4,20 6:1,15,18,21, 22,24 9:3 17:21 24:24 32:2,12,13 36:18 40:2 42:2 43:20
worked 5:24 40:9
working 5:17 7:17 36:13 37:3,11 50:7
works 18:20 25:12 29:19 36:25 37:5 53:25
world 52:15
worst 47:16, 19
worthwhile 2:22
wouldn't 26:6,13 52:8
Wright 3:8
write 30:16, 24 50:3
writer 48:22
writing 9:4 37:25 49:8,18 50:2
wrong 23:11, 18
wrote 51:17

Y

Yates 40:5
year 2:7 3:4 30:1
years 3:2 11:11
yesterday 2:25 21:14,24 22:8 36:2 44:16
Young 47:16
you'd 28:15
you're 2:12, 19 5:7 6:13 7:16,18,19 14:11,16 20:5,13 24:8, 9 25:24 30:5, 7 31:19,20,23 33:21 34:8,11 37:3,4 40:24 41:7,8 43:8, 22,24 44:3 46:12 48:6,14 50:2 52:4 53:7,12
you've 7:11 8:13 14:17 29:11 31:12 46:15

Z

Zahra 4:5 11:24,25 13:2,4,24 14:2,4 16:14 17:9 18:2,7 20:3,13 23:3, 13,24 27:10, 18 28:2,5 30:15,19 34:16,22 35:8 44:13 45:6, 10,14,16,21, 23 49:6
Zausmer 3:11
Zoom 4:25 5:2,3,21 6:2 9:19,24 38:19,20 40:15,22 41:4 42:14,25 43:17 44:10 46:23

Tab C

Hear Ye, Hear Ye:

Remote Oral Arguments in the Court of Appeals

May 13, 2022

MS. BARBARA GOLDMAN: Good afternoon and thank you all for staying.

There's an old story that a prophet learned that a great flood was coming and he told the king and the king summoned his ministers and one minister said, "Well, let's fast and pray and maybe the gods will change their mind." Another minister says, "Let's go out and enjoy ourselves; it's our last day." And the third minister said, "Let's gather all the wise people and learn how to live under water."

So what the Court of Appeals has been doing for the last two years has been learning to live under water. And if we can say that there's a silver lining to the pandemic cloud, it's been the discovery that we can have oral arguments via Zoom.

Our panel today, in alphabetical order is: Scott Bassett, who many of you know as famous for being able to practice law in Michigan even though he lives in Florida, and who writes our "Tech Tips" column for the Appellate Practice Journal from time to time.

Judge Amy Ronayne Krause, who's been with Court of Appeals since 2012 and previously was a judge in district court in Lansing.

Vivek Sankaran is on the faculty of the University of Michigan Law School and he's the director of

the Child Welfare Appellate Clinic and another clinical program.

Beth Wittmann, who's in the audience as our question wrangler from Kitch.

Jessica Zimbelman has been with the State Appellate Defender's Office for the last 10 years and is a managing attorney there.

And finally, of course, we all know Jerry Zimmer, the Chief Clerk of the Court of Appeals.

Now, because it's after lunch and it's the last day, we're going to try to keep you on your toes so we're going to have some things where the audience will interact with the panel. And Scott has provided us with a number of tech tips, which we're going to intersperse with the panel comments.

So Scott, if you'd like to take away the audience polling?

MR. SCOTT BASSETT: Hopefully you've all downloaded the app and installed it on your phone or your tablet or even your computer. And if we could switch to the first question in the poll up on the screen

So the first question is going to be, "How many remote oral arguments have you participated in?" Let's go ahead and answer that. We can see the real time results up there. So obviously, a lot of veterans of remote oral argument. Does that surprise anybody? Probably not, right?

Question two: Is your appellate practice exclusively as appointed counsel, retained counsel, predominantly appointed, or predominantly retained? Okay. That tells us a little bit about who we all are and what we do.

MS. BARBARA GOLDMAN: Our first presentation will be from Jerry Zimmer. I would be particularly interested in what we might call the mechanics of the Zoom arguments from the court's side. We heard quite a bit about it from the practitioner's side yesterday but let's see what the court has to say.

MR. JERRY ZIMMER: Good afternoon. What Barbara said, I think, struck with me - the idea that we're doing remote arguments so easily now, why did it take so long and why did it take a pandemic to make

that happen? It really was never part of the discussion that I was involved in, back before the pandemic. Like, "Let's start trying to do remote;" we just never did. We had a couple of stray arguments that we did by phone because the pro per was out of state or something and we would set a conference phone up on the podium and have them talk that way. But before that, before the pandemic, we didn't do any of it; we didn't even think about it, really. And that's kind of puzzling now why we didn't.

But especially being thrown into it and having to come up with a solution right away and how do we do it. I think Zoom had been out there but nobody knew that name, obviously, before March of 2020. And so we learned on the fly and we kind of pressed different people into roles that they had never been in before. Our assistant clerk, Sean Soard, had just started with the clerk's office and he kind of was thrown in to helping us figure this out. We also have Mike Wilcott who, I think, a lot of you had talked to on our tech sessions. He did a lot of that, too. And it's just quickly became so easy to do.

We did have to throw a lot of ad hoc practices in place. You all probably got my emails that were

coming directly from me to give you your Zoom links. And you know, that's something we really never thought about -- we just didn't have a way to do it. And we needed to get the links out and so I would just send them.

Beyond that we had to train hosts to host the arguments. Sean and Mike were the first ones; they were hosting. Our docket clerks now do all the hosting; that's part of their job. You know, when you're on panel one, well one day of that panel we have one docket clerk who's hosting it. They're docketing while they're watching on TV, they're watching the argument. And then when they need to bring people in, they'll stop typing and move the party into the panel.

But there have been a lot of things like that. I think now that we've moved past that fully remote setting, we – well, early on, like early 2021 – we convened a workgroup of judges to study once we do get back to the courtroom should we keep Zoom as an option, remote hearings, as an option? And I think that we were already to the point that it's got to be; it works so well for so many reasons. But then the next question is outfitting the courtrooms. We took time to find a vendor

that put in a very nice system for us last fall in all of our courtrooms. If you've been there we have a big screen in one corner of the bench and then each of the judges have a small monitor in front of them where anybody who is arguing remotely, they can be seen on that big screen or on the monitors.

The courtrooms are outfitted with cameras, one camera on each judge and one on the podium. So I think it does provide a very seamless experience. We moved from a fully in-person argument to the next case that gets called the judge will just say, "Oh, this person's on remote," and that person will appear on TV. The audio is seamless. It's just been a very smooth transition to that. Behind the scenes, I guess there were a lot of struggles with how to do it; learning the technology and who to be responsible for the different aspects of that. But our IS department, our judges, our clerk staff have all been great.

In a nutshell some Suggestions, I guess now that we're in the courtroom, we're not fully remote anymore. I had a couple things come up from the breakouts. One person was telling me that when we had a judge who was remote this month and so as she was at the podium, she was saying that

she felt like she had to keep turning to the TV over here to talk to the judge and I was saying, well that judge is actually watching you this way from the camera up here. So if you're turning to look at the TV you're not actually looking at that judge. So it is something, I think, for everybody to get used to.

The other thing, I've heard a couple of things, maybe how to get in touch if you're having a technical problem, we do have a Zoom help email address and a Zoom help phone number. And I think one of the things I learned here, we don't have that as prominently displayed as we ought to and so I think we're going to add that to our website and on our emails that do provide links, we'll include that information. But in a nutshell, that's all I've got.

MS. BARBARA GOLDMAN: Thank you. We're going to have a little diversion. Scott is going to share a total of 10 tips; not all of them to do with oral argument. Scott, take it away for the first few.

MR. SCOTT BASSETT: Sure. I want to first say that I want to thank my friends - Jason Killips, Stuart Friedman, and Saraphoena Koffron - for giving me some of these suggestions that ended up in these tech tips. They aren't exclusively my idea; it was a group effort.

The first tip has to do with - since we're

dealing with Zoom and we're dealing with both audio and video - you can be deficient or superb in either area. Deficient seems to be the default though if you're using the microphone built into your laptop or even the one built into your webcam if you have one sitting up at the top of your monitor. The microphones built into either one, webcams or laptops, are not very good. Sometimes if you're typing, you can hear the pounding coming through. So my recommendation is to use a good microphone or an actual full headset microphone, which has the advantage of keeping the microphone a fixed distance from your mouth, which is important for audio quality. It also makes you look like a nerd, which is I guess, the downside. I've watched a few oral arguments.

HONORABLE AMY RONAYNE KRAUSE: [Inaudible] for this group.

MR. SCOTT BASSETT: We're already most of the way there, aren't we? But I've watched a few oral arguments, in both the Court of Appeals and the Supreme Court, where the lawyers, and in some cases, the judges have been wearing headsets, so I guess it's okay; not a violation of protocol too much. And you can go with wireless. Jason Killips mentioned that he really likes my suggestion of the Shokz Opencomm headset. It's a wireless Bluetooth headset that uses bone conduction technology; it doesn't actually go in

your ear. The vibrations are on your cheek and they get to your ear canal that way. And that's a good choice, not terribly expensive, about $160. But if you want to go cheaper and have a wired headset, the Sennheiser SC60 is what I actually use and it's only $42 if you can find it on Amazon. Or if you want to go really fancy and have like a broadcast quality microphone, the one that I typically do use for my oral arguments is a Blue Yeti. They're about $130 but it's a big think so I have it on an arm suspended just below picture level so that the judges can't see that I'm speaking into this giant microphone; it's about seven inches long. But it makes your audio clear and crisp. I've had a few arguments where opposing counsel was hard to hear because they were sitting back a ways from their laptop and were relying on their laptop mic to pick up the audio and it just didn't work very well.

The other would be make sure you have a better webcam and lighting. The truth is that the webcams built into your laptops are not very good and if you're sitting behind a window, so that you're backlit basically, you're going to look like this gentleman; basically just a shadow. And that's not all that helpful either. Any kind of light you put in front of you is going to be good; sitting in front of a window might be good. But these little ring lights that sometimes go around your webcam - and you can

buy them on Amazon for $10, $15, $20, $25 - and it can make a big difference in the quality of your presentation.

MS. BARBARA GOLDMAN: Incidentally, all of these links are in the materials that are integrated with your app.

For our next comment, I'd like to hear from Judge Krause and, specifically, about the judge's view of the difference between in person and remote arguments. Are there any advantages besides the obvious that we've already discussed to Zoom arguments?

HONORABLE AMY RONAYNE KRAUSE: That's a very good question.

I would say this about Zoom argument. I think that it certainly works, it is a very helpful tool. I think it's going to be here pretty much forever and I think that the only disadvantage I find with a Zoom argument is there are times that I want to ask a question whereas so if John and I are -- we're he's arguing, he knows I want to ask a question because he

can see my face better but he's -- when he's on Zoom, he's trying to see six different faces because he's got lawyers and judges and but he'll know right away. He'll look at me, "Oh, you have a question, Judge Ronayne Krause?" I mean, he knows because he can see me. So that is the disadvantage.

I love oral argument; I love listening to the lawyers. I really appreciate having some great colloquies where it doesn't feel like I'm asking questions; it's more like I'm having a conversation about that area of the law. For me, that's a great feeling.

I do think that's more effective live and in person. However, I think the top priority has to be safety and I think we want to make sure that if you are not feeling well, please don't try to come in; just don't. I mean, it's not a good idea because you don't know what it is. Don't. Don't. Don't come in. I don't want to see you, I'm sorry. And you know, and similarly, I am not coming in if I don't feel well. I mean, I'll call the chief judge.

She really understands that and for her, safety is the most important thing, as well. So I think if you see judges that are not live in front of you and they're on the Zoom, it's because they're doing it for your safety; for your good. Or for their safety, depending on what the situation is.

So those are my comments. I know we went through quite a bit on Zoom. I actually said that perhaps what we should do is say, "Gosh, it's a nice day out there and we've talked a lot about Zoom. Any questions? No? Okay, let's go." But that was voted down. I only had one vote. And it's not like I'm on a panel of three anyway. So those are my thoughts and I'm certainly willing to expound on them if anyone has any questions.

MS. BARBARA GOLDMAN: Thank you very much, Judge Krause. And now Scott's going to take over for another few minutes to do a polling question presentation and some more tech tips.

MR. SCOTT BASSETT: W e'll put you back to work if we could switch to question three and the link. This question asks about the most significant advantage of remote oral arguments so get out your apps and cast your votes.

MS. BARBARA GOLDMAN: We do have to appreciate

the fact that the percentages are going to be a factor of how many people are actually responding, so if not everybody's participating --

UNKNOWN MALE SPEAKER: Can you display the absolute numbers?

MS. BARBARA GOLDMAN: I don't --

MR. SCOTT BASSETT: Good question.

MS. BARBARA GOLDMAN: -- think so?

UNKNOWN MALE SPEAKER: Okay.

MR. SCOTT BASSETT: There we go. Cool. Okay. And then let's move to question four, which is which of the following is the most significant disadvantage of remote oral argument?

MS. BARBARA GOLDMAN: It looks like we do have some consensus on that one.

MR. SCOTT BASSETT: Okay.

MS. BARBARA GOLDMAN: Okay.

MR. SCOTT BASSETT: Great.

MS. BARBARA GOLDMAN: Scott is a specialist in family law, so now he's going to talk about how Zoom remote oral arguments and his area interact.

MR. SCOTT BASSETT: Most people think of access to justice issues as being either a criminal law issue or a poverty law issue but most of my

clients tend to be middle class, working class; I represent a lot of nurses, hair stylists, teachers, firefighters. And the remote oral argument has actually improved access to justice, appellate justice, for them in two ways.

One of the things it's done is reduce the overall cost of the appeal because I live in Florida so there were always travel costs from Florida to Michigan for my clients. I always explained to them that since most lawyers bill portal to portal, my travel costs - which were typically under $500 round-trip - were often less than what some of their local attorneys were charging them to drive into Detroit from Oakland County at their hourly rates. But in any event, it has saved those costs and that is helpful.

It has also improved their ability to see what's going on in the court. It used to be fairly rare - I have clients who live all over the state and it wouldn't necessarily be true that they were still living in or near where the Court of Appeals District Office is or the court where the oral argument was taking place where they had to take off work because they're working parents - so this way they were able to pull up their smartphone and be able to observe the oral argument so they'd know exactly what was going on. And it made them feel like they were much more a part of the

process because it can be hard; you're caught up in the moment during oral argument and you think you did a good job but you don't know for sure. Y ou're trying to debrief the whole thing to your client and let them know what happened and this way they've actually seen it. They were watching it live while you were doing it. That's the great thing about the links that Jerry sends out; you know, as soon as I get one, it goes right to my client. I say, "Save this, put it in your Google calendar or whatever and on the oral argument day, click on that so you'll be able to watch the whole thing as it happens." So obviously since I live in Florida, I'm a big proponent of remote oral argument but I think it has a lot of advantages, as well, even if you're practicing closer to where the oral argument takes place.

Okay, I guess I'm still up for tech tips, right?

MS. BARBARA GOLDMAN: Tech tips.

MR. SCOTT BASSETT: Now we're going to talk about the briefing part of what we do as appellate advocates. Let me get to the next one.

Don't think you always have to use whatever font your installation of Microsoft Word or WordPerfect defaults to. And don't think you have to use tired, old, difficult-to-read Times New Roman. There are

options. Obviously, we've got a 12-point minimum but feel free to go larger. We're about to be in an era, I think, of word limits instead of page limits for our briefs and people will grumble about that. On the other hand, it gives you a lot more flexibility to make your briefs more readable. Jason Killips taught me that if you're looking for a new font, anything that ends in "book" is probably a good choice. I don't do criminal work - or other kinds of regulatory work – so I don't often have cases with the AG's office on the other side, but I know that they use Century Schoolbook. It's a large font, it's easy to read, so that's a possibility. I personally use Charter, which is not a built-in font; you have to go out on the web and download it, but it is free. And anybody who is looking for advice on fonts, go to Matthew Butterick's site, "Typography for Lawyers," and by all means, if you use his site, also buy his book to support him so he can keep the website going.

But I might also add, if you use a non-system font and you're sharing documents with co-counsel or even a client to review it, embed those fonts if they're non-system fonts in the document; there is a setting in Word that allows you to do that - file options, save, embed fonts in file - and that way when they open the document, they're going to have the benefit of having all the fancy

fonts that you've installed.

Let me go through these a little faster. Formatting for iPad reading. Many of the judges read -- as you can see, Judge Ronayne Krause has her iPad and that's how she reads briefs. The Appellate Practice Section had a webinar earlier this year, and Judge Swartzle was talking about doing exactly the same thing so we need to format our briefs to mesh well with reading on a tablet like an iPad, which typically means more white space, wider margins, consider true double-spacing; not what Word erroneously calls double-spacing.

And you'll have access to these slides when we get through.

HONORABLE AMY RONAYNE KRAUSE: And also, just as an aside, also making sure that you have bookmarks. Thank you.

MR. SCOTT BASSETT: Bookmarks, yes.

HONORABLE AMY RONAYNE KRAUSE: Make sure you do that because otherwise it's really not as easy.

MR. SCOTT BASSETT: The other thing that Judge Swartzle taught us at the webinar and that webinar, by the

way, is available online if you want to watch it at the Appellate Practice Section website on the State Bar's page and all you have to do is make sure you're logged into SPMconnect, which we all know is not an easy thing to do, but you'll eventually figure that out.

And he was talking about making sure you incorporate key photos or diagrams or charts directly into your brief and if at all possible, use the colored version of them because, after all, they're using screens that can display color just fine.

And don't print and scan. We still see people do this. I can tell when I get a brief from some law offices that what they've done is they printed it out and then scanned it in instead of just using the export to PDF function. Of course, that results in not only a much larger PDF that's more difficult to file because it takes a little bit longer but it's also not full-text searchable at that point, which makes it a lot less useful for the court or for opposing counsel to read. So don't do that. Always export to PDF or print to PDF; do not print and scan.

This shows you exactly how to do that in Microsoft Word. I know some of you are still WordPerfect afficionados. My advice is get over it but in any event, this is how you do it in Word. And if you want to make your PDF's full-text searchable, make sure you do that

within Word. I use Adobe Acrobat and it's a fairly simple process to be able to do that. So if you have exhibits that you're putting into your appendix, it's always a good idea to make those full-text searchable, as well, and that'll make the appendix a lot easier for the court to go through.

MS. BARBARA GOLDMAN: And if you're a cheapie like me, there is a free program called PDF To Go that will do almost everything that Adobe does.

MR. SCOTT BASSETT: Okay, and that's it for the tech tips for the moment.

MS. BARBARA GOLDMAN: All right. Then our next panelist will be Jessica Zimbelman who is, of course, primarily an appointed public counsel.

MS. JESSICA ZIMBELMAN: So I'm in the enviable position of trying to offer a fresh take on something we've been talking about for two days with 25 minutes to go. So bear with me; I'm going to talk fast and hopefully maybe offer a new perspective. Although, if you were in my breakout yesterday morning, this might be a repeat for some of you.

From the criminal perspective, I found the beginning of the Zoom oral arguments - so spring, summer, of 2020 - really invigorating. I thought there was so much more discussion than maybe was typically happening before

that with the attorneys and the judges. I have a theory it's because we were lonely, right? And sick of our pets and our kids and our spouses or roommates. But I think that that sense of community developed through Zoom and I was grateful to the Court of Appeals for creating that technology. And I think now that we're back in person, it's kind of the same thing happening again. We're all very excited to be seeing each other in person so that those conversations are continuing and being really engaging and thorough when we have oral arguments.

The one other perspective that I offer as representing primarily people who are incarcerated, it has been really good to be able to show them their oral argument and show them us, as their attorneys, advocating for them and their constitutionally guaranteed right to appeal. I think it'd be really cool to take that one step further to have our clients join us - not physically with us - but through the Polycom Systems in the Department of Corrections to be able to watch their oral argument live. And I think that there would be technology problems with that or, I should say, the amount of technology. But I think one thing that Zoom court has done is given us all a glimpse into the lives of people we represent and the lives of people who are impacted by the criminal legal system. And I've advocated in Zoom court, not just at the

Court of Appeals, but in the Michigan Supreme Court and trial courts all over Michigan, and it's been really impactful to me, as an attorney, to meet people where they are. And that's why I think it'd be really cool for the judges to meet our clients who are incarcerated where they are, as well. And to see the people whose decisions the judges are impacting because that has been one benefit for Zoom court, in trial courts especially, for judges and us attorneys to meet our people where they are. So those are the reflections that I have for you this morning and happy to chat about that any time.

MS. BARBARA GOLDMAN: Okay, thank you. So we have another polling question.

MR. SCOTT BASSETT: Yes, this is our fifth and final polling question.

This is which technical issues present the most challenges, which is referring to Zoom. We all have technical issues in other areas that are challenging.

MS. BARBARA GOLDMAN: I think Jerry's mentioned that the court is making additional efforts to help people who are in the position of getting lost. I was viewing a Zoom argument not too long ago and that did happen. Somebody - I think it was one of the judges - actually disappeared briefly but we found him again.

MR. SCOTT BASSETT:

We need to remind judges not to use chairs that lean back or recline during oral argument because - and I won't mention their names - but there were two particular judges in some of the Zoom arguments that I've had where they kept rocking back and then all I could see was the top of their head and then they would come back and I could see their face and it was a little bit distracting.

MS. BARBARA GOLDMAN: But they didn't fall over.

MR. SCOTT BASSETT: No.

MR. JERRY ZIMMER: I was just going to add that - and I mentioned this in one of our breakouts - that we do have a technical session. If you do get a remote argument, on the bottom of that it will tell you that there's a technical session that you can join on the Monday before the first day of that month's call and it would be hosted by either Jeff, Sean, or Mike Wilcott. We've had hundreds of attorneys do that, mostly during the fully remote period, but even still, we get a few every month. And if you feel uncomfortable with what you're about to do then that would be the time to maybe check your connections and talk to somebody, make sure that it's all working well.

HONORABLE AMY RONAYNE KRAUSE: Well, and Jerry, judges can do that, too, right?

MR. JERRY ZIMMER: Yes.

HONORABLE AMY RONAYNE KRAUSE: Yes.

MR. SCOTT BASSETT: And even if you think you have this process down because you've done it dozens of times, I still do the tech session every time; just to make sure in case I changed anything in my set up. If I have a new camera, a new microphone, or a different laptop or whatever, I want to make sure it's working.

Okay, let's switch back to the PowerPoint.

MS. BARBARA GOLDMAN: Final set of tech tips.

MR. SCOTT BASSETT: Finish out the tech tips. Obviously, when you're putting together your appendix, you're starting with a lot of individual PDF files. Sometimes they're transcripts, sometimes they're, register of action, sometimes they're photographs, but the idea, of course, is to get them all into one PDF. Again, I use Acrobat; it is kind of the gold standard when working with PDFs. Not that there aren't other good programs - some that are even less expensive - that you could use. But if you use Acrobat, it's pretty simple to go to "Tools" and combine and you can just check off all of the PDFs that you want to combine into a single

PDF document to create your appendix. But Stuart Friedman, in the second APS webinar that we had, also online if you want to watch it - talked about doing this as a PDF portfolio. So if you create your appendix using a PDF portfolio and combine files, that has the advantage of actually giving you a head start on bookmarking because it will create your bookmarks if you do it from portfolio. They might still need some light editing but Stuart demonstrated, and actually, there's a video that is part of the Zoom presentation, where he goes through the steps to show you how that happens. So I would encourage you to go to the Appellate Practice Section website, go to the library area, and you will find the video for that.

Next is Bates stamping, and that's a fairly simple process, again, using Adobe Acrobat. We go to the "Tools," section, "Pages," and "Bates Numbering," and "Add Bates Numbering." In some versions, it might be somewhat different so there are so many different versions of Acrobat out there in use. But that's something that you're going to want to do.

The final tech tip is to shrink your PDFs down to manageable size. We still have a 25-megabyte limit for e-filed documents. I hope that changes at some point as storage becomes less expensive but I know that

there are always budgetary concerns. But you can do a simple "File," "Save As," "Reduced Size PDF" and that can often bring your appendix down to a manageable level. My preference is always to file a single volume appendix if I can do that if all possible. And by shrinking the PDF, it does give you the ability to maybe do that, so that's what I would recommend.

MS. BARBARA GOLDMAN: I wonder if we'll ever reach a point where the court would feel comfortable with having large PDFs stored somewhere else and accessible via link the way that we do Dropbox? I know that there are some security concerns but it would get around the file size limit.

MR. JERRY ZIMMER: I think the file size limit is coming through the e-filing system; that's what you mean, right? And the vendor sets that, ImageSoft ; we don't really have any control. It's not a matter of storage for us; it's the vendor that's there. And you know, that's a statewide system, as well as they do that nationwide with those systems in different states.

MR. SCOTT BASSETT: I am kind of curious. Do a lot of you have that issue of trying to shrink your PDFs down to meet that 25-megabyte limit for the uploads? Apparently not a common issue -- okay, some of you do.

MS. BARBARA GOLDMAN: Our final commentary will be from Vivek, whose perspective is that of child advocacy and welfare.

MR. VIVEK SANKARAN: I think I'm the last speaker before you get to go out on this beautiful day so I'm going to keep it short.

I often refer to termination of parental rights cases as sort of the afterthought cases, right? When you get your case call for oral arguments, usually they're not preserved, right? When you just skip over oral argument for these cases. You know, we often think about these cases as the most important rights that we have as individuals, right? As a father of three young children, I can't think of anything more important than my rights to my kids.

But I think the sad reality is when it comes to oral argument, particularly, and appellate advocacy in this world, we've gotten accustomed to a norm where attorneys don't show up to oral argument in termination of parental rights cases. I think in my 15 years of practicing here in Michigan, I've rarely had a contested oral argument where everyone shows up and really argues as if these cases mattered. And the reality is when I show up for my oral argument, I'm one of the few attorneys - and my students are one of the few attorneys - who've preserved oral

argument, right? So the reality is that most people file their briefs late because oral argument isn't valued in this field. And then even if they have preserved oral argument, by the time the argument arises, many, many attorneys make a choice simply not to show up.

For me, and perhaps this is bold in my field, I think it's unacceptable that attorneys don't show up to oral argument in termination of parental rights cases. If you're going to file a brief, you show up. I think we owe it to our clients who have so much on the line to at least show up and be their advocate.

And so as we talk about sort of the pandemic and Zoom court, it's less for me about convenience - although, maybe it's all tied up - but it's more about what can we do to create a world where more attorneys are actively participating in the process? When I took to kind of get ready for some of these thoughts, I reached out to a number of parents' attorneys across the state just to get a sense of what appointed attorneys get paid to do appellate advocacy in termination of parental rights cases. And the norm is, I don't know, $40, $50, $60 an hour in most counties with a pretty harsh cap at 20 to 25 hours of work, which we all know is pretty insubstantial. And so that's sort of the world that defines why so many people simply aren't showing up, right? We don't have a state appellate

defender's office in this world; they're all mainly solo practitioners doing this work on their own in various parts of the state. An attorney from the UP reached out to say for her to do an in person oral argument, she'd have to come to Lansing most often so it takes, what seven, eight hours to get there? Probably spend the day overnight there because she doesn't want to drive all the way back the same day so it's really a three-day trip for $40 an hour, which is capped, and travel time not included. So we do the math and there's huge disincentives.

So my hope is that as the court thinks about using virtual technology going forward, we think less about sort of what we want as the professionals in the system and think more about what the clients and the families in the system need, which is attorneys who will do this work and do this work at all stages, including oral argument.

And so, my hope is that we'll make it kind of a default, at least in this world, that attorneys are given every incentive to argue orally and if that means they have to invoke the right to do it on Zoom or automatically get to do it on Zoom, that's the world that I think makes the most sense. Our arguments are often short, right? They're targeted questions. If I get a 10-mintue oral argument in a termination case, that

means something's going well for my client; like we're having a real conversation about it. Usually three, four, five minutes is probably what we get. And I have found that we lost very little in terms of conversation. In fact, I have found the court as engaged, if not more engaged, when we've been on Zoom. And so, I hope it stays; I hope this isn't sort of a quick fix that we did for COVID because it certainly has benefited the families in our system.

MS. BARBARA GOLDMAN: Thank you. And I'll just ask, any or all of the panelists, to comment. It seems that it's pretty clear by now that remote oral arguments are going to be a permanent part of appellate practice from both the bench and the bar. Do you consider the net effect will be positive or negative? Anybody who would care to comment and are there any audience questions?

HONORABLE AMY RONAYNE KRAUSE: Well I'm going to say positive because I think that it's not going to be something that we do all the time; it's going to be for purposes that are legitimate and helpful. I remember the Chief Justice asked me to be on the taskforce for this whole privacy issues dealing with Zoom and coming up with ideas. And one of the things that one of the judges talked about is how hard it is for certain clients that he

has , because he's a probate court judge, to get there. They have to take a bus or they have to get some other sort of transportation because they can't drive or they get to the court and they don't have the money to park. There are certain times where I think this is going to be more helpful and I certainly think that some of the downsides, depending on what the upsides are for the other folks, the lawyers and the litigants, I think that makes a big difference.

MS. BARBARA GOLDMAN: Anyone else?

MR. SCOTT BASSETT: I think positive, too. I want to comment on some of the things that Vivek said because he and I both kind of grew up in the Child Advocacy Law Clinic at U of M Law School, first as students, and then as faculty members, so we have that kind of shared experience, although in very different generations or decades, I should say, given how old I am.

I always viewed the termination of parental rights cases as being the closest thing that Michigan has to a death penalty case and they should be treated with that kind of seriousness and given that kind of attention. And it's shocking that appellate attorneys handling these cases often have caps of less than $1,000 to handle the entire appeal, depending which county the case

is coming from. And if we have the ability to increase the level of advocacy in those cases by allowing continuing Zoom oral arguments to those grossly underpaid attorneys who are doing God's work handling these cases and protecting one of the most fundamental constitutional rights we have, then I think that we should definitely consider continuing that process. It applies to criminal cases as well, obviously, but -- this is more of a family law issue and this is the area that I know.

MS. BARBARA GOLDMAN: Anyone else?

MS. JESSICA ZIMBELMAN: For many of the same reasons expressed by Scott and Vivek and I think for the criminal defense bar and for people appealing their felony convictions, it's definitely a net positive to have this increased access.

MS. BARBARA GOLDMAN: Anyone else? We do have a thank you to Vivek for sharing and running the Parent Attorney listserv. And a plug - anybody who belongs to the Appellate Practice Section, we are in the process of revising our listserv.

I do have a question that's addressed to the court members. Basically, what does the court do if a Zoom argument is interrupted or dropped? For example, have you

requested supplemental briefing where the argument was interrupted?

HONORABLE AMY RONAYNE KRAUSE: I have not done that because we've never had a case where there was a drop to such a point where we didn't get the person back, even if it was by the phone. One way or another, we get back to the person. Do I think that supplemental briefing could be helpful if, in fact, we did lose somebody completely? Potentially, that might be the way to do it. The other way might be to - which I know we have done -- our clerk's office is amazing. Jerry's people have learned how to do all this, I just haven't had the problem. We find them and we get them back. S ometimes they're gone; sometimes a little bit like have little halos around them, which may be a good thing; I don't know. But you know, we always get them back.

MS. BARBARA GOLDMAN: Very good.

MR. JERRY ZIMMER: I recall maybe one case where that happened. I think the solution we came up with - we don't have a practice because it has only happened one or two times to my knowledge - but

we allowed --
she might have been pro per, but we allowed her to file, not really a supplemental brief, but just essentially what she would have told us in an oral argument. And we just passed that along to the panel.

MS. BARBARA GOLDMAN: Any other comments from the audience? One more? This many appellate attorneys in one room, I can imagine there aren't more questions?

This is addressed to Judge Krause: What what is considered a legitimate reason for requesting a remote argument? For example, is distance to the court a legitimate reason?

MR. SCOTT BASSETT: I hope so.

HONORABLE AMY RONAYNE KRAUSE: It certainly -- it has been. We had a case and I believe that the chief was on the case with me and it was going to be a 444-mile roundtrip or something. And we did say that that person could appear by Zoom. We normally try to go to the UP or to Traverse or to Petoskey; we try to hear cases up there but sometimes we just don't have enough cases to do that. So if there is a significant number of miles that are going to have to be traveled, what I would say is let us know right away because if that's true I think that most of us are going to be very sympathetic to that. H aving

been in the attorney general's office for six years and having to drive in the middle of a snowstorm to Berrien County and almost sliding off the road. And I called the court and said, "I'm going to be late," and Judge Schofield said, "Tell her she has to stop driving and turn back around." And I said, "No, no. They don't want us to do that because -- the AG wants us to get there; we have to get there." And he got on the phone and he said, "Amy, it's Judge Schofield. I'm ordering you to turn around." I went, "Okay." So I'm turning around.

But the truth is that we particularly when winter comes or -- one of the things that always hits me is when it's Art Fest in Grand Rapids. I love Art Fest, but you know, then the hotel rooms are like $400.

MR. SCOTT BASSETT: Can I add something to that? Because the Northern Michigan case calls are always interesting but one of the things I've noticed is from driving to Petoskey, it was always a grand chance to get together with all of my Detroit-area friends because it seemed like all of the cases --

HONORABLE AMY RONAYNE KRAUSE: Right.

MR. SCOTT BASSETT: -- may have been from

the Northern Michigan area; all the attorneys involved were from the core part of the state.

HONORABLE AMY RONAYNE KRAUSE: That's one of the reasons -- I don't think we've been doing that as often because most of the time it's an assistant attorney general who's driving from Lansing for the prosecution and so, that doesn't make sense.

MR. SCOTT BASSETT: The good thing about it though is that it was timed so that you could drive to Petoskey during peak color and it was just beautiful.

HONORABLE AMY RONAYNE KRAUSE: Sorry about that, Scott. You might miss that.

MS. BARBARA GOLDMAN: Someone yesterday asked about augmented reality but I think we're a ways away from that. I think we're closing in on our time. Are there any final comments from the panelists?

HONORABLE AMY RONAYNE KRAUSE: Are you kidding?

MS. BARBARA GOLDMAN: If not, then I will thank everyone and we'll see you in three years.

MR. PHILLIP DEROSIER: So that does conclude our formal program but I think Tim Diemer was going to wrap up and say a few words and then Matt and I will say some thank

you's so for anyone who wants to stick around for just a few more minutes, we're almost done. But thank you to our panel and to Barbara and Beth for putting together the final plenary.

MR. TIMOTHY DIEMER: Sorry about that. My name is Tim Diemer; I'm the treasurer of the foundation and I've got to correct statements. Vivek said he was the last one to speak before you get to enjoy the beautiful weather but, unfortunately, I've got a couple remarks. And secondly, and more egregiously, Scott Basset badmouthing Corel WordPerfect instead of Microsoft Word, that's unforgiveable.

I wanted to just highlight two things. One, you saw the names scrolling of all the donations and the sponsors. This has been another record-breaking fundraising event. In 2013, we fundraised to the tune of $80,000. For this event, just four times later, we're all the way up to $137,000, so huge generosity from the law firms, the lawyers, the DeWitt Holbrook Foundation. Unfortunately, the folks from Comerica couldn't be here but I appreciate, as a treasurer, all of the generosity.

There are a couple of people I get the privilege of thanking. First off, this is the first conference that I've attended where Mary Massaron did not chair the event and there were a lot of very nervous people about how it

was going to go with Mary chairing and I can say, from my experience, it was a seamless transition. And it's a lot of work. The planning for the 2025 event will probably start next month and then we'll be having Zooms every month. Every Zoom meeting has got 20, 25 people - judges, justices, law clerks, lawyers, everybody puts so much work into it - but there are two individuals who really stepped up and filled huge shoes when Mary stepped away and that's Matt Nelson and Phil DeRosier. And the Board bought the two of them some gifts, if you guys would come on up and get your gifts; your party gifts.

MR. MATTHEW NELSON: Are they gifts?

MR. TIMOTHY DIEMER: Matt, here you go.

MR. MATTHEW NELSON: Thank you.

MR. TIMOTHY DIEMER: And there are - here you go, Phil - two other people to acknowledge. That's Madelyn Lawry and Valerie Sowulewski, Shared Resources. As a past president of MBTC and I'm involved in the negligence section and with this group, Madelyn, Valerie, her staff, Tara, who I got to meet for the first time, Matt Hinkle's who's here, are unbelievably helpful. Before Matt was involved, the last six to eight weeks before this conference, my office was completely run ragged dealing with hotel staff and vendors and financial information and that is no longer the case because Madelyne and Valerie and

her staff are so helpful. They never turned down a request for help, always willing to do more and more for the foundation, which we all greatly appreciate, and Madelyne and Valerie, we've got a couple of gifts for you, too.

CHIEF JUDGE ELIZABETH L. GLEICHER: One final thank you before you go. I want to thank our security team who have been here for us. You know, before I was a judge, I didn't realize how important they are to our self-confidence wherever we go. So we love you, we thank you, we appreciated seeing you here, and we hope you enjoyed some of it. So thank you, guys.

MR. PHILLIP DEROSIER: Okay, I guess that does it. Hopefully, we'll see everyone in three years. Thank you.

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10 3:7 8:18
10-mintue 29:25
12-point 17:1
15 27:20

2

20 28:22
2011 2:22
2020 5:15 20:24
2021 6:18
25 20:17 25:23 26:24 28:22

A

ability 15:15 26:6 32:1
ABS 25:2
absolute 14:5
access 14:24 15:3 18:12 32:16
accessible 26:10
accustomed 27:18
Acrobat 20:1 24:20,23 25:16,20
action 24:18
actively 28:15
actual 9:10
ad 5:24
add 8:12 17:19 23:11, 13 25:18
additional 22:20
address 8:9
addressed 32:23
Adobe 20:1,9 25:16
advantage 9:11 13:23 25:6
advantages 11:10 16:15
advice 17:15 19:23
advocacy 27:3,17 28:20 31:14 32:2
advocate 28:11
advocated 21:25
advocates 16:21
advocating 21:14
afficionados 19:23
afternoon 2:1 4:22
afterthought 27:8
AG'S 17:10
ahead 4:7
allowing 32:2
alphabetical 2:16
amazing 33:13
Amazon 10:6 11:1
amount 21:21
Amy 2:21 9:15 11:12,17 18:14,19,22 24:1,4 30:17 33:3,6
anymore 7:22
app 3:23 4:1 11:6
Apparently 26:25
appeal 15:6 21:16 31:25
appealing 32:14
Appeals 2:11, 22 3:10 9:19 15:19 21:5 22:1
appellate 2:19 3:1,7 4:11 15:4 16:21 18:5 19:2 25:12 27:17 28:19, 25 30:13 31:23 32:20
appendix 20:3,5 24:16 25:1,4 26:3,4
applies 32:8
appointed 4:13,14 20:14 28:19
apps 13:23
area 9:2 12:13 14:22 25:13 32:9
areas 22:18
aren't 8:24 9:18 24:21 28:25
argue 29:20
argues 27:22
arguing 7:5 11:25
argument 4:9 6:12 7:10 8:18 11:19,23 12:8 14:13 15:3,20,24 16:2,11,14,16 21:14,19 22:22 23:3,15 27:10,17,19, 21,24 28:1,2, 4,8 29:4,17, 25 32:25 33:1
arguments 2:15 4:6,19, 24 5:4 6:6 9:14,18 10:8, 13 11:9,11 13:23 14:21 20:23 21:10 23:1,5 27:9 29:23 30:12 32:3
arises 28:4
arm 10:9
asks 13:22
aspects 7:17
assistant 5:17
attention 31:22
attorney 3:8 22:3 29:3 32:19
attorneys 15:11 21:1,14 22:9 23:20 27:18,24,25 28:5,7,15,18, 19 29:15,19 31:23 32:4

audience 3:3, 13,17 30:16
audio 7:13 9:1,12 10:12, 16
automatically 29:22

B

back 5:2 6:20 10:14 13:15, 20 21:6 23:3, 6,7 24:12 29:7 33:7,9, 16,20
backlit 10:20
bar 30:14 32:14
Barbara 2:1 3:20 4:16,23 8:16 11:4,15 13:16,25 14:6,8,14,17, 19 16:18 20:7,12 22:12,19 23:10 24:13 26:8 27:1 30:10 31:11 32:11,17 33:5,21
Bar's 19:2
basically 10:20,21 32:24
Bassett 2:17 3:19,22 8:20 9:17 13:20 14:7,10,16, 18,23 16:19 18:21,24 20:10 22:14, 25 23:12 24:6,14 26:22 31:12
bate 25:15
Bates 25:17, 18
bear 20:18
beautiful 27:5
beginning 20:23
belongs 32:20
bench 7:3 30:14
benefit 17:25 22:7
benefited 30:8
Beth 3:3 13:15
big 7:3,5 10:9 11:2 16:13 31:9
bill 15:9
bit 4:15,19 13:8 19:17 23:8 33:17
Blue 10:8
Bluetooth 9:24
bold 28:6
bone 9:25
book 17:7,17
bookmark 18:18,19
bookmarking 18:21 25:7
bookmarks 25:7
bottom 4:1,3 23:16
breakout 20:20
breakouts 7:23 23:14
briefing 16:20 33:1,9
briefly 22:24
briefs 17:3,5 18:5,8 28:2
bring 6:13 26:3
broadcast 10:7
budgetary 26:1
built 9:4,6 10:18
built-in 17:13
bus 31:2
Butterick's 17:15
buy 11:1 17:17

C

calendar 16:10
call 4:18 12:21 23:18 27:9
called 7:11 18:17 20:8
calls 18:11
camera 7:8 8:3 24:10
cameras 7:7
canal 10:2
can't 10:10 11:13 27:14 31:3
cap 28:22
capped 29:9
caps 31:24
care 30:15
case 7:11 24:9 27:9 29:25 31:21, 25 33:4,23
cases 9:20 17:10 27:8, 11,12,20,22 28:8,20 31:20,24 32:2,5
cast 13:24
caught 16:1
Century 17:11
chairs 23:2
challenges 22:17
challenging 22:18
change 2:6
changed 24:9
charging 15:11
Charter 17:13
charts 19:7
chat 22:11
cheaper 10:4
cheapy 20:7
check 23:24 24:24
cheek 10:1
chief 3:10 12:22,23 30:22
child 3:1 27:2 31:14
children 27:13
choice 10:2 17:8 28:5
class 15:1
clear 10:12 30:12
clerk 3:10 5:17 6:11 7:18
clerks 6:8
clerk's 5:19 33:13
click 16:11
client 16:5,9 17:21 30:1
clients 15:1, 8,17 21:17 22:5 28:10 29:14 30:25
Clinic 3:1

31:15
clinical 3:1
closer 16:16
closest 31:20
cloud 2:14
co-counsel 17:20
colloquies 12:10
color 19:10
colored 19:9
column 2:19
combine 24:24,25 25:5
comfortable 26:9
comment 23:1 30:11,16 31:13
commentary 27:1
comments 3:16 11:7 13:7
common 26:25
community 21:4
completely 33:11
computer 3:24
concerns 26:1,12
conduction 9:25
conference 5:6
connections 23:24
consensus 14:15
constitutional 32:6
constitutionally 21:15
contested 27:21
continue 17:18
continuing 21:9 32:3,7
control 26:17
convened 6:19
convenience 28:13
conversation 12:12 30:2,4
conversations 21:9
convictions 32:15
cool 14:11 21:16 22:4
corner 7:3
Corrections 21:19
cost 15:6
costs 15:7,9,13
counsel 4:13 10:13 19:19 20:14
counties 28:22
county 15:12 31:25
couple 5:4 7:22 8:7
court 2:11,21,23 3:10 4:21 9:19 15:16,19,20 19:18 20:6 21:5,22,25 22:1,8,20 26:9 28:13 29:11 30:5 31:1,4 32:24
courtroom 6:20 7:22
courtrooms 6:25 7:2,7
courts 22:2,8
court's 4:19
covid 30:7
create 25:1,4,7 28:15
creating 21:5
criminal 14:24 17:8 20:22 21:24 32:8,14
crisp 10:13
curious 26:22

D

day 2:8 3:12 6:10 13:9 16:11 23:18 27:5 29:6,8
days 20:17
dealing 9:1 30:23
death 31:21
debrief 16:4
decades 31:18
decisions 22:6
default 9:3 29:19
defaults 16:24
defender's 3:7 29:1
defense 32:14
deficient 9:2,3
defines 28:24
demonstrated 25:9
department 7:18 21:18
depend 4:2
depending 13:6 31:7,25
Detroit 15:12
developed 21:4
diagrams 19:7
didn't 5:8,10 6:3 10:16 23:10 33:7
difference 11:2,9 31:9
difficult 16:25 19:16
directly 6:1 19:8
director 2:25
disadvantage 11:22 12:6 14:13
disappeared 22:24
discovery 2:14
discussed 11:11
discussion 5:2 20:25
disincentives 29:10
display 14:4 19:10
displayed 8:11
distance 9:11
distracting 23:9
district 2:23 15:19
diversion 8:17
docket 6:8,10
docketing 6:11
document 17:22,24 25:1
documents 17:20 25:24
doesn't 9:25 12:11 29:7
don't 8:11 12:17,18,19,21 14:6 16:3,22,24 17:8,9 19:11,19

26:17 27:19 28:7,21,25 31:4 33:17, 19,24
double-spacing 18:10,11
download 17:14
downloaded 3:23
downside 9:14
downsides 31:7
dozens 24:7
drive 15:12 29:7 31:3
drop 33:7
Dropbox 26:11
dropped 32:25

E

e-file 25:24
e-filing 26:15
ear 10:1,2
earlier 12:10 18:6
early 6:18
easier 20:5
easily 4:24
easy 5:23 17:12 18:23 19:4
editing 25:9
effect 30:14
effective 12:14
effort 8:24
efforts 22:20
email 8:9
emails 5:25 8:13
embed 17:21, 23
encourage 25:12
ended 8:23
ends 17:7
engaged 30:5, 6
engaging 21:10
enjoy 2:7
entire 31:25
enviable 20:15
era 17:2
erroneously 18:10
event 15:13 19:23
eventually 19:5
everybody's 14:3
excited 21:8
exclusively 4:12 8:24
exhibits 20:2
expensive 10:3 24:22 25:25
experience 7:9 31:17
explained 15:8
export 19:14, 20
expound 13:14
expressed 32:13

F

face 12:1 23:8
faces 12:2
fact 14:1 30:5 33:10
factor 14:1
faculty 2:24 31:16
fairly 15:16 20:1 25:16
fall 7:1 23:10
families 29:15 30:8
family 14:20 32:9
famous 2:17
fancy 10:6 17:25
fast 2:6 20:18
faster 18:2
father 27:13
feel 12:11,21 15:25 17:1 23:22 26:9
feeling 12:13,17
felony 32:14
felt 8:1
FEMALE 18:18
field 28:3,6
figure 5:20 19:5
file 17:23,24 19:16 26:2,4, 12,14 28:1,9
files 24:17 25:5
final 22:15 24:13 25:22 27:1
finally 3:9
find 6:25 10:5 11:22 25:13 33:15
Finding 4:4
fine 19:10
Finish 24:14
firefighters 15:2
fix 30:7
fixed 9:11
flexibility 17:5
flood 2:4
Florida 2:18 15:6,7 16:13
fly 5:15
folks 31:8
font 16:23 17:7,11,13,20
fonts 17:15, 21,22,24 18:1
forever 11:21
format 18:7
Formatting 18:3
forward 29:12
found 20:22 22:24 30:3,5
free 17:2,14 20:8
fresh 20:16
Friedman 8:22 25:1
friends 8:21
front 7:4 10:23,24 13:4
full 9:10
full-text 19:17,25 20:4
fully 6:17 7:10,22 23:21
function 19:15
fundamental 32:5

G

gather 2:9
generations 31:17
gentleman 10:21
giant 10:11

give 6:1 13:15 26:6
giving 8:22 25:6
glimpse 21:23
gods 2:6
God's 32:4
gold 24:20
GOLDMAN 2:1 3:20 4:16 8:16 11:4,15 13:16,25 14:6,8,14,17, 19 16:18 20:7,12 22:12,19 23:10 24:13 26:8 27:1 30:10 31:11 32:11,17 33:5,21
good 2:1 4:9, 22 9:7,9 10:2,19,23,24 11:12,18 12:18 13:5 14:7 16:3 17:8 20:4 21:13 24:22 33:5,19,21
Google 16:10
Gosh 13:9
grateful 21:5
great 2:4 7:19 12:9,10, 13 14:18 16:7
grew 31:14
grossly 32:3
group 8:24 9:16
grumble 17:4
guaranteed 21:15
guess 7:15,21 9:13,21 16:17

H

hair 15:2
halos 33:18
hand 17:4
handle 31:25
handling 31:24 32:4
happen 5:1 22:22
happened 16:5 33:23,25
happening 20:25 21:7
happy 22:10
hard 10:14 16:1 30:25
harsh 28:22
hates 12:24
haven't 33:15
head 23:7 25:6
headset 9:10, 24 10:4
headsets 9:21
hear 9:8 10:14 11:7,13
heard 4:19 8:7
hearings 6:21
helpful 10:22 11:20 15:14 30:20 31:6 33:10
he'll 12:3
he's 2:25 12:1,2 14:20 31:1
hoc 5:24
HONORABLE 9:15 11:12,17 18:14,19,22 24:1,4 30:17 33:3,6
hope 25:24 29:11,18 30:6,7
host 6:6
hosted 23:19
hosting 6:7, 8,11
hosts 6:6
hour 28:21 29:8
hourly 15:12
hours 28:22 29:6
huge 29:10
hundreds 23:20
hyperlink 18:17

I

idea 4:23 8:24 12:18 20:4 24:19
ideas 30:24
impacted 21:24
impactful 22:3
impacting 22:7
important 9:12 13:2 27:12,14
improved 15:3,15
inaudible 9:15 26:16
incarcerated 21:12 22:5
incentive 29:10,20
inches 10:12
Incidentally 11:4
include 8:14
included 29:9
including 29:16
incorporate 19:7
increase 32:1
increased 32:16
individual 24:16
individuals 27:13
information 8:14
installation 16:23
installed 3:23 18:1
insubstantial 28:23
integrated 11:5
interact 3:13 14:22
interested 4:18
interrupted 32:25 33:2
intersperse 3:15
invigorating 20:24
invoke 29:21
involved 5:2
ipad 18:3,4,8
isn't 28:2 30:7
issue 14:25 26:23,25 32:9
issues 14:24 22:16,18 30:23
it'd 21:16 22:4
it's 2:14 3:11 4:1 5:22 6:23 7:13 9:21,24 10:5, 9,11 11:14,21

12:12,18 13:4,9,12 17:11 18:17, 23 19:17 20:1,3 21:7 22:2 23:25 24:11,23 26:17,18 28:7,13,14 29:8 30:12, 18,19 31:23 32:15
I'd 11:7
I'll 12:21 18:12 23:11 30:10
I'm 10:11 11:15,17 12:11,12,20 13:12,13 15:6 16:12,13,17 18:16 20:15, 18 27:4,6,24 30:18
I've 8:7,15 9:14,18 10:13 21:25 23:6 27:21

J

Jason 8:21 9:22 17:6
Jeff 23:19
Jerry 3:9 4:17,22 16:8 23:11,13 24:1,3,5 26:14 33:22
Jerry's 22:19 33:14
Jessica 3:6 20:13,15 32:12
job 6:9 16:3
John 11:24
join 21:17 23:17
Journal 2:20
judge 2:21,22 7:8,11,24 8:2,3,5 11:8 12:4,22,23 13:16 18:4,6, 24 31:1
judges 6:19 7:4,18 9:20 10:10 12:3 13:3 18:3 21:1 22:5,7, 8,23 23:2,5 24:2 30:24
judge's 11:8
justice 14:24 15:4 30:22

K

keeping 9:11
key 19:7
kids 21:3 27:15
Killips 8:21 9:22 17:6
kind 5:9,15, 18,19 10:22 21:7 24:20 26:22 28:16 29:18 31:14, 16,22
kinds 17:9
king 2:4
Kitch 3:5
knew 5:14
knowledge 33:25
Koffron 8:22
Krause 2:21 9:15 11:8,12, 17 12:5 13:17 18:4,14,19,22 24:1,4 30:17 33:3,6

L

Lansing 2:23 29:5
laptop 9:4 10:15 24:10
laptops 9:7 10:19
large 17:11 26:10
larger 17:2 19:16
late 28:2
law 2:18,25 12:13 14:20, 24,25 19:13 31:15 32:9
lawyers 9:20 12:3,8,10 15:9 17:16 31:8
lean 23:3
learn 2:9
learned 2:3 5:15 8:11 33:14
learning 2:12 7:16
legal 21:24
legitimate 30:20
let's 2:5,7,8 4:6,20 5:3 13:11 14:11 24:12
level 10:10 26:3 32:2
library 25:13
light 10:22 25:8
lighting 10:18
lights 10:25
likes 9:23
limit 25:24 26:14,24
limits 17:3
lining 2:13
link 13:21 18:17 26:11
links 6:1,4 8:13 11:5 16:8
listening 12:8
LISTSERVE 32:19,22
litigants 31:9
live 2:9,12 4:3 12:14 13:4 15:6,17 16:7,13 21:20
lives 2:18 21:23,24
living 15:18
local 15:11
logged 19:3
lonely 21:2
long 4:25 10:12 22:22
longer 19:17
lose 33:10
lost 22:21 30:4
lot 4:8 5:21, 22,24 6:16 7:15 13:10 15:2 16:14 17:5 19:18 20:5 24:16 26:23
love 12:7,8
lunch 3:11

M

made 15:25 23:1
make 4:25 10:12,17 11:2 12:16 17:5 18:22 19:3,

24,25 20:4,5 23:24 24:8,11 28:5 29:18
makes 9:13 19:18 29:23 31:9
making 18:15 19:6 22:20
MALE 14:4,9
manageable 25:23 26:3
managing 3:8
March 5:14
margins 18:9
materials 11:5
math 29:9
matter 26:17
mattered 27:23
Matthew 17:15
means 17:16 18:9 29:20 30:1
mechanics 4:18
meet 22:3,5,9 26:24
megabyte 25:23 26:24
members 31:16 32:24
mention 23:4
mentioned 9:23 22:19 23:14
mesh 18:8
mic 10:15
Michigan 2:18,25 15:7 22:1,2 27:21 31:20
microphone 9:4,10,11 10:7,11 24:10
microphone's 9:6
Microsoft 16:23 19:22
mics 11:15
middle 15:1
Mike 5:20 6:6 23:19
mind 2:6
minimum 17:1
minister 2:5, 7,8
ministers 2:5
minutes 13:18 20:17 30:3
moment 16:2 20:11
Monday 23:17
money 31:4
monitor 7:4 9:6
monitors 7:6
month 7:25 23:22
month's 23:18
morning 20:20 22:10
mouth 9:12
move 6:14 14:11
moved 6:17 7:10

N

names 23:4
nationwide 26:20
necessarily 15:18
needed 6:3
negative 30:15
nerd 9:13
net 30:14 32:15
nice 7:1 13:9
non- 17:21
non-system 17:19
norm 27:18 28:21
number 3:14 8:10 28:17
Numbering 25:17,18
numbers 14:5
nurses 15:2
nutshell 7:20 8:14

O

Oakland 15:12
observe 15:23
obvious 11:10
offer 20:16, 19 21:11
office 3:7 5:19 15:20 17:10 29:1 33:13
offices 19:13
online 19:1 25:3
open 4:1 17:24
Opencomm 9:24
operating 4:2
opposing 10:13 19:19
option 6:21
options 17:1, 23
oral 2:15 4:6,8 8:18 9:14,18 10:8 12:7 13:23 14:13,21 15:3,20,23 16:2,11,14,16 20:23 21:10, 13,19 23:3 27:9,10,17, 19,21,23,25 28:2,3,8 29:4,16,25 30:12 32:3
orally 29:20
order 2:16
outfitted 7:7
outfitting 6:25
overnight 29:6
owe 28:10

P

Pages 25:17
paid 28:19
pandemic 2:14 4:25 5:3,8 28:12
panel 2:16 3:14,15 6:9, 10,14,15 12:25 13:12
panelist 20:13
panelists 30:11
panic 2:13
Parent 32:19
parental 27:7,19 28:8, 20 31:19
parents 15:22 28:18
park 31:5
part 5:1 6:9 15:25 16:20 25:10 30:13
participate 3:21
participated 4:6
participating 14:3 28:16
parts 29:2

party 6:14
past 6:17
PDF 19:15,16, 20 20:8 24:16,20 25:1,4,5 26:2,6
PDFS 24:21,25 25:23 26:10, 23
PDF'S 19:25
penalty 31:21
people 2:9 5:16 6:13 14:2,23 17:4 19:12 21:12, 23,24 22:3,6, 9,20 28:1,24 32:14 33:14
percentages 14:1
period 23:21
permanent 30:13
person 7:10, 12,23 11:9 12:15 21:6,8 29:4 33:7,9
personally 12:7 17:12
person's 7:12
perspective 20:19,22 21:11 27:2
pets 21:2
phenomenal 12:22
phone 3:20,23 5:5,6 8:10 33:8
photographs 24:19
photos 19:7
physically 21:17
pick 10:15
picture 10:10
pink 3:4
place 5:25 15:21 16:16
plug 32:19
podium 5:6 7:8,25
point 6:22 19:18 25:25 26:9 33:7
poll 3:25 4:3
polling 3:18 13:18 22:15
Polycom 21:18
portal 15:9
portfolio 25:4,5,8
position 20:16 22:21
positive 30:15,18 31:12 32:15
possibility 17:12
Potentially 33:11
pounding 9:8
poverty 14:25
Powerpoint 24:12
practice 2:18,20 4:11 18:5 19:2 25:12 30:13 32:20 33:24
practices 5:24
practicing 16:15 27:20
practitioners 29:2
practitioner's 4:20
pray 2:6
predominantly 4:13,14
preference 26:4
present 22:16
presentation 4:16 11:3 13:18 25:10
preserved 27:10,25 28:3
pressed 5:16
pretty 11:21 24:23 28:22, 23 30:12
previously 2:22
primarily 20:14 21:12
print 19:11, 20
printed 19:13
priority 12:15
privacy 30:23
pro 5:5
probate 31:1
problem 8:9 33:15
problems 21:20
process 16:1 20:2 24:7 25:16 28:16 32:7,21
professionals 29:13
Professor 32:18
program 3:2 20:8
programs 24:22
prominently 8:11
prophet 2:3
proponent 16:14
protecting 32:5
protocol 9:21
provide 7:9 8:13
provided 3:14
public 20:14
pull 15:23
pulling 22:13
purposes 30:20
put 7:1,16 10:23 13:20 16:10
putting 20:3 24:15
puzzling 5:9

Q

quality 9:12 10:7 11:2
question 3:4, 25 4:5,11,12 6:24 11:13, 23,25 12:4 13:18,21,22 14:7,11 22:13,15 32:23
questions 12:12 13:10, 15 29:24 30:16
quick 30:7
quickly 5:23

R

rare 15:16
rarely 27:21
rates 15:13
reach 26:9
reached 28:17 29:3
read 16:25 17:12 18:3 19:19

readable 17:6
reading 18:3, 8
reads 18:5
ready 28:17
real 4:7 30:2
reality 27:16,23 28:1
reasons 6:24 32:13
recall 33:22
recline 23:3
recommend 26:7
recommendation 9:9
reduce 15:5
Reduced 26:2
refer 27:7
referring 22:17
reflections 22:10
register 24:18
regulatory 17:9
relying 10:15
remember 30:21
remind 23:2
remote 4:6,8, 24 5:3 6:18, 21 7:12,22,24 11:9 13:23 14:13,21 15:3 16:14 23:15, 21 30:12
remotely 7:5
repeat 20:20
represent 15:1 21:23
representing 21:12
requested 33:1
responding 14:2
responsible 7:17
results 4:7 19:15
retained 4:13,14
review 17:21
revising 32:21
rights 27:8, 12,14,20 28:8,20 31:20 32:6
ring 10:24
rocking 23:6
roles 5:16
Roman 16:25
Ronayne 2:21 9:15 11:12,17 12:4 18:4,14, 19,22 24:1,4 30:17 33:3,6
roommates 21:3
roundtrip 15:10
running 32:18

S

sad 27:16
safety 12:15 13:2,5,6
Sankaran 2:24 27:4
Saraphoena 8:22
save 16:9 17:23 26:2
saved 15:13
SC60 10:4
scan 19:11,20
scanned 19:14
scenes 7:14
School 2:25 31:15
Schoolbook 17:11
Scott 2:16 3:14,17,19,22 8:17,19,20 9:17 13:20 14:7,10,16, 18,20,23 16:19 18:21, 24 20:10 22:14,25 23:12 24:6,14 26:22 31:12 32:13
Scott's 13:17 14:19
screen 3:25 7:3,6
screens 19:10
scroll 4:1
seamless 7:9, 13
Sean 5:17 6:6 23:19
searchable 19:17,25 20:4
section 19:2 25:12,17 32:20
security 26:12
send 6:4
sends 16:8
Sennheiser 10:4
sense 21:4 28:18 29:23
seriousness 31:22
session 23:15,17 24:8
sessions 5:22 23:2
set 5:6 24:9, 13
sets 26:16
setting 6:18 17:22
shadow 10:21
share 8:17
shared 31:16
sharing 17:20 32:18
she'd 29:4
she's 3:4 12:23,25
shocking 31:23
Shokz 9:23
short 27:6 29:23
show 21:13,14 25:11 27:19, 23 28:5,7,9, 11
showing 28:25
shows 19:21 27:22
shrink 25:22 26:23
shrinking 26:5
sick 21:2
side 4:19,20 17:10
significant 13:22 14:12
silver 2:13
similarly 12:20
simple 20:1 24:24 25:16 26:2
simply 28:5, 24
single 24:25 26:4
site 17:16,17
sitting 9:5 10:14,19,23
situation 13:6

size 25:23 26:2,13,14
skip 27:10
slides 18:13
small 7:4
smartphone 15:23
smooth 7:14
Soard 5:17
soft 26:17
solo 29:1
solution 5:12 33:24
something's 30:1
sort 27:8 28:12,24 29:13 30:7 31:3
space 18:9
speaker 14:4, 9 18:18 27:5
speaking 10:11
specialist 14:20
specifically 11:8
spend 29:6
SPMCONNECT 19:4
spouses 21:3
spring 20:23
staff 7:18
stages 29:16
stamping 25:15
standard 24:21
start 5:3 25:6
started 5:18
starting 24:16
state 3:6 5:5 15:17 19:2 28:18,25 29:3
states 26:20
statewide 26:19
staying 2:2
stays 30:6
step 21:17
steps 25:11
stop 6:13 12:25
storage 25:25 26:18
stored 26:10
story 2:3
stray 5:4
struck 4:23
struggles 7:15
Stuart 8:21 25:1,9
students 27:24 31:15
study 6:19
stylists 15:2
suggestion 9:23
suggestions 7:21 8:23
summer 20:23
summoned 2:5
superb 9:2
supplemental 33:1,9
support 17:17
Supreme 9:19 22:1
surprise 4:9
suspended 10:9
Swartzle 18:6,25
switch 3:24 13:21 22:15 24:12
system 4:2 7:1 17:22 21:25 26:15, 19 29:14,15 30:9
systems 21:18 26:20

T

tablet 3:24 18:8
takes 16:16 19:16 29:5
taking 15:20
talk 5:7 8:2 14:20,21 16:20 20:18 23:24 28:12
talked 5:21 13:10 25:3 30:25
talking 12:25 18:6 19:6 20:17
targeted 29:24
taskforce 30:21,22
taught 17:6 18:25
teachers 15:2
tech 2:19 3:15 5:21 8:23 13:19 16:17,18 20:11 24:8, 13,14 25:22
technical 8:9 22:16,18 23:15,17
technology 7:16 9:25 21:6,20,21 29:12
telling 7:23
tells 4:14
tend 15:1
termination 27:7,19 28:8, 20 29:25 31:19
terms 30:4
terribly 10:3
that'll 20:5
that's 5:9 6:2,8 8:14 10:2,12,22 11:12 12:13, 14 16:7 17:12 18:4 19:16 20:10 22:4 25:15,20 26:7,15,18,19 28:23 29:22 31:10 32:23
theory 21:1
there's 2:3, 13 23:17 25:9 29:10 31:5
they'd 15:24
they'll 6:13
they're 6:11, 12 10:8 13:4, 5 15:21 17:21,25 19:9 24:17,18 27:9 29:1,24 33:16,17
they've 16:6 19:13
thing 8:7 10:9 13:2 16:5,7,12 18:7,16,24 19:4 21:7,22 31:7,20 33:19
things 3:13 6:16 7:23 8:7,10 15:5 30:24 31:13
thinks 29:11
thought 6:2 20:24 31:10
thoughts 13:13 28:17

three-day 29:8
throw 5:24
thrown 5:11, 19
tied 28:14
time 2:20 4:7 6:25 22:11 23:23 24:8 28:4 29:9 30:19
times 11:23 16:25 24:8 31:5 33:25
tip 8:25 25:22
tips 2:19 3:15 8:18,23 13:19 16:17, 18 20:11 24:13,14
tired 16:25
today 2:16
toes 3:12
told 2:4
tool 11:20
Tools 24:24 25:17
top 9:5 12:15 23:7
total 8:18
touch 8:8
train 6:6
trained 6:8
transcripts 24:17
transition 7:14
transportation 31:3
travel 15:7,9 29:9
treated 31:21
trial 22:2,8
trip 29:8
true 15:18 18:10
truth 10:18
turning 8:1,4
TV 6:12 7:13 8:1,4
typically 10:7 15:10 18:9 20:25
typing 6:13 9:8
Typography 17:16

U

unacceptable 28:7
uncomfortable 23:22
underpaid 32:3
understands 13:1
underwater 2:10,12
University 2:25
UNKNOWN 14:4, 9 18:18
upgrading 32:21
uploads 26:24
upsides 31:8

V

valued 28:2
vendor 6:25 26:16,18
version 19:9
versions 25:18,19
veterans 4:8
vibrations 10:1
video 9:2 25:10,14
view 11:8
viewed 31:19
viewing 22:21
violation 9:21
virtual 29:12
Vivek 2:24 27:2,4 31:13 32:13,18
volume 26:4
vote 13:12
voted 13:11
votes 13:24

W

watch 16:12 19:1 21:19 25:3
watched 9:14, 18
watching 6:12 8:3 16:6
ways 10:14 15:4
wearing 9:20
web 17:14
webcam 9:5 10:18,25
webcams 9:6,7 10:18
webinar 18:6, 25 25:2
website 8:13 17:18 19:2 25:13
week 12:10
welfare 3:1 27:3
we'll 8:13 13:17,20 26:8 29:18
we're 3:12,15 4:24 7:21,22 8:12,16,25 9:1,17 11:24 16:19 17:2 21:6,7 30:1 32:21
we've 6:17 11:10 13:10 17:1 20:16 23:20 27:18 30:6 33:4,13
what's 15:15
white 18:9
Whittmann 3:3
who's 2:21 3:3 5:17 6:11 23:19 27:2
who've 27:25
wider 18:9
Wilcott 5:20 23:20
window 10:20, 24
wired 10:4
wireless 9:22,24
wise 2:9
won't 23:4
word 16:23 17:3,22 18:10 19:22,24
Wordperfect 16:24 19:22
work 10:16 13:21 15:21 17:8,9 28:22 29:2,16 32:4 33:14
workgroup 6:19
working 11:18 15:1,22 23:25 24:11,21
works 6:23 11:20
world 27:18 28:15,24 29:1,19,22
wouldn't 15:18

wrangler 3:4
writes 2:19
wrong 18:16

Y

year 18:6
years 2:12 3:7 27:20
yesterday 4:20 20:20 23:1
Yeti 10:8
young 27:13
you'd 3:17
you'll 16:11 18:12 19:5
you're 4:2 6:9 8:4,5,8 9:3,8 10:19, 20 16:1,2,4, 15 17:6,20 19:3 20:3,7 23:23 24:15, 16 25:21 28:9
you've 3:22 7:2 18:1 24:7

Z

Zimbelman 3:6 20:13,15 32:12
Zimmer 3:9 4:17,22 23:11,13 24:3,5 26:14 33:22
Zoom 2:15 4:18 5:13 6:1,20 8:9,10 9:1 11:11,19, 22 12:1 13:4, 8,10 14:21 20:23 21:4, 22,25 22:8, 17,22 23:5 25:10 28:13 29:21,22 30:6,23 32:3, 24